Protecting Servicemembers from Illegal Pretrial Punishment: A Survey of Article 13, Uniform Code of Military Justice, Caselaw

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I. Introduction

A servicemember, unlike his civilian counterpart, is afforded no civil remedy for illegal restraint under either the Federal Civil Rights Act[2] or the Federal Tort Claims Act.[3] A servicemember, however, does have recourse under Article 13 of the Uniform Code of Military Justice (UCMJ), which protects the basic guarantee of the Fifth Amendment Due Process Clause.[4] The Eighth Amendment[5] and Article 55,[6] both of which prohibit cruel and unusual punishment, generally do not apply to conduct occurring prior to a court-martial.[7] Thus, in many instances, Article 13 serves as the only judicial recourse for defense counsel seeking relief for clients suffering from otherwise unlawful pretrial punishment.

This article surveys Article 13 caselaw to identify key rules and decisional factors commonly used by military courts when adjudicating pretrial punishment issues. Part II briefly describes the purpose and judicial breadth of Article 13. Part III details the black letter law, standard of review, and general decisional factors applicable to Article 13 cases. Part IV outlines the most commonly cited forms of non-confinment pretrial punishment addressed by military courts. The article emphasizes the identification of important factual issues, factors, and specific rules applied by the courts. A similar analysis for confinement-based pretrial punishment is conducted in Part V. Part VI briefly investigates issues surrounding how and when Article 13 protection may be waived by accused servicemembers. Finally, Part VII discusses the remedies available to military courts after finding that an accused servicemember was intentionally or inadvertently exposed to illegal pretrial punishment.

II. Article 13

Article 13 codifies the prohibition against pretrial punishment[8] and fundamentally embodies the precept that an accused servicemember is presumed innocent until proven guilty.[9] As such, Article 13 safeguards constitutional due process

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[2] 42 U.S.C.S. §§ 1983, 1985 (LEXIS 2006).

[3] 28 U.S.C.S. § 1346 (LEXIS 2006); United States v. Miller, 46 M.J. 248, 249-50 (1997).

[4] *See* UCMJ art. 13 (2005).

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

See also U.S. CONST. amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

See generally United States v. Fischer, 61 M.J. 415, 422 (2005) (Erdmann, J., dissenting) (discussing how Article 13 is rooted in the constitutional guarantee of due process before the law).

[5] U.S. CONST. amend. VIII.

[6] UCMJ art. 55.

[7] United States v. Destefano, 20 M.J. 347, 349 (C.M.A. 1985) (referencing Powell v. Texas, 392 U.S. 514 (1968)).

[8] UCMJ art. 13.

[9] *See* United States v. Heard, 3 M.J. 14, 17 (C.M.A. 1977).

protections by preventing the imposition of punishment prior to conviction.[10] Moreover, Article 13 proscribes imposing pretrial punishment by anyone exerting authority over the accused, irrespective of the chain of command.[11]

Military courts have asserted Article 13 protection broadly, consistently rebuking prosecutorial attempts to narrowly define applicability to only *pretrial* punishment. Such protections extend to servicemembers awaiting trial, retrial, or rehearing.[12] The protection also extends to conduct prior to the preferral of charges.[13] Essentially, the onus of inquiry turns on the treatment of the accused servicemember rather than the date a criminal proceeding formally commences.[14]

Illegal pretrial punishment[15] may manifest itself in two distinct ways. First, punishment can take the form of unreasonable or harassing restraint that creates a specter of guilt shadowing a servicemember prior to trial.[16] Second, punishment may result from an onerous confinement condition imposed on a servicemember.[17] In either instance, the punishment may be intentional[18] or a product of circumstances giving rise to a permissible inference that an accused or suspected servicemember is being punished.[19]

III. Black Letter Law, Appellate Standard of Review, & Decisional Factors

A. Black Letter Law

Trial judges have substantial discretion to grant administrative credit upon an affirmative finding that pretrial punishment has been inflicted against an accused servicemember.[20] Whether a restraining activity or confinement constitutes punishment turns on the circumstances surrounding the alleged Article 13 violation. The U.S. Supreme Court in *Bell v. Wolfish* articulated the general test for judges to use when considering the merits of pretrial punishment allegations.[21]

> A court must decide whether the disability has been imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. . . [I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal--if it is arbitrary or purposeless--a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees. (Citations and footnotes omitted).[22]

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[10] *See id*.; Courtney v. Williams, 1 M.J. 267, 271 (C.M.A. 1976) (citing *In re* Winship, 397 U.S. 358 (1970)).

[11] United States v. Villamil-Perez, 29 M.J. 524, 525 (A.C.M.R. 1989).

[12] United States v. Combs, 47 M.J. 330, 333 (1997).

[13] United States v. Davis, 30 M.J. 980, 981-82 (A.C.M.R. 1990).

[14] *Id*.

[15] Prior to trial, servicemembers may be lawfully restrained, and even confined, so as to ensure the servicemember's appearance at trial or prevent misconduct. United States v. Fischer, 61 M.J. 415, 422 (2005) (Erdmann, J., dissenting); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305(h)(2)(B) discussion (2005) (listing factors commanders should consider before imposing pretrial confinement) [hereinafter MCM]. Moreover, the *MCM* identifies four types of legal restraint: conditions on liberty, restriction in lieu of arrest, arrest, and confinement. *Id.* R.C.M. 304(a)(1).

[16] *See, e.g.*, United States v. Stringer, 55 M.J. 92 (2001) (finding a Soldier subject to illegal punishment when arrested and handcuffed during formation). *But see* United States v. Starr, 53 M.J. 380 (2000) (stating that an accused was not subject to illegal punishment when transferred to different unit for legitimate government purposes); United States v. Ozores, 53 M.J. 670 (A.F. Ct. Crim. App. 2000).

[17] *See, e.g.*, United States v. Kinzer, 56 M.J. 739 (N-M Ct. Crim. App. 2002) (holding that an arbitrary policy placing accused in pretrial confinement violated Article 13). *But see* United States v. Fogarty, 35 M.J. 885 (A.C.M.R. 1992) (commingling of sentence and pretrial confines did not constitute an Article 13 violation given the limited size of the facility).

[18] *See* United States v. McCarthy, 47 M.J. 162 (1997).

[19] *See* United States v. Pryor, 57 M.J. 821 (N-M. Ct. Crim. App. 2002).

[20] United States v. Fulton, 55 M.J. 88, 89 (2001).

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

[22] *Id*. at 538-39.

Subsequently, the Court of Appeals for the Armed Forces (CAAF) in *United States v. Starr* refined the *Bell* test into a simple two-part rule that asks whether "there [was] an intent to punish or stigmatize a person awaiting disciplinary action, and if not, were the conditions . . . in furtherance of a legitimate, nonpunitive, government objective."[23] All of the Military Service Courts of Criminal Appeals have recognized the *Starr* two-part test.[24]

B. Appellate Standard of Review

The Supreme Court and the CAAF consider Article 13 issues as a mixed constitutional and statutory matter.[25] As such, appellate courts grant independent review of Article 13 rulings,[26] akin to questions raised under Article 31(b),[27] compulsory self-incrimination prohibited, and Article 37,[28] unlawfully influencing action of court. Notwithstanding the CAAF ruling in *United States v. McCarthy* mandating a *de novo* standard of review, prior conflicting military service court opinions adopting an abuse of discretion standard have yet to be directly overruled.[29] The CAAF, however, has consistently applied *McCarthy*, and subsequently *United States v. Mosby*,[30] to require *de novo* review.[31]

C. Decisional Factors

In *United States v. Smith*, the CAAF identified the following four broad factors for courts to consider when determining whether pretrial restraint crosses the threshold to pretrial punishment:[32]

> • What similarities, if any, in daily routine, work assignments, clothing attire, and other restraints and control conditions exist between sentenced persons and those awaiting disciplinary disposition?
> • If such similarities exist, what relevance to customary and traditional military command and control measures can be established by the government for such measures?
> • If such similarities exist, are the requirements and procedures primarily related to command and control needs, or do they reflect a primary purpose of stigmatizing persons awaiting disciplinary disposition?
> • If so, was there an intent to punish or stigmatize a person waiting disciplinary disposition?[33]

The boundaries between the four *Smith* factors are fluid and judges may give greater emphasis to one factor over the others depending on the facts present in each case.[34] Moreover, the *Smith* factors have been either directly applied or implicitly recognized in subsequent military service court cases.[35]

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[23] United States v. Starr, 53 M.J. 380, 381 (2000) (citing *Bell*, 441 U.S. at 520; United States v. Phillips, 42 M.J. 346 (1995)).

[24] *See* United States v. Fortune, NMCCA 200300779, 2005 CCA LEXIS 119, at *5 (N-M. Ct. Crim. App. Apr. 13, 2005) (unpublished); United States v. Fay, 59 M.J. 747, 749 (C.G. Ct. Crim. App. 2004); United States v. Payne, ACM 34422, 2002 CCA LEXIS 121, at *6 (A.F. Ct. Crim. App. May 29, 2002) (unpublished); United States v. Quintero, 54 M.J. 562, 566 (Army Ct. Crim. App. 2000).

[25] United States v. McCarthy, 47 M.J. 162, 164-65 (1997) (citing *Bell*, 441 U.S. at 520; United States v. Palmiter, 20 M.J. 90 (C.M.A. 1985)).

[26] *Id.* at 165 (quoting Thompson v. Keohane, 516 U.S. 99 (1995)).

[27] UCMJ art. 31(b) (2005).

[28] *Id.* art. 37.

[29] United States v. Phillips, 38 M.J. 641, 642 (A.C.M.R. 1993); United States v. Daniels, 23 M.J. 867, 868 (A.C.M.R. 1987).

[30] 56 M.J. 309, 310 (2002).

[31] United States v. Crawford, 62 M.J. 411, 414 (2006); United States v. Fischer, 61 M.J. 415, 423 (2005).

[32] United States v. Smith, 53 M.J. 168, 172 (2000).

[33] *Id*.

[34] *See* CPT Jeffery D. Lippert, Notes from the Field, *A Trial Counsel's Guide for Article 13 Motions: Making Your Best Case*, ARMY LAW., Sept. 2002, at 36, 37.

[35] *See, e.g.*, United States v. Quintero, 54 M.J. 562, 567 (Army Ct. Crim. App. 2000); United States v. Chapa, 53 M.J. 769, 773 n.4 (Army Ct. Crim. App. 2000); United States v. Field, No. NMCM 200100146, 2001 WL 641752, at *1 (N-M. Ct. Crim. App. June 8, 2001).

IV. Pretrial Punishment Other Than Confinement

A. Non-Confinement Punishment Generally

Issues relating to alleged non-confinement pretrial punishment often turn on questions concerning officers or enlisted personnel exerting unreasonable command authority over the accused servicemember. Court decisions in this area are highly dependent upon the specific facts that define the case; specifically, whether an authority intentionally acted in a way calculated to serve as punishment or whether the authority's conduct was consistent with an otherwise legitimate governmental purpose. Caselaw covering the most common confinement punishment issues typically involves the following issues:

- Public Apprehension[36]
- Humiliation or Ridicule[37]
- Transfer to Special or Different Unit[38]
- Display of Military Uniform[39]
- Withholding of Pay[40]
- Use of Escorts[41]

B. Public Apprehension

Generally, military courts consider the intentional public apprehension of a suspected servicemember as an act violating Article 13, particularly if the arrest or detainment is conducted in the presence of the servicemember's unit. In *United States v. Cruz*, the Court of Military Appeals (COMA) held that apprehending a servicemember during a scheduled mass formation, stripping him of his unit crest, and detaining him in the presence of the formation constituted illegal punishment in violation of Article 13.[42] The court specifically rejected the government's argument that the apprehension was a legitimate exercise to curb a substantial drug abuse problem within the unit.[43] Specifically, the court stated, "Clearly, public denunciation by the commander and subsequent military degradation before the troops prior to courts-martial constitute unlawful pretrial punishment prohibited by Article 13."[44]

Furthermore, the Army Court of Military Review (ACMR) has recognized that mass apprehensions with "less extraordinary aggravating circumstances" than *Cruz* will also violate Article 13.[45] In *United States v. Hatchell*, the court held that removing and handcuffing suspected servicemembers from the rear of a morning physical fitness training formation constituted illegal punishment.[46] Again, the trial counsel failed to demonstrate a legitimate government purpose. In dicta, the *Hatchell* court demanded that the government clearly show the "necessity" behind the use of mass apprehensions, a form of detainment not common to the military justice system.[47] Although military courts articulate only a rationale basis standard of review, deference is rarely granted, and the courts appear to require a factual showing more consistent with demonstrating an important government interest.

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[36] *See, e.g.*, United States v. Cruz, 25 M.J. 326 (C.M.A. 1987).

[37] *See, e.g.*, United States v. Stamper, 39 M.J. 1097 (A.C.M.R. 1994).

[38] *See, e.g.*, United States v. Starr, 53 M.J. 380 (2000).

[39] *See, e.g.*, United States v. Carr, 37 M.J. 987 (A.C.M.R. 1993).

[40] *See, e.g.*, United States v. Jauregui, 60 M.J. 885 (Army Ct. Crim. App. 2004).

[41] *See, e.g.*, United States v. Smith, 53 M.J. 168 (2000).

[42] United States v. Cruz, 25 M.J. 326 (C.M.A. 1987).

[43] *Id*. at 331.

[44] *Id*.

[45] United States v. Hatchell, 33 M.J. 839, 842 (A.C.M.R. 1991).

[46] *Id*.

[47] *Id*.

C. Humiliation or Ridicule

Military courts also generally find that an overt and intentional attempt to publicly humiliate or ridicule an accused servicemember constitutes illegal punishment.[48] Again in *Cruz*, the COMA held that removing the accused Soldier's unit crest and denouncing him in front of his fellow troops prior to his arrest by Criminal Investigation Division agents violated Article 13.[49] Two specific factors the military courts commonly consider are whether the servicemember was (1) *publicly* ridiculed by (2) anyone acting within an *official* capacity. In *United States v. Stamper*, the ACMR held that the repeated disparaging and public comments made by an accused servicemember's company commander violated Article 13 by "chip[ping] away at the accused's presumption of innocence."[50] Specifically, the court stated, "this behavior is offensive, not only because it is by one who would bear the title of 'leader,' but because it also violates due process of law."[51]

In situations where the accused is denounced privately without malice intent, however, military courts will not find that the offending conduct reaches illegal punishment. For instance, removing an honor guard tab from an accused servicemember in anticipation of pretrial confinement does not constitute illegal punishment.[52] Additionally, an accused servicemember in confinement is not illegally punished when subject to ridicule by others not in a position of authority over him and when the commanding authority (e.g., commanding officer or first sergeant) did not sanction such ridicule.[53]

D. Transfer to Special or Different Unit

In many instances, accused servicemembers pending court-martial are not placed in pretrial confinement. Nevertheless, attempts by the chain of command to transfer the accused into a special unit without demonstrating a legitimate government interest may produce an Article 13 violation. In *Cruz*, servicemembers accused of various drug-related charges were segregated from their unit and combined into a "peyote platoon," where the servicemembers were subject to ridicule. After preferral of charges, the servicemembers were given the option of returning to the unit, but many elected to remain in the platoon.[54] The COMA held that the peyote platoon violated Article 13 despite the servicemembers' opportunity to elect to return to their original unit.[55]

An Article 13 violation is not necessarily implicated, however, when an accused servicemember is transferred to a special unit for legitimate, non-punitive reasons. For example, in *United States v. Starr*, an Airman attached to a security forces squadron under suspicion of misconduct was transferred to an "X-Flight," a unit composed of personnel who did not conduct security operations.[56] Airmen on medical profile, under investigation, or serving administrative punishment were assigned to the X-Flight and were not allowed to wear their Security Police berets or carry firearms, a requirement for security personnel.[57] The CAAF held that the transfer did not violate Article 13 because the government provided the Airman a productive, non-punitive position that did not require the use of a weapon, which the Airman was prohibited from carrying pending final disposition of his case.[58]

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[48] United States v. Latta, 34 M.J. 596, 597 (A.C.M.R. 1992).

[49] *Cruz*, 25 M.J. at 331.

[50] United States v. Stamper, 39 M.J. 1097, 1100 (A.C.M.R. 1994) ("'Don't go out stealing car stereos this weekend,' 'don't go looking at car lots at night,' 'watch your stuff on your desk, Stamper's here,' 'getting any five finger discounts lately Stamper?' and 'go ask Stamper where it is if its [sic] 'lost'' were typical of CPT Decato's comments."); *see also Latta*, 34 M.J. at 597 (stating that the first sergeant referring to an accused Soldier as "my favorite AWOL case" constituted Article 13 violation).

[51] *Stamper*, 39 M.J. at 1100 (citing United States v. Nelson, 39 C.M.R. 177, 181 (C.M.A. 1969)).

[52] *See* United States v. Van Metre, 29 M.J. 765 (A.C.M.R. 1989).

[53] United States v. Fogarty, 35 M.J. 885, 891 (A.C.M.R. 1992).

[54] *Cruz*, 25 M.J. at 329.

[55] *Id*. at 330.

[56] United States v. Starr, 53 M.J. 380, 381 (2000).

[57] *Id.*

[58] *Id*.

E. Display of Military Uniform

Attempts to visually distinguish an accused servicemember by requiring different uniforms or removal of rank, name tag, or other insignia, can be considered proscribed punishment under Article 13. In *United States v. Carr*, the accused, following his return to military control from absent without leave (AWOL), was assigned to the personnel control facility (PCF), where he was required to wear a special PCF uniform.[59] "Prior to his assignment to the PCF unit, [the accused] was assigned to B Battery, 2d Battalion, 62d Air Defense Artillery."[60] The PCF uniform lacked any army insignias or rank and "all of the tasks performed by the members of the [PCF] were performed in the "PCF uniform" in full view of the military community."[61] As such, Soldiers in the military community called the accused a criminal and ridiculed him even though he had not been convicted of a crime.[62] The ACMR held the "the military judge correctly found that the conduct of the government in requiring soldiers to alter their uniforms so that they do not comply with government standards and not allowing them to wear their insignia of rank was improper."[63] The court, however, also stated that "the test is not only whether the government intended to punish or humiliate, but also whether the conduct serves a legitimate nonpunitive governmental objective."[64] Finding that the government failed to demonstrate a legitimate purpose for not allowing accused servicemembers to wear standard military uniforms, the ACMR held that requiring the accused to wear the PCF uniform was inappropriate and tantamount to illegal punishment.[65]

When an accused servicemember is placed in pretrial confinement, however, the government can require the servicemember to wear an alternate uniform without violating Article 13. For instance, in *United States v. James*, the COMA held that an accused servicemember placed in pretrial confinement at a civilian detention facility may be required to wear an orange jumpsuit instead of his military uniform.[66] The court found that "all the complained-of conditions were rationally related to reasonable operating procedures of the facility and were not so 'excessive' as to rise to the level of punishment."[67] Specifically, the court found that the accused "failed to demonstrate that any condition of his confinement was intended as punishment. Even though he was required to wear an orange jumpsuit instead of his uniform, wearing of the jumpsuit was consistent with the internal operating procedures of the jail, and all detainees were required to wear this garb."[68] In a related case, *United States v. Palmiter*, the court held that the Navy did not violate Article 13 when a confined servicemember was only allowed to wear under-shorts while being held in a solitary cell and a uniform similar to sentenced prisoners while being held in the general population.[69] Although recognizing that the record failed to explain the necessity for the Navy's dress code regulations, the court nevertheless concluded that the imposed restrictions were not punishment.[70]

F. Withholding of Pay

The government may withhold a servicemember's pay without violating Article 13 so long as the regulation or activity is not intentionally punitive or punitive in effect.[71] If the government *erroneously* withholds a servicemember's pay, however, the defendant may still seek recovery under Article 13.[72] In *United States v. Jauregui*, the Army erroneously failed to pay an accused Soldier for seventy-seven days of military duties after returning from AWOL.[73] The Army Court of Criminal

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[59] United States v. Carr, 37 M.J. 987 (A.C.M.R. 1993).

[60] *Id.* at 988.

[61] *Id*.

[62] *Id*. at 988-89.

[63] *Id.* at 990.

[64] *Id.*

[65] *Id*. at 991-92.

[66] United States v. James, 28 M.J. 214 (C.M.A. 1989).

[67] *Id.* at 216 (citing Bell v. Wolfish, 441 U.S. 520, 539 (1979)).

[68] *Id.*

[69] United States v. Palmiter, 20 M.J. 90 (C.M.A. 1985).

[70] *Id*.

[71] United States v. Fischer, 61 M.J. 415 (2005).

[72] *See* United States v. Jauregui, 60 M.J. 885 (Army Ct. Crim. App. 2004).

[73] *Id*. at 886.

Appeals (ACCA) never decided whether such failure constituted an Article 13 violation because the defense constructively waived Article 13 protections by failing to raise the issue prior to the court-martial.[74] Instead, the court took judicial notice of the error and reduced the accused's sentence under the court's discretionary powers under Article 66(c).[75]

G. Use of Escorts

Servicemembers awaiting trial may be assigned a security escort while on a military installation or visiting certain locations on the installation. Such a restriction is not considered punishment if reasonably calculated to advance a legitimate government purpose.[76] For instance, in *United States v. Smith*, the CAAF held that requiring an escort for an Air Force Academy cadet when visiting the dormitory, cadet store, post office, and barber shop was justified because the government was ensuring the cadet's personal safety since the crimes he was charged with were against other cadets and occurred while he was living in the cadet dormitory.[77] In addition, the court recognized the command's concern "about the possibility of [the accused] committing further thefts against his fellow cadets."[78]

V. Illegal Pretrial Confinement

A. Generally

Pretrial confinement should be used only as necessary to insure the accused's presence at court and to prevent foreseeable serious misconduct.[79] Servicemembers in pretrial confinement generally cannot be required to participate in punitive work duties, wear special uniforms, or perform otherwise humiliating tasks.[80] Also, servicemembers in pretrial confinement should not be commingled with sentenced prisoners.[81] Additionally, questions of whether an act of confinement or restraint constitutes punishment often turn on whether the act advances an otherwise legitimate government interest and was imposed without punitive intent.[82] The following are the most common confinement punishment issues:

- Commingling of Detainees & Prisoners[83]
- Confinement Conditions[84]
- Punitive Duty Assignments[85]

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[74] *Id.* at 888. "Complaints of unlawful pretrial punishment in violation of Article 13, UCMJ, are ordinarily waived if made for the first time on appeal." *Id.*

[75] 10 U.S.C.S. § 866(c) (LEXIS 2006); *Jauregui*, 60 M.J. at 889. "We will eliminate any prejudice to appellant by exercising our authority under Article 66(c), UCMJ, to approve only that part of the sentence which we determine should be approved. We will take the erroneous failure to pay appellant into consideration in our reassessment of the sentence." *Id.* (citation omitted).

[76] United States v. Rogers, 50 M.J. 815 (A.F. Ct. Crim. App. 1999).

[77] United States v. Smith, 53 M.J. 168 (2000).

[78] *Id.* at 173.

[79] *See* United States v. Scalarone, 52 M.J. 539 (N-M. Ct. Crim. App. 1999); United States v. Anderson, 49 M.J. 575 (N-M. Ct. Crim. App. 1998); United States v. Carr, 37 M.J. 987 (A.C.M.R. 1993).

[80] *See* United States v. Corteguera, 56 M.J. 330 (2002).

[81] *See* United States v. Palmiter, 20 M.J. 90 (C.M.A. 1985).

[82] United States v. Washington, 42 M.J. 547 (A.F. Ct. Crim. App. 1995) (stating that manual labor that is not otherwise demeaning or degrading can still constitute an illegal form of punishment if imposed with punitive intent).

[83] *See, e.g.*,United States v. Bruce, 14 M.J. 254 (C.M.A. 1982).

[84] *See, e.g.*, United States v. Fricke, 53 M.J. 149 (2000).

[85] *See, e.g.*, United States v. Corteguera, 56 M.J. 330 (2002).

B. Commingling of Detainees & Prisoners

The general rule states that pretrial detainees should not be commingled with sentenced prisoners.[86] Simply placing a pretrial detainee in the same facility as sentenced prisoners or allowing casual contact during work periods, however, does not constitute commingling.[87] Absent an otherwise legitimate government reason, housing a pretrial detainee with sentenced prisoners and ordering him to perform duty assignments indistinguishable from those conducted by sentenced prisoners violates Article 13.[88] Notwithstanding a detainee's express waiver, Article 13 protections cannot be affirmatively waived prior to court-martial.[89] For instance, in *United States v. Bruce*, the COMA refused to accept the Air Force's argument that a confined Airman waived Article 13 protections after volunteering to be commingled with prisoners to obtain access to recreational facilities.[90] Under certain circumstances, a detainee *can* voluntarily accept a confinement situation that involves commingling with sentenced prisoners; however such acceptance is not considered an affirmative waiver of Article 13 rights.[91]

Military courts recognize that there are situations requiring the commingling of pretrial detainees and sentenced prisoners. As with other Article 13 issues, a key factor to consider in determining if commingling constitutes pretrial punishment is whether officials intended commingling to be a punishment; or, in the alternative, whether there exists an otherwise legitimate government reason for the commingling.[92] In *United States v. Fogarty*, the COMA took judicial notice of the small size and limited facilities of the Marine Corps' Parris Island Brig, which the Army also used as a pretrial confinement facility for Fort Stewart Soldiers under an interservice support agreement.[93] The court held that commingling at the Parris Island Brig "did not constitute pretrial punishment, but was a condition that was reasonably related to a legitimate governmental purpose."[94] Specifically, the court found that commingling "occurred because of the physical limitations of the Brig, the limited manpower resources to operate the Brig, and the need to maintain security and order of the general population inside and outside of the Brig."[95] The court stated that confinement officials did not commingle prisoners with pretrial detainees to punish the detainees but did so to "ensure the orderly and efficient operation of the confinement facility."[96] More importantly, the court stated that absent substantial evidence to the contrary, courts should give deference to decisions made by facility operators.[97]

C. Confinement Conditions

Article 13 provides that pretrial confinement should not be "more rigorous than the circumstances require to insure" the servicemember's presence at court.[98] "Conditions that are sufficiently egregious may give rise to a permissive inference that an accused is being punished. . . ."[99] Arbitrary or purposeless conditions also can be considered to raise an inference of

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[86] *See* United States v. Pringle, 41 C.M.R. 324 (C.M.A. 1970).

[87] United States v. Stroud, 27 M.J. 765 (A.F.C.M.R. 1988); United States v. Austin, 25 M.J. 639 (A.C.M.R. 1987).

[88] United States v. Bruce, 14 M.J. 254 (C.M.A. 1982).

[89] *See, e.g.*, *id*. at 256 ("We can find in this statute no express provision for waiver by a military accused, nor are we inclined to find such a waiver provision by implication."); United States v. Palmiter, 20 M.J. 90, 96 (C.M.A. 1985) ("[I]t should be noted that a prisoner cannot 'waive' his Article 13 protections prior to trial because no one can consent to be treated in an illegal manner.").

[90] *Bruce*, 14 M.J. at 256.

[91] *See Palmiter*, 20 M.J. at 96; United States v. Huffman, 40 M.J. 225, 226 (C.M.A. 1994), *overruled on other grounds*, United States v. Inong, 58 M.J. 460 (2003). In *Huffman*, pretrial detainees continued to wear military uniforms (as opposed to the orange jumpsuits worn by the prisoners), performed duties separate from sentenced prisoners, and were otherwise treated as active duty servicemembers. *Id.*

[92] *See* United States v. Walker, 27 M.J. 878 (A.C.M.R. 1989). "[I]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective." (quoting *Palmiter*, 20 M.J. at 95 (quoting Bell v. Wolfish, 441 U.S. 520, 539 (1979))).

[93] United States v. Fogarty, 35 M.J. 885, 887 (A.C.M.R. 1992).

[94] *Id*. at 890-91.

[95] *Id.* at 890.

[96] *Id.*

[97] *Id*.

[98] UCMJ art. 13 (2005).

[99] United States v. King, 61 M.J. 225, 227-28 (2005); *see also* United States v. Crawford, 62 M.J. 411 (2006).

punishment.[100] Similar to Article 13 claims surrounding the illegal commingling of pretrial detainees and sentenced prisoners, military courts often give deference to confinement officials' security determinations.[101]

Conditions imposing more than a de minimis hardship that create genuine privations over an extended period of time may raise constitutional due process questions as to whether the conditions constitute punishment.[102] In *United States v. Fricke*, a naval officer raised an Article 13 motion following his conviction alleging illegal pretrial punishment based upon his pretrial confinement.[103] During 326 days of pretrial confinement, the accused was forced to live in a six-foot by eight-foot cell for twenty-three hours per day, disallowed to speak with other prisoners, permitted only to read the *Bible* or other Christian literature, and required to sit at a small school-like desk from 1630 to 2200 each day.[104] The CAAF recognized that the pretrial confinement conditions alleged were not "'de minimis' impositions on a pretrial detainee"[105] and remanded the case for a *DuBay* hearing[106] so that "the record can be fully developed as to the conditions actually imposed on [the accused] during his pretrial confinement and the intent of detention officials in imposing those conditions."[107] In another case, the ACMR held that ordering a Soldier pending trial to live in a pup tent surrounded by concertina wire constituted illegal punishment despite the government's argument that such actions were imposed as corrective training to teach the accused to respect the barrack space he damaged during a party.[108]

Not all hardship conditions, however, amount to illegal pretrial confinement. Hardship conditions imposed on a pretrial detainee can survive an Article 13 challenge if the government can demonstrate that the restriction or condition is reasonably related to a legitimate government goal.[109] One such goal is to separate potentially dangerous or high escape risk detainees from the general prison population.[110] Military courts have consistently upheld the validity of administrative actions that place dangerous or flight-risk detainees under heightened or separate security pending trial.[111] Additionally, military courts loathe accepting Article 13 motions predicated on imposed hardships based solely on limited confinement facility services. Because a pretrial confinement facility lacks some amenities required by military regulations does not create a per se Article 13 violation.[112] Rather, the courts often use a totality of the circumstances test when deciding if a substandard facility or lack of amenities constitutes illegal punishment.[113] For instance, the mere lack of hot running water did not constitute punishment for a servicemember being held at the detention facilities at the Naval Base in Roosevelt Roads, Puerto Rico.[114] Even temporarily housing an accused Soldier in a barracks utility room does not create an Article 13 issue where the confinement was predicated on a concern that an otherwise acceptable confinement facility was unavailable and there was a legitimate

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[100] *King*, 61 M.J. at 227-28 (citing United States v. James, 28 M.J. 214, 216 (C.M.A. 1989)).

[101] *Id*. at 228.

[102] United States v. Fricke, 53 M.J. 149, 155 (2000) (quoting Bell v. Wolfish, 441 U.S. 520, 542 (1979)); *see also* Duran v. Elrod, 760 F.2d 756, 759 (7th Cir. 1985); Pippins v. Adams County Jail, 851 F. Supp. 1228, 1232 (C.D. Ill. 1994).

[103] *Fricke*, 53 M.J. at 154.

[104] *Id.* at 151.

[105] *Id.* at 155. On remand, the military service court found that the accused's claims were unwarranted and did not correspond with the record developed under the mandated *DuBay* hearing. The court held that there was no Article 13 violation. United States v. Fricke, NMCCA 9601293, 2004 WL 784271, at *3-5 (N-M. Ct. Crim. App. Apr. 9, 2004) (unpublished).

[106] *See* United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967).

[107] *Fricke*, 53 M.J. at 155.

[108] United States v. Hoover, 24 M.J. 874 (A.C.M.R. 1987); *see also* United States v. Fitzsimmons, 33 M.J. 710 (A.C.M.R. 1991).

[109] *Fricke*, 53 M.J. at 155 (on remand after a *DuBay* hearing the court found that there was no Article 13 violation); *see also* Block v. Rutherford, 468 U.S. 576, 583-84; United States v. Singleton, 59 M.J. 618, 621 (Army Ct. Crim. App. 2003).

[110] United States v. Hopkins, 2 M.J. 1032 (A.C.M.R. 1976), *aff'd in part, rev'd in part on other grounds*, 4 M.J. 260 (C.M.A. 1978).

[111] *See, e.g.*, United States v. Willenbring, 56 M.J. 671 (Army Ct. Crim. App. 2001) (justifying maximum custody upon determination of violent, predatory, and dangerous criminal behavior over period of years); United States v. Swan, 45 M.J. 672 (N-M. Ct. Crim. App. 1996) (solitary confinement justified to protect other detainees); United States v. Hitchman, 29 M.J. 951 (A.C.M.R. 1990) (justifying confinement on basis of detainee posing flight risk); United States v. Moore, 32 M.J. 56 (C.M.A. 1991) (preventing detainee from seeing stepdaughter-victim justified); United States v. Smith, 20 M.J. 528 (A.C.M.R. 1985) (precluding exposure to aberrant sexual misconduct temptations is legitimate government purpose).

[112] United States v. Daniels, 23 M.J. 867 (A.C.M.R. 1987).

[113] United States v. Phillips, 38 M.J. 641, 643 (A.C.M.R. 1993).

[114] United States v. Tschida, 1 M.J. 997 (N.C.M.R. 1976).

concern of escape.[115] Shackling a pretrial detainee to a cot, however, constitutes illegal punishment without a justifiable belief that there exists a flight risk or other aggregating factors.[116]

D. Punitive Duty Assignments

The COMA announced the general rule governing duty assignments under Article 13 in *United States v. Bayhand*, where the court held that a pretrial detainee may not be required to perform work with sentenced prisoners or be subject to punitive duties.[117] A pretrial detainee, however, can be required to perform legitimately useful military duties similar to work performed by other servicemembers.[118] Additionally, assigning pretrial detainees duties similar to sentenced prisoners is not per se unlawful punishment; rather, the nature, purpose, and duration of duties must be considered to determine whether an Article 13 violation exists.[119] Military courts adjudicate punitive duty claims on a case-by-case basis.[120] In *United States v. Corteguera*, the CAAF held that activities such as filling sandbags, yard work, washing vehicles, and painting red lines did not constitute punitive duties, nor were the tasks so onerous as to have the effect of punishment.[121]

When a duty is assigned arbitrarily or with intent to humiliate a servicemember, however, a court may substantiate an Article 13 claim. For example, in *United States v. Lee*, a Coastguard Fireman (E-3) pending trial on narcotics charges was occasionally required to "de-puddle" a pier with a sponge, which demanded that he work on his hands and knees in the presence of other servicemembers.[122] The Coast Guard Court of Criminal Appeals found no legitimate government interest in cleaning the pier in such a manner and held that the task was intended to humiliate and degrade the servicemember.[123]

A detainee generally cannot refuse to complete duties on the basis that the tasks are beneath his rank or require him to perform the tasks with those junior in grade. In *United States v. Quintero*, the ACCA held that a noncommissioned officer cannot refuse to perform cleaning duties with enlisted prisoners.[124] The *Quintero* court identified the following four factors when determining the legality of the assigned work detail:

> (1) [accused's] assignment to work details was consistent with the prison's operational and security requirements; (2) [accused's] work assignments were not intended to punish or humiliate him, nor were his working conditions different from other pretrial prisoners; (3) the conditions of [the accused's] pretrial confinement served legitimate nonpunitive governmental objectives as embodied in *Army Regulation 190-47*; and (4) [accused's] pretrial confinement conditions constituted a reasonable accommodation between [the accused's] dual status as a noncommissioned officer and as a [S]oldier who had to be confined and guarded to ensure his presence for court-martial.[125]

Defense counsel should also note that the court took judicial notice of the government's attempt to respect and balance a confined servicemember's rank and status with the realities of effectively operating a confinement facility.[126]

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

[116] *Id*. at 798.

[117] *See* United States v. Bayhand, 21 C.M.R. 84 (C.M.A. 1956).

[118] *Id*. at 772.

[119] United States v. Corteguera, 56 M.J. 330, 335 (2002); United States v. Holz, 59 M.J. 926, 930 (C.G. Ct. Crim. App. 2004).

[120] United States v. Huelskamp, 21 M.J. 509, 510 (A.C.M.R. 1985).

[121] *Corteguera*, 56 M.J. at 335.

[122] United States v. Lee, 61 M.J. 627, 631-32 (C.G. Ct. Crim. App. 2005).

[123] *Id*.

[124] United States v. Quintero, 54 M.J. 562, 567 (Army Ct. Crim. App. 2000).

[125] *Id*. (citations omitted).

[126] *Id.*

VI. Waiving Article 13 Protections

If a servicemember does not assert an Article 13 issue within a timely manner, the issue may be waived. Generally, absent plain error, if an alleged Article 13 offense is not raised at court-martial, it cannot be redressed on appeal.[127] In limited circumstances, however, an Article 13 claim may be argued for the first time on appeal. In *United States v. Singleton*, an accused servicemember on appeal asserted that his defense counsel advised him that "he should not raise the issue of unlawful pretrial punishment with the military judge or convening authority because this issue would be 'better raised on appeal.'"[128] The ACCA examined the servicemember's assertions as an issue of ineffective assistance of counsel as opposed to an Article 13 claim.[129] As such, the court remanded the matter for reconsideration following a limited *DuBay* hearing.[130]

Under no circumstances may a servicemember waive Article 13 protections *prior to* court-martial.[131] Even when a servicemember executes an agreement or "work program request" relinquishing certain statutory protections, such as duty hours and commingling, Article 13 protections are not waived and may be raised at trial.[132] This blanket prohibition recognizes that no one can consent to be treated in an illegal manner.[133] An accused servicemember, however, can waive a motion for Article 13 credit under a pretrial agreement plea deal during the sentencing phase of a court-martial.[134]

VII. Remedies

Various potential remedies are available to a servicemember who successfully raises an illegal pretrial punishment issue. In *United States v. Sharrock*, the COMA identified the following three options that can be argued before a trial judge:

- If the accused is still confined at the time of trial, he may seek release from the unlawful confinement by means of a pretrial motion;
- If the accused has been released at the time of trial, he may seek credit against his sentence for any served unlawful confinement by means of a sentencing motion; or
- If evidence is seized as a result of unlawful confinement, the accused may seek to suppress admission of this evidence at court-martial.[135]

In extraordinary circumstances and in the interests of justice, a trial judge could dismiss the charges entirely because of the highly egregious nature of the pretrial punishment.[136] Or, in the alternative, a servicemember could seek extraordinary relief from the military appellate court system.[137] Additionally, relief may be available when the illegal punishment resulted from the actions of persons not involved in actually confining the accused servicemember.[138] Finally, although highly unlikely, the

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[127] United States v. Inong, 58 M.J. 460, 463-64 (2003) (implementing a "raise or waive" rule and overruling affirmative waiver caselaw, including United States v. Huffman, 40 M.J. 225 (C.M.A. 1994), United States v. Southwick, 53 M.J. 412 (2000), and United States v. Tanksley, 54 M.J. 169 (2000)); *see also* United States v. King, 58 M.J. 110 (2003); United States v. Watts, 36 M.J. 748 (A.C.M.R. 1993).

[128] United States v. Singleton, 59 M.J. 618, 622 (Army Ct. Crim. App. 2003), *aff'd*, 60 M.J. 409 (2005).

[129] *Id*. at 623, 627 ("accepting as true appellant's unrebutted assertion that his counsel told him he should raise the issue of illegal pretrial punishment for the first time at our court, we conclude that this issue was not waived" and remanding the case for a *DuBay* hearing where the "military judge will determine whether appellant received ineffective assistance of counsel during appellant's trial with respect to the issue of illegal pretrial punishmen").

[130] *Id*. at 627.

[131] United States v. Palmiter, 20 M.J. 90 (C.M.A. 1985).

[132] *Id*.; *Watts*, 36 M.J. at 749-50; United States v. Alexander, 17 M.J. 763 (N.M.C.M.R. 1983).

[133] *Palmiter*, 20 M.J. at 96.

[134] *See generally* MCM, *supra* note 15, R.C.M. 705 (2005).

[135] United States v. Sharrock, 32 M.J. 326, 330 (C.M.A. 1991) (citations omitted).

[136] United States v. Fulton, 55 M.J. 88 (2001).

[137] *See generally* United States v. Montesinos, 28 M.J. 38 (C.M.A. 1989) (stating that military appellate courts may issue extraordinary writs pursuant to inherent powers granted under the All Writs Act, 28 U.S.C.S § 1651(a) (LEXIS 2006)).

[138] Coyle v. Commander, 21st Theater Army Area Command, 47 M.J. 626 (1997) (giving credit because of punishing actions of commander); United States v. Latta 34 M.J. 596 (A.C.M.R. 1992) (giving credit for ridiculing remarks made by accused's first sergeant).

chain of command could bring criminal charges under Article 97, UCMJ,[139] against those officers or non-commissioned officers who illegally punished an accused servicemember.[140]

Ultimately, there is no defining formula for military courts to use when granting relief from illegal pretrial punishment.[141] Furthermore, not all Article 13 violations require a remedy if no substantial prejudice resulted from the violation.[142] When relief is granted, the military judge generally grants administrative credit to the accused's sentence[143] or takes judicial notice of the illegal punishment when drafting a sentence upon a finding of guilt.[144]

VIII. Conclusion

Counsel and appellate courts should approach Article 13 allegations carefully, giving particular attention to the facts surrounding the asserted violation. Although the common law provides general guidance to the courts, few bright line rules exist, and most situations will require hyper-individualized treatment. The policy underlying Article 13, however, is clear: any overt or negligent act that intentionally or unintentionally imposes a punitive condition that tends to unjustifiably erode a servicemember's presumption of innocence infringes upon a constitutional right of due process. As each Article 13 issue is unique, military courts have substantial judicial latitude to craft individualized remedies to appropriately respond to illegal acts of confinement or command influenced pretrial punishment.

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[139] *See* UCMJ art. 97 (2005) (proscribing the unlawful apprehension, arrest, or confinement of any person bound by the UCMJ).

[140] 10 U.S.C.S. § 897 (LEXIS 2006).

[141] United States v. Newberry, 35 M.J. 777, 781 (A.C.M.R. 1992).

[142] *Id.*; *see also* United States v. Villamil-Perez, 32 M.J. 341, 344 (C.M.A. 1991); United States v. Hatchell, 33 M.J. 839, 843 (A.C.M.R. 1991).

[143] *See* United States v. Tilghman, 44 M.J. 493 (1996) (accused servicemember received ten-for-one credit); United States v. Carr, 37 M.J. 987 (A.C.M.R. 1993) (one-for-one credit granted).

[144] United States v. Hoover, 24 M.J. 874 (A.C.M.R. 1987) (voiding forfeitures).