

# **AWOL FROM THE ARMY**

## **Information for Lawyers and Counselors on how to help**

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This article is intended to provide an overview of the process that a lawyer or a lay military counselor would use in assisting a soldier who is AWOL (or considering going AWOL) from the US Army. While some of the ideas discussed here would be applicable to other branches of the military, it is imperative to understand that many of the procedures discussed below are unique to the Army and that anyone who is assisting a servicemember from another branch should get the latest information on AWOL/UA policies from other sources that will be listed in the future.

I also should say that I am a fairly new lawyer having practiced for a little over one year. The information provided here is what I've learned from my own experiences as well as the very helpful advise of the members of the Military Law Task Force and the GI Rights Hotline network. I've done my best to be as accurate and complete as possible but I would encourage readers to double-check the article's accuracy before acting on its advice. If you find errors in this please email me so I can fix it for future versions of this article.

### **I. BASIC CONCERNS**

One of the challenges in assisting AWOL soldiers is to help a soldier with their immediate situation while not breaking the law oneself. (While I personally respect, admire and appreciate any person who chooses to defy unjust laws in following the higher law of conscience, this article is addressed to people like myself who are forced to comply with the letter of the law.) The key thing to remember is that it is not against the law to tell a soldier, "It is against the law to go AWOL or stay AWOL. I cannot advise you to go or stay AWOL, but I can tell you what the consequences of your illegal action would be. I can also help you to deal with the legal consequences of your decision." If a soldier chooses to go AWOL after hearing this warning, they have acted with the knowledge that their action is illegal. And for soldiers who are already AWOL or thinking about going AWOL, it is best to repeat the disclaimer above on every phone call, email or in-person meeting.

Where things get more sticky are those cases in which a soldier has decided to go AWOL but needs help in accomplishing his or her goal. It is not uncommon for soldiers to ask for advise on how to leave a post, etc. While there is not clarity in the very limited case law on the issue, it is probably a bad idea to tell a soldier who is not in actual danger of hurting him/herself or others, how to go AWOL (i.e. "catch a taxi from the PX to get off the base"). If, however, a soldier is suicidal or homicidal, I think one could make a good argument that the necessity defense (the idea that a person shouldn't be punished for a crime, if the harm that the criminal statute is intended to prevent is less harmful than the harm that would occur if the law were followed) would excuse the soldier's action; since it is better to go AWOL than to commit suicide or homicide. In theory at least, the necessity defense would in turn protect a counselor or lawyer who "aided and abetted" a suicidal or homicidal AWOL soldier.

With regards to the consequences a soldier could face if they go AWOL, it is important to let the soldier know what the worst case scenario is. Certainly we hope to help our clients to avoid a negative

outcome, but our clients deserve to know the worst that can happen to them before they chose to make a life altering decision. You can find the potential sentences for AWOL-related offenses in the *Manual for Courts-Martial* (a set of regulations that interpret and flesh out the *UCMJ*), however the longest sentence that has actually been given to the best of my knowledge during the current war for for AWOL-related offenses is 18 months, which has been given on two occasions, to SGT Kevin Benderman, and to PVT Neil Quinten Lucas; however, both Benderman and Lucas served only 13 months of their sentence before being released.<sup>1</sup>

There are other “worst case scenarios” that could happen as well. An AWOL soldier could be forced to remain in the military by a command that refuses to court-martial him or her (which might force a soldier to choose to break other laws such as disobeying orders if the soldier refuses to cooperate with remaining in the military). Another negative outcome is that the friends and family of an AWOL soldier could in theory be prosecuted if they assisted their loved one in going or staying AWOL<sup>2</sup>, but to the best of my knowledge this hasn't happened since the Vietnam War era.

## II. THE PROCESS FOR PCF-ELIGIBLE AWOL SOLDIERS

### PCF Eligibility and Exceptions

The PCF (Personnel Control Facility) process<sup>3</sup> enables AWOL soldiers to be discharged in a reasonably expeditious manner, IF they meet certain criteria. The PCF process was created to serve the Army's best interests and has the following functions: (1) to allow the Army to discharge AWOL soldiers who are unable or unlikely to ever be able to function well in the Army, (2) to enforce discipline in the ranks and discourage soldiers from going AWOL, since soldiers going through PCF are normally “punished” in most cases with an OTH (Other than honorable) discharge, (3) enable the Army to discharge soldiers who went AWOL from Europe, Korea, and other overseas non-active war zone areas without having to spend the money to fly the AWOL soldier back overseas, and (4) enable extreme cases of injustice to be corrected without considerable expense or command embarrassment.

It is important to understand these objectives because they help to explain why the PCF-eligibility rules are drawn the way they are. The Army for the most part does not care what is best for the soldier involved, but rather is supremely concerned with what is best for it as an institution.

A US Army soldier is PCF eligible if he or she meets the following criteria:

1. The soldier is AWOL and has remained AWOL long enough to be DFR'd (dropped from the rolls).
2. The soldier fits into one of the following two categories:
  - a. The soldier has not graduated from AIT (Advanced Individual training – this is the stage of training that follows Basic training) OR
  - b. The soldier is OCONUS, meaning the soldier is stationed outside the Continental United

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1 For more information on the cases of Benderman, Lucas and other war resisters, go to <http://www.couragetoresist.org/x/content/blogcategory/39/86/>

2 While in theory it is illegal for a family member or friend to help soldier go or be AWOL, the law does not require anyone to rat out an AWOL soldier. For more information on this issue read the memo “I ain't singing, Charlie” that is online at [http://nlgmltf.org/i\\_aint\\_singing\\_charlie.html](http://nlgmltf.org/i_aint_singing_charlie.html).

3 The regulations that describe the PCF process can be found at AR 600-62, which is online in PDF format at: [http://www.army.mil/usapa/epubs/pdf/r600\\_62.pdf](http://www.army.mil/usapa/epubs/pdf/r600_62.pdf). While these regulations lay out the general parameters of the operation of PCF, this article below will discuss the actual common practices of PCF's at Ft. Sill and Ft. Knox.

States (which includes Alaska and Hawaii), AND the soldier does not have orders to deploy to either Iraq or Afghanistan, or is stationed in Iraq or Afghanistan.

Generally the PCF eligibility rules apply to members of the Army National Guard with one caveat: ANG members are subject to state as well as federal law and could face state law sanctions as well as sanctions under the *UCMJ*.<sup>4</sup>

One other key point is that the command of an AWOL soldier can intervene and stop a soldier from being processed out at PCF, even though the soldier is otherwise PCF-eligible. If this happens, PCF will transport the AWOL soldier to their prior duty station to face the music (normally by giving the AWOL soldier a ride to the airport and a plane ticket). At present, the only post doing this is Ft. Huachuca (an installation that trains Army intelligence), which has been instructing PCF to not process any of their soldiers who are AWOL from AIT at their installation, but it is always possible that other posts could adopt similar policies and practices.

### **How an AWOL soldier can find out if he or she is DFR'd**

Under AR 630-10, a unit is supposed to go through a detailed process when a soldier goes AWOL. The process begins when the unit initially reports the soldier is AWOL. During the next 30 days, the unit often seeks to communicate with the AWOL soldier and his/her friends and family to seek to get the soldier to return to military control. The command may also issue what is called a “misdemeanor” warrant to local law enforcement. In most cases, local police do not actively seek to apprehend AWOL soldiers at this point (and may not even hold an AWOL soldier if otherwise detained in a traffic stop), but in other cases (mostly in small towns), local police may be very zealous in seeking to apprehend a soldier during this time.

After 30 days pass, the unit is supposed to send the soldier's packet (their military records) to the DIP (Deserter Information Point) at Ft. Knox. At that point, the DIP is responsible for issuing a federal “deserter” warrant. This warrant is entered into the federal National Crime Information Center (NCIC) warrant database which will almost certainly result in an arrest if the soldier is pulled over in a traffic stop or attempts to enter the US from a foreign country.

In actuality however, this process is rarely followed. There are many reports of varying timetables for soldiers to be actually DFR'd, but in my experience the average wait time is 35-45 days, with it typically taking longer for members of the National Guard and for OCONUS soldiers (the longest I'm aware of with my clients is almost six months for an OCONUS soldier who went AWOL from Germany).

To find out if this process has occurred, an AWOL soldier must call the DIP<sup>5</sup> themselves (DIP normally refuses to give information to attorneys, counselors or family members), which can be a difficult process. When an AWOL soldier calls DIP, they should provide only their name and social security number and ask if they have been DFR'd (dropped from the rolls) and whether they have his or her packet. If the answer to both of these questions is yes, then the AWOL soldier is ready to proceed to the next stage in the case.<sup>6</sup> It is probably best for a soldier to call with a calling card or to block caller

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4 Check with the Center of Conscience and War for information on what potential state law penalties are, and what states are actually imposing potential sanctions.

5 The telephone numbers as of January 2008 for DIP are 502-626-3711, 502-626-3712, 502-626-3713.

6 If an AWOL soldier wants to make absolutely sure they are DFR'd they can do two additional things: (1) they can ask DIP if they have issued a warrant for them, and (2) they can call their old unit to see if the packet has been sent to DIP.

ID to conceal their location from DIP.

One challenge that AWOL soldiers may face is that the operators answering the DIP hotline sometimes give out false or misleading information. Some of these lies and the rebuttals to the lies are:

1. "If a soldier is AWOL for 30 days, the soldier is automatically DFR'd." - This is not true. If a soldier goes to PCF after 30 days but before they are actually DFR'd, they will likely be sent back to their old unit.
2. "If a deserter warrant is issued for an AWOL soldier, it will be on their record for 70 years and is the same as having a felony on your record." - Warrants and convictions are not the same thing. Most background checks only show actual convictions and a soldier going through the PCF process will not get a conviction as they are being discharged in lieu of court-martial.
3. "The best thing for an AWOL soldier to do is not wait to be DFR'd, but rather to turn themselves in at the nearest military installation immediately." - This is a difficult mistruth to combat, because a lawyer or counselor cannot tell an AWOL soldier to prolong their AWOL, as this is against the law. However, a counselor or lawyer can tell an AWOL soldier that the consequences of following the advise of the DIP operator is that they will likely be sent back to their old unit and possibly face a court-martial, instead of getting a relatively easy discharge at PCF.

DIP operators may try to convince AWOL soldiers to provide additional information. Counselors and lawyers should tell AWOL soldiers that they have a legal right to not answer those questions, and should refuse to give any information except their name and social security number. There have been occasions in which DIP operators have refused to provide information to AWOL soldiers who do not answer additional questions, in which case the AWOL soldier should call at another time of the day to reach a different operator.

### **What a soldier can expect while AWOL**

Being AWOL is a very difficult and draining process for many soldiers. The continual fear of apprehension causes many soldiers to experience severe anxiety. This anxiety is often exacerbated by the fears of family members and friends who do not support or understand the decision to go AWOL. There can also be challenges of a practical nature: where to live, how to provide for one's living expenses, how to care for loved ones who are dependent on the soldier's income, etc.

Unfortunately, there are limits on how much we can help soldiers during this difficult time. As a lawyer or counselor, we are prevented from acting in material ways to help AWOL soldiers be AWOL or stay AWOL. We can and should, however, provide emotional support and kindness to an AWOL soldier and their family, and we can provide appropriate referrals to professional assistance as needed (i.e. mental and physical health care providers, attorneys, charitable organizations, etc.).

The biggest concern for most AWOL soldiers is whether the Army will try to find them while AWOL. In most cases, the Army will call the home of record of the soldier, the cell phone of the soldier

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In most cases these two steps probably aren't necessary but might be worth pursuing if DIP doesn't give a decisive answer.

(in my experience this is very common), and any numbers the command has of friends and family of the soldier. The best advice to give a soldier with regards to these calls, is that they should tell family and friends that it potentially is a crime to lie to the military or law enforcement, but that it is not against the law to refuse to talk. One typical scenario that illustrates this would be: An AWOL soldier is staying at her parent's house. Her drill sergeant calls the house and the soldier's mother answers. If the mother says "My child isn't here," she may have broken the law. However, if the mother says, "I have nothing to say to you and will not answer your questions," she has not broken the law.

It is also possible, but less likely, that the Army could send someone to look for the AWOL soldier. This person could be the recruiter who signed up the soldier, other soldiers from the same unit as the AWOL soldier (often the Army sends out soldiers from the unit to try to find the soldier, promising extra leave or other rewards if they can talk to the AWOL soldier into returning), or it could be local law enforcement (this is more likely to happen in small towns than in big cities). If the AWOL soldier is not present during such a visit, the best thing for the occupants of the home to do is to simply state that they are going to exercise their right to not answer any questions and then to shut the door. If the AWOL soldier is present in the home when there is a visit, the AWOL soldier should not be the one to answer the door. Instead, another person should ask if the visitors have a warrant. If they say yes, the occupants should open the door and cooperate with them, but if they say no, then the person answering the door should say that they going to exercise their right to not permit anyone in the house.

These scenarios of course can be very intimidating for an AWOL soldier and those dear to them, so it may be helpful for lawyers and counselors to do role playing exercises with them to practice what to do. I also would suggest that lawyers should tell their clients that they can give callers from the military/law enforcement their name and phone number. The lawyer of course should then tell military/law enforcement when they call that "I have advised my client to exercise his or her right to remain silent. I have nothing to say to you either."

Another concern that many clients may have is that their family may not support their going AWOL or worse may actually try to rat out their loved one to the Army. As a lawyer or a counselor, I think it is important to not necessarily assume an AWOL soldier's family is supportive but instead to ask the soldier how their family feels about the situation and advise them accordingly.

### **Planes, Trains, and Automobiles**

Basic transportation can also be a challenge for AWOL soldiers. If soldiers are driving and stopped in a traffic stop, they potentially could be arrested (depending on whether the police have the warrant yet, normally early on during the time of absence this is less likely). If soldiers absolutely must drive while AWOL, they should follow the speed limit and make sure their tags are up to date. Alternatives to driving include getting rides from others (not always much safer as the police sometimes run the passengers for warrants during traffic stops), bicycling (but make sure the bike has proper lights if being ridden at night. One client of mine was caught because he was pulled over by the police for not having a headlight on his bike.), using public transportation or walking. As for traveling long distances, I have not heard reports of warrants being checked when plane, bus or train tickets are purchased, but probably the safest bet is to pay cash for a ticket with Greyhound.

Many soldiers must work to support themselves or their families while AWOL. Normally this isn't a problem except in small towns where local police or the military might seek to apprehend the soldier at work, particularly if they are working where they worked before they entered the military. Normally if an employer does find out about the pending AWOL case when doing a background check,

the worst thing that will happen is that the AWOL soldier won't get the job. (I have yet to see any potential employers rat out an AWOL to the authorities).

Lastly, it is very important for AWOL soldiers to avoid getting into any additional legal problems while staying AWOL. Until a soldier is discharged, they are under the *UCMJ* and could face sanctions upon returning. In particular, soldiers who are seeking to be discharged under the PCF-process should be aware that any criminal charges could slow down or even prevent a PCF discharge from going through.

### **What if the \*\$%& hits the fan?**

If an AWOL soldier is apprehended while AWOL, they will most likely be taken to the local jail (either municipal or county depending on where the apprehension took place) to wait for the military to decide what to do with them. The jail is supposed to contact the Army, but the Army is often not so good with following through on taking action on an AWOL soldier's case. Sometimes the Army will act quickly (in 24-72 hours) but sometimes the Army will drag things out for several weeks (or even longer). Once the Army does decide to act, they will sometimes send the MP's from the nearest local military installation to pick the soldier up, but more likely they will tell the jail to release the soldier with orders that the soldier should take the next available bus to either Ft. Sill/Knox PCF or to the soldier's old unit; in most cases depending on whether the soldier is PCF-eligible or not.

If you receive a call from an AWOL soldier who has been apprehended and is still in jail, it is best to contact the AWOL apprehension office that is nearest to where the soldier was apprehended (i.e. if a soldier was apprehended in Los Angeles, call Ft. Irwin) to make sure that the Army actually knows that the client has been apprehended. Amazingly, the military is frequently unaware of the apprehension. It also sometimes is necessary to continue to call repeatedly to make sure that the AWOL apprehension unit does its job and either picks up the soldier or makes travel arrangements for the soldier.

In the long-term, the consequences for an apprehended AWOL soldier vary. Most PCF-eligible soldiers will in the end be sent to PCF at either Ft. Sill or Ft. Knox for the standard PCF process. Non-PCF eligible soldiers might if they are lucky be sent to PCF, but most of the time will be sent to their old permanent party duty station. Upon arrival, they could face a harsher sentence for AWOL and/or Desertion under the sentencing guidelines in the *Manual for Courts-Martial*. However, there is a way to possibly avoid this by an attorney negotiating with the AWOL apprehension unit and ask that the soldier be released from the county jail and given a plane/bus ticket to their permanent party station. If the Army allows this to happen, then the soldier has the chance to show that he or she is not a deserter, since the soldier had the chance to go AWOL again (since the soldier isn't escorted or in handcuffs and shackles), but instead returned to their post on their own power.

### **The PCF Experience**

For AWOL soldiers who are fortunate enough to be PCF-eligible, the experience at the Ft. Sill and Ft. Knox PCF's is for the most part very positive. Most soldiers are understandably very nervous about returning to military control, so one of the most important tasks for a lawyer or counselor in this situation is to tell their client as much information as they can about what to expect at PCF. (Most of my experience with PCF is at the Ft. Sill, but from what I know the process at Ft. Knox is almost identical.) Also, before a soldier comes to PCF, a counselor or lawyer should ensure that the AWOL soldier is in fact PCF-eligible (including being DFR'd) and that adequate mitigation evidence has been

prepared (see section IV). Lastly, it is best for clients to arrive at PCF on either a Monday or Tuesday to ensure that your client spends as little time at PCF as possible.

If possible, it works well for lawyers or counselors to take AWOL soldiers to PCF. This helps because it allows your client to have some emotional support but also allows you to be present while your client is being questioned at the military police station. If it is not possible to accompany your client to PCF, then you should prepare your client as thoroughly as possible and be available to advise them via telephone if problems arise.

Upon arrival at the gates of either Ft. Sill or Ft. Knox, you will need to show photo ID's for all occupants of the car and to tell the security at the gate that you are going to PCF. In some rare cases, the M.P.'s may take your client into custody at the gate, but in most cases you will be free to drive into the post. From there you will drive to the M.P.'s station. At the M.P.'s office, they will ask for your client's identification (preferably their driver's license/state ID and their military ID) to check to see if the client is DFR'd. Once they check the DFR status, a police officer (80% of the time at Ft. Sill it will be a civilian) will prepare a police report to document the fact that your client has returned voluntarily to military control. While being questioned you should try to stay with your client (if your a counselor they may not let you, if you are an attorney they must let you be present while your client is questioned). The report will include basic information (i.e. Name, rank, SSN, MOS, etc.) as well as more difficult questions, which include:

**How did you go AWOL?** - Oftentimes soldiers went AWOL with the assistance of friends or family members. While no one has been prosecuted for aiding and abetting an AWOL since Vietnam, it is best to avoid unnecessarily implicating those people who helped a soldier to go AWOL. Probably the best way to answer this question is to either decline to answer it, or to simply refuse to say who it was that helped. That is, a soldier can honestly say "a friend picked me up," but can decline to say what friend it was.

**Why did you go AWOL?** - This one is dangerous because the police officer will summarize the statement your client makes, and may do so in a sloppy or inaccurate way. My suggestion is for the client to either decline to answer the question, or to give a brief one sentence response. (i.e. "mental health" or "family problems"). If the MP's say that they must say more, the soldier should just say, "I am exercising my right under the *UCMJ* to not say more on this matter." If you have prepared mitigation documentation, you can give a copy of it to the MP at this time.

**What is your unit?** - This one is a challenge because some soldiers can't remember it, particularly if the soldier has been AWOL for an extended period of time. If possible, I encourage a returning AWOL soldier to try to find this out before returning because it could slow the process down if PCF cannot get in touch with their old unit.

After the police officer completes the report, your client will be patted down and their bags searched before being transported from the M.P.'s office to PCF. In most cases the police officer will allow the client to just ride in the police car over to PCF, but in other cases the officer will put the client in handcuffs before transporting them, or even allow an accompanying attorney to transport the client to PCF. (I do recommend that even if the police transports your client to PCF, that you follow behind in your own car and hand-deliver your client's documentation to the PCF staff.) Upon arrival at PCF, your client will be told to put his or her bags down, stand at parade rest and read three laminated sheets on the wall that give the rules of PCF. (In most cases, accompanying attorneys and counselors will have to

leave at this point. An attorney could insist on being present at all further questioning but this is not logistically possible because you won't know when your client will go in for in-processing or for the conversations with the First Sergeant or JAG.)

One problem that may arise is that PCF may not properly file your client's documentation and somehow “lose” it before it gets to the appropriate party. To be on the safe side, an attorney or counselor should hand-deliver the documentation during duty hours to the PCF staff, or if it is after-hours the attorney or counselor should give the documentation to a PCF escort and ask that the paperwork be given to the First SGT in the morning. You can then follow up by calling the FSGT in the morning to ensure that he or she did in fact receive the paperwork and even let the FSGT know which PCF staff member that you gave the documentation to, if the documentation didn't make it into the file.

From this point forward, the processing stages of PCF start to take place. The following is a rough outline of what typically happens:

1. **Initial in-processing** – This is very similar to the process that takes place at the M.P.'s office, with the exception that the PCF staff are not trying to trick your client into saying the wrong thing. With only a few rare exceptions, it is normally best to encourage your client to be as open and honest as possible with the questions that are asked. It is also important for your client to be polite and helpful to the PCF staff, because the staff members can help or hurt you in getting out in a timely manner. (If they like you, they will do all they can to move the process along faster) Normally this will happen on Tuesday or Wednesday.
2. **Being issued BDU's and given a haircut** – Normally on Wednesday, PCF soldiers will be issued BDU's (Battle Dress Uniform, the old style dark forest green camos) without name patches or insignia to wear at PCF. Male soldiers will also be given training haircuts and will be charged \$5.75 for the privilege.
3. **Seeing the First Sergeant** – This is the most important stage of the process. The FSGT will formally “read the charges” to the returnee and then ask the returnee to tell their story. The returnee should be prepared to tell why they went AWOL, with a special focus on the main points raised in the documentation that is brought to PCF. The returnee should also ask the FSGT if he or she has read the documentation and should carry a copy of the documentation to give to the FSGT if the documentation didn't somehow make it into the file. In rare cases, the PCF commander may also be present for the interview, but most of the time only the FSGT will be present.

After the FSGT hears the client out, he or she may ask some questions, and then will announce what kind of discharge that will be recommended in the soldier's case. The FSGT may also attempt to “resell” the soldier on the Army and try to convince the soldier to not seek a discharge, so it is important to advise a client in advance of the dangers of military service so that they will understand the implications of reenlisting when promised a better MOS, better duty station, etc.

My own experiences have been only with Ft. Sill, but the FSGT there tends to expect respect and a proper “military bearing” from the returnee that he is meeting with, but will return that respect and will give the returnee a fair hearing. The FSGT is quick to pick up on bogus reasons why a soldier went AWOL, but is also often willing to recommend a better discharge to a soldier who is sincere and provides a good reason why he or she needed to go AWOL.

4. **Completing U.S. Army Training And Doctrine Command (TRADOC)** - This is the required counseling in which the Army explains what support it gives to soldiers who are being discharged, which includes a description on how a soldier can seek a discharge of their military upgrade at a later point in time.
5. **Seeing JAG** – Trial Defense Services will meet briefly with each returnee. TDS will in most cases look over any documentation that the soldier has and will recommend any possible alternative approaches that could be taken. If a returnee has a civilian attorney, TDS should call that attorney before making changes to the returnee's documentation, but to be on the safe side it is advisable for a civilian attorney to tell his or her client to be sure call them before changes are made.

The quality of assistance provided by TDS varies widely. Some TDS attorneys give excellent information both to their clients and to counselors/attorneys working with them (much of what I know about the PCF process is what I learned from TDS attorneys), but other TDS attorneys give misleading information and will speak disparagingly to their clients about their civilian legal counsel. It is best to prepare one's client to deal appropriately with whatever kind of TDS attorney they are assigned, and to be prepared to stick up for their desired course of action if TDS thinks it is a bad idea.

6. **Being issued a new military ID and leave papers** – Technically PCF only makes a recommendation for discharge, so soldiers leaving PCF are given a new military ID (which is good for 3-6 months) and leave papers (to show to law enforcement if the so-called “deserter warrant” hasn't been removed from the National Crime Information Center (NCIC). One positive thing is that soldiers can use their new military ID to shop at the PX, get medical care, etc., until their discharge goes through. Dependents of the returnee will also likely still be covered under Tricare until the discharge is finalized. (One client of mine had the delivery of his child covered by Tricare about a month after going through PCF.)
7. **Leaving PCF** – The final step can be a problem for some clients, because the Army will not pay for travel home. PCF will drive departing soldiers to the bus station and airports closest to base (for Ft. Sill it is Lawton, OK), but due to the costs of flying in and out of small airports, many departing soldiers will share a cab to either Oklahoma City, OK, or Louisville, KY. If a soldier does not have the financial means to pay for travel home, they will either need to try to raise the money or they will have to stay at PCF for a month. I know of some cases where the other PCF soldiers all chip in to pay for a comrade's bus ticket. At the end of the month, the Army will then pay for travel out of the pay that the soldier will receive for the month they spent at PCF.

In any given week there will anywhere from 20-50 soldiers being processed out of a PCF, so there is a lot of dead time for soldiers to kill between these processing stages. Since the Army knows that this is a recipe for trouble, PCF staff do their best to keep PCF soldiers busy during their 1-3 weeks there. A typical day at PCF starts at 5 a.m. (or 6 a.m. on the weekends). The next 30 minutes is spent getting dressed and cleaning their barrack room (at Ft. Sill, the barrack rooms are 4 person rooms), followed by a morning formation (but no PT) in which soldiers are told daily to not speak to members of the opposite sex (the one cardinal rule of PCF) and to not go AWOL again. Following the formation, PCF soldiers go back into the barracks for more cleaning until breakfast at 8 a.m. The rest of the day is spent in doing details (mowing lawns on base, working in the recycling room, etc.) or in sitting on

segregated bleachers (men on one side, women on the other). While on the bleachers, soldiers are free to talk to each other, to smoke, to read a book, but cannot sleep. The only breaks in the monotony are for the processing stages discussed above and for meals (which at Ft. Sill at least are said to be very good). In the evenings, soldiers typically get 1-2 hours of free time in which they can watch TV, talk on the pay phone (for only 5 minutes, using a calling card), or just relax. As for discipline at PCF, the PCF staff have two means of punishment: dishing out an extra hour of fire guard or taking away free time (sometimes free time is taken away from all of the PCF soldiers if the staff are particularly irritated by misconduct). It is also possible that PCF staff could decide to not allow a soldier to continue with the PCF process, but I haven't seen that happen to date.

Soldiers going through the PCF process spend a short period of time at PCF. Most of the time, PCF-eligible soldiers arriving at PCF on a Monday or Tuesday will be out of the Army by Friday afternoon, but an increasing number (my estimate is 15-25%) are taking longer, usually 2-3 weeks. There seems to be no predictable rationale for delays at PCF, but most often involve either a very busy week at PCF (i.e. weeks in which more than 40 soldiers are going through the process) or the unavailability of one of the key decision-makers at PCF due to illness or leave, such as the First Sergeant or JAG. Other problems that could delay the process include National Guard cases (because in some cases the state military officials haven't completed all of their necessary paperwork) or clients with criminal problems during their time of being AWOL (which could result in only a delay in processing or possibly could result in potential prosecution under the *UCMJ*).

The end result of the PCF process itself is a discharge recommendation. In most weeks, a few of the soldiers at PCF will receive a better discharge (either an ELS or a General discharge), with the rest getting an OTH (Other than Honorable) discharge. Those soldiers who receive the better discharges are those that are well-prepared with mitigation evidence (see section IV below) and who do a good job of presenting themselves at PCF.

### **How to assist emotionally fragile clients at PCF**

While PCF is a good experience for many soldiers (one client told me “this was the best week I've spent in the Army”), for others it is very trying. If a soldier is experiencing mental health issues, PTSD, or other problems, being back in the Army can be very, very challenging. Some of the approaches that have worked for me in assisting soldiers in this case include: visiting the client while at PCF (the PCF staff are very open to having attorney visits and in some cases family visits, subject to the schedule restraints of the facility), providing as much preparation as possible as to what the PCF experience will be like, and being available to take phone calls while the client is at PCF. Probably the best approach though is the “buddy system,” in which an AWOL soldier returns him/herself to PCF at the same time as someone else (often another AWOL soldier from the same unit). This helps a lot as it enables a soldier to have a friend to go through the experience with, and also helps if phone time is limited (as one client can call you with messages for both clients if only one client is able to use the pay phone).

In more extreme cases, I have sometimes let PCF know ahead of time if a client has serious mental health issues, particularly if a client has recently been suicidal. Generally the PCF staff seem pretty good about looking out for soldiers who are experiencing serious problems and are actually encouraging to soldiers who are struggling to make it through the process. In fact one thing that is often helpful to tell anxious soldiers is that the only military personnel who work at PCF are the commanding officer and the First Sergeant. All of the other staff members are civilian security escorts. They expect soldiers to respect and obey them, but most of them will return that respect to PCF soldiers by treating

them with dignity and basic human kindness (something that most soldiers going AWOL from Basic training and AIT are not used to experiencing in the military). There are of course exceptions and some soldiers will have negative experiences with the PCF staff, but most soldiers report that they were treated better than they had expected.

A more serious concern with regards to the mental health of returnees, is that survivors of sexual assault and sexual harassment may experience intense anxiety while at PCF, and may need additional support while going through the process. It is best for a returnee to begin counseling while they are AWOL and for plans to be made to provide extensive support to the soldier while they are PCF. Unless a returnee does not tell the PCF staff about what happened to them, they can expect to be questioned by the Criminal Investigations Division (CID), the equivalent of the FBI in the military, and to receive assistance from Victim Advocate Services. This process can be a positive one for the returnee (if they are ready to tell their story) and certainly is important to stop further abuse by the perpetrator, but can be very traumatic for the soldier. One way to make this as easy as possible is to call CID before the soldier returns to military control and make prior arrangements to have the soldier report a day early (on Sunday or Monday) to CID for questioning and support services before going on to PCF. This makes it easier for PCF to quickly expedite getting the soldier out, but also gives PCF the advance notice that the returnee is a survivor of serious trauma and should be treated appropriately.

### **OCONUS PCF Situations**

OCONUS (Outside the 48 continental United States) soldiers, who are not ordered to go to Iraq or Afghanistan or who are AWOL from Iraq or Afghanistan, are also PCF eligible, even though they have graduated from training. They are treated like other PCF returnees, with a few exceptions. First, I have yet to see any OCONUS soldiers receive anything better than an OTH discharge through the PCF process. It still is worth shooting for, but I think the odds of getting a better discharge are much more difficult. Secondly, OCONUS PCF soldiers can expect to be “resold” on the Army and given the chance to continue their careers in the military killing machine (with the catch sometimes being that they must switch to a combat MOS). Certainly it is our client's job to decide what is best for them, but I think it is our job as counselors and lawyers to make sure that such soldiers not fall prey to this pitch. How you do that is up to you, but I think it is very appropriate to remind our clients of the reasons they went AWOL in the first place and to also remind them that there are loopholes and exceptions to almost all of the promises that they may be told at PCF regarding their staying in the military.<sup>7</sup>

### **III. THE PROCESS FOR NON-PCF ELIGIBLE SOLDIERS**

The process for non-PCF eligible soldiers is much more difficult to navigate. The Army sees these cases as more serious, because there is a greater investment in time and resources in training the soldier, and because there is a presumption that soldier who is of higher rank and experience should be held to a higher standard than a trainee who goes AWOL. The most important issue for non-PCF eligible cases is mitigation. If a command can be convinced that a soldier had a “good” reason to go AWOL, the command may very well chapter the soldier out or only give him or her minimal punishment instead of pursuing a general discharge with possible jail time.

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<sup>7</sup> I would also suggest that it is best to discuss this possibility with OCONUS returnees before they get to Ft. Sill so hopefully their minds are already made up. This is good advise both for the well-being of the client, but also to avoid headaches for PCF with trying to get a soldier enlisted and then having them back out. As much as possible, within the limits of legal ethics and our client's best interests, we should try to befriend the PCF staff, as they can help or hurt our clients in the future. If they have a negative experience with your clients on a repeated basis, that can definitely hurt you in the future with other clients.

Counselors often can and do work with soldiers who are not PCF-eligible, but it is important to be in touch with an attorney as early on as possible to at least be on standby, as many of these cases may wind up in a court-martial. A challenge for many clients is that they may not be able to raise funds to hire a civilian attorney, but it would be a good idea to at least arrange for a civilian attorney to be available to provide a second opinion if a non-PCF eligible AWOL soldier decides to take advantage of a JAG trial defense service attorney (the equivalent of a public defender in the military system).

### **Negotiating with the command prior to returning to military control**

Once a returning non-pcf eligible AWOL soldier has prepared strong mitigation (and hopefully either is working with a lawyer or has one on standby), the next step is to attempt to negotiate with the soldier's command about possible ways to return to military control and be discharged, while hopefully avoiding serious negative consequences. A lawyer can certainly do this negotiating, but it is also possible for a lay counselor or even the soldier him/herself to contact the command. Generally, the best way to approach the command is to fax or email the mitigating evidence that helps to explain why the soldier felt compelled to go AWOL (being careful to present the client in the best light possible and to avoid further implicating the client in any kind of way), and then to follow up with phone calls with the command. Sometimes the client may think it is best to negotiate with their sergeant instead, but in most cases the sergeant cannot promise an outcome (and if they did, probably can't be trusted, since the commanding officer is the one who normally is the actual decision maker).

Another challenge for soldiers who have been AWOL for extended periods of time is tracking down who their current commander is. If a soldier missed a movement to Iraq and their commander is still in Iraq, then normally you would want to begin negotiations with the "Rear D" (Rear Detachment commander, normally a low ranking officer who stays behind while the unit is overseas). Often the Rear D will refuse to act without consulting with the unit's commander in theater, but normally it still makes sense to begin negotiations with the Rear D (and hopefully get the email address of the unit commander in Iraq to follow up with, so that you are not stuck negotiating second-hand via the Rear D only).

With regards to what you are shooting for in negotiations, most of the time the command is unwilling to actually promise anything in advance of the soldier turning him or herself in; however, I still think it useful to make this effort before the soldier turns him/herself in. First, you might get lucky and be able to convince the command to let the soldier be processed out at PCF (a non-PCF eligible soldier can be processed out at PCF, if, the command consents to it). Secondly, you could get lucky and get the command to commit to a certain course of action in advance (i.e. an Article 15 followed by a Chapter 10, or maybe a summary court-martial). Finally, you can normally at least get the command to go on the record (hopefully in email or other written communications) to make sure your client is not mistreated by fellow soldiers or NCO's in the unit. And, certainly I think it helps to make a positive first impression in which your client gets to put his or her best foot forward in writing with regards to mitigation issues.

### **Returning to Military Control or not?**

Once an effort is made at negotiating with the command (and unless you get lucky and the negotiations results in a guaranteed outcome of some kind), your client will need to decide how and when they will turn themselves into military control. While the unit will likely say that the soldier should turn themselves into the nearest military installation, it is normally better to go back in a way

that best ensures your client's emotional and legal well-being. There are several possibilities and no single right answer, but here are a few options that may make sense:

1. **Returning to the soldier's old unit** – The advantage of this option is that the soldier is able to speed the process along in the quickest way possible. Normally the decision-maker, who will in the end decide how the case will be resolved, is at the old unit, so often it makes the most sense to get the client returned to military control there. The negative of this option, however, is that many clients are scared to death to actually return to their old unit, particularly if they experienced mistreatment by their old command. In fact, even if a soldier says they can go back, don't be surprised if they they back out before they get to the gate (this did happen with one of my clients, even though he had already traveled 1000+ miles by Greyhound to return).
2. **Returning to PCF** – In almost all cases, a returning non-pcf-eligible soldier will not get to stay at PCF, but instead will be put on a plane or bus to their old unit within 24 hours. However, there are exceptions to this rule<sup>8</sup>, which normally come from explaining why a soldier should be treated as if they hadn't graduated from AIT, even though they had technically graduated from PCF. Another value in some cases to taking an AWOL non-PCF eligible soldier to PCF is for cases where the soldier doesn't have the funds to travel to their old post but can make it to PCF, as the Army will pay for travel from PCF to their old unit.
3. **Contacting an AWOL apprehension unit for making travel arrangements** – If a soldier is short on funds to travel back to their old unit, a counselor or lawyer can normally call the AWOL apprehension unit at either a local military installation<sup>9</sup> or at their old post<sup>10</sup>, and the Army will pay for travel to get the soldier back to their old unit.

Whichever method your client chooses to use, it makes a lot of sense to have someone such as a counselor, an attorney, or a friend/family member of the client, accompany the soldier when they return to military control. This can be helpful for the client to have this emotional support when they return, but also helps to send a subtle message to the command that the soldier is not alone in their struggle. Normally it makes the most sense to try to get through the gate and then proceed to the Provost Marshall's (aka Military Police) station on post. At the station, the client can expect to be questioned by a police officer (either a civilian or an MP). The questions will be pretty much identical to the questions asked by the police for AWOL soldiers returning to PCF, but the consequences of the answers to the questions are more serious (the more difficult questions discussed above in section II should be reviewed for sure with the client).

**The client may also be asked to write out a written statement explaining themselves, which is extremely dangerous. The police officer will often try to tell the soldier that they must make a**

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8 My favorite exception was of a married couple who were both AWOL from a permanent party duty station. By the time the couple was ready to return to military control, the wife was 8-1/2 months pregnant, so I had the wife's doctor write a letter saying she couldn't fly, and then had the couple drive to Ft. Sill PCF from their home state. Upon arrival, PCF was stuck in a major quandary. They couldn't send the wife back to their old permanent party station since she couldn't fly (and didn't want to keep her at Ft. Sill, because the Army would be stuck paying for the baby's delivery). They also felt uncomfortable sending the husband away when his wife was about to give birth. In the end, Ft. Sill fast-tracked their case through and gave them a quick recommendation for an OTH discharge within 72 hours of their reporting to Ft. Sill. (And more amazingly, the husband was even allowed to pass through the process without having to get the dreaded haircut!)

9 I have success with this at Ft. Irwin and Ft. Huachuca.

10 Ft. Riley's SJA office has said they can help arrange for travel if you call them in advance to let them know that an AWOL soldier from their post wants to return to military control but can't afford to get back.

**statement, but that is not true. Both the *UCMJ* and the US Constitution protect a client's right to avoid self-incrimination, so a client has the right to refuse to make a statement or to prepare a statement in advance. I would suggest that two possible ways for a client to respond are...**

1. "I reserve the right to make a statement at a later point in time, but will exercise my right at this time to not make a statement."
2. "I have prepared a statement in advance that I have attached to this document. I will exercise my right to make no further statements at this time."

I should also mention that some clients may decide not to return to military control after you attempt to negotiate with their command. As a lawyer or counselor, you cannot advise them to break the law (and refusing to return to military control is against the law), but you can advise them of the consequences of breaking the law and you can help them to deal with the legal consequences of breaking the law.

If a soldier decides to be AWOL indefinitely, they will continue to bear the risk of being apprehended by the police in a traffic stop, while crossing an international border, or any other occasion when a nosy police officer decides to check if the AWOL soldier has any warrants. Many soldiers do stay AWOL for decades, but if and when they are caught there is a high likelihood that they will face a court-martial for the higher offense of desertion.<sup>11</sup> And for many soldiers, the resulting stress of having an outstanding warrant can be far more damaging than the possible negative consequences of returning to military control.

With regards to leaving the US for a third-country such as Canada, the main thing to remember is that this is generally a permanent decision. There have been soldiers who have been able to successfully negotiate a return to the US, but there is no guarantee that this would be possible without facing serious jail time. Also, at the present time the political and legal situation in Canada is uncertain, so I would encourage clients considering this option to contact legal counsel in Canada, but to understand that this option is illegal under US law<sup>12</sup>. However for many soldiers, it is preferable to break the law and to follow their own conscience, and there are many in Canada who are supportive of them taking this step.

### **Fighting for a discharge back at the unit**

Unless an non-pcf-eligible returnee is fortunate enough to be processed out at PCF or to secure a commitment from the command as to how they will be treated, the soldier will need to be prepared for several weeks or even months of waiting. Depending on the circumstances (mostly how long the client has been AWOL), it may take a few hours or even a few weeks for a post to figure out what unit the soldier is currently in. Once a soldier is out of administrative limbo and is picked up by their unit, they will then have more waiting to do. In some cases, a command may immediately decide to proceed with a court-martial against the client, but it is more likely that the command will sit on the case for awhile. Often, the command will be willing to forget the whole matter altogether or to give the client an Article 15, if the client is willing to stay in the Army and commit to not going AWOL again. However,

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<sup>11</sup> Under the *UCMJ*, desertion requires that the GI never intends to return to military jurisdiction. Thus, it is easily possible for a GI who has been AWOL for years to show that (s)he always intended to return to the military to resolve his/her problems, but was unable to do so at an earlier time.

<sup>12</sup> See "AWOL in Canada, a counseling memo" by the War Resisters Support Campaign, *online at* [http://resisters.ca/AWOL\\_in\\_Canada.pdf](http://resisters.ca/AWOL_in_Canada.pdf)

if a client is determined to get out they need to be persistent in seeking a discharge. They should continue to document any problems that might help them with regards to mitigation (i.e. keeping medical records, a journal, etc.), and should continue to pester their command about their situation. Definitely this is an occasion where the old adage is true: the squeaky wheel gets the grease. Your client needs to be the squeaky wheel.

As a counselor or a lawyer, you can help your client to get the message across as well, by continuing to call and write the command about the problems the soldier is encountering, and to be ready to help a client to file an Article 138 or seek other remedies if a command fails to do what it is supposed to do. In some cases, however, a command may simply refuse to act in a timely manner and a client decides that the best outcome is to force a command to seek a court-martial or to choose to go AWOL again. Situations of command inertia are very difficult to overcome and often a counselor or attorney's role is to help the client to navigate the situation and to encourage them to be patient with the process.

### **Trying to avoid a pending deployment**

This related topic is outside the scope of this memo, but it is worth mentioning that many non-PCF-eligible soldiers who go AWOL, did so to avoid a deployment. Such cases are normally more difficult because the client could wind up facing charges for Missing Movement and because the command may be more desperate to try to retain the soldier. A common tactic used by commands for soldiers who have returned to military control after a missed movement, is to insist that the soldier ship out in a short period of time (sometimes as short as 1-2 weeks) and to be told that they will be considered for a discharge once they arrive in Iraq. Often, such soldiers are also placed on restriction to barracks until their new deployment date, so as to avoid giving the soldier another chance to go AWOL again. Often soldiers in such a situation may decide that they would rather face a court-martial (and get the chance to present their mitigation evidence and defenses to the court) than to deploy, but it can be very difficult to do this in a way that minimizes further punishment. Definitely soldiers in these scenarios need to have an attorney working with them, as the potential consequences range from being sent to jail or to possibly having to kill or be killed in Iraq. And, of course, it goes without saying that the standard disclaimer must always apply: Lawyers and counselors cannot tell a client to break the law, but can advise a client of the consequences of breaking the law and can help a client deal with those consequences.

## **IV. MITIGATION AND HOW TO PREPARE IT**

In all AWOL cases, be it PCF or non-PCF eligible soldiers, mitigation is the key to getting your client the best outcome possible.

Mitigation is a very broad concept, which includes almost anything that would help to explain why an offense should not be punished or should be punished with less severity than would normally be justified. Generally anything that would be grounds for a discharge (physical or mental health issues, family hardship, etc.) would be appropriate as mitigation, along with anything that would otherwise generate sympathy or understanding by the decision-makers in a case (i.e. command mistreatment of a soldier, failure of a command to stop mistreatment by fellow soldiers, etc.).

### **Types of Mitigation Evidence**

I believe that developing mitigating evidence is a time to be creative. Almost anything can be

used demonstrate the validity of the mitigation in a particular case. Such mitigating evidence might include:

1. Evaluations by medical doctors, psychologist, psychiatrists, PA's (physician assistants), chiropractor, or other medical care providers;
2. Records, notes, and letters by medical care providers. X-rays in particular seem to get lots of attention by the military. Copies of prescriptions are also very useful;
3. Written statements by the client;
4. Letters from the client's spouse, parents, children, grandparents, or other family members or friends;
5. Military records and evaluations;
6. Copies of letters or emails sent by a client to a family member while in a combat zone;
7. Copies of diary or journal entries kept by a client; and,
8. A letter from a client's lay GI Rights counselor telling the story of their time working with a client.

The only real limit on mitigation is whether the evidence in question helps or hurts a client's case, and also the Rules of Evidence if the mitigating evidence is to be used in a court-martial.

### **What if you think there isn't any mitigating evidence**

Some cases look on first glance to not have any mitigation possibilities, but I believe that every case provides some opportunity for the creative, yet honest, use of mitigation evidence. For instance, if a soldier says that the only reason he or she had for going AWOL was that "I just didn't like the Army anymore and it wasn't for me," it is still worth exploring if there are any potential mental health issues. Possibly the soldier was experiencing some degree of depression that has yet to be diagnosed, or maybe there is another issue that is weighing on a soldier's mind? Whatever suspicions you have, go ahead and probe some more. If a client says he or she is not depressed, ask the soldier if they have had problems sleeping or eating, or if there have been problems with sexual function? A soldier may very well be experiencing symptoms of depression and yet not be aware that these symptoms are the result of a mental illness. Another possibility is to ask probing questions about family issues and financial hardship. A soldier might not say that he or she has a family hardship case, but they might later admit that they are having problems making ends meet with their crappy Army salary and have been fighting a lot with their spouse about this. These issues might not rise to the level that would justify a discharge on the grounds of family hardship, but they could at least mitigate a soldier's AWOL offense and help to lessen the severity of possible punishment.

I would also encourage clients whenever possible to get a civilian medical care provider to make an evaluation or at least to write an informal letter explaining the condition, if the client is using physical or mental health concerns as mitigation. Even if the client has military medical records documenting the condition, it is often very helpful to get a diagnosis from a civilian care provider, as often the military understates the severity of physical and mental health issues.

## **How to effectively present mitigation evidence for a soldier returning to military control**

If you have done your job well and have created a good volume of mitigation evidence, your next challenge will be to help your client present this material in an effective and compelling way. For lawyers, I think the best approach is to write a cover letter that outlines the key mitigation arguments, summarizes the key evidence, and closes with a pitch for what relief you are seeking for your client (e.g. a better discharge or the decision to not prosecute a client for a UCMJ offense).

For counselors, probably the best plan is to prepare the evidence and then ask a lawyer to draft a letter as discussed above, or to work with the client in writing a letter that summarizes the evidence and makes the pitch.

The key in these letters is to make your arguments as clear as possible. Often the decision-makers in your case will not spend the time to thoroughly review your documentation, so you need to lead with your key arguments to hopefully pull them in and get them to review all of your mitigation evidence documentation.

## **What types of mitigation tends to work and what is a stretch to pull off**

Generally a command likes to know that if it chooses to act in a way favorable to your client, that they have grounds to back them up if they are later questioned about their decision. As a result of this, most commands tend to respond most favorably to those situations that are quantifiable and easily verified. This means that broken bones (which you can see on an x-ray) are more believable than soft tissue damage (which is more difficult to prove), and that physical health concerns are seen as being more valid than mental health concerns (since mental health diagnosis is seen as being more subjective in their eyes).

Most commands are also less willing to grant positive relief to a client, if the mitigation concern makes them look bad or might be seen as promoting a breakdown of discipline in a command. This is why conscientious objection is frowned upon (because commanders are scared that other soldiers will start thinking for themselves and listening to their own consciences), claims of sexual, racial, or gender harassment/discrimination are discouraged (because it makes the command look bad for allowing the condition to exist), and seeking a discharge for being homosexual is difficult (because again, commands are scared that other soldiers might fake being gay). However, these more “difficult” grounds for mitigation are not impossible to use. PCF eligible soldiers seem to be given more leeway in making claims that would be embarrassing to their commands since PCF is deciding the outcome and not the original command. As for non-PCF-eligible cases, it is often helpful to try to think ahead as to why a command would want to shoot down a particular argument and then to try to argue against it. For instance, a conscientious objector might want to emphasize the fact that he or she kept their beliefs on war secret from their fellow soldiers so as to not harm the discipline of the unit as a whole. The key is to be creatively honest and to attempt to think ahead.

Lastly, many soldiers may want to try to argue “breach of contract” as a ground for mitigation (as in, “my recruiter lied to me and said I wouldn’t see combat with this MOS”), but I have yet to see this work successfully. Maybe there is a way to pull this off but from what I can tell this isn’t very doable.

Whatever the circumstances are, however, never let an AWOL soldier return to military control

empty handed. There always is something that can be used for mitigation. Be creative!

## **CONCLUSION**

Assisting soldiers who are AWOL get their cases resolved is highly satisfying work. The outcome if you are successful is to help your client get the best outcome possible, while at the same time hopefully freeing them from military service. Every soldier we can help get out of the Army is one less soldier who will be killing on the front lines of an unwarranted war, and every soldier we help get out of the Army is one less person who could be changed forever by the horrors of war.

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