



While the system of bells that keeps time on ships is unchanging from generation to generation, the speedy-trial clock saw a major update in 1991. (Credit: Mark C. Olsen)

Practice Notes

It's Not Too Late to Start Doing Speedy Trial Right

By Lieutenant Commander Gabriel Bradley, U.S. Navy

There is a common fallacy regarding the speedy-trial clock under Rule for Courts-Martial (RCM) 707. Many believe that for a requested period of pre-referral delay to be excluded from the RCM 707 period, the delay must be both: (1) approved by the convening authority or preliminary hearing officer (PHO), and (2) classified as “excludable” by the convening authority or PHO. This view is so widespread that it has been suggested in dicta by the U.S. Navy-Marine Corps Court of Criminal Appeals.¹ However, it “just ain’t so.”²

All pre-referral delay approved by the convening authority or PHO—to whom the convening authority may delegate approval authority³—is excluded from the RCM 707 period. Regardless of who requests the delay or for what reason the delay is requested, a convening authority or PHO cannot simultaneously approve a delay and classify that same delay as being included in the RCM 707 period.⁴ Let me explain.

RCM 707 gives the Government 120 days to bring the accused to trial.⁵ Some periods of delay are automatically excluded from the 120-day period, such as when the accused is absent without authority.⁶ Also, the rule says, “All other pretrial delays approved by . . . the convening authority shall be similarly excluded.”⁷ The text of the rule contains only one limitation on the convening authority’s power to approve delay—it must be done prior to referral of charges.⁸ (After referral, it is the military judge who decides whether to approve delay.⁹) Case law also requires that the delay be for a reasonable time.¹⁰

Because “[a]ll . . . delays approved by . . . the convening authority shall be . . . excluded”¹¹ from the RCM 707 period, it makes no difference which party requested the delay. Nor does it matter why the delay was requested. All that matters is whether the convening authority (or PHO) approved the delay.¹²

In days gone by, under a prior version of RCM 707, pretrial delay attributable to the Government was included in the 120-day period, while pretrial delay attributable to the defense was excluded.¹³ This often led to protracted litigation seeking to attribute responsibility for any and all delay. In *United States v. Dies*, the Court of the Appeals for the Armed Forces described such litigation:

What resulted often were pathetic side-shows of claims and counter-claims, accusations and counter-accusations, proposed chronologies and counter-proposed chronologies, and always the endless succession of witnesses offering hindsight as to who was responsible for this minute of delay and who for that over the preceding months. The military judge then had to sift through this minutiae and make factual determinations regarding events long passed and often vaguely indicated. Regularly, the record of these collateral matters exceeded in length that of the merits and the sentencing phases combined.¹⁴

Does that sound familiar? If so, that is probably because the habit of seeking to attribute responsibility for delay persists, even though that framework was eliminated from RCM 707 in the early 1990s.¹⁵

In a recent case, when defense counsel requested a continuance of the preliminary hearing, trial counsel responded that the Government “does not oppose this continuance request provided the PHO deems the delay between 18 June and 15 July excluded for [RCM] 707 purposes.”¹⁶ The proviso is unnecessary; if the PHO approves the delay, it is perforce excluded. For the same reason, a trial counsel requesting or agreeing to pre-referral delay cannot accept that delay as being included in the RCM 707 period.¹⁷ Approved delay is excluded even if the trial counsel asked for the delay or would agree to it being included.

In another case, the PHO appointing order read, like many others,

Authority to grant continuances in this matter pursuant to [RCM 707]

of up to thirty days from the dates in this letter is delegated to the [PHO]. . . . Pursuant to [RCM 707], you are also authorized to make a finding of excludable delay for any requests for delay; this finding must be in writing and included in your report.¹⁸

The “also” language incorrectly suggests that an approval of delay is not already sufficient to exclude the delay from the RCM 707 period.

specifically granted the authority to grant one continuance for a reasonable duration up to three weeks in the subject case and, where appropriate, exclude the time from the Government’s R.C.M. 707 speedy trial clock.”²² The phrase “where appropriate” misleadingly suggests that the question whether to approve delay is distinct from the question whether the delay should be excluded from the RCM 707 period, which, as discussed above, it is not. The same publication includes a sample PHO order

Since *all* approved pre-referral delay is excludable, any litigation seeking to attribute responsibility for approved delay is pointless, and any so-called “finding” by the convening authority or PHO purporting to attribute responsibility for approved delay is irrelevant in determining excludable delay under RCM 707.

In that same case, defense counsel requested seven days of delay, writing, “The Defense respectfully objects to excludable delay for this requested one-week continuance.”¹⁹ The defense request went on to allege a number of dilatory acts by the Government that supposedly justified the PHO approving delay while also ruling that the same delay was included in the RCM 707 period. Rather than simply point out that all approved pre-referral delay is excludable, trial counsel proclaimed her own diligence and argued that the requested delay should be excluded from the RCM 707 period because the “existence of a 4-day-long gap between the Government’s request for counsel package and detailing of defense counsel is beyond the Government’s control.”²⁰ So we see that the “claims and counter-claims” that pervaded under the old rule have not fully gone away, notwithstanding that the legal basis for making such arguments was eliminated long ago.²¹

Why do military attorneys continue to argue under a rule that has not applied for over thirty years? Apparently some new lawyers are still being trained that way. A sample PHO appointing letter published by the Naval Justice School reads, “You are

approving delay, which reads, “This delay is requested by and therefore attributable to the defense.”²³ This language suggests that attribution of responsibility for the delay is somehow relevant to the RCM 707 calculation, but there has been no support for such a notion in RCM 707 since 1991.

To be sure, any party requesting delay should state the reasons for the request.²⁴ And the best practice is for the convening authority or PHO to make a written record of the reasons why delay was approved.²⁵ But since *all* approved pre-referral delay is excludable, any litigation seeking to attribute responsibility for approved delay is pointless, and any so-called “finding” by the convening authority or PHO purporting to attribute responsibility for approved delay is irrelevant in determining excludable delay under RCM 707.

How about after referral? Can the military judge look back and retroactively decide that some of the approved pre-referral delay should be included in the RCM 707 period? No, not really. Whether to approve pre-referral delay is within the “sole discretion” of the convening authority.²⁶ And when the convening authority’s power to approve delay has been delegated



Litigation seeking to attribute responsibility for delay is often a waste of time because all approved pre-referral delay is excluded from the RCM 707 period, regardless of who requests the delay or for what reason. (Credit: AIC Albert Morel)

to the PHO, the PHO enjoys the same discretion.²⁷ A military judge will revisit the issue only if the convening authority or PHO abused its discretion by approving the delay.²⁸ As the abuse-of-discretion standard is the classic expression of deference,²⁹ and that standard will be satisfied in only the most egregious cases, the decision of the convening authority or PHO will almost always be final.

Of course, there is not just one speedy-trial right; there are several.³⁰ RCM 707 is merely a rule of criminal procedure. The U.S. Constitution also guarantees a speedy trial.³¹ So too does Article 10 of the Uniform Code of Military Justice for an accused in pretrial confinement.³² Yet the constitutional and statutory speedy-trial rights do not operate by a precise “clock” in the same way RCM 707 does.

In determining whether a constitutional or statutory speedy-trial violation has occurred, a court is guided by the four factors established by the U.S. Supreme Court in *Barker v. Wingo*: (1) length of the delay, (2) reasons for the delay, (3) whether the accused objected, and (4) prejudice to the accused.³³ In conducting this analysis, the military judge will sit as the factfinder and will make any legal determinations de novo.³⁴

De novo review is the classic expression of no deference.³⁵ In determining “the reasons for the delay” under *Barker*,³⁶ the military judge may consider the reasons stated by a party in a request for delay. The military judge may also consider the reasons stated by the convening authority or PHO in a grant of delay. The military judge might be persuaded by such a statement of reasons,

but a military judge will not *defer* to the convening authority or PHO regarding the reasons for the delay. As an independent factfinder, the military judge will make up their own mind about what the reasons for the delay were. So outside the RCM 707 context, it makes even *less* sense for the convening authority or PHO to make a “finding” that attributes responsibility for delay. A contemporaneous statement of reasons may be probative, but a mere conclusion is unlikely to be helpful in the military judge’s analysis.

Armed with a clear-eyed understanding of RCM 707, there are several ways military justice practitioners can tighten things up. The staff judge advocate (SJA) preparing a written grant of pre-referral delay for signature by the convening authority can omit misleading language purporting to attribute

a period of delay to one party or another. When preparing a PHO appointing order for signature by the convening authority, the SJA can omit misleading language encouraging the PHO to make a finding as to whether a period of approved delay is excludable. Counsel requesting delay can simply state the reasons why delay is needed, without also presenting arguments and evidence as to whether the requested delay should be “excludable” or “not excludable.” Likewise, counsel responding to a request for delay can simply inform the convening authority or PHO of any facts germane to whether the delay should be approved, without being provoked into an exchange of “accusations and counter-accusations” about which attorney has dragged their feet more.³⁷

Most importantly, the convening authority or PHO, when considering a request for delay, should do so unburdened by the fallacious notion that they have the option of including approved delay in the speedy-trial clock.

The fact that a misconception about a basic rule of procedure has been uncritically adopted by so many lawyers for so long is a stark reminder of the danger of giving in to the inertia of the way things have always been done. There is no substitute for consulting primary sources. Although it is tempting to simply imitate more senior counsel, based on the assumption that they doing things correctly, military justice is a dynamic and ever-changing practice area, and it can be a struggle to stay current on the law. But the good news is, it is not too late to start doing speedy trial right. **TAL**

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Notes

1. The court noted that if defense counsel’s request to delay the preliminary hearing by twenty days was “approved as excludable delay” then there would be no RCM 707 violation. *United States v. Aguilar*, No. 202300092, 2024 CCA LEXIS 398, at *6 (N-M. Ct. Crim. App. Sep. 30, 2024). At a pretrial hearing, the Government “presented only evidence that the delay had been requested, not that it had been approved or classified as excludable.” *Id.* Later, the Government provided an affidavit from the PHO attesting that he had granted the continuance request “along with the Government’s request that the [twenty] days be excludable.” *Id.* at *7.

2. “T’ain’t what a man don’t know that hurts him; it’s what he knows that just ain’t so.” Mark Twain is sometimes credited with authoring this and similar quips, but that too just ain’t so. *See* Alex Shephard, “*It Aint What You Don’t Know that Gets You into Trouble*,” *Which Must Be Why The Big Short Opens with a Fake Mark Twain Quote*, *NEW REPUBLIC* (Dec. 29, 2015), <https://newrepublic.com/minutes/126677/it-aint-dont-know-gets-trouble-must-big-short-opens-fake-mark-twain-quote> [<https://perma.cc/Y94W-J695>] (identifying the misquote and attributing a similar quote to Josh Billings); RALPH KEYES, *THE QUOTE VERIFIER* 94, 229–30 (2016) (attributing the quote to Abe Martin).

3. *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, R.C.M. 707(c)(1) (2024) [hereinafter MCM].

4. *United States v. Lazauskas*, 62 M.J. 39, 41–42 (C.A.A.F. 2005).

5. MCM, *supra* note 3, R.C.M. 707(a)–(b). Subsection (a) of the rule reads: “(a) *In general*. The accused shall be brought to trial within 120 days after the earlier of: (1) Preferral of charges; (2) The imposition of restraint under R.C.M. 304(a)(2)–(4); or (3) Entry on active duty under R.C.M. 204.” *Id.* R.C.M. 707(a). Subsection (b) details the calculation of that 120-day period. *See id.* R.C.M. 707(b).

6. *Id.* R.C.M. 707(c).

7. *Id.*

8. *Id.* R.C.M. 707(c)(1).

9. *Id.*

10. *See United States v. Guyton*, 82 M.J. 146, 151 (2022).

11. MCM, *supra* note 3, R.C.M. 707(c).

12. *See United States v. Lazauskas*, 62 M.J. 39, 41–42 (C.A.A.F. 2005).

13. *See MANUAL FOR COURTS-MARTIAL, UNITED STATES* R.C.M. 707(c)(4) (1984) (listing in the exclusions “[a]ny period of delay resulting from a failure of the defense to provide notice, make a request, or submit any matter in a timely manner as otherwise required by this Manual”).

14. *United States v. Dies*, 45 M.J. 376, 377–78 (C.A.A.F. 1996).

15. Exec. Order No. 12767, sec. 1(g), 56 Fed. Reg. 30289–90 (July 1, 1991) (amending RCM 707).

16. E-mail from Trial Counsel to author (June 13, 2024) (on file with author).

17. *But cf.* E-mail from Trial Counsel to author (Jan. 29, 2025) (on file with author) (asking PHO to exclude only a portion of approved pre-referral delay).

18. Letter from Convening Authority to author (Apr. 20, 2023) (on file with author) (emphasis omitted).

19. Letter from Defense Counsel to author (Apr. 25, 2023) (on file with author).

20. E-mail from Trial Counsel to author (Apr. 26, 2023) (on file with author).

21. *United States v. Dies*, 45 M.J. 376, 377 (C.A.A.F. 1996).

22. *NAVAL JUST. SCH., THE ARTICLE 32 PRELIMINARY HEARING OFFICER’S GUIDE* encl. 1 at 2 (2019).

23. *Id.* encl. 3b at 1.

24. MCM, *supra* note 3, R.C.M. 707(c)(1).

25. *Id.* R.C.M. 707(c)(1) discussion.

26. *Id.*

27. *United States v. Lazauskas*, 62 M.J. 39, 41 (C.A.A.F. 2005).

28. *Id.* at 42.

29. *See Abuse of Discretion*, *BLACK’S LAW DICTIONARY* (12th ed. 2024) (“1. An adjudicator’s failure to exercise sound, reasonable, and legal decision-making; specif., a decision-maker’s use of power in a way that denies justice or deprives someone of a substantial right, as when it is based on a misunderstanding of the law. 2. An arbitrary, fanciful, or manifestly unreasonable exercise of authority. 3. An outcome or decision that is without rational explanation, inexplicably departs from established policies or practices, or is based on insupportable conclusions. 4. An appellate tribunal’s standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence.”).

30. *Lazauskas*, 62 M.J. at 41.

31. U.S. CONST. amend. VI.

32. UCMJ art. 10 (2016).

33. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

34. *See United States v. Wilder*, 75 M.J. 135, 138 (2016).

35. *De Novo*, *BLACK’S LAW DICTIONARY* (12th ed. 2024) (“When a court engages in de novo review of a legal issue, it makes an independent determination without deference to any earlier analysis about the matter. It is treated as if no previous decision had been made: there is no presumption of the correctness or validity of any prior finding, recommendation, or conclusion.”).

36. *Barker*, 407 U.S. at 530.

37. *United States v. Dies*, 45 M.J. 376, 377 (C.A.A.F. 1996).