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RESTORING THE PROMISE OF THE RIGHT TO SPEEDY TRIAL TO SERVICE MEMBERS IN PRETRIAL ARREST AND CONFINEMENT

A Thesis
Presented to
The Judge Advocate General's School
United States Army

MAJOR DANIEL P. SHAVER

The opinions and conclusions that the author has expressed in this written dissertation do not necessarily represent the views of The Judge Advocate General's School, the Judge Advocate General's Corps, the United States Army, or any other government agency.

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RESTORING THE PROMISE OF THE RIGHT TO SPEEDY TRIAL TO SERVICE MEMBERS IN PRETRIAL ARREST AND CONFINEMENT

MAJOR DANIEL P. SHAVER

ABSTRACT: In 1991, the President promulgated the most recent amendments to the military's procedural speedy trial rule—Rule for Courts-Martial 707 (R.C.M. 707). This new version of R.C.M. 707 envisaged the simplification of some forty years of confusion over what the right to a speedy trial means to persons who are subject to the Uniform Code of Military Justice (UCMJ). The enactment of this new rule apparently was sufficient to convince the Court of Military Appeals that the President finally had provided a procedural mechanism that was capable of carrying out UCMJ Article 10's speedy trial mandate without judicial intervention. Accordingly, in *United States v. Kossman*, the court retired the ninety-day rule of *United States v. Burton*, in lieu of the President's comprehensive speedy trial scheme. A critical analysis of the court's holding in *Kossman*, however, reveals that it resurrects a multitude of issues—and creates a number of new issues—that will affect the speedy trial rights of service members in pretrial arrest or confinement. Examining these issues reveals that the present structure for assuring the right to a speedy trial to service members in pretrial detention is statutorily infirm and constitutionally unavailing. This circumstance not only demands the military justice system's immediate attention, but also implores the President to amend R.C.M. 707 to restore the promise of the right to speedy trial to service members in pretrial arrest or confinement.

RESTORING THE PROMISE OF THE RIGHT TO SPEEDY TRIAL TO SERVICE MEMBERS IN PRETRIAL ARREST AND CONFINEMENT

MAJOR DANIEL P. SHAVER*

I. Introduction

The Sixth Amendment to the United States Constitution guarantees that an "accused shall enjoy the right to a speedy . . . trial."[1] In addition, the Eighth Amendment, by proscribing excessive bail, implicitly reinforces the principle that an individual is presumed innocent and should retain the right to liberty until the state actually convicts that individual of a crime.[2] The Constitution, however, does not explicitly distinguish the right to a speedy trial enjoyed by a person who is free during the pendency of his or her criminal proceedings, from the right to a speedy trial enjoyed by a person whom the government has restrained or confined prior to a finding of guilt. Nevertheless, because any form of detention inherently deprives the individual of some measure of liberty, the right to a speedy trial is plainly more important to an individual under restraint—particularly pretrial confinement—than it is to a similarly situated individual, who is enjoying relatively free reign while awaiting trial. Accordingly, the right to a speedy trial not only serves as an element of repose that protects

individuals from the dilatory effects of indeterminate criminal proceedings, but also prevents the state from capriciously depriving a person—a person whom the law cloaks with a presumption of innocence—of his or her fundamental right to liberty.

The federal government correctly has taken the speedy trial mandate seriously by legislating speedy trial laws, executing speedy trial rules, and adjudicating speedy trial issues. The resulting body of law charges the government, in all criminal prosecutions, with the duty to exercise reasonable diligence in moving the case to trial. Similarly, protecting an accused service member's right to a swift resolution of pending criminal charges has typified the development of speedy trial law in the military, creating a speedy trial framework that other justice systems in America consistently have acknowledged, if not emulated.[3]

Not surprisingly, all three branches of the federal government have made their marks on the emergence of the present state of speedy trial law in the military. In passing the Uniform Code of Military Justice (Code or UCMJ) in 1950,[4] Congress included Article 10, which requires the government to take "immediate steps" to try an accused whom a commander has placed in pretrial arrest or confinement.[5] Seeing the need to clarify this congressional mandate, the Court of Military

Appeals, in *United States v. Burton*,[6] declared that the government presumptively has failed to take the "immediate steps" required by UCMJ Article 10 if it has held an accused in pretrial confinement for more than three months.[7] Almost coincidentally, the United States Supreme Court established a four-part balancing test for evaluating Sixth Amendment speedy trial claims in *Barker v. Wingo*.[8]

Twenty years later, the President promulgated a new Rule for Courts-Martial (R.C.M.) 707,[9] which generally directs military authorities to bring an accused to trial within 120 days. This new rule, which appears in Change 5 to the *Manual for Courts-Martial*[10] (*Manual*), envisaged the simplification of some forty years of confusion over what the right to a speedy trial means to a person subject to the Code. The enactment of this new rule apparently was sufficient to convince the Court of Military Appeals that the President finally had provided a procedural mechanism that was capable of carrying out Article 10's "immediate steps" mandate without judicial intervention. Accordingly, in *United States v. Kossman*,[11] the court retired the *Burton* ninety-day rule. A critical analysis of the court's holding in *Kossman*, however, reveals that it resurrects a multitude of issues—and creates a number of new issues—that will affect a service member's right to a speedy trial. The most important consequence of the *Kossman* decision and the provisions of the new R.C.M. 707, however, is that they render the present

structure for assuring the right to a speedy trial to service members in pretrial detention statutorily infirm and constitutionally unavailing.

II. Constitutional Rights to a Speedy Trial

The Due Process Clause of the Fifth Amendment and Speedy Trial Clause of the Sixth Amendment are the primary sources of every citizen's right to a speedy trial. In addition, Congress and most state legislatures have passed speedy trial statutes that provide criminal defendants with even greater speedy trial rights than those secured by the Bill of Rights.[12]

A. Speedy Trial and Due Process.

In general, the Due Process Clause of the Fifth Amendment protects an individual from the prejudicial effects of deliberate government delays in accusing, charging, and indicting on criminal offenses. In *United States v. Marion*,[13] the Supreme Court held that the familiar Sixth Amendment right to a speedy trial did not apply until the government actually had "arrested, charged, or otherwise subjected [an individual] to formal restraint prior to indictment."[14] The Court noted that statutes of limitations generally protect the individual from any prejudice that may inhere from an extended delay prior to the pendency of formal criminal proceedings.[15] Nevertheless, the

Marion Court conceded that excessive and unnecessary delays prior to an individual's arrest or indictment could trigger due process concerns. Justice Douglas's concurring opinion aptly states the following:

> The anxiety and concern attendant on public accusation may weigh more heavily upon an individual who has not been formally indicted or arrested for, to him, exoneration by a jury of his peers may be only a vague possibility lurking in the distant future. Indeed, the protection underlying the right to a speedy trial may be denied when a citizen is damned by clandestine innuendo and never given the chance promptly to defend himself in a court of law.[16]

In *United States v. Lovasco*,[17] the Court addressed the issue of whether the actual prejudice arising from a delay in charging an individual could be sufficiently detrimental to warrant the remedy of dismissal. Noting that the Sixth Amendment did not apply to such a claim,[18] the *Lovasco* Court formulated a two-part test to determine whether precharging delays violated a putative defendant's due process rights.[19] The defendant first must prove that he or she suffered actual prejudice because of the delay.[20] Second, the court must find that the government deliberately and oppressively delayed its prosecution of the case or intentionally acted in a dilatory manner with indifference to the rights of the

prospective defendant.[21] If a defendant meets this two-part test, the court must dismiss the applicable charge with prejudice.

Because of the harshness of the dismissal sanction, the Supreme Court apparently recognized that a due process speedy trial right is important. Nevertheless, the *Lovasco* Court presumably was still convinced that statutes of limitations are the principle safeguards against prejudice to would-be defendants; it concluded its opinion by acknowledging that few defendants would be able to demonstrate a quantum of actual prejudice sufficient to force a trial court to inquire into the actions of the government.[22]

Because due process speedy trial issues do not arise as often as Sixth Amendment speedy trial claims, *Marion* and *Lovasco* are not as important as adjuncts to the body of speedy trial law as they are espousers of the values that support the right to a speedy trial. Specifically, in both of these cases, the Supreme Court implicated liberty as the basic value that the right to a speedy trial protects. In *Marion*, for instance, the Court noted that, even in the absence of actual prejudice to the defense case, an inordinate pretrial delay may "seriously interfere with the defendant's liberty."[23] In addition, when the Court had the opportunity to fashion an analogous rule that would have protected property interests in the same manner that *Lovasco*

protects liberty interests, the justices declined to do so.[24] Accordingly, the liberty of the individual—whether that individual actually suffers physical detention or merely agonizes over the specter of criminal proceedings—is the essential value that the due process right to speedy trial seeks to vindicate. This liberty interest is no less important to service members than it is to civilians.[25]

B. The Sixth Amendment Right to Speedy Trial.

The right to a speedy trial is "as fundamental as any rights secured by the Sixth Amendment."[26] In *Smith v. Hooey*,[27] the Supreme Court addressed the three principal interests that the Sixth Amendment right to speedy trial protects: "(1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself."[28] A speedy trial also provides society with ancillary benefits.[29] Nevertheless, even though the Supreme Court has distinguished the right to a speedy trial because it is a right in which the accused and society share interests, the government has no vicarious "right" to a speedy trial to protect those societal interests.[30]

The seminal case in Sixth Amendment speedy trial law is *Barker v. Wingo*.[31] The government indicted Barker in September 1958 for the July 1958 killing of an elderly couple. After

sixteen continuances[32]—caused largely by the government's resolve to convict Barker's coconspirator in the killings prior to trying Barker—the prosecution finally proceeded with its case in October 1963. Barker again raised the speedy trial issue at trial, only to be convicted over his objections. The Supreme Court confirmed Barker's conviction, but decided to use his case to delineate a four-factor test to determine whether the government had violated a defendant's Sixth Amendment right to a speedy trial. These factors are (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant demanded—or waived—his right to speedy trial, and (4) whether the defendant suffered any actual prejudice because of the delay.[33]

Although it acknowledged that the first factor—the length of the delay—normally would trigger the analysis,[34] the *Barker* Court stressed that none of the four factors was dispositive.

> We regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. In sum, these four factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interests in a speedy trial is specifically affirmed in

the Constitution.[35]

The Court reiterated the broad parameters of this balancing test in *Moore v. Arizona*.[36] In particular, *Moore* overturned an Arizona Supreme Court decision that interpreted *Barker* to mean that prejudice to the defendant was a condition precedent to finding a Sixth Amendment speedy trial violation.[37] The high Court noted that *Barker* "expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to speedy trial."[38]

The Supreme Court's decision in *Barker*, and its clarification of that decision in *Moore*, intimate that courts must *consider* all four *Barker* factors, but need to *rely on* no more than one in finding a Sixth Amendment speedy trial violation. *Barker*, therefore, is just as important for what it does not require to sustain a defendant's objection, as it is for what it does require. Most significantly, however, *Barker* and *Moore* hold that courts cannot summarily deny a defendant's otherwise valid Sixth Amendment speedy trial objection because he or she fails to show either a substantial length of delay or actual prejudice.

C. Reconciling the Fifth and Sixth Amendment Rights to Speedy Trial.

When speedy trial issues arise prior to arrest or

indictment, the Fifth Amendment Due Process Clause sufficiently vindicates most of the traditional liberty interests—that is, liberty interests such as the rights to one's reputation, to be free from unnecessary anxiety, and to conduct one's affairs without unwarranted interference.[39] The Sixth Amendment Speedy Trial Clause, on the other hand, prescribes an independent right to a speedy trial. *Smith v. Hooey* held that this right is founded on three interests: preventing capricious pretrial incarceration, minimizing the defendant's anxiety, and limiting the prejudicial effects of delay on the defense.[40] The *Lovasco* test, however, which relies entirely on the Fifth Amendment right to due process of law, already protects the undetained, prospective defendant from the prejudicial effects that oppressive government delays have on that person's nonphysical liberty interests.[41] Consequently, while the Sixth Amendment right to a speedy trial serves many laudatory purposes—and has many ancillary societal benefits—it actually adds only two principal protections to the guarantees that the Due Process Clause already affords. First, it protects the individual from the marginal quantum of anxiety that he or she may experience after the transition from a mere suspect to an accused defendant. Second, it protects the physical liberty interests of all untried detainees, regardless of whether the government formally has charged them. The Supreme Court virtually clarified this distillation of Sixth Amendment speedy trial law in *Marion* by holding that only a formal accusation against, or a detention of,

an individual will trigger the speedy trial protections of the Sixth Amendment.

Nevertheless, the vitality of the Due Process Clause may narrow the need for the Sixth Amendment speedy trial right even further. The Supreme Court noted in *Smith v. Hooey* that the right to a speedy trial is meant to minimize a defendant's "anxiety and concern."[42] Arguably, however, this interest is limited, not only because this additional anxiety frequently is minimal, but also because a putative defendant's anxiety often will diminish once he or she is formally charged.[43] In addition, when it referred to the Sixth Amendment's guarantee of a speedy trial in *Barker v. Wingo*, the Court noted that the right "is specifically *affirmed* in the Constitution."[44] This language implies that the justices recognized that the right to a speedy trial derives from legal customs and traditions of fairness that antedate the Bill of Rights. Therefore, notwithstanding their manifest importance to the overall rights of an accused, the supplementary protections afforded by the Sixth Amendment right to a speedy trial are very limited.

The narrow reach of the Sixth Amendment speedy trial right becomes even clearer by considering the tremendously expanded coverage in the area of procedural due process. Even before *Mathews v. Eldridge*,[45] petitioners have invoked the Due Process Clause to protect personal interests in welfare payments,[46]

driver's licenses,[47] and school attendance.[48] That due process would not also protect a presumptively innocent person from the unwarranted liberty deprivations "attendant on public accusation"[49] is inconceivable. Moreover, consider the absurdity of a case in which a undetained criminal defendant could satisfy the *Barker* Sixth Amendment speedy trial test, but could not prevail on a *Lovasco* due process speedy trial claim. The most important point, however, is that in the absence of the Sixth Amendment, most of the interests that the independent right to a speedy trial guarantees still would receive protection under the Due Process Clause.

Even though courts, commentators, and historians have posited the numerous interests served by the right to a speedy trial, they often fail to distinguish between the two sources of speedy trial rights in the Constitution. While the language of the Sixth Amendment contains the express right with which most lawyers are familiar, the Fifth Amendment Due Process Clause provides substantial speedy trial protections as well. Accordingly, few practitioners probably recognize how narrow the Sixth Amendment right really is. Nevertheless, above and beyond the protections that inhere from the Fifth Amendment Due Process Clause, the Sixth Amendment right to a speedy trial has one paramount purpose: restoring the physical liberty rights of innocent persons as soon as reasonably possible.

III. Federal Statutory Speedy Trial Rights.

Although *Barker v. Wingo*[50] set out a broad test for determining if a Sixth Amendment speedy trial violation had occurred, the Supreme Court has confirmed that the prerogative to specify explicit temporal criteria that would trigger a defendant's speedy trial rights vests with the legislature.[51] Accordingly, two years after the Court rendered its opinion in *Barker*, Congress passed the Federal Speedy Trial Act of 1974 (FSTA).[52] In general, the FSTA requires the prosecution to bring a defendant to trial within 100 days of the date of his or her arrest or service of summons, or within ninety days of the onset of pretrial detention, whichever is earlier.[53] Not surprisingly, the FSTA allows for several exemptions from the running of these time limits,[54] and specifically excludes periods of delay caused by continuances that the trial court grants to "serve the ends of justice."[55] The remedy for an FSTA violation is dismissal, although the trial court has discretion to dismiss with or without prejudice.[56]

Although the 100-day time limit delineates the temporal boundaries for all criminal prosecutions, one key element of the FSTA provides added protections to defendants in pretrial detention. Section 3164 of the FSTA mandates, "The trial or other disposition of cases involving . . . a detained person who

is being held in detention solely because he is awaiting trial . . . *shall be accorded priority.*"[57] This critical provision offers some insight into Congress's rationale for passing the FSTA. More than any other reason, Congress was concerned that the failure to accord a speedy trial would cause irreparable harm to the innocent person.[58] The legislative history of the FSTA recites all of the deleterious of effects caused by delays in processing criminal charges that the Supreme Court had pointed out in *United States v. Marion*,[59] including the cloud of anxiety, suspicion, and hostility under which the putative defendant must carry on his or her life.[60] The FSTA, therefore, provides some degree of speedy trial protection to all criminal defendants,[61] but deliberately provides enhanced speedy trial protections to defendants in pretrial detention.

In addition, the House Report that explains the statute clearly concentrates on Congress's concern over the effects that lengthy delays have on pretrial detainees. The history of the FSTA notes that pretrial incarceration disrupts family life and interferes with associations; enforces idleness; provides few recreational opportunities; affords no rehabilitation; and hinders the preparation of a defense by diminishing the defendant's ability to gather evidence, contact witnesses, and consult with counsel.[62] Pretrial incarceration also causes a loss of privacy, imposes a relatively harsh disciplinary routine, and gives the government a tactical advantage in securing

evidence and communicating with witnesses.[63] Finally, the House Report acknowledges the benefits that speedy trials accrue to the public; however, the societal advantages it enumerates—reduced prison costs and the defendant's continued productivity as a member of society—apparently address the harms of pretrial detention, not the harms of pretrial delays in general. Accordingly, when Congress passed the FSTA, its principal concern was to minimize the pernicious effect that lengthy pretrial detention has on presumptively innocent persons.

In the wake of *Barker v. Wingo*,[64] Congress clearly was disconcerted over the "amorphous quality" of the four-part test that the Supreme Court had formulated.[65] Moreover, congressional lawmakers certainly could have construed the Court's declaration that, to "hold that the Constitution requires a criminal defendant to be offered a trial within a specified time period would require this Court to engage in legislative or rulemaking activity," as an invitation to draft legislation. This invitation was especially enticing because Congress—more than the courts—was undoubtedly concerned with the societal interests that the Sixth Amendment promoted,[66] but that the *Barker* Court only acknowledged.

Congress reacted to *Barker* by lamenting about the prejudices that a pretrial detainee faces, as well as the ancillary societal costs attributed to pretrial detention. This reaction was

predictable because the Supreme Court declined to adopt a *Barker* factor that would have differentiated a pretrial detainee from a similarly situated defendant who retained his or her freedom pending trial. Significantly, the speedy trial rules set out in *Barker*, *United States v. Marion*,[67] and *United States v. Lovasco*[68] require courts to consider the prejudice to the defendant's case more seriously than prejudice to the defendant's liberty. Furthermore, because *Barker* requires a balancing test, courts need not rely on prejudice to physical liberty—that is, pretrial incarceration—as a trigger for heightened scrutiny of speedy trial compliance.[69] This was a deficiency in *Barker* that Congress apparently sought to remedy by adopting the FSTA.

The only form of prejudice that all defendants suffer with potential equality is the anxiety and concern that a presumptively innocent person may suffer while awaiting his or her first chance at exoneration.[70] On the other hand, the potential magnitude of each of the other forms of prejudice[71] increases dramatically once the government has incarcerated an accused.[72] In passing the FSTA, Congress recognized that a statutory mechanism to guard against such increased prejudice is integral to the Sixth Amendment's speedy trial guarantees. Consequently, the FSTA's mandate that pretrial detainees receive priority not only is critical to the underlying statutory speedy trial scheme, but also expresses a constitutional standard for Sixth Amendment speedy trial rights that is no less important

than the Supreme Court's decision in *Barker*.[73]

IV. Speedy Trial in the Military

Although the right to a speedy trial is constitutional,[74] the *Manual* codifies the rule with relative precision.[75] The provisions of R.C.M. 707 and Article 10, as well as the severe sanction for violating them—namely, dismissal of the affected charges—clearly set higher standards for ensuring that an accused enjoys a speedy trial than the Sixth Amendment requires.[76] Moreover, these higher standards emphasize the military's objective of operating an expeditious justice system. Both the government and an accused have a substantial interest in expediting court-martial proceedings and in avoiding intolerable delays.[77] The military speedy trial rules manifest the legal axiom that a service member accused of an offense requires just as much protection against the government's delaying his or her day in court as a civilian.[78] Furthermore, the need for such a rule in the military is heightened by the need to prevent unlawful command influence—or even the appearance of unlawful command influence—from interfering with the pretrial timetable.

Because of these substantial interests, compliance with speedy trial rules is one of the most hotly litigated trial issues at courts-martial. Nevertheless, the proliferation of

speedy trial statutes and rules has made the appearance of a pure Sixth Amendment speedy trial claim unusual in courts-martial. Accordingly, prior to the recent change to the *Manual*, many military practitioners had grown accustomed to litigating issues arising principally from three so-called speedy trial rules. The first was the 120-day rule contained in the former R.C.M. 707(a), which required the government to bring an accused to trial no later than the earlier of 120 days after preferral,[79] or 120 days after the government first restricted,[80] arrested,[81] or confined[82] the individual.[83] The second rule was the ninety-day limit imposed by the former R.C.M. 707(d), which prohibited the pretrial arrest or confinement of an accused in excess of ninety days. The third and final rule was the *Burton* ninety-day rule,[84] which stated that a court-martial shall presume that the government has violated the "immediate steps" requirement of UCMJ Article 10 if it has detained the accused in pretrial arrest or confinement for more than ninety-days. In most cases, these rules provided a sufficiently comprehensive framework for analyzing a speedy trial issue to avoid a court's taking cognizance of the issue as a constitutional claim.

A. Speedy Trial or Speedy Release?

Because, taken together, they generally imposed a much stricter standard than the Sixth Amendment right to a speedy trial, interpreting these three rules predominated speedy trial issues that arose during the pendency of a court-martial. The

principal benefit of these rules was that they imposed objective, measurable, and relatively easy-to-apply speedy trial requirements. Nevertheless, a trial practitioner's acclimation to these provisions often was misplaced. Specifically, an inexperienced trial counsel easily could assume that if the accused was not in pretrial arrest or confinement, the government simply had to bring him or her to trial within 120 days. This assumption may have been safe under most circumstances, but mere compliance with the 120-day time limit of R.C.M. 707(a) never has immunized the government totally from a Sixth Amendment speedy trial claim.[85]

Similarly, a neophyte trial counsel easily could have believed that if the accused was in pretrial arrest or confinement, the government had only ninety days to get to trial. Harboring this belief also may have been prudent in most situations because it undoubtedly enhanced the government's sense of urgency in processing a detainee's court-martial charges. Nothing in R.C.M. 707(d), however, actually required the government to bring an accused to trial before the end of the rule's ninety-day period. To the contrary, a careful reading of the *Manual*'s former speedy trial provisions reveals that the R.C.M. 707(d) ninety-day rule was not a pure speedy trial rule at all. That rule stated the following:

> When the accused is in pretrial arrest or

> confinement under R.C.M. 304 or 305, immediate steps shall be taken to bring the accused to trial. *No accused shall be held in pretrial confinement in excess of 90 days* for the same or related charges. . . . The military judge may, upon a showing of extraordinary circumstances, extend the period by 10 days.[86]

Remarkably, the government easily could avoid a violation of this rule by releasing an accused from pretrial arrest or confinement just before the expiration of the ninety-day period. Furthermore, if the prosecution took this step to avoid an R.C.M. 707(d) violation, the government still would have had the benefit of thirty additional days to prepare for trial.

Essentially, the former R.C.M. 707(d) purported to impose two speedy trial standards on the government: (1) the government had to take "immediate steps to bring a detained person to trial, and (2) the government could not hold an individual in pretrial arrest or confinement for more than ninety days. Accordingly, the plain language of R.C.M. 707(d) did not impose an empirical limitation on the time that the government could expend in preparing its case for court-martial. Instead, the ninety-day rule of the old R.C.M. 707(d) merely limited the length of a person's pretrial arrest or confinement.

Because practitioners easily could confuse the actual

nomenclatures and effects of the *Manual*'s so-called speedy trial rules, these provisions perhaps are best understood if considered for what they are—executive orders. By including the former R.C.M. 707(d) ninety-day rule and the other provisions of R.C.M. 707 in the *Manual*, the President effectively had imposed three standing orders on all officials responsible for processing court-martial charges on behalf of the government: (1) bring every case to trial within 120 days; (2) if the accused is in pretrial arrest or confinement, take immediate steps to prepare for trial—that is, do not fail to comply with UCMJ Article 10; and (3) if a person has been deprived of liberty for more than ninety days, either proceed to trial or emancipate that person immediately.

Consequently, the two components of the old R.C.M. 707(d) were substantial adjuncts to military speedy trial law. The first prong of old rule reiterated—and thereby reemphasized—the "immediate steps" requirement that already appeared in UCMJ Article 10. Likewise, the rule's ninety-day time limit was not only a speedy trial provision, but also—and more importantly—a ninety-day release rule. Accordingly, while the primary objective shared by the 120-day rule, the *Burton* ninety-day rule, and the "immediate steps" rule certainly was to protect an accused's right to a speedy trial, the language of the *Manual*'s ninety-day rule actually manifested a primary objective of protecting a presumptively innocent service member's right to

liberty. The former R.C.M. 707(d), therefore, vindicated the precise physical liberty interests that are at the heart of the FSTA and the Sixth Amendment's Speedy Trial Clause.

B. The Detainee's Right to a "Speedier" Trial

In addition to their accustomed views of the speedy trial rules, many trial practitioners would agree that an accused in pretrial arrest or confinement should enjoy a right to a "speedier" trial than an identically situated accused who is awaiting trial on his or her own recognizance. The *Manual*'s former ninety-day rule implicitly recognized a detainee's right to a "speedier trial" by codifying a thirty-day difference between the 120-day rule and the ninety-day rule. Moreover, notwithstanding their decision to eliminate the *Manual*'s separate ninety-day release rule, the drafters of Change 5 to the *Manual* acknowledged that the government should process charges against an individual in pretrial arrest or confinement with greater urgency than it does against a similar, but undetained, person.[87]

Even before the President promulgated Change 5 to the *Manual*, none of the added protections contained in the *Manual*'s speedy trial rules effectively could assure a detained person's right to a speedier trial. The R.C.M. 707(d) "immediate steps" rule, which merely reiterated the "immediate steps" language of Article 10, failed to provide complete and certain protection because it affixed no objective criterion to assist a court in

determining the meaning of "immediate steps." In addition, the R.C.M. 707(a) 120-day rule was ineffective because it provided no relative benefit based on an accused's pretrial detention status. Similarly, the ninety-day "speedy release" rule of R.C.M. 707(d) could not directly assure a speedier trial because it did not address the temporal urgency with which the government proceeded to trial. The *Burton* rule, on the other hand, could accelerate the processing of charges because it rewarded a burden-shifting procedural advantage to an accused whom the government already had detained for ninety days.[88]

By promulgating Change 5 to the *Manual*, however, the President eliminated the already sparse speedy trial protections that a pretrial detainee had at his or her disposal. No longer can an incarcerated accused invoke the R.C.M. 707(d) "immediate steps" or ninety-day rules; instead, the detained service member is subject to the same speedy trial standards as his or her unincarcerated counterpart. The advent of this new R.C.M. 707 "universal" 120-day speedy trial rule only recently elicited an authoritative response from the judiciary. Remarkably, in *United States v. Kossman*,[89] the Court of Military Appeals answered the President's decision to eliminate the administrative priority accorded to a pretrial detainee's case by eliminating the pretrial detainee's military-judicial speedy trial protections as well. Accordingly, in a period of a little over twenty-six months the President and the Court of Military Appeals extracted

the teeth from Article 10.[90]

Even though the Court of Military Appeals has decided to put the *Burton* ninety-day rule to rest, Congress's silence on the military speedy trial issue apparently means that the "immediate steps" requirement of UCMJ Article 10 retains its vitality.[91] Nevertheless, Article 10, standing alone, never has been a panacea for avoiding speedy trial violations in the military. The speedy trial interests promoted by Article 10—like the interests promoted by any statute—require objective executive rulemaking and a coherent body of case law if those who administer the military justice system are to remain tractable. Because the R.C.M. 707(d) "immediate steps" rule encouraged the government to move swiftly else risk a dismissal under R.C.M. 707(e), and the *Burton* ninety-day rule encouraged the government to move swiftly else risk having the substantial burden of proof on a speedy trial motion, a pretrial detainee always had a distinct procedural advantage. In other words, unlike an undetained service member who was pending trial, an incarcerated accused stood a better chance of prevailing on a speedy trial motion to dismiss at any time during the pendency of his or her pretrial detention period. Unfortunately, now that the R.C.M. 707(d) "immediate steps" rule and the *Burton* rule have perished, an accused in pretrial incarceration has no regulatory or military-judicial advantage over an accused who is free awaiting trial. Similarly, but for the very slight consideration accorded

to incarceration under the *Barker v. Wingo* test,[92] an accused in pretrial detention has no compulsory judicial advantage over an accused who is free awaiting trial—that is, no court is obliged to consider pretrial detention as a talismanic speedy trial factor.[93]

1. Analyzing the Kossman *Decision.*—In *Kossman*, military law enforcement officials detained a Marine Corps private in pretrial confinement for 110 days, 102 of which were attributable to the prosecution.[94] Based on the government's failure to meet its burden of showing diligence in accordance with *United States v. Burton*,[95] the trial judge dismissed certain charges and specifications.[96] The government appealed to the Navy-Marine Corps Court of Military Review[97] and—in an ironic departure from one of its earlier attempts to overrule *Burton*[98]—it affirmed.[99] The *Kossman* case arrived at the Court of Military Appeals as the following certified question from The Judge Advocate General of the Navy: "Whether the Navy-Marine Corps Court of Military Review correctly determined that the military judge was bound to apply [the Court of Military Appeals'] holding in *United States v. Burton* in resolving appellee's speedy trial motion instead of the President's comprehensive speedy trial scheme contained in RCM 707."[100]

Judge Cox, writing for the majority,[101] answered the certified question in the negative.[102] The court based its

decision to discard the *Burton* ninety-day rule, in lieu of the "President's comprehensive speedy trial scheme," on four conclusions that it derived from the evolution of speedy trial law in the military. First, the *Kossman* majority noted that, since *Burton*, the President has changed the military magistrate system so that, "pending courts-martial, military magistrates and judges[—not just commanders—]now hold keys to confinement facilities and brigs . . . ."[103] Second, the court pointed out that courts-martial must award sentencing credit for time served in pretrial confinement.[104] Third, the majority observed that the court never had found a *Burton* violation in any case in which the government had satisfied R.C.M. 707.[105] In making this observation, the court apparently was asserting that the *Burton* rule, as applied, was effectively redundant to the R.C.M. 707(d) ninety-day rule.[106] Finally, Judge Cox declared that the President's decision to amend R.C.M. 707 in 1991—an amendment which, inter alia, eliminated the ninety-day pretrial confinement rule of the former R.C.M. 707(d)—changed the "landscape" of speedy trial law and constituted a responsible act in an area in which the Chief Executive had clear authority.[107] Evidently, the court concluded that *Burton* no longer accommodated the President's design to simplify regulatory speedy trial procedures.[108] Consequently, *Kossman* essentially held that executive rulemaking transcended the protections that the *Burton* ninety-day rule provided to accuseds awaiting trial in pretrial confinement.

2. Why the Kossman *Decision Is Faulty.*—Notwithstanding the Court of Military Appeals' apparent desire to streamline military speedy trial law, all four of the conclusions upon which it based its *Kossman* ruling are misplaced. First, a review of the reasons for confinement by a military magistrate or judge has no effect on the speed at which the government ultimately proceeds to trial. Although the *Manual*'s pretrial confinement review provisions undoubtedly protect an accused from unlawful incarceration, they do nothing to promote a speedy trial after an appropriate official has reviewed and affirmed a commander's decision to place a service member under pretrial restraint.[109] Indeed, R.C.M. 305—cited by the court in *Kossman*—is devoid of any language that confers on a military magistrate or military judge the authority to order the release of a confined service member based on violation of that service member's right to a speedy trial.[110] Furthermore, even if the rule granted these powers, other temporal restrictions would render the authority meaningless in practice.[111]

Consequently, while the military magistrate system provides an accused with procedural due process safeguards, it does nothing to reduce the length of pretrial confinement by assuring a speedier trial. More importantly, the bases for holding a service member in pretrial confinement actually make the government complacent, not diligent. Specifically, if a

commander has founded his or her decision to put an accused in pretrial confinement on a valid belief that the accused may engage in serious criminal misconduct, the government may be reticent to proceed to trial if any risk of acquittal exists. Paradoxically, as the likelihood of a court's acquitting a dangerous accused increases, the government's incentive to expedite the case—and the accused's release—arguably decreases.

The *Kossman* court also incorrectly relied on the effect that sentencing credit has on an accused's right to a speedy trial. Actually, the concept of sentencing credit is an affront to speedy trial law. Both the military and the civilian criminal justice systems emphasize that pretrial incarceration is not punitive.[112] A sentence to posttrial confinement, on the other hand, is definitively punitive. Accordingly, the concept of giving a convicted service member sentencing credit for pretrial confinement either must violate the principle that a sentence shall be punitive or must violate the principle that pretrial confinement shall not be punitive.[113] Finally, the drafters of R.C.M. 305 never intended sentencing credit as a means of enforcing the speedy trial rules. Sentencing credit merely deters military officials from violating the rules governing the propriety of—as opposed to the length of—pretrial confinement.[114]

The *Kossman* court's intimation that the *Burton* ninety-day

rule was redundant is equally unconvincing. First, in two passages in the *Kossman* opinion, the majority emphasizes that the Court of Military Appeals created the *Burton* ninety-day rule to enforce the speedy trial provisions of UCMJ Article 10.[115] The court, however, effectively concedes that Article 10 does not require the President to promulgate a speedy trial rule to implement the "immediate steps" rule.[116] Instead, *Kossman* points out that R.C.M. 707 is a discretionary exercise of the powers to prescribe pretrial, trial, and posttrial procedures, which Congress delegated to the President under UCMJ Article 36(a).[117] In other word, while R.C.M. 707 may delineate a "comprehensive speedy trial scheme"[118] it is not required as an Article 10 enforcement mechanism. Accordingly, even if the court's interpretation of the present R.C.M. 707 were correct, it only would warrant the military judiciary's exercising considerably more deference in employing the *Burton* standard; it certainly would not justify the court's drastic action in abandoning the *Burton* rule altogether.

Finally, the *Kossman* court's explanation that the *Burton* rule was merely a crude judicial measure, meant to fill an ephemeral procedural deficiency that the President now has responsibly corrected, is unpersuasive. Actually, the President's decision to eliminate the ninety-day release rule and the "immediate steps" rule of the former R.C.M. 707(d), made the *Burton* ninety-day rule even more important to the enforcement of

a pretrial detainee's right to a speedy trial. Significantly, the Court of Military Appeals emphasized that it created the *Burton* rule to enforce Article 10—a statute that irrefutably confers additional speedy trial protections only on service members in pretrial restraint.[119] Nevertheless, the *Kossman* decision declares that trial courts are bound by the "President's comprehensive speedy trial scheme," instead of *Burton*, in resolving subconstitutional speedy rules motions.[120] This is a remarkably curious result because, while the *Burton* rule guaranteed augmented speedy trial protections to pretrial detainees, nothing in the "President's comprehensive speedy trial scheme" mandates that the prosecution expedite the cases of incarcerated service members.[121] Accordingly, had the court decided to scrap the *Burton* rule when R.C.M. 707(d) protected pretrial detainees with an "immediate steps" rule and a ninety-day release rule, its actions may have been more understandable. Its decision to dispense with the rule now, however, is perplexing.

Before taking its bold step in *Kossman*, the Court of Military Appeals should have scrutinized the purported comprehensiveness of the military's present regulatory speedy trial scheme. If it had done so, the court would have found that the current version of R.C.M. 707 fails to fulfill its drafters' intent. For instance, the drafters of the *Manual* assert that they based the R.C.M. 707 on the FSTA[122] and the *ABA Standards for*

Criminal Justice (*ABA Standards*).[123] Unlike the FSTA and the *ABA Standards*, however, R.C.M. 707 does not mandate a shorter speedy trial period for persons held in pretrial confinement than for those at liberty pending trial.[124] Accordingly, in the absence of the *Burton* ninety-day rule, pretrial detainees in the military no longer enjoy the right to a "speedier" trial—a right that the Sixth Amendment, UCMJ Article 10, the FSTA, and the *ABA Standards* recognize, but that the present R.C.M. 707 does not.

D. Conclusion

The new speedy trial provision that appears in Change 5 to the *Manual* manifests indifference to a service member in pretrial confinement. In addition, with the demise of the *Burton* rule, a service member in pretrial arrest or confinement has virtually no assurances that his or her trial will commence any earlier than a similarly situated undetained accused.[125] Consequently, the speedy trial mechanisms that the military justice system now has in place effectively deprive service members in pretrial detention of the traditional methods for enforcing the speedy trial rights that the Sixth Amendment and Article 10 were meant to guarantee. Accordingly, practitioners, judges, and convening authorities must employ other features of the military justice system to vindicate these important rights. An accused service member in pretrial detention, therefore, now has only negligible means to assure that the government is processing his or her charges faster than the an identically situated accused who is

enjoying pretrial freedom.

First, the service member may move to dismiss based on the government's failure to satisfy UCMJ Article 10's "immediate steps" mandate. Specifically, an accused in pretrial confinement still can accrue the extreme remedy of dismissal if he or she demonstrates that the government purposefully, oppressively, or arbitrarily delayed trial.[126] *Kossman*, however, indicates that courts should use the "reasonable diligence" standard expressed in *United States v. Tibbs*[127] to resolve Article 10 speedy trial motions.[128] The *Kossman* court also saw "nothing in Article 10 that suggests that speedy-trial motions could not succeed where a period under 90—or 120—days is involved."[129] Nevertheless, to the extent Judge Cox believes that the *Burton* rule "virtually assured that no accused could ever prevail on an Article 10 motion if the pretrial confinement chargeable to the Government was less than 90 days,"[130] a court's obligation to apply the President's comprehensive speedy trial scheme contained in R.C.M. 707"[131] just as certainly assures that no accused ever will prevail on an Article 10 motion if the pretrial confinement chargeable to the government is less than 120 days. Indeed, the government's 102-day delay in Private Kossman's case enshrines this postulate. Accordingly, after *Kossman*, a service member in pretrial confinement is no more likely to prevail on a speedy trial motion based on Article 10 than if he or she were free and asserting the same motion based on R.C.M. 707.

In addition to an Article 10 motion, an incarcerated accused may assert a straight Sixth Amendment speedy trial claim based on *Barker v. Wingo*.[132] The *Barker* test, however, considers pretrial detention as just one of many prejudicial factors that a court must balance.[133] *Barker*, therefore, fails to compel a court to give a detainee greater speedy trial protection than a similarly situated, undetained accused. Moreover, even if the court finds that the government failed to take immediate steps under Article 10, the *Barker* test will tolerate a denial of a speedy trial motion if the three other balancing factors weigh against dismissal.[134] Consequently, a Sixth Amendment speedy trial motion offers no certain, additional relief to a accused merely because he or she is incarcerated while awaiting trial.

In the wake of *Kossman*, therefore, the military justice system has no distinct, objective mechanism for enforcing the Sixth Amendment right to a speedy trial and the important "immediate steps" mandate of UCMJ Article 10.[135] Nevertheless, the interests that the Article 10 and the Sixth Amendment rights to speedy trial seek to protect demand that the government process the cases of presumptively innocent military detainees with some degree of priority. Until *Kossman*, the *Burton* ninety-day rule served as the keystone for protecting these rights. Moreover, because an incarcerated accused rarely can be expected to obtain the empirical evidence necessary to prove that the

government failed to give his or her case priority over other cases, the *Burton* presumption-shifting rule was not only appropriate, but also indispensable. Now, however, military practitioners must look elsewhere for methods to vindicate the speedy trial rights of service members whom the government has incarcerated pending trial. Three such methods may derive from renewed attention to UCMJ Article 33, application of the FSTA to courts-martial, and revision of R.C.M. 707.

V. Renewing the Military Justice System's Attentiveness to Article 33

One set of "immediate steps" that historically has received little attention comprise the requirements expressed in UCMJ Article 33, which states the following:

> When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay.

The principle purpose of this statute is "to insure an expeditious processing of charges and specifications in general court-martial trials."[136] Article 33 effectively requires the government either (1) to prefer charges, prepare the charge sheet and allied papers, produce a report of investigation, and forward these documents to the general court-martial convening authority[137] within eight days after issuing an order putting the accused into arrest or confinement;[138] or (2) to report in writing to the general court-martial convening authority the reasons why preferring, investigating, and forwarding the charges within those eight days is impracticable.[139]

Article 33 applies only to cases in which the government is holding an accused for trial by general court-martial. When a service member is in pretrial arrest or confinement, however, and the pendency of a general court-martial is manifest—as in the case of an accused facing serious charges such as murder, rape, or robbery—Article 33 clearly requires the government to take certain "immediate steps." Consequently, under certain circumstances, the interplay between Article 33 and the "immediate steps" requirement of Article 10 conceivably could warrant a dismissal based on a speedy trial violation *before* the expiration of the 120 days prescribed by R.C.M. 707(a).

The "immediate steps" mandate does not require the

government to move continuously toward court-martial. The military courts, however, will require a trial counsel to exercise reasonable diligence in bringing charges to trial.[140] Furthermore, absent lawfully excludable delays, a court-martial must apply speedy trial rules strictly.[141] Because the *Manual's* 120-day rule is fairly mechanical, a court-martial can apply it with relative objectivity. Applying the "immediate steps" rule of UCMJ Article 10, on the other hand, usually requires a more subjective evaluation of whether or not the government proceeded to trial with reasonable diligence.[142] A finding that the government failed to exercise reasonable diligence, however, may depend on a variety of factors, any of which may be so outrageous that it could trigger a speedy trial violation. The pertinent issue, therefore, is whether the government's failure to take the steps required by Article 33 ever could be sufficient to demonstrate a lack of reasonable diligence analogous to a violation of the "immediate steps" mandate of Article 10, thereby warranting the dismissal of charges against an accused.

A. Article 33 Case Law

The government's failure to satisfy the requirements of Article 33 should be a cognizable reason for vindicating a government violation of an individual's speedy trial protections in the same manner as a court must remedy violations of UCMJ Article 10, R.C.M. 707, and the Sixth Amendment—namely, moving for dismissal. Only a handful of cases, however, have addressed

the meaning and significance of Article 33.

In *United States v. Hounshell*,[143] the accused asserted that the government violated his rights to a speedy trial under the Sixth Amendment by holding him in pretrial confinement for over eleven months.[144] Although the Court of Military Appeals ultimately declined to resolve the speedy trial issue purely on Article 33 grounds, it stressed that Article 33 was integral to Congress's scheme of "emphasi[zing] the importance" of according speedy trial rights to service members awaiting courts-martial.[145] The *Hounshell* court concluded that "speedy trial is a substantial right," and that a trial judge can redress a denial of that right by dismissing charges against the accused.[146]

In *United States v. Callahan*,[147] the government held the appellant in pretrial confinement for almost a month before preferring charges against him, and for over an additional month before the general court-martial convening authority referred the charges to a court-martial.[148] Unlike its decision in *Hounshell*, the Court of Military Appeals not only acknowledged that the government had violated Article 33, but also considered the remedy required. The *Callahan* court noted that neither Article 33 itself, nor any other provision in the UCMJ, prescribed dismissal of charges as the remedy for violating Article 33. Instead, the court stated that it would examine "'reasons' for the delay" to determine the effect of the violation.[149]

Accordingly, finding that the government had proceeded with reasonable dispatch, and noting that the defense never specifically objected to the prosecution's failure to transmit an "eight-day letter,"[150] the court denied Callahan's motion to dismiss.

Scarcely six month's passed until Article 33 again became the focus of a speedy trial issue before the Court of Military Appeals. In *United States v. Brown*,[151] the accused was confined for two months before the convening authority received the charges and referred them to a court-martial. At a general court-martial convened 108 days after the government put the accused in pretrial confinement, Brown's defense counsel asserted that the government's delays violated UCMJ Articles 10 and 33, deprived Brown of "a substantial right," and required dismissal of the charges.[152] The trial counsel responded by conceding that he could not explain the reasons for the substantial delay. Accordingly, the law officer acknowledged that the accused proffered sufficient evidence to raise a cognizable speedy trial issue and stated for the record, "The law officer wishes to state that, of course, he is in full agreement with the principles referenced in the Federal Constitution, and in the Uniform Code of Military Justice, pertaining to providing a prompt trial. . . ."[153] As comforting as this language may have been to the accused, the law officer nevertheless placed on Brown the burden of proving that the delay materially prejudiced his substantial

rights.[154]

The Court of Military Appeals aptly pointed out that the law officer "demonstrated his misconception of the effects of Articles 10 and 33."[155] Amplifying on its language from *Hounshell*, that Congress implemented UCMJ Articles 10 and 33 as components of a statutory scheme to assure speedy trials in the military, the Court of Military Appeals asserted the following:

> From these provisions,[156] read in the light of the intent of Congress as ascertained from the views of the framers of the Code, set out in our opinion in United States v. Hounshell . . . it is clear that whenever it affirmatively appears that officials of the military services have not complied with the requirements of Articles 10 and 33, . . . and the accused challenges this delict by appropriate motion, then, *the prosecution is required to show the full circumstances of the delay.*[157]

Noting that dismissal of charges was not an automatic remedy when officials fail to comply with these statutes, the *Brown* court went on to imply that dismissal nonetheless would be appropriate if the government could not prove satisfactorily that it proceeded with "reasonable dispatch."[158] In Brown's case, however, the court declined to rule on the merits of the Article

33 issue. Instead, it remanded the case for additional proceedings, concluding that the law officer's improperly shifting the burden of proof from the government to the accused effectively prevented that officer from correctly resolving Brown's speedy trial motion.[159]

Five years after *Brown*, Private Floyd McKenzie's assertion that, by failing to comply with Article 33, the government denied him military due process, elicited the Court of Military Appeals' first formal admonition to the military justice community on the gravity of Article 33. In *United States v. McKenzie*,[160] the government not only failed to forward charges to the general court-martial convening authority until the accused already had served seventy-nine days in pretrial confinement, but also failed to report the reasons for the delay to that officer in writing.[161] While it ultimately found neither prejudice to the substantial rights of the accused, nor a denial of due process, Judge Ferguson, speaking for the court, effectively cautioned all military practitioners against ignoring the edicts of Article 33.

> [W]e emphasize the duty and responsibility of every officer to comply with the mandates of the Uniform Code. In the past, we fear, Article 33 has been observed more often in breach than in following its clear terms. In order to avoid future controversies in this area, we suggest that the

attention of all concerned with the processing of court-martial matters be forcibly drawn to its unambiguous command.[162]

Although Judge Ferguson's comments in *McKenzie* certainly put judge advocates on notice of the unequivocal terms of Article 33, the United States Court of Appeals for the Eighth Circuit apparently found flexibility in the statute's language. In *Burns v. Harris*,[163] the Eighth Circuit considered the habeas corpus petition of a convicted service member. Burns asserted that the government violated UCMJ Article 33 by failing to take steps to try him on murder charges until he had been in pretrial confinement for fourteen days. The court implicitly conceded that a technical violation of Article 33's eight-day rule had occurred. Nevertheless, it evidently was impressed by Article 33's adaptability to "the overriding considerations of military life," the relatively short duration in forwarding charges, and the government's ultimate success in completing Burns's court-martial within three month's of his arrest.[164] Accordingly, the court essentially held that, as long as the government eventually concludes its trial against an accused in an otherwise speedy manner—that is, without purposeful or oppressive delay—compliance with other UCMJ speedy trial provisions can vitiate an Article 33 violation. The Eighth Circuit, therefore, apparently found Article 33 to be tolerant of minor transgressions and quite forgiving to the government,

notwithstanding the *McKenzie* court's language to the contrary.[165]

Although Judge Ferguson adhered to the principles he delineated in *McKenzie*, his brethren apparently were comfortable with the elastic approach to alleged Article 33 violations that the Eighth Circuit took in *Burns*. In *United States v. Tibbs*,[166] Chief Judge Quinn and Judge Kilday—both of whom concurred in *McKenzie*[167]—blatantly ignored Judge Ferguson's admonition. In *Tibbs*, the accused alleged that the government failed to comply with Article 33 by holding him in pretrial confinement for over one month before forwarding the charges to the general court-martial convening authority and by failing to report in writing the reasons for this delay.[168] Chief Judge Quinn's explanation of the facts in *Tibbs* revealed that the government unmistakably violated the unambiguous terms of Article 33. Moreover, the trial counsel and the law officer presiding at Tibbs's court-martial acknowledged on the record that a technical violation of Article 33 actually had occurred. Remarkably, however, the Court of Military Appeals determined that, because "satisfactory reasons for the delay appear[ed] in the record of trial . . . [t]here [was], therefore, no indication of a violation of the requirements of Article 33 . . . ."[169]

Predictably and correctly, Judge Ferguson strenuously dissented to the majority's holding—a holding that essentially held that the statute's "unambiguous command" for an "eight-day

letter" was merely precatory. Judge Ferguson asserted that the court's "rationale betray[ed] an impatience with the commands laid down [in UCMJ Article 33] by Congress and implicitly suggest[ed] that no remedy was intended for their enforcement . . . ."[170] After he reiterated the importance of UCMJ's speedy trial provisions in general,[171] Judge Ferguson asserting that Article 33 is the "positive command" of Congress and, as such, compliance with its requirements is not a matter of degree.[172] Moreover, he reiterated the persistent indifference with which military officials violate the statute's manifest scriptures. The dissenting opinion then concludes by demanding that the armed forces comply with the law as passed by Congress, and by declaring the following:

> If we do not insist upon a consistent approach to this recurring problem of unexplained delay, then the Articles will become a dead letter and accused persons—denied the opportunity for bail—will continue to go without relief until such time as their commanders find it convenient to try them. I submit that Congress intended no such situation to exist under the Code, and I cannot be a party to allowing it once more to rear its medusan head.[173]

In 1969, the Court of Military Appeals rendered two opinions that addressed Article 33 issues: *United States v. Hawes*[174] and

United States v. Mladjen.[175] Neither of these cases elucidated the court's expectations of military justice officials responsible for complying with Article 33. Nevertheless, both of them offered factual scenarios that provided the courts some latitude in interpreting the statute.

Hawes, for example, examined whether an accused's actions could be tantamount to a waiver of his or her statutory speedy trial rights under Article 33. In *Hawes*, the accused was in pretrial confinement for over two months, awaiting trial for an unauthorized absence. During this period, the government lost or misplaced the case file, delaying Hawes's case for thirty-five days. The court acknowledged that "losing a case file is especially intolerable if it may result in unnecessary pretrial confinement of the accused."[176] It noted, however, that Hawes never really contemplated a defense to the charge against him. Furthermore the court pointed out that Hawes implicitly had countenanced the delay—not only to afford his defense counsel time to negotiate a favorable plea agreement, but also to postpone his trial until after his unit deployed to Vietnam.[177] Concluding that the government's failure to comply with Article 33 did not prejudice the accused, the court determined that dismissal was not required.[178]

Because the *Hawes* court acknowledged that the government technically violated Article 33, the absence of a dissenting

opinion by Judge Ferguson is surprising. One explanation for Judge Ferguson's silence in *Hawes* may be that he believed that Hawes should be estopped from seeking relief for an Article 33 violation that apparently inured to his own benefit.

In *Mladjen*, the court considered Article 33's implicit demand on a commander to portend the ultimate disposition of a service member's case. Article 33 applies only to "a person held for trial by general court-martial" whose case file the general court-martial convening authority has yet to receive.[179] Accordingly, to determine if the statute's eight-day rules apply to a particular military detainee, a commander faces the dilemma of predicting to which level of court-martial the senior convening authorities in the chain of command ultimately will refer that person's case.

Military authorities apprehended Mladjen when he was absent without authority, and discovered that he was carrying a false identification card and a concealed weapon.[180] Surprisingly, Mladjen immediately attempted escape; not surprisingly, Mladjen's commander immediately put Mladjen in pretrial confinement upon his recapture.[181] Apparently anticipating a quick disposition to the case, the special court-martial convening authority promptly referred the charges against Mladjen to a special court-martial. Before trial, however, investigators uncovered evidence to support additional charges against the accused.[182] These

allegations prompted the special court-martial convening authority to initiate a formal pretrial investigation,[183] which later persuaded him to combine all of the charges and forward them to the general court-martial convening authority for disposition. Significantly, less than eight days after the investigating officer recommended that Mladjen actually was deserving of a general court-martial, the special court-martial convening authority adopted that recommendation and transmitted it to the general court-martial convening authority.[184]

The delays attendant to the additional investigation, rereferral, and trial preparation forced Mladjen to remain in pretrial confinement for almost six months.[185] Notwithstanding these delays, if the Article 33 "clock" started when an officer having the power to dispose of the charges received an investigating officer's recommendation to refer the charges by general court-martial, then the government complied with Article 33.[186] If, on the other hand, the time commenced substantially earlier—such as on Mladjen's first day of pretrial confinement, or on the day the special court-martial convening authority learned of the additional allegations—then a technical violation of Article 33 occurred. The *Mladjen* court rejected the latter interpretation, holding that, because the case initially had been referred to a special court-martial, Article 33 did not apply to the first set of charges.[187]

Emerging from his silence in *Hawes*, Judge Ferguson concurred only in the result in *Mladjen*. In his concurring opinion, he acknowledged the difficulties in resolving speedy trial issues that arise from Article 33. Nevertheless, Judge Ferguson again lashed out at the military legal community, stating that, "in most instances, the issue is avoidable through the simple expedient of proper adherence by the Government to the specific provisions of Articles 10 and 33 . . . ."[188] Moreover, he manifested his cynicism that the special court-martial convening authority only realized that a general court-martial was possible after receiving an Article 32 investigating officer's report. Convinced that military officials could not seriously entertain a mere special court-martial in the wake of the additional allegations against Mladjen, Judge Ferguson declared that the government's actions demonstrated an "utter lack of regard for the spirit of the law and the intent of Congress when it considered [Article 33's] enactment."[189]

After *Mladjen*, the courts that heard complaints founded on Article 33 evidently were content to relegate their analyses to the footnotes of their opinions. In *United States v. Nelson*,[190] for example, the Court of Military Appeals easily disposed of a speedy trial claim by basing its ruling entirely on Article 10. Nevertheless, for no apparent reason, the court punctuated its speedy trial discussion with a footnote that acknowledged the relevance of Article 33 as a procedural mandate.[191]

Likewise, in *United States v. Rogers*,[192] the court considered an accused's Article 33 complaint, but only in a footnote to its opinion.[193] In *Rogers*, the government held the accused in pretrial confinement for 153 days, while he awaited a general court-martial on two charges of rape.[194] Rogers appealed his conviction, asserting *inter alia* that the government violated his speedy trial rights by failing to overcome the *Burton* presumption and by failing to comply with Article 33.[195] The Court of Military Appeals disposed of the *Burton* issue by finding that less than ninety days of the 153-day delay were attributable to the government.[196] The court, however, implied that a technical violation of Article 33 had occurred. Nevertheless, it "rejected [Rogers's] complaint that his rights preserved under Article 33 . . . were violated," noting that the delay did not work to his prejudice and that the commander who forwarded the charges explained the delay in the transmittal letter accompanying the charges.[197]

The Navy-Marine Corps Court of Military Review also gave Article 33 passing attention in *United States v. Wholley*.[198] The *Wholley* court considered the case of a Marine whose special court-martial commenced eighty days after authorities first ordered him into pretrial confinement.[199] At the opening pretrial session, the accused moved to dismiss for a lack of speedy trial, asserting *inter alia* that the government failed to forward an

"eight-day letter" in accordance with Article 33.[200] In a memorandum of decision on this motion, Judge Wholley made several specific findings that cited speedy trial violations—one of which was the government's failure to comply with Article 33. He concluded by ruling that, "under the totality of the circumstances . . . the government had not met its burden of showing it has proceeded in bringing these charges to trial with reasonable diligence."[201] Judge Wholley then sustained the motion and granted the remedy of dismissal.

Claiming that the judge abused his discretion, the government petitioned the Navy-Marine Corps Court of Military Review for extraordinary relief to reverse the order to dismiss. Notwithstanding its lengthy opinion—which exhaustively addresses each of Judge Wholley's specific findings—the court quickly found no merit in the accused's Article 33 objection. Essentially, the court determined that, because the accused's case had been referred to a special court-martial, Article 33 simply did not apply.[202] After examining the entire record, the court granted the government's petition.

The most recent case to give direct attention to Article 33 was *United States v. Honican*.[203] In *Honican*, the Army Court of Military Review determined that the weight of an Article 33 violation implicated the accused's Article 10 right to a speedy trial.[204] While in pretrial confinement, Private First Class

Honican faced multiple allegations of desertion[205] and forgery.[206] Despite substantial evidence against Honican on the forgery allegations,[207] the government chose to delay its prosecution of those charges while it awaited the arrival of a "largely superfluous"[208] laboratory analysis of fingerprint evidence. The government did not prefer the forgery charges until the seventy-seventh day of Honican's pretrial confinement. Moreover, on the very next day, it referred only the desertion charges to a special court-martial that assembled on the eighty-third day of Honican's pretrial detention—a court-martial that convicted Honican of two absences without leave (AWOL).[209] Finally, only after completing his incarceration of ninety-two days on the AWOL convictions did the government refer the forgery charges to a general court-martial which, upon receiving Honican's pleas of guilty, sentenced him to a dishonorable discharge and three years of confinement.[210]

The Army Court of Military Review found that the government needlessly split the charges against Honican. Therefore, the court took the unusual step of counting all of the confinement for the first set of charges—both pretrial and posttrial—as pretrial confinement time for the second set of charges.[211] It also found that preferring, investigating, and forwarding the forgery charges for trial with the desertion charges was not "impracticable."[212] Accordingly, the Army court held that the government violated Article 10's mandate of a speedy trial in two

ways: The government not only violated the *Burton* ninety-day rule by failing to bring Honican to trial until the ninety-second day of pretrial confinement, but also violated Article 33 by failing to process the forgery charges as expeditiously as practicable.[213]

Honican is significant because the court found that dismissal was warranted—at least in part—based on an Article 33 violation. Nevertheless, the case fails to settle the state of confusion in applying Article 33 as a speedy trial rule. Because the government clearly failed to complete the forwarding of general court-martial charges against the accused within the eight-day limit, and because nothing in the record indicated the existence of an "eight-day letter" to explain the reasons for the delay, the *Honican* court was correct in noting that an Article 33 violation had occurred. The court also was correct in pointing out that the Article 33 violation demonstrated the government's "apparent disregard for statutorily-prescribed procedure."[214]

Unfortunately, two aspects of the decision detract from *Honican*'s conclusiveness as Article 33 case law. First, the Article 33 violation depends solely on the court's ruling that all of the net confinement time that Honican served on the initial set of charges also counted as pretrial confinement on the later set. Without this ruling, Honican never actually was "held [in pretrial arrest or confinement] for trial by general

court-martial."[215] Likewise, because the government tried Honican on the first set of charges—the charges for which he *was* held in pretrial confinement—by special court-martial, *Wholley* and *Mladjen* nevertheless would have made any Article 33 objection moot.[216] Accordingly, the finding of an Article 33 violation in *Honican* fairly relies on the court's decision to manipulate the categorization of confinement periods.

The second aspect of the *Honican* opinion that diminishes its comprehensiveness is that, in ruling to dismiss the charges against the accused, the court relied predominantly on several factors—other than the government's failure to comply with Article 33—to find that an Article 10 speedy trial violation had occurred. Moreover, the court declined to give any intimation as to the relative weight a court should give to an Article 33 violation in resolving a speedy trial issue. Consequently, even after the *Honican* court gave Article 33 unprecedented attention, military trial practitioners still have no definitive guidance on the implications of violating the statute's eight-day rules.

B. Article 33 Commentary

In practice, the case in which the charges and a report of investigation actually reach the general court-martial convening authority within eight days is a rarity. Accordingly, many military practitioners apparently have become inured to viewing the mandate of Article 33 as an "anachronism."[217] Some

commentators actually countenance this interpretation because "the procedural requirements attendant to processing and forwarding charges make the requirement[s of Article 33] difficult to meet."[218] The view of these commentators, however, misconstrues not only the general mandate of laws that apply to the military, but also the specific mandates of Article 33.

First, the general mandate of laws that apply to the military is manifest—that is, the *Manual for Courts-Martial* and the service regulations that pertain to the military justice system must implement and facilitate the statutory requirements that the UCMJ imposes on the armed forces. Conversely, any regulatory requirement promulgated in the *Manual* or contained in a service regulation is legally deficient if its application habitually prevents the implementation of a statute or patently frustrates a statute's purpose. An otherwise valid law, therefore, manifestly cannot endure the persistent indifference of the officials charged with implementing it—especially when the reason for the indifference is the officials' assertions that *they* have created an administrative structure that effectively renders the law an anachronism.

Paradoxically, the *Manual* and the service regulations that implement the UCMJ have created the procedural requirements that now supposedly make Article 33 compliance difficult. If meeting the requirements of Article 33 is almost always impossible, and

Congress does not act to repeal or amend Article 33, the military's mandate should be clear: It must eliminate the "procedural requirements attendant to processing and forwarding charges" that frustrate the unequivocal mandate of Article 33 and adopt procedures that assure Article 33 compliance. Dismissing a valid federal statute as an "anachronism" simply is an unacceptable retort—and, in practice, an illegal response—to an otherwise valid law.

The second problem with the view of Article 33 shared by these commentators is that it addresses only the article's fundamental requirement—that is, forwarding charges within eight days.[219] Even though this basic requirement is not "inflexibly mandatory or self-executing,"[220] the article itself explicitly defines the sole cure for violating this basic requirement—namely, forwarding an "eight-day letter" instead. The unambiguous, rigid, and exclusive character of this intrinsic exception, therefore, creates a unitary statutory framework that is, in reality, inflexibly mandatory and self-executing.[221]

Furthermore, analyzing the actions necessary to comply with Article 33, in theory, is remarkably elementary. A functional analysis of the article yields only two possible outcomes:

(1) If complying with the statute's basic requirement is practicable, then the only way the

government can comply with Article 33 is to ensure that the accused's commanding officer forwards the charges and allied papers to the general court-martial convening authority within eight days.

(2) If complying with the statute's basic requirement is not practicable, then the only way the government can comply with Article 33 is to explain the reasons for the impracticability by forwarding an "eight-day letter" instead.

This analysis clarifies that many commentators—and certainly the drafters of the opinion in *United States v. Tibbs*[222]—have been incorrect in asserting that impracticability alone will vitiate an Article 33 violation. To the contrary, if complying with Article 33's basic requirement of forwarding charges within eight days truly is impracticable under the facts of a particular case, the government still can assure compliance with Article 33 by forwarding an "eight-day letter" to the convening authority. Nothing in statute implies that the government also can be excused—by averring impracticability or by advancing any other justification—from Article 33's intrinsic "eight-day letter" requirement. Consequently, although the language of Article 33 itself acknowledges that satisfying its basic requirement will not always be possible, satisfying the statute's overall mandate—a mandate that embodies a single exception to

accommodate military exigencies[223]—*always* must be practicable.

Because complying with the mandates of Article 33 is—and always has been—practicable, dismissing it as an anachronism is a peculiar method of excusing the government for violating it. On the contrary, as an adjunct to the speedy trial enforcement framework contained in the UCMJ, Article 33's intended purpose is as valid now as it was when Congress passed it in 1950. The statute's legislative history points out, "This article is . . . intended to insure expeditious processing of charges and specifications in general court-martial trials. *The requirement that the report be made in writing will help insure compliance with this article.*"[224] Commentators who argue that Article 33 is incongruous to contemporary court-martial practice effectively ignore Congress's incorporation of the statute's enduring purpose. Specifically, if the evolution of court-martial practice over the past forty years has had any effect on Article 33, it has not made it an anachronism. Rather, the practical difficulties that often lead to the government's inability to comply with the basic eight-day forwarding requirement simply should force the government regularly to satisfy the statute's mandate by using the "eight-day letter."

Consequently, the protections that Article 33 affords to service members in pretrial confinement is not merely conceptual, but is real. In particular, the statute is a crucial part of a

military detainee's right to a "speedier" trial. Accordingly, Article 33 clearly is an important component of Congress's intended speedy trial scheme that deserves the military justice system's renewed attentiveness.

VI. Applying the Federal Speedy Trial Act to Courts-Martial.

Courts and commentators generally agree that the FSTA[225] does not apply to courts-martial.[226] A close reading of the statute, however, reveals that Congress failed to make a comprehensive exception that totally excluded the military justice system from the FSTA's reach. Specifically, the purported court-martial exception—which actually is a court-martial *offense* exclusion—states the following:

> As used in this chapter— . . . the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than . . . an offense triable by court-martial, military commission, provost court, or any other military tribunal).[227]

Those who interpret this provision to mean that the FSTA's protections do not extend to courts-martial apparently believe

that the statute's inapplicability to military offenses implies that the statute is equally inapplicable to military detainees. On the other hand, a strict interpretation of this provision would mean that any protection afforded by the FSTA that does not depend on the characterization of the underlying criminal offense should apply to the military.

Significantly, while the sections of the FSTA that set objective time limits on the processing of charges for all criminal cases specifically refer to covered criminal "offenses," the section that accords priority to cases in which the subject is confined awaiting trial does not. That section states, "the trial or other disposition of cases involving— . . . a detained person who is being held in detention solely because he is awaiting trial . . . . shall be accorded priority."[228] Taken out of context, this section clearly is immune from the court-martial offense exception. Nevertheless, because the congressional intent in passing the FSTA not only was to promote speed in punishing criminal offenses, but also was to protect the speedy trial rights of individuals,[229] nothing indicates that Congress did not want section 3164's "detained person priority rule" to apply to all individuals—regardless of the characterization of the offense charged. That the remedy for a section 3164 violation is release from custody, rather than dismissal of the offense,[230] supports this notion. Accordingly, ample compelling reasons support a strict interpretation of the court-martial

offense exception, and the application of the FSTA's detained person priority rule to incarcerated service members awaiting courts-martial.

VII. Revising Rule for Courts-Martial 707

Since it rendered its 1972 decision in *United States v. Burton*,[231] the Court of Military Appeals and the President have dueled over the military's speedy trial procedures. First, convinced that UCMJ Article 10 required an effective enforcement mechanism, the court formulated the *Burton* ninety-day rule.[232] Next, the drafters of the 1984 version of the *Manual*, answering the court's call for an objective standard and hoping to ameliorate what it perceived to be a harsh rule,[233] formulated a regulatory ninety-day rule with the intent of supplanting the *Burton* ninety-day rule.[234] The Court of Military Appeals responded in *United States v. Harvey*,[235] finding that R.C.M. 707(d) manifested no "Presidential intent to overrule *Burton*" and expressing doubt about the President's authority to displace the court's interpretation of Article 10.[236] The *Harvey* opinion, therefore, intimated that the President's initial attempt to protect a detained accused's speedy trial rights by executive order was inadequate.

Curiously, the *Manual*'s drafters responded, not by

strengthening the protections that R.C.M. 707 afforded to pretrial detainees, but by eliminating these protections altogether. As if to concede that the *Burton* ninety-day rule transcended any attempt by the drafters to formulate a superseding regulatory mechanism to enforce Article 10, in 1991 the President not only eliminated the *Manual*'s ninety-day release and "immediate steps" rules, but also eliminated dismissal with prejudice as the sole remedy for regulatory speedy trial violations.[237] Paradoxically, this latest change—a change that affords no additional speedy trial protections to an accused in pretrial confinement over his or her counterpart at liberty—was sufficient to convince the Court of Military Appeals that the President's comprehensive speedy trial scheme now is adequate to enforce UCMJ Article 10.[238]

Although nothing in the analysis to the present R.C.M. 707 explicitly states that the President yielded to the court in this duel over speedy trial procedures, several nuances imply that the drafters meant to do just that. First, a principal reason for making the latest change to R.C.M. 707 was to simplify speedy trial procedures.[239] Accordingly, if the drafters recognized that two ninety-day rules merely complicated speedy trial issues, and they resigned to the court's apparent unwillingness to withdraw the *Burton* rule, the President's decision to eliminate the R.C.M. 707(d) ninety-day rule was quite rational.[240] The drafters' change in tone on the *Burton* rule supports this reasoning. In

particular, while the former R.C.M. 707 analysis tacitly challenged the Court of Military Appeals to reexamine *Burton*, the drafters eliminated this provocative language in the present analysis.[241] Accordingly, that Change 5 to the *Manual* defers to *Burton*, rather than challenges it, is a plausible theory. Moreover, accepting this conclusion means that—even though some continued to hope that the court would overrule *Burton*—many undoubtedly held the view that the latest changes to R.C.M. 707 made the *Burton* ninety-day rule more important now than ever.[242]

Kossman, therefore, should not end the President's dialectic with the Court of Military Appeals over enforcing the speedy trial rights of service members in pretrial detention. Rather, the President should respond to the court's decision to abandon the *Burton* rule by reinstituting a regulatory ninety-day rule and by amending certain provisions of R.C.M. 707 so that they reinforce the incarcerated service member's right to a "speedier" trial. These changes need not "reinvent the speedy-trial clock, second by second."[243] They need only repair the mechanisms necessary to sound the clock's alarm.

A. Resurrecting the R.C.M. 707 Ninety-Day Rule

The former R.C.M. 707(d) ninety-day rule required the government to release a service member whom it detained in pretrial confinement for ninety days.[244] This rule was entirely consistent with the FSTA, which requires the government to try or

release incarcerated defendants within ninety days of arrest or confinement.[245] Moreover, like the FSTA,[246] a violation of the R.C.M. 707(d) ninety-day rule did not require dismissal; it required only the immediate release of the service member in custody.[247] Accordingly, consistent with federal criminal practice,[248] the old R.C.M. 707(d) protected the liberty interests of service members in pretrial detention, and encouraged the government to process their cases with exceptional diligence. The present version of R.C.M. 707, however, affords no such enhanced protection.[249]

Consequently, even though the drafters' analysis asserts that the remedies provided in the current R.C.M. 707 are consistent with one section of the FSTA,[250] the rule actually ignores the important ninety-day release mechanism that is an integral part of *Congress's* federal speedy trial scheme. More importantly, without this mechanism, the *President's* "comprehensive speedy trial scheme" does not appear to be so "comprehensive."[251] The President, therefore, should reinstitute a ninety-day release rule modeled after section 3164 of the FSTA.

B. Removing the Article 32 Officer's Authority to Grant Continuances

The discussion to the present R.C.M. 707(c)(1) states, "Prior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 investigating

officer."[252] Although this passage is not legally binding,[253] R.C.M. 707(c)(1) gives the service secretaries the authority to prescribe regulations that could systematize such delegations. Delegating the authority to grant prereferral continuances in the cases of detained service members, however, effectively circumvents much of Congress's intent in passing UCMJ Article 33.

The second prong of Article 33 imposes a reporting requirement on the commander of certain service members who have served more than eight days in confinement.[254] Congress intended the statute as a means of expediting the charges in general courts-martial, and intended the reporting requirement as a method of enforcing compliance with the statute.[255] The drafters of Article 33, however, also were concerned about ensuring that an officer having general court-martial convening authority would know when a service member, for whom that officer may have to convene a court-martial, was in pretrial confinement awaiting investigation.[256] Finally, implicit in Article 33 is a statutory guarantee to an incarcerated accused that the general court-martial convening authority having jurisdiction over his or her case personally will consider the reasons for a delay in forwarding the charges.[257] In practice, therefore, continuances granted by Article 32 investigating officers, which otherwise would appear valid under the present R.C.M. 707(c)(1), often will violate the spirit—if not the letter—of Article 33.[258]

Accordingly, the President must amend R.C.M. 707 so that the rule comports with, and promotes the interests of, Article 33. Even the former R.C.M. 707(c)(5), which allowed for the exclusion of periods attributable to delays in the Article 32 investigation, required the government to "'invoke the relevant mechanism' by requesting and being granted a delay or a continuance."[259] Nevertheless, because it applied regardless of whether or not the accused was in pretrial confinement, this provision was broader than necessary. Accordingly, the President need only amend R.C.M. 707(c)(1) to clarify that, prior to referral in any case, the general court-martial convening authority personally must approve in writing any delays beyond the eighth day after an accused has been ordered into arrest or confinement.[260] The addition of this language would be a necessary and sufficient means of protecting the Article 33 interests that the present R.C.M. 707 speedy trial rule fails to accommodate. Moreover, because few unit commanders would rather solicit a written approval from a division commander than do what is necessary to ensure that a service member's case proceeds to trial with due diligence, the proposed amendment would serve as a functional adjunct to the speedy trial guarantees that Article 33 seeks to promote.

C. Amending the Factors That a Court Must Consider in Making its Decision to Dismiss With or Without Prejudice

The present version of R.C.M. 707 allows a military judge to

dismiss the charges affected by a speedy trial violation either "with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date."[261] The rule directs a court-martial to consider four factors in determining whether to dismiss with or without prejudice: (1) the seriousness of the offense charged; (2) the reasons for the delays that led to a speedy trial violation; (3) the impact that reinstitution of the charges will have on the administration of justice; and (4) the prejudice that the accused suffered because the government denied him or her a speedy trial.[262] The first three factors clearly are consistent with the three elements expressed in the FSTA's dismissal rule.[263] The fourth R.C.M. 707(d) factor comports with the Supreme Court's interpretation that Congress meant for judges to consider prejudice in applying the FSTA dismissal rule.[264] Nevertheless, while R.C.M. 707(d) certainly is true to the *federal* speedy trial statute, the real issue is whether it is true to Article 10—that is, the *military's* speedy trial statute.

Unfortunately, in *Kossman*, the Court of Military Appeals permitted the "tail to wag the dog" on precisely this issue. Addressing the remedy of dismissal, the *Kossman* court made the following conclusion:

> The remedy for an Article 10 violation must remain dismissal with prejudice of the affected charges. If

> it is concluded that the circumstances of delay are sufficiently excusable or avoidable as to permit a reinstitution of the charges, there is no violation of Article 10 in the first place. Where the circumstances of delay are not excusable, on the other hand, it is no remedy to compound the delay by starting all over.[265]

The meaning of this passage is unmistakable: If, after considering all four R.C.M. 707(d) factors, the court determines that the government may reprosecute the accused—even though it already has denied the service member the right to a speedy trial—no Article 10 violation could have occurred. Unfortunately, the court's reasoning is problematic.

The *Kossman* court exercised reverse logic by implying that, absent an abuse of discretion, the nature of a speedy trial remedy will determine the characterization of a speedy trial violation. This logic is faulty for two reasons. The first flaw is that it ignores the overreaching of the remedial scheme that appears in the present R.C.M. 707(d). In particular, the present R.C.M. 707(d), unlike the remedial provision in the former R.C.M. 707, attempts to prescribe the remedy for *all* speedy trial violations—not just violations of R.C.M. 707 itself.[266] Accordingly, under the present rule, a judge can predicate an R.C.M. 707(d) dismissal not only on a violation of the speedy trial rule itself, but also on a violation of a detained

accused's right to speedy trial under Article 10, Article 33, the priority provisions of the FSTA, the Sixth Amendment, or any other valid law or regulation.[267]

If the judge finds a constitutional speedy trial violation, dismissal with prejudice is the only possible remedy.[268] If, on the other hand, any other speedy trial violation—including an Article 10 violation—has occurred, R.C.M. 707(d) requires the judge to determine the characterization of the dismissal by using the four-factor test.[269] *Kossman*, therefore, essentially ignores that the present rule facilitates the possibility of a dismissal without prejudice as the remedy for an Article 10 violation. More importantly, the *Kossman* decision clearly means that the court yielded some of its authority to the "President's comprehensive speedy trial scheme."[270] Accordingly, notwithstanding *Kossman*'s admonition that "[t]he remedy for an Article 10 violation must remain dismissal with prejudice," the court's next step may be to defer to the President the authority to prescribe the remedy for all subconstitutional speedy trial violations.

The second flaw in the *Kossman* decision's logic is that it erroneously concludes that an "excusable or unavoidable" delay militates against an Article 10 violation and the concomitant need to dismiss the affected charges with prejudice.[271] The *Kossman* majority apparently ignored the prospect of situations in

which a judge could find an Article 10 violation, but nevertheless could determine that the subject delay was "excusable or unavoidable" under R.C.M. 707(d)'s four-part test.[272] Earlier in its opinion, however, the court acknowledges the possibility of such an outcome, noting that "[m]erely satisfying presidential standards does not insulate the Government from the sanction of Article 10."[273]

Significantly, R.C.M. 707(d)'s four-part test comprises the presidential standards to which the court referred. That test requires a judge to consider four factors: (1) the seriousness of the alleged offense; (2) the reasons for delay; (3) the effect of reprosecution on the administration of justice; and (4) prejudice to the accused. On the other hand, after *Kossman*, the four-part test delineated in *Barker v. Wingo*,[274]—whose elements correspond to the military's "reasonable diligence" factors[275]—will define the Court of Military Appeals' standard for measuring Article 10 compliance. Like R.C.M. 707(d), this pre-*Burton* standard also requires the judge to consider four factors: (1) the length of the delay; (2) the reasons for delay; (3) the assertion of the right; and (4) prejudice to the accused. Clearly, neither one of these tests subsumes the other. Furthermore, because both of the tests require a court to *balance* all four factors, even the common elements—reasons for delay and prejudice to the accused—may receive substantially more weight when applied to one test than when applied to the other.

For example, consider a case in which the government has violated the 120-day speedy trial rule.[276] Applying the pre-*Burton* reasonable diligence standard, a court also might find an Article 10 violation based, in part, on a finding that the length of the delay outweighed the reasons for the delay.[277] Presumably, this Article 10 violation—consistent with *Kossman*—would require the court to dismiss the affected charges with prejudice. In accordance with the four-part test of R.C.M. 707(d), however, the court nevertheless may determine that reinstitution of proceedings should be permissible because the seriousness of the offense outweighs the reasons for the delay. Consequently, under the current R.C.M. 707 speedy trial scheme, a court's conclusion that a trial delay was "sufficiently excusable . . . to permit reinstitution of the charges" does not mean that the government has complied with Article 10.

To reconcile the language of R.C.M. 707(d) with the remedial requirements of Article 10, the President should eliminate "seriousness of the offense" and "the impact of reprosecution on the administration of justice" as factors bearing on the characterization of dismissal.[278] The two factors bear no relationship to an accused's personal speedy trial rights or to the issue of whether the government's delay was oppressive, reasonable, or fair. Indeed, evidence on either one of these factors would be irrelevant to a charge against a government

official who deliberately delayed court-martial proceedings.[279] Moreover, the factors defy objective measurement; they indicate no criteria—such as degree of violence, cost to the victim, or importance in principle—for a court to consider in making a decision. Although the elimination of these two elements would diminish R.C.M. 707(d)'s similarity to the FSTA, it clearly would make the President's comprehensive statutory scheme more compatible with the interests that Article 10 seeks to protect.

D. Restricting the Postdismissal Speedy Trial Time Limit

The present version of the *Manual* provides for the 120-day speedy trial time period to restart after the government dismisses the affected charges.[280] This rule, set out in R.C.M 707(b)(3)(A), states that, "[i]f charges are dismissed, . . . a new 120-day time period under this rule shall begin on the date of dismissal . . . for cases . . . in which the accused is in pretrial restraint."[281] Read in conjunction with the remedial procedures, which allow for dismissal without prejudice,[282] the effect of this rule is manifest: It gives the government another 120 days of regulatory speedy trial time—after it already has committed a speedy trial violation—to retry a case while an imprisoned service member continues to await his or her trial. Significantly, because the rule does not limit the number of times that a court could dismiss a particular charge without prejudice, the President's speedy trial scheme conceivably could allow an accused to languish in pretrial detention while the

government aggregates multiple 120-day time periods.[283] The effect of the rule is especially peculiar, considering the drafters' comment that "[t]he harm to be avoided is continuous pretrial confinement."[284]

The present R.C.M. 707(b)(3)(A), therefore, provides another example of how the current regulatory speedy trial mechanisms lawfully could tolerate the uninterrupted pretrial detention of a presumptively innocent service member for periods far in excess of the those envisaged by Article 10's "immediate steps" mandate.[285] If the government has charged a service member with a serious offense, he or she may prevail on multiple speedy trial motions, yet never gain the predicate dismissal with prejudice necessary for his or her release. Even if, *arguendo*, an "excusable or unavoidable" delay should vitiate a speedy trial violation sufficiently to allow the government to reprosecute a service member who already has been in pretrial confinement for 120 days,[286] allowing the government to have another, full 120 days to do so is unconscionable.

Accordingly, the President should change R.C.M. 707(b)(3)(A) to limit the period of extended incarceration after a charge has been dismissed on account of a speedy trial violation.[287] In particular, the drafters should consider a rule that requires the government to try or release an accused in pretrial confinement within thirteen days after any dismissal without prejudice based

on R.C.M. 707(d). The suggestion of thirteen days is not talismanic, but nor is it arbitrary; it derives from the sum of the eight-day rule from Article 33[288] and the five-day rule of R.C.M. 602.[289] Because the government already would have conducted a preliminary investigation[290] on the affected charge, eight days is a generous time period to allow the accused's commander to forward the case to the general court-martial convening authority for rereferral. Furthermore, because the government presumably was prepared to proceed immediately when it fought—and lost—the subject speedy trial motion, five additional days is sufficient time to reconvene the court and to proceed anew. Consequently, if the President retains the facility to dismiss charges affected by a speedy trial violation without prejudice, a thirteen-day release rule would provide added protections to the liberty interests of service members in pretrial detention, thereby making R.C.M. 707's comprehensive speedy trial scheme more consistent with the speedy trial guarantees of Article 10 and the Sixth Amendment.

VIII. Conclusion

Because of the recent amendments to R.C.M. 707 and the Court of Military Appeals' decision in *United States v. Kossman*,[291] the present structure for assuring the right to a speedy trial to service members in pretrial detention is inconsistent with the

statutory mandates of Article 10 and Article 33. By promulgating Change 5 to the *Manual*, the President extended the time limit for trying a service member in pretrial confinement,[292] eliminated the provision in the *Manual* that limited the duration of an accused service member's pretrial arrest or confinement,[293] attenuated the checking mechanism for ensuring that a detained accused received an expedited investigation and review of his or her charges,[294] allowed for dismissal of charges without prejudice as the remedy for speedy trial violations that violated Article 10,[295] and provided for the lengthy reprosecution of a pretrial detainee of whom the government already has deprived the right to a speedy trial.[296] Coincidentally, by abolishing the *Burton* ninety-day rule,[297] the Court of Military Appeals eliminated "any real chance for compliance with Article 10."[298]

While Congress has left these important speedy trial laws intact,[299] the President and the courts have rendered Article 10 edentate.[300] Consequently, a dilatory prosecution now can snatch victory from the jaws of a speedy trial motion that, in the past, would have assured the government's defeat. Moreover, these changes apparently portend a trend leading to the evisceration of the enhanced speedy trial rights historically enjoyed by service members.[301] In their unexplained efforts to make the Rules for Courts-Martial consistent with federal criminal procedure, the drafters have tried to adapt the provisions of the FSTA to military practice, largely abandoning the separate and distinct

protections that Congress bestowed on service members in UCMJ Article 10. Furthermore, these efforts have led to a drift in the course speedy trial law—a course on which the military justice system has become the sightless follower, rather than the visioned leader.[302]

Nevertheless, in the absence of leadership in the form of change, defense attorneys likely will attempt to fashion claims of de jure speedy trial violations, calling on the language of the Federal Speedy Trial Act[303]—an act that, paradoxically, R.C.M. 707 purports to emulate. Consequently, in amending R.C.M. 707, the drafters carefully must reexamine the nuances in federal speedy trial law. They also must acknowledge that, because the speedy trial scheme that Congress established in the FSTA is not only comprehensive, but also unitary, the military cannot necessarily "pick and choose" among its provisions and adopt only those that appear to be adaptable to military practice. Finally, and most importantly, the drafters must recognize that Article 10—not the FSTA—is the penultimate guarantee of an accused's right to a speedy trial in the military.

The President now has a unique opportunity to change the military's speedy trial protections for the better. The Court of Military Appeals' decision in *Kossman* indicates the court's reluctance to preempt an area of the law in which the President has established a comprehensive regulatory scheme. Accordingly,

perhaps the best news about the *Kossman* decision is that the demise of the *Burton* ninety-day rule means that the President now can refine military speedy trial rules in a judicial vacuum.[304] Specifically, the drafters should amend R.C.M. 707 so it reifies the priority that the Sixth Amendment right to a speedy trial and Article 10 implicitly guarantee to incarcerated defendants. The rule, in particular, should enforce a ninety-day release rule to limit the length of a service member's pretrial arrest and incarceration; reinforce—rather than to confute—the speedy trial protections of Article 33; limit the reasons that would allow the government to reprosecute a case in the wake of a speedy trial violation; and protect an accused from the aggregation of pretrial detention periods caused by the hollow sanction of dismissal without prejudice.

The recent changes to the speedy trial provisions in the *Manual for Courts-Martial* and the demise of the *Burton* ninety-day rule signaled an end to the era of objectivity in measuring speedy trial rights under military law. For the presumptively innocent service member in pretrial detention, Article 10 survives as the sole promise that his or her case will receive the relative attentiveness it deserves, consistent with the constitutional precepts from which the right to a speedy trial derives. The President—through the Rules for Courts-Martial—should fulfill that promise by seriously enforcing all of the statutory speedy trial rights that Congress has deemed

necessary and proper to the prompt and fair administration of military justice.

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1. U.S. CONST. amend. VI.

2. *Id.* amend. 8 ("Excessive bail shall not be required . . . .").

3. *Cf.* W. WINTHROP, MILITARY LAW AND PRECEDENTS, preface (1st ed. 1886) (noting that military law typically sets the example for other justice systems to follow).

4. U.C.M.J. art. 10 (1988).

5. *See id.* ("When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him [or her] of the specific wrong of which he [or she] is accused and to try him [or her] or to dismiss the charges and release him [or her]).

6. 44 C.M.R. 166 (C.M.A. 1971), *overruled in part by* United States v. McCallister, 27 M.J. 138 (C.M.A. 1988) (prospectively repealing the holding in *Burton* in so much as it provided an accused to a speedy trial right that he or she could trigger by a demand).

7. *See* United States v. Driver, 49 C.M.R. 376, 379 (C.M.A. 1974) (changing the *Burton* three-month speedy trial rule to a more workable 90-day rule).

8. 407 U.S. 524, 530 (1972).

9. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 707 (1984) [hereinafter MCM].

10. *See id.* R.C.M. 707(a) (1984) (C5, 15 Nov. 1991).

11. 38 M.J. 258 (C.M.A. 1993).

12. *See, e.g.*, The Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1988); CAL. PENAL CODE § 1382 (West 1970); ILL. REV. STAT. ch. 38, para. 103-5(a) (1969); NEV. REV. STAT. § 178.556 (1967); PA. STAT. ANN. tit. 19, § 781 (1964); VA. CODE ANN. § 19.1-191 (Michie 1960). Speedy trial statutes, which generally attempt to enforce

all of the personal freedoms and societal interests that inhere from the right to a speedy trial, reify the idea that, "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." United States v. Salerno, 481 U.S. 739, 755 (1986).

13. 404 U.S. 307 (1971).

14. *Id.* at 325; *see also id.* at 319 (citing Note, *The Right to a Speedy Trial*, 57 COL. L. REV. 846, 848 (1957)) ("[i]n no event . . . [does] the right to speedy trial arise before there is some charge or arrest, even though the prosecuting authorities had knowledge of the offense long before this").

15. *Marion*, 404 U.S. at 325-26. The Court specifically noted that the prejudices commonly cited by defendants to support Sixth Amendment speedy trial claims—namely, the possibility that memories will dim, evidence will be lost, and witnesses may become unavailable—normally will be insufficient to support a due process speedy trial claim. *Id.* As long as an appropriate statute of limitations covers the actionable criminal conduct, the individual enjoys a right to repose that is adequate to protect him or her from indeterminate criminal proceedings. *See* United States v. Habig, 390 U.S. 222, 227 (1968) (criminal statutes of limitations are statutes of repose); Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944) ("even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and

. . . the right to be free from stale claims in time comes to prevail over the right to prosecute them"). In addition, the Court reasserted its holding in Toussie v. United States, 397 U.S. 112 (1970), by noting that statutes of limitations "protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Id.* at 114-15.

16. *Marion*, 404 U.S. at 330-31 (Douglas, J., concurring).

17. 431 U.S. 783 (1977).

18. *Id.* at 790; *see Marion*, 404 U.S. at 321.

19. *Lovasco*, 431 U.S. at 790.

20. *Id.* The Court implied that this first prong may not necessarily be crucial, stating that "proof of prejudice is generally a necessary . . . element." *Id.* (emphasis added). This language may give a court the necessary discretion to hold—even in the absence of proof of actual prejudice—that a due process violation has occurred when the government's actions are especially oppressive. Many of the federal circuit courts have adopted a burden-shifting presumption that, upon a finding that the government has acted dilatory, requires the prosecution to demonstrate that the defendant was not prejudiced by the delay. *See* Murray v. Wainwright, 450 F.2d 465, 471 (5th Cir. 1971); United States *ex rel.* Solomon v. Mancusi, 412 F.2d 88, 91 (2d Cir. 1969); Pitts v. North Carolina, 395 F.2d 182, 184 (4th

Cir. 1968); *see also* Bethea v. United States, 395 A.2d 787, 789 (D.C. Ct. App. 1978) (requiring government to show that defendant suffered only minimal anxiety because of lengthy delay).

21. *Lovasco*, 431 U.S. at 790. The *Lovasco* Court did not give specific examples of government oppression. Accordingly, the second prong of the test apparently requires the trial court to determine whether the government acted in bad faith. *See id.* at 796-97; *see also id.* at 792-95 (government may have a variety of good-faith reasons for a delay in charging or arresting an individual; therefore, the government never is required to charge or arrest a person at the first opportunity).

22. *Id.* at 796. While the *Lovasco* Court was concerned about making the first prong of the two-part due process test too easy for a defendant to meet, it evidently was more concerned about the inevitable repercussions on prosecutorial actions if courts were to reach the second prong too often. Specifically, if courts regularly required the prosecution to justify its precharging delays, the government may act with unnecessary haste in arresting or charging suspects. *See also Marion*, 404 U.S. at 325 n.18 (citing Hoffa v. United States, 385 U.S. 293, 310 (1966)) (acknowledging that law enforcement officials risk violating the Fourth Amendment if they "act too soon").

23. United States v. Marion, 404 U.S. 307, 320 (1971) (noting that trial delays affect a defendant's liberty interests and "may disrupt his employment, drain his financial resources,

curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends"); *see also* United States v. Palmer, 502 F.2d 1233, 1234 (5th Cir. 1974) (defendant alleging that he was living under the "sword of Damocles" while he awaited the government's decision to prosecute).

24. *See* United States v. Eight Thousand Eight Hundred and Fifty Dollars, 461 U.S. 555, 557 (1983). In *Eight Thousand Eight Hundred and Fifty Dollars*, the defendants urged the Court to adopt the *Lovasco* due process speedy trial rule to vindicate their property rights. The defendants alleged that inordinate postseizure delays in a forfeiture proceeding were prejudicial to their property rights in confiscated money, thereby raising a *Lovasco* issue. The Court, however, declined to employ the *Lovasco* test. *Id.* One explanation for the Court's unwillingness to extend the *Lovasco* rationale to protect property rights in the speedy trial context is that loss of the use of one's property is ultimately compensable, but loss of "the use" of one's liberty is not.

25. *See* United States v. Devine, 36 M.J. 673, 677 (N.M.C.M.R. 1992). In *Devine*, the Navy-Marine Corps Court of Military Review recognized that due process requires the dismissal of charges if an oppressive prepreferral delay prejudices an accused's case. *Id.* Such delays, the court noted, "violate[] those fundamental conceptions of justice which lie at

the base of civil and political institutions and which define the community's sense of fair play and decency." *Id.* (citing *Lovasco*, 431 U.S. at 790).

26. Klopfer v. North Carolina, 386 U.S. 213, 223 (1967). In *Klopfer*, the Supreme Court held that the Sixth Amendment right to a speedy trial applied to the states through the Due Process Clause of the Fourteenth Amendment. *Id.*

27. 393 U.S. 374 (1969).

28. *Id.* at 377-78.

29. *See* Dickey v. Florida, 398 U.S. 30 (1970); Ponzi v. Fessenden, 258 U.S. 254 (1922). In *Dickey*, Justice Brennan observed that swift justice enhances the criminal law's deterrent effect on individuals, and that a torpid justice system tends to increase the likelihood that defendants will to become fugitives or will commit other acts of misconduct. *Dickey*, 398 U.S. at 42 (Brennan, J., concurring). In *Ponzi*, the Court pointed out that delays can have the same deleterious effect on the prosecution's ability to prove its case as they have on the individual's ability to defend himself or herself. *See Ponzi*, 258 U.S. at 264.

30. *Cf.* Barker v. Wingo, 407 U.S. 514, 521 (1972); United States v. Ewell, 383 U.S. 116, 120 (1966). In *Barker*, the Supreme Court recognized the manifold societal interests that speedy trials promote. It noted that delays contribute to the backlog of cases; allow criminals to cut better pretrial deals

with prosecutors; increase the likelihood of individuals to jump bail, escape, or commit other crimes; diminish the effectiveness of rehabilitative efforts; contributes to prison overcrowding, which leads to increased costs, deplorable conditions, and even violent rioting; and increases the costs to society and families through lost wages. *Barker*, 407 U.S. at 521. While these societal interests are obviously substantial, at least one commentator has confirmed a point that should be just as obvious—that is, societal interests play no part in the Sixth Amendment right to a speedy trial. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 685 (1985) (criticizing *Barker*'s judicial recognition of a societal interest by noting, "[T]he Bill of Rights does not speak of the rights and interests of the government. Moreover, to assert that this "societal interest" might well be disserved if the defendant was to surrender his right . . . [does not] make the speedy trial right different from the other Sixth Amendment rights").

31. 407 U.S. 514 (1972).

32. *Id.* at 517 (noting that Barker actually raised his first speedy trial objection after the government moved for its twelfth continuance in February 1962).

33. *Id.* at 530. Actually, the *Barker* Court merely adopted a Sixth Amendment speedy trial test that several federal circuits had been employing for almost a decade. *See generally* United States v. Banks, 370 F.2d 141 (4th Cir. 1966), *cert. denied*, 386

U.S. 997 (1967); Bautte v. United States, 350 F.2d 389 (9th Cir. 1965), *cert. denied*, 385 U.S. 856 (1966); United States v. Simmons, 338 F.2d 804 (2d Cir. 1964), *cert. denied*, 380 U.S. 983 (1965).

34. *Barker*, 407 U.S. at 530. Recently, the Supreme Court hinted that a delay of one year may raise a presumption that the government has prejudiced the defendant, thereby requiring the courts to review the reasons for delay. *See* Doggett v. United States, 112 S. Ct. 2686, 2691 n.1 (1992). The *Doggett* Court, however, stopped short of adopting an automatic presumption of prejudice. Accordingly, the Supreme Court continues to require lower courts to consider all of the broad parameters of the *Barker* balancing test. *Cf.* United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971), *overruled by* United States v. Kossman, 38 M.J. 258 (C.M.A. 1993) (sanctioning a rule by which a three-month trial delay would trigger a presumption of a statutory speedy trial violation in the military).

35. *Barker*, 407 U.S. at 533 (footnote omitted).

36. 414 U.S. 24 (1973).

37. *Id.* at 26 ("The state court was in fundamental error in its reading of Barker v. Wingo and in the standard applied in judging petitioner's speedy trial claim").

38. *Id.*

39. *Cf.* Board of Regents v. Roth, 408 U.S. 564, 572 (1972) (quoting Meyer v. Nebraska, 262 U.S. 390 (1923)) (due process

protection of liberty proscribes not only physical restraint, but also all threats to the right "generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men"). In Paul v. Davis, 424 U.S. 693 (1976), the Supreme Court held that mere injury to reputation did not constitute a per se deprivation of liberty. *Id.* at 708-10. The Court, however, was careful to point out that, in *Paul*, the petitioner could vindicate his liberty interest—that is, his reputation—by filing a tort action for defamation. Without a recourse in tort, the *Paul* Court likely would have found an irreconcilable liberty deprivation. Justice Steven's dissenting opinion in Ingraham v. Wright, 430 U.S. 651, 700 (1977), essentially confirms that this was the Court's rationale for declining to find a protected liberty interest in *Paul*.

40. Smith v. Hooey, 393 U.S. 374, 377-79 (1969).

41. *See supra* notes 17-22 and accompanying text.

42. *See Smith*, 393 U.S. at 377. The Supreme Court stated that one of the basic demands of the right to a speedy trial is "to minimize anxiety and concern accompanying *public accusation.*" *Id.* (emphasis added).

43. *See* United States v. Marion, 404 U.S. 455, 331-32 (1971) (Douglas, J., concurring) ("The anxiety and concern attendant to public accusation may weigh more heavily upon an individual who has not yet been formally indicted or arrested"); *see also* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE

§ 25.02, at 608 (1993) ("A person under public investigation can suffer as much damage to reputation and financial and occupational interests as an arrested person").

44. *Barker v. Wingo*, 407 U.S. 514, 533 (1972) (emphasis added).

45. 424 U.S. 319 (1976). In *Mathews*, the Supreme Court created a balancing test to determine the extent of due process procedural protections that the government must afford an individual before it takes an action that could deprive that individual of a constitutionally protected liberty or property interest. The Court stated that it would consider three factors: (1) the importance of the interest; (2) the efficacy of the proposed procedure in reducing the risk of an erroneous deprivation; and (3) the government's interests in minimizing the burdens and costs involved in providing enhanced safeguards. *Id.* at 335.

46. *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970) (extensive pretermination hearing is a condition precedent to government's terminating subsistence payments to an indigent).

47. *See generally* Bell v. Burson, 402 U.S. 535 (1971) (law that requires law enforcement officials to suspend the driver's license of a individual involved in an accident unless that individual could provide security to cover potential tort judgments violates due process unless the state affords the individual a presuspension hearing).

48. *See generally* Goss v. Lopez, 419 U.S. 565 (1975) (sanction of suspension infringed on students' liberty interests because it could affect their opportunities for employment and association).

49. United States v. Marion, 404 U.S. 307, 331 (1971) (Douglas, J., concurring).

50. 407 U.S. 514 (1972).

51. *Cf.* Doggett v. United States, 112 S. Ct. 2686, 2691 (1992) (courts may find presumption of prejudice as pretrial delay approaches one year).

52. 18 U.S.C. §§ 3161-3174 (1988).

53. *Id.* §§ 3161(b), 3164(b). The FSTA actually specifies three separate and explicit time limits as follows: (1) the government must file an information or indictment within 30 days of arrest or service of summons; (2) the prosecution must commence its trial of the defendant within 70 days of information or indictment, or within 70 days of the defendant's first appearance before a judicial officer, whichever is later; and (3) unless the defendant expressly waives his or her right to counsel, no trial may commence within 30 days of the defendant's first appearance with counsel. *Id.* § 3161(b), (c)(1)-(2). At least two circuits have held that, for FSTA purposes, trial is deemed to begin when the prosecution initiates voir dire. *See generally* United States v. Richmond, 735 F.2d 208 (6th Cir. 1984); United Stated v. Manfredi, 722 F.2d 519 (9th Cir. 1983).

54. *See* 18 U.S.C. § 3161(h)(1)-(8) (1988). The exemptions that toll the running of the FSTA's 100-day clock include the following: (1) deferral agreements among the prosecution, the defense, and the court; (2) delays attributable to the unavailability of the defendant or essential witnesses; (3) delays attributable to the defendant's inability to stand trial; (4) certain delays that resulted from the defendant's drug rehabilitation treatment; and (5) reasonable delays resulting from the government's joinder of defendants. *Id.* In addition, most delays caused by pretrial motions and similar proceedings are excluded. *See also* Henderson v. United States, 476 U.S. 321, 326-30 (1986) (holding that courts could exclude delays attributable to pretrial motions even absent an express finding that such delays were "reasonably necessary"). Courts also may exclude time periods between the dates the prosecution drops a charge and files a new charge on the same or related offense. 18 U.S.C. § 3161(h)(6) (1988); *cf.* United States v. Loud Hawk, 474 U.S. 302 (1986) (time period between dismissal of charges at trial and reinstatement due to appellate decision in the prosecution's favor is excludable for speedy trial purposes); United States v. McDonald, 456 U.S. 1 (1982) (four-year hiatus between dismissal of charges and reindictment of essentially similar charges did not implicate speedy trial rights).

55. 18 U.S.C. § 3161(h)(8) (1988). Federal circuits have found continuances to "serve the ends of justice" in several

cases. *See, e.g.*, United States v. Nance, 666 F.2d 353, 355-56 (9th Cir.), *cert. denied*, 456 U.S. 918 (1982) (continuances to assure that defendant had adequate opportunity to secure counsel served the ends of justice); United States v. Martin, 742 F.2d 512, 514 (9th Cir. 1984) (continuance granted to see if United States Supreme Court would overturn circuit precedent unfavorable to the defendant was valid). *But see* United States v. Perez-Reveles, 715 F.2d 1348, 1350 (9th Cir. 1984) (complexity of case is not necessarily a valid reason to grant a continuance to give government additional time to prepare).

56. *See* 18 U.S.C. § 3162 (1988). In determining whether to dismiss with or without prejudice, the court must consider the seriousness of the offense, the reasons for the FSTA violation, and the interests of justice. *Id.* In addition, even though the FSTA does not list prejudice to the defendant as a factor, the Supreme Court has determined that Congress actually intended courts to contemplate prejudice in their dismissal decisions. *See* United States v. Taylor, 487 U.S. 326, 341 (1988).

57. 18 U.S.C. § 3164 (1988) (emphasis added).

58. *See* H.R. REP. No. 93-1508, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7408.

59. 404 U.S. 307, 320 (1971)

60. *See* H.R. REP. No. 93-1508, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7408.

61. *See* United States v. Fox, 788 F.2d 905, 908 (2d Cir. 1986) (in passing the FSTA, Congress gave effect to—but did not displace—the speedy trial guarantees of the Sixth Amendment).

62. *See* H.R. REP. No. 93-1508, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7408.

63. *See id.* at 7408-09.

64. 407 U.S. 514 (1972); *see supra* notes 31-38 and accompanying text.

65. LAFAVE & ISRAEL, *supra* note 30, § 18.3, at 691.

66. *See* H.R. REP. No. 93-1508, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7408 (noting that speedy trials substantially reduce the prison-related costs to society caused by excessive pretrial incarceration).

67. 404 U.S. 307 (1971); *see supra* notes 13-16 and accompanying text.

68. 431 U.S. 783 (1977); *see supra* notes 17-22 and accompanying text.

69. *Cf.* Moore v. Arizona, 414 U.S. 25, 26 (1973) (holding that, although courts must consider prejudice, an actual finding of prejudice is not required for a determination that the government violated the defendant's speedy trial rights).

70. *Cf.* Turner v. Estelle, 515 F.2d 853, 859 (5th Cir. 1975). In *Turner*, the defendant already was incarcerated for first degree murder. He asserted a speedy trial claim on a

separate robbery charge, basing his argument, in part, on the prejudicial effects of a four-year delay. *Id.* at 854-55. The *Turner* court doubted the need to protect a pretrial detainee from the "anxiety and concern . . . and public obloquy" because the defendant "suffered no prejudice . . . because he was in prison anyway." Referring to these indicia of prejudice, Judge Ainsworth noted that "we doubt that these further clouded Turner's mood while he was in death row for multiple murders." *Id.* at 859.

71. *See* H.R. REP. No. 93-1508, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7408.

72. *Cf. id.* Arguably, the loss of evidence or the unavailability of witnesses caused by the passing of time also may be a prejudice suffered equally by detained and free defendants alike. Incarceration, however, clearly hinders a defendant's ability to contact witnesses and gather evidence throughout the pendency of a case. *Id.* Accordingly, a pretrial detainee generally has a diminished opportunity to memorialize testimony and evidence that may be useful to his or her defense, should the original forms of such evidence and testimony fail to meet the test of time.

73. Congress is no less capable of—nor less responsible for—formulating laws necessary to enforce the Constitution than is the Supreme Court or the President.

74. *See* U.S. CONST. amend. 6; *see also* ID. amend. V; *supra* notes 12-49 and accompanying text.

75. *See* MCM, 1984, *supra* note 9, R.C.M. 707 (C5, 15 Nov. 1991).

76. *See* United States v. King, 30 M.J. 59, 62 n.5 (C.M.A. 1990) (citing United States v. Powell, 2 M.J. 6 (C.M.A. 1976); United States v. Marshall, 47 C.M.R. 409 (C.M.A. 1973)).

77. *See* United States v. Rachels, 6 M.J. 232 (C.M.A. 1979).

78. *See* United States v. Maresca, 26 M.J. 910 (N.M.C.M.R 1988), *review granted in part*, 27 M.J. 475 (C.M.A. 1989).

79. MCM, *supra* note 9, R.C.M. 707(a) (C3, 1 June 1987) (current version is R.C.M. 707(a) (C5, 15 Nov. 1991)).

80. *Id.* R.C.M. 304(a)(2).

81. *Id.* R.C.M. 304(a)(3).

82. *Id.* R.C.M. 304(a)(4).

83. *Id.* R.C.M. 707(a)(2) (C3, 1 June 1987) (current version is R.C.M. 707(a) (C5, 15 Nov. 1991)).

84. *See* United States v. Burton, 44 C.M.R. 166, 177 (1971). Actually, *Burton* prescribed a three-month rule that the Court of Military Appeals defined more precisely as 90 days in United States v. Driver, 49 C.M.R. 376 (1974).

85. *See* Barker v. Wingo, 407 U.S. 514 (1972); *supra* notes 31-38 and accompanying text. Although the *Barker* Court acknowledged that the length of the pretrial delay could

"trigger" the test, it specifically clarified that it could not establish a quantifiable test to determine constitutional speedy trial rights for all situations. *Barker*, 407 U.S. at 530. Consequently, in a rare case in the military, if the government can give no legitimate reason for an extended pretrial delay, the government still is unprepared to present its case after the accused has demanded immediate trial, and the accused can demonstrate clear prejudice, the accused could prevail on a Sixth Amendment speedy trial claim even though the case is less than 120 days old. *See* DEP'T OF ARMY, PAMPHLET 27-173, LEGAL SERVICES: TRIAL PROCEDURE, para. 15-5, at 97 (31 Dec. 1992) [hereinafter DA PAM. 27-173].

86. MCM, *supra* note 9, R.C.M. 707(d) (C3, 1 June 1987) (emphasis added) (current version is R.C.M. 707 (C5, 15 Nov. 1991)).

87. *See* MCM, *supra* note 9, R.C.M. 707(a)(1) discussion, at 7 (C5, 15 Nov. 1991) ("Priority shall be given to persons in arrest or confinement"). This passage from the Discussion to R.C.M. 707(a)(1), however, has no binding effect whatsoever. *See infra* note 121. Military courts generally have required the government to proceed with greater dispatch on cases in which an accused is in pretrial detention. *See* Carroll J. Tichenor, *The Accused's Right to Speedy Trial in Military Law*, 52 MIL. L. REV. 1, 20 (1971).

88. *See* United States v. Cook, 27 M.J. 212 (C.M.A. 1988);

United States v. McCallister, 24 M.J. 881 (A.C.M.R. 1987), *rev. granted in part*, 26 M.J. 171 (C.M.A. 1988), *affirmed*, 27 M.J. 138 (C.M.A. 1988).

89. 38 M.J. 258 (C.M.A. 1993).

90. *See id.* at 259. Change 5 to the *Manual* was effective on July 6, 1991; the Court of Military Appeals rendered its decision in *Kossman* on September 29, 1993. *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE, § 13-3(C)(2), at 439 (3d ed. 1992). "The Court of Military Appeals decision in *United States v. Burton* added teeth to the Article 10 provisions which provide no specific time limits for bringing an accused to trial." *Id.* (footnote omitted).

91. *See* The Military Justice Act of 1982, S. 2521, 97th Cong., 2d Sess. (1982) (latest apparent attempt to consider statutory structure of speedy trial rights in the military, which resulted in no change).

92. 407 U.S. 514 (1972).

93. *See id.* at 533.

94. *Kossman*, 38 M.J. at 259. The parties agreed with the trial judge's computation of the pretrial delay and with the judge's determination that the delay did not trigger the standards set out by the Supreme Court in Barker v. Wingo, 407 U.S. 514, 530 (1972). *Kossman*, 38 M.J. at 259; *see supra* text accompanying note 33.

95. 44 C.M.R. 171, 172 (C.M.A. 1972).

96. *Kossman*, 38 M.J. at 259.

97. *Id.* The government appealed in accordance with UCMJ art. 62, which permits the United States to appeal a ruling by a court-martial empowered to grant a punitive discharge if that ruling effectively terminates the proceedings).

98. *See* United States v. Calloway, 23 M.J. 799, 800-01 (N.M.C.M.R. 1986); United States v. Ivester, 22 M.J. 933, 937 (N.M.C.M.R. 1986) (calling *Burton* rule "anachronistic" in light of R.C.M. 707(d) 90-day rule).

99. *Kossman*, 37 M.J. 639 (N.M.C.M.R. 1992), *overruled by* 38 M.J. 258 (C.M.A. 1993).

100. *Kossman*, 38 M.J. at 258 (citation omitted); *see* UCMJ art. 67(a)(2) (1988) (directing the Court of Military Appeals to review the record of a case before a court of military review when the judge advocate general of the respective service dispatches the record, raising specific issues at law).

101. *See Kossman*, 38 M.J. at 258. In *Kossman*, Judges Crawford and Gierke concurred with Judge Cox's opinion; Judges Sullivan and Wiss wrote separate dissenting opinions.

102. *Id.* at 262.

103. *Id.* at 260 (dangling modifier corrected); *see* MCM, *supra* note 9, R.C.M. 305(i)(2), (i)(5), (j)(1) (directing duly

appointed, "neutral and detached officers" and judges to review the reasons for pretrial confinement).

104. *Kossman*, 38 M.J. at 260; *see* United States v. Allen, 17 M.J. 126, 128 (C.M.A. 1984) (providing day-for-day postconviction sentence credit for time spent in pretrial confinement); MCM, *supra* note 9, R.C.M. 305(j)(2), (k) (providing additional day-for-day postconviction sentence credit for any portion of time spent in pretrial confinement that was in violation of R.C.M. 305).

105. *Kossman*, 38 M.J. at 260. The court noted that "the particular periods of time that satisfied the RCM 707 exclusions also overcame the *Burton* presumption." *Id.*

106. *Id.* (citing United States v. Carpenter, 37 M.J. 291, 299 (C.M.A. 1993); United States v. King, 30 M.J. 59, 66 & n.7 (C.M.A. 1990)).

107. *Id.* at 261. The *Kossman* court stated that it formulated the *Burton* 90-day rule "in a procedural vacuum, without the benefit of Presidential input." *Id.* The court presumably concluded that, now that the President has provided his input in the form of a regulatory speedy trial rule, the "rough-and-ready rule of thumb (the *Burton* rule) now merely aggravates an already complicated subject." *Id.* Unfortunately, the court declined to aver the reasons for its belief that the "landscape" of speedy trial law has become complicated. The *Kossman* opinion seems to beat around the bush on this issue.

Perhaps its was concerned that *Burton* provide fertile ground for unnecessary speedy trial litigation. On the other hand, the court may have felt that the military justice system had become sufficiently accustomed to regulatory speedy trial rules and that a reassertion of the *Burton* rule thereby would be an encroachment on presidential turf. Nevertheless, Judge Wiss's dissenting opinion intimates that "no fewer than 10 Judges of [the Court of Military Appeals] and . . . countless judge advocates" had weeded through *Burton* issues "without undue difficulty." *Id.* at 262 (Wiss, J., dissenting).

108. *Id.* at 260; *see* UCMJ art. 36(a) (1988) (authorizing the President to establish pretrial, trial, and posttrial procedures for courts-martial).

109. *Cf.* United States v. Rexroat, 38 M.J. 292, 295-97 (C.M.A. 1993) (holding that military magistrates must review pretrial confinement reasons within 48 hours of arrest) (enforcing County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991)). Arguably, having a magistrate review the reasons for pretrial detention within 48 hours of arrest provides little comfort to a presumptively innocent service member who now could wait at least 118 additional days in confinement before the government is required to provide him or her with an opportunity for vindication.

110. *See generally* MCM, *supra* note 9, R.C.M. 305. Actually, in his or her initial review, the military magistrate

considers only the adequacy of the reasons for confinement. *Id.* R.C.M. 305(i). In addition to confirming the commander's reasonable grounds for believing that the prisoner committed an offense triable by court-martial and that forms of restraint less severe than confinement will not be adequate, the magistrate need only affirm the commander's belief that the accused is a flight risk or likely will engage in serious criminal misconduct. *Id.* R.C.M. 305(h)(2)(B). Likewise, the rule gives a military judge the authority to order a prisoner released only if the judge finds that the reasons for confinement were not, or no longer are, valid. *Id.* R.C.M. 305(j)(1).

111. *See id.* R.C.M. 305(j) (referral of charges triggers military judge's authority to review the reasons for confinement); R.C.M. 602 (referral must occur at least five days before general court-martial and three days before special court-martial); R.C.M. 707(a)(2) (C5, 15 Nov. 1991) (trial must commence within 120 days of imposition of restraint); *Rexroat* 38 M.J. at 298 (magistrate must review reasons for confinement within 48 hours of arrest). Taken together, these rules provide the government with considerable leeway in proceeding to trial. The only time a magistrate needs to review the confinement order will occur no later than day two of incarceration. In addition, the military judge's review, which obtains only after referral, may occur as late as day 115 or 117 of incarceration, depending on the type of court-martial. Accordingly, notwithstanding the

protections of the military magistrate system, the accused in pretrial confinement may serve between 113 and 115 days in a veritable judicial-review blackout period.

112. *See* UCMJ art. 13 (1988) ("No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement upon him be any more rigorous than the circumstances required to insure his presence"); United States v. Bayhand, 21 C.M.R. 84, 88 (C.M.A. 1956) ("confinement itself . . . is penal servitude . . . [; therefore,] if the restraint [rises to a level at which it is] more than is needed to retain safe custody, the unnecessary restrictions [constitute] punishment").

113. *See* United States v. Salerno, 481 U.S. 739 (1986). *Salerno* exposes a number of paradoxes between the concepts that support the need for pretrial confinement and the right to a speedy trial. The *Salerno* Court held that pretrial detention under the Bail Reform Act of 1984, 18 U.S.C. § 3141 (1988), is not punitive. The Court pointed out that Congress merely intended to use pretrial detention as a means for attaining the "legitimate regulatory goal" of "preventing danger to the community." *Salerno*, 481 U.S. at 746-47. If the Court's reasoning is correct, Congress may as well pass a statute that allows law enforcement officials to lock up all allegedly dangerous individuals based on administrative proceedings, rather

than criminal trials. Just as the military often finds that administratively separating a problem service member is easier than prosecuting him or her in hopes of obtaining a punitive discharge, many communities would welcome a streamlined process in which the government administratively separates problem people from the rest of society.

The *Salerno* Court also noted that the Speedy Trial Act, 18 U.S.C. § 3161 (1988), placed stringent time limitations on the duration of pretrial confinement. In addition, the Court implied that, at some point, the duration of pretrial confinement might become "excessively prolonged, and therefore punitive." *Salerno*, 481 U.S. at 747 n.4. The justices, however, declined to intimate what factors a court should examine to determine whether pretrial detention is tantamount to punishment. Moreover, the Court gave no clue as to the remedy for punitive pretrial detention. Presumably, the victim of pretrial punishment deserves the same remedy—namely, dismissal—as the victim of a speedy trial violation. Certainly the right to a speedy trial must guarantee to a presumptively innocent defendant that the government will process his or her case with sufficient diligence to ensure that the opportunity to vindicate occurs before the government proceeds with a punishment.

The most compelling argument in *Salerno* appears in Justice Marshall's dissent, in which he posits the following rhetorical

question: If the idea of administrative detention is valid, and a dangerous individual is held pending trial, but later acquitted, "[m]ay the Government continue to hold the defendant in detention based upon its showing that he [or she] is dangerous?" *Id.* at 763 (Marshall, Brennan, JJ., dissenting). Justice Marshall's example epitomizes the absurdity in formulating a dichotomy between punitive and nonpunitive confinement. More importantly, *Salerno*, in general, demonstrates why courts should not create legal fictions as parameters for measuring constitutional rights. Finally, accepting the fiction of a punitive-nonpunitive dichotomy creates absurd results at courts-martial. Offsetting punitive confinement with nonpunitive confinement necessarily gives the convicted service member a windfall by diluting the severity of the punishment that the court-martial meted out. In addition, it deprives society of the rehabilitative effects that punitive confinement has on the convicted service member—rehabilitative effects that ultimately will benefit the community when he or she is released. Finally, sentencing credit has no bearing on the speed at which the government proceeds to trial.

114. *See* MCM, *supra* note 9, R.C.M. 305 analysis, app. 21, at A21-18. Sentencing credit clearly cannot be the answer for illegal pretrial confinement and other transgressions, such as speedy trial violations because it only recompenses actual criminals—and then, only criminals whom a court-martial has sentenced to a punishment more severe than the confinement they

already have served. Perhaps the best method of reconciling this unusual remedy with common notions of fairness is to give "get out of jail free" cards to those whom a court-martial acquits.

115. *Kossman*, 38 M.J. at 259 ("the '*Burton* presumption' was conceived of as a mechanism to enforce Article 10"); *id.* at 261 ("*Burton* was a tool for effectuating Article 10").

116. *Id.* at 260-61.

117. *Id.* at 260; *see* UCMJ art. 36(a) (1988) (authorizing the President to prescribe procedures consistent with the principles of law generally recognized by federal criminal courts, as long as those procedures are consistent with the provisions of the UCMJ).

118. *Id.* at 258.

119. *See* UCMJ art. 10 (1988) ("When any person subject to this chapter *is placed in arrest or confinement* prior to trial, immediate steps shall be taken . . . ." (emphasis added). Unless the government holds the accused in some form of pretrial restraint, he or she enjoys no protection under Article 10. *Cf.* United States v. Nelson, 5 M.J. 189 (C.M.A. 1978) (confinement of some duration is necessary to trigger Article 10); United States v. Rachels, 6 M.J. 232 (C.M.A. 1979) (retention of service member past his or her expiration of term does not rise to restraint sufficient to trigger Article 10); United States v. Williams, 37 C.M.R. 209 (C.M.A. 1967) (restraint must be lengthy or onerous to be tantamount to restraint sufficient to invoke Article 10

protections). In addition, Congress passed Article 10, in part, because the military justice system has no provision for posting bail in lieu of pretrial confinement. *See* United States v. Mock, 49 C.M.R. 160 (A.C.M.R. 1974). Accordingly, Congress never intended an undetained accused to receive any pendant protections from Article 10. *See also* SCHLUETER, *supra* note 91, § 13-3(C)(2), at 438-39 n.53.

120. *Kossman*, 38 M.J. at 258, 262.

121. *See generally* MCM, *supra* note 9, R.C.M. 707 (C5, 15 Nov. 1991). The discussion to R.C.M. 707 states, "Priority shall be given to persons in arrest or confinement." *Id.* R.C.M. 707(a)(1) discussion, at 7. Discussions to *Manual* provisions, however, expressly are not directory in nature. *Id.* preamble, para. 4, discussion (discussions are not official views of the military departments; nor do they constitute rules or any other exercise of authority of the United States Government). More pointedly, the statement that "[p]riority will be given to persons in arrest or confinement" is, at best, precatory. This comment, like all discussions to the *Manual*, "do not create rights or responsibilities that are binding on any person, party, or other entity (including any authority of the Government of the United States) . . . . [and f]ailure to comply . . . does not, of itself, constitute error . . . ." *Id.*

122. 18 U.S.C. § 3161-3174 (1988) (imposing time limits on

the period between arrest or summons and trial in federal criminal cases).

123. *See* STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, speedy trial standards 12-2.1, 12-2.2 (American Bar Ass'n 1986) [hereinafter ABA STANDARDS].

124. *See* 18 U.S.C. § 3164(a)(1) (1988) ("The trial or disposition of cases involving . . . a detained person who is being held in detention solely because he is awaiting trial . . . shall be accorded priority"); ABA STANDARDS, *supra* note 123, pretrial release standard 5.10 ("Every jurisdiction should adopt, by statute or court rule, a time limitation within which defendants in custody must be tried which is shorter than the limitation applicable to defendants at liberty pending trial"). Interestingly, the "by statute or court rule" language in Standard 5.10 would seem to mandate the *Burton* ninety-day rule even in the presence of the former R.C.M. 707(d) ninety-day release and "immediate steps" rules. Nevertheless, while the former R.C.M. 707 apparently met the *ABA Standards*, the present version of the rule does not.

125. *See also Kossman*, 38 M.J at 261-62. *Kossman's* validity is independently suspect because it advocates military judges to consider arguably inappropriate factors, such as "crowded dockets, unavailability of judges, and attorney caseloads," when they resolve Article 10 speedy trial issues. *Id.* While the operational necessities of the military always

have weighed heavily in balancing *regulatory* speedy trial rights with the practical interests involved in administering military justice, balancing "judicial impediments" against an accused's *statutory* rights to a speedy trial is questionable. The FSTA, for instance, expressly states that a judge shall not exclude from speedy trial computations any time periods for continuances granted "because of general congestion of the court's calendar." 18 U.S.C. § 3161(h)(8) (1988). One commentator has noted that [t]his provision . . . is the heart of this statutory scheme." LAFAVE & ISRAEL, *supra* note 30, § 18.3(b), at 693.

126. *See* United States v. Parish v. 38 C.M.R. 209 (1968).

127. 35 C.M.R. 322 (C.M.A. 1965).

128. *See Kossman*, 38 M.J. at 262 (citing *Tibbs* 35 C.M.R. at 325) ("touch stone for measurement of compliance with . . . [UCMJ] is not constant motion, but reasonable diligence in bringing the charges to trial"). The Court of Military Appeals first announced the reasonable diligence standard in United States v. Parish, 38 C.M.R. 209, 214 (C.M.A. 1968).

129. *Kossman*, 38 M.J. at 261.

130. *Id.*

131. *Id.* at 258.

132. 407 U.S. 514 (1972).

133. *See id.* at 526; *supra* notes 31-38 and accompanying text.

134. *See* Barker, 407 U.S. at 526 (in assessing Sixth Amendment speedy trial issues, courts must balance the length of the delay, the reasons for the delay, the assertion of the right, and the prejudice to the defendant). For instance, even if the government failed to take immediate steps to try the accused, the court may find that no speedy trial violation occurred if the only prejudice suffer by the accused was incarceration, the accused never demanded speedy trial, and the length of the delay was not excessive under the circumstances.

135. *See Kossman*, 38 M.J. at 262 (Sullivan, C.J., dissenting) (the majority's decision "eviscerates this body of speedy trial law in favor of essentially unreviewable ad hoc decisions by military trial judges. The result is chaos"). The right to a speedy trial in the military is of such procedural importance that the appellate courts will find that a staff judge advocate's posttrial review of a case is inadequate if it fails to apprise the convening authority of a speedy trial issue litigated at trial. *See* United States v. Hagen, 9 M.J. 659 (N.M.C.M.R. 1980). Indeed, enforcing the right to speedy trial is not the sole responsibility of the courts. *See* United States v. Davis, 39 C.M.R. 170 (C.M.A. 1969) (holding that convening authority must conduct a new posttrial review when the staff judge advocate recommended that the convening authority merely defer to the appellate board of review to decide the speedy trial issue).

136. S. REP. No. 486, 81st Cong., 2d Sess. 17 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2240. The Court of Military Appeals also has found that Article 33 is inextricably related to a service member's right to counsel—based on notions of fundamental fairness—even for short periods of pretrial confinement. *See* United States v. Jackson, 5 M.J. 223, 226 (C.M.A. 1978).

137. *See* UCMJ art. 22 (1988) (prescribing who may convene a general court-martial). General court-martial convening authority typically vests with each service secretary and commanding officer in the chain of command from the President down to commanding general officers of two-star rank. Below that level, the President and service secretaries may designate additional commanding officer billets as general court-martial convening authorities. *See also* MCM, *supra* note 9, R.C.M. 504(b)(1) (defining who may convene general courts-martial).

138. *See generally* MCM, *supra* note 9, R.C.M. 305(d) (prescribing conditions necessary for a commander to order a service member into pretrial confinement); *id.* R.C.M. 304(c) (prescribing conditions necessary for a commander to order a service member into pretrial restraint, including arrest).

139. *See* S. REP. No. 486, 81st Cong., 2d Sess. 17 (1950), *reprinted in* 1950 U.S. Code Cong. Serv. 2240 ("the requirement that the report be in writing will help insure compliance with this article").

140. *See* United States v. Demmer, 24 M.J. 731 (A.C.M.R. 1987).

141. *See* United States v. Givens, 30 M.J. 294, 298 (C.M.A. 1990) (requirements of original R.C.M. 707(e) are unequivocal); *see also* United States v. Carlisle, 25 M.J. 426, 428 (C.M.A. 1988).

142. *See* United States v. Parish, 38 C.M.R. 209, 214 (C.M.A. 1968).

143. 21 C.M.R. 129 (C.M.A. 1956).

144. *Id.* at 132.

145. *Id.*

146. *Id.*

147. 27 C.M.R. 230 (C.M.A. 1959).

148. *Id.* at 231.

149. *Id.*

150. *Id.* Although the opinion did not expressly cite to waiver as a reason for dismissing the appellant's speedy trial claim, the defense clearly failed to assert a complete writ of error. Unless the individual challenges both a violation of the eight-day forwarding requirement and a violation of the "eight-day letter" requirement, the appellant effectively has waived the error. *See supra* notes 132-39 and accompanying text.

151. 28 C.M.R. 498 (C.M.A. 1959).

152. *Id.* at 68.

153. *Id.*

154. *Id.*

155. *Id.* at 69.

156. UCMJ arts. 10, 33 (1950) (current versions appear at UCMJ arts. 10, 33 (1988)). The court also noted that UCMJ Article 98 was a part of the congressional scheme. *Brown*, 28 C.M.R. at 69. Article 98 provides, *inter alia*, for criminal sanctions against any person subject to the UCMJ who is responsible for "unnecessary delay in the disposition of any case." UCMJ art. 98(1) (1988).

157. *Brown*, 28 C.M.R. at 69 (emphasis added).

158. *Id.*

159. *Id.* at 70.

160. 34 C.M.R. 141 (C.M.A. 1964).

161. *Id.* at 142.

162. *Id.* at 144. Judge Ferguson did not fashion this admonition in a judicial vacuum. The military has had a long-standing precedent to mandate its inflexible adherence to the language of congressional statutes. In United States v. Clay, 1 C.M.R. 74, 77-78 (C.M.A. 1951), the court noted the following:

> Generally speaking, due process means a course of legal proceedings according to those rules and principles which have been established in our system of

jurisprudence for the enforcement and protection of private rights. For our purposes, and in keeping with the principles of military justice developed over the years, we do not bottom those rights and privileges on the Constitution. We base them on the laws enacted by Congress.

163. 340 F.2d 383 (8th Cir. 1965) (per curiam).

164. *See id.* at 387.

165. *Compare id. with McKenzie*, 34 C.M.R. at 144.

166. 35 C.M.R. 322 (C.M.A. 1965).

167. *See McKenzie*, 34 C.M.R. at 144.

168. *Id.* at 324.

169. *Id.* The Navy-Marine Corps Court of Military Appeals later confused the holding in *Tibbs* even more. Carefully read, the ultimate finding in *Tibbs* was that no violation of Article 33 had occurred. *See id.* In United States v. Wager, 10 M.J. 546, 554 (N.M.C.M.R. 1980), however, the court incorrectly cited *Tibbs* for the proposition that "noncompliance with [the Article 33] procedural mandate does not, of itself, require any corrective action."

170. *Id.* at 329 (Ferguson, J., dissenting).

171. *Id.* at 329-32 (citing United States v. Schlack, 34 C.M.R. 151, 154 (C.M.A. 1964); United States v. McKenzie, 34 C.M.R. 141 (C.M.A. 1964); United States v. Brown, 28 C.M.R. 64,

69 (C.M.A. 1959); United States v. Hounshell, 21 C.M.R. 129, 132 (C.M.A. 1956); UCMJ arts. 10, 30(b), 33 (1964)).

172. *Id.* at 332.

173. *Id.* at 333.

174. 40 C.M.R. 176 (C.M.A. 1969).

175. 41 C.M.R. 159 (C.M.A. 1969).

176. *Hawes*, 40 C.M.R. at 177.

177. *Id.* at 178.

178. *Id.* at 179.

179. *See* UCMJ art. 33 (1988).

180. United States v. Mladjen, 41 C.M.R. 159, 160 (C.M.A. 1969).

181. *Id.* at 161.

182. *Id.* The additional charges against Mladjen included larceny and wrongful sale of military property. *Id.*

183. *See* UCMJ art. 32 (1988) (requiring a pretrial investigation of charges prior to their referral to a general court-martial).

184. *Mladjen*, 41 C.M.R. at 162.

185. *Id.* at 160-61.

186. *See id.* at 162 (noting that the special court-martial convening authority complied with Article 33 by forwarding the

report of investigation within eight days after determining that the charges required trial by general court-martial).

187. *Id.*

188. *Id.* at 162-63 (Ferguson, J., concurring in the result).

189. *Id.* at 163 (Ferguson, J., concurring in the result) (citing United States v. Hounshell, 21 C.M.R. 129, 133-34 (C.M.A. 1956)).

190. 5 M.J. 189 (C.M.A. 1978).

191. *Id.* at 190 n.1.

192. United States v. Rogers, 7 M.J. 274 (C.M.A. 1979). The court-martial sentenced Rogers to twenty years' confinement, total forfeitures, and a dishonorable discharge. *Id.*

193. *Id.* at 275 n.2.

194. UCMJ art. 120 (1988).

195. *Rogers*, 7 M.J. at 275 & nn. 1, 2.

196. *Id.* at 275.

197. *Id.* at 275 n.2 (citing United States v. Nelson, 5 M.J. 189, 190 n.1 (C.M.A. 1978).

198. 13 M.J. 574 (N.M.C.M.R. 1982).

199. *Id.* at 577. The accused allegedly conspired to steal a .45 caliber pistol, aided in stealing it, and ultimately received it as stolen property. *Id.* at 575. He was in pretrial

confinement for fifty-six days before receiving the benefit of an appointed defense counsel. On the 64th day of his confinement, Marine Corps authorities released the accused, and two days later, his counsel entered a written demand for speedy trial. Sixteen days later, the trial commenced. *Id.* at 575-77.

200. *Id.* at 576-78. The accused apparently argued that the government's decision to hold an Article 32 investigation evidenced its intention to try the accused at a general court-martial. Accordingly, based on the objective standard urged by the dissent in *United States v. Mladjen*, the government should have complied with Article 33 regardless of the case's eventual disposition. *See* 41 C.M.R. 159, 162-63 (C.M.A. 1969) (Ferguson, J., dissenting); *see also supra* notes 180-89 and accompanying text.

201. *Wholley*, 13 M.J. at 577.

202. *Id.* at 580. The court added that, even if Article 33 had applied, "no prejudice accru[ed] to the accused. *Id.*

203. 27 M.J. 590 (A.C.M.R. 1988).

204. *Id.* at 594.

205. UCMJ art. 85 (1988).

206. *Id.* art. 123.

207. *Honican*, 27 M.J. at 592.

208. *Id.* at 593.

209. UCMJ art. 86 (1988).

210. *Honican*, 27 M.J. at 591. Pursuant to a pretrial agreement, the convening authority suspended for 180 days the length of confinement that exceeded a period of two years. *Id.*

211. *Id.* at 592-93, 593-94.

212. *Id.* at 593.

213. *Id.* at 594.

214. *Id.* at 593.

215. UCMJ art. 33 (1988).

216. *See* United States v. Mladjen, 41 C.M.R. 159, 162 (C.M.A. 1969) (holding that government has no Article 33 duties until it actually intends to proceed against an accused at a general court-martial); United States v. Wholley, 13 M.J. 574, 580 (C.M.A. 1982) (holding that government's ultimate decision to try an accused a special court-martial will neutralize Article 33 objections, even if it may have intended earlier to proceed to a general court-martial); *see also supra* notes 180-89, 198-202 and accompanying text.

217. *See* DA PAM. 27-173, *supra* note 85, para. 15-2*a*, at 93.

218. *Id.*

219. UCMJ art. 33 (1988).

220. *See* Burns v. Harris, 340 F.2d 383 (8th Cir. 1965) (per curiam).

221. *Cf. id.* at 387. The Eighth Circuit's analysis in *Burns*—an analysis that heralds Article 33's flexibility—is

distorted. The court's assertion that "[Article 33] contains an exception, or area of discretion, in its twice appearing 'if practicable' language" is not an accurate description of Article 33's framework. The Eighth Circuit's language implies that the statute has two independent exception clauses. In other words, it implies that the statute says, "Do *X* if practicable; if not, do *Y* if practicable." A more accurate characterization of the statute's exception, however, would have stated, "Do *X* if practicable; if not, do *Y*."

222. 35 C.M.R. 322 (C.M.A. 1965).

223. *See Burns*, 340 F.2d at 387 (noting that Congress incorporated the "if practicable" language of Article 33 to adapt the statute's mandate to "the overriding considerations of military life . . . ").

224. S. REP. No. 486, 81st Cong., 2d Sess. 17 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2240 (emphasis added).

225. 18 U.S.C. §§ 3161-3174 (1988).

226. *See* United States v. Aragon, 1 M.J. 662, 667-68 (N.M.C.M.R. 1975); SCHLUETER, *supra* note 91, § 13-3(C), at 436 ("The Federal Speedy Trial Act is not applicable to courts-martial") (footnotes omitted); DA PAM. 27-173, *supra* note 85, para. 15-1*b*, at 92 n.10 (although R.C.M. 707 is based loosely on the FSTA, "the act itself specifically excludes trials by court-martial"); *cf.* United States v. Greer, 21 M.J. 338, 340-41 (C.M.A. 1986) (time limitations contained in Interstate Agreement

on Detainers is applicable to the military); 18 U.S.C. app. 2, § 2 (1988).

227. 18 U.S.C. § 3172(2) (1988).

228. *Id.* § 3164(a)(1).

229. *See* United States v. Krohn, 558 F.2d 390 (8th Cir.), *cert. denied*, 434 U.S. 868 (1977); *cf.* United States v. Bullock, 551 F.2d 1377 (5th Cir. 1977).

230. *See* United States v. Diaz-Alvarado, 587 F.2d 1002 (9th Cir. 1978), *cert. denied*, 440 U.S. 927 (1979) (holding that sole remedy for 18 U.S.C. § 3164 violation is release from custody); United States v. Gandara, 586 F.2d 1156 (7th Cir. 1978) (same); United States v. Gaines, 563 F.2d 1352 (9th Cir. 1977) (same); United States v. Krohn, 560 F.2d 293 (7th Cir.) (same), *cert. denied*, 434 U.S. 895 (1977).

231. 44 C.M.R. 166 (C.M.A. 1971).

232. *Id.* at 172.

233. *See* Chris G. Wittmayer, *Rule for Courts-Martial 707: The 1984 Manual for Courts-Martial Speedy Trial Rule*, 116 MIL. L. REV. 221, 259 (1987) ("R.C.M. 707 and 707(d) are, in part, a response to a perception that the *Burton* rules have been applied too harshly against the Government"). *See generally* Note, *Military Court System Takes the Initiative With the Issue of Speedy Trial*, 3 CAPITAL U.L. REV. 292 (1974).

234. *See* MCM, *supra* note 9, R.C.M. 707(d) analysis, app.

21, at A21-38 (C3, 1 June 1987) (current version is R.C.M. 707 analysis (C5, 15 Nov. 1991)). The drafters of R.C.M. 707 unquestionably wanted the Court of Military Appeals to overrule the *Burton* decision. *Id.* ("Subsection (d), together with the speedy trial requirements of this rule provides a basis for further reexamination of the *Burton* presumption").

235. 23 M.J. 280 (C.M.A. 1986) (memorandum opinion); *see also* United States v. Alexander, 26 M.J. 587, 588 (A.C.M.R. 1988) (acknowledging that *Burton* ninety-day rule is "alive and well").

236. *Id.* The court since has clarified the ambiguity that its decision in *Harvey* created. "[T]he President cannot overrule or diminish [the court's] interpretation of a statute." United States v. Kossman, 38 M.J. 258, 260-61 (C.M.A. 1993) (footnote omitted). Curiously, the footnote to this passage from the *Kossman* opinion states that, in *Burton*, the court was "not purporting to interpret Article 10, but to enforce it." *Id.* at 261 n.2. This assertion epitomizes the apparent dialectic between the Court of Military Appeals and the President over the speedy trial issue. Clearly, the prerogative and the responsibility to enforce a statute—that is, to "take Care that the Laws be faithfully executed"—vests with the President as an express executive power. *See* U.S. CONST. art. II, sec. 3. Accordingly, the *Kossman* court evidently stepped back from its challenge to presidential authority in *Harvey*. While "the President [may not be able to] overrule or diminish [the court's]

interpretation of a statute," the President certainly should be able to overrule or diminish the court's mechanism for enforcing a statute.

237. *See* MCM, *supra* note 9, R.C.M. 707 (C5, 15 Nov. 1991); *id.* R.C.M. 707(d) (allowing trial judge to dismiss charges affected by speedy trial rule violations either with or without prejudice). Permitting a judge who finds a speedy trial violation to dismiss without prejudice is a radical departure from the prior version of R.C.M. 707. The drafters' analysis merely states that the rule is based on the FSTA, which permits dismissal without prejudice. *See id.* R.C.M. 707 analysis, at 9; 18 U.S.C. § 3162 (1988). Apparently, without acknowledging the distinctions between federal-civilian and military criminal practices, the drafters decided to adopt the FSTA's rule summarily. Prior to this change, however, the drafters emphasized this distinction in the following passage:

> [The Federal Speedy Trial Act] provides dismissal as a sanction for speedy trial violations, but permits the judge to dismiss with or without prejudice. The *ABA Standards* . . . point out that dismissal without prejudice is largely meaningless and especially inapposite as a sanction for speedy trial violations. Dismissal without prejudice merely creates additional delay in disposing of a case already found to have been

delayed unreasonably. *Such a remedy is particularly inappropriate in courts-martial.*

MCM, *supra* note 9, R.C.M. 707(e) analysis, app. 21, at A21-38 (emphasis added) (C3, 1 June 1987) (current version is R.C.M. 707 analysis (C5, 15 Nov. 1991); *see* 18 U.S.C. § 3162 (1988). In addition, unlike the current drafters' analysis to R.C.M. 707, the original analysis stressed that the military speedy trial rule is "generally similar to [the FSTA, but] differs from [it] in terms of specific requirements *because of the different procedures in courts-martial and because of the different conditions in the military.*" MCM, *supra* note 9, R.C.M. 707 analysis, app. 21, at A21-37 (emphasis added) (C3, 1 June 1987) (current version is R.C.M. 707 analysis (C5, 15 Nov. 1991)).

238. *See Kossman*, 38 M.J. at 262. One commentator made the following observation about the original version of R.C.M. 707, which contained the 90-day release rule and the "immediate steps" rule, and made dismissal with prejudice as the sole remedy for speedy trial violations:

> The *Burton* ninety day rule . . . arose from a need perceived by the Court of Military Appeals in 1971 for clearer guidance to insure more timely prosecution of courts-martial. The policy choices made by the President in R.C.M. 707 respond to the same perceived need for specified time limits. With R.C.M. 707 now

> the law, supplemented by the protection of the sixth amendment, little need remains for the *Burton* rules. . . . [O]ne would hope that the court will find that R.C.M. 707 supplants the *Burton* rules.

Wittmayer, *supra* note 233, at 263-64. That commentator's hopes finally were answered in *Kossman*. Nevertheless, one must wonder why the Court of Military Appeals determined that the original R.C.M. 707(d)—a rule which virtually mimicked *Burton*—was not sufficient to displace *Burton* in 1984, while the present R.C.M. 707—a much more lenient rule than *Burton*—was sufficient to displace *Burton* in 1993.

239. *See* MCM, *supra* note 9, R.C.M. 707 analysis, at 9 (C5, 15 Nov. 1991) ("The purpose of this rule is to provide guidance for granting pretrial delays and to eliminate after-the-fact determinations as to whether ceratin periods of delay are excludable").

240. *Cf.* 1 *Kings* 3:16-28. As if to abide by the judgment of King Solomon, the drafters deferred to the Court of Military Appeals and its *Burton* ninety-day rule, rather than perpetuate confusion over speedy trial law by dividing the responsibility for enforcing Article 10 between the President and the judiciary.

241. *Compare* MCM, *supra* note 9, R.C.M. 707(d) analysis, app. 21, at A21-38 (C3, 1 June 1987) ("Subsection (d), together with the speedy trial requirements of this rule provides a basis

for further reexamination of the *Burton* presumption") *with id.* R.C.M. 707 analysis, at 9 (C5, 15 Nov. 1991). The old and new analyses share the language, "Unless *Burton* and its progeny are reexamined, it would be possible to have a *Burton* violation despite compliance with this subsection." *Id.* R.C.M. 707(d) analysis, app. 21, at A21-38 (C3, 1 June 1987) (cross-reference omitted) (current version is R.C.M. 707 analysis (C5, 15 Nov. 1991)); *id.* R.C.M. 707 analysis, at 9 (C5, 15 Nov. 1991) (substituting the word "rule" for the word "subsection"). This passage, however, serves only as an admonition to trial practitioners.

242. *See Kossman*, 38 M.J. at 267 (Wiss, J. dissenting) ("I have serious misgivings about the capacity of [the present R.C.M. 707] to fill the void caused by overruling *Burton*"); *cf.* FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 17-20.00, at 625 (1991) ("at present *Burton* is the ultimate judicial protection of the statutory military right to a speedy trial"); *id.* § 17-57.00, at 654-55 ("one would predict . . . renewed emphasis on the [*Burton*] ninety day rule"). In addition to his "misgivings," Judge Wiss expressed concern that the "unexceptionally weakening trend in the fundamental, underpinning elements of" R.C.M. 707 and that, by eliminating the *Burton* rule in the wake of this trend, the *Kossman* majority has "reduc[ed] . . . any real chance for compliance with Article 10. *Kossman*, 38 M.J. at 267, 268 (Wiss, J. dissenting).

243. *Kossman*, 38 M.J. at 262 (Sullivan, C.J., dissenting).

244. *See* MCM, *supra* note 9, R.C.M. 707(d) (C3, 1 June 1987) (current version is R.C.M. 707 (C5, 15 Nov. 1991)).

245. *See* 18 U.S.C. § 3164(a), (b) (1988) ("The trial of ['a detained person who is being held in detention solely because he or she is awaiting trial'] shall commence not later than ninety days following the beginning of such continuous detention); *id.* § 3164(c) ("No detainee . . . shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of trial").

246. *Id.* § 3164(c).

247. *See supra* note 86 and accompanying text; *cf.* United States v. Diaz-Alverado, 587 F.2d 1002 (9th Cir. 1978), *cert. denied*, 440 U.S. 927 (1979) (sole remedy at the expiration of 90-day time period in 18 U.S.C. § 3164 is release from custody); United States v. Krohn, 560 F.2d 293 (7th Cir.), *cert. denied*, 434 U.S. 895 (1977) (same); United States v. Carpenter, 542 F.2d 1132 (9th Cir. 1976) (same); United States v. Tirasso, 532 F.2d 1288 (6th Cir. 1976) (18 U.S.C. § 3164 authorizes no less than an unconditional release from custody at the expiration of 90 consecutive days of pretrial confinement).

248. *Cf.* UCMJ art. 36(b) (1988) (presidential regulations that enforce the UCMJ should be, "so far as he considers practicable," consistent with the laws applied in federal criminal cases).

249. *See* MCM, *supra* note 9, R.C.M. 707 (C5, 15 Nov. 1991). The analysis to the new R.C.M. 707 fails to offer an explicit justification for abandoning the 90-day release rule. *See id.* R.C.M. 707 analysis, at 9. Actually, the drafters of the analysis to the new rule appear to have been deliberately subtle in making the change. The adornment that R.C.M. 707(d) "is based on [inter alia] 18 U.S.C. § 3164," which appeared in the original analysis to the rule, has vanished. *Compare id.* R.C.M. 707 analysis, app. 21, at A21-38 (C3, 1 June 1987) *with id.* R.C.M. 707(d) analysis, at 9 (C5, 15 Nov. 1991).

250. *See id.* R.C.M. 707(d) analysis, at 9 (C5, 15 Nov. 1991) ("(d) *Remedy.* This subsection is based on *The Federal Speedy Trial Act*, 18 U.S.C. § 3162"). The cited section of the FSTA provides for dismissal—with or without prejudice—as the remedy for FSTA violations, but provides no protections to guarantee the liberty rights of defendants in pretrial detention. *See* 18 U.S.C. § 3162 (1988).

251. *Cf.* United States v. Kossman, 38 M.J. 258, 258 (C.M.A. 1993).

252. MCM, *supra* note 9, R.C.M. 707(c)(1) discussion, at 7 (C5, 15 Nov. 1991); *see* UCMJ art. 32 (1988).

253. *See supra* note 121 (*Manual* discussions are not legally binding).

254. *See supra* notes 135-38 and accompanying text.

255. *See* S. REP. No. 486, 81st Cong., 1st Sess. 17 (1949); H.R. REP. No. 491, 81st Cong., 1st Sess. 20 (1949).

256. *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 908 (1949).

257. *See* Tichenor, *supra*, note 87, at 29.

258. *Cf.* United States v. Weisenmuller, 38 C.M.R. 434, 438 (C.M.A. 1968). In *Weisenmuller*, the court emphasized the importance of complying with Article 33 by "explain[ing] on the record the reasons for otherwise untoward delay while the accused languishes in *durance vile*." *Id.* More important, the *Weisenmuller* court accentuated the relationship between personally informing the convening authority of the reasons for delay and the right to speedy trial in the military. Complying with this statutory requirement "would . . . insure that each man [and woman] would receive the speedy, fair disposition of his [or her] case to which he [or she] is entitled under the Uniform Code." *Id.*

259. *See* Wittmayer, *supra* note 233, at 246 (citing United States v. Kuelker, 20 M.J. 715, 717 (N.M.C.M.R. 1985)).

260. *Cf.* Tichenor, *supra* note 257, at 30 (proposing that, for the purposes of Article 33 compliance, commanders and investigating officers routinely should treat a pretrial detainee as if he or she is awaiting trial by general court-martial). The proposed rule also would compel commanders to keep their chains

of command apprised of the status of their service members in pretrial confinement. *See id.* at 31. Furthermore, the requirement for approval in writing not only complements Article 33's requirement for an "eight-day letter," but also preserves the record for judicial review should a speedy trial issue arise.

261. MCM, *supra* note 9, R.C.M. 707(d) (C5, 15 Nov. 1991). The court must redress a denial of the accused's constitutional right to a speedy trial by dismissing the affected charges with prejudice. *Id.*; *see* Strunck v. United States, 412 U.S. 434 (1973) (dismissal of charges is the only appropriate remedy for violating a defendant's Sixth Amendment right to a speedy trial).

262. MCM, *supra* note 9, R.C.M. 707(d) (C5, 15 Nov. 1991).

263. *Compare id. with* 18 U.S.C. § 3162 (1988).

264. *See* United States v. Taylor, 487 U.S. 326 (1988).

265. United States v. Kossman, 38 M.J. 258, 262 (C.M.A. 1993).

266. *Compare*, MCM, *supra* note 9, R.C.M. 707(d) (C5, 15 Nov. 1991) ("failure to comply with *the right to a speedy trial* will result in dismissal of the affected charges") (emphasis added) *with id.* R.C.M. 707(e) (C3, 1 June 1987) ("failure to comply with *this rule* shall result in dismissal of the affected charges") (emphasis added).

267. *See* Dettinger v. United States, 7 M.J. 216, 224 (C.M.A. 1979) (citing United States v. Walker, 47 C.M.R. 288, 290

(A.C.M.R 1973)) (dismissing charges based on violation of regulatory speedy trial provision appearing in Air Force military justice manual); *cf.* Richard R. Boller, *Pretrial Restraint in the Military*, 50 MIL. L. REV. 71, 97 & n.137 (1970) (pointing out that local commands may enact regulations that limit the duration of pretrial confinement). A division commander's decision to give his or her service members speedy trial rights greater than those appearing in R.C.M. 707 is no less valid than the President's decision to give all service members speedy trial rights greater than those appearing in Article 10 and the Sixth Amendment. Accordingly, if a service member accrues any regulatory "right" to a speedy trial that is more protective than the guarantee contained in the Sixth Amendment, that enhanced regulatory protection is, nonetheless, a "right." Therefore, because the present R.C.M. 707(d) does not distinguish among the sources of speedy trial rights—as the former R.C.M. 707(e) did—the current remedy under the current rule is much more farreaching. *See also* GILLIGAN & LEDERER, *supra* note 242, § 17-60.00, at 655-56 (discussing regulatory 45-day speedy trial rule formerly employed by U.S. Army Europe).

268. *See* MCM, *supra* note 9, R.C.M. 707(d) (C5, 15 Nov. 1991).

269. *Id.*; *see supra* text accompanying notes 261-62.

270. *Kossman*, 38 M.J. at 258.

271. *Id.* at 262.

272. *See* MCM, *supra* note 9, R.C.M. 707(d) (C5, 15 Nov. 1991); *see also supra* notes 261-62 and accompanying text.

273. *Kossman*, 38 M.J. at 261.

274. 407 U.S. 514, 523 (1972).

275. *See Kossman*, 38 M.J. at 259-60, 262; United States v. Tibbs, 35 C.M.R. 322, 325 (1965).

276. *See* MCM, *supra* note 9, R.C.M. 707(a) (C5, 15 Nov. 1991).

277. *Cf. Kossman*, 38 M.J. at 261 ("We see nothing in article 10 that suggests that speedy trial motions could not succeed where a period under 90—or 120—days is involved").

278. *Cf.* LAFAVE & ISRAEL, *supra* note 30, at 685 (societal interests should play no part in analyzing an individual's personal right to a speedy trial).

279. *See* UCMJ art. 98 (1988) ("Any person subject to this chapter who . . . is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter . . . shall be punished as a court-martial may direct").

280. *See* MCM, *supra* note 9, R.C.M. 707(b)(3)(A) (C5, 15 Nov. 1991).

281. *Id.*

282. *Id.* R.C.M. 707(d).

283. *Cf. id.* R.C.M. 707(d) (indicating that a court need not consider the length of the delay as a factor in deciding to dismiss a charge with or without prejudice).

284. *Id.* R.C.M. 707(b)(3)(B) analysis, at 9.

285. *See* UCMJ art. 10 (1988); *cf.* United States v. Burton, 44 C.M.R. 166, 171-72 (imposing a presumption of an Article 10 violation after just 90 days of pretrial detention).

286. *See* United States v. Kossman, 38 M.J. 258, 262 (C.M.A. 1993).

287. *See supra* notes 244-51 (proposing the resurrection of the 90-day release rule; MCM, *supra* note 9, R.C.M. 707(d) (C3, 1 June 1987) (current version is R.C.M. 707 (C5, 15 Nov. 1991)). If the President reinstates the 90-day release rule, amending R.C.M. 707(b)(3)(A) would be unnecessary.

288. *See* UCMJ art. 33 (1988) ("the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers to the officer exercising general court-martial jurisdiction").

289. *See* MCM, *supra* note 9, R.C.M. 602 ("no person may, over objection, be brought to trial . . . before a general court-martial within a period of five days after service of charges"). *See generally* United States v. Cherok, 19 M.J. 559 (N.M.C.M.R. 1984), *aff'd*, 22 M.J. 438 (C.M.A. 1986).

290. *See* UCMJ art. 32 (1988); MCM, *supra* note 9, R.C.M. 405.

291. 38 M.J. 258 (C.M.A. 1993).

292. *Compare* MCM, *supra* note 9, R.C.M. 707(a)(2) (C5, 15 Nov. 1991) (requiring trial of an accused within 120 days of arrest or confinement) *with id.* R.C.M. 707(d) (C3, 1 June 1987) (requiring trial or release of an accused within 90 days of arrest or confinement).

293. *Id.* R.C.M. 707(d) (C3, 1 June 1987) (ninety-day release rule) (current version is R.C.M. 707 (C5, 15 Nov. 1991)).

294. *See supra* notes 252-58. *Compare* MCM, *supra* note 9, R.C.M. 707(c)(1) discussion, at 7 (C5, 15 Nov. 1991) ("Prior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 investigating officer") *with id.* R.C.M. 707 discussion (C3, 1 June 1987) (providing no suggestion that a convening authority delegate his or her authority to grant continuances during the pendency of a preliminary investigation).

295. *See supra* notes 261-64. *Compare* MCM, *supra* note 9, R.C.M. 707(d) (C5, 15 Nov. 1991) (allowing judge to use a four-factor test to dismiss, without prejudice, charges affected by a violation of the accused's right to a speedy trial) *with id.* R.C.M. 707(e) (C3, 1 June 1987) (prescribing dismissal with prejudice as the only sanction for government's violation of the speedy trial rule).

296. *See supra* notes 280-86; MCM, *supra* note 9, R.C.M. 707(b)(3)(A) (C5, 15 Nov. 1991) (providing government with additional 120-day period to reprosecute after a dismissal without distinguishing the reasons for the dismissal).

297. *See* United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971), *overruled by* United States v. Kossman, 38 M.J. 256 (C.M.A. 1993).

298. *Kossman*, 38 M.J. at 268 (Wiss, J., dissenting).

299. *See* The Military Justice Act of 1982, S. 2521, 97th Cong., 2d Sess. (1982). The Senate captioned this unenacted statute, "A Bill to amend chapter 47 of title 10, United States Code (Uniform Code of Military Justice), to improve the military justice system, and for other purposes." *Id.* Significantly, the bill apparently was the closest Congress come, in recent years, to proposing a change to Article 33. The proposal, in pertinent part read, "Section 833 (article 33) is amended by striking out "the investigation" and inserting in lieu thereof "any investigation conducted under section 832 of this title (article 32)." *Id.* sec. 3(i). Evidently Congress saw fit to leave Article 33—and Article 10—alone.

300. THE AMERICAN HERITAGE DICTIONARY 414 (New College ed. 1976) ("edentate" is an adjective meaning "lacking teeth"); *cf.* SCHLUETER, *supra* note 91, § 13-3(C)(2), at 439 ("The Court of Military Appeals decision in *United States v. Burton* added teeth to the Article 10 provisions which provide no specific time

limits for bringing an accused to trial) (footnote omitted); *Burton*, 44 C.M.R. at 172.

301. *See Kossman*, 38 M.J. at 263 (Wiss, J., dissenting) (characterizing *Kossman* as "a step backwards); GILLIGAN & LEDERER, *supra* note 242, § 17-10.00, at 623 (noting that service members, as compared to their civilian counterparts, receive "unparalleled" speedy trial protections).

302. *See* WINTHROP, *supra* note 3, preface.

303. 18 U.S.C. §§ 3161-3174 (1988); *see supra* notes 225-30 (arguing that practitioners plausibly can interpret the FSTA so that the provisions mandating priority treatment for cases in which the defendant is in pretrial detention apply to the military).

304. *Cf. Kossman*, 38 M.J. at 261 ("*Burton* presumption was court-made and declared in a procedural vacuum").