

## PRETRIAL CONFINEMENT PROCEDURES

1. General: While it is unquestionable that pretrial confinement is necessary in some cases to bring an accused to justice and to protect society, it also stands in apparent opposition to the presumption of innocence – a cornerstone of our legal system. Therefore, pretrial confinement should be used only when necessary and imposed only in strict compliance with the regulations set forth in the Rules for Courts-Martial.

2. Confinement Procedures:

a. **Who may confine.** Any commissioned officer may order any enlisted person into pretrial confinement. Confinement may only be ordered when there is a reasonable belief that (a) an offense triable by court-martial has been committed; (b) the accused committed it; and (c) confinement is necessary under the circumstances. Normally, pretrial confinement should not be imposed for an offense that is normally tried at a summary court-martial.

b. **Notification of commander.** The commander of a prisoner ordered into pretrial confinement shall be notified of the confinement action within 24 hours. This notice can be made by any means, but it should include (a) the name of the prisoner; (b) the offense charged; and (c) the name of the person who ordered the confinement.

c. **48-hour probable cause determination.** At any time within 48 hours of a person being confined, a neutral and detached officer must review the case to ensure adequate probable cause exists for confinement to continue. It is entirely appropriate for this review to be accomplished immediately after confinement begins; it simply must be completed within 48 hours.

d. **72-hour commander's review.** At any time within 72 hours of a person being confined, the commanding officer of the detainee must decide whether pretrial confinement will continue. If the commander has remained neutral and detached, and acts within 48 hours, this decision can satisfy both the 48-hour review and the 72-hour review requirements. There are four findings the commander must make in order for confinement to continue:

- (i) An offense has been committed;
- (ii) The accused committed it;
- (iii) Confinement is necessary because it is foreseeable that
  - (A) The accused will not appear at trial; or
  - (B) The accused will engage in serious criminal misconduct; and
- (iv) Less severe forms of restraint are inadequate.

If pretrial confinement is approved, the commander must prepare a written memorandum that outlines the reasons that the four findings listed above have been met. It may include hearsay statements, and may refer to other documents, such as command investigations or NCIS reports. This memorandum will be forwarded to the Initial Review Officer (IRO).

e. **7-day review.** Within 7 days of confinement being imposed, an Initial Review Officer (IRO) shall review the probable cause determination and the necessity of confinement. He shall consider the command's written memorandum, any other written matters, the statement of the accused or his counsel, and the statement, if any, of a command representative. While the rules of evidence do not apply, the four findings listed above must be proved by a preponderance of the evidence. The IRO will enter findings and either approve continued confinement or order immediate release.

f. **Reconsideration.** The IRO can reconsider his decision based upon any significant information not previously considered. The IRO's decision can also be reviewed by a military judge at any time after referral of charges to a court-martial.

g. **Confinement after release.** If a prisoner is released from confinement by a commander, and IRO, or a military judge, he cannot be confined again prior to the completion of trial *except* when evidence is discovered or misconduct occurs following the release which, under all the circumstances, justifies confinement.

h. **Remedy.** A military judge can order additional administrative credit toward an accused's sentence for violation of these rules.