

Pretrial Restraint and Speedy Trial: Catch Up and Leap Ahead

Major Michael J. Hargis
Professor, Criminal Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

Introduction

The past year saw both regulatory and judicial changes to the law of pretrial restraint and speedy trial. The 1998 changes to the Rules for Courts-Martial (R.C.M.)¹ governing pretrial confinement and speedy trial were, for the most part, housekeeping changes to make the R.C.M. conform to existing judicial decisions. The judicial decisions during the last year, by contrast, raised—but did not answer—some significant issues in both speedy trial and pretrial restraint that impact military justice practice.

Pretrial Restraint

The Rules for Courts-Martial (R.C.M.)

Rule for Courts-Martial 305² underwent two important changes in 1998. The first change to R.C.M. 305 was the addition of a forty-eight hour review to the previous seven-day review.³ This change to R.C.M. 305 incorporated prior case law, which imposed this forty-eight hour review of pretrial confinement requirement on the Army.⁴ The second change also

incorporated prior case law⁵ into the text of R.C.M. 305(k),⁶ allowing the military judge to grant additional discretionary pretrial confinement credit for pretrial confinement under “unusually harsh circumstances.”⁷

In its 1975 decision in *Gerstein v. Pugh*,⁸ the United States Supreme Court read the Fourth Amendment to guarantee a “prompt” probable cause review by a magistrate for persons arrested without a warrant. In 1976, the Army Court of Military Review applied *Gerstein* to the Army in *Courtney v. Williams*.⁹ By 1991, the United States Supreme Court decided *County of Riverside v. McLaughlin*,¹⁰ which interpreted the *Gerstein* promptness requirement to mean forty-eight hours, in normal circumstances. By 1993, the Court of Military Appeals, in *United States v. Rexroat*,¹¹ applied the *McLaughlin* forty-eight hour review standard to the Army. The 1998 change adding R.C.M. 305(i)(1)¹² formalizes the *McLaughlin* / *Rexroat* requirement in the *Manual for Courts-Martial*.

Practitioners need to note that this forty-eight hour review is *in addition to* the seven-day review, not in place of it.¹³ Although both the forty-eight hour review and the seven-day review consider the probable cause for pretrial confinement, they are procedurally different.¹⁴ The forty-eight hour review

1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. (1998) [hereinafter MCM].

2. *Id.* R.C.M. 305.

3. *See id.* R.C.M. 305(i)(1) (requiring a 48 hour review); *see also id.* R.C.M. 305(i)(2) (requiring a 7 day review). The seven-day review is commonly referred to as the “magistrate’s review.”

4. *See County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *United States v. Rexroat*, 38 M.J. 292 (C.M.A. 1993).

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

6. MCM, *supra* note 1, R.C.M. 305(k).

7. *Id.*

8. 420 U.S. 103 (1975).

9. 1 M.J. 267 (C.M.A. 1976).

10. 500 U.S. 44 (1991).

11. 38 M.J. 292 (C.M.A. 1993).

12. MCM, *supra* note 1, R.C.M. 305(i)(1).

13. *See United States v. Williams*, No. 9601314 (Army Ct. Crim. App. June 12, 1998). As a practical matter, military justice practitioners can “kill two birds with one stone” by continuing the common practice from some installations of conducting the magistrate’s review within 48 hours. *See MCM, supra* note 1, R.C.M. 305(i).

14. *See MCM, supra* note 1, R.C.M. 305(i)(1), (i)(2).

need only be conducted by a “neutral and detached officer,” not necessarily the military magistrate.¹⁵ Unlike the seven-day review, the forty-eight hour review is done “on the record,”¹⁶ and neither the soldier nor his counsel must be present.¹⁷

Prior to the 1998 change to R.C.M. 305(k), if the command placed a soldier in pretrial confinement under “unusually harsh circumstances,” the military judge could order additional pre-trial confinement credit at trial under *United States v. Suzuki*.¹⁸ Now, the military judge’s authority for such credit is included directly in R.C.M. 305(k). This change clarifies application of credit for unusually harsh circumstances of confinement as well; such credit is to be applied to the accused’s approved sentence, not his adjudged sentence.¹⁹

Case Law

Sentence Credit for Pretrial Restraint

This area has been the subject of much confusion for military justice practitioners. In 1998, the courts both expanded the

reach of regulatory sentence credit provisions and implied support for a major change to sentence credit.²⁰

In *United States v. Williams*,²¹ the Army Court of Criminal Appeals (ACCA) addressed the remedy for a violation of R.C.M. 305(l).²² Private First Class Williams was charged with, *inter alia*, two specifications of aggravated assault.²³ His command placed him in pretrial confinement on 2 September 1995. The military magistrate released him from pretrial confinement on 4 September 1995.²⁴ Uncomfortable with the magistrate’s decision, the government “appealed” the magistrate’s decision to the supervising military judge, who reconfined Williams on 8 September 1995.²⁵

On appeal, the ACCA considered this case in light of *Keaton v. Marsh*,²⁶ and found that the accused’s reconfinement violated R.C.M. 305(l).²⁷ The court was, however, faced with a problem; what is the remedy for this violation, as R.C.M. 305(k) by its terms applies only to violations of R.C.M. 305(f), (h), (i), or (j)? The ACCA looked at the purpose behind pretrial confinement credit under R.C.M. 305(k) and found that it was intended

15. *Id.* While both the 48-hour and the seven-day review require review by a “neutral and detached officer,” R.C.M. 305(i)(2) includes an additional requirement that the neutral and detached officer be “appointed in accordance with the regulations prescribed by the Secretary concerned” The R.C.M. 305(i)(2) reviewing officer is the military magistrate appointed under chapter 9 of *Army Regulation 27-10*. See U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE, ch. 9 (24 June 1996) [hereinafter AR 27-10].

16. Unlike the seven day review, no hearing-type procedure exists for the 48-hour review. See MCM, *supra* note 1, R.C.M. 305(i)(2)(A).

17. Compare MCM, *supra* note 1, R.C.M. 305(i)(1) (requiring a 48-hour review), with R.C.M. 305(i)(2)(A) (requiring a seven-day review and discussing the procedures for this review). Rule for Courts-Martial 305(i) provides many more rights for the confined soldier at the seven-day review than at the 48-hour review.

18. 14 M.J. 491 (C.M.A. 1983). *Suzuki* draws its authority from Article 13, UCMJ, which prohibits pretrial confinement “any more rigorous than the circumstances require . . . to insure his presence” Although it is questionable whether *Suzuki* is an Article 13 case or an independent judicially-created basis for sentence credit, *Suzuki*’s reliance on *United States v. Lerner*, supports the better argument that *Suzuki* is an Article 13 case. *Id.* at 492 (citing *United States v. Lerner*, 1 M.J. 371 (C.M.A. 1976)).

19. Notwithstanding the seemingly clear language that R.C.M 305(k) credit is to be applied to the adjudged sentence, *United States v. Gregory* made clear that “adjudged” really meant “approved,” where R.C.M. 305(k) credit was concerned. See *United States v. Gregory*, 21 M.J. 952 (A.C.M.R. 1986). See also Coyle v. Commander, 21st Theater Army Area Command, 47 M.J. 626 (Army Ct. Crim. App. 1997) (supporting this interpretation by saying that *Suzuki* credit for unduly rigorous pretrial confinement is applied against the approved sentence, not the adjudged sentence). Applying pretrial confinement credit is the subject of much debate within the bench and bar. Additional executive or judicial intervention may be necessary to completely clarify this area.

20. *United States v. Martin* dangled the prospect of a tantalizing credit in front of the defense bar—credit for time spent in civilian confinement. See *United States v. Martin*, No. 9700900 (Army Ct. Crim. App. June 18, 1998). This would not be a new credit, but merely an updated and expanded *Allen* credit. *Id.* (citing *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984)). In *Allen*, the Court of Military Appeals interpreted a Department of Defense (DOD) Instruction and federal statute to find that soldiers were entitled to day-for-day credit for time spent in military pretrial confinement. *Allen*, 17 M.J. at 126. Revisiting *Allen*, in light of the current DOD Directive and applicable federal statute, may very well result in credit for time spent in civilian pretrial confinement, in certain circumstances.

21. 47 M.J. 621 (Army Ct. Crim. App. 1998).

22. Rule for Courts-Martial 305(l) prohibits placing a soldier back into pretrial confinement if he has once been released, absent “the discovery, after the order of release, of evidence or of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement.” MCM, *supra* note 1, R.C.M. 305(l).

23. *Williams*, 47 M.J. at 622.

24. *Id.* at 623.

25. *Id.* See AR 27-10, *supra* note 15, para. 9-5b.

26. 43 M.J. 757 (Army Ct. Crim. App. 1996). In *Keaton*, the Army Court found paragraph 9-5b of AR 27-10 to be invalid in light of R.C.M. 305(l). Neither the government nor the military judge in *Williams* can be faulted, as their actions predated the Army Court of Criminal Appeal’s decision in *Keaton v. Marsh*.

27. *Williams*, 47 M.J. at 623.

to “grant relief appropriate to cure the prejudice suffered.”²⁸ The ACCA also considered several cases involving credit under Article 13, UCMJ.²⁹ These cases reminded the ACCA that remedies for illegal pretrial confinement must be “effective.”³⁰ Finding that the violation of R.C.M. 305(l) prejudiced Williams, the ACCA held that R.C.M. 305(k) credit also applies to R.C.M. 305(l) violations and awarded Williams an additional forty-five days of credit.³¹ Practitioners should add a margin note to their *Manual for Courts-Martial* next to R.C.M. 305(k), citing *Williams* as authority for pretrial confinement credit resulting from violations of R.C.M. 305(l).

Another judicial development with potentially far-reaching implications is *United States v. Martin*.³² In *Martin*, the ACCA examined whether the Army should award expanded pretrial confinement credit for soldiers in civilian pretrial confinement.

Private Perry Martin went absent without leave from his unit at Fort Hood, Texas on 20 December 1996.³³ On 7 April 1997, civilian police in Pearl, Mississippi arrested him for an unrelated offense.³⁴ Civilian authorities notified the Army on 8 April 1997, and the Army officially requested Martin’s detainer late on 10 April 1997.³⁵ Civilian authorities turned Private Martin over to the Army on 14 April 1997.³⁶ At trial, the military judge authorized pretrial confinement credit from 11 April 1997 until the date of trial.³⁷

Private Martin claimed that he was entitled to full credit from the time he was initially incarcerated by civilian authori-

ties (7 April to trial).³⁸ On appeal, he maintained that *Department of Defense Directive (DOD Dir.) 1325.4*³⁹ and 18 U.S.C.A. § 3585(b)⁴⁰ mandate such credit. *DOD Dir. 1325.4* mandates that the DOD follow the procedures established by the Department of Justice (DOJ)⁴¹ for sentence computation. Section 3585(b) of 18 U.S.C.A., which governs how the DOJ computes sentences, provides:

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

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

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

that has not been credited against another sentence.⁴²

Private Martin argued that he had not been credited in Mississippi with the time he spent in civilian confinement for the Mississippi arrest.⁴³ Because the Mississippi offense, for which he was confined, happened after the offense for which he was

28. *Id.* (citing R.C.M. 305(k) analysis, at 20-21).

29. *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983) (citing *United States v. Lamer*, 1 M.J. 371 (C.M.A. 1976)).

30. *Id.* at 493.

31. *Williams*, 47 M.J. at 623-4.

32. No. 9700900 (Army Ct. Crim. App. June 18, 1998).

33. *Id.* at 2.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. U.S. DEP’T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES (19 May 1988) [hereinafter DOD DIR. 1325.4].

40. 18 U.S.C.A. § 3585(b) (West 1999).

41. The “[p]rocedures employed in the computation of sentences [within the DOD] shall conform to those established by the Department of Justice for Federal prisoners unless they conflict with this Directive.” DOD DIR. 1325.4, *supra* note 39, para. H.5.

42. 18 U.S.C. § 3585(b) (1994).

43. *Martin*, No. 9700900 at *2.

sentenced at his court-martial, he contended he was entitled to credit at his court-martial for the time he spent in civilian confinement.⁴⁴

Acknowledging the apparent validity of Private Martin's legal argument, but avoiding a decision on that issue, the ACCA said "however appealing [his argument] might be legally, [it] fails for lack of a factual basis."⁴⁵ Instead, the ACCA said that Private Martin had the burden to demonstrate that he had *not* been given credit for the time he spent in civilian confinement against another sentence.⁴⁶ Because Private Martin failed to prove at trial that he had not been given such credit, the ACCA denied him credit.

In 1996, the Air Force Court of Criminal Appeals (AFCCA) addressed the same issue in *United States v. Murray*,⁴⁷ but decided that *DOD Dir. 1325.4* and 18 U.S.C.A. § 3585(b) do require that a military accused be given credit at his court-martial for time spent in civilian confinement.⁴⁸ The Court of Appeals for the Armed Forces (CAAF) has not recently addressed or decided this issue directly.⁴⁹ Until then, defense counsel must continue to request the additional credit for civilian pretrial confinement. In so doing, defense counsel should cite these decisions, *DOD Dir. 1325.4*, and 18 U.S.C.A. §

3585(b). In light of *Martin*, the defense must also be prepared to establish that the client is factually entitled to the credit by showing he previously has not received credit for that confinement.⁵⁰

Applying Sentence Credit

How to apply pretrial confinement credit—against the adjudged sentence or against the approved sentence—is frequently confusing to practitioners. Last year, in *Coyle v. Commander, 21st Theater Army Area Command*,⁵¹ the ACCA attempted to clarify this area.⁵² In *Coyle*, the court distinguished between credit awarded for pretrial confinement and credit awarded for pretrial punishment. In the ACCA's view, pretrial confinement credit is applied against the approved sentence. Pretrial punishment credit, however, is applied against the adjudged sentence, and, in some cases, the approved sentence.⁵³

While this issue remains ripe for the CAAF to consider, in a concurring opinion in *United States v. Ruppel*,⁵⁴ Judge Effron provided some insight into what may be his view on the subject. Master Sergeant Ruppel was convicted of sodomy and indecent

44. *Id.*

45. *Id.* at 3.

46. *Id.*

47. 43 M.J. 507 (A.F. Ct. Crim. App. 1996), *pet. denied* 43 M.J. 232 (1995). The Air Force Court of Criminal Appeals followed *Murray* in a later, unreported case. *United States v. Taylor*, No. ACM 31574, 996 WL 354883 (A.F. Ct. Crim. App. 1996).

48. Although the facts in *Murray* differ from those in *Martin* (Airman Murray was ultimately court-martialed for the offense for which he was in civilian confinement), the DOD Directive and the statute are identical. The DOD Directive and the statute do not require that the offense generating civilian confinement be the same as the one for which the servicemember is ultimately court-martialed.

49. The Court of Appeals for the Armed Forces denied a petition for review in *Murray*. The CAAF—then the CMA—did address the interplay between DOD Instructions, statutes, and pretrial confinement credit in the familiar case of *United States v. Allen*. Should the court revisit *Allen*, it might very well agree with the service courts in *Martin* and *Murray*.

50. See *United States v. Lamb*, 47 M.J. 384 (1998). In *Lamb*, the CAAF reiterated prior case law, stating that soldiers are not entitled to pretrial confinement credit for civilian confinement unless that civilian confinement is: (1) for a military offense, and (2) with the notice and approval of military authorities. *Id.* at 385. The CAAF, however, did not even address, let alone decide the case on the basis of the DOD Directive and the statute discussed in *Martin* and *Murray*. The CAAF decided *Lamb* on the basis of R.C.M. 305(k) credit. *Lamb* held that absent the two factors above, R.C.M. 305 did not apply, and a violation of R.C.M. 305 (such as a late review) could not give rise to credit. *Id.* The CAAF has yet to squarely address the legal arguments raised by Private Martin and Airman Murray.

51. 47 M.J. 626 (Army Ct. Crim. App. 1997).

52. See Lieutenant Colonel James Kevin Lovejoy, *Re-interpreting the Rules: Recent Developments in Speedy Trial and Pretrial Restraint*, ARMY LAW., Apr. 1998, at 19 (containing a good discussion of this case).

53. *Coyle*, 47 M.J. at 630. Unfortunately, the court did not discuss the specific circumstances under which pretrial punishment credit would be applied against the approved sentence. *Coyle* also does not answer all the questions posed by applying sentence credits as it suggests. If the sentence credits are applied against the adjudged sentence, does this mean that the terms and duration of pretrial restraint or confinement are no longer matters in extenuation and mitigation under R.C.M. 1001(c)(1)? See *infra* note 65 and accompanying text. If they are matters to be considered on sentencing, does the defense thereby get a "double benefit from the same period of pretrial confinement" (a result that Judge Cook described as "absurd")? See *United States v. Allen*, 17 M.J. 126, 130 (C.M.A. 1984) (Cook, J., dissenting). On the other hand, if the credit is credited by the sentencing authority, how can practitioners be sure that this credit will not effectively increase the time the accused spends in confinement, when "good time" is factored in? See *United States v. Larner*, 1 M.J. 371, 372-3 (C.M.A. 1976). In such a situation, the remedy is certainly not an "effective" one. See generally *United States v. Suzuki*, 14 M.J. 491, 493 (C.M.A. 1983). Although intriguing, these questions are beyond the scope of this article and await judicial and executive action.

54. 49 M.J. 247 (1998).

acts involving his stepdaughter and his natural daughter.⁵⁵ At the trial, the military judge ordered eighteen days of credit for conditions that he found to be tantamount to confinement.⁵⁶ As a result of allegations of government misconduct, the convening authority ordered a rehearing on certain findings and on the sentence.⁵⁷ At the rehearing, the second military judge refused the defense request for the eighteen days of sentence credit.⁵⁸ On appeal, the defense argued that the first military judge's decision was the law of the case and must be followed by the second military judge.⁵⁹ The CAAF disagreed and refused to grant the eighteen days of sentence credit to Master Sergeant Ruppel.⁶⁰

In his concurring opinion,⁶¹ Judge Effron discussed that the military judge's power to grant sentence credit is judicially created to implement Article 13, UCMJ⁶² and DOD guidance.⁶³ Judge Effron wrote:

Even though a credit is related to the sentence and may be addressed during the sentencing proceeding, the sentence-credit determination is not part of the adjudged findings or sentence that Congress has determined should be final. . . . The basis for the credit is not a consideration in the sentencing process, and the credit itself is not a reduction of the sentence.⁶⁴

One interpretation of Judge Effron's comments is that all sentence credits—resulting from pretrial punishment or pretrial confinement—are applied against the approved sentence, not the adjudged sentence.⁶⁵ Even though Judge Effron's comments relate directly to whether a sentence credit determination is a "final" determination (to which the law of the case doctrine would apply), they also provide some insight into how one judge on the CAAF might treat the application of sentence cred-

its, if directly faced with that issue.⁶⁶ Practitioners need to ensure that any sentence credit awarded by the military judge, if not expressly considered on sentencing as in *Coyle*,⁶⁷ is reflected in the convening authority's action and the promulgating order.⁶⁸

The Navy-Marine Court of Criminal Appeals (NMCCA) recently found that one confinement facility's administrative decisions to place pretrial confinees in maximum custody violated of Article 13, UCMJ.⁶⁹ In *United States v. Anderson*,⁷⁰ the NMCCA reviewed the pretrial confinement of Corporal Jonathan Anderson. At his general-court martial, Corporal Anderson was ultimately convicted of several marijuana-related offenses.⁷¹ On appeal, Corporal Anderson argued that he had been subjected to pretrial punishment in violation of Article 13,⁷² by spending seventy-seven days in "maximum custody status."⁷³ The policy at the brig where he was held was that any pretrial confinee facing more than five years of confinement served his pretrial confinement in that maximum status.⁷⁴ Comparing that "single blanket criterion"⁷⁵ with the provisions of Article 13—that the circumstances of confinement be no more rigorous than required to ensure the accused's presence at trial—the court found that the brig procedure was arbitrary and constituted "unreasonable punishment."⁷⁶ Accordingly, the court awarded Corporal Anderson seventy-seven days credit.⁷⁷

In addition to awarding Article 13 credit on the basis of the brig's procedure, the NMCCA advised practitioners of several important matters. First, the court explained that it based its decision in *Anderson* on the particular facts of that case.⁷⁸ Second, the court stated that defense counsel must diligently investigate and raise such issues at the trial level.⁷⁹ Although courts will not presume waiver of Article 13 issues under current decisions,⁸⁰ defense counsel should be mindful of a possible ineffective assistance claim. Third, the NMCCA advised staff

55. *Id.* at 248.

56. *Id.* at 251.

57. *Id.* at 248.

58. *Id.* at 251.

59. *Id.* at 253.

60. *Id.*

61. *Id.* at 254 (Effron, J., concurring).

62. *Id.* (citing *United States v. Larner*, 1 M.J. 371 (C.M.A. 1976)).

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

64. *Id.* at 254.

65. This interpretation is consistent with the *Military Judge's Benchbook*. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGE'S BENCHBOOK 94 (30 Sept. 1996) [hereinafter BENCHBOOK]. The *Benchbook* instruction tells panel members to "consider" that the accused has been in pretrial confinement. The same instruction, however, advises the members that the accused will be credited with the time spent in pretrial confinement against any adjudged confinement by "authorities at the correctional facility . . ." *Id.*

judge advocates to watch for allegations that even hint at pre-trial punishment, and take appropriate action.⁸¹ Finally, the NMCCA advised confinement authorities to consider “all relevant factors” in deciding confinement limitations.⁸²

Speedy Trial

The R.C.M.

Among the other changes to the *Manual for Courts-Martial*, the 1998 changes added a new clause to R.C.M. 707(c):

(c) Excludable delay. All periods of time during which the appellate courts have issued stays in the proceedings, *or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney Gen-*

66. Applying sentence credit remains confusing and is an area ripe for regulatory reform, such as consolidating all sentence credit provisions into R.C.M. 305(k) and applying all sentence credits—whether from pretrial confinement or from pretrial punishment—against the approved sentence. Only by applying the sentence credits against the approved sentence can the accused be guaranteed that he will actually get the benefit of the credit. *See United States v. Larner*, 1 M.J. 371 (C.M.A. 1976) (holding that applying sentence credit administratively against the approved sentence provides a complete remedy, whereas applying it against the adjudged sentence may not). An in-depth analysis of that issue, however, is beyond the scope of this article. Such changes are the province of the courts and the President. Confusion in the area of sentence credit is not limited to pretrial confinement or pretrial punishment situations. *See United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989) (requiring that a soldier who is court-martialed for an offense for which he has already been punished under Article 15, UCMJ, be given complete credit against his court-martial sentence for the prior punishment). Because of the automatic forfeiture provisions of Article 58b, UCMJ, crafting effective forfeiture credit has been difficult. In *United States v. Ridgeway*, the Army Court discussed the effect of Article 58b, UCMJ, on the Private Ridgeway’s court-martial sentence. *See United States v. Ridgeway*, 48 M.J. 905 (Army Ct. Crim. App. 1998). At his court-martial, the military judge sentenced Private Ridgeway to forfeit \$200 per month for four months (along with confinement and a punitive discharge). *Id.* at 906. Trying to comply with *Pierce*, the convening authority ordered that Private Ridgeway be credited with \$300 against his adjudged forfeitures. *Id.* Unfortunately for Private Ridgeway, Article 58b automatically took two-thirds of his pay while he was confined, regardless of what forfeitures the convening authority ultimately approved. *Id.* The Army Court gave practitioners a number of options for dealing with these situations. First, the court said to avoid this situation entirely; the government should court-martial soldiers for offenses previously disposed of by Article 15 only in “rare cases.” *Id.* at 907 (citing *Pierce*, 27 M.J. at 369). Second, if requested by the soldier, the convening authority could defer the appropriate amount of adjudged and automatic forfeitures. *Id.* *See United States v. Self*, No. 9800614 (Army Ct. Crim. App. Feb. 26, 1999) (commenting that such cases have become “all too common”). Third, the convening authority could waive the appropriate amount of automatic forfeitures, sending the money to the accused’s dependents. *Id.* Finally, the convening authority could convert the forfeitures to additional confinement credit. *Id.* The court also advised defense counsel to assist the government by requesting “specific, meaningful relief based on their clients’ monetary situation, family circumstances, and personal desires.” *Id.* Although Articles 57(a) and 58b are confusing to many in the field, if a defense counsel can craft a workable plan to get his client realistic *Pierce* credit, the client has the best chance of getting relief at the installation level, rather than having to wait for appellate action.

67. 47 M.J. 626 (Army Ct. Crim. App. 1997).

68. *See MCM*, *supra* note 1, R.C.M. 1107(f)(4)(F), 1114(c)(1).

69. *United States v. Anderson*, 49 M.J. 575 (N.M. Ct. Crim. App. 1998). *See also United States v. Avila*, No. NMCM 9700776, 1998 WL 918614 (N.M. Ct. Crim. App. Dec 23, 1998).

70. 49 M.J. 575 (N.M. Ct. Crim. App. 1998).

71. *Id.* at 575.

72. *Id.* at 576. Corporal Anderson did not raise this issue at trial, nor in his post-trial submissions before the convening authority’s initial action.

73. *Id.*

74. *Id.*

75. *Id.* at 577.

76. *Id.*

77. *Id.*

78. *Id.* at 577 n.4. This comment is probably based on the government’s failure to submit anything to rebut the defense assertion of a “facing five years = maximum custody status” policy. In future cases, should the government be able to produce evidence that the confinement authorities consider other factors—possible punishment being only one—the result may be different.

79. *Id.*

80. *Id.* Judge Crawford advocates applying waiver in Article 13 cases. *See United States v. Huffman*, 40 M.J. 225, 228 (C.M.A. 1994) (Crawford, J., dissenting).

81. *Anderson*, 49 M.J. 577 n.4. Such action could be relief at initial action or a post-trial hearing ordered by the convening authority.

82. *Id.*

eral, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded.⁸³

The new provision continued a trend, started by the appellate courts,⁸⁴ toward a return to the “laundry list” of exclusions from speedy trial calculations. This trend deviates from the avowed purpose of the wholesale 1991 amendment of R.C.M. 707, which sought to simplify the speedy trial system and to avoid speedy trial motions that too frequently degenerated into “pathetic side-shows.”⁸⁵

An accused’s incompetence to stand trial also generated a change to the restart provisions of R.C.M. 707(b)(3)(E).⁸⁶ The new R.C.M. 707(b)(3)(E) provides a fifth restart provision, applicable when the accused returns to the custody of the general court-martial convening authority from the custody of the attorney general (as a result of the accused’s incompetence to stand trial).⁸⁷

Case Law

Restarting the Clock: From the Frying Pan, Into the Fire

83. MCM, *supra* note 1, R.C.M. 707(c).

84. *See* United States v. Dies, 45 M.J. 376 (1996) (holding that periods during which the accused is absent without leave are automatically excluded from the R.C.M. 707 speedy trial clock).

85. *Id.* at 377. Whether the courts or the President continue this trend is an open question. As a 1997 new developments article on this subject pointed out, the field is potentially wide open for government and defense advocates to convince trial and appellate judges that specific equitable circumstances mandate another exception to the seemingly monolithic rule. Major Amy Frisk, *Walking the Fine Line Between Promptness and Haste: Recent Developments in Speedy Trial and Pretrial Restraint Jurisprudence*, ARMY LAW., Apr. 1997, at 14.

86. MCM, *supra* note 1, R.C.M. 707(b)(3)(E).

87. *Id.* R.C.M. 909(f). This fifth restart joins the other four restart provisions. *See id.* R.C.M. 707(b)(3)(A) (discussing dismissal or mistrial), 707(b)(3)(B) (discussing release from pretrial restraint for a significant period), 707(b)(3)(C) (discussing government appeals), 707(b)(3)(D) (discussing rehearings ordered or authorized by the appellate courts).

88. 48 M.J. 211 (1998).

89. Rule for Courts-Martial 707(b)(3)(B) restarts the speedy trial clock to zero when “the accused is released from pretrial restraint for a significant period” The clock then starts to tick again when a new triggering event occurs. MCM, *supra* note 1, R.C.M. 707(b)(3)(B).

90. *Ruffin*, 48 M.J. at 211.

91. *Id.* at 212.

92. *Id.*

93. *Id.*

94. *See* MCM, *supra* note 1, R.C.M. 707.

95. *Id.*

96. *Id.*

97. *Id.*

In *United States v. Ruffin*,⁸⁸ the CAAF also dealt with speedy trial restart provisions and determined what does and does not constitute a “significant period” of release from pretrial restraint under R.C.M. 707(b)(3)(B).⁸⁹ In late 1993, Aviation Electronics Technician Airman Ruffin was suspected of attempted murder, conspiracy to commit murder, aggravated assault and wrongful discharge of a firearm.⁹⁰ On 10 December 1993, Ruffin’s command placed him on pretrial restriction.⁹¹ On 15 February 1994, Ruffin’s command released him from that restriction, but preferred charges against him on 16 February 1994.⁹² The command never placed Ruffin under any further pretrial restriction before his trial on 30 August 1994.⁹³

In response to Ruffin’s speedy trial motion at trial, the military judge concluded that the start date for Ruffin’s 120-day clock⁹⁴ was 16 February 1994—the date of preferral.⁹⁵ Subtracting authorized delays, the military judge found that the government had arraigned Ruffin within 120 days.⁹⁶ Ruffin argued that his release from restriction did not reset his speedy trial clock to zero under R.C.M. 707(b)(3)(B), because there had not been a “significant period” between his release from restraint and preferral of charges (only one day).⁹⁷ Therefore, Ruffin contended that his start date was the date the command placed him in pretrial restraint (10 December 1993).⁹⁸ Accord-

ing to Ruffin, even excluding the authorized delays, the government arraigned him beyond 120 days.⁹⁹

On appeal, the CAAF considered the purpose behind R.C.M. 707(b)(3)(B) and rejected Ruffin's argument.¹⁰⁰ The CAAF found that the harm R.C.M. 707 sought to prevent was continuous pretrial confinement (and sham releases for the sole purpose of restarting the clock). Relying on the drafter's analysis, the CAAF determined that the government should treat a service member who is released from pretrial restraint for a significant period of time as one who had not been restrained.¹⁰¹ Since Ruffin's command never again placed him in pretrial restraint, his release was for a significant period.¹⁰² Because the next speedy trial trigger was preferral on 16 February 1994, his speedy trial clock started then.¹⁰³

Dismissal Without Prejudice: With Friends Like This, Who Needs Enemies?

Rule for Courts-Martial 707 allows the military judge to dismiss charges without prejudice,¹⁰⁴ upon a finding that the government violated the speedy trial provisions in R.C.M. 707.

98. *Id.* at 213. The 120-day clock starts (notwithstanding restarts) at the earlier of the imposition of pretrial restraint (but not conditions on liberty), entry on active duty, or preferral. MCM, *supra* note 1, R.C.M. 707(a).

99. *Ruffin*, 48 M.J. at 213.

100. *Id.*

101. *Id.* at 212.

102. *Id.* at 213.

103. *Id.*

104. The dismissal without prejudice provision is based on the Federal Speedy Trial Act, 18 U.S.C. § 3162. Rule for Courts-Martial 707(d) provides:

In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a re prosecution on the administration of this chapter and on the administration of justice.

MCM, *supra* note 1, R.C.M. 707(d).

105. 48 M.J. 545 (N.M. Ct. Crim. App. 1998).

106. Article 59(a) provides that the appellate courts cannot hold a finding or sentence "incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." UCMJ art. 59(a) (1999). Given the NMCCA's interpretation of reviewability, unless the court found dismissal with prejudice appropriate, the court would affirm, notwithstanding a technical violation of R.C.M. 707 (also called "harmless error").

107. 46 M.J. 540 (N.M. Ct. Crim. App. 1997).

108. 47 M.J. 770 (N.M. Ct. Crim. App. 1997).

109. Many accused might argue that this is a benefit itself—a second shot at acquittal. Although many speedy trial motions are handled at the trial level, if the issue is resolved on appeal, the accused may find himself without further prosecution. The government may find further prosecution is not feasible, after such a delay, since evidence becomes lost, witnesses scatter, and memories fade.

110. 48 M.J. 545 (N.M. Ct. Crim. App. 1998).

111. Judge Wynne would impose a threshold requirement that the defense show substantial or presumptive prejudice before the court would consider the alleged violation of the appellant's speedy trial rights. Such a showing would establish a *prima facie* entitlement to dismissal with prejudice, which is a substantial right of the accused under Article 59(a), UCMJ. Quoting *United States v. Kossman*, Judge Wynne states that "[w]here the circumstances of delay [in trial] are not excusable . . . it is no remedy at all to compound the delay by starting all over." *Id.* at 546 (quoting *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1995)).

*United States v. Flarity*¹⁰⁵ continues a trend by the NMCCA to treat dismissal without prejudice as unreviewable, under Article 59, UCMJ.¹⁰⁶

In his minority opinions in *United States v. Anderson*¹⁰⁷ and *United States v. Robinson*,¹⁰⁸ Judge Wynne expressed his view that the remedy of dismissal without prejudice under R.C.M. 707 was not reviewable by the service courts under Article 59(a), UCMJ. Under Judge Wynne's analysis, dismissal without prejudice is not a substantial right of the accused, since it does nothing for the accused beyond giving the government a second "bite at the apple" and—when granted on appeal—subjecting the accused to a second trial.¹⁰⁹ In *United States v. Flarity*,¹¹⁰ Judge Wynne's view carried the day. Under this view, unless an accused can argue that the government's legal error has deprived him of a dismissal with prejudice, the NMCCA will not alter the findings or the sentence.¹¹¹ Whether other panels on the NMCCA—or other service courts—will adopt this rationale remains to be seen.¹¹² Defense counsel must vigorously make their case for dismissal with prejudice at the trial level by establishing that the government's violation of R.C.M. 707 has irreparably harmed their cases.¹¹³

*Article 10 v. R.C.M. 707: But Boss, We Were Within
120 Days . . .*

The right to a speedy trial in the military has multiple sources.¹¹⁴ Each source has different rules, and compliance with one source does not necessarily guarantee compliance with another.¹¹⁵

In *United States v. Hatfield*, the CAAF held that complying with the R.C.M. 707 120-day clock does not necessarily ensure compliance with the standard of “reasonable diligence” under Article 10, UCMJ.¹¹⁶ In *United States v. Calloway*, the NMCCA reaffirmed its commitment to this concept.

Private First Class David Calloway reported to the provost marshal that a noncommissioned officer had assaulted him. The next day, he found himself in pretrial confinement; eventually, the government charged him with disobeying and using disrespectful language toward noncommissioned officers.¹¹⁷ The NMCCA characterized what next happened in his case as follows:

After his confinement on 21 July 1995, the first action on his case was receipt of the Request for Legal Services, on 10 August 1995. Second, a week passed before any further action was taken on the case, when the Military Justice Officer reviewed it. Third, more than a month—34 days—passed before the next action on the case, which was referral of the charge. Fourth, although a “brief”

period of only 5 days passed between preferring the charge and delivering the charge to the defense section, there is no reasonable explanation as to why the appellant spent more than 2 months—66 days—in pretrial confinement before a defense counsel was assigned to him.

Two days after the appellant was assigned a defense counsel, his case was docketed to go to trial on 30 October 1995—33 days later. Fifth, after the case was docketed, a week passed before the summary court-martial officer received the charge. The very next day, the charge was referred and the appellant was informed of the charge against him. Sixth, although the delay between receipt of the charge by the summary court-martial officer and the appellant being informed of the charge against him was brief, we find it significant that the appellant was informed of the charge 76 days after being placed in pretrial confinement. Seventh, although the military judge redocketed the case three times before the prosecution took any further action, the next action toward prosecution of the case was service of the referred charge upon the accused, which occurred 22 days after the charge was referred. Eighth, the next action toward prosecution of the case occurred 18 days after the appellant was

112. Dismissal without prejudice is new to military practice as of 1991. The CAAF has characterized the benefit the defense gets from such dismissal as “ephemeral.” See *United States v. Thompson*, 46 M.J. 472, 476 (1997). Although it was finally included in the legislation, the American Bar Association (ABA) opposed dismissal without prejudice. The ABA’s position was:

the only effective remedy for denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense, subject only to the running of the statute of limitations, the right of speedy trial is largely meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay.

Act of January 3, 1975, Pub. L. No. 93-619, 88 Stat. 2076.

Testifying before Congress on this bill, Judge Alfonse J. Zirpoli said “I would be disposed to accept the view of the American Bar.” *Id.* Dismissal without prejudice appears to be, as Judge Wynne says, an oxymoron. Presumably the President did not intend to provide speedy trial protection in R.C.M. 707 without a remedy. If the government was dilatory to the point that it violated the accused’s rights under R.C.M. 707, what remedy is it to the accused to allow the government to begin anew under a freshly-restarted speedy trial clock? In his dissent in *United States v. Robinson*, Judge Wynne stated that “[t]he order of this court [dismissing findings and authorizing a rehearing for violation of speedy trial rights] . . . essentially prescribes that the accused may be tried again in exactly the same manner. The President could not have intended to create such a remedy . . .” *Robinson*, 47 M.J. at 770 (Wynne, J., dissenting). Addressing this issue directly remains the province of the President, as the “proponent” of the Rules for Courts-Martial.

113. Defense counsel must also examine basing speedy trial motions on Article 10 or the Sixth Amendment. Dismissal with prejudice is the only remedy for a violation of these speedy trial provisions.

114. See U.S. CONST. amends. 5, 6; MCM, *supra* note 1, R.C.M. 707; UCMJ art. 10 (West 1999). See also *United States v. Ruffin*, 48 M.J. 211, 212 (1998); Colonel Thomas G. Becker, *Games Lawyers Play: Pre-Preferral Delay, Due Process and the Myth of Speedy Trial in the Military Justice System*, 45 A.F. L. REV. 1 (1998).

115. See *United States v. Hatfield*, 44 M.J. 22 (1996); *United States v. Calloway*, 47 M.J. 782 (N.M. Ct. Crim. App. 1998).

116. *Id.* at 262. See *Kossmann*, 38 M.J. at 261. “Merely satisfying lesser presidential standards [in R.C.M. 707] does not insulate the [g]overnment from the sanction of Article 10.” *Id.*

117. However unfair and one-sided the facts may have appeared, the NMCCA said they were not a factor in the government’s loss. *Calloway*, 47 M.J. at 786.

served, when he was arraigned—115 days after being placed in pretrial confinement.¹¹⁸

Faced with a speedy trial motion at trial, the military judge, although noting Article 10's supremacy over R.C.M. 707, found that the government did not violate Article 10. In addition, the military judge found that the government had complied with R.C.M. 707.

On appeal, the NMCCA disagreed that the government had prosecuted the case with reasonable diligence and found the judge abused his discretion in denying the motion. Importantly, the Court faulted the military judge for focusing on an R.C.M. 707-type analysis in denying the motion to dismiss for lack of speedy trial. Pointing out that there are no exceptions to the government's responsibility to prosecute the case with reasonable diligence, the court chided the military judge for "reliev[ing] the government of the burden of proof of reasonable diligence . . . by findings which said, in effect, 'I approved [the delay], so it's all right.'"¹¹⁹ Accordingly, government counsel should beware; delays that toll the R.C.M. 707 speedy trial clock do not satisfy the government's obligation of reasonable diligence under Article 10.

Speedy Trial and the Status of Forces Agreement (SOFA)

In *United States v. Thomas*,¹²⁰ a case with increasing relevance given the growing frequency of deployments outside the United States, the CAAF examined how the military's speedy trial provisions apply in conjunction with an applicable SOFA.

Air Force Technical Sergeant Thomas was stationed at Rhein-Main Air Base in Germany.¹²¹ Although married, Sergeant Thomas began a relationship with another woman, whom he met through a mutual friend.¹²² Eventually, Sergeant Thomas tried to end the relationship, but his paramour did not want that to happen, phoning Sergeant Thomas several times a day.¹²³ Sergeant Thomas' girlfriend also told her friend that she was in love with Sergeant Thomas and wanted to marry him.¹²⁴ Frustrated with his former girlfriend's actions and concerned that his wife would divorce him, Sergeant Thomas told his roommate that he was going to try to get his former girlfriend deported from Germany;¹²⁵ failing that, he would have to do "something else."¹²⁶ That "something else" (as the government proved beyond a reasonable doubt at trial) was murder his former girlfriend, chop up her body, and then set fire to the pieces.¹²⁷

On 21 September 1991, the German police arrested Sergeant Thomas for murdering his former girlfriend.¹²⁸ That same day, the Air Force took custody of Sergeant Thomas and held him in a military confinement facility on behalf of German authorities.¹²⁹ Under the North Atlantic Treaty Organization SOFA and its supplementary agreements, both the United States and Germany had jurisdiction to try Sergeant Thomas. German authorities, however, had the primary right to exercise jurisdiction over the case, unless the victim was "a member of the force or civilian component of [the sending state] or . . . a dependent. . . ."¹³⁰ Even if the Germans had the primary right of jurisdiction, the United States could ask the Germans to waive their primary right of jurisdiction.¹³¹ If the Germans choose to waive

118. *Id.* at 784.

119. *Id.* at 787.

120. 49 M.J. 200 (1998).

121. *See* *United States v. Thomas*, 43 M.J. 626 (A.F. Ct. Crim. App. 1995) (explaining the facts more fully).

122. *Id.* at 628.

123. *Id.*

124. *Id.*

125. *Id.* His girlfriend was not a U.S. service member, a member of the civilian component, or a dependent. She was also Filipino, not German. These facts would become pivotal when the United States and Germany tried to determine which nation had primary jurisdiction over the case.

126. *Id.*

127. The head and hands were never found, and the body showed signs of having been subjected to repeated cuts with a knife, ax, or machete. Some bones had marks consistent with having been cut by a saw. *Id.* at 629-30.

128. *United States v. Thomas*, 49 M.J. 200, 206 (1998).

129. Had the Air Force not asked for custody, the military judge found that the appellant would have remained in a German jail until trial. *Id.* at 205.

130. North Atlantic Treaty Regarding the Status of Forces, June 19, 1951, art. VII, para. 3, 4 U.S.T. 1792.

131. Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, 3 Aug. 1959, art. 19, para. 1, 14 U.S.T. 531.

their primary right of jurisdiction, however, they could recall that waiver within twenty-one days if “major interests of German administration of justice make imperative the exercise of German jurisdiction.”¹³²

Because of the condition of the remains, determining the victim’s identity became a major challenge. Pending identification, German authorities notified the Air Force that they intended to prosecute the appellant.¹³³ On 28 April 1992, scientific test results showed that the victim was not a member of the force, civilian component or a dependent; therefore, Germany had primary jurisdiction.¹³⁴ On 12 May 1992, however, the United States asked Germany to waive its jurisdiction, which Germany did on 29 May 1992.¹³⁵ The Air Force preferred charges against Sergeant Thomas the same day. Although the government arraigned Sergeant Thomas 195 days after preferal, 140 days were approved delays that were requested by the defense.¹³⁶

On appeal, Sergeant Thomas argued that because the United States requested that Germany waive its primary right to jurisdiction, and could have done so earlier, the United States had primary jurisdiction. Accordingly, Sergeant Thomas claimed that this time counted for speedy trial purposes.¹³⁷ The military judge found that although the SOFA allowed the United States to request a waiver of jurisdiction, it did not indicate when the United States had to do so. The military judge found that Sergeant Thomas was not available to be tried by the United States until Germany waived jurisdiction, which they would not have done earlier under the circumstances.¹³⁸ Agreeing with the Air Force Court of Criminal Appeals, the CAAF held that the mil-

itary judge’s decision denying the defense motion was not an abuse of discretion.¹³⁹

From this decision, overseas practitioners can gain some degree of comfort that the United States need not request jurisdiction at the first available moment. Nevertheless, *Thomas* stops short of saying that SOFA provisions completely insulate the government from speedy trial challenges. Government counsel should not consider this case as authority for delaying requests for jurisdiction solely for speedy trial purposes; under less compelling facts, the court may decide differently.

How Far Can the Government Twist That Arm?

In *United States v. Benitez*,¹⁴⁰ the NMCCA reminded all practitioners to beware of pretrial agreements (PTAs) that require a waiver of speedy trial motions.

Prior to his general court-martial, Airman Recruit Benitez entered into a PTA with the government, which, among other provisions, required him to waive “all non-constitutional or non-jurisdictional motions.”¹⁴¹ At trial, the military judge determined that the defense could have made a valid speedy-trial motion, but for the PTA. The judge further found that the PTA term had originated with the government.¹⁴² Citing R.C.M. 705(c)(1)(B)¹⁴³ and *United States v. Cummings*,¹⁴⁴ the NMCCA held that the provision violated public policy because it was initiated by the government to prevent the accused from raising his speedy trial motion.¹⁴⁵

The NMCCA’s decision in *Benitez* is sound and one that the clear language of R.C.M. 705 supports. Speedy trial is a partic-

132. *Id.* para. 3. “Major interests” include “offenses causing the death of a human being” The Protocol of Germany to the Supplemental Agreement to the NATO SOFA, para. 2(a)(ii).

133. *United States v. Thomas*, 43 M.J. 626, 637 (A.F. Ct. Crim. App. 1995).

134. *Id.*

135. Germany told the United States that it would not recall its waiver of jurisdiction under the Protocol of Germany. *Thomas*, 49 M.J. at 207.

136. *Thomas*, 43 M.J. at 638.

137. *Thomas*, 49 M.J. at 207.

138. *Thomas*, 43 M.J. at 638. The military judge apparently relied on several factors. First, the victim’s identity determined who had primary jurisdiction. Identity, however, was not finally determined until 29 April 1992 by deoxyribonucleic acid test results (although investigators determined in March 1992 that the victim’s identity was such as to give Germany primary jurisdiction). Second, Germany consistently indicated its desire to prosecute the case. Finally, because the death penalty was possible in the military, but not under German law, Germany would have retained jurisdiction if it thought the imposition of the death penalty was a possibility.

139. *Id.*

140. 49 M.J. 539 (N.M. Ct. Crim. App. 1998).

141. *Id.* at 540.

142. *Id.*

143. MCM, *supra* note 1, R.C.M. 705.

144. 38 C.M.R. 174 (C.M.A. 1968).

ularly important right for soldiers in pretrial confinement, given the absence of bail in the military. Free market trends from the appellate courts in other areas notwithstanding,¹⁴⁶ practitioners should not cheapen the fundamental rights that speedy trial provisions protect, in the name of time off of a prospective sentence.¹⁴⁷

Conclusion

Last year saw the R.C.M. catch up with case law in some areas. Case law has also jumped ahead of the R.C.M. in other areas, leaving the R.C.M. ripe for future amendments. Finally, 1998 has seen the service courts raise issues that can only be resolved by the CAAF or by presidential action. Until then, advocates on both sides of the courtroom have fodder for creative representation in both the pretrial restraint and speedy trial areas.

145. *Benitez*, 49 M.J. at 541. Contrast this with provisions that require the defense to waive requests for sentence credit, which are allowed. *United States v. McFadyen*, 1998 WL 742395 (A.F. Ct. Crim. App. Sept. 9, 1998).

146. *See generally* *United States v. Burnell*, 40 M.J. 175, 177 n.5 (C.M.A. 1994) (holding that the government can include as a provision in a pretrial agreement that the accused must proceed to trial by military judge alone, and stating that “[no accused has] a right to a sentence-limiting, pretrial agreement.”). *See also* *United States v. Weasler*, 43 M.J. 15 (1995) (holding that a pretrial agreement can also contain a term by which the accused waives an unlawful command influence issue).

147. *See generally* *United States v. Gregory*, 21 M.J. 952, 959 n.3 (A.C.M.R. 1986). While the ACCA eschews pretrial confinement credit as a substitute for the due process and military due process protections contained in R.C.M. 305, the discussion could just as easily have been about speedy trial rights. These protections are what “so strongly separates military service in a democracy from military service in a police state.” *Id.*