UNITED STATES
GENERAL ACCOUNTING OFFICE

More Effective Criteria And Procedures Needed For Pretrial Confinement

Department of Defense

FPCD-76-3

JULY 30, 1975

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

FEDERAL PERSONNEL AND
COMPENSATION DIVISION

B-168700

The Honorable
The Secretary of Defense

Dear Mr. Secretary:

We have surveyed the pretrial confinement policies and procedures of DOD and the military services to determine if the military services had adopted uniform criteria and safeguards to insure the use of pretrial confinement only when necessary. Our survey was performed from October 1974 through May 1975 at the headquarters of DOD and the four services and at one Air Force, three Army, two Navy, and three Marine Corps field activities at six installations. (See app. I.)

Military and civilian sectors differ in administering pretrial confinement. Civilian law provides for bail; the Uniform Code of Military Justice does not. The code requires the continuation of pay and allowances of military personnel during pretrial confinement; civilian law does not make such provisions.

Our survey demonstrates that DOD needs to establish more definitive criteria and procedures to guard against error, abuse, or misunderstanding of commanders' discretionary authority to impose pretrial confinement. The services have not adopted uniform guidelines for pretrial confinement, and some service activities have provided more stringent safeguards than others against unnecessary pretrial confinement. Service representatives disagree on how much discretion should be left to commanding officers.

PERSONNEL IN PRETRIAL CONFINEMENT

In an earlier report 1/ we estimated that about 128,000 military personnel were confined during fiscal year 1974 at staffing costs of about $65 million. On November 30, 1973,

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1/"Uniform Treatment of Prisoners Under the Military Correctional Facilities Act Currently Not being Achieved," FPCD-75-125, May 30, 1975.

the military services had 8,130 personnel in confinement, including 3,551 in pretrial confinement and excluding 426 who had completed their sentences but were continuing in retraining programs. Since that date, the number of confinees before trial has been reduced to 2,575. Most of the decrease occurred in the Army, where additional safeguards were recently adopted to preclude unnecessary pretrial confinement. (See pp. 8-9.) Comparative statistics are shown below.

	Confinees					
	11-30-73			1-31-75 (note a)		
		Pretrial			Pretrial	
Service	Total	Number	Percent	Total	Number	Percent
Army	b/4,530	2,106	46	b/3,058	1,057	35
Marine Corps	1,846	790	43	1,867	902	48
Navy	1,229	575	47	1,262	546	43
Air Force	b/ 525	80	15	b/ 381	70	18
Total	8,130	3,551	44	6,568	2,575	39

a/December 31, 1974, totals were used for the Air Force because its quarterly reporting system does not show totals for January 31, 1975.

b/Excludes personnel who had completed their sentences but were continuing in Air Force and Army correctional retraining center programs.

The Air Force, as shown above, has the least number of personnel in pretrial confinement. One reason is that it has fewer violators of the code, when measured by the number of nonjudicial punishments and courts-martial. Thus, according to an Air Force representative, top management has more time to see that each case of pretrial confinement is justified.

IMPROVEMENTS NEEDED IN CRITERIA AND PROCEDURES FOR PRETRIAL CONFINEMENT

Pretrial confinement guidelines issued by DOD and the services are very general. They do not require independent review of all pretrial confinement cases. The Army has recently provided for such review at its largest installations.

DOD task force study

The Secretary of Defense commissioned a task force on April 5, 1972, to study aspects of the administration of military justice. The task force report, dated November 30, 1972, stated that in 26 percent of the pretrial confinement cases reviewed the confinees were subsequently released with no apparent disciplinary action. The task force recommended that:

> "Procedures concerning the admission of an accused into pretrial confinement and retention therein in each service be standardized with a view towards limiting the opportunity for the abuse of discretion and enhancing the perception of fairness, such procedures to include the appointment of * * * a legal officer, independent of the confining command, authorized to review the pretrial confinement and release the accused from confinement as the circumstances warrant * * *."

At the conclusion of our survey, DOD said it had not finalized its position on the task force recommendations.

Related court case

During our review, a case involving pretrial confinement of military personnel was elevated to the U.S. Supreme Court--DeChamplin v. Lovelace, et al. The U.S. Court of Appeals for the Eighth Circuit, ruling on the case on February 3, 1975, made the following points:

--The initial decision to confine pending trial must be made by an officer or military judge who is neutral and detached from prosecution of the case.

--The accused serviceman must be afforded an opportunity, before or within a reasonable time after he is ordered into confinement, to appear before a neutral office or judge and present evidence relevant to the necessity for confinement before trial. The right to be heard is fundamental to due process.

--Due process requires the Government to bear the burden of proving the necessity for confinement or lesser restrictions pending trial. If release is not granted, the decisionmaker should provide the accused with a short, written statement of the basis for the decision.

--The Air Force has not demonstrated that "conditions peculiar to military life require a different rule" or

that the military will be prejudiced by granting a prompt hearing on pretrial release to the accused.

On April 10, 1975, the Supreme Court agreed to hear the case pursuant to a grant of certiorari. However, before the case was heard, the defendent pleaded guilty to specified charges and was sentenced. Since the controversy over pretrial confinement then became moot, the Supreme Court did not resolve the issues raised. On June 2, 1975, the Supreme Court remanded the case to the U.S. District Court of origin with instructions to dismiss the action.

Differences in criteria for pretrial confinement

The code provides that pretrial confinement be used "as circumstances may require." The "Manual for Courts-Martial" (Executive Order 11476) and DOD and service regulations provide that confinement may be imposed pending trial when deemed necessary to insure the presence of the accused at the trial or because of the seriousness of the alleged offense.

Additional criteria for pretrial confinement were provided by four of the nine activities surveyed, which seek to prevent violence to or by the accused. Similar criteria were once included in DOD guidelines and Army and Navy regulations but were deleted on June 7, 1974, by DOD and subsequently by the services.

Although not included in Army regulations, more definitive criteria were suggested by the Army in a letter to its commands dated July 31, 1974. The letter forwarded sample procedures for the military magistrate program (see pp. 8-9), stating that pretrial confinement should be used only:

"1. When the accused has allegedly committed a serious offense, such as murder, rape, robbery or aggravated assault, or an offense which tends to incite violence. This is not meant to imply that pretrial confinement must be used in every case where a serious offense is alleged.

"2. When it is necessary to prevent the accused from committing dangerous or violent acts or to prevent violence from being used against the accused by another. Under this criterion, such offenses as sale of illegal drugs, or the possession of a large

quantity of illegal drugs, or frequent barracks' larcencies by an accused, may warrant the imposition of pretrial confinement, under appropriate circumstances.

"3. When it is necessary to insure the presence of the accused at his court-martial. Pretrial confinement under this criterion should not be used solely because the accused frequently breaks restriction or goes on short AWOL's, but should be considered in the light of such acts as well as other aspects of the accused's conduct. Additionally, pretrial confinement will not normally be imposed when the accused voluntarily returns from an unauthorized absence or was apprehended, but returned to his unit unescorted."

Some criteria directing against pretrial confinement are provided. The code states that pretrial confinement should ordinarily not be used when a person is charged only with an offense normally tried by a summary court martial. Navy regulations contain more definitive criteria than those of DOD or the other military services, as shown below.

Criteria to prevent pretrial confinement	Criteria included in regulations of			
	DOD	Army	Air Force	Navy (note a)
The pendency of administrative discharge proceedings	Yes	Yes	b/Yes	Yes
An absentee who surrenders or, though apprehended, indicates he will not absent himself again	No	No	No	Yes
Senior enlisted personnel facing minor charges after previously unblemished records	No	No	No	Yes
Obviously stable individuals facing minor charges	No	No	No	Yes
A person evaluated as a suicidal risk	No	No	No	Yes

a/Used also by the Marine Corps.

b/Incorporated by reference to DOD regulations.

Five of the six Army and Marine Corps activities we surveyed had established additional criteria directing against pretrial confinement.

Circumstances where pretrial confinement should not be used	Number of activities including criterion	
	Army	Marine Corps
As a form of immediate visible punishment	1	-
Solely for the purpose of removing a member from his unit in the interest of morale, or to avoid other problems which may result from his continued presence	-	1
When post-trial confinement will not be approved	1	-
First-time absentee, regardless of whether absence terminated by apprehension or surrender, if he aggrees in writing to be present for trial	-	1
Absentee voluntarily returns and agrees in writing to be present for trial	-	1
Normally, when absentee voluntarily returns	2	1
Normally, if the absentee was apprehended but returned to his unit unescorted	2	1

Differences in approval and review of pretrial confinement

The code and the "Manual for Courts-Martial" state that any commissioned officer can place enlisted personnel in pretrial confinement. They also state that a commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order the arrest or confinement of enlisted personnel under his command or authority. A commissioned officer or warrant officer can be confined only by his commanding officer. Neither the code nor the "Manual for Courts-Martial" require approval or review of the decision to confine personnel before trial.

DOD regulations do not provide any additional guidance for imposing pretrial confinement. They require each case of pretrial confinement exceeding 30 days to be reviewed and approved by the officer exercising general court-martial

jurisdiction over the command ordering investigation of alleged offenses.

Procedures for approval and review of pretrial confinement varied among the nine activities we visited, and even among activities on the same installation. The different procedures are described below.

1. Approval by unit commander.

2. Approval by the organization discipline officer, although each case is discussed before or after the fact with the base commander or his executive officer.

3. Approval by any officer, although we were told each case must be discussed with and verbally approved by the base commander or his designee.

4. Recommendation by command discipline officer, with special-court-martial-convening authority acting on the recommendation.

5. Approval by unit commander. The special-court-martial-convening authority is required to review the circumstances surrounding every case of pretrial confinement and insure that it is essential. We were told this is accomplished by reviewing a weekly list of individuals in pretrial confinement. The decision is also subject to review by the staff judge advocate who can make recommendations but lacks authority to release a confinee.

6. Approval by unit commander. The decision is subsequently reviewed by a part-time confinement commissioner from the judge advocate's office who holds a hearing, normally within 24 hours, to determine if the confinement meets legal and regulatory requirements. The commissioner can make recommendations but lacks authority to release a confinee.

7. Approval by both the special-court-martial-convening authority and the staff judge advocate.

8. Approval by both the unit commander and the staff judge advocate.

9. Approval by both the special-court-martial-convening authority and the staff judge advocate. The decision

> must be reviewed within 3 days by a part-time military magistrate, who has authority to release the confinee if he concludes that pretrial confinement is unnecessary. As part of his review, the military magistrate is required to interview the confinee.

Army military magistrate program

The Army is the only service which requires by regulation independent review of pretrial confinement. The Army eatablished a program in July 1974 requiring appointment of a military magistrate at each confinement facility having an average of more than 50 pretrial prisoners. The magistrate may release a pretrial confinee if he decides confinement is unwarranted. The program was optional at other installations, but all commands were encouraged to reexamine their procedures for monitoring pretrial confinement and "to stiffen those procedures" if appropriate.

The underlying reason for the program was explained in a letter dated July 31, 1974, from the Secretary of the Army to Army commands:

> "Commanders make sound judgments as to the need for pretrial confinement based upon the necessity to insure the continued presence of the accused or because of the seriousness of the offense. This decision is based upon judgment, a review of the facts, legal advice from the staff judge advocate, medical opinions as needed, and often a one-to-one, personal knowledge of the accused, his habits, and propensities. It is recognized that commanders have an interest in exercising sound discretion in ordering pretrial confinement, because their responsibility runs not only to the rights, safety, and welfare of the accused but also to all other members of the command who may be adversely affected. Nevertheless, there still exists the potential for error or abuse in the imposition of pretrial confinement, and the "appearance of evil" persists in the minds of some. The need for some system for monitoring the necessity of continued pretrial confinement is apparent." (Underscoring added.)

Although the military magistrate is precluded by regulation from holding a formal hearing, he is instructed to consider all relevant circumstances in deciding whether the person should remain in pretrial confinement. The magistrate

must interview the accused within 7 days after pretrial confinement begins. If he concludes that confinement is justified, he must subsequently review the case every 2 weeks until the pretrial confinement is terminated.

After the requirement for the military magistrate program was issued, pretrial confinement in the Army was reduced from 1,974 persons on July 31, 1974, to 1,057 persons on January 31, 1975. All three Army activities we visited had reduced pretrial confinement. Although a magistrate was required at only one, all three had adopted more stringent local safeguards against unnecessary pretrial confinement. For example, at the activity where a magistrate was appointed, pretrial confinement had to be approved before the fact by the special-court-martial-convening authority and the staff judge advocate. Pretrial confinees were reduced from 59 to 18 within 2 months after the changes.

CONCLUSIONS

DOD and the military services have issued limited criteria and guidance for determining whether personnel should be confined before trial. Activities we visited, and in some instances activities on the same installation, had different procedures and criteria for pretrial confinement.

A decision on pretrial cconfinement by a neutral party separate from the unit initiating prosecution and a subsequent review by a neutral party would seem desirable to guard against error, abuse, or misunderstanding of a commander's discretionary authority to confine personnel before trial.

The more definitive and uniform criteria and procedures throughout the services, the greater the confidence one can have that pretrial confinement is approached fairly, uniformly, and in the best interests of the individual and the service.

RECOMMENDATIONS

To assure that personnel are not confined unnecessarily, we recommend that the Secretary of Defense:

--Require that an independent, neutral party, with authority to release the confinee, review each case of pretrial confinement. The review should include an interview with the confinee.

--Issue definitive criteria and procedures for pretrial confinement.

We appreciate the cooperation and courtesies extended to our staff by the many representatives of DOD and the services. At the conclusion of our field work, we briefed representatives of DOD and the Judge Advocates General of each service on the issues discussed in this report. They expressed concern about pretrial confinement and were seeking ways to improve procedures.

As you know, section 236 of the Legislative Reorganization Act of 1970 requires the head of a Federal agency to submit a written statement on actions he has taken on our recommendations to the House and Senate Committees on Government Operations not later than 60 days after the date of the report and to the House and Senate Committees on Appropriations with the agency's first request for appropriations made more than 60 days after the date of the report.

We are sending copies of this report to the Director, Office of Management and Budget; the Chairmen of the Senate and House Committees on Appropriations, Armed Services, and Government Operations; and the Secretaries of the Army, Navy, and Air Force.

Sincerely yours,

Forrest R. Browne
Director

FIELD ACTIVITIES VISITED

AIR FORCE

Richards-Gebaur Air Force Base, Missouri

ARMY

United States Army Training Center Engineering and Fort Leonard Wood, Fort Leonard Wood, Missouri
Headquarters, 1st Infantry Division and Fort Riley, Fort Riley, Kansas
U.S. Army Field Artillery Center and Fort Sill, Fort Sill, Oklahoma

MARINE CORPS

Marine Aviation Training Support Group-90, Naval Air Station, Memphis, Tennessee
Marine Corps Base, Camp Pendleton, California
1st Marine Division, Camp Pendleton, California

NAVY

Naval Air Station, Memphis, Tennessee
Naval Air Technical Training Center, Naval Air Station, Memphis, Tennessee

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