IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**RULING:**
v.	)	**ARTICLE 13, UCMJ**
	)	
MANNING, Bradley E., PFC	)	
U.S. Army, xxx-xx(b) (6)	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 7 January 2013
Fort Myer, VA 22211	)	

On 27 July 2012, the Defense filed a Motion to Dismiss for Unlawful Pretrial Punishment in violation of Article 13, UCMJ, and the Fifth and Eighth Amendments to the U.S. Constitution. Alternatively, the Defense motion requests 10 for 1 sentencing credit from 27 August 2010 – 20 April 2011. On 17 August 2012, the Government filed a response to the Motion opposing dismissal and sentencing credit except for 7 days for the periods of 6-11 August 2012 and 19-20 January 2012 where the Marine Corps Brig Quantico (MCBQ) Brig Officer (Brig O) maintained the accused in suicide risk (SR) status after a medical officer opined he was no longer considered to be a suicide risk, in violation of Secretary of the Navy Instruction (SECNAVINST) 1640.9C, Enclosure 1, paragraph 5(d). Supplemental briefs were filed by the Defense on 24 August 2012 and by the Government on 7 September 2012. The Court also ordered the Government to produce to the Defense approximately 1400 emails exchanged among MCBQ command and staff and higher headquarters during the period of the accused's confinement at MCBQ. On 26 November – 2 December, 5-7 December, and 10-11 December 2012, the parties presented testimony, evidence, and argument regarding this motion. Having received the briefs, heard the witnesses, and examined the emails and physical evidence presented by the parties, the Court finds and rules as follows:

FINDINGS OF FACT.

Governing Regulations and Relevant Provisions.

SECRETARY of the Navy Instruction SECNAVIST 1640.9C (3 January 2006).

SECNAVINST 1640.9C (3 January 2006) governed corrections policy for the Navy and the Marine Corps during the period of the accused's confinement as a pretrial detainee at MCBQ from 29 July 2010 – 20 April 2011. Relevant portions of the SECNAVINST to this case are found in Enclosure (1), Chapter 4 and are summarized below. The SECNAVINST governs corrections policy for both post-trial prisoners and pretrial detainees. As such, some of the provisions must be read to apply primarily to post-trial prisoners. The term "prisoners" includes both pre-trial detainees and post-trial prisoners.

1. **Custody Classification Guidance.** The purpose of custody classification is to establish the degree of supervision needed for control of individual prisoners. Custody classification provides guidance for supervision of prisoners and permits establishment of security measures consistent with requirements of the individual. The SECNAVINST recognizes that there are wide variations in personality and mentality among prisoners. Where there is fair and impartial treatment, prisoners generally present no serious disciplinary problems. Some prisoners are deliberately uncooperative; some have personality difficulties which make them chronic sources of trouble, such as the highly aggressive person or those acutely depressed. Efforts must be made to identify all special cases, and control measures instituted to ensure

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the safety and orderly administration of the confinement facility. An objective custody classification process which addresses the characteristics of the prisoners shall be used per reference (t); the Correctional Management Information System (CORMIS) electronic equivalent is also authorized.

2. **Pretrial Detainee Custody Classification.** Pretrial detainees receive custody classification as either Maximum Security (MAX) or Medium In (MDI).

a. **Maximum Custody (MAX)** is appropriate for detainees who require special custodial supervision because of the high probability of escape, [who] are potentially dangerous or violent, and whose escape would cause concern of a threat to life, property, or national security. Ordinarily, only a small percentage of prisoners shall be classified as MAX. The following procedures apply to prisoners classified as MAX custody.

(1) Supervision must be immediate and continuous. A Department of Defense Form (DD) 509, Inspection Record of Prisoner in Segregation, shall be posted by the cell door and appropriate entries made at least every 15 minutes.

(2) They shall not be assigned to work details outside the cell.

(3) They shall be assigned to the most secure quarters.

(4) MAX prisoners shall wear restraints at all times when outside the maximum-security area and be escorted by at least two escorts.

(5) On a case-by-case-basis, the brig officer in charge may authorize additional restraint for movement of MAX prisoners.

b. **Medium In (MDI)** is appropriate for detainees who present security risks not warranting MAX. They are not regarded as dangerous or violent. The following procedures apply to prisoners classified as MDI custody.

(1) Supervision shall be continuous within the security perimeter and immediate and continuous when outside the security perimeter of the confinement facility.

(2) They shall not be assigned to work outside the security perimeter.

(3) They shall wear restraints outside the security perimeter unless the Brig O directs otherwise.

(4) They may be assigned dormitory quarters.

c. **Differences between MAX and MDI Custody at MCBQ IAW SECNAVINST 1640.9C.** At MCBQ, all detainees regardless of custody level live in individual cells in Special Quarters 1. MAX detainees may not work outside the cell, MDI may. MAX detainees wear restraints at all times when outside the maximum security area and must be escorted by at least two escorts. MDI detainees wear restraints outside the security perimeter unless the Brig O directs otherwise. Two or more staff members must be present when MAX detainee is out of his cell. MAX detainees must be checked every 15 minutes with entries posted on a DD 509, Inspection Record of Prisoner in Segregation.

(d) **Classification Criteria**. Custody classification shall be based on amount of supervision and restraint each prisoner requires. All new prisoners except those specifically deemed to be serious

management problems (MAX), shall be assigned a MDI custody classification during the reception phase. Ultra-conservative custody classification results in a waste of prisoner and staff manpower. Prisoners shall be placed in the lowest custody classification as soon as possible.

(1) Non-all inclusive factors considered in assessing higher custody classifications (MAX or MDI): (1) assaultive behavior; (2) disruptive behavior; (3) serious drug abuse; (4) serious civil/military criminal record (convicted or alleged); (5) low tolerance of frustration; intensive acting out or dislike of the military; history of previous escape(s); (6) pending civil charges/detainer filed; (7) poor home conditions or family relationships; (8) mental evaluation indicating serious neurosis or psychosis; (9) indication of unwillingness to accept responsibility for personal actions past or present; demonstrated pattern of poor judgment; (10) length, or potential length, of sentence.

(2) Non-all inclusive factors indicating lower custody classifications (MDO, MIN, or IC): (1) clear military record, aside from present offense; (2) close family ties, good home conditions; (3) offense charged is not serious; (4) apparently stable mental condition (responsible for own actions); (5) indications the individual wishes to return to duty; (6) comparatively short sentence to confinement, however length of sentence shall not be an overriding factor; (7) behavior during a previous confinement; (8) completion of, or active participation in, treatment programs or groups.

(3) The above factors are indicators, not ironclad rules. The Brig O shall consider objective based overrides where applicable. An evaluation of all phases of the prisoner's performance shall be made prior to each custody change. The Court notes the SECNAVINST refers to factors considered in higher v. lower custody classification. Pretrial detainees are not eligible for Medium Out (MDO), Minimum Custody (MIN) or IC. MCBQ considered lower custody classification levels to determine whether MDI rather than MAX custody was appropriate. Per the SECNAVINST, each staff member has responsibility for passing information concerning prisoners to the proper authority in the confinement facility. What seems to be a bit of trivial information may prove to be significant when coupled with other information on hand. Behavior and attitude of the prisoner in the berthing area, at work, in recreation, and in a classroom provide a good overall indicator of problem areas and adjustment progress. Continuous staff evaluation of each prisoner cannot be overemphasized.

3. **Special Quarters (SQ)**. SQ is a group of cells used to house prisoners who have serious adjustment problems, create anxiety or disruption among other prisoners in the general population, or who need protection from other prisoners. SQ is a preventive management tool, not to be used as punishment, except when the procedures for disciplinary segregation are followed. The SECNAVINST recognizes that some prisoners require additional supervision and attention due to personality disorders, behavior abnormalities, risk of suicide or violence, or other character traits. If required to preserve order, the Brig O or, in his/her absence, the Brig Duty Officers (BDO) or Duty Brig Supervisors (DBS) may authorize special quarters for such prisoners for the purpose of control, prevention of injury to themselves or others, and the orderly and safe administration of the confinement facility. A hearing to determine the need for continued administrative segregation of the prisoner shall be conducted. This hearing may be by board action or by member of the confinement facility appointed in writing by the brig officer and a written recommendation to the Brig O will be provided within 72 hour of the prisoner's entry into segregation. All detainees in SQ shall be under continual supervision, sighted at least once every 15 minutes by a staff member, visited daily by a member of the medial department and the Brig O with daily visits by a chaplain encouraged. As with MAX custody detainees, DD 509 (Inspection Record of Prisoner in Segregation), shall be used to document visits. Prisoners assigned to SQ shall not have normal privileges restricted unless privileges must be withheld for reasons of security or prisoner safety (e.g. suicide risk). For each 30 days a prisoner is retained in SQ, the C&A board shall review and provide a recommendation to the Brig O, who will determine and certify the requirement for continuation in SQ. A segregated prisoner shall be released to regular quarters as soon as the need for special segregation is passed.

a. **Status**. Although the SECNAVIST does not use the word "status", Navy and MC corrections staff routinely used the word "status" to define whether a detainee is within the general population, in administrative segregation (AS), or in disciplinary segregation (DS).

b. **AS.** The SECNAVINST defines AS to be the involuntary or voluntary separation for specific cause, of select prisoners from the general prison population to SQ for purposes of control, preserving order, prevention of injury to themselves or others, and for the orderly and safe administration of the confinement facility. AS must be authorized by the Brig O or in his/her absence, DBO or DBS.

c. **Suicide Risk (SR) and Prevention of Injury (POI) as AS**. Both SR and POI are subcategories of AS. POI includes prevention of injury to the prisoner and to staff. The decision to retain a prisoner on POI rests with the Brig O. The SECNAVINST provides that for behavior and custody problems, on rare occasions, it may be necessary to confine violent prisoners in cells without furnishings to prevent them from injuring themselves or others. Such a measure shall be used only upon the specific direction of the Brig O. A segregated prisoner shall be released to regular quarters as soon as the need for special segregation is passed. There is no additional guidance or criteria in the SECNAVINST for POI beyond that of AS nor is there a specific requirement for mental health provider input, however, the SECNAVINST encourages medical officer participation in the C&A board where practicable. For SR, the SECNAVINST states in relevant part that prisoners who have threatened suicide or have made a suicidal gesture but are found fit for confinement and prisoners with a history of suicide attempts or who are considered suicidal may be placed in SQ under continuous observation while in the category of SR. Such prisoners shall be immediately referred to the medical department/clinical services/ mental health department for further evaluation and appropriate action. The Brig O may direct removal of the prisoner's clothing when deemed necessary. SR prisoners shall be physically checked every 5 minutes and annotated on the DD 509. They shall not be permitted to retain implements with which they could harm themselves. When prisoners are no longer considered to be SR by the medical officer, they shall be returned to appropriate quarters. Thus, unlike POI where authority to continue the status vests in the Brig O, the SECNAVINST gives the medical officer authority to determine whether and when to remove a prisoner from SR status.

d. **AS/SR/POI and MAX Custody.** Although there are required 15 minute checks for both AS and MAX Custody, there is nothing in the SECNAVINST addressing whether MAX custody classification is required for prisoners assigned to SQ under AS/SR or AS/POI. In contrast, paragraph 5105(e) states that assignment to DS does not automatically warrant a reduction to MAX custody and paragraph 5105(e)(9) states that prisoners released from DS shall normally be placed in MDI custody. The C&A board reviews custody classification and continuation in SQ as AS/SR or AS/POI as separate determinations.

4. **Classification and Assignment (C&A) Board**. The C&A board establishes an individual prisoner's custody classification using objective classification/reclassification procedures. When the C&A board determines custody classifications, it shall be composed of the Brig O or designate, one senior staff member from security and one from programs, and any other members appointed by the Brig O. At consolidated brigs, a mental health specialist and chaplain shall be assigned. Where practicable, and not assigned to facility staff, representatives from outside the confinement facility such as a psychologist or chaplain, may be appointed to the board. The board meets at least weekly. Prisoners may appear before the board. The C&A board uses the classification criteria described above. The C&A board also reviews SQ prisoners every 30 days. The C&A board may be reported in the Correctional Management Information System (CORMIS) or DD Form 2711, Initial Custody Classification; DD 2711-1, Custody Reclassification; and DD 2711-2, Custody Initial/Reclassification Summary Addendum. When immediate action is necessary, the Brig O may make changes in custody, classification, etc. without board action. Changes shall be part of the agenda for the next C&A Board.

5. **Time for Sunshine/Recreation Call.** The SECNAVINST does not use the term "sunshine call". It does use the term "recreation" as a privilege. A privilege is defined as a benefit afforded to prisoners over and above minimum statutory requirements. Privileges can be removed for rule violations but only after a due process hearing (e.g. Discipline and Adjustment (D&A) Board.) Privileges often include, but are not limited to: commissary visits, phone calls, television, radio, movies, recreation, special events, and special visits. In paragraph 5105(e)(5) addressing policies for DS, the SECNAVINST provides that a one hour exercise period shall be granted daily when the prisoner's behavior is satisfactory. The SECNAVINST is silent regarding a minimum amount of exercise period for non-DS prisoners.

6. **Visitation.** The Brig O may deny visitation for good cause, (e.g. civilian or military protective orders, legitimate rehabilitative interests, and good order, discipline, and security of the facility). Official, Press and Civilian Visits – requests for general visiting of the confinement facility by groups or individuals shall be coordinated with local public affairs office (PAO).

MCBQ Base PCF Order P1640.1c, 1 July 2010.

The MCBQ policies largely mirror the SECNAVINST. Although signed by CWO4 Averhart on 1 July 2010 on or about the time of MCBQ transfer from level 1 to pretrial detention facility, some of the policies appear to address post-trial detainees and functioning as a level 1 facility. Relevant differences or supplements in comparison with the SECNAVINST are set forth below.

1. **Paragraph 2006 - SQ.** MCBQ has 36 single occupancy cells SQ1 consisting of 30 cells and SQ2 with 6 cells. All cells in SQ are 6' wide, 8' long, and 8' high. SQ cells permit inmates to converse with and be seen by all staff members.

2. **Paragraph 2007 - Exercise/Recreation and Training.** Outdoor exercise areas for general population will be provided, to ensure that prisoners receive at least one hour of exercise IAW the Plan of the Day (POD) or PCF Supervisor or CO discretion. An additional exercise area is provided for those prisoners within the population who cannot participate in general population recreation call due to custody or current handling requirements. This area is contained within the locking gate. Prisoners in segregation will receive recreation call IAW the POD and their handling letter.

3. **Paragraph 6004(1) – Classification and Assignment. Maximum Custody.** Prisoners requiring special custodial supervision because of the higher probability of attempted escape due to potential length of sentence or because they are charged with a dangerous or violent offense and escape would cause concern of a threat to life or property. A prisoner may be designated as maximum custody because they [sic] have been determined to pose a threat to their own safety or another individual's safety. Ordinarily, only a very small percentage of prisoners should be classified as maximum custody.

4. **Paragraph 6004(11)(d) – SQ/SR.** Those prisoners who have either attempted or considered committing suicide will be assigned to MAX custody. Medical Officer Approval Required: When prisoners are no longer considered to be suicide risks by a medical officer they shall be returned to appropriate quarters once the PCF Commanding Officer's approval is given. The Court finds the PCF Commanding Officer is the Brig O at MCBQ.

5. **Paragraph 6004(11)(e). SQ/POI.** Those prisoners who have given an indication that they intend or are contemplating harming themselves or others *will* be assigned MAX custody. [The Court notes that this paragraph is not consistent with paragraph 6004(1) above which states that a POI prisoner *may* be considered for MAX custody.]

6. **Paragraph 8031(a) Authorized Visitors.** States the same as the SECNAVINST.

Background – Prior to Accused's Transfer to Theatre Confinement Facility Kuwait on 31 May 2010.

1. The accused's Basic Active Service Date (BASD) is 2 October 2007. He attended basic training at Fort Leonard Wood, Missouri. On 28 March 2008, in his 9th week of training, while on hold over status due to medical problems, the accused was command referred to mental health for "fits of rage." The accused reported that he was increasingly anxious because of graduation in 5 days. He reported no prior mental health history and that he was on no medications.

2. The accused graduated from basic training, completed advanced individual training at Fort Huachuca, Arizona, and did a permanent change of station (PCS) to Fort Drum on 18 September 2008.

3. On 30 June 2009, the accused was command referred to mental health at Fort Drum for difficulties adapting to his unit. His Non-Commissioned Officer In Charge (NCOIC), MSG Paul Adkins, reported that upon being confronted by his supervisor for missing morning formation, the accused began screaming uncontrollably and clenching his fists with his eyes bulged and his face contorted. He screamed three times, then stopped, caught his breath and collected himself. Neither the accused nor the mental health provider found evidence of any significant mental health problem. The accused was invited to return only if and as frequently as he desired after JRTC.

4. On 19 August 2009, the accused self-referred to Fort Drum mental health reporting that he was isolating himself, losing bearing, going downhill, crying and feeling vulnerable. He also reported that he was going to "break down" that day and described a process of bottling up emotions. The accused further reported that he was not taking medications, had a history of family dysfunction growing up, and had been on Lexapro in the past. The accused was assessed with an adjustment disorder with mixed emotional features.

5. On 15 September 2009, the accused was command referred to the Fort Drum mental health clinic. The mental health provider described the accused as presenting almost rigidly physically and emotionally throughout the discussion and when no other probable cause for his being sent is developed, his demeanor is reflected as perhaps being perceived as odd by others, though there does not appear to be anything diagnosable about it. The accused reported that both parents were alcoholics and that since separating from his mother he has had to rely on himself for survival and for that reason very carefully manages his interactions with others. The accused was assessed with a personality disorder, not otherwise specified; mild with cluster C characteristics, obsessive but not compulsive.

6. On 23 and 29 September 2009, the accused had follow up appointments at Fort Drum mental health clinic. Discussion ensued about the accused using intellectualization to avoid contacts that may for some reason be emotionally difficult for him. The 29 September 2009 assessment found the accused had adjustment difficulties typical of persons in their 20s, which he was quite consciously exploring and engaging. He was doing fine. The mental health provider anticipated one or two more meetings prior to the accused's deployment.

7. The accused deployed with his unit to Forward Operating Base (FOB) Hammer, Iraq on 11 October 2009.

8. On 24 December 2009, the accused was command referred to FOB Hammer Combat Stress Clinic for a command directed evaluation due to anger outbursts over the past month where he shoved a chair and began yelling after his NCOIC, MSG Paul Adkins, counseled him on the loss of a room key and yelled

and flipped a table when counseled by two superiors. The accused reported that in 2005, he was prescribed Lexapro by a family physician for problems he was experiencing with his step-mother and he was referred to a physician by his aunt in 2007 due to anxiety attacks he was having and was again put on Lexapro. With respect to his current situation, the accused reported he was working the night shift with three other service members and that it was lonely. He reported persistent worry and anxiety about oversleeping and being late for duty and also a hypersensitivity to criticism of his mistakes. The accused was assessed with anxiety disorder NOS with cluster B/C personality traits and insomnia. The accused had a normal mental status examination.

9. The accused had follow up visits on 30 December 2009, 6 January 2010, 16 February 2010, 2 March 2010, 16 March 2010, 23 March 2010, 30 March 2010, and 6 April 2010. The accused discussed problems he was having with a supervisor who was another E-4, his difficulties in relating to people and how that manifests itself, and his discomfort and guard when deflecting issues too close to his "comfort zone." The accused was reluctant to engage in interventions to address his discomfort with discussing emotions or sharing personal feelings. The accused was anxious and remained focused on maintaining his behavior and expecting a different outcome from other people.

10. Prior to 8 May 2010, the accused was not assessed to be at risk of harm to himself or others. On 8 May 2010, the accused was brought to the clinic by his NCOIC because he struck another Soldier in the jaw. The accused disclosed to the mental health provider that he desired to be the opposite sex when grown and that he was coming to grips with openly revealing that. He also reported that he lived openly with a wig as Breana Manning for 3 days while on leave. Although not assessing the accused as a threat for harm to himself or others, the mental health provider placed the accused on unit watch and recommended that the command bring the accused to the Combat Stress Clinic daily.

11. On 10, 12, 13, 15, and 19 May 2010, the accused had a follow up appointment at the Combat Stress Clinic. He did not show for the 12 and 15 May 2010 appointments. The accused advised that he had been transferred to the company and was doing clerical work that was beneath him. He also expressed remorse for the assault and was concerned over what his future would be in the Army. The accused remained on unit watch.

12. On 17 May 2012, the accused received a company grade Article 15 for the assault.

13. On 22 May 2010, the accused's mental health provider opined that his emotional and behavioral symptoms continue to cause impairment, the accused's progress for rehabilitation was considered poor and that a separation under Army Regulation (AR) 635-200 Chapter 5-17 be initiated.

14. On 26 May 2010, the accused had a follow up visit at the Combat Stress Clinic. He reported he received an Article 15 for the assault and had his rank reduced. The accused remained on modified unit watch without access to a weapon.

15. On 28 May 2010, the accused's mental health provider was advised that the U.S. Army Criminal Investigation Command (CID) was investigating the accused for compromising secret information. He was assessed to be at high risk of suicide, homicide or AWOL and remained on unit watch. The accused was also required to be under guard by escorts. On the evening of 28 May 2010, the accused contacted a colleague, SPC Rebecca Schwab, gave her pieces of paper, and asked her to check his email and investments for him and to open the emails, read, and write down whatever was in them.

16. The accused was placed in pretrial confinement at FOB Hammer Brig on 29 May 2010. He was transferred to the Theater Field Confinement Facility (TFCF) at Camp Arifjan, Kuwait on 31 May 2010. The accused remained at TFCF until his transfer to MCBQ on 29 July 2010.

TFCF Kuwait 31 May – 29 July 2010.

1. On 1 June 2010, the accused's initial custody classification was Medium Custody. He was held in administrative segregation in a cell in Echo-1 tent. On 2 June 2010, the accused collapsed in his cell.

2. The accused was subsequently moved into a general population 20 man tent with 3-6 other detainees. Reveille was at 2200 and the day ended at 1300-1400. The accused participated with the other detainees in outdoor recreation call and visits to the dining facility and the recreation tent.

3. On or about 9 June 2010, the accused announced in front of a group of detainees that he was gay after he became agitated that they were making negative comments about gay people. When asked on 11 June 2010, by MACM Chris Moore if he felt threatened by the other inmates, the accused responded that he didn't feel threatened but "they might feel threatened". After the interview, the accused took deep breaths as if having an anxiety attack. CAPT Balfour from Kuwait Mental Health Clinic arrived. The accused started crying saying he was sorry. He subsequently advised cadre that he was gay and a woman. He often became non- responsive to verbal communications and orders from cadre, followed by an anxiety attack. During one incident he ran around in circles outside the yard before finally laying down on the ground and refusing to stand up. The accused had to be carried back to his cell.

4. On 14 and 28 June 2010, the accused was seen at the Kuwait Mental Health Clinic to address concerns with anxiety. He presented with disheveled hair, although otherwise unremarkable. There was no evidence of current suicidal or homicidal ideation or intent.

5. On 30 June 2010, after an inspection by MA2 Murin, the accused became unresponsive to commands and began yelling uncontrollably. MA2 Murin called CAPT Balfour, the TFCF Mental Health Officer. Both of them ordered the accused into his cell. The accused refused. The accused then began screaming, shaking, babbling, and banged the back of his head into an adjacent wall. The accused then was placed into a cell in Echo-03 tent with constant watch while he continued to mumble and bang the back of his head against the floor. The accused also knotted sheets into nooses.

6. On 30 June 2010, the accused was reclassified to Maximum Custody/Administrative Segregation/Suicide Watch 1:1.

7. On 3 July 2010, CAPT Iverson, the Commanding Officer, Expeditionary Medical Facility Kuwait formally requested the Commander, Theatre Field Confinement Facility to transfer the accused to a facility with a separate locked and specialized psychiatric ward or psychiatric nurses, both of which would be required to manage a case of this level of high risk and complexity for any extended amount of time. CAPT Iverson described the accused's condition as complex and appearing to be long term requiring ongoing close monitoring (one to one observation). On 11 July 2010, the Commander, 1st Armored Division and U.S. Division, Center sent a memorandum to Commander, Army Corrections Command advising that the Commander, Third Army/ARCENT ordered the transfer of the accused from TFCF Kuwait. Although the memorandum requested transfer of the accused to Mannheim, Area Confinement Facility, Mannheim, Germany, the accused was ultimately transferred to MCBQ on 29 July 2010.

8. On 5 July 2010, the accused was advised of the original charges preferred against him. Those charges were: four specifications of Article 92, UCMJ violations and eight specifications of Article 134, UCMJ violations to include one specification assimilating18 United States Code (U.S.C.) Section 793(e), three specifications assimilating 18 U.S.C. Section 1030(a)(1), and four specifications in violation of 18 U.S.C. Section 1030(a)(2). The maximum sentence that could be imposed for the charged offenses would be

reduction to the grade of E-1, total forfeiture of all pay and allowances, confinement for 68 years, and a dishonorable discharge.

9. On 10 July 2010, the Article 32 investigating officer scheduled the Article 32 investigation for 14 July 2010. On 12 July 2010, the accused was notified. The Article 32 investigation was subsequently delayed and did not begin until 16 December 2011.

10. On 30 June 2010, the accused was seen by at the Kuwait Mental Health Clinic (USMHK). The providers, Drs. Weber and Hutcheson reported increased levels of regressive behavior by the accused to include rocking himself, sitting on floor immobile despite requests that he move, and making nooses. During the interview with the accused he stated that he didn't intend to use the nooses but he wanted to have the option of hurting/killing himself, even if he didn't really do it. He wouldn't deny current suicidal ideations and stated he wouldn't tell someone if he was thinking about doing it because that would defeat the purpose. The accused stated he was sleeping poorly and was confused with mood swings. He appeared thin and exhausted and sat almost the entire time with his knees pulled against his chest and his arms hugging his chest, looking into space as he spoke. The mental health providers noted the accused had chronic suicide ideations without any delineated plan or intent currently. The mental health providers recommended the accused to remain in his cell with alert 1:1 watch. They also proscribed Clonazepam for insomnia and Citalopram.

11. The accused had the following follow up sessions at USMHK:

a. On 1 July 2010, Dr. Weber saw the accused in his cell. His hair was disheveled, eyes red and tearful, and displayed poor eye contact, staring off into the distance. The accused reported being scared and hopeless. He again reported suicide ideation and plan without specific intent and that he would not tell anyone if he did intend to attempt suicide. Dr. Weber recommended the accused be transferred to a facility with more resources for higher care, evaluation, and treatment.

b. On 2 July 2010, the accused was seen by Dr. Richardson. In addition to the notes from 1 July 2010, this report noted that the accused was collecting several items that could potentially be used for possible self harm such as metal. The accused remained ambiguous about discussing suicidal thoughts stating he was still confused and uncertain. The accused stated clearly he would not contract for safety or notify any staff if he decided to harm himself or had increasing suicidal ideation.

c. On 4 July 2010, the accused was again seen by Dr. Richardson and Weber. The accused's glasses had been returned. During the session the accused described having been seen by a psychologist who thought he had obsessive compulsive disorder (OCPD) and possible generalized anxiety disorder and attention deficit hyperactive disorder (ADHD). When asked about suicidal ideations, the accused said "I don't know how I am supposed to feel." And again declined to contract for safety or inform staff if he had a suicidal ideation. The accused remained diagnosed elevated high risk of self harm, remained on suicide watch 1:1, and recommended to have one book in his cell.

d. On 6 July 2010, the accused was again seen by Dr. Weber. He discussed reading "Hunt for Red October" and discussed his IQ range. He appeared less anxious but reported he considers suicide an option and feels a sense of relief when he is able to have the option available if needed. He continued to decline to contract for safety or inform anyone if he had a suicidal ideation.

e. The accused was seen by Dr. Richardson 8 and 10 July 2010. Although his anxiety appeared to be superficially calmer, he remained ambiguous about his condition and safety, stating on 10 July 2010 - in response to a direct question about whether he wanted to kill himself - "not right now" and "it is always an option." Again he would not contract for safety.

f. On 12 July 2010, the accused was seen by Dr. Richardson. He admitted he would like to die and have it all be over and that he would take his life if he was sure he would die. He did not want pain but did want death. He may or may not get out of his situation and how permanent and long standing the matter was, was settling in. The accused further stated he was at peace with the option of dying and that he was a "patient man." The accused was found at heightened risk of self harm and suicide watch 1:1 remained.

g. On 14 and 16 July 2010, the accused had further follow up with Dr. Richardson. The accused was aware there was consideration about moving him to another facility. He was frustrated and wanted to be moved off suicide precautions. On 16 July 2010, the accused said he would not hurt himself but admitted that he tried to lift the pin to the cell door in the past and thought he could be successful. Dr. Richardson believed the accused's statements that he would not hurt himself were made to get off suicide precautions.

h. On 19 July 2010, the accused saw Dr. Richardson and was noticeably irritable and frustrated, stating he didn't have control over his future. Dr. Richardson determined that although the accused stated he would not kill himself, his reliability was poor. "His statements are taken in context of his assessment over a period of time. He stated previously that he had accepted his death, that he had no future, and would kill himself if he knew he would die. He had added that he is a patient man. The accused's more recent statements seem to be in context of wanting a change in status and what he wears. There is little depth to his conversation when talking about his emotions, such as when he disclosed his helplessness. When interacting with others in the correctional community, the accused acted out and decompensated. He also acted in an unreliable way (making 2 nooses, collecting other items that could potentially be used for self harm), seemingly deceitful about that. The accused has a very fragile ego which could easily decompensate in that similar environment at this time. In discussion with CAPT Balfour, there are limited resources at this facility, that combined with the member's unpredictability would create vulnerabilities for his safety."

i. On 21 July 2010, the accused saw Drs. Weber and Richardson. The accused's anxiety and frustration levels were improved. Essential elements of daily life including physical care, and intellectual, social, and spiritual health. He was reading Tom Clancy novels and reported exercising and eating well with an increasing abilities to find meaning in moments. Accused remains at elevated risk. The possibility of transfer raises his risk and is a transitional point for him. The accused was given a provisional diagnosis of Depressive Disorder NOS requiring further time and observation to make a final diagnosis.

j. On 24 July 2010, the accused saw Dr. Richardson. He was angry and irritated with a focus on trying to change his status and 1:1 watch. The accused stated he did not care about his safety in the sense of relating to the quality of his life and was considering legal action. Dr. Richardson explained that safey was the priority issue. In the recent past, when the accused was with the other inmates, there were rules that he was expected to follow and did not, that by making one or two nooses, collecting things that could potentially be used for self harm and that he did not do well emotionally in the community setting. The accused stated he understood the reasons for placing him on suicide watch but he was a "different person" now. Dr. Richardson discussed reducing the restrictions on the accused with the CO of TFCF. 15 minute checks were the next step down. Both opined the risk was still too high to implement the restriction.

k. On 27 July 2010, the accused was seen by Dr. Weber who found him to be receptive and eager to engage. The accused felt the medications were helpful and that he felt safe. In spite of the improvement, Dr. Weber did not recommend decreasing to 15 minute checks on the accused because of

the setting and limited resources in Kuwait and because the accused still demonstrated a large amount of mood lability, splitting, potential manipulation and low ego strength.

l. On 28 July 2010, Dr. Richardson prepared a summary of the mental health condition and treatment of the accused during his time in confinement at TFCF. The Assessment for Axis 1 was anxiety disorder NOS, depressive DO NOS (Provisional, R/oMDD, Probable Gender Identity Disorder (by previous assessment).

12. On 29 July 2010, the Deputy Commander of the confinement facility in Kuwait, LCDR Jeffrey Barr, prepared a memorandum for record regarding the accused's confinement in Kuwait. LCDR Barr observed that accused presented with normal behavior during intake and for the initial few days, but then began to exhibit abnormal behavior and his mental state deteriorated. Ultimately the confinement facility had to place him on 24-hour suicide watch for the remainder of his detention there. Prior to being placed on suicide watch, accused announced that he was gay when he overheard other detainees making negative remarks about homosexuals, and during the days following that incident he told cadre that he was "gay" and "a women [sic]." He would often become nonresponsive to verbal communications and orders from cadre, which was sometimes followed by an anxiety attack. During one incident, the accused ran around in circles in the yard before lying down on the ground and refusing to stand up. Cadre had to carry him to his cell. During a routine cell check, cadre found the accused curled in a ball on the floor with a bed sheet tied into a noose next to him on the floor. Mental health professionals evaluated him on several occasions throughout his confinement. They found that he had mental issues, to include being "emotionally de-compensated," and was at a high risk of harm to himself or suicide. They recommended that transfer to a facility with adequate specialized resources and mental health professionals available to manage his case over an extended period of time, which did not exist at the facility in Kuwait.

13. On 29 July 2012, the accused was transferred from TFCF to MCBQ.

MCBQ 29 July 2010 – 20 April 2011.

1. On or about June 2010, as a result of the Base Realignment and Closure Act of 2005 (BRAC 2005), MCBQ was converted from a level 1 facility to a pretrial confinement facility. Resourcing was cut 50%. MCBQ was not structured to be a long-term pretrial confinement facility. Post-trial prisoners could be held at MCBQ for 30 days pending transfer. MCBQ was not resourced to house pretrial detainees for more than 180 days (see Pretrial Confinement Zero Based Review – AE 280, volume 3 of 6, pages 00513119 and 00513073-88). Pretrial detainees housed at MCBQ after July 2010 were typically held from two weeks to three months. MCBQ was not resourced for long term mental health or other treatment programs. There were no organic mental health assets. Pretrial detainees at MCBQ were assigned custody classification of either Maximum (MAX) or Medium In (MDI). All pretrial detainees regardless of custody level were housed in individual cells in Special Quarters 1 (SQ1) that were 6' wide by 8' long and 8' high. The accused was housed in the same sized cell as all the other pretrial detainees at MCBQ regardless of custody level and status. During the 264 days the accused was in pretrial detention at MCBQ, the brig averaged between 5 and 20 prisoners staying a length of two weeks to approximately three-four months. No other prisoner during the accused's tenure at MCBQ was on POI status longer than a few weeks.

2. At the time of the accused's arrival at MCBQ on 29 July 2010, CWO4 Averhart was the Brig Officer in Charge (Brig O), MSgt Papapke was the Brig Supervisor, MSgt (then GySgt) Blenis was the Chief of Programs and the Senior Counselor. MSgt Blenis was the accused's counselor. CAPT Hocter provided mental health support for MCBQ as an ancillary duty. He was not an organic asset for the brig. He had been providing mental health services to the brig since 2006 and was the mental health provider when Marine Corps CAPT Webb committed suicide on or about Spring 2010.

3. From 2010 to the present, prevention of suicide has been a top priority for the Department of Defense and all of the military services. Suicide awareness and prevention training is mandatory across the military services. MCBQ had a pre-trial detainee suicide, CAPT Webb, during the year before the accused arrived. Many of the brig staff worked at the brig during that time. CAPT Hocter provided mental health support to the brig. He did not recommend CAPT Webb to be placed on Suicide Risk (SR) or Prevention of Injury (POI) status. CAPT Webb's suicide was a traumatic event for MCBQ staff. At the time of the accused's arrival, MCBQ staff was hyper-vigilant regarding their duty to prevent pretrial detainees from attempting or committing suicide. They also mistrusted CAPT Hocter's judgment as a mental health provider because they believed he missed the indicators for suicide risk in the CAPT Webb case. Their approach to maintaining the accused on POI status was to err on the side of caution and even over-caution.

4. On or about 28 July 2010, the brig was initially notified of the accused's arrival. They were also aware of the accused's mental health history in Kuwait. Upon learning of the accused's pending transfer to MCBQ as a potential long-term pretrial detainee, Col Choike, Quantico Installation Commander, called MG Horst, the accused's General Court Martial Convening Authority, to advise him of his concerns about MCBQs lack of resources for long-term pretrial detainees.

5. On or about 28 July 2010, Col Choike held a staff meeting including Col Oltman, Security Battalion Commander, LtCol. Greer, Quantico Deputy SJA, CWO4 Averhart, MCBQ OIC, Quantico PAO staff, and other brig staff to address management of the accused upon arrival. LtGenFlynn, Quantico Senior Mission Commander, did not attend the meeting but was aware it occurred. The brig staff as well as Col Oltman, Col Choike, Lt Col Greer, PAO, and CWO4 Averhart were aware that the accused was a high profile detainee who would bring media and other attention to Quantico brig and base. Col Oltman ordered CWO4 Averhart to prepare a weekly report regarding the status of the accused. CWO4 Averhart would forward the report to Col Oltman who would then forward the report to Col Choike. LtGenFlynn was aware of the weekly reports and received them from Col Choike, although perhaps not routinely. Weekly reports on the accused began on 10 August 2010 and continued until the accused was transferred on 20 April 2011 to JRCF, with the final weekly report prepared on 13 April 2011. The weekly reports included GySgt Blenis' weekly counseling notes of the accused and any significant events involving the accused that occurred that week.

6. After the accused arrived at MCBQ, LtGen Flynn was engaged both with Col Choike and Col Oltman on the brig side and with CAPT Mary Neill, Commander Naval Health Clinic and CAPT Hocter's supervisor, on the mental health side. On 9 August 2010 at 13:42 LtGen Flynn sent an email to Col Oltman and Col Choike with an attached 9 August 2010 New York Times article about the accused. LtGen Flynn stated that with one suicide in the brig, the command needed to cover down on lessons learned from that case. LtGen Flynn stressed the absolute necessity of keeping a close watch on the accused, to include brig, medical, chaplain, and transport personnel. LtGen Flynn believed the accuseds life has completely fallen apart making him a strong candidate (from LtGen Flynn's perspective) to take his own life. Col Choike responded that CAPT Neill agreed to prepare weekly mental health reports from CAPT Hocter regarding the accused's mental health status and to forward these reports to Col Oltman and Col Choike. The mental health status reports were in addition to the Weekly reports from the brig. On 9 August 2010 at 16:41 LtGen Flynn responded to Col Choike "Dan, Just want to be sure all know my intent and concerns. Is there a secure mental health ward at Walter Reed? What medical authority makes the call on his confinement location as well as his mental fitness? For how long are suicide watch in skivvies and a blanket proper? Please make sure that there are [sic] procedures are correct, we have good assumptions, and we are applying the regulations correctly." On 9 August 2010 at 17:23, CAPT Neill reported to Col Choike that that CAPT Hocter opined that the accused no longer needed to be on SR as of 6 August 2011 and recommended changing the status to POI. On 9 August 2010 at 18:19, Col Choike

forwarded the mental health status report to LtGen Flynn with an email stating he spoke with Col Oltman earlier who advised that the Brig O preference was to maintain SR for a few more days. [The Court notes that per the SECNAVINST the medical officer has authority to determine when to remove a prisoner from SR status. *See* para 3c above.] On 9 August 2010, at 19:50, LtGen Flynn responded via email to Col Choike asking "With the status being changed by the medical authority, what is the logic for this continuing other than OIC preference?" CAPT Neill, Col Minor, the SJA, and Col Oltman were cc'd on these emails. None of the brig staff was cc'd. LtGen Flynn did not communicate directly with the Brig O or brig staff. He did not order brig officials to classify the accused in a particular custody classification or status. He did not influence brig decisions regarding the accused's custody or classification. His intent was to ensure that appropriate regulations and procedures were being applied correctly with common sense, that the accused was receiving appropriate mental health treatment, that brig staff and mental health providers were coordinating, and that the accused was safe. Neither Col Choike nor Col Oltman ordered the Brig O or the brig staff to reach any particular conclusions regarding the accused's custody or status.

7. On the evening of 29 July 2010, the accused arrived at MCBQ and began the indoctrination phase. While completing his inmate background summary's mental health section, the accused indicated that he had considered suicide and wrote in the remarks section - "Always planning, never acting." The accused was not ordered to fill in remarks or told what remarks to write. He wrote "always planning, never acting" of his own volition.

8. The accused scored a "5" on the management factors for initial custody classification. This would result in a custody level of MDI. The Duty Brig Supervisor (DBS) did an override to initially classify the accused as MAX Custody/SR. Also on 29 July 2010, the Classification and Assignment (C&A) Board reviewed the classification of the Accused. All three members recommend MAX custody with indoctrination and SR status. The Brig O, CWO4 James Averhart, approved the recommendation of the DBS and C&A Board.

9. A 3 member C&A Board met weekly to review the accused's custody level and status. GySgt Blenis, the accused's counselor was normally the senior member of the board. GySgt Blenis prepared the paperwork and recommended custody level and status before the board met. Board results were documented in CORMIS but not Brig Form 4200.1 (Jan 11) until the review on 3 January 2011. After that review, the board results were documented on Brig Form 4200.1 until the accused was transferred from MCBQ. The Board consistently recommended that the accused remain in MAX custody and on POI status. [The accused was placed on SR status on from 18-20 Jan 11 by CWO4 Averhart]. Both Brig Os, CWO4 Averhart and CWO2 Barnes approved all of the C&A board recommendations. The decision to maintain the accused in MAX custody and POI status were based on similar factors, the accused's history of violence toward himself and others in FOB Hammer and Kuwait, his statements in Kuwait and on his intake form that he was "a patient man," "suicide is always an option," and "always planning, never acting" indicating a never-ending time when the accused may be considering suicide, the nature of the offenses charged, the length of potential sentence, poor family relationships, low tolerance for frustration, requirement for mental health treatment and on the accused's guarded interaction and lack of communication with his counselor and the brig staff. After 18 January 2011, the C&A board and the Brig O, CWO2 Barnes added factors of disruptive conduct by the accused on 18 January 2011, his statements to the board that his initial form "always planning, never acting" may have been false and that his current assurances to the board that he was not suicidal may also be false. After 2 March 2011, the C&A Board and the Brig O added factors of the accused's 2 March 2011 statement to MSgt Papapke that he could use the waistband of his underwear to kill himself, the increased stressors to the accused of receipt of new charges including "Aiding the Enemy" with a potential sentence of life without parole or death if a capital referral, the accused's almost complete withdrawal from communication with the brig staff, and his removal of a number of visitors from his visitation list. After 6 April 2011, the Brig O also considered

manipulative and false statements made by the accused to LTC Russell and increasing incidents of minor violations of brig SOP.

10. CAPT Hocter was the mental health provider for the accused from 29 July 2010 – 18 January 2011 when he deployed. Because the accused was an Army Soldier, he consulted with COL Malone, a mental health care provider from the Army to add credibility to his assessments of the accused. CAPT Hocter visited the accused at least weekly and issued a 1 page form to the C&A Board entitled "Suicide Risk and Prevention of Injury Assignment Review." (SR&POI AR). The top line of the form stated "The following action is recommended for subject: Custody; Squad Bay, Job." The "Job" portion is where SR or POI was recommended. The form then had 4 block checks: (1) whether the detainee poses a threat to himself or not; (2) whether the detainee requires further mental evaluation; (3) whether the accused needs to be segregated from general population or not; and (4) whether the detainee has low or average tolerance of frustration/stress. Below the block checks are lines for the medical officer's remarks. CAPT Hocter submitted SR&POI AR to the C&A board on the following dates:

30 July 10 – SR
6 Aug 10 – POI
20 Aug 10 – POI
27 Aug 10, 3, 10, 17, and 24 Sep 10, – Off POI/15 minute checks from MAX custody sufficient
15, 22, and 29 Oct 10, 19 Nov 10- Off POI
Undated form between 24 September and 15 October 2010, COL Malone recommended the accused be removed from POI
10 Dec 10 – POI – accused not suicidal but under great deal of stress.
13, 17, 23, and 30 Dec 10 and 7, 14 Jan 11 – off POI

The remarks column of CAPT Hocter's SR&POI AR forms were usually between 2 and 5 lines. The remarks provided CAPT Hocter's recommendation but not the reasons for his recommendation. Some of the remarks were not legible. CAPT Hocter made scrivener's errors in the block checks on 3 and 17 September 2010 misstating that the accused needed to be segregated from the general population and that the accused posed a threat to himself. These errors confused the C&A board members and led them to believe that CAPT Hocter was unreliable and was "covering his six."

11. CAPT Hocter provided mental health services as an ancillary duty for MCBQ since 2006. MCBQ officials usually followed his recommendations with respect to SR/POI status although they delayed implementing them. In the accused's case the Brig O, CWO4 Averhart delayed implementing CAPT Hocter's recommendations to remove the accused from SR to POI from 6-11 August 2010, a total of six days and again delayed removal of the accused from SR to POI on from 18-20 January 2011, a total of three. CWO4 Averhart did not implement any of CAPT Hocter's recommendations to remove the accused from POI status.

12. There was no meaningful communication between the Brig O, the C&A Board or any of the Brig staff and CAPT Hocter regarding the accused's mental health condition and what, if anything, that condition and his behaviors contributed to the necessity of maintaining the accused on POI status. In addition, the brig staff mistrusted CAPT Hocter because they believed he provided no notice of his visits, didn't spend enough time with the accused to properly assess whether he was at risk of attempting suicide, didn't provide reasons for his recommendations in the SR&POI ARs, and failed to assess the SR indicators in CAPT Webb.

13. During the CWO4 Averhart/CAPT Hocter tenure, the accused remained in MAX custody and POI from 27 August 2010 –18 January 2011 against the recommendation of CAPT Hocter except for a three

day period between 10 and 13 December 2010 where CAPT Hocter recommended the accused remain on POI because of additional stressors.

14. From 11 August 2010 – 18 January 2011, GySgt Blenis' counseling notes consistently described the accused as courteous and respectful with average to above average work reports and no disciplinary reports. The accused reported no suicidal feelings. He was cooperative with staff. The notes do not reflect that the accused complained about or asked about POI or MAX custody status. The notes did reflect that the accused was guarded in his communications with brig staff and preferred to be left alone in his cell sitting on his rack. The following odd behaviors were documented in the counseling notes:

a. 29 September 2010 - on 23 September 2010 the accused tried to send a letter signed as Briana Elizabeth Manning.

b. 20 October 2010 – the accused prefers to spend his day sitting Indian style on his rack until taps. Although he is authorized to have a book in his cell between reveille and taps, he has read only two books since his arrival.

c. 25 November 2010 – on 23 November 2010 GySgt Blenis overheard guards discussing strange unorthodox conduct observed by the accused in his cell to include: sword fighting imaginary characters in his cell; lifting imaginary weights in his cell as if displaying actual strain and exertion; and staring the mirror and making faces at himself for extended periods of time. The accused was on occasion observed licking the bars to his cell after taps. When questioned by guards, the accused acted as if he were just woken up and asked staff members how long he was there.

d. 1 December 2010 – accused observed dancing in front of the mirror in his cell.

e. 8 December 2010 – accused observed posing and flexing his muscles in front of the mirror in his cell.

f. 15 December 2010 – accused observed standing in the middle of his cell with arms spread out and staring at the floor, dancing in his cell like rave dancing and playing peek a boo with himself in the mirror.

The behaviors observed by the guards were unusual and strange and were not commonly engaged in by MAX prisoners. The brig staff and CAPT Hocter never engaged to discuss the strange behaviors exhibited by the accused and what, if anything, that meant from a mental health perspective regarding the accused's need for POI status.

15. On 11 August 2010, the accused was downgraded from MAX/SR to MAX/POI. The accused's special handling instructions provide for the following: the accused (1) will wear restraints and be escorted according to custody classification when leaving his cell. The DBS will be notified prior to the accused moving outside SQ. Control Center will commence lockdown; (2) is authorized sunshine call, television call, library call, to make and receive phone calls, Weekend/Holiday visitation in a non-contact booth; and to speak to occupants of other cells in a low conversational tone; (3) is not authorized to lie on rack between reveille and taps unless on medical bed rest, to keep any gear inside his cell with the exception of: one rules and regulations, one mattress, and one set PT gear during hours of reveille, (4) will receive toilet paper upon request only; (5) will receive one underwear and one POI blanket during taps; (6) will eat in cell with metal spoon only, will have sick call, medication call, and chaplain visits conducted at cell hatch with legal visits conducted at cell or in a non-contact booth, remain in cell during fire drills, come to the position of attention in front of hatch upon entry of any commissioned officer and will remain at attention until told to carry on; address all enlisted duty personnel by their rank at parade rest and will be required to stand at the position of attention for count until carry on is sounded. The following additional instructions also applied to the accused: (1) will receive correspondence material from 2020 -2120 to include mail, legal papers, envelopes, DD 510 forms, one pencil or pen, and one book (religious or non-religious); (2) will receive hygiene items in accordance with POD only; (3) will receive a 20 minute sunshine call in the SQ recreation yard; (4) all gear will be removed from cell after Taps with

the exception of one mattress, one underwear, and one POI blanket; (5) will wear a second chance vest when leaving the facility on temporary absence at all times. Starting on 27 October 2010, the accused's correspondence time was increased to two hours from 1920-2120 and sweat pants and a sweat top were authorized during periods of reveille. Starting on 10 December 2010, the accused was authorized one hour of recreation call in the SQ recreation yard or inside recreation area in case of inclement weather. Accused's restraints were to be removed during recreation call. Library, TV call, and phones were brought to MAX prisoners via a cart. The amount of TV call depended on the number of MAX prisoners sharing the cart. The accused frequently received more than one hour of TV call. In addition, the accused was required to be observed every 5 minutes either in person of from the guard tower. The accused was occasionally asked how he was doing and was required to respond. He was not asked how he was doing with each 5 minute check. On 15 September 2010, the Special Court Martial Convening Authority (SPCMCA), COL Coffman, advised Col Choike that the Army required monitoring of the accused's phone calls, visitation, and mail. Privileged communications between the accused and his attorneys, mental health providers, and brig chaplains were not monitored. Monitoring of detainee communications and visits was not normal standard operating procedure (SOP) at MCBQ. On or about 1 December 2010, the Brig O ordered that any unusual behavior be logged in a logbook kept by the guards solely on the accused. On or about 10 December 2010 the accused TV privileges were taken away because of news reports that the accused had committed suicide. They were subsequently restored. On 15 December 2010, the accused was provided a safety mattress with a one-piece pillow included. On 2 March 2011, the accused's handling instructions were changed to remove all gear between reveille and taps except his mattress and 2 POI blankets. On 7 March 2011, the accused received a suicide smock ordered by HQMC Security Division, Plans, Policies, and Operations (PSL).

16. The main distinctions in handling instructions between the accused while in SR status and while on POI status are that while on SR status from 18-20 January 2011, the accused was not allowed to keep one book and one set of PT gear shoes during reveille and not allowed to keep his eyeglasses unless reading or moving outside the cell and was constantly observed (1:1) rather than at 5 minute intervals.

17. From 29 July 2010 – 10 December 2010, the Accused was allowed 20 minutes of exercise rather than one hour because of his POI status not because of his MAX custody classification. On 10 December 2010, after CAPT Hocter recommended that the accused receive additional exercise time, CWO4 Averhart changed the accused's handling instructions to 1 hour of recreation/sunshine call without restraints.

18. The accused received regular command visits. He told his chain of command he did not understand why he was on POI status during every command visit except 7, 15, and 21 October and 12 and 10 and 26 November 2010. The accused consistently told his chain of command he was treated professionally by the brig guards. He never asked the command to take any action to change his MAX custody or POI status.

19. The accused was familiar with the DD 510 Request for Interview forms. On 17 November 2010, the accused submitted three DD 510s regarding an LES issue, an inquiry regarding command visits and monitoring, and a request for a subscription to "Scientific American" magazine. On 22 December 2012, the accused submitted two DD 510 requests for books and an emergency phone call to his defense counsel. The accused did not file any DD 510 requests regarding MAX custody or POI status until 7 January 2011. The accused also did not raise MAX custody/POI status with GySgt Blenis during the weekly counseling reviews or with the Brig O during his visits to SQ. GySgt Blenis did not tell the accused CAPT Hocter was recommending he remain on POI status during Oct/Nov 2010. The accused also did not raise his MAX/POI status or otherwise complain about his treatment at the brig with any of his visitors. The accused did not request to speak with other detainees or to eat outside of his cell. On 21 January 2011, the accused told the C & A board that he might need to be placed in protective custody. He

did not complain about his pre-15 December 2010 mattress, his post 15 December 2010 mattress or his POI blankets to the brig staff or, when asked about it, during a personal visit on 26 February 2011. Defense counsel began raising the issue of the accused's continuation on POI over mental health recommendations via email on 29 November 2010. Defense counsel sent a memorandum to the Brig O on 5 January 2011 requesting reduction in the accused's classification from MAX to MDI and removal from POI on the grounds that CAPT Hocter recommended the accused's custody be downgraded from MAX to MDI and recommended that the accused by removed from POI. On 13 January 2011, Mr. Coombs filed a Request for Release from Confinement Under RCM 305(g) with COL Coffman, the SPCMCA, on the same basis. On 14 January 2011, the accused advised his chain of command of the 7 January 2011 DD 510 request to change his status that had not yet been acted upon by the Brig O. On 19 January 2011 the accused filed a Request for Redress under Article 138, UCMJ. On 10 March 2011, the accused submitted a rebuttal to the response to his original Article 138 Request for Redress.

20. CAPT Hocter recommended that the accused be removed from POI. He never recommended a downgrade of custody from MAX to MDI. CAPT Hocter's recommendations to remove the accused from POI stated that 15 minute checks required by MAX custody would suffice. The custody classification decision of MAX/MDI is a Brig O decision based on the level of security required for a particular pretrial detainee.

21. There was an increase in media, international and non-governmental organization, and individual member Congressional interest in the accused's confinement conditions on or about December 2010/January 2011 and concurrently with the accused and defense counsel complaints and filings about the accused's MAX/POI custody/status. The brig received numerous requests from outside entities who were not on the accused's approved witness list to come and visit him, to include Mr. Juan Mendez, U.N. Special Rappateur and Congressman Dennis Kucinich. Such requests were directed to the DoD Office of Congressional Legislative Liaison Affairs, not the brig.

22. On 27 December 2011, LtGen Flynn called MGen Ary, Staff Judge Advocate to the Commandant of the Marine Corps, stating that while he had the utmost confidence in the way the brig is being run, he wanted to be proactive to ensure the MC held the moral high ground when responding the media. The subsequent emails among HQMC proposed outside visits to MCBQ by high level DoD officials with corrections expertise and development of fact sheets to compare MCBQ standards with DoD/ACA/BOP protocols.

23. On 14 January 2011, there was a meeting at MCBQ with the staff and CAPT Hocter and CAPT Moore. Among the issues discussed was CAPT Hocter's concern about the accused remaining on POI status. He opined POI was not justified from a medical viewpoint. CWO4 Averhart explained that the medical component was part of the overall classification assessment and the process was continually evaluated. Col Oltman and CWO2 Barnes were present at the meeting. The meeting got heated between Col Oltman and CAPT Hocter. CAPT Hocter told the brig staff to call POI something else if they wanted to maintain the accused on that status for security reasons because it was not warranted for psychiatric reasons. Col Oltman told CAPT Hocter that the accused would remain in POI status and that if keeping him in that status was required to get the accused to trial, that's what they would do.

24. On 18 January 2011, the accused had an anxiety attack at recreation call. He was being escorted by LCpl Tankersly, LCpl Cline, and GM1 Webb. All of the guards were doing their job properly. They were not harassing the accused. The conduct of the guards had nothing to do with any protest that occurred at MCBQ on or before 18 January 2011. The accused perceived the guards to be anxious so he became anxious. The accused's anxiety attack was consistent with his history at Fort Drum, FOB Hammer, and Kuwait. The accused recovered and continued his recreation call without incident. LCpl Tankersly and LCpl Cline were replaced for non-disciplinary reasons. After the accused returned to his

cell, he was visited by GySgt Blenis, MSgt Papapke, and CWO4 Averhart. They asked him how he was doing and questioned him about what happened during the anxiety attack. The accused grew frustrated when discussing the comparison between his anxiety attack and what happened in Kuwait. He put his hands up by his head and began yelling such things as "Why are you staring at me," and "Why are you yelling at me?" CWO4 Averhart placed the accused on "special move, SR". The accused initially refused to give his clothes to MSgt Papapke causing CWO4 Averhart to order a Code Blue and order that the accused be video-taped. The accused gave his clothes to MSgt Papapke and continued to argue to both MSgt Papapke and GySgt Blenis that this anxiety attack was different than Kuwait, that he was not suicidal, and that he should not be on POI. CAPT Hocter arrived and recommended the accused be taken off SR and placed on POI status for 24 hours. CWO4 Averhart did not take the accused off SR until 20 January 2011.

25. On 21 January 2011, after being questioned by 1SG Williams following his command visit with the accused on 14 January 2011, CWO4 Averhart acted on the accused's DD 510 approving his appearance before the 21 January 2011 C&A board. The accused also appeared before the C&A board on 4 February 2011 and 25 February 2011. During his appearance before the board on 21 January 2011, three days after his 18 January 2011 anxiety attack, the accused was asked about his intake statement "always planning, never acting." The accused advised the board that the statement may have been false. In response to a question of whether the board should then believe his current assurances that he was not suicidal were false, the accused replied "they may be false." These statements by the accused caused great alarm to each of the board members and exacerbated their concerns that the accused may be patiently waiting to harm himself.

26. On 24 January 2012, the brig changed command from CWO4 Averhart to CWO2 Barnes. COL Malone replaced CAPT Hocter as the primary mental health provider for the accused following CAPT Hocter's 18 January 2011 visit with the accused prior to CAPT Hocter's deployment. CWO2 Barnes and COL Malone had a much more coordination regarding the accused's mental health condition and a much better personal rapport than did CWO4 Averhart and CAPT Hocter. Together, they revised the SR/POI Assignment Review mental health forms. CWO2 Barnes also implemented the Brig Form 4200.1 (Jan 11) to document the C&A Board proceedings.

27. Beginning on 21 January 2011, COL Malone found that the accused had no current suicidal thoughts or intent and that he was psychologically cleared to come off of POI status. On 28 January 2011, COL Malone opined that the accused remained at moderate risk of self harm, had below average tolerance for frustration and had a limited ability to express or understand his feelings. COL Malone opined that the risks/benefits of POI are not further detrimental at this time. Starting on 18 February 2011, COL Malone changed the SR/POI Recommendation Form to a Report of Behavioral Health Evaluation Form for the C&A board. This form is similar to the standard mental status examination form used for mental status examinations. The form contained blocks to assess the accused's behavior, level of alertness and orientation, mood and affect, thinking process, thought content, memory and findings as to the status of the accused's mental disorder, risk for suicide/self harm, risk for violence, whether the accused has a behavioral disturbance, whether he needs to be segregated from the general population due to a treatable mental disorder, and whether and how frequently the accused needed further examination. Rather than recommending a particular status, COL Malone described the accused's current mental health status in the remarks. On 18 February 2011, COL Malone found the accused's behavior normal, fully alert and oriented, unremarkable mood and affect, clear thinking process, normal thought content, good memory and found the accused's mental disorder resolved, risk for suicide/self harm and risk for violence low, that behavioral disturbance was not applicable, that the accused did not need to be segregated from the general population due to a treatable mental disorder, and that he required routine further examination. In the remarks section COL Malone opined that the accused's anxiety disorder remains in early full remission; he is tolerating medication taper off well; he understands risks and benefits of treatment and

non-treatment; and that he responds well to intellectual stimulation. On 4, 11, and 18 March and 8 April 2011, COL Malone checked the same boxes and remarked that the accused's anxiety disorder was in remission, he was completely off his medications, remains at low risk of suicide/self harm, and that he would benefit from intellectual stimulation.

28. On 6 and 15 April 2011, LTC Russell did the mental health assessment of the accused for COL Malone. LTC Russell checked the same blocks as COL Malone, except he found the accused's mental disorder stable rather than resolved. After speaking at length with CWO2 Barnes, LTC Russell opined that the accused's presentation to him varied significantly from that observed by the brig staff. LTC Russell opined that the Brig O's decision to maintain due diligence for self-harming behavior was not unreasonable given the accused's recent withdrawal from staff and his refusal to communicate with brig staff to give them assurances of his safety if removed from POI. He further opined that the accused's behavior was likely to persist.

29. The withdrawal of the accused from his medication was not listed on the accused's chart until 23 February 2011. CWO2 Barnes thought the accused was refusing his medication until she spoke with COL Malone on 23 February 2011 and learned that because the accused had extra supervision, COL Malone was comfortable taking him off his medications. CWO2 Barnes disagreed with COL Malone's decision to wean the accused off his medications because of the accused's additional stressors and uncertainty about his future.

30. On 2 Mar 2011, the accused received notice of the current charges, including Aiding the Enemy, with a possibility of confinement for life without parole or death, if a capital referral. He also received Col Choike's response denying his Article 138 Request for Redress. The Marine Corps Base Quantico chain of command wanted COL Malone available to see the accused to assess his mental health with the arrival of these additional stressors. The accused was observed mumbling in his cell. COL Malone could not be located and was on emergency leave. On 3 March 2011, CWO2 Barnes got in touch with COL Malone who arranged to see the accused on 4 March 2011. The MCBQ chain of command was not happy about this. This incident caused LtGen Flynn to fully engage with CAPT Neill to coordinate with the Army to get additional mental health support for the accused and for MCBQ.

31. On 2 March 2011, shortly before taps, MSgt Papapke was advised by a guard that the accused did not understand why he had to give up his clothes except underwear at night. MSgt Papapke spoke with the accused who continued to insist he didn't understand why all of the items are taken except his underwear with the elastic band that is the most dangerous piece. The accused was chuckling briefly as if the conversation was absurd. MSgt Papapke told CWO2 Barnes of the comment. CWO2 Barnes ordered that the all of the accused's gear except one mattress and 2 POI blankets be removed from his cell after taps to include his underwear, shower shoes, and eyeglasses. CWO2 Barnes cited SECNAVINST para 4-14(d)(5)(b) as authority to remove the accused's underwear. This paragraph applies only to SR risk status not POI. However, the Court finds that SECNAVINST paragraphs 4-14(a) and (b) give authority to the Brig O authority to restrict privileges for prisoners in SQ when they must be withheld for reasons of security or safety. This would include authority to remove clothing, to include underwear, in cases where the Brig O has reason to believe the clothing was necessary to be removed for security or safety reasons for a period of time that is not excessive in relation to the legitimate Government interest in protecting pretrial detainees from self-harm.

32. The proper mode of communication from a pretrial detainee to a guard when asking a question was to address the guard by his rank and then ask the question. There was no requirement for detainees to refer to themselves in the third person. The accused was aware of this through indoctrination. The accused did not refer to himself in communications with staff in the 3rd person as reflected during his 26 February 2011 personal visit when he asked "LCpl, can I turn on the light?"

33. On the morning of 3 March 2011 prior to reveille, the accused's clothes were not in his feed tray. He stood at attention during count naked, without covering himself with his POI blanket, as was his normal practice. The accused had never done this before. While in POI status from 11 August 2010 until 2 March 2011, the accused had his clothes removed from taps to reveille except underwear and shower shoes. He stood for count covering himself with his POI blanket. The accused testified that he attempted to stand with his POI blanket covering himself and was told by a guard "Is this how you stand at parade rest?" The accused testified that he requested clarification from the guard by asking "LCpl, detainee Manning asks if he has to put the blanket down." He testified that he received a "yes" response and took it as an implied task to drop the POI blanket and stand naked at parade rest and then at the position of attention during count. Nobody from the brig staff ordered the accused to stand naked at the position of attention during count. The brig staff did not consider the incident significant until the 4 March 2011 New York Times Article entitled "Soldier in Leaks Case Was Jailed Naked, Lawyer Says."

34. On 3 March 2011 after count, the accused made a telephone call to Mr. Coombs. Mr. Coombs maintains a blog on this case. On 4 March 2011, the New York Times article was printed stating in relevant part that "A lawyer for PFC Bradley Manning has complained that his client was stripped and left naked in his cell for seven hours on Wednesday." The article quoted the following taken from Mr. Coombs' blog. "The Soldier's clothing was returned to him Thursday morning, after he was required to stand naked outside his cell during an inspection. This type of degrading treatment is inexcusable and without justification. It is an embarrassment to our military justice system and should not be tolerated. PFC Manning has been told that the same thing will happen to him again tonight. No other detainee at the brig is forced to endure this type of isolation and humiliation." From 4 March 2011 – 20 April 2011, the accused was ordered to relinquish all items from his cell except his suicide mattress and 2 POI blankets. The accused was given a suicide smock to wear starting on 7 March 2011. There is no evidence before the Court that the accused was ordered by anyone in the brig to stand naked outside his cell at any time or to stand naked at any time after the morning of 3 March 2011. On 4 March 2011, the accused's clothes were in his feed tray prior to count. He was semi or completely dressed prior to reveille.

35. On 4 March 2011, LtCol Wright from HQ MC, Law Enforcement and Corrections Branch, Security Division Plans, Policies, and Operations (PSL), the proponent for SECNAVINST 1640.9, wrote an email to Col Oltman stating that it was the professional opinion at PSL that they had concerns about recent decisions made by the Brig O and that "to take measures that are consistent with suicide watch but not officially place that person on a suicide watch status is inconsistent with the way we are supposed to do business."

36. LtGen Flynn knew nothing of the new handling instructions regarding the accused until he read about them in the New York Times on 4 March 2011. LtGen Flynn was not happy to learn about them this way. He contacted Col Choike to relay his intent that any changes in the accused's handling instructions or assignment must be briefed to Col Choike and passed on to LtGen Flynn before execution. LtGen Flynn's intent was to ensure he would be prepared to address political impact, media interest, legal ramifications, and senior leadership reaction to any changes in handling instructions. The guidance came after CWO2 Barnes increased restrictions on the accused. There was no attempt by LtGen Flynn, Col Choike, or Col Oltman to prevent CWO2 Barnes from easing restrictions on the accused or to chill her discretion in making custody or status determinations for the accused.

37. Prior to the 4 March 2011 New York Times Article, LtGen Flynn was coordinating with HQMC, HQDA, and the mental health chain of command to provide permanent mental health support both for the accused and for MCBQ and for additional assets for MCBQ if it continued to serve as a *de facto* joint regional Personnel Confinement Facility (PCF). He was also coordinating PAO responses to queries

regarding the confinement conditions of the accused and inviting visits from outside inspectors general and officials with corrections experience to visit MCBQ to ensure that the brig was confining the accused IAW properly IAW confinement regulations and procedures. LtGen Flynn's guidance after 4 March 2011 to Col Choike was to ensure he was briefed before any changes to the accused's handling instruction occurred so he would be prepared to fully explain what occurred and why. LtGen Flynn did not intend to influence the decisions of the Brig O regarding the accused's custody, status, or handling instructions. The Brig O did not perceive LtGen Flynn's guidance as a constraint on her discretion.

38. On 14 January 2011, LtGen Flynn ordered Col Choike to conduct a zero based review of MCBQ to assess MCBQs resourcing and viability of designating MCBQ as a Joint or Regional PCF with associated funding and manpower. The review found in relevant part that MCBQ was not resourced to house long-term pretrial detainees for more than 180 days and was not resourced to house high profile pretrial detainees requiring maximum security and with complex mental health issues. The zero based review further recommended that the brig policy provision changes: (1) the provision mandating detainees in SR/POI receive a custody classification of MAX should be changed to provide that custody and status evaluations be conducted separately; (2) clarify the authority of a Medical Officer to determine what protective measures are necessary based on a mental health evaluation, and of a Brig O to impose, or re-impose, additional protective measures based on subsequent behavior; (3) establish separate SQ and general population quarters; and (4) ensure that the Brig O returns detainees to the appropriate conditions or quarters when no longer considered to be suicide risks by a Medical Officer. The SOP should also state that, absent additional factors, the Brig O may not place, or return, a detainee to SR status and impose associated protective measures. Ultimately the zero based review recommended the confinement facility at MCBQ be closed.

39. On 20 April 2011, the accused was transferred to the Joint Regional Confinement Facility (JRCF), Fort Leavenworth, KS. He was classified MDI and remains at the classification level to date with one disciplinary review board. JRCF does not have POI status.

40. After the accused's transfer, HQMC, PSL sent guidance to MCBQ to ensure that custody and classification were separate determinations. As a matter of correctional practice, similar factors are considered to determine MAX custody and POI status.

The Law:

1. Article 13, UCMJ prohibits the imposition of (1) punishment prior to trial and (2) conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure the accused's presence for trial. Prong one involves a purpose or intent to punish determined by examining the intent of detention officials or by examining the purposes served by the restriction or condition and whether such purposes are reasonably relate legitimate government objective. The second prong applies only when an accused is in pretrial confinement. Prong 2 examines whether conditions are sufficiently egregious to give rise to a permissive inference that the accused is being punished or the conditions may be so excessive as to constitute punishment. *United States v. King,* 61 M.J. 225 (C.A.A.F. 2005).

2. Under both prongs, the burden is on the Defense to show military officials intended to punish the accused or that the restrictions imposed were excessive or otherwise not reasonably related to legitimate government objectives. *U.S. v. Harris,* 66 M.J. 166 (C.A.A.F. 2008).

3. Sentence credit is the appropriate remedy for Article 13, UCMJ violations IAW RCM 305(k). *U.S. v. Williams,* 68 M.J. 252 (C.A.A.F. 2010). Dismissal is also a possible remedy that is rarely appropriate and should be exercised only under the most egregious circumstances so as not to exonerate an accused

for reasons unrelated to guilt or innocence and thereby preclude the public's interest in deterring the commission of serious misconduct. *U.S. v. Fulton,* 52 M.J. 767 (A.F. Ct. Crim. App. 2000).

4. Conditions of confinement relate to both ensuring the accused's presence for trial and the security needs of the confinement facility. Military Courts should be reluctant to second-guess the security determinations of confinement officials. *United States v. Crawford,* 62 M.J. 411, 414 (C.A.A.F. 2006). Maintaining security and order and operating the institution in a manageable fashion are peculiarly within the province and professional expertise of corrections officials, and, in the absence of *substantial evidence* in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. *Id.* (quoting *Bell v. Wolfish,* 441 U.S. 520, 540 n.23 (1979)). The test is (1) is there an intent to punish or stigmatize a person awaiting disciplinary action; and (2) if not, were the conditions reasonably in furtherance of a legitimate non-punitive objective? *United States v. Starr,* 53 M.J. 380 (C.A.A.F. 2000). The Court finds that "reasonably" includes an analysis of whether restrictions taken by military officials are excessive in relation to the legitimate government interest involved.

5. The Eight Amendment protection against cruel and unusual punishment does not apply to prisoners who have not been convicted and sentenced – or in other words, punished. Pretrial detainees challenging pretrial confinement conditions as unlawful pretrial punishment do so via the Due Process Clause of the Fifth Amendment to the U.S. Constitution. *U.S. v. Bistrian,* 2012 WL 4335958 (Third Cir. 2012). Like Article 13, UCMJ, the Fifth Amendment Due Process clause protects pretrial detainees who have not been convicted and sentenced from being punished. Conditions reasonably related to a confinement facilities' interest in maintaining jail security are not unlawful pretrial punishment. Like Article 13, the test under the Fifth Amendment for whether a particular measure amounts to unlawful pretrial punishment is whether there is an express intent to punish, when the restriction or condition is not reasonably related to a legitimate non-punitive government purpose, or when the restriction is excessive in light of that purpose in light of the totality of the circumstances. *Bell v. Wolfish,* 441 U.S. 520 (1979). The Court finds that the 'excessiveness" in relation to government interest is included in the Article 13 analysis of whether a condition of confinement is reasonably related to a legitimate government interest. The Court has not been presented with any evidence that sentence credit is a remedy for Fifth Amendment violation of unlawful pretrial punishment. Dismissal of charges under the Fifth Amendment Due Process clause is appropriate only in rare instances where the government has engaged in outrageous conduct. *U.S. v. Djokich,* 2012 WL 3711536 (1st Cir. 2012). As such, the Court encompasses the Fifth Amendment challenge in its Article 13, UCMJ findings of fact and conclusions of law.

6. Confinement in violation of service regulations does not create a per se right to sentence credit under Article 13, UCMJ. *U.S. v. Williams,* 68 M.J. 252 (C.A.A.F. 2010) citing *U.S. v. Adcock,* 65 M.J. 18 (C.A.A.F. 2007). Failure to follow the requirements of a regulation such as the SECNAVINST as it relates to the conditions of pretrial confinement, is not determinative on the issue of a violation of Article 13. *U. S. v. McCarthy,* 47 M.J. 162, 168 (C.A.A.F. 1997).

7. [*D*]*e minim*is impositions . . . are not cognizable under Article 13, UCMJ. *United States v. Corteguera,* 56 MJ 330 (C.A.A.F. 2002).

8. Long-term classification of a pretrial detainee in MAX custody is not automatically a violation of article 13. *McCarthy,* 47 M.J. at 168. Even if the accused is confined as a pretrial detainee for a long time, he is not allowed to dictate the conditions of his confinement. *U.S. v. Willenbring,* 56 M.J. 671 (A. Ct. Crim. App. 2001). Decisions to place pretrial detainees into MAX custody status based on arbitrary policies that do not examine the individual circumstances of the accused or based solely on the charges rather than a reasonable evaluation of the facts and circumstances in a case can violate Article 13, U.C.M.J. *U.S. v. Crawford,* 62 M.J. 411 (C.A.A.F. 2006) *U.S. v. Evans,* 55 M.J. 732 (N.M. Ct.Crim.App.

2001); *U.S. v. Anderson,* 49 M.J. 575 (N.M. Ct. Crim. App. 1998 (brig policy requiring custody level of MAX for detainees who face more than five years confinement is arbitrary and constitutes unlawful pretrial punishment in violation of Article 13). However, the nature and seriousness of the offense and potential length of sentence are relevant factors brig officials may consider in determining custody level. *U.S. v. Harris,* 2007 W.L. 1702575 (N.M. Ct. Crim. App. 2007).

9. Preventing suicide is a legitimate government interest. *U.S. v. Williams,* 68 M.J. 252 (C.A.A.F. 2010).

10. Failure of the accused to contemporaneously complain is strong evidence that Article 13 was not violated. Subsequent good behavior does not serve to revise the facts as they existed and were known to brig authorities. *U.S. v. Crawford,* 62 M.J. at 415 *quoting U.S. v. Huffman,* 40 M.J. 225, 227 (C.M.A. 1994)). However, the fact that an accused or defense counsel does complain does not prove that an Article 13 violation occurred. *U.S. v. King,* 61 M.J. 225 (C.A.A.F. 2005).

11. The views of United Nations officials, such as the Special Rapporteur in this case, may serve as a useful interpretative aid, but do not possess the force of law unless Congress has endowed them with such authority, and are not controlling of legal determinations in American courts. *INS v. Aguirre-Aguirre,* 526 U.S. 415 (1999). There has been no evidence presented that Article 13, UCMJ was enacted to implement any international obligations of the United States. *Medallin v. Texas,* 554 U.S. 759 (2008).

Conclusions of Law:

1. The Defense Challenges the periods the Accused remained on SR over CAPT Hocter's recommendation as unlawful pretrial punishment. The Government concedes that maintaining the accused on SR after a mental health provider determined he was no longer a suicide risk constitutes unlawful pretrial punishment under Article 13. The Court agrees. The accused will receive 1 day confinement credit starting the day after CAPT Hocter recommended the accused be removed from SR. Thus the accused will receive sentence credit for pretrial punishment in violation of Article 13 from 7-11 August 2010 and 19-20 January 2011, a total of 7 days.

2. From on or about December 2010 until the accused was transferred to JRCF on 20 April 2011, the accused's conditions of confinement generated a lot of media, non-governmental organization (NGO), international entity, and individual Congressional attention. Individuals from these organizations, to include Mr. Mendez, U.N. Special Rapporteur and Congressman Kucinich, requested to visit the accused. MCBQ did not deem these as "official visits," and elevated inquiries from such individuals or entities to visit the accused in an unmonitored status to higher headquarters Marine Corps, Army, or DoD. This was appropriate. Neither Mr. Mendez nor Congressman Mr. Kucinich nor any other member of a NGO or international entity were on the accused's visitation list. What, if any, visitation between individual members of international or NGO entities and individual Congressmen acting on their own recognizance is within the discretion of the Executive branch. There has been no evidence presented that Article 13, UCMJ was enacted to implement any U.S treaty or other foreign affairs obligation of the United States. The Court further defers to the agency interpretation of its own regulations. Denial of or monitoring of visits by NGOs, international bodies, or Congressmen acting in their individual capacities is within the discretion of the Executive Branch and does not constitute illegal pretrial punishment under Article 13, UCMJ.

3. The accused was not held in solitary confinement. Solitary means alone and without human contact. Although the accused was confined by himself in a cell similar to that of the other detainees at MCBQ, he had daily human contact. There were no additional doors separating the accused's cell from the main hallway. He could view all activity going on in the hallway. The accused had weekly visits with his counselor and mental health professionals as well as daily walk through visits by the Brig O.

4. Throughout the duration of the accused's pretrial detention at MCBQ, the C&A board met weekly to assess the accused's custody level and classification. Although there was some confusion in the brig policy over whether POI status required MAX custody, the C&A board independently determined the accused should be detained in MAX status relying on factors set forth in the SECNAVINST independent of POI, primarily the nature of the accused's offenses, the potential length of sentence, low tolerance for frustration, continuing need for mental health evaluation, and poor family relationship. GSgt Blenis prepared and presented his recommendation as to custody and classification as the accused's counselor while simultaneously serving as the senior member of the board. Although this procedure was not ideal, the Court finds each member of the C&A board reached his determination independently and the board procedures were conducted and reported within the SECNAVINST guidance. The Court further finds that CWO4 Averhart and CWO2 Barnes made independent judgments with regard to each of the accused's custody/classification determinations. Although Col Oltman concurred with both CWO4 Averhart and CWO2 Barnes' determinations, he made no attempt to influence their decisions. Col Oltman concurred after the determinations were made. Neither Col Choike nor LtGen Flynn attempted to influence the decisions of either CWO4 Averhart or CWO2 Barnes with respect to custody or classification of the accused. On 14 January 2011, heated words were exchanged between Col Oltman and CAPT Hocter. Col Oltman stated if it were necessary for the accused to appear at trial, the accused would stay on MAX/POI while under his watch. By these comments, Col Oltman did not attempt to influence CWO2 Barnes in her custody/status decisions. He did not in fact influence her custody/status decisions regarding the accused. Throughout the accused's detention at MCBQ, when Col Oltman was briefed by CWO4 Averhart or CWO2 Barnes regarding the accused custody, classification, or handling instructions, the briefing occurred to advise Col Oltman of the decisions after they had been made. The Brig O's decision to maintain the accused in MAX custody throughout his confinement at MCBQ was based on an individualized consideration of the accused and the SECNAVINST factors. This was neither an abuse of discretion nor a violation of Article 13.

5. As early as the arrival of the accused, LtGen Flynn's intent was to ensure MCBQ was following regulations and procedures properly with common sense in detaining the accused. He wanted to hold the moral high ground. LtGen Flynn was consistently engaging with the mental health chain of command, HQMC Corrections, and the Army at the HQDA level to obtain additional mental health to enable MCBQ to effectively maintain the accused as a long-term pretrial detainee. As the Senior Mission Commander equivalent of MC Quantico, LtGen Flynn had a need to know of any changes in handling instructions, custody/status, or other confinement conditions for the accused so he was prepared to engage and inform higher headquarters, PAO, and others who were informing the public about MCBQ to ensure accurate information was being relayed about the accused's conditions of confinement.

6. There was no intent to punish the accused by anyone on the MCBQ staff or in the MC Quantico chain of command. Their intent was to ensure the accused was safe, did not hurt or kill himself, and was present for trial. MCBQ staff was also concerned about the security of MCBQ, its staff, and other prisoners there.

7. The charges are serious in this case and there was no intent to punish the accused. Dismissal of charges is not an appropriate remedy for any Article 13, UCMJ violations in this case.

8. Preventing a pretrial detainee from injuring or killing himself is a legitimate government interest. The use of POI as a status is a reasonable tool for advancing that interest. Unlike SR, where the decision to remove is made by a medical officer, the SECNAVINST leaves the POI removal decision to the Brig O. In this case, the accused was held in long-term POI status based largely on his mental health history and his mental health condition with restrictions approaching those of SR. At some point, continuing POI

over the recommendation of mental health professionals becomes excessive in relation to the legitimate government interest absent changes in circumstances.

9. With respect to the CWO4 Averhart/CAPT Hocter tenure, there was no meaningful engagement between the brig staff and CAPT Hocter. The brig staff did not trust CAPT Hocter. CAPT Hocter recommended that the accused be removed from POI on 27 August 2010. The Brig O had the discretion to maintain the accused on POI after that recommendation for a reasonable period of time. The reasonableness of time includes consideration of the accused's history of suicidal ideation and violent behavior in Kuwait, the ambiguous statements made by the accused regarding suicide as an option indefinitely, and the accused's continued guarded communication with brig staff. The Court finds that continued maintenance of the accused on POI status over mental health recommendation after 1 November 2010 was excessive in relation to the legitimate POI interest resulting in the accused being held in conditions more rigorous than necessary except for the period of 10-13 December 2011 where CPT Hocter recommended the accused remain on POI. The court will award 1 day of sentence credit from 1 November 2010 – 17 January 2011, (minus 10-13 December) a total of 75 days.

10. The accused's panic attack on 18 January 2011 followed by his comments on 21 January 2011 and 2 March 2011 in light of his behavior and comments in Kuwait caused reasonable concern for the brig staff. Continuing the accused on POI, notwithstanding the recommendations from mental health professionals, was not excessive in relation to the legitimate government interest in preventing the accused from injuring himself or others. There was no Article 13 violation from 18 January – 3 March 2011 and a reasonable period thereafter.

11. CWO2 Barnes had authority to remove the accused's underwear when he made a direct comment about the ability to commit suicide with the waist-band. However, this removal does approach SR restrictions and, at some point, the accused's comments must be considered in context and in connection with his mental health diagnosis even if the brig officials disagree with the diagnosis/treatment plan of the mental health professional. The Court sets that point at 1 April 2011. Maintaining the accused in POI status over the recommendation of the mental health professionals when his mental health condition was in remission and without considering the context of the 2 March 2011 communication by the accused became excessive in relation to the legitimate government interest. This decision is a very close call. In March/April 2011, the accused removed visitors from his visitation list, withdrew completely from communication with brig staff even after being advised that if he provided assurances to the Brig O and explanations of his behavior, he could be taken off POI status, was engaging in a subtle increase in rule violations, and was not truthful in statements to LTC Russell. These factors are balanced by the fact that the Brig O was aware the accused believed his comments of 21 January 2011 and 2 March 2011 were being used against him to continue his POI status and the history of maintaining the accused on lengthy POI status without meaningful mental health provider input. The Court will grant day for day sentence credit from 1-20 April 2010, a total of 20 days.

12. Although the SECNAVINST does not affirmatively state that one hour is required exercise time for all prisoners, the testimony from CWO5 Galaviz, CWO2 Barnes, and LTC Hilton, as well as the DS section of the SECNAVINST and MCBQ policy indicate that 1 hour of exercise is the standard for all prisoners unless limited because of prisoner behavior or staff resource constraints. The Court finds neither existed to systematically limit the accused to 20 minutes of exercise call from 29 July 2010 – 10 December 2010. This violation, although not *de minimus,* is minor. One for one day sentence credit is excessive and disproportionate to the Article 13, UCMJ violation; the Court grants 10 days of sentence credit.

13. Any comments that may be perceived as derogatory statements made about the accused in emails between brig staff are *de minimus,* were not communicated to the accused or any other prisoner, and were not humiliating to the accused. No sentence credit is warranted.

14. Monitoring the accused's communications and visitation under circumstances where the accused is charged with disclosing a huge volume of classified information is legitimate government interest and does not violate Article 13.

15. The court recognizes that RCM 305(k) could provide an independent basis for additional credit. *U.S. v. Williams,* 68 M.J. 252 (C.A.A.F. 2010). Having considered the totality of the circumstances as set forth above, RCM 305(k) and the granted Article 13 credit, the Court does not believe additional credit is warranted.

RULING: The accused will be credited 112 days of sentence credit for Article 13 punishment.

SO ORDERED this 7th day of January 2013.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit