



# Military Law Task Force of the National Lawyers Guild

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## AWOL in the Army:

### *A guide for attorneys and GI Rights counselors*

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*“Soldiers who desert their units are ruining their lives. They normally wind up with years of jail time, and a dishonorable discharge. In fact they are getting off easy because desertion in time of war is punishable by death!”*  
- Statement by an unnamed basic training drill sergeant

*“If you want to go AWOL, go right ahead. If you don’t want to be here, the Army doesn’t want you. Just follow the train tracks off post. Just get the \*\*\*\* out of here! Hell, we’ll even mail you your discharge papers.”* -  
Statement by a different unnamed sergeant

These two statements are examples of the over-simplified rumors that members of the US Army hear on a regular basis. I’ve heard both of these statements (and variations on those statements) repeated by my clients, which added a great deal of confusion to an already difficult situation. I believe that it is better for soldiers to know the whole truth about how AWOL cases are handled in the Army. This article is intended to help to tell the real story.

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1 This is the third version of this article, with prior versions published in 2008 and 2009.

This article is primarily written for lawyers and lay G.I. Rights counselors, but it also may be of use to soldiers and their families, however, I strongly urge any soldiers reading this article to consult with a qualified GI Rights counselor or attorney before acting up on the information contained herein.

Please also note that while some of the ideas discussed here would be applicable to other branches of the military, most of the procedures discussed below are unique to the Army. Information on the AWOL/UA (unauthorized absence) policies of other military branches are listed in the addendum to this article.

The information in this article is based on DOD and US Army regulations as well as the experiences of myself and others engaged in this work. I have 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. Please also remember that the Army often changes its policies and practices with little or not advance warning.

## **I. Basic Concerns: The Requisite Disclaimer and “Worst Case” Scenarios**

One of the challenges in assisting AWOL soldiers is helping a soldier with his or her immediate situation without breaking the law oneself. (While I personally respect, admire and appreciate any person who chooses to defy unjust laws in obedience to the higher law of conscience, this article is addressed to people like myself who are compelled 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, he or she has acted with the knowledge that to do so 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 advice on how to leave a post, etc. While the limited case law on the issue lacks clarity, 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<sup>2</sup> (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 were the law 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.

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2 George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, (1999) Vol. 48 *Duke Law Journal*, 975.

If a soldier is considering going AWOL, it is important to inform him or her of the worst case scenario. Certainly we hope to help our clients to avoid a negative outcome, but they deserve to know the worst that can happen to them before they chose to make a life-altering decision freighted with serious consequences. The types of punishment for AWOL-related offenses are found in the Manual for Courts-Martial (a set of regulations that interprets and fleshes out the Uniform Code of Military Justice, or UCMJ). The worst punishments possible for absence related offenses (based on the worst possible aggravating circumstances) are:

- **Desertion:** Dishonorable Discharge, forfeiture of all pay and allowances and confinement for 5 years.<sup>3</sup>
- **AWOL:** Dishonorable Discharge, forfeiture of all pay and allowances and confinement for 18 months months.<sup>4</sup>
- **Missing movement:** Dishonorable Discharge, forfeiture of all pay and allowances and confinement for 2 years.<sup>5</sup>

However, to my knowledge, the longest absence-related sentence meted out during the post 9-11 era is 24 months; very few soldiers have received a sentence of more than 12 months.

There are other “worst case scenarios” aside from being incarcerated. 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 chose 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>6</sup>, but, based on available information, there has not been a successful prosecution for aiding and abetting an AWOL since the Vietnam War era.

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3 *See* Manual for Courts-Martial (2008 Edition) Part IV § 9 (e), *online at* <http://www.jag.navy.mil/documents/mcm2008.pdf>. --- In theory, desertion in time of war is punished by “death or otherwise as the court-martial might direct,” but current case law would seem to indicate that the Supreme Court would rule that the use of the death penalty in non-murder cases would constitute “cruel and unusual punishment.” In practice, the Army has not executed a soldier for desertion since World War II.

4 *See* Manual for Courts-Martial (2008 Edition) Part IV § 10 (e), *online at* <http://www.jag.navy.mil/documents/mcm2008.pdf>

5 *See* Manual for Courts-Martial (2008 Edition) Part IV § 11 (e), *online at* <http://www.jag.navy.mil/documents/mcm2008.pdf>

6 While it is arguably illegal for a family member or friend to help a soldier go or be AWOL, the law does not require anyone to turn in an AWOL soldier. *See* “I ain't singing, Charlie,” *Military Law Task Force of the National Lawyers Guild* [http://nlgmltf.org/i\\_aint\\_singing\\_charlie.html](http://nlgmltf.org/i_aint_singing_charlie.html).

## II. Determining PCF Status

The outcome of Army AWOL cases hinges on a very important question. Is the soldier eligible for out-processing at a PCF (Personnel Control Facility)<sup>7</sup> at either Fort Sill<sup>8</sup> or Fort Knox<sup>9</sup>, or will they have to return to their original unit?

### a. Eligibility and Exceptions

The “PCF process”<sup>10</sup> enables AWOL soldiers to be discharged in a reasonably expeditious fashion if they meet certain criteria. The PCF process was created to serve the Army’s best interests and has the following practical functions:

- (1) to allow the Army to discharge AWOL soldiers who are unable or unlikely ever to 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 Other Than Honorable (OTH) discharge<sup>11</sup>;
- (3) enable the Army to discharge soldiers who went AWOL from Europe, Korea, Hawaii and other overseas non-active war zone areas without having to spend the money to fly the AWOL soldier back overseas to face punishment; and
- (4) enable extreme cases of injustice to be corrected without considerable expense or command embarrassment.<sup>12</sup>

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7 See AR 600-62, online at [http://www.army.mil/usapa/epubs/pdf/r600\\_62.pdf](http://www.army.mil/usapa/epubs/pdf/r600_62.pdf).

8 See [http://sill-www.army.mil/USAG/HHD\\_Garrison/pcf.html](http://sill-www.army.mil/USAG/HHD_Garrison/pcf.html)

9 See <http://www.knox.army.mil/garrison/des/spc.asp>, also see <http://www.ima.army.mil/sites/news/knoxawols.asp>

10 See AR 600-62, online at [http://www.army.mil/usapa/epubs/pdf/r600\\_62.pdf](http://www.army.mil/usapa/epubs/pdf/r600_62.pdf), also see AR 630-10, online at [http://armypubs.army.mil/epubs/pdf/R630\\_10.pdf](http://armypubs.army.mil/epubs/pdf/R630_10.pdf)

11 There are 5 standard characterizations of discharge in the military: Honorable (getting all benefits including possible GI Bill eligibility), General (getting most benefits, but normally no GI bill eligibility), OTH (Other than honorable – having almost no benefits, but does not count as a criminal conviction), BCD (Bad Conduct Discharge – counts as a federal misdemeanor conviction on one's record), and Dishonorable (counts as a federal felony conviction on one's record, includes a lifetime ban on firearms ownership and in some states a ban on voting rights). The military also in rare cases grants an “uncharacterized” discharge to soldiers in entry level status who do not have enough of a record to merit either a positive or a negative discharge. Such discharges are rarely given in the Army in recent years.

12 One example are soldiers who were allowed to enlist at age 17, but who later went AWOL. Such soldiers have been routinely given General discharges at PCF, instead of the more typical Other than honorable discharge.

One must assume that this is because the US is arguably in violation of the “Optional Protocol on the Involvement of Children in Armed Conflict” to the Convention on the Rights of the Child (2002). See [http://en.wikipedia.org/wiki/Optional\\_protocol\\_on\\_the\\_involvement\\_of\\_children\\_in\\_armed\\_conflict](http://en.wikipedia.org/wiki/Optional_protocol_on_the_involvement_of_children_in_armed_conflict), also see <http://www2.ohchr.org/english/law/crc-conflict.htm>.

It is important to understand these objectives because they help to explain why the PF-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. But knowing the PCF process and its rationale in advance is a huge benefit as well for the AWOL soldier returning to the system.

A U.S. 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 dropped from the rolls (DFR'd) ;
2. The soldier fits into one of the following two categories:
  - a. The soldier has not graduated from AIT<sup>13</sup>, OR
  - b. The soldier is OCONUS, i.e. permanently stationed outside the lower 48 Continental United States AND the soldier does not have orders to deploy to either Iraq or Afghanistan, or is stationed in Iraq or Afghanistan.

The flow-chart in Figure 1 illustrates how these rules function.

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13 AIT = Advanced Individual training. This is normally as second round of training after Basic training, in which a soldier learns their individual job skills for their future duties in the Army. --- For infantry soldiers, AIT is combined with Basic to form OSUT (One Station Unit Training).

# Army AWOL PCF-eligibility Flow Chart

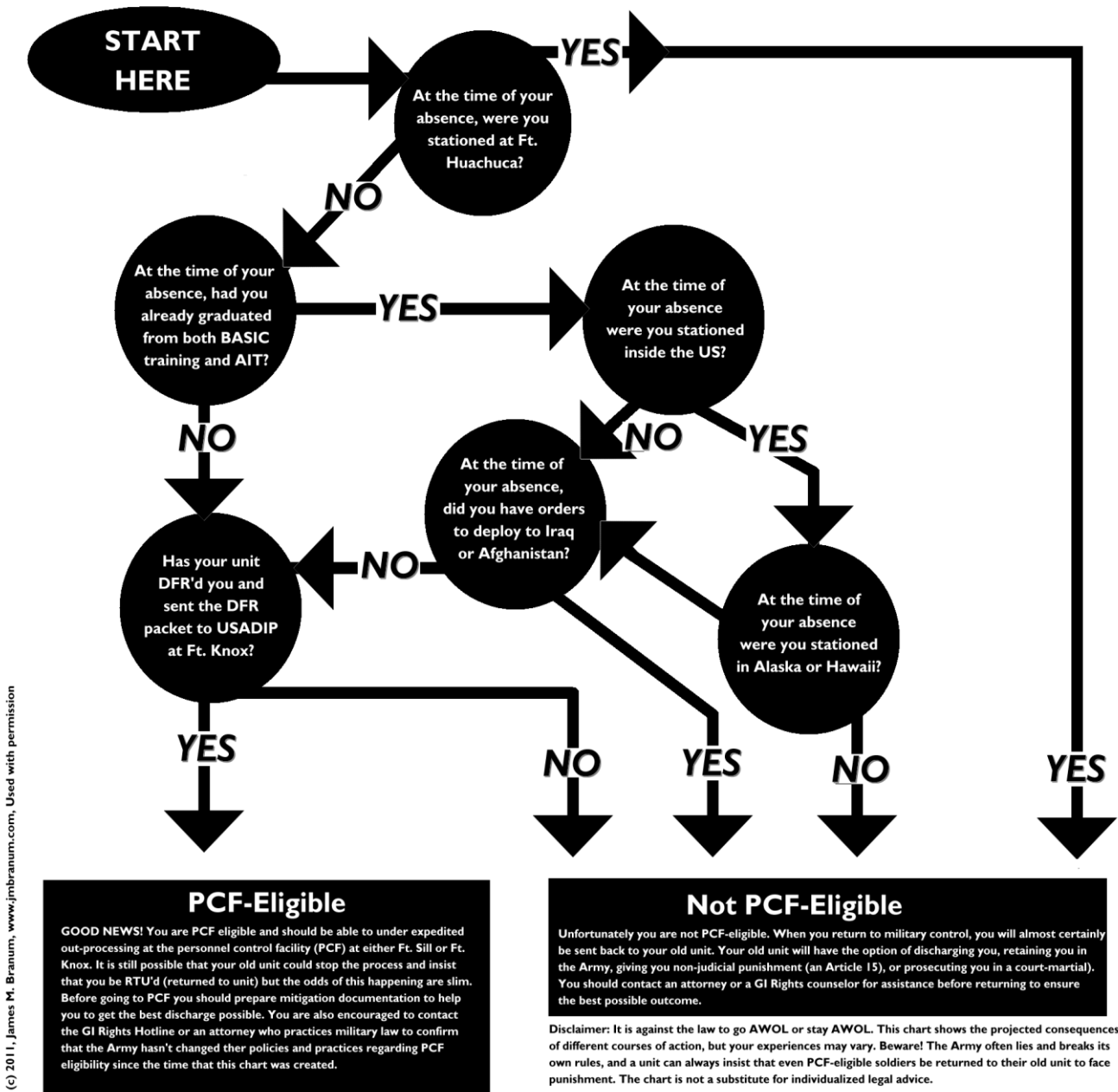


Figure 1

Generally the PCF eligibility rules apply to activated members of the Army National Guard (ARNG) with one caveat: ARNG members are subject to state as well as federal law and could face state law sanctions as well as sanctions under the UCMJ.<sup>14</sup>

The PCF eligibility rules do not apply to soldiers who are part of the IRR (Individual Ready Reserve)<sup>15</sup> or the DEP/DTP programs<sup>16</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 his or her prior duty station to face the music (normally by giving the AWOL soldier a ride to the airport and a plane ticket). At present (as of October 2011), the only post doing this on a frequent basis is Ft. Huachuca (a post that trains Army intelligence), which often instructs PCF to not process any of its soldiers who are AWOL from AIT at their installation.

Other posts do this on rare occasions and could adopt similar policies and practices as the norm. Most often soldiers caught in this situation have some kind of unusual aggravating circumstance at play, such as pending charges at their old unit for misconduct of some kind.

#### **b. How an AWOL soldier finds 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 mistakenly 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 rare cases, local police have cooperated with military authorities in seeking to apprehend a soldier during this time.

#### **c. The “Deserter” Warrant**

After 30 days, the unit is supposed to send the absent soldier’s packet (military records) to the US Army Deserter Information Point (USADIP) at Ft. Knox. At that point, the DIP is responsible for

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14 Inactive reservists who miss monthly drills are only AWOL for the duration of the drills. Normally frequent absentees from drills are discharged for “failure to participate.” See AR 135-91 *online at* [http://armypubs.army.mil/epubs/pdf/R135\\_91.pdf](http://armypubs.army.mil/epubs/pdf/R135_91.pdf) , also see <http://www.girightshotline.org/discharges/awolreserves/army/index.shtml> and <http://girightshotline.org/en/military-knowledge-base/topic/absences-from-the-reserves>

15 Information on the IRR program and the consequences of failing to report to IRR callups can be found at <http://couragetoresist.org/news/irr.html>.

16 See USAREC 601-95 *online at* [http://www.usarec.army.mil/im/formpub/REC\\_PUBS/r601\\_95.pdf](http://www.usarec.army.mil/im/formpub/REC_PUBS/r601_95.pdf), also see USAREC 601-56 *online at* [http://www.usarec.army.mil/im/formpub/REC\\_PUBS/r601\\_56.pdf](http://www.usarec.army.mil/im/formpub/REC_PUBS/r601_56.pdf) , also see <http://girightshotline.org/en/military-knowledge-base/topic/delayed-entry-program-discharge-dep-discharge>.

issuing a federal “deserter”<sup>17</sup> 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, attempts to enter the US from a foreign country, or otherwise has to show a police officer his or her ID.

In actuality however, this time requirement is rarely followed. There are many reports of varying timetables for soldiers to actually be DFR’d. In my experience the average wait time is 45-65 days, typically longer for members of the National Guard and for OCONUS soldiers – in one instance, nearly six months for an OCONUS soldier who went AWOL from Germany.

#### **d. Methods for Getting One’s DFR status**

Before March 2008, soldiers could call the United States Army Deserter Information Point (USADIP) to find out if they had been DFR’d. Since that time, however, the USADIP has stopped giving AWOL soldiers confirmation of whether their DFR packet had been received from the unit they left, and the GI Rights Hotline has not found another single source to confirm a completed DFR packet. Still, some soldiers have been successful in obtaining confirmation of their DFR status through other avenues.

Some methods suggested by counselors with the GI Rights Hotline network include<sup>18</sup>:

**1. Calling a AWOL apprehension unit:** A soldier or those helping them could call and ask an officer with an AWOL apprehension unit<sup>19</sup> to call USADIP to check on the status of the DFR Packet. Normally it works best to have a reason why a particular office was chosen (i.e. it is the post closest to where the soldier is currently at, or it is the soldier's old post)

The most recent phone number's reported for AWOL apprehension offices are<sup>20</sup>:

*Fort Belvoir, VA - 703.806.4024*

*Fort Benning, GA - 706.545.2638*

*Fort Bliss, TX - 915.568.3309*

*Fort Bragg, NC - 910.396-7504*

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17 The military uses the word “deserter” sloppily in this context, to refer to a soldier who has been AWOL for more than 30 days, while in fact the UCMJ says that a “deserter” is a soldier who is absent from his or her unit AND who either intended to remain away forever OR intended to shirk hazardous duty. This means that a “deserter” could in theory only be absent for a short period of time and still be a deserter if the intent element has been satisfied.

18 This information is besides my own experiences, the the reports of GI Rights counselors on the network's internal email listserve, and a memorandum written by Steve Woolford of the GI Rights Hotline Network.

19 AWOL apprehension units are normally a division of the Provost Marshall Office, the primary law enforcement agency of a US Army post. Such units are most often sometimes staffed by civilian police officers, but are also sometimes staffed by military police. On some posts the AWOL apprehension office consists of a single “Civil Liaison” who coordinates to pick up soldiers apprehended by civilian law enforcement in their area. At other posts, the AWOL apprehension division has multiple staff.

20 If the numbers are out-of-date, one can normally get the current number by searching a post's phone directory (which are often online in downloadable PDF format) or by calling the post operator during regular business hours.

*Fort Campbell, KY - 270.798.5402*  
*Fort Carson, CO - 719.526.0648*  
*Fort Drum, NY - 315.772.5954 or 2599*  
*Fort Eustis, VA - 757.536.4551*  
*Fort Gordon, GA - 706.791.3023*  
*Fort Hood, TX - 254.287.1077*  
*Fort Huachuca, AZ - 520.533.8827*  
*Fort Jackson, SC - 803.751.1481*  
*Fort Knox, KY - 502.624.4720*  
*Fort Lee, VA - 804.734.7400*  
*Fort Leonard Wood, MO - 573.596.1098*  
*Fort Lewis, WA - 253.966.9442*  
*Fort McCoy, WI - 608.388.2864*  
*Fort McPherson, GA - 404.464.3474*  
*Fort Polk, LA - 337.531.6812*  
*Fort Riley, KS - 785.239.2226*  
*Fort Rucker, AL - 334.255.0381*  
*Fort Sam Houston, TX - 210.221.2004*  
*Fort Sill, OK - 580.442.6802*  
*Fort Stewart, GA - 912.767.8057*

**2. Asking a military or civilian law enforcement officer to look up a soldier and see if they are listed as having a warrant:** This can work, but is also risky. The problem is that most police will immediately arrest a person who they discover has an outstanding warrant. It is probably safest to have a family member or friend do the asking, rather than the AWOL soldier.

**3. Contacting Trial Defense Services (TDS):** TDS are the public defenders of the Army JAG corps. In some cases they may be willing to contact USADIP to check on a soldier's DFR status.

**4. Contacting the soldier's old unit to see if they sent the DFR packet up:** This method is inadvisable in most cases. The main problem here is that it is always possible that a unit has prepared the DFR packet, but that USADIP hasn't properly filed the packet. Also it is normally best for a PCF-eligible soldier to fly under the radar of their old unit, to avoid any chance of the old unit wanting them back.

**5. Contacting a congressional office to ask them to contact USADIP for information:** This method has rarely worked, as most congressional staffers take the brush-off of military officials without question. It may be helpful to remind the congressional staffer of AR 630-10 § 1-4,g(2) which states: "Commander, Personnel Control Facility, Fort Knox, Kentucky and Chief, USADIP will ... verify all inquiries concerning deserters."

**6. Contact USADIP directly:** This is unlikely to work, but it is always possible that USADIP could change their policies again without notice. Soldiers calling USADIP should be prepared to be denied any information and/or be threatened with horrible consequences by USADIP staff.

**7. Taking an educated guess:** Due to the difficulty of getting a straight answer, most AWOL soldiers end up taking this route.

Most regular army soldiers from CONUS are DFR after being absent for two-and-a-half to three months. Reservists and members of the National Guard can often be two or three months longer. Overseas cases can go six months, eight months and even over a year before DFR. OCONUS soldiers could try contacting the country liaison to see about DFR status. (In one case, the Korea liaison office got a caller DFR'd in one week when it found out he was still being paid after eight months AWOL.) The longer someone waits to surrender, the greater likelihood of the packet being sent. Of course a longer wait can mean a greater risk of apprehension; however, because the Army does not issue a federal warrant until some time after the DFR packet is received, the risk of apprehension prior to being DFR'd is much less.

When callers guess wrong, the result can be more time at the PCF while the staff requests the unit send the packet (more common with OCONUS cases) or "stragglers orders" to return to the base the soldier is absent from (usually a plane or bus ticket). Many in this latter category simply choose not to comply with the orders, cool off somewhere while a packet is sent, and then return to the PCF weeks or months later (or after confirming status by one of the above methods). Often the issuing of stragglers orders speeds up the unit's sending a packet on to USADIP.

### **III. The Experience and Consequences of Being 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 lawyers and GI Rights counselors, we are prevented from acting in material ways to help AWOL soldiers be AWOL or stay AWOL. However, we can and should provide emotional support and kindness to an AWOL soldier and his or her family, and we can provide appropriate referrals to professional assistance as needed (i.e. mental and physical health care providers, attorneys, charitable organizations, etc.). And of course we can and should help soldiers prepare for the day they will return to military control.

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 (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 to remind 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: 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.

### **a. Recent Changes regarding attempts by the Army to apprehend AWOL soldiers**

Until recently the Army seldom took any active steps to find AWOL soldiers, however this has recently changed. It is now common practice for USADIP to call the local police of the community where a soldier is believed to be; the call is to alert the police to the existence of a warrant and to ask the police to actively try to find the AWOL soldier. Based on this current practice, a soldier should expect to be apprehended if they are staying at their home of record or at any other address the Army knows about.<sup>21</sup>

It is also possible but unlikely that the Army will try to send other people to look for the AWOL soldier. These people could include the recruiter who signed up the soldier as well as other soldiers from the same unit of 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).

In the case of a visit by either law enforcement or military officials in pursuit of an AWOL soldier, 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 and then close the door.<sup>22</sup>

These scenarios of course can be very intimidating for an AWOL soldier and his or her loved ones, so it may be helpful for lawyers and counselors to do role playing exercises to practice what to do. I also suggest that lawyers should tell their clients that they can give callers from the military/law enforcement the lawyer's name and phone number. The lawyer, of course, should then tell a military/law enforcement caller 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 turn in 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 accordingly.

### **b. Everyday Life for AWOL Soldiers**

Basic transportation can be a challenge for AWOL soldiers. For examples, AWOL soldiers are subject

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21 In past versions of this article, I stated that residents of small towns are more likely to be picked up by the police on so-called "deserters' warrants." This is no longer the case. Even big city police departments are actively pursuing soldiers who are AWOL.

22 See "I ain't singing, Charlie," *Military Law Task Force of the National Lawyers Guild*  
[http://nlgmtf.org/i\\_aint\\_singing\\_charlie.html](http://nlgmtf.org/i_aint_singing_charlie.html)

to arrest during traffic stops (this is most likely to occur after a soldier has been DFR'd). Soldiers who drive while AWOL will likely run into problems, particularly if they are speeding or driving with expired tags.

Some AWOL soldiers have utilized alternatives to driving such as getting rides from others (not always much safer since the police sometimes run the passengers for warrants during traffic stops), using public transit, walking or bicycling.<sup>23</sup> As for traveling long distance, I have not heard reports of warrants being checked when plane, bus or train tickets are purchased, but probably the safest bet is paying 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 working the same job s/he had before entering 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. It is possible that an employer would rat on the AWOL soldier but it is unlikely.

Lastly, it is very important for AWOL soldiers to avoid getting into any additional legal problems while staying AWOL. A soldier, until discharged, is 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.<sup>24</sup>

### **c. Apprehension**

A soldier apprehended while AWOL will most likely be taken to the local jail (either municipal or county depending on where the apprehension took place in) to wait for the military to decide what to do. The arresting agency 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, it will sometimes send the MPs from the nearest local military installation to pick the soldier up, but more likely it will tell the jail to release the soldier with orders that the soldier take the next available bus to either Ft. Sill/Knox PCF or to the soldier's old unit (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 picked up (e.g., if a soldier was captured in Los Angeles, call Ft. Irwin) to make sure that the Army actually knows that the client has been apprehended. The Army, amazingly enough, often is unaware of the arrest. It also

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23 Bicyclists should make sure to be using proper lights if riding at night; one client of mine was caught on an AWOL warrant because he was pulled over by the police for not having a headlight on his bike!

24 AWOL soldiers who return to PCF are not given drug tests as a matter of course, but returnees going to other posts are often given drug tests. Returnees should be encouraged to ensure that they will have clean system when they return to avoid additional trouble.

sometimes is necessary to continue to call repeatedly to make sure that the AWOL apprehension unit does its job and either picks up or makes travel arrangements for the soldier. It is also a good idea to call USADIP to make sure that they know the soldier is picked up, so that they will remove the outstanding warrant from the NCIC system.

In the long term, the consequences for apprehended AWOL soldiers 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 will almost certainly 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: If possible, an attorney could negotiate with the AWOL apprehension unit and ask that the soldier be released from the county jail and given a plane/bus ticket to his or her permanent party station. If the Army allows this, then the soldier has the chance to show that he or she may not a deserter, since the soldier had the chance to go AWOL again (i.e., wasn't escorted or in handcuffs and shackles) but instead returned of his or her own volition.

## **IV. The Process for PCF eligible AWOL soldiers**

### **a. Introduction to the PCF process**

For AWOL soldiers who are fortunate enough to be PCF-eligible, the experience at the Ft. Sill and Ft. Knox PCFs 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 give the client as much information as possible about what to expect at PCF. Also, before an AWOL soldier comes to PCF, a counselor or lawyer should ensure that the soldier is in fact PCF-eligible (including being DFR'd) and that adequate mitigation evidence has been prepared<sup>25</sup>. Also, when possible, it is best for returnees to arrive at PCF on either a Monday or Tuesday to ensure spending as little time at PCF as possible.

When possible, it is advantageous for lawyers or GI Rights counselors to take AWOL soldiers to PCF. This allows the client to have some emotional support but also allows the lawyer to be present while the 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 furnish advice via telephone if problems arise. The following steps are given in the most usual order, but are subject to change.

### **b. Arriving at Fort Sill or Fort Knox PCF**

Upon arrival at the gates of either Ft. Sill or Ft. Knox, the returning soldier will need to show photo IDs for all occupants of the car and to tell the security at the gate that you are going to PCF. In some cases, the MPs may take your client into custody at the gate, but in other cases the soldier will be free to drive on to the post. From there the soldier will drive to the MP station. There, the MPs will ask for

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<sup>25</sup> See section VI of this article.

your client's identification (preferably a drivers license/state ID and their military ID) to verify if the client is DFR'd. Once DFR status has been checked, a police officer (at Ft. Sill this will likely be a civilian police officer, and Ft. Knox it will likely be a military police officer) will prepare a report to document the fact that your client has returned voluntarily to military control. (At Fort Knox, the AWOL soldier is normally fingerprinted while at the MP station as well.)

You should try to stay with your client during questioning. If you are an attorney, you must be allowed to be present; if you're a counselor, you may be excluded. 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?** Often soldiers went AWOL with the assistance of friends or family members. While the odds of prosecution for aiding and abetting are remote, 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 decline to answer it.
- **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. (e.g., "mental health" or "family problems"). If the MPs demand more information, the soldier should just say, "I am exercising my right under the US Constitution and the UCMJ to not say more on this matter."
- **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 the service member's old unit. It can also be helpful to get a phone number for the unit before traveling to PCF, but this not a necessity.

After the police officer completes the report, your client will be patted down and his or her bags searched before being transported from the MP 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 him or her – or simply allow an accompanying attorney to transport the client to PCF. It is recommended that even if the police transports your client to PCF, 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 for in-processing or for the conversations with the PCF Commander (or his or her designated representative) or JAG, and your client will likely not want to extend their stay at PCF to ensure you can be there for those meetings.

One problem that may arise is that the 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 after-hours, give the documentation to a PCF escort and ask that the paperwork be given to the PCF Commander in the morning. You can then follow up by calling either the PCF Commander or the civilian PCF administrator in the morning to ensure that they did in fact receive the paperwork. (it might be helpful to remember the name of the PCF staff member you gave the documentation to, in the event of any problems).

### **c. What happens while a soldier is at PCF – Processing Stages**

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 MP’s office, with the exception that the PCF staff do not have a “law enforcement” mindset, and are likely not trying to trick your client into saying the wrong thing. With 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.) Ideally this stage will happen on Monday or Tuesday of a given week.

**2. Getting a haircut and a uniform** – Normally on Tuesday or Wednesday, PCF soldiers will be issued ACUs – the regular desert camouflage uniform worn during most duties by soldiers – 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.<sup>26</sup> At night, soldiers are allowed to wear PT uniforms (shorts and t-shirt normally worn by soldiers for physical training) or sometimes even civilian clothing.

Prior to being issued a uniform, a soldier will be wearing his or her civilian clothing, so it is normally best for a returnee to bring a change or two of civilian clothing (they also will need civilian clothing for their trip back home).

**3. Seeing the PCF Commander or his/her designated representative for the formal reading of the charges** -This is the most important stage of the process, as this is where a returnee will be read the charges for being AWOL and in most cases offered a discharge out of the Army (normally a chapter 10 discharge in lieu of court-martial<sup>27</sup>). This returnee will have the chance to respond to this offer, through either accepting the deal, asking for a better discharge determination (based on the mitigating factors behind the AWOL), and/or ask to be retained in the Army (the latter request being rarely granted).

Please be aware that this stage has slight variations in process at Ft. Sill and Ft. Knox.

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<sup>26</sup> A lucky few male soldiers get to skip the haircut at Ft. Sill, mostly older soldiers who the PCF staff identify with.

<sup>27</sup> “Chapter 10” refers to chapter 10 of AR 635-200, *online at* [http://www.army.mil/usapa/epubs/pdf/r635\\_200.pdf](http://www.army.mil/usapa/epubs/pdf/r635_200.pdf). The Army often refers to discharges under AR 635-200 as “being chaptered out” or as “getting a chapter.”

**a. Fort Sill PCF** - At Ft. Sill PCF, the First Sergeant (1SG) is the commander's designated representative. The 1SG will formally "read the charges" to the returnee and then ask the returnee to tell his or her story. The returnee should be prepared to tell why he or she 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 1SG if he or she has read the documentation and should carry a copy of the documentation to give to the 1SG if the documentation somehow didn't 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 1SG will be present.

After the 1SG 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. In rare instances, the 1SG may also attempt to "resell" the soldier on the Army and try to convince the soldier to not seek a discharge<sup>28</sup>, so it is important to advise a client, in advance, of the dangers of military service so that they will not make the mistake of reenlisting when promised a better MOS (military occupational specialty), better duty station, etc.

When meeting with the 1SG at Ft. Sill PCF, returnees should attempt to show the 1SG respect and have a proper "military bearing" in this meeting. Also returnees should be reminded that the 1SG 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.

**b. Fort Knox PCF** - At Ft. Knox, the AWOL soldier will still be "read the charges" but not always by the same official. Sometimes it will be the commander, sometimes it will be a 1LT (first lieutenant), sometimes it will be another PCF staff member.

Unlike Ft. Sill, a returnee to Ft. Knox will often not be given a chance to verbally "make his case" at all unless the returnee specifically requests it (and often returnees are told that making this request will extend the duration of their stay at PCF). However, returnees will be given the chance to make a written statement that will go in their file for consideration. It would be best to prepare this statement before the returnee arrives at PCF, to allow a counselor or lawyer to ensure that the returnee avoids incurring further incrimination beyond the basic AWOL offense.

**4. Completing ACAP** - This is the required counseling in which the Army explains the almost non-existent support it gives to soldiers who are being discharged, including a description of how a soldier can seek an upgrade of his or her military discharge at a later point in time.

**5. Seeing JAG** – Trial Defense Services (TDS), the military equivalent of a public defender, will meet briefly with each returnee. TDS will in most cases look over the soldier's documentation and recommend possible alternative approaches. 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 a civilian

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<sup>28</sup> The current Ft.Sill PCF 1SG does not commonly do this, and will in fact likely discourage a soldier who wants to stay in. Past 1SG's, however, have pushed soldiers to stay in, so it is possible that future 1SG's may have a different stance.

Also it appears that Commanders and 1SG's at Ft. Sill PCF stay for assignments of about 12-18 months.

attorney should tell his or her client to call the attorney 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, but other TDS attorneys give misleading information<sup>29</sup> 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 is assigned and to be prepared to stick up for the desired course of action even if TDS thinks it is a bad idea.

**6. Issuance of 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 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.<sup>30</sup> Dependents of the returnee will also likely still be covered under Tricare until the discharge is finalized. For example, one client of mine had the delivery of his child covered by Tricare about a month after going through PCF.

**7. Leaving PCF** – This 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. Soldiers who lack the financial means to pay for travel home will either need to raise the money – e.g., try to get other PCF soldiers to chip in to pay for their comrade's bus ticket – or stay at PCF for a month. If the soldier stays for the month, the Army will then pay for travel out of the pay that the soldier will receive for the extra time spent at PCF.

**8. After PCF:** The returnee will technically be on “terminal leave.” PCF staff often tell soldiers that they will discharge papers in the mail in 3 months, but it is more likely to be 6 months. In the meantime, I encourage soldiers to make multiple copies of their leave papers and to keep one copy in their wallet at all times to prove that they are not AWOL any more.<sup>31</sup> Also once a soldier receives their actual DD 214 (discharge papers), they should make multiple copies of it as well.<sup>32</sup>

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29 One common misstatement repeated by some TDS attorneys is that a returnee who winds up with an OTH discharge is forever barred from college financial aid or government jobs. This is simply not true. Veterans are eligible for need-based federal financial aid for college such as Pell grants, student loans and work study, no matter what kind of discharge they received from the military. It is true that vets with bad discharges will be ineligible for college funds from the GI Bill, but this will not affect their eligibility for funding that is not dependent on one's veteran status.

30 While the soldier will have a valid military ID, they will be barred from entering the base that they went to PCF at though, either Ft. Sill or Ft. Knox. However, the soldier should be able to enter other military posts without problem.

31 USADIP is bad about not removing warrants from the NCIC system. I know of several cases of soldiers who were arrested on AWOL warrants, despite the fact that they had already gone through PCF. Without the leave papers, a soldiers who could sit in a county jail for several weeks instead of several hours.

32 I know of at least once case where a soldier who was discharged at Fort Carson, was later arrested for being AWOL and stuck in the Army for several months, because both he and the Army had lost the DD 214. He couldn't prove he wasn't in the Army and the Army was convinced that he had gone AWOL and they just failed to do do the proper paperwork.

I encourage attorneys and counselors to debrief their clients after they go to PCF, first to find out if there are any potential problems in the client's case, but also to find out if there are any changes in PCF policies/practices. (I normally ask, "was everything like I told you it would be? Did they do anything different than what you expected?")

If any changes are discovered, please report the information to the GI Rights Network and the Military Law Task Force.

#### **d. What happens while a soldier is at PCF – Practical Concerns**

In any given week there will anywhere from 5-20<sup>33</sup> 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 are 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 Physical Training – during which soldiers are told daily not to 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.

At Ft. Sill PCF, the rest of the day is spent doing details (mowing lawns on base, working in the recycling room, etc.) or in sitting on gender-segregated bleachers. While there, soldiers are free to talk to each other, smoke (smokers are encouraged to bring lots of cigarettes to pass the time and/or to share with their new friends), or read a book, but they 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 phone<sup>34</sup>, 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 aggravated 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.

At Ft. Knox PCF, the day is spent mostly sitting in a day room. There is no smoking allowed at Ft. Knox's PCF but soldiers can watch TV and are very unlikely to be sent out on a detail.

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<sup>33</sup> A few years ago the numbers were much higher, sometimes as many as 50 in a given week. It is unclear why these trends have changed.

<sup>34</sup> Until recently, returnees were only allowed to use a pay phone for about 5 minutes a day, however, recently the policies were changed so that returnees were allowed to keep their cell phones. It appears that returnees can only use them for phone calls during free time in the evening, but that they may be allowed to send text messages at other times. To be on the safe side, it might be smart for returnees to bring both their cell phone and calling card for payphones, so that they will be prepared for any unexpected policy changes.

## e. Discharge

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 (est. 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 an especially busy week at PCF, or the unavailability of one of the key decision-makers at PCF due to illness or leave, such as the Commander or JAG. Other problems that could delay the process include activated National Guard cases where, for example, 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 merely in delay of processing or even potential prosecution under the UCMJ.

The end result of the PCF process itself is a discharge recommendation, most often for “Chapter 10-Discharge in lieu of court-martial.”<sup>35</sup> A rare few soldiers will receive a better discharge (either an ELS<sup>36</sup> or a General discharge)<sup>37</sup>, but 95% or more will get the OTH (Other than Honorable) discharge.

Soldiers who are well-prepared with mitigation evidence<sup>38</sup> and who do a good job of presenting themselves at PCF typically receive better discharges.

## f. 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 in assisting soldiers in this case include:

- **Visits:** The PCF staff do not like to accommodate visits, but they do sometimes allow visits of attorneys and family members, if they are scheduled in advance and approved by the PCF commander.

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35 “Chapter 10” refers to chapter 10 of AR 635-200, *online at* [http://www.army.mil/usapa/epubs/pdf/r635\\_200.pdf](http://www.army.mil/usapa/epubs/pdf/r635_200.pdf). The Army often refers to discharges under AR 635-200 as “being chaptered out” or as “getting a chapter.”

Also, in theory, a chapter 10 is supposed to be initiated by a servicemember after he or she is read charges, but in the PCF context the reality is that PCF has already drafted the chapter 10 request documents.

36 ELS's are normally given out under Chapter 11. It is also possible for a soldier to get an ELS through a chapter 10 discharge, see AR 635-200 § 10-8 (c) .

37 The few rare general discharges are normally granted under AR 635-200 § 10-8 (a) which provides that “A discharge under other than honorable conditions normally is appropriate for a soldier who is discharged in lieu of trial by court-martial. However, the separation authority may direct a general discharge if such is merited by the soldier’s overall record during the current enlistment.”

38 See section VI of this article.

- **Preparation:** Being well-prepared with information helps ease the mind of many scared returnees.
- **The “Buddy System”** 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. It can be very helpful for a soldier to go through the experience with a friend. It also helps if phone time is limited; e.g., 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 either a 1SG (at Ft. Sill) or a 1LT (at Ft. Knox). 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.

#### **g. Special Needs of Survivors of Sexual Assault and Sexual Harassment**

A more serious concern with regards to the mental health of returnees is the intense anxiety that survivors of sexual assault and sexual harassment may experience while at PCF. These soldiers may need additional support while going through the process.<sup>39</sup>

It is best for a returnee to begin mental health counseling while still AWOL and for plans to be made to provide extensive support to the soldier while at PCF. Many survivors who wish to be discharged quickly choose to either not report the sexual assault or to do what is called “restricted reporting,” which enables the survivor to seek medical and support services without any command or law enforcement involvement in the case.<sup>40</sup> However not doing full “unrestricted reporting” may cause serious psychological harm to the survivor and will also permit the perpetrator to continue the abuse against other soldiers.

For those soldiers who do choose to do “unrestricted reporting,” they can expect to be questioned by Criminal Investigations Division (CID), the equivalent of the FBI in the military, and to receive assistance from Victim Advocate Services. Though potentially traumatic for the soldier, this process can prove to be positive in the long run for some survivors. 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

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39 Resources worth consulting include Servicewomen's Action Network (<http://servicewomen.org/>),

40 See [http://www.sexualassault.army.mil/content/policy\\_restricted\\_unrestricted\\_reporting.cfm](http://www.sexualassault.army.mil/content/policy_restricted_unrestricted_reporting.cfm)

going on to PCF. This both gives PCF the advance notice that the returnee is a survivor of serious trauma and should be treated appropriately and makes it easier for PCF to quickly expedite the soldier out. Also I recommend talking to the victims advocate in advance, to inquire as to whether the designated person will do their job or not. If the designated advocate is not supportive, it may make sense to utilize an outside victim's advocate.<sup>41</sup>

Unfortunately it is possible that the Army will use the investigation of the assault as an excuse to hold the returnee at PCF longer, so it is important to be ready to fight to prevent a delay in discharge. Such advocacy might include seeking assistance from a congressional office or filing an IG complaint.

#### **h. OCONUS PCF Situations**

OCONUS (Outside the 48 continental United States) soldiers who (a) are not ordered to go to Iraq or Afghanistan, or (b) are AWOL from Iraq or Afghanistan, are also PCF eligible, even though they have graduated from training. They are treated like other PCF returnees, but there are a few special concerns with these cases.

First, formerly-OCONUS PCF returnees can expect to be “resold” on the Army and given the chance to continue their careers in the military killing machine – with the possible catch that they must switch to a combat MOS. Certainly it is the client’s job to decide what is best, but I think it is our job as counselors and lawyers to make sure that such soldiers not fall prey to this pitch. It is very appropriate to remind clients of the reasons they went AWOL in the first place and, especially, that there are loopholes and exceptions to almost all of the promises military pitchmen may make at PCF regarding their staying in the military.

Second, many formerly-OCONUS PCF returnees will be combat veterans with PTSD. Being back on post (even in the lower stress environment of PCF) can bring up a lot of PTSD triggers, so it would be worthwhile for the returnee to discuss coping techniques with a mental health professional before returning. --- Also combat veterans should be prepared for being badgered with nosy/intrusive questions by other PCF returnees (most of whom will be very young soldiers who went AWOL from training).

### **V. The process for non-PCF eligible soldiers**

This section discusses the plight of those soldiers who are not eligible for out-processing at PCF. The discussion is also relevant for the rare few PCF-eligible soldiers who get sent back to their old posts.

#### **a. Avoiding Court-Martial**

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 of time and resources in training the soldier, and because there is a presumption that a soldier who is of higher rank and experience should

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<sup>41</sup> My past experiences working with Victim Advocate Services at Ft. Sill have been horribly bad. In one case, the so-called “advocate” told my client that “all of this will go away if you just tell them you made the rape story up.”

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.

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 the JAG TDS.<sup>42</sup>

#### **b. 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 – then to follow up with phone calls to the command. Sometimes the client may think it is best to negotiate with his sergeant or another NCO (non-commissioned officer) instead, but in most cases the sergeant cannot promise an outcome, and any promise a sergeant made probably could not be trusted, since the commanding officer normally is the actual decision maker. Commanders often are not trustworthy either, but they are less likely to lie to a lawyer or an outside GI Rights counselor.

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 his/her commander is still in Iraq, then normally you would want to begin negotiations with the Rear Detachment commander (Rear-D), 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. Nonetheless, try to get the email address of the unit commander in Iraq for follow-up, so you are not stuck negotiating second-hand via the Rear-D only.

While useful to attempt negotiations before a soldier turns him- or herself in, the command frequently is unwilling to actually promise anything in advance. Still, I think it is worth shooting for. The reasons for this are:

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<sup>42</sup> The right for a servicemember to be represented by his or her choice of legal counsel is provided by the Sixth Amendment to the US Constitution, as well as *Rule for Courts-Martial* 506, from *Manual for Courts-Martial (2008 Edition)*, Part II. This counsel can be a civilian lawyer, a detailed TDS attorney, or both civilian and TDS counsel.

1. You may be able to get persuade the command to commit to a certain course of action in advance, i.e. an Article 15 (Nonjudicial Punishment) followed by a Chapter 10 (Discharge in Lieu of Trial by Court-Martial).
2. 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 so consents. This almost never happens, but miracles do happen every once in awhile.
3. You can try to get the command to go on the record (hopefully in email or other written communications) that they will make sure your client is not mistreated by fellow soldiers or NCOs in the unit. If the unit later breaks their word, you can use their prior statements to hold their feet to the fire.
4. Last, it always helps to make a positive written first impression, where one can frame the mitigating circumstances in the context most favorable to your client.

### **c. To Return to Military Control or Not to Return?**

Once an effort is made at negotiating with the command (and unless you get lucky and the negotiations results in a pre-arranged outcome of some kind), your client will need to decide how and when to turn him/herself into military control. While the unit will likely say that the soldier should turn him/herself 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, though no single right answer.

Here are a few options:

**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. This option makes sense because generally the ultimate decision-maker is located at the old unit. The downside of this option, though, 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 he can go back, don't be surprised if he backs out before reaching the gate. This did happen with one of my clients – even though he had already traveled 1,000-plus 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, and instead will be put on a plane or bus to his/her old unit within 24 hours. However, there are very rare exceptions to this rule<sup>43</sup> that normally result from explaining why the soldier should be treated as if s/he hadn't graduated from AIT, even though s/he had technically graduated from AIT. Another advantage, in some cases, to taking an AWOL non-PCF eligible soldier to PCF, is for cases in which the soldier doesn't have the funds to travel to his/her old post but can make it to PCF – since the Army will pay for travel from PCF to the soldier's old unit; it should be said that the Army doesn't

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<sup>43</sup> The rarity is more profound in recent years. I am only aware of one non-PCF eligible soldier who was allowed out at PCF in the last 12 months.

really pay for the travel, since the travel costs will be deducted out of the soldier's future pay.

**3. Contacting an AWOL apprehension unit for making travel arrangements** – If a soldier is short on funds to travel back to his old unit, a counselor or lawyer can normally call the AWOL apprehension unit<sup>44</sup> at either a local military installation or at the soldier's old post, and the Army will pay for travel to get the soldier back to the soldier's old unit.

Some soldiers have also tried reporting directly to another military installation for their turn-in. I normally do not recommend this, as the other military installation may just incarcerate the soldier to await transport (this is most common for soldiers who report to a non-Army military installation).

**4. Turning oneself in to the local police:** This is terrible, terrible idea, but is one that the Army often suggests to AWOL soldiers. This is pretty much guaranteed way for a soldier to spend several days (or even weeks) in jail awaiting pickup by the Army. Even if a soldier is broke and has no funds, it would be better to first try to arrange pickup directly by an AWOL apprehension unit.

**5. Getting admitted to a hospital:** This has worked very well for many of my clients with PTSD or other mental health issues. According to Army regulations, a hospitalization can constitute a return to military control,<sup>45</sup> so I have had several of my clients get admitted to the psychiatric units of hospitals in their area, either civilian or VA. The VA hospitals I think work best, but the challenge is to convince the hospital staff to admit the soldier despite the fact they are AWOL.

The best way I know to ensure admission is for the client to admit to having suicidal ideation. It is of course a bad idea for a soldier to lie about having such ideation, but in most cases of severe PTSD that I have dealt with, the soldier already had the thoughts in their head, but have never told anyone about them. So I just encourage them to be vocal about what they are feeling.

One caution though about being hospitalized --- every state is different on their laws regarding voluntary/involuntary mental health hospitalization, and the effects of such a hospitalization on one's civil rights, including the right to own firearms.<sup>46</sup>

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 he or she returns to military control. This gives the client emotional support upon return, but also helps to send a subtle message to the command that the soldier is not alone in his or her struggle. Normally it makes the most sense to try to get through the gate and then proceed to the Provost Marshall's (aka

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44 See section II (d)(1) of this article for a list of the phone numbers of AWOL apprehension offices.

45 “Absentees and deserters are returned to military control when they . . . Are receiving treatment in civilian medical facilities but cannot be immediately transferred to a military facility.” - AR 630-10 § 4-1, *online at* <http://www.army.mil/usapa/epubs/pdf/r630-10.pdf>,

46 See “Bad Risk? An Overview of Laws Prohibiting Possession of Firearms by Individuals With a History of Treatment for Mental Illness” *Journal of the American Academy of Psychiatry Law* 35:3:330-338 (2007) by Joseph R. Simpson, MD, PhD, *online at* <http://www.jaapl.org/cgi/content/full/35/3/330>

Military Police) station on post.<sup>47</sup> 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 those 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 IV certainly should be reviewed with the client.

The client may also be asked to write out a written statement explaining him/herself, which is extremely dangerous. The police officer will often try to tell the soldier that s/he must make a statement, but that is not true. Both the UCMJ<sup>48</sup> and the US Constitution protect a client's right to avoid self-incrimination, so the client has the right to refuse to make a statement or to prepare a statement in advance. I suggest that two possible ways for a client to respond are:

**Response #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."

**Response # 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."

Worth noting is that some clients may decide to not 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, he or she 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 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. 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.<sup>49</sup> As of this writing, 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

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47 Some posts prefer that soldiers report directly to their old unit. I generally recommend against this, because of the concern that the police will not contact USADIP to make sure that the warrant has been lifted from the NCIC system.

48 Uniform Code of Military Justice, Article 31 (Published as part of the *Manual for Courts-Martial (2008 Edition) Appendix 2*, online at <http://www.jag.navy.mil/documents/mcm2008.pdf>)

49 Returning Army resistors from Canada have received sentences of 24 months (Fort Campbell), 15 months (Fort Carson), 12 months (Fort Stewart), 10 Months (Fort Hood) and 8 months (Fort Carson).

this option is illegal under US law. 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 their taking this step.<sup>50</sup>

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

Unless a non-PCF-eligible returnee is fortunate enough to be processed out at PCF or to secure a commitment from the command as to how he or she 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. And once a soldier passes out of administrative limbo – she or he will get to wait some more after being picked up by his/her unit. 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, clients who are determined to get out must be persistent in seeking a discharge. They should continue to document any problems that might help them with regards to mitigation (e.g., keeping medical records, keeping a journal, etc.) and should continue to pester their command about their situation. This is definitely an occasion in which 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 (Complaint) or seek other remedies (such as a Congressional inquiry, a complaint to the Inspector General's office, or in extreme cases going to the press) if a command fails to do what it is supposed to. In some cases, though, a command may simply refuse to act in a timely manner, and a client may decide that the best outcome is to seek to force a command to seek a court-martial or to go AWOL again. Situations of command inertia are very difficult to overcome, and often it's the role of a counselor or attorney to help the client navigate the situation and to encourage patience.

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

This related topic is outside the scope of this article, 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 or Desertion, 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

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<sup>50</sup> A discussion of the current state of the legal situation for US war resisters in Canada is found in the article "Building the Campaign to Defend GI Resisters: Is it time to call for amnesty?" *On Watch*, by Gerry Condon (June 2011), *Online at* <http://nlgmtf.org/downloads/on-watch/>.

movement is to insist that the soldier ship out in a short period of time (sometimes as short as 1-2 weeks) and wait until arriving overseas before being considered for a discharge. 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. 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.

Soldiers in these scenarios definitely 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 an unjust imperial war. 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 warn a client of the consequences of breaking the law and help a client deal with those consequences.

## **VI. Mitigation and Defenses**

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, including almost anything that would help to explain why an offense should not be punished or should be punished with less severity than might otherwise 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 (e.g., command mistreatment of a soldier, failure of a command to stop mistreatment by fellow soldiers, etc.).

It is also important to remember that bringing forward mitigation evidence can bring to light factors about a command, that the command would want to keep concealed. This kind of command discomfort could work to a soldier's favor (so that a command might want to discharge the soldier quicker or with a better discharge, in the hopes of keeping the soldier from embarrassing), but it also could result in reprisals and harassment against a perceived troublemaker, who is "disloyal" to the unit. It is important to always be aware of both possible outcomes when preparing a mitigation case.

### **a. Mitigation vs. Defenses**

Before discussing mitigation, it is essential to discuss the related subject of defenses, and the potential confusion that many practitioners (both attorneys and counselors) have in differentiating between mitigating factors and defenses. This is a critical distinction, because the existence of a legal defense could result in a command being unable to prosecute a soldier for AWOL.

In a nutshell, mitigation is any factor that would help to lessen the potential punishment due for committing a crime. Mitigation does not excuse a crime, but it may lessen the consequences of committing the crime. In contrast, defenses are factors that legally excuse a crime, to make the crime as if it never happened at all. The potential defenses to crimes in the military context are found under

Military Rule of Evidence, Rule 916.<sup>51</sup>

Defenses are very rare in the AWOL/Desertion context, but possibilities would include involuntary intoxication (which requires the AWOL soldier to prove that the cause of his or her absence was the result of being intoxicated against his or her will), insanity (an almost impossible thing to prove in military courts-martial), obedience to an order (i.e. a soldier receives a verbal order to go home by his or her commander), inability (i.e. a soldier is given an order to report to post at a certain time, even though the roads might be icy or impassable), or duress.

Duress is the most likely possibility to explore as possible defense. MRE 916 (h) defines duress as the “reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.” Normally the only time that duress would be an issue would be a situation in which a soldier is threatened with death or serious bodily injury by the soldier's commander or NCO, or where a command failed to act upon a soldier's serious and immediate report of these kinds of threats made by other soldiers; however, it may be possible to try to find a way to argue duress under other circumstances.

Another thing to remember about defenses, is that the existence of a potential defense could “break providence” in the context of a guilty plea, which could then take away a soldier's negotiated plea deal. The reason for this is that plea negotiations work very differently in the military system of justice, as compared to the civilian world. All defendants pleading guilty in a military court-martial must be found to be “provident” (or be able to prove they are actually guilty of what they are pleading guilty to), or else they will not get the benefit of any plea deal that has been negotiated.

Unlike in the civilian context, a military defendant can only take a guilty plea if he or she can “prove”

## **b. Types of Mitigation Evidence**

I believe that gathering mitigation evidence calls for creativity. Almost anything can be used to demonstrate the validity of the mitigation in a particular case. Such mitigating evidence might include:

- Evaluations by medical doctors, psychologists, psychiatrists, physician assistants (PAs), chiropractor, or other medical care providers.
- 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.
- Written statements by the client.

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<sup>51</sup> Military Rule of Evidence 916, Published as part of the *Manual for Courts-Martial (2008 Edition) Part II*, online at <http://www.jag.navy.mil/documents/mcm2008.pdf>

- Letters from the client's spouse, parents, children, grandparents, or other family members or friends.
- Military records and evaluations.
- Copies of letters or emails sent by a client to a family member while in a combat zone.
- Copies of diary or journal entries kept by a client.
- A letter from a client's lay GI Rights counselor telling the story of his or her time working with a client.

The only real limits on mitigation are (a) whether the evidence in question helps or hurts a client's case, and (b) the rules of evidence if the mitigating evidence is to be used in a court-martial.

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 whether 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 he or she has 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 might later admit to having problems making ends meet on the inadequate Army salary and have been fighting with a 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.

Whenever possible, I would also encourage clients who are using physical or mental health concerns as mitigation to get a civilian medical care provider to make an evaluation or at least to write an informal letter explaining the condition. 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.

### **c. Effective Presentation of Mitigation Evidence**

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 the lawyer is seeking for his or her 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.<sup>52</sup>

If the letter is going to be written by the client, it is important this clause be included in the letter:

*This statement is under the provisions of Military rule of Evidence 410 (b), which provides that statements made "by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial" are inadmissible in a later court-martial.*

so that it can't be later used in a negative way against a soldier in a court-martial.<sup>53</sup>

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 best arguments to pull the reader in and, hopefully, get him or her to review all of your mitigation evidence documentation. The first few paragraphs are especially critical. I also recommend the use of "bullet points" and sub-headings to pull in the attention of a likely distracted and indifferent commander.

#### **d. More Difficult Grounds for Mitigation**

Generally a command likes to know if there are grounds for acting favorably to your client, in case the commander later is questioned about the decision. As a result of this, most commands tend to respond most favorably to quantifiable and easily verified situations. This means that broken bones that you can see on an X-ray are more believable than soft-tissue damage (which is more difficult to prove). Also, physical health concerns are considered more valid than mental health concerns (since a mental health diagnosis is considered more subjective per military sensibilities).

Most commands are also less willing to grant positive relief to a soldier if the mitigation concern makes them look bad or might be seen as promoting a breakdown of discipline. This is why conscientious objection is frowned upon (because commanders are afraid that other soldiers will start thinking for themselves and listening to their own consciences) and claims of sexual<sup>54</sup>, racial, or

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52 Normally a formal chapter 10 request for discharge in lieu of court-martial can only be made after charges are made. However, an attorney or counselor can approach a command and/or the prosecution to suggest that they move the process forward in a mutually beneficial manner. The key is to convince the Army that the desired outcome is in their best interests.

53 Military Rule of Evidence 410 (b), Published as part of the *Manual for Courts-Martial (2008 Edition) Part II*, online at <http://www.jag.navy.mil/documents/mcm2008.pdf>

54 An especially touchy issue will be the cases of gay soldiers who were harassed by their comrades during the DADT era, particularly since clear and adequate policies prohibiting such harassment do not yet exist as of August 2011.

gender harassment/discrimination are discouraged (because it makes the command look bad for allowing the condition to exist). Still it may be possible to use these more difficult circumstances for mitigation, if one can convince a command that a soldier has the ability to make life more difficult for the command, if the command is not cooperative.

Financial hardship on reserve/National Guard cases are especially difficult. The financial difficulties of a middle-class professional who is forced back into active duty military service are very real, but the NCO's and the command are unlikely to be sympathetic as they are themselves dealing with the same financial burdens (but possibly without the benefit of the higher civilian pay). I have often found it best for soldiers in this status to find other mitigating grounds to use instead (i.e. mental health issues of the soldiers and the family members --- not a stretch since financial distress can lead to depression and anxiety).

Please understand though that 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 his/her 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 grounds 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 success seems unlikely.

Whatever the circumstances are, never let an AWOL soldier return to military control empty handed. There always is something that can be used for mitigation. Be creative!

## **VII. Conclusion**

Assisting soldiers who are AWOL with getting their cases resolved is highly satisfying work. The outcome if you are successful is to provide valuable assistance to your client, hopefully freeing him or her from the killing machine. Every soldier we can help get out of the Army is one less soldier who will be killing on the front lines of an imperialist war, and every soldier we help get out of the Army is one less person who could be damaged forever by the horrors of war.

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# **Addendum 1: Navy, Marine Corps and Air Force AWOL/UA Policies**

**By Kathleen Gilberd**

The services vary considerably in their handling of long-term AWOL or UA (unauthorized absence) cases for enlisted personnel. Since most policies are based on regulations or even local command practices, they are subject to abrupt changes. For this reason it is always important to check for policy and informal practice changes when assisting a returning AWOL or UA servicemembers. Needless to say, clients' options and the outcome of cases may vary considerably depending on facts specific to the case, such as prior or pending disciplinary action, mitigating or extenuating circumstances, defenses, rank, military occupational specialties (MOSs), particularly security and intelligence, and intangibles such as command attitude. The general caveats in James Branum's article are important in considering any individual case.

## **Marine Corps**

Marine Corps policy on unauthorized absence is discussed in Marine Corps Order (MCO) P5800.16A, the Marine Corps Manual for Legal Administration, and MCO 5800.10B, Return of Marine Corps Absentees. By regulation, Marines absent for 180 days or less should be returned to the major command (defined as a command with an officer having general court-martial authority) from which they left. Those gone over 180 days should be returned to the "non-operating force major command" closest to their point of surrender or apprehension and consistent with their duty assignment or MOS. However, UA Marines normally will be returned to their parent command if any administrative or disciplinary action was pending when they left.

MCO P5800.16A includes a chart (table 5-1) showing points of return based on Military Occupational Specialty (MOS) and length of absence. Non-operating force major commands include Marine Corps Base (MCB) Quantico; MCB Camp Lejeune; MCB Camp Pendleton; Marine Corps Air Station (MCAS) Cherry Point; MCAS Miramar; Marine Corps Recruit Depot (MCRD) Parris Island; and MCRD San Diego. Male Marines who surrender have the option of returning to any of these bases in the hope of being processed there; female Marines should be sent to Miramar.

Male Marines who have been gone for more than 180 days and seek an other than honorable discharge in lieu of special court-martial often return to Quantico or Parris Island, where the chance of court-martial and punitive discharge is lowest for simple UAs. Staff personnel at both of those bases recently told GI Rights Network counselors that they will discharge UA Marines in lieu of court-martial if the Marines have been gone more than 30 days and make it clear that they have no desire to continue to serve, despite the provisions of the MCO. (Staff at Quantico have now said that this shorter time frame would apply specifically to those in basic and advanced training.) At this writing, counselors have not yet seen many cases in this category and so have no practical experience with them. Both Quantico and Parris Island tend to process these discharges within several weeks to two months, so that these bases may provide the least undesirable outcome for many longterm UA Marines. With extensive mitigating circumstances, it is possible to argue for general or entry-level separation discharges in lieu of court-martial, though these cases are rare. At Quantico, at least,

counselors report that about one in five activated drilling reservists is likely to face courtmartial rather than administrative discharge.

The other non-operating major commands currently have less lenient treatment, with greater possibility of a punitive discharge, or the possibility of a summary (or even special) court-martial and confinement prior to other than honorable discharge by reason of misconduct, and in some cases the procedures take longer. Lejeune sometimes gives summary or special courts-martial and brig time before misconduct discharge, particularly for those above E-3, and courts-martial with bad conduct discharges are a possibility, though the number of discharges in lieu of court-martial have increased recently. Counselors experienced with Lejeune report that members of the drilling reserve frequently receive courts-martial and punitive discharges (no information is available on inactive reserve members). Processing tends to take between four and eight weeks. At Pendleton, courts-martial and punitive discharges, while not the norm, are also a possibility, and cases often take several months to process.

With Marine reservists UA from active duty, counselors have seen both courts-martial with punitive discharge and discharge in lieu of court-martial, without enough cases to see any patterns.

## **Navy**

The Navy, which for many years used 180 days as the distinguishing date for long-term UAs, has changed this provision. The Naval Military Personnel Manual (MILPERSMAN) Sections 1600-010 through 1600-120 covers policy for UAs and desertion; it recently changed Section 1600-030 to state that enlisted sailors who have been gone for 120 days or more should be returned to the Navy processing unit closest to their point of apprehension or surrender. These include the Transient Personnel Units (TPUs) at Puget Sound in Silverdale, WA, Jacksonville, FL, Great Lakes, IL, Norfolk, VA, San Diego, CA and Pearl Harbor, Hawaii.

Sailors absent for less than 120 days are normally returned to their parent commands, with some exceptions. Those stationed at overseas units, or whose ships are deployed (underway for periods of at least 90 consecutive days) will be taken to the Navy processing unit closest to the place of apprehension if they return to military control in the US, while those whose units, ships or submarines are at sea for shorter periods will be sent to the TPU at their home port.

Currently, the Navy processing units most well known to counselors — Great Lakes, Norfolk and San Diego — tend to accept requests for discharge in lieu of courtmartial for sailors gone 120 days or more. Discharges are almost always under other than honorable conditions, though strong evidence of mitigating circumstances will occasionally result in a better character of discharge. These three processing units generally handle administrative discharges in two or three weeks. Great Lakes and Norfolk normally return sailors gone for less than 120 days to their parent commands in accordance 1600-030. San Diego reportedly will accept requests for discharge in lieu from sailors who are UA over 30 days from San Diego or ships stationed there. Norfolk's policy is similar, with sailors from local ships able to request discharge in lieu unless their ships ask for their return. Less is known about the other TPUs. It is important to bear in mind that, unlike the policies on point of return, discharge policies are matters of Navy and local base practice, and are always subject to change.

## **Air Force**

The Air Force discusses AWOLs in Air Force Instruction 36-2911, but has no central policy for disposition of AWOL cases. Individual commands are free to shape their own policy, and use of discharge in lieu of court-martial is not common. Air Force personnel who have been gone longer than 30 days face the likelihood of a special court-martial, confinement, and the perhaps a bad conduct discharge.

Counselors have reported courts-martial for airmen with AWOLs of only two or three weeks. Documentation of mitigating circumstances may be particularly useful here. Counselors or attorneys are encouraged to check with the Military Law Task Force or with counselors at the GI Rights Network group at Quaker House, in Fayetteville, North Carolina, for policy or practice changes when handling new AWOL or UA cases.

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