

# On Watch



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the National Lawyers Guild

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## AWOL from the Army

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**BY JAMES M. BRANUM AND UPDATED BY SUSAN BASSEIN**

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This article is intended to provide an overview of the process that a lawyer or a lay military counselor would use in assisting a soldier who is AWOL (absent without leave), or considering going AWOL, from the US Army. While some of the ideas discussed here would be applicable to other branches of the military, it is imperative to understand that many of the procedures discussed below are unique to the Army and that anyone who is assisting a servicemember from another branch should get the latest information on AWOL/UA (unauthorized absence) policies from the sources listed in the addendum to this article.

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

### **I. Basic Concerns: 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 following 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, s/he 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.

Submissions, comments or questions should be sent to: [onwatch@nlgmtf.org](mailto:onwatch@nlgmtf.org)

#### ***On Watch* Editors**

Chris Ford  
Kathleen Gilberd  
Harold Jordan  
Jeff Lake

#### **Editorial Coordinators:**

Jeff Lake  
Kathleen Gilberd

#### **Production Editor**

Rena Guay

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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 (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.

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). However, to the knowledge of this author, the longest AWOL-related sentence meted out during the current war is 18 months. Sentences of this duration have been given on two occasions: to SGT Kevin Benderman, and to PVT Neil Quinten Lucas – both of whom served only 13 months before being released.<sup>i</sup>

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>ii</sup>, but, based on available information, this hasn’t happened since the Vietnam War era.

## II. Determining PCF Status

### Eligibility and Exceptions

The PCF (Personnel Control Facility) process<sup>iii</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 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;

(3) enable the Army to discharge soldiers who went AWOL from Europe, Korea, and other overseas non-active war zone areas without having to spend the money to fly the AWOL soldier back overseas; and

(4) enable extreme cases of injustice to be corrected without considerable expense or command embarrassment.

### The Army Acts in Its Own Self Interest

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

- The soldier is AWOL and has remained AWOL long enough to be dropped from the rolls (DFR’d) ;
- The soldier fits into one of the following two categories:
  - a. The soldier has not graduated from Advanced Individual training (AIT), the stage of training that follows Basic training, OR
  - b. The soldier is OCONUS, i.e. stationed outside the Continental United States, which excludes Alaska and Hawaii AND the soldier does not have orders to deploy to either Iraq or Afghanistan, or is stationed in Iraq or Afghanistan.

Generally the PCF eligibility rules apply to members of the Army National Guard (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>iv</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, the only post doing this on a regular basis is Ft. Huachuca (an installation that trains Army intelligence), which has been instructing PCF to not process any of its soldiers who are AWOL from AIT at their installation. Other posts occasionally do so and could adopt similar policies and practices as the norm.

### **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 called a "misdemeanor" warrant to local law enforcement. In most cases, local police do not actively seek to apprehend AWOL soldiers at this point (and may not even hold an AWOL soldier if otherwise detained in a traffic stop), but in other cases (mostly in small towns), local police may be very zealous in seeking to apprehend a soldier during this time.

### **The "Deserter" Warrant**

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

In actuality however, this process is rarely followed. There are many reports of varying timetables for soldiers to actually be DFR'd. In my experience the average wait time is 35-45 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.

### **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.

The following options were gathered by counselors with the GI Rights Hotline Network, and compiled by GIRH counselor Steve Woolford. They have been tried with varying degrees of success (success often depends on happening to reach someone willing to help even though doing so is not a job requirement):

1) Callers can contact the AWOL apprehension unit (part of the Military Police operation) at the base they left (or at a nearby base) and ask them to contact USADIP to find out if their packet has been filed. Counselors have reported some success with this method. Phone numbers for AWOL apprehension units are:

- Fort Belvoir, VA - 703.806.4024
- Fort Benning, GA - 706.545.2638
- Fort Bliss, TX - 915.568.3309
- Fort Bragg, NC - 910.396-7504
- 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) MP units other than the AWOL soldier's can access information from the USADIP. Callers could contact the MP station of the base they left or at a nearby base and ask them to get the soldier's status from USADIP. Another way to use the MPs is to have a family member call looking to confirm "rumors" that a person is AWOL. People can be straightforward and forthright or try a more creative ap-



proach. They could ask if the person has a federal warrant on the basis that the soldier might walk in their door, and they want to know if the rumors they have heard about a warrant are true. If the conversation goes well, the family member could explain what she or he has read on the Internet regarding DFR and the PCF and express a desire to help facilitate a surrender and see if the MP will find out more.

Note: while there is almost no record of family members being prosecuted, counselors should still inform callers that intentionally lying to MPs or other law enforcement could subject them to criminal prosecution. However, a person can give a vague yet honest answer – e.g. “I’m not sure where the person is now or if I will see him anytime soon,” or “I am not in a position to disclose information about her whereabouts at this time.” Another option is to tell law enforcement, “You will have to get information as to the soldier’s whereabouts on your own, but if I can get this DFR information from you, I may be able to hasten a surrender in the event that I can pass it on.”

3) Callers could ask the JAG at the base from which the soldier departed to contact USADIP (preferably someone in trial defense; but even letting a prosecutor know that you are planning to surrender may not be that harmful – prosecutors can already confirm a soldier is AWOL, and surrendering is not a crime).

4) DFR packets for NG and USAR soldiers normally have to pass through some part of those components for authorization before going to the USADIP (in fact that’s often where the packet is held up). Someone there may be able to confirm whether the packet has been sent. The National Guard liaison at the base the soldier left can normally get this information.

5) One caller was still friends with the legal officer from the unit he left and used that person to check his status with USADIP.

6) Callers with friends or family in law enforcement can access the NCIC to check for a federal warrant, which of course virtually confirms DFR status.

Even without a buddy in law enforcement, callers could contact law enforcement themselves, or, to be extra careful, have a family member do it in another city or state and ask if there is a warrant out. Of course, a caller who contacts local law enforcement directly runs the risk of alerting law enforcement to the warrant. The warrant can contain the address for the person’s home of record as well as addresses the person may have used on leave requests.

7) Calling the unit that sent the packet may get results. While the soldier’s unit often gives incorrect or incomplete information, sometimes the realization that it will otherwise have to deal with the returning soldier is enough incentive for the unit to complete the packet.

8) A person could try to get a congressional staff member to contact the USADIP (by phone if possible to save time but in writing if necessary). Soldiers may want to urge the staff member to avoid giving any information – such as the address where they are staying – to the military. Callers can refer the staff member to 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.

Of course, with any of these avenues above, information has to pass through an extra step, and inevitably, reliability suffers. Callers should be cautioned about this.

9) Counselors can still discuss the option of callers contacting USADIP for several reasons:

a) Just as USADIP never informed the hotline of the previous change, it may resume providing DFR status, and the hotline wouldn’t know without callers checking in with USADIP.

b) People may still get the information they want. When one caller identified the unit he had left, a USADIP staff member prepared to give him the information (thinking he was not the soldier in question but someone from the unit inquiring about its member). Unfortunately, the caller (and it is unclear why he did this) clarified that he was the soldier and consequently was denied the information. Someone who calls USADIP saying, “I’m from the (insert unit, and location) calling about the status of (name with rank)” and giving the social security number may obtain the desired information.

c) Counselors have suggested that if the USADIP staff have to spend as much time on the phone saying “no” as they previously did giving information, they may decide the old way was better – especially when complications from soldiers surrendering and then leaving again become more of a headache to the PCF and other staff.

It is important for counselors to explain the likely outcome to callers when referring them to contact USADIP directly.



10) Callers with no or incomplete information can try taking an educated guess.

Most regular army soldiers from CONUS are DFR by two-and-a-half to three months. USAR and NG soldiers 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 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 DFR 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 fail to comply (or 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 a lawyer or counselor, 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.).

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.

### **What to Do When The Army Comes Looking**

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

These scenarios of course can be very intimidating for an AWOL soldier and 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/

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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.

### **Everyday Life a Challenge for AWOL Soldiers**

Basic transportation can also be a challenge for AWOL soldiers. For examples, AWOL soldiers are subject to arrest during a traffic stop (depending on if the police have the warrant yet, normally early on during the time of absence this is less likely). If soldiers absolutely must drive while AWOL, they should follow the speed limit and make sure their tags are up-to-date. Alternatives to driving include getting rides from others (not always much safer since the police sometimes run the passengers for warrants during traffic stops), using public transit, walking or bicycling – but make sure the bike has proper lights if being ridden at night; one client of mine was caught because he was pulled over by the police for not having a headlight on his bike. 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 (I have yet to see any potential employers turn in an AWOL to the authorities).

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.

### **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 jailor 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 (in most cases, depending on whether the soldier is PCF-eligible or not).

If you receive a call from an AWOL soldier who has been apprehended and is still in jail, it is best to contact the AWOL apprehension office that is nearest to where the soldier was 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 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.

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 may, if lucky, be sent to PCF, but most will be sent to their old permanent party duty station. Upon arrival, they could face a harsher sentence for AWOL and/or Desertion under the sentencing guidelines in the Manual for Courts Martial. However, there is a way to 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 is 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**

### **Navigating PCF**

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. (Most of my experience about PCF is at Ft. Sill, but, from what I know, the process at Ft. Knox is almost identical.) 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 (see section VI below). Lastly, it is best for clients to arrive at PCF on either a Monday or Tuesday to ensure spending as little time at PCF as possible.

If 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.

### **First Stop: MP Station**

Upon arrival at the gates of either Ft. Sill or Ft. Knox, you 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 rare cases, the MPs may take your client into custody at the gate, but in most cases you will be free to drive on to the post. From there you will drive to the MP station. There, the MPs will ask for 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 (or, at Ft. Sill, 80% of the time it will be a civilian) 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 no one has been prosecuted for aiding and abetting an AWOL since Vietnam, it is best to avoid unnecessarily implicating

those people who helped a soldier to go AWOL. Probably the best way to answer this question is to either decline to answer it, or to simply refuse to name who helped. (i.e. a soldier can honestly say "a friend picked me up" but can decline to say who the friend was)

Why did you go AWOL? This one is dangerous because the police officer will summarize the statement your client makes and may do so in a sloppy or inaccurate way. My suggestion is for the client to either decline to answer the question, or to give a brief one sentence response. (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 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.

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 First Sergeant or JAG.

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 First SGT and/or the PCF Commander in the morning. You can then follow



up by calling the FSGT in the morning to ensure that he or she did in fact receive the paperwork and even let the FSGT know which PCF staff member that you gave the documentation to, if the documentation didn't make it into the file.

### **The PCF Process in a Nutshell**

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

**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 are not trying to trick your client into saying the wrong thing. With only a few rare exceptions, it is normally best to encourage your client to be as open and honest as possible with the questions that are asked. It is also important for your client to be polite and helpful to the PCF staff, because the staff members can help or hurt you in getting out in a timely manner. (If they like you, they will do all they can to move the process along faster.) Normally this will happen on Tuesday or Wednesday.

**Getting a haircut and a uniform** – Normally on 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.

**Seeing the First Sergeant (FSGT) and/or the PCF Commander** – This is the most important stage of the process, but beware that the process varies slightly at Ft. Sill and at Ft. Knox.

**Fort Sill PCF** - At Ft. Sill PCF, the FSGT 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 FSGT if he or she has read the documentation and should carry a copy of the documentation to give to the FSGT if the documentation 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 FSGT will be present.

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

When meeting with the FSGT at Ft. Sill PCF, returnees should attempt to show the FSGT respect and have a proper "military bearing" in this meeting. Also returnees should be reminded that the FSGT is quick to pick up on bogus reasons why a soldier went AWOL, but is also often willing to recommend a better discharge to a soldier who is sincere and provides a good reason why he or she needed to go AWOL.

**Fort Knox PCF** - At Ft. Knox, the AWOL soldier will still be "read the charges" but not always by the FSGT; sometimes charges are also read by the PCF commander, and sometimes by another PCF staff member. Also unlike Ft. Sill, often the returnee to Ft. Knox will not be given a chance to verbally "make his case" at all and will not see the FSGT, 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, they 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.

**Completing ACAP** - This is the required counseling in which the Army explains what 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.

**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 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

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(much of what I know about the PCF process I learned from TDS attorneys), but other TDS attorneys give misleading information and will speak disparagingly to their clients about their civilian legal counsel. It is best to prepare one's client to deal appropriately with whatever kind of TDS attorney is assigned and to be prepared to stick up for the desired course of action even if TDS thinks it is a bad idea.

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. 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.

**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. At the end of 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.

### **PCF Soldiers Awaiting Discharge Kept Busy; Mum's the Word to Opposite Sex**

In any given week there will anywhere from 20-50 soldiers being processed out of a PCF, so there is a lot of dead time for soldiers to kill between these processing stages. Since the Army knows that this is a recipe for trouble, PCF staff do their best to keep PCF soldiers busy during their 1-3 weeks there. A typical day at PCF starts at 5 a.m. (or 6 a.m. on the weekends). The next 30 minutes 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.

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, 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 on the pay phone (for only 5 minutes, using a calling card), or just relax. As for discipline at PCF, the PCF staff have two means of punishment: dishing out an extra hour of fire guard or taking away free time. Sometimes free time is taken away from all of the PCF soldiers if the staff are particularly 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.

### **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, i.e. more than 40 soldiers processed, or the unavailability of one of the key decision-makers at PCF due to illness or leave, such as the First Sergeant or JAG. Other problems that could delay the process include National Guard cases 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 but possibly could result in potential prosecution under the UCMJ.

The end result of the PCF process itself is a discharge recommendation. Most weeks, a few of the soldiers at PCF will receive a better discharge (either an ELS or a General discharge), with the rest getting an (Other than Honorable (OTH) discharge).

Soldiers who are well-prepared with mitigation evidence (see section VI below) and who do a good job of presenting themselves at PCF typically receive better discharges.

### **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. Visiting the client while at PCF. The PCF staff are open to having attorney visits and in some cases family visits, subject to the schedule restraints of the facility.
- Preparation. The attorney should offer as much preparation as possible about the PCF experience and should be available to take phone calls while the client is at PCF.
- “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 the First Sergeant. All of the other staff members are civilian security escorts. They expect soldiers to respect and obey them, but most of them will return that respect to PCF soldiers by treating them with dignity and basic human kindness (something that most soldiers going AWOL from Basic training and AIT are not used to experiencing in the military). There are of course exceptions and some soldiers will have negative experiences with the PCF staff, but most soldiers report that they were treated better than they had expected.

### **Special Needs of Victims of Sexual Assault and Sexual Harassment Cases**

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.

It is best for a returnee to begin counseling while still AWOL and for plans to be made to provide extensive support to the soldier while at PCF. Unless a returnee

does not tell the PCF staff about what happened, she 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 positive, if the returnee is ready to tell her story, and it certainly is important to stop further abuse by the perpetrator. One way to make this as easy as possible is to call CID before the soldier returns to military control and make prior arrangements to have the soldier report a day early (on Sunday or Monday) to CID for questioning and support services before going on to PCF. This 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.

### **OCONUS PCF Situations: Tough to Do Better Than OTH Discharge**

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, with a few exceptions.

First, I have yet to see any OCONUS soldiers receive anything better than an OTH discharge through the PCF process. It still is worth shooting for, but I think the odds of getting a better discharge are more difficult. Second, OCONUS PCF soldiers can expect to be “resold” on the Army and given the chance to continue their careers in the military killing machine – with the 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.<sup>9</sup>

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

### **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 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.

### **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 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.

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 unwill-

ing to actually promise anything in advance. First, you might get lucky and be able to convince the command to let the soldier be processed out at PCF. A non-PCF-eligible soldier can be processed out at PCF, if the command so consents. Secondly, you could get lucky and get 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), or maybe a summary court-martial. Finally, you normally can at least get the command to go on the record (hopefully in email or other written communications) to make sure your client is not mistreated by fellow soldiers or NCOs in the unit. And, certainly, I think it helps to make a positive written first impression in which your client gets to put forth mitigation issues.

### **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 guaranteed 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 that may make sense:

**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.

**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 exceptions to this rule<sup>vi</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.



**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 at either a local military installation<sup>vii</sup> or at the soldier's old post<sup>viii</sup>, and the Army will pay for travel to get the soldier back to the soldier's old unit.

Whichever method your client chooses to use, it makes a lot of sense to have someone, such as a counselor, an attorney, or a friend/family member of the client, accompany the soldier when s/he 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 Military Police) station on post. At the station, the client can expect to be questioned by a police officer (either a civilian or an MP). The questions will be pretty much identical to 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 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:

- "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."
- "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 mili-

tary 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, s/he will continue to bear the risk of being apprehended by the police in a traffic stop, while crossing an international border, or any other occasion when a nosy police officer decides to check if the AWOL soldier has any warrants. Many soldiers do stay AWOL for decades, but if and when they are caught there is a high likelihood that they will face a court-martial for the higher offense of desertion. 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>x</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 this option is illegal under US law<sup>x</sup>. However for many soldiers, it is preferable to break the law and to follow their own conscience, and there are many in Canada who are supportive of their taking this step.

#### **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 s/he 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,

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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; and 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 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 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.

### **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 and because the command may be more desperate to try to retain the soldier.

A common tactic used by commands for soldiers who have returned to military control after a missed movement is to insist that the soldier ship out in a short period of time (sometimes as short as 1-2 weeks) and wait until arriving in Iraq 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 Iraq. And, of course, it goes without saying that the standard disclaimer must always apply: lawyers and counselors cannot tell a client to break the law but can advise a client of the consequences of breaking the law and help a client deal with those consequences.

## **VI. Mitigation and how to prepare it**

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

outcome possible. Mitigation is a very broad concept, 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.).

### **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.
- 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.

### **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.

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.

### **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); claims of sexual, racial, or gender harassment/discrimination are discouraged (because it makes the command look bad for allowing the condition to exist); and seeking a discharge for being homosexual is difficult (because, again commands are scared that other soldiers might fake being gay).

However, these more “difficult” grounds for mitigation are not impossible to use. PCF-eligible soldiers seem to be given more leeway in making claims that would be embarrassing to their commands, since PCF is deciding the outcome and not the original command. As for non-PCF-eligible cases, it is often helpful to try to think ahead as to why a command would want to shoot down a particular argument and then to try to argue against it. For instance, a conscientious objector might want to emphasize the fact that he or she kept 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 American 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.

*James M. Branum is a solo attorney practicing military/GI Rights law in Oklahoma with the firm of [GIRightsLawyer.com](http://GIRightsLawyer.com). He is a co-chair of the MLTF and is also the Minister of Peace and Social Justice at Joy Mennonite Church of Oklahoma City. He writes a blog of social and political commentary that can be found at [www.JMBzine.com](http://www.JMBzine.com).*

*Susan Bassein is a GI Rights counselor at the American Friends Service Committee in San Francisco. She maintains the [www.girightshotline.org](http://www.girightshotline.org) website and designed the <http://girights.freeshell.org/counseling> website. She translates texts from English to Spanish for free for non-profit organizations working for social justice, environmental, peace, anti-militarist, or humanitarian purposes ([www.eng2span.org](http://www.eng2span.org)).*

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- i. For more information on the cases of Benderman, Lucas and other war resisters, see <http://www.couragetoresist.org/x/content/blogcategory/39/86/>
  - ii. While in theory it is 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," [http://nlgmltf.org/i\\_aint\\_singing\\_charlie.html](http://nlgmltf.org/i_aint_singing_charlie.html).
  - iii. The regulations that describe the PCF process can be found at AR 600-62, [http://www.army.mil/usapa/epubs/pdf/r600\\_62.pdf](http://www.army.mil/usapa/epubs/pdf/r600_62.pdf). While these regulations lay out the general parameters of the operation of PCF, this article discusses the actual common practices of PCF's at Ft. Sill and Ft. Knox.
  - iv. Center on Conscience and War has information on what potential state law penalties are, and what states are actually imposing potential sanctions. 1-800-379-2679
  - v. I would also suggest that it is best to discuss this possibility with OCONUS returnees before they get to Ft. Sill so hopefully their minds are already made up. This is good advice both for the well-being of the client, but also to avoid headaches for PCF with trying to get a soldier enlisted and then having them back out. As much as possible, within the limits of legal ethics and our client's best interests, we should try to befriend the PCF staff, as they can help or hurt our clients in the future. If they have a negative experience with your clients on a repeated basis, that can definitely hurt you in the future with other clients.
  - vi. My favorite exception was of a married couple who were both AWOL from a permanent party duty station. By the time the couple was ready to return to military control, the wife was 8-1/2 months pregnant, so I had the wife's doctor write a letter saying she couldn't fly, and then had the couple drive to Ft. Sill PCF from their home state. Upon arrival, PCF staff were in a major quandary. They couldn't send the wife back to her old permanent party station since she couldn't fly – yet didn't want to keep her at Ft. Sill, because the Army would be stuck paying for the baby's delivery. They also felt uncomfortable sending the husband away when his wife was about to give birth. In the end, Ft. Sill fast-tracked their case, giving them a quick recommendation for an OTH discharge within 72 hours of their reporting to Ft. Sill. And, more amazingly, the husband was even allowed to pass through the process without having to get the dreaded haircut!
  - vii. I have success with this at Ft. Irwin and Ft. Huachuca.
  - viii. Ft. Riley's SJA office has said it can help arrange for travel if you call in advance to say an AWOL soldier from that post wants to return to military control but can't afford to get back.
  - ix. Thus far two soldiers are known to have been deported from Canada, after having previously fled there to avoid the Iraq war. Both soldiers were prosecuted at Ft. Carson for desertion; Robin Long received a 15-month sentence and a dishonorable discharge for his "crime" while Daniel Sandate received an 8-month sentence and a Bad Conduct Discharge.
  - x. See "AWOL in Canada, a counseling memo" by the War Resisters Support Campaign, [http://resisters.ca/AWOL\\_in\\_Canada.pdf](http://resisters.ca/AWOL_in_Canada.pdf)

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# Navy, Marine Corps and Air Force AWOL/UA Policies

## Addendum to AWOL in the Army

**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 re-

turning 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 long-term 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 court-martial 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 court-martial 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.

*Kathleen Gilbert is a legal worker in San Diego, California, and co-chair of the MLTF.*

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# New Military Oversight for Personality Disorder Diagnoses

By KATHLEEN GILBERD

*New rules could improve screening, but if poorly implemented, could hinder challenges in discharge proceedings to unwanted diagnoses*

On August 28, 2008 the Department of Defense revised DoD 1332.14, "Enlisted Administrative Separations," renaming it DoD Instruction 1332.14, and making important changes to the provisions for personality disorder diagnoses and discharges. The changes are effective immediately and applicable to discharge proceedings initiated on or after August 8, 2008. The service secretaries may make case-by-case decisions to use the new procedures in discharges initiated before that date. It may take some time for the new provisions to appear in service regulations and even interim guidance.

DoD 1332.14, Encl. 3, A1.3.a.(8), which covers discharge by reason of "Other Designated Physical or Mental Conditions," now includes in subsection (c):

"Separation on the basis of personality disorder is authorized only if a diagnosis by a psychiatrist or PhD-level psychologist utilizing the Diagnostic and Statistical Manual of Mental Disorders, and in accordance with procedures established by the Military Department concerned, concludes that the disorder is so severe that the member's ability to function effectively in the military environment is significantly impaired. *For Service members who have served or are currently serving in imminent danger pay areas, a diagnosis of personality disorder as addressed in the previous sentence must be corroborated by a peer or higher-level mental health professional and endorsed by the Surgeon General of the Military Department concerned. The diagnosis must address post-traumatic stress disorder (PTSD) or other mental illness co-morbidity. The onset of personality disorder is frequently manifested in the early adult years and may reflect an inability to adapt to the military environment as opposed to an inability to perform the requirements of specific jobs or tasks or both. As such, observed behavior or specific deficiencies should be documented in appropriate counseling or personnel records and include history from sources such as supervi-*

*sors, peers, and others, as necessary to establish that the behavior is persistent, interferes with assignment to or performance of duty, and has continued after the Service member was counseled and afforded an opportunity to overcome the deficiencies."* [emphasis added]

An addition to subsection (d) provides that, "[u]nless found fit for duty by the disability evaluation system, a separation for personality disorder is not authorized if service-related post-traumatic stress disorder (PTSD) is also diagnosed." This simply emphasizes existing policy which is often overlooked in a rush to get rid of problem soldiers or sailors.

The changes are the result of increasing media, public and Congressional attention to the misuse of personality disorder (PD) discharges for soldiers suffering from PTSD and other serious illnesses. This tendency has long been known to military counselors and attorneys, but anecdotal information suggests that PD discharges are becoming more common as the Iraq and Afghanistan wars progress.

For soldiers and veterans, the differences between PD and, for instance, post-traumatic stress disorder PTSD can be of tremendous significance. When PDs are severe enough to interfere significantly with performance of military duties, they are grounds for administrative discharge, characterized as honorable or general according to the service-member's overall record. Unlike all other discharges tied to a medical condition, personality disorder is the name of the discharge, and appears on DD-214 discharge documents as the narrative reason for discharge. (By way of contrast, a soldier medically retired for schizophrenia will not have any psychiatric label on his or her discharge paperwork.)

PD discharges do not result in any compensation from the military or the VA, and they are seldom seen as worthy of treatment. PTSD or other serious psychiatric disorders are normally grounds for disability discharge or retirement when they are found to be severe, resulting in discharge with a lump sum payment or placement on the disability retirement

-continued on next page





## MLTF Meetings in Detroit a Success

By **DAN MAYFIELD**

More than 400 NLG members and friends met in Detroit for the 71<sup>st</sup> annual convention from October 15 to 19, 2008.

The Military Law Task Force sponsored a workshop on the importance of learning from the anti-war movement that grew up around the war in Vietnam and how to apply those lessons to the growing movement today. Task Force co-chair James Branum spoke about his recent national tour with Iraq Veterans Against the War and Task Force member (and former National President) Marjorie Cohn spoke about the importance of organizing against torture and the illegal acts of the Bush regime.

The MLTF met to plan strategy for the coming year. The ideas and projects coming out of the meeting will be discussed on the MLTF listserv throughout the year. If you have not already done so, please sign up so that you can be

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*Continued from previous page:*

list with a monthly pension. For those who are retired, medical care is available through the military or the VA, and other benefits of retirement (health insurance for family members, on-base shopping privileges, etc.) are ensured. While the VA is free to make its own diagnosis, and may diagnose and compensate PTSD or depression where the military has found only PD, VA doctors are often swayed by military diagnoses.

The changes in DD 1332.14 have the potential for improving screening and diagnosis, and weeding out sloppy use of PDs as an easy and inexpensive way to separate soldiers who are ill or who are simply considered trouble-makers. If poorly implemented, however, they could provide a rubber stamp for inaccurate diagnoses, making it more difficult for members to challenge the diagnosis in discharge or discharge review proceedings. Much will depend on the honesty and thoroughness of those tasked with reviewing diagnoses. With close attention to the processing of cases, counselors and attorneys can help to ensure that the new review procedures are used, and that they are meaningful.

*Kathleen Gilbert is a legal worker in San Diego, California, and co-chair of the MLTF.*

informed and give input to the Task Force. Task Force members voted to keep the current Steering Committee members pending a change in the "by-laws" of the MLTF to allow for a general membership vote by email for new SC members.

Thursday night was the opening plenary and we had two major speakers: Grace Lee Boggs from Detroit and Daniel Ellsberg from California. Both were wonderful speakers and enlightened us with their insights. Grace Lee Boggs looked back over 75 or more years of socialist activism and spoke about the need to "think globally but act locally." Daniel Ellsberg drew parallels between his personal history with the Pentagon Papers and the war in Vietnam and the current situation and the secrecy of the Bush White House.

The NLG convention featured more than 20 workshops aimed at every aspect of NLG work from Mass Defense of Protestors to Native American Rights, and from Stopping Torture to Freedom Summer. All of the workshops were well attended, and in several instances the discussion carried on well after the workshop was over. The National Executive Committee also set aside special time for "Major Panels" on Friday and Saturday and for Anti-Racism Training.

The early evenings during the convention were dotted with various receptions: The International Committee, the Immigration Committee, and the Sugar Law Center. Various NLG authors held receptions or book signings. The Daniel Levy Award from the National Immigration Project was awarded to the lawyers from the ACLU of Southern California. The award this year was given to the 14 lawyers and legal workers who organized the Southern California response to the ICE (Immigration) raids.

On Sunday afternoon the National Executive Committee met and began planning for the 72<sup>nd</sup> annual convention in Seattle. See you there!

*Dan Mayfield is a criminal defense lawyer. He has been a member of the NLG since 1974 and is the representative to the NEC for the Military Law Task Force.*

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## Announcements

### VETS & SERVICEMEMBERS SURVIVAL GUIDE

Veterans for America recently published and has now updated an on-line book for veterans and servicemembers, with a wealth of information about VA and other federal veterans benefits, discharges, discharge upgrading, problems of women in the military and the VA system, and advice for families and caregivers of wounded soldiers. The *Survival Guide* is an update and expansion of the 1985 *Viet Vet Survival Guide*. Several MLTF members, including David Addlestone, J.E. McNeil and Kathleen Gilberd, contributed chapters to the new book. It is available for download without charge on the organization's website, [www.veteransforamerica.org](http://www.veteransforamerica.org). Because of popular demand, the book is now also available in printed form, and VFA is seeking contributions to print copies for placement in military Family Assistance Centers. For information, or to make a donation, visit the website or contact VFA at 1025 Vermont Ave, 7th Floor, Washington, DC 20005.

### MILITARY COUNSELING CD

The GI Rights Network has produced a CD of the training workshops and seminars held during its 2008 national conference. The CD includes a three-workshop series on conscientious objection, workshops on medical discharge and retirement, AWOL and UA policy, "don't ask, don't tell," and a range of other topics. It provides a useful introduction for counselors and attorneys not experienced in voluntary discharge counseling or other GI rights areas. Copies are available for \$10, from Alex Bacon (who produced the CD), at 1814 17th Avenue South, Seattle, WA 98144; [abacon@riseup.net](mailto:abacon@riseup.net).

### MILITARY LAW SEMINARS

Would you like to arrange a seminar on military law and counseling or conscientious objection in your area?

The MLTF can provide speakers and resources for day-long or half-day seminars on these issues: an overview of military law, with emphasis on discharges, handling AWOL cases, and dissent, or habeas corpus petitions in conscientious objection cases. Both sessions can be geared for law students and counselors as well as attorneys. For more information, contact Kathleen Gilberd at 619-463-2369.

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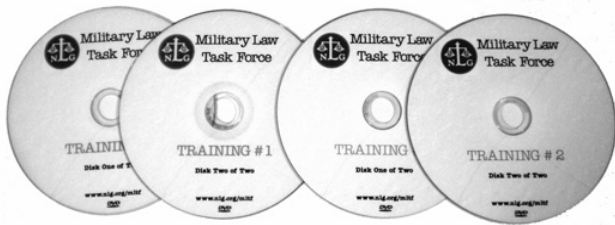
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*On Watch*, the journal of the NLG Military Law Task Force, is published about 8 times a year. Each issue is sent to over 200 MLTF members and *On Watch* subscribers, by email (in PDF format) or by regular mail in printed form. At a later point, each issue is also available on the NLGMLTF.org website for public downloading.

The Editorial Board of *On Watch*, which approves all ads for each issue, encourages MLTF members and supporters to buy these spots.

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# About the Military Law Task Force

The National Lawyers Guild's Military Law Task Force includes attorneys, legal workers, law students and "barracks lawyers" interested in draft, military and veterans issues. The Task Force publishes *On Watch* as well as a range of legal memoranda and other educational material; maintains a listserv for discussion among its members and a website for members, others in the legal community and the public; sponsors seminars and workshops on military law; and provides support for members on individual cases and projects.

The MLTF defends the rights of servicemembers in the United States and overseas. It supports dissent, anti-war efforts and resistance within the military, offering legal and political assistance to those who challenge oppressive military policies. Like its parent organization, the NLG, it is committed to the precept that human rights are more sacred than property rights.

The Task Force encourages comments, criticism, assistance, subscriptions and membership from Guild members and others interested in military, draft or veterans law. To join, or for more information, please check our website at [www.nlgmltf.org](http://www.nlgmltf.org) or contact the Task Force at:

**MLTF**, 730 N. First Street, San Jose, CA. 95112

(619) 463-2369

[info@mltf.info](mailto:info@mltf.info)



**Military Law Task Force**  
**730 North First Street**  
**San Jose, CA 95112**