

Pretrial Confinement in the Military

Pretrial confinement in the military is similar to the civilian system in some respects and different in others. In the civilian community, police arrest serious offenders and take them to jail. In military cases, servicemembers who are "apprehended" ("arrest" has a different technical meaning in the military) are typically turned over to a member of command authority. The command then decides whether to confine the member in a military jail (called "brig" or "stockade" or "confinement"). The command may also impose pretrial "restrictions" instead of confinement. For instance, the servicemember may be restricted to his post or base, pending trial. Before any servicemember is confined or restrained, there must be "probable cause" (a reasonable belief) that the servicemember committed an offense triable by courts-martial and that confinement or restriction is necessary under the circumstances.

In addition, like a civilian policeman, any military officer can order an enlisted servicemember to be confined. The decision to confine a military member is the subject of several reviews. The military justice system follows the civilian requirement that a review of the decision to confine the person be conducted within 48 hours. Within 72 hours, the military member is entitled to have his commanding officer review whether his continued confinement is appropriate. (However, if someone other than the commanding officer confined the member and the commanding officer review was actually conducted within 48 hours, then this commanding officer review can serve to satisfy both review requirements.) Thereafter, a military magistrate who is independent of the command must conduct another review within 7 days. Finally, a military member may request the military judge assigned to the case review the appropriateness of the pretrial confinement.

Throughout the confinement review process, a servicemember is provided a military lawyer, at no expense, to assist him or her. These reviews must confirm, in writing, that there is probable cause to believe that the servicemember committed an offense triable by courts-martial; that confinement is necessary to prevent the servicemember from fleeing or engaging in serious criminal misconduct; and that lesser forms of restraint would be inadequate. These review requirements may be suspended by the Secretary of Defense when operational necessities make them impractical. For the same reason, these requirements are not applicable to ships at sea. When his charges are "referred" or presented to a court-martial, the confined servicemember may ask the military judge presiding over the court to review his pretrial confinement again. If rules were violated, the military judge can release the servicemember, and he can reduce any subsequent sentence, giving additional credit for inappropriate confinement.

In the civilian community, persons accused of crimes who might flee or commit other crimes may also be confined prior to their trial. A civilian magistrate must review this confinement within 48 hours. In many cases, the magistrate will require confinees to post bail to ensure their return for trial. While awaiting trial, a civilian confinee usually does not receive pay and may actually lose his or her job. Servicemembers do not have to post bail, receive their regular military pay, and do not lose their jobs while awaiting trial.