

Managing an Installation's Utilization of a Civilian Confinement Facility: A Primer

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*If a thing like this is worth doing at all, it's worth doing right.*¹

I. Introduction

It is a frustrating event for any chief of justice (CoJ) or trial counsel (TC) to witness an accused's time in pretrial confinement result in a large credit against confinement because of conditions at the civilian confinement facility (CCF)² contracted by the installation. Confinement credit in this instance disrupts good order and discipline by altering court-adjudged punishment meant to fully address an accused's criminal activity. It also shines light on the government's failure to provide proper conditions to a Soldier accused of a crime. No judge advocate wants to find himself in the unenviable position of bringing a greatly diminished, or nonexistent, sentence of post-trial confinement to his staff judge advocate or—what may be more harrowing—to a commander.

Within the Department of the Army (DA), there are eighteen jurisdictions contracting with CCFs to confine pretrial and post-trial Soldiers.³ These facilities are located off the installations (sometimes are many miles away) and managed by civilians who may have no knowledge of the Army Confinement System (ACS) as established in Army Regulation (AR) 190-47. The lack of military control at CCFs can lead to violations of law or military regulations.

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¹ HUNTER S. THOMPSON, FEAR AND LOATHING IN LAS VEGAS: A SAVAGE JOURNEY TO THE HEART OF THE AMERICAN DREAM 9 (1971).

² Civilian confinement facility (CCF) describes a confinement facility contracted by an installation to confine servicemembers in accordance with Department of Defense (DoD) standards. The acronym is not to be confused with an identical acronym used to denote the term *correctional* confinement facility as found in paragraph 2-3.a, Army Regulation (AR) 190-47, *The Army Corrections System*. A correctional confinement facility as described in AR 190-47 is a U.S. Army-managed program to discipline Soldiers for minor infractions not warranting a court-martial. U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 2.3.a (15 June 2006) [hereinafter AR 190-47].

³ U.S. ARMY CORRECTIONS COMMAND, 10 DECEMBER 2013 INMATE COUNT TRACKER (2013) [hereinafter ACC TRACKER] (on file with author). (The Department of the Army currently contracts with CCFs in the following eighteen jurisdictions: (1) Carlisle Barracks, (2) Fort Benning, (3) Fort Bliss, (4) Fort Bragg, (5) Fort Campbell, (6) Fort Carson, (7) Fort Drum, (8) Fort Gordon, (9) Fort Hood, (10) Fort Huachuca, (11) Fort Knox, (12) Fort Lewis (in the event that the Northwest Joint Regional Confinement Facility located on Fort Lewis is at capacity), (13) Military District of Washington [as of Dec. 2014 this contract is no longer active], (14) Fort Polk, (15) Fort Richardson, (16) Fort Riley, (17) Fort Sill, and (18) Fort Stewart. The Army Corrections Command maintains current numbers of confined Soldiers on this tracker and may be contacted for the most current figures.) *Id.*

Besides hindering good order and discipline by detracting from adjudged sentences, such violations can have other, deleterious effects upon the military justice system. Regulatory violations can endanger Soldier welfare, waste government counsels' time, deteriorate the relationship between commanders and their judge advocates, and anger a judge with of a long memory and wide discretion to award confinement credit.

Fortunately for the beleaguered CoJ, properly understanding an installation's use of a CCF can help him implement enduring systems to confine servicemembers safely and in accordance with Army regulations. This article first provides the CoJ with the legal and regulatory framework governing the confinement of servicemembers in CCFs. Second, this article describes some common pretrial confinement problems with conditions in CCFs that can result in confinement credit under Article 13, Uniform Code of Military Justice (UCMJ) and Rule for Courts-Martial (RCM) 305. Finally, this article proposes a guide for the CoJ in assessing, improving, and maintaining an installation's use of a CCF in accordance with AR 190-47. Specifically, this last section is designed to help with reviewing an installation's contract with a CCF, maintaining effective quality assurance and quality control (QA/QC) systems, developing relationships with the right installation and CCF personnel, and training counsel to spot pretrial confinement issues.⁴ With proper management, a CoJ should be able to coordinate installation assets to avoid an angry military judge awarding significant confinement credit to a convicted Soldier because of problems at a CCF.

Because pretrial detainees comprise a larger population of the Soldiers in CCFs than post-trial prisoners⁵ and the conditions of pretrial confinement are litigated at the trial level,⁶ this article focuses on the pretrial confinement of servicemembers.⁷

⁴ This article only covers CCFs housing detainees at the U.S. Army's request in compliance with military law. It will not discuss facilities of another jurisdiction holding Soldiers (e.g., a U.S. State or a foreign power).

⁵ ACC TRACKER, *supra* note 3.

⁶ Improper conditions for post-trial Soldiers may be addressed to a convening authority through post-trial matters submitted in accordance with Rule for Court-Martial (RCM) 1105. A Soldier whose sentence does not allow for review by the Army Court of Criminal Appeals (ACCA) under Article 66, Uniform Code of Military Justice (UCMJ), may petition his service's Judge Advocate General for relief under Article 69.

⁷ To maintain clear terminology, this article refers to servicemembers in pretrial confinement as "pretrial detainees" and servicemembers in post-trial confinement as "post-trial prisoners."

II. The Army Corrections System and the Use of a Civilian Confinement Facility

A. Military Confinement from 30,000 Feet

The authority to place servicemembers in confinement is found in the UCMJ⁸ and the RCM.⁹ Post-trial confinement—confinement adjudged as part of a sentence by a court-martial following a conviction—is inherently punitive. In the Army, post-trial confinement is the primary purpose of the ACS and is closely managed by the Army Corrections Command (ACC).¹⁰ Servicemembers who have been ordered into post-trial confinement by a competent authority after receiving a sentence of confinement or death are designated as “prisoners.”¹¹

Conversely, pretrial confinement is meant only to ensure a servicemember’s presence at a future judicial hearing and is inherently nonpunitive.¹² There are, expectedly, more strictures controlling when and how a command may confine a servicemember before trial than following a conviction at court-martial.¹³ The Department of Defense (DoD) classifies servicemembers held in pretrial confinement awaiting trial or rehearing as “detainees.”¹⁴

The primary pretrial provisions in the UCMJ are found in Article 12,¹⁵ expressly prohibiting the confinement of

servicemembers with foreign nationals, and Article 13,¹⁶ protecting servicemembers from punishment and harsh conditions. Within the RCM, Rule 304(f)¹⁷ protects servicemembers from pretrial punishment, and RCM 305(k)¹⁸ allows courts to award credit for any violations of servicemembers’ pretrial confinement procedural guarantees and conditions of confinement that involve “abuse of discretion or unusually harsh circumstances.”¹⁹ Military judges may award confinement credit as a remedy for violations of Articles 13 and RCM 305(f), (h), (i) or (j).²⁰

Where there is no nearby military confinement facility (MCF) for pretrial detainees and post-trial prisoners, DoD and the DA regulations allow an installation to contract with a local CCF.²¹ In the Army, most Soldiers confined in CCFs are pretrial detainees awaiting trial.²² Soldiers held in post-trial confinement by CCFs fall into two categories: those sentenced to less than thirty days confinement, and those with lengthy adjudged sentences awaiting transportation to a permanently assigned MCF.²³

B. Judicial Remedies for Illegal Pretrial Confinement²⁴

1. Article 13, Uniform Code of Military Justice²⁵

Article 13 prohibits the “punishment or penalty” of a servicemember in pretrial confinement.²⁶ It also prohibits conditions of a servicemember’s pretrial confinement from

⁸ The UCMJ is promulgated by the U.S. Congress under U.S. CONST. art. I, § 8, providing the Congress the power “[t]o make Rules for the Government and Regulation of the land and naval Forces.” (Articles 9 and 10 of the UCMJ govern pretrial confinement and Article 58 governs the execution of adjudged confinement.)

⁹ The *Manual for Courts-Martial (MCM)*, which includes the RCM, also establishes rules for confinement and is promulgated by the President under his executive powers established by U.S. CONST., art. II, § 2, cl.1. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 304, 305, 1003, and 1101 (2012) [hereinafter MCM].

¹⁰ ARMY CORRECTIONS COMMAND, <https://core.us.army.mil/c/downloads/319247.pdf> (last visited Feb. 16, 2014).

¹¹ U.S. DEP’T OF DEF., DIR. 1325.04, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES para. E2.1.7. (23 Apr. 2007) [hereinafter DoDD 1325.04]. However, AR 190-47, paragraph 3-1.b designates individuals who have had their sentences announced but not approved by a convening authority as “adjudged prisoner(s),” and paragraph 3-1.c designates individuals whose sentences has been approved by a convening authority as “sentenced prisoner(s).”

¹² UCMJ art. 13 (2012).

¹³ The procedures for placing a servicemember in pretrial confinement are governed by RCM 305. This article focuses on the conditions of pretrial confinement in a CCF rather than the rules of pretrial confinement.

¹⁴ DoDD 1325.04, *supra* note 11, para. E2.1.3. However, AR 190-47 designates such individuals as “pretrial prisoner(s).” AR 190-47, *supra* note 2, para. 3-1.a.

¹⁵ UCMJ art. 12 (2012).

¹⁶ *Id.* art. 13.

¹⁷ MCM, *supra* note 9, R.C.M. 304(f).

¹⁸ *Id.* R.C.M. 305(k).

¹⁹ *Id.*

²⁰ Sentence credit under Article 13 and RCM 305(k) are not to be confused with other types of credit, such as day-for-day *Allen* credit awarded when an accused is detained in pretrial confinement. See *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). Military justice practitioners must also be aware that good conduct time is applied against sentence credit; the more sentence credit an accused is awarded, the more good time credit he receives. See U.S. DEP’T OF ARMY, REG. 633-30, MILITARY SENTENCE TO CONFINEMENT (28 Feb. 1989).

²¹ See DoDD 1325.04, *supra* note 11; U.S. DEP’T OF DEF., INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY (11 Mar. 2013) [hereinafter DoDI 1325.07]; and AR 190-47, *supra* note 2.

²² ACC TRACKER, *supra* note 3.

²³ AR 190-47, *supra* note 2, paras. 3-2.i, 10-19.b, and 16-5.b.

²⁴ A recommended primer for a better understanding of sentencing credit is Major M. Patrick Gordon, *Sentencing Credit: How to Set the Conditions for Success*, ARMY LAW., Oct. 2011, at 7.

²⁵ For a thorough study on Article 13, see Mr. Timothy Riley, *Protecting Servicemembers from Illegal Pretrial Punishment: A Survey of Article 13, Uniform Code of Military Justice, Caselaw*, ARMY LAW., Dec. 2006, at 36.

²⁶ UCMJ art. 13 (2012).

being “any more rigorous than the circumstances required to insure his presence.”²⁷ Pretrial confinement is only authorized when “required by the circumstances,”²⁸ and is not meant to punish or subject extreme conditions on servicemembers awaiting trial.²⁹

In *United States v. Suzuki*, the military’s highest court held that a judge could award confinement credit for violations of Article 13.³⁰ A military judge may award credit against an adjudged sentence³¹ where he determines a particular action taken against a pretrial detainee was made with a “purpose or intent to punish.”³² In ruling whether an action was punitive, the military judge conducts an analysis “examining the intent of detention officials or by examining the purposes served by the restriction or condition.”³³ If the court finds the intent or purpose of an act taken by the government was “reasonably related to a legitimate governmental objective, it does not, without more, amount to ‘punishment.’”³⁴

A military judge is given broad discretion to grant “an appropriate remedy” in terms of credit against confinement for Article 13 violations.³⁵ Violations of Article 13 are ordinarily remedied by awarding RCM 305(k) administrative credit³⁶ against confinement, hard labor without confinement, restriction, fine, or forfeiture of pay.³⁷ In cases where “meaningful relief for violations of Article 13, UCMJ,” demands relief beyond that provided by RCM 305(k), a judge may apply Article 13 credit against a punitive discharge.³⁸

2. Rule for Courts-Martial 305(k)

Rule for Court-Martial 305(k) allows the military judge to award two types of confinement credit based upon pretrial confinement conditions. First, the judge may award day-for-day credit for the government’s violation of the pretrial confinement procedures found in RCM 305, sections (f), (h), (i) or (j).³⁹ Second, and important for jurisdictions confining servicemembers in CCFs, RCM 305(k) provides the judge discretion to award additional credit for “pretrial confinement that involves an abuse of discretion or unusually harsh circumstances.”⁴⁰ “Rule for Court-Martial 305(k) codifies the credit prescribed in *Suzuki* for violations of Article 13.”⁴¹

Thus, RCM 305(k) “provides an independent basis” for a judge to award confinement credit for violations of service regulations governing conditions of servicemember confinement, making the protections of RCM 305(k) more expansive than those of Article 13.⁴² In *United States v. Adcock*, the Court of Appeals for the Armed Forces (CAAF) awarded RCM 305(k) credit to an Air Force officer when his pretrial confinement in a CCF violated conditions of confinement required by an Air Force instruction (regulation).⁴³ The court held “(v)iolations of service regulations prescribing pretrial confinement conditions provide a basis for a military judge, in his or her discretion, to grant additional credit under the criteria of RCM 305(k).”⁴⁴

An installation contracting with a CCF that is violating provisions of AR 190-47, runs the risk of seeing convicted servicemembers awarded sentence credit, though not all violations result in such credit. *Adcock* noted that “confinement in violation of regulations does not create a *per se* right to sentencing credit under the UCMJ.”⁴⁵ Instead, a military judge will look to RCM 305(k) “as a basis for pretrial confinement credit . . . when those regulations reflect a long-standing concern for the prevention of pretrial punishment and the protection of servicemembers’ rights.”⁴⁶ The court in *Adcock* determined “[a]dministrative relief under RCM 305(k) is appropriate where . . . confinement

²⁷ *Id.*

²⁸ MCM, *supra* note 9, R.C.M. 305(d)(3).

²⁹ See *Coffin v. United States*, 156 U.S. 432, 453 (1895) (holding that “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”). See also *United States v. Heard*, 3 M.J. 14, 17 (C.M.A. 1977).

³⁰ *United States v. Suzuki*, 14 M.J. 491, 493 (C.M.A. 1983).

³¹ Where there is a discrepancy between adjudged and approved sentences (e.g., in the instance of a pretrial agreement), awarded sentence credit is applied against whichever is less, i.e., whichever the servicemember will serve. See *United States v. Spaustat*, 57 M.J. 256 (C.A.A.F. 2002).

³² *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005).

³³ *Id.*

³⁴ *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).

³⁵ *Suzuki*, 14 M.J. at 493.

³⁶ *Spaustat*, 57 M.J. at 26 (ruling that Article 13 *Suzuki* credit is “‘explicitly recognized’ in RCM 305(k)”) (quoting *United States v. Rock*, 52 M.J. 154, 156 (C.A.A.F. 1999)).

³⁷ MCM, *supra* note 9, R.C.M. 305(k).

³⁸ *Zarbatany*, 70 M.J. at 177.

³⁹ Procedural portions of the pretrial confinement rules dealing with access to counsel, actions by a commander, review of confinement by a neutral and detached officer, and review by a military judge, respectively.

⁴⁰ MCM, *supra* note 9, R.C.M. 305(k).

⁴¹ *Zarbatany*, 70 M.J. at 175. See *United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006).

⁴² See *United States v. Williams*, 68 M.J. 252, 256 (C.A.A.F. 2010).

⁴³ *United States v. Adcock*, 65 M.J. 18 (C.A.A.F. 2007).

⁴⁴ *Id.* at 21.

⁴⁵ *Id.* at 23.

⁴⁶ *Id.* at 21.

officials have knowingly and deliberately violated provisions of service regulations designed to protect the rights of presumptively innocent servicemembers.⁴⁷ Furthermore, the military courts have also been careful not to strip confinement personnel of “discretionary authority” in managing military detainees, especially as authorized under AR 190-47.⁴⁸

3. Burden, Waiver, and Review

The burden of proof borne by the accused for any Article 13 or RCM 305(k) motion is a preponderance of the evidence standard.⁴⁹ The accused must also raise the issue of illegal pretrial confinement at or before trial or the issue is considered waived.⁵⁰ Appellate courts will review the matter of confinement credit *de novo*.⁵¹

C. The Regulatory Framework

1. Department of Defense Guidance

Department of Defense regulations governing servicemember confinement are contained within Department of Defense Directive (DoDD) 1325.04 and Department of Defense Instruction (DoDI) 1325.07. Department of Defense Directive 1325.04 directs the secretaries of each military department to “(i) issue regulations on the confinement of military prisoners.”⁵² The secretary must “(p)rovide military correctional facilities or enter into such agreements as are necessary to provide for the incarceration of members of the Military Departments who have been ordered into pretrial confinement or who have received sentences to confinement as a result of court-martial.”⁵³ The directive also stipulates that a department’s policies must observe “national accreditation standards issued by the American Correctional Association.”⁵⁴

⁴⁷ *Id.* at 25.

⁴⁸ See *United States v. King*, 61 M.J. 225, 228 (C.A.A.F. 2005); AR 190-47, *supra* note 2, ch. 12 (Administrative Disciplinary Measures and Disciplinary Action Procedures). Discretionary provisions may also be found in the contract between the installation and the Civilian Confinement Facility (CCF) (e.g., stipulating that a confinee may be segregated if deemed necessary by prison managers for the safety of the confinee or others).

⁴⁹ See *MCM*, *supra* note 9, R.C.M. 905(c) and *United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005).

⁵⁰ *United States v. Inong*, 58 M.J. 460, 463–64 (C.A.A.F. 2003).

⁵¹ *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002).

⁵² DoDD 1325.04, *supra* note 11, para. 5.3.1.

⁵³ *Id.* para. 5.3.3.

⁵⁴ *Id.* para. 4.9

Finally, the secretaries must ensure their policies adhere to the Defense Incident-Based Reporting System (DIBRS).⁵⁵

Department of Defense Instruction 1325.07 expands upon the requirements set forth in DoDD 1325.04. It authorizes the confinement of Soldiers in civilian facilities where a MCF is not available. If an MCF is unavailable, DoDI 1325.07 permits servicemembers to be confined in facilities used by the U.S. Marshals Services or “accredited by the American Correctional Association (ACA) or [accredited by the State in which the prisoner is to be confined].”⁵⁶ The ACA “is the oldest and largest international correctional association in the world,” and its standards represent “the world-wide authority on corrections.”⁵⁷ Ordinarily, Level 1 (“minimum security”) MCFs within the DoD correctional systems provide for pretrial confinement of Soldiers awaiting trial and post-trial confinement for Soldiers sentenced to a brief confinement or “pending transfer” to a higher, more secure level of MCF for the completion of a long sentence.⁵⁸

2. Department of the Army Guidance

Army Regulation 190-47, *The Army Corrections System*, is the Department of the Army’s regulation governing confinement of Soldiers. It focuses primarily on DOD-managed MCFs within the ACS. However, like DoDI 1325.07, the regulation permits an installation to “contract to incarcerate pretrial prisoners in federally approved local civilian jails when military facilities are not available. Federally approved is defined as a facility used or approved by the Federal Bureau of Prisons, U.S. Marshals, or Immigration and Customs Enforcement and it is accredited by ACA.”⁵⁹ For post-trial Soldiers, AR 190-47 authorizes installation commanders to “contract with [sic] local jails for prisoners with sentences to confinement of 30 or fewer days, followed by notification of [the Department of the Army Provost Marshal] DAPM of such action. Local jails may not be used to confine sentenced prisoners beyond 30 days without prior approval from DAPM.”⁶⁰ Army Regulation 190-47 requires that all “[a]greements with civilian jurisdictions will provide for the segregation of pretrial Army prisoners by officer, noncommissioned officer, and

⁵⁵ *Id.* & para. 5.3.9. For more information about DIBRS, see U.S. DEP’T OF DEF., DIR. 7730.47, DEFENSE INCIDENT-BASED REPORTING SYSTEM (DIBRS) (1 Dec. 2003) [hereinafter DoDD 17730.47].

⁵⁶ DoDI 1325.07, *supra* note 21, para. 2.a.(2).

⁵⁷ The Am. Correctional Ass’n, <http://www.aca.org/> (last visited Feb. 17, 2014).

⁵⁸ DoDI 1325.07, *supra* note 21, para. 4.a.(1).

⁵⁹ AR 190-47, *supra* note 2, para. 3-2.i.

⁶⁰ *Id.*

enlisted, sex, and post trial status. Copies of agreements will be forwarded to DAPM.”⁶¹

Given the highly-regimented conditions necessary to run a well-ordered prison, it should be no surprise that AR 190-47 covers a wide variety of standards set for Soldier health, welfare, and discipline. Notably, AR 190-47 establishes rules for segregation of detainee,⁶² medical⁶³ and mental health⁶⁴ care, custody and control procedures,⁶⁵ disciplinary procedures,⁶⁶ complaint processing,⁶⁷ access to mail⁶⁸ and visitors,⁶⁹ work restrictions,⁷⁰ chaplain services,⁷¹ space allocated detainee,⁷² limits on (solitary) confinement,⁷³ and use of photographs of detainee.⁷⁴ While these standards regulate conditions in MCFs, they are also applicable to conditions in CCFs through RCM 305(k).

D. The Army Corrections Command and Installation Directorates

The use of a CCF by an installation involves both the installation command and the DAPM. U.S. Army installation (or garrison) commands will ordinarily have a Directorate of Emergency Services (DES). The DES or installation Provost Marshal’s Office (PMO), which also falls under a garrison commander, may provide a liaison function between an installation and a CCF. The DAPM is responsible for the Army Corrections Command (ACC), which is, in turn, responsible for the management of the

⁶¹ *Id.*

⁶² *Id.* paras. 3-2.i., 9-4.d.(1), 11-1.b.(1), 11-1.b.(2), and 16-7.a.

⁶³ *Id.* para. 7-2 (outlining healthcare services necessary for inmate care).

⁶⁴ *Id.* para. 7-6 (requiring mental healthcare for inmates either on site or from a “supporting medical facility”).

⁶⁵ *Id.* ch. 11 (detailing custody and control procedural requirements for Army Corrections System (ACS) facilities).

⁶⁶ *Id.* para. ch.12 (governing ACS disciplinary procedures).

⁶⁷ *Id.* para. 10-14 (permitting inmates to file grievances and request interviews with ACS officials).

⁶⁸ *Id.* para. 10-10 (ACS mail procedures, including inspection restrictions of attorney mail).

⁶⁹ *Id.* para. 10-13 (covering ACS visitation procedures).

⁷⁰ *Id.* para. 5-6.j.(1) (“A pretrial prisoner will not be assigned work details with posttrial prisoners.”).

⁷¹ *Id.* para. 7-4 (mandating access to religious support to ACS inmates).

⁷² *Id.* para. 9-6 (setting minimum standards for inmate space in ACS facilities).

⁷³ *Id.* para. 11-1 (establishing ACS levels of inmate custody).

⁷⁴ *Id.*, para. 10-12.a (Limiting public access to ACS facilities, including tours.).

ACS.⁷⁵ The ACC is commanded by the Deputy Provost Marshal General of the U.S. Army.⁷⁶ The ACC advises U.S. Army Installation Management Command (IMCOM) and installations on the use of MCFs and CCFs.⁷⁷

As part of its advising function, the ACC developed the Local Civilian Confinement Facility Contract Guidance (LCCFCG) to “ensure [a] contracted correctional facility meets basic life, health, and safety standards.”⁷⁸ The LCCFCG is a three-page checklist meant “to serve as a guide to installations who have or are considering entering into a local contract for confinement needs.”⁷⁹ This contract guidance addresses the important legal and regulatory requirements for confining Soldiers addressed above. Therefore, a judge advocate can expect a contract that does not contain necessary LCCFCG provisions—or a CCF that violates these provisions in a contract—to result in defense motions for confinement credit.

E. Local Standard Operating Procedures

Many installations have developed Standard Operating Procedures (SOPs) for managing the confinement of pretrial and post-trial servicemembers in CCFs. If these SOPs exist, they are usually promulgated by the installation’s DES or PMO. The SOP should synthesize AR 190-47, AR 27-10,⁸⁰ and the contract between the installation and the CCF.⁸¹

Large installations contracting with CCFs may have a Confinement Liaison Branch (CLB) within the installation’s DES or PMO with an SOP providing “uniform guidance and procedures for confining military personnel assigned” to the installation.⁸² Such an SOP should detail responsibilities for

⁷⁵ Headquarters, U.S. Army Correction Command, Gen. Order No. 2008-05 (31 Mar. 2008). For more information on the Army Corrections Command, an information paper may be found at <https://core.us.army.mil/c/downloads/319247.pdf> (last visited Feb. 16, 2014).

⁷⁶ ARMY CORRECTIONS COMMAND, STANDING OPERATING PROCEDURES #1: ORGANIZATION & ADMINISTRATIVE FUNCTIONS AND RESPONSIBILITIES (27 May 2010).

⁷⁷ E-mail from Lieutenant Colonel Beth C. Richardson, Army Corrections Command Plans & Operations Officer, to Major Marc Wm. Zelnick, Student, 62d Judge Advocate Officer Graduate Course, The Judge Advocate Gen’s Sch., U.S. Army (Nov. 19, 2013, 14:16 EST) (on file with author).

⁷⁸ U.S. ARMY CORRECTIONS COMMAND, LOCAL CIVILIAN CONFINEMENT FACILITY CONTRACT GUIDANCE 1 (7 Nov. 2012) [hereinafter LCCFCG].

⁷⁹ *Id.*

⁸⁰ U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE (3 Oct. 2011) [hereinafter AR 27-10].

⁸¹ *E.g.*, U.S. ARMY GARRISON, FT. HOOD, CONFINEMENT LIAISON BRANCH STANDARD OPERATING PROCEDURES 1 (19 Oct. 2013) [hereinafter CONFINEMENT LIAISON SOP].

⁸² *Id.*

the CLB, unit commanders, Trial Defense Counsel, servicing CCFs, and military magistrates concerning the processing of servicemembers in and out of a CCF. The SOP should cover procedures for transporting detainees, appointment and visitation scheduling, processing inmate mail, transferring post-trial prisoners, and discharging confined personnel.⁸³ A comprehensive SOP should contain indices including checklists, memoranda, Department of Defense and DA Forms, and maps to the servicing CCFs.⁸⁴

III. Survey of Common Problems Confining Soldiers in CCFs

A. Case Study: *United States v. Zarbatany*

A case study of how things can go wrong with a CCF is *United States v. Zarbatany*.⁸⁵ The CAAF noted in *Zarbatany* that “meaningful relief” for violations of Article 13, UCMJ, may require awarding credit applied against a punitive discharge.⁸⁶ Yet beyond the CAAF’s specific ruling, the facts at trial clearly demonstrate how problems at a CCF can result in the government successfully convicting a servicemember for serious crimes only to see him walk out of the courthouse a free man because of awarded sentence credit.

Airman Zarbatany was stationed at Elmendorf Air Base, Alaska. While awaiting trial on unauthorized absence and drug charges, he was confined in the Anchorage Correction Complex. Elmendorf Air Base contracted with the Anchorage Correction Complex through a memorandum of agreement (MOA) to confine pretrial detainees.⁸⁷

Conditions for Airman Zarbatany at the Anchorage Correction Complex failed to comply with AFI 31-205,⁸⁸ the Air Force’s equivalent of AR 190-47.⁸⁹ Substandard conditions at the CCF included housing Zarbatany in maximum (solitary) confinement for 119 days despite being a “model prisoner with no disciplinary infractions,” housing him for six days with civilian post-trial prisoners (“one of whom was a convicted sex offender”), refusing him adequate recreation time, locking him in a shower for 30 minutes to an hour between four and eight times, denying him medical care for 24 hours after he was exposed to

pepper spray used on another inmate, forcibly weighing him after he complained about his conditions, denying him hygienic services, denying him mental health counseling despite repeated requests, and making him pay for medical care.⁹⁰ Airman Zarbatany’s commander also refused to provide Airman Zarbatany with mental health care when his request was made known to the command.⁹¹

The military judge awarded Airman Zarbatany a total of 476 days of RCM 305(k) administrative credit for illegal conditions during his 119 days of pretrial confinement.⁹² The grand total of Airman Zarbatany’s confinement credit, including *Allen* credit, was 595 days. His adjudged sentence was a bad-conduct discharge, six months of confinement, forfeiture of all pay and allowances, and reduction to E-1.⁹³

Though on remand the Air Force Court of Criminal Appeals found Airman Zarbatany had received meaningful relief and no credit need be applied to his punitive discharge,⁹⁴ the CAAF’s opinion makes clear that this course of action is an option when there are egregious pretrial punishment conditions found by a court.⁹⁵

Zarbatany is also of interest because Elmendorf Air Base had been experiencing problems with its CCF for some time. At trial, the court “noted two prior cases involving illegal pretrial conditions at [the Anchorage Correction Complex].”⁹⁶ The military judge expressed his displeasure with this fact on the record. “[T]his installation [Elmendorf] has been aware of the deficiencies of using local confinement since at least 8 December 2005, at the time Airman Junior was court-martialed. Three years. So my guidance to this installation, the NAF, and MAJCOM is that they fix this.”⁹⁷

B. Recurring Problems with Civilian Confinement Facilities

The conditions of confinement described in *Zarbatany* are not unique to the Anchorage Correction Complex. Other CCFs throughout the ACS suffer similarly. Avoiding motions for sentence credit based upon illegal conditions of confinement in a CCF requires more than the ability of a

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *United States v. Zarbatany*, 70 M.J. 169 (C.A.A.F. 2011).

⁸⁶ *Id.* at 177.

⁸⁷ *Id.* at 171.

⁸⁸ U.S. DEP’T OF AIR FORCE, INSTR. 31-205, THE AIR FORCE CORRECTIONS SYSTEM (17 MAY 2010) [hereinafter AFI 31-205].

⁸⁹ *Zarbatany*, 70 M.J. at 171.

⁹⁰ *Id.* at 171–72.

⁹¹ *Id.* at 172.

⁹² *Id.*

⁹³ *Id.* at 170.

⁹⁴ *United States v. Zarbatany*, 2012 CCA Lexis 8.

⁹⁵ *Zarbatany*, 70 M.J. at 177.

⁹⁶ *Id.* at 172.

⁹⁷ *Id.*

judge advocate to know what right looks like. He must also know what wrong looks like. Below are some of the more common problems experienced by jurisdictions using CCFs—issues involving segregation, uniform and work detail, medical and psychological care, suicide watch, maximum security, pay problems, and unauthorized publication of mugshots.

One of the more common problems with confining U.S. Army personnel in CCFs is a failure to segregate as required by the UCMJ, RCM, and AR 190-47. Article 12 prohibits “foreign nationals not members of the armed forces” from being confined with servicemembers.⁹⁸ Additionally, AR 190-47 dictates that “[a]greements with civilian jurisdictions will provide for the segregation of pretrial Army prisoners by officer, noncommissioned officer, and enlisted, sex, and post trial status.”⁹⁹ This segregation pertains to “employment and recreational areas” as well as to billeting.¹⁰⁰ Army Regulation 190-47 uses absolute language in discussing the comingling of pretrial and post-trial Soldiers, stating clearly that servicemembers in pretrial confinement “will not reside, work, or be permitted to mingle with prisoners who have been sentenced to confinement.”¹⁰¹

A CCF’s violation of rules regarding pretrial detainee uniforms and work details also presents problems. A servicemember in pretrial confinement may not be made to wear the uniform “prescribed only for post-trial prisoners.”¹⁰² Rule for Courts-Martial 304(f) prohibits a pretrial detainee from serving “punitive duty hours or training” or “perform[ing] punitive labor.”¹⁰³ Army Regulation 190-47 states that “[a] pretrial prisoner will not be assigned work details with posttrial prisoners.”¹⁰⁴

A judge advocate must monitor servicemember access to medical and mental health treatment in a CCF.¹⁰⁵ Army Regulation 190-47 requires a confined servicemember to be provided healthcare services¹⁰⁶ and mental health support.¹⁰⁷ When a pretrial detainee requires hospitalization, “[p]roperly trained guards of the prisoner’s assigned unit will secure pretrial prisoners,”¹⁰⁸ as “[c]ustody and control of hospitalized pretrial prisoners . . . are the responsibility of the prisoner’s parent unit commander.”¹⁰⁹ If a CCF is not equipped to provide certain levels of mental healthcare, an installation may need to coordinate the movement of the pretrial detainee to a MCF where such care is available, such as the Joint Regional Confinement Facility at Fort Leavenworth, Kansas.¹¹⁰

Suicidal servicemembers present particular difficulty in confinement.¹¹¹ In the event a CCF restricts a servicemember by placing him on suicide watch, Article 13 credit may be awarded if the CCF did not have a legitimate concern for the Soldier’s mental and physical health and was determined to be punishing him.¹¹² If placing a servicemember on suicide watch is ruled an “abuse of discretion”—e.g., neglecting to follow service regulations regarding mental health treatment—the Soldier may be entitled to RCM 305(k) credit.¹¹³

⁹⁸ UCMJ art. 12 (2012).

⁹⁹ AR 190-47, *supra* note 2, para. 3-2.i (“Agreements with civilian jurisdictions will provide for the segregation of pretrial Army prisoners by officer, noncommissioned officer, and enlisted, sex, and post trial status.”). *Id.* para. 11-1.b.(2) (“A noncommissioned officer in pretrial status will be segregated from other pretrial prisoners unless he or she voluntarily waives, in writing, the right to be segregated and the waiver is approved by the facility commander.”).

¹⁰⁰ *Id.* para. 11-1.b.(1).

¹⁰¹ *Id.* para. 16-7.a.

¹⁰² MCM, *supra* note 9, R.C.M. 304(f). *See also* AR 190-47, *supra* note 2, para. 10-6 (“Pretrial prisoners will wear a different color badge than posttrial prisoners.”).

¹⁰³ MCM, *supra* note 9, R.C.M. 304(f).

¹⁰⁴ AR 190-47, *supra* note 2, para. 5-6.j.(1).

¹⁰⁵ *See* Gregg Zoroya & Meghan Hoyer, *Mental Health Leading Cause of Military Hospital Stays*, USA TODAY (Sep. 25, 2013, 7:19 PM), <http://www.usatoday.com/story/news/nation/2013/09/25/hospitalization-troops-record-army-ptsd-patients/2868421/> (“Through 2012, mental illness in the military took up more days for hospitalization than any other mental or physical problems, including war wounds, accidents, illness or pregnancies.”). Mental illness is a particularly important problem facing the U.S. military after more than a decade of fighting in contingency operations.

¹⁰⁶ AR 190-47, *supra* note 2, para. 7-2.

¹⁰⁷ *Id.* para. 7-6.

¹⁰⁸ *Id.* para. 5-10.g.(3).

¹⁰⁹ *Id.* para. 11-12.a.

¹¹⁰ E-mail from then Captain (Promotable) Christopher D. Coleman, Chief, Admin. Law, 101st Airborne Div., to Major Marc Wm. Zelnick, Student, 62d Judge Advocate Officer Graduate Course, The Judge Advocate Gen’s Sch., U.S. Army (Feb. 06, 2014, 16:12 EST) (on file with author) (Pretrial detainees confined to the CCF for Fort Campbell, Kentucky, who suffer from certain psychological conditions must be moved to the Joint Regional Confinement Facility at Fort Leavenworth, Kansas, for continued pretrial confinement.).

¹¹¹ U.S. DEP’T OF DEF, SUICIDE EVENT REPORT: CALENDAR YEAR 2011 ANNUAL REPORT (2012) (In 2011, 301 servicemembers committed suicide and 915 servicemembers attempted suicide.).

¹¹² *United States v. Williams*, 68 M.J. 252, 257–58 (C.A.A.F. 2010).

¹¹³ *Id.* at 257.

The practice of placing pretrial detainees in maximum custody (e.g., solitary confinement) has been addressed by the military courts, most notably in *United States v. Crawford*.¹¹⁴ Ordinarily, “confinement of pretrial prisoners will be limited to those facilities with cell areas that provide a minimum of 72 square feet per prisoner.”¹¹⁵ Sometimes, however, a detainee must be isolated for the protection of himself or other detainees. While the court in *Crawford* was unwilling to question the “security determinations of confinement officials,” it warned against “arbitrary policies imposing ‘maximum custody.’”¹¹⁶ The court also stated that Article 13 credit may be warranted where a pretrial detainee is placed in maximum custody “solely because of the charges rather than as a result of a reasonable evaluation of all the facts and circumstances of a case.”¹¹⁷

Pay problems are also a common occurrence when a Soldier is placed in pretrial confinement. Such problems are especially relevant to cases where a Soldier has recently returned to military control after an extended absence, (e.g., absence without leave in violation of Article 86, UCMJ). In some cases, units mistakenly stop the pay of a servicemember when he is placed in pretrial confinement. The military courts have made clear that, absent an intent to punish a Soldier, issues regarding pay while confined will not amount to an Article 13 violation.¹¹⁸

There is a growing practice at CCFs of placing mugshots of inmates—including military members pretrial detainees and post-trial prisoners—on their websites.¹¹⁹ Third party websites will post these photos along with inmate information and charge a fee to take the photos down.¹²⁰ Such photography is strictly prohibited by AR 190-47 which clearly directs “[p]risoners will not be photographed, except in support of medical documentation and for official identification purposes.”¹²¹

¹¹⁴ *United States v. Crawford*, 62 M.J. 411 (C.A.A.F. 2006) (The court ruled that detention officials were justified in placing an accused in solitary confinement based upon his determined level of dangerousness.).

¹¹⁵ AR 190-47, *supra* note 2, para. 16-6.b.

¹¹⁶ *Crawford*, 62 M.J. at 417.

¹¹⁷ *Id.*

¹¹⁸ *United States v. Fischer*, 61 M.J. 415 (C.A.A.F. 2005) (The Court in *Fischer* addressed the nonpunitive regulatory rule ceasing a servicemember’s pay at the end of his service obligation while still in confinement.). See also *United States v. Jauregui*, 60 M.J. 885 (A. Ct. Crim. App. 2004).

¹¹⁹ See, e.g., CHRISTIAN CNTY. JAIL ONLINE INMATE SYSTEM, <http://www.ccjail.org/qcms/index.asp?Page=Inmate%20Information> (last visited Mar. 2, 2014).

¹²⁰ See, e.g., Mugshots.com, <http://www.mugshots.com> (last visited Mar. 2, 2014). See also Jose Pagliery, *Mug Shot Extortion Sites Still Up and Running . . . For Now*, CNNMONEY (Oct 16, 2013, 9:29 AM), <http://money.cnn.com/2013/10/16/technology/mug-shot-websites/>.

¹²¹ AR 190-47, *supra* note 2, para. 10-12.a.

IV. Implementing and Maintaining Management Systems for Civilian Confinement Facility Utilization

A. Initial Assessments and Establishing an Installation Civilian Confinement Facility Working Group

1. Assessing an Installation’s Civilian Confinement Facility From “Go”

Confinement, especially pretrial confinement, is an important part of a CoJ’s military justice practice. As such, the CoJ arriving at an installation which contracts with a CCF should make early inquiries into any confinement problems during the handover with his predecessor. In particular, the CoJ should ask his predecessor (and others in the military justice shop) what issues have been litigated under Article 13 and RCM 305 and what military judges have said on record regarding the CCF. An understanding of past problems and what corrective actions—if any—have been taken to address these problems will allow the CoJ to form an initial assessment of his installation’s relationship with the servicing CCF. Additionally, the CoJ should identify the individuals with responsibilities under the CCF contract and ask his predecessor how responsive he found them.

2. Reviewing the Existing Contract¹²²

The CoJ should next investigate the contractual relationship between the installation and the CCF by reviewing the existing contract, along with all enclosures and allied documents.¹²³ The CoJ’s initial review of the contract will not only show him what is contractually required of the CCF, but will identify the Contracting Officer Representative (COR) managing the contract for the installation. The contract will also detail contractual responsibilities of individual units and installation departments (e.g. a civil liaison branch within the DES or PMO). If the CCF must create certain QA/QC products as part of the contract, the CoJ should ask the COR for copies of these to review.¹²⁴

After the CoJ collects the full contract and completes his initial review, he should request a full review of the contract by the servicing Administrative Law (AdLaw) office to ensure compliance with AR 190-47 and the ACC’s

¹²² Some installations contract with CCFs using a memorandum of agreement (MOA), performance work statement (PWS), statement of work (SOW), etc. For the purposes of this article, the author uses the term “contract” to represent all types of binding agreements between an installation and a CCF.

¹²³ These documents should be kept on file at both the Criminal Law and Administrative Law offices for reference, discovery, and litigation.

¹²⁴ Such products might include quality control plans (QCP), quality assurance surveillance plans (QASP), or periodic data reports.

LCCFCG. The installation may be exercising an option of a base contract made several years before the LCCFCG was released in 2012. The AdLaw review should pay particular attention to any incongruities between the contract, Army regulations, or ACC contractual guidance. Where incongruities exist, it may be helpful for the reviewing AdLaw attorney to contact the ACC for guidance on achieving future compliance.¹²⁵

The CoJ should also ask the AdLaw office to review their records for any prior investigations conducted into conditions at the contracted CCF. If investigations exist, they may provide a history of the CCF's compliance (or noncompliance) with contractual obligations and Army regulations.¹²⁶ Past investigations may also demonstrate systemic failures on the part of the installation.

3. *Civilian Confinement Facility Working Group*

After the CoJ has familiarized himself with the CCF contract, he should establish an installation CCF working group in coordination with the installation command. Members should include the COR, DES (or PMO) personnel with contractual roles, a representative from the installation medical facility, and the installation chaplain. The creation of this working group will allow the CoJ to identify roles and responsibilities of installation offices and establish a working group to quickly identify, report, and resolve future issues.

Establishing a working group permits the CoJ to review installation systems in place to adhere to the contract and AR 190-47. The first meeting should include a review of all installation and CCF SOPs and any CCF QA/QC programs. The working group should also establish notification requirements for serious incidents that occur in the CCF.

4. *Inspecting the Civilian Confinement Facility*

The CoJ should conduct a site visit to the CCF as soon as practicable with the CCF working group, his trial counsel and military justice paralegals, as well as other interested individuals, such as brigade judge advocates and commanders. Meeting the CCF officials early is critical to a good working relationship. The inspection will give the CoJ an honest appreciation for the confinement conditions and facility.

The inspection should involve a discussion of how each provision of the contract is executed at the CCF, with particular focus on segregation, disciplinary procedures,

¹²⁵ LCCRCG, *supra* note 78, at 3.

¹²⁶ This material may also be discoverable to the Defense. See MCM, *supra* note 9, RCM 701(6)(C).

access to healthcare, and complaint processing. The inspection should include a review of the CCF's QA/QC program. Finally, the CCF management should be asked what problems, if any, exist in confining military members under the contract.

B. Trial Counsel Responsibilities

Trial counsel play an important role in pretrial confinement. First, they must advise a command regarding the wisdom of placing a servicemember in pretrial confinement. If there are problems with a servicing CCF—e.g. distance creates travel issues or conditions within the CCF will result in the military judge awarding sentence credit—the TC's best advice may be not to place the servicemember in pretrial confinement.¹²⁷ Second, if there are problems with a CCF that will result in confinement credit, the TC should inform the command so that a cost analysis may be applied to placing the servicemember in pretrial confinement. Sometimes pretrial confinement is the right call despite significant confinement credit to the accused, but the TC must help the command and the CoJ make that determination. Third, the TC is ultimately responsible for quickly informing the CoJ of any problems associated with a servicemember's confinement when they come to the attention of the unit.

The CoJ may wish to supplement his pre-trial confinement SOP with CCF-specific checks for TC and paralegals. The SOP might include a check for the TC to e-mail defense counsel requesting that any problems with his client's confinement be brought to the TC's attention immediately for remedial action. The SOP may also detail unit paralegals to ensure the unit regularly visits the Soldier to check on his health and welfare. Paralegal responsibilities under the SOP might also include checking with the unit to identify and solve any problems regarding a confined Soldier's pay, prescription medication, and spiritual needs.

C. Fixing Problems

If, after consulting the ACC, the CoJ and AdLaw attorney believe the current contract is substantially deficient, the CoJ should schedule a meeting with the CCF working group to develop solutions. If an issue appears easily solvable (e.g., uniform problem),¹²⁸ the COR may be able to solve the matter with the CCF quickly. If an issue appears to require a

¹²⁷ The trial counsel (TC) should guard against the unit placing restrictions upon an accused that are tantamount to confinement. See *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) and *United States v. Smith*, 20 M.J. 528 (A.C.M.R. 1985). The TC must also make certain his command does not punish the servicemember while awaiting trial. See *United States v. Smith*, 53 M.J. 168 (C.A.A.F. 2000).

¹²⁸ See MCM, *supra* note 9, R.C.M. 304.

larger solution (e.g., Soldiers' prescription medications are prohibited within the facility by CCF policy, or CCF has too little space to properly segregate pretrial detainees and post-trial prisoners),¹²⁹ the contract may need to be modified or re-bid as soon as possible in coordination with the installation contracting office.

Where a CCF is continually costing an installation administrative confinement credit and no contractual alteration can bring the CCF into compliance with AR 190-47, it may be time for the installation to look elsewhere. Installations can enter into an MOA with a nearby Air Force, Navy, or Marine base to confine Soldiers.¹³⁰ The installation can also look to another local jail during its next bidding of the CCF contract. Working with AdLaw and the installation contracting office, the CoJ can look for ways to increase invitations for bids by local jails eager to secure a lucrative federal contract.

V. Conclusion

Doctrinally, the proper use of a CCF by an installation is not a function of a CoJ. Practically, however, the CoJ's ultimate responsibility to his jurisdiction's military justice program means he must take an active role in ensuring the CCF is adhering to the law and AR 190-47 through a properly drafted contract. Just as a CoJ must actively participate in the investigative mission of Criminal Investigation Command to guarantee successful prosecutions of a serious crimes, so too must he actively participate in the contractual mission of his installation to guarantee safe, compliant, and credit-free confinement.

¹²⁹ E-mail from Major Jennifer M. Healy, Student, 62d Judge Advocate Officer Graduate Course, The Judge Advocate Gen.'s Sch., U.S. Army, to Major Marc Wm. Zelnick, Student, 62d Judge Advocate Officer Graduate Course, The Judge Advocate Gen.'s Sch., U.S. Army (Dec. 04, 2014, 12:48 EST) (on file with author). Major Healy, a former Senior Defense Counsel at Fort Polk, Louisiana, was describing conditions at a Christian Confinement Jail used by Fort Polk that resulted in significant RCM 305(k) credit.

¹³⁰ Telephone Interview with Major Brian R. Sykes, Chief, Military Justice, Joint Reg'l Training Facility and Fort Polk (Jan. 23, 2014). Major Sykes was discussing his installation's determination to house pretrial detainees at Barksdale Air Force Base through an MOA as the installation works through contractual issues with the servicing CCF.