

The Practical Consequences of a Court-Martial Conviction

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Introduction

The court-martial has just ended. Despite your best efforts, your client has been found guilty and sentenced to confinement and a punitive discharge. You properly prepared for trial and did an outstanding job presenting your case. But now, as you watch your client say goodbye to his tearful wife, you wonder if you did everything you could to prepare him for this moment. Have you sufficiently advised him of the practical and legal consequences of his conviction? Does he realize all the implications of his sentence? Does his wife know what benefits she is entitled to while he is in confinement? As you instruct the guards to escort your client back to your office, you know that you are not going home anytime soon. You want to go the “extra mile” for your client. You want to ensure that your client appreciates not only the legal aspects of his sentence, but also understands the practical consequences.

This article explains the legal aspects and the practical consequences that may result from a court-martial conviction. For example, can the soldier cash-in unused leave if sentenced to a punitive discharge? If he is sentenced to confinement, can his family members continue to receive medical benefits? Is a court-martial conviction reported to the state and federal authorities so that the soldier will not be allowed to purchase firearms or vote? What consequences does a punitive discharge have on the soldier’s Department of Veterans Affairs (VA) entitlements or on his retirement eligibility? Knowing the answers to these and other practical questions will greatly enhance the quality of a trial attorney’s advice to his clients.

Experienced trial attorneys may know the answers to some of these questions; however, they may never have actually looked up the laws or regulations. Along with answers to these questions, this article cites the underlying legal authority.¹ Attorneys can therefore properly advise their clients and take appropriate actions to safeguard their clients’ rights and interests.

This article consists of three main sections. Section I briefly describes the statutory requirements when different forms of court-martial punishment are executed. It contains subsections covering the procedural aspects of punitive discharges, forfeitures of pay and allowances, and reduction in grade. It also covers how much confinement a prisoner actually serves, as well as matters of clemency and parole. Section II explains the administrative consequences of a punitive discharge. It contains subsections covering matters such as: entitlements to leave, discharge gratuities, Uniformed Services benefits, travel, transportation, and transitional compensation for dependents. Finally, Section III details the collateral effects that flow from a court-martial conviction. It contains subsections covering such matters as the loss of the right to vote or own a firearm, VA entitlements, the requirements imposed by Megan’s Law, and the loss of retirement eligibility.

Section I: Legal Aspects of a Court-Martial Sentence

The *Manual for Courts-Martial (MCM)*² authorizes nine types of punishment. These include death, punitive discharge, confinement, hard labor without confinement, restriction to specified limits, reduction in pay grade, a fine, forfeiture of pay and allowances, and a reprimand.³ Articles 57, 57a, and 58, Uniform Code of Military Justice (UCMJ), dictate when these types of punishment become effective. Because they become effective at different times depending on various criteria,⁴ it is easy to get confused about when a particular type of punishment goes into effect.⁵ This section discusses and analyzes when various forms of punishment become effective. More specifically, it covers punitive separation, forfeiture of pay and allowances, reduction in grade, and confinement. It then addresses how much of a sentence to confinement soldiers actually serve. Finally, it explains clemency and parole procedures for soldiers sentenced to confinement.

1. The World Wide Web contains almost all the resources used in this article. Most footnotes contain both the legal authority and the applicable Web address.

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000) [hereinafter MCM], available at <http://192.156.19.100/Pubs/Pubs.htm> (PDF format).

3. *Id.* R.C.M. 1003.

4. *See* UCMJ arts. 57, 57a, 58 (2000).

5. For example, confinement becomes effective on the day the sentence is adjudged, *id.* art. 57(b), adjudged forfeitures become effective fourteen days after the sentence is adjudged or when the convening authority approves them, *id.* art. 57(a)(1), and hard labor without confinement becomes effective when the convening authority orders it to be executed, *id.* art. 57(c).

Punitive Discharge

After a court-martial has adjudged a punitive discharge, the discharge cannot be executed until several procedural safeguards have been observed. First, the soldier can request clemency and submit extenuation and mitigation matters to the general court-martial convening authority (GCMCA).⁶ After reviewing this request, the GCMCA decides whether to approve the adjudged findings and sentence. In doing so, the GCMCA takes action and promulgates his decision in the initial promulgating order. The initial action and promulgating order specifies which portions of the sentence are approved and at what time each will be executed.⁷

Second, if the GCMCA approves the punitive discharge, it may not be executed until the appellate courts have affirmed the case, including the punitive discharge.⁸ For enlisted members, a punitive discharge becomes final once the appellate review is complete and the discharge is ordered executed.⁹ For officers, in addition to appellate review, the Secretary of the Army or his designated Assistant Secretary must also approve the dismissal.¹⁰

Depending on the complexity of the case and the extent of the appellate review, these due process procedures can take from four months to several years.¹¹ During this process, the soldier remains in an active duty status and is thus entitled to all the benefits of an active duty service member. Should the soldier complete any adjudged confinement (or if no confinement was adjudged) before the completion of appellate review, the soldier will most likely be placed on involuntary excess leave until the appellate process is complete.¹²

Defense counsel should ensure that the soldier understands the process and procedure for taking the initial action and completing the promulgating order, as well as the meaning and effect of each. The initial promulgating order usually states that the sentence is approved, and except for the punitive discharge, will be executed.¹³ The convicted soldier must understand that this means that while the convening authority has approved the punitive discharge, it will not become effective unless and until the appellate courts have affirmed his case. Once the case has been affirmed, the GCMCA takes final action and orders the discharge executed,¹⁴ or under rare circumstances, disapproves the discharge.¹⁵

Forfeiture of Pay and Allowances

If a court-martial adjudges forfeitures, the forfeitures take effect either fourteen days after the sentence is adjudged or when the convening authority approves the sentence, whichever is earlier.¹⁶ As a matter of law, even if there are no adjudged forfeitures, soldiers automatically forfeit money during any period of confinement or parole if the court-martial sentence includes either: (1) confinement for more than six months or death, or (2) a punitive discharge and any amount of confinement.¹⁷ In general courts-martial, this "automatic forfeiture" amounts to an automatic forfeiture of all pay and allowances due the soldier during that period of confinement. In special courts-martial, this amounts to automatic forfeiture of two-thirds pay during that period of confinement.¹⁸ As with adjudged forfeitures, automatic forfeitures take effect either fourteen days after the sentence is adjudged or when the con-

6. See MCM, *supra* note 2, R.C.M. 1105(b)(1). Rule for Courts-Martial 1105(b)(1) states: "The accused may submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence. The convening authority is only required to consider written submissions." *Id.*

7. UCMJ art. 60. The convening authority may either approve the findings and sentence as adjudged, suspend part or all of the sentence, reduce any part of the sentence or disapprove the findings or sentence. *Id.* art. 60(c).

8. *Id.* art. 71(c)(1). A soldier may waive these rights. *Id.* art. 71(c)(2).

9. *Id.* art. 71(c)(1).

10. *Id.* art. 71(b).

11. Interview with Colonel (Retired) Joseph Neurauter, Clerk of Court, Army Court of Criminal Appeals (May 15, 2001).

12. See *infra* notes 68-75 and accompanying text.

13. See UCMJ art. 71(c)(1).

14. See MCM, *supra* note 2, R.C.M. 1114(b)(2). In cases involving the dismissal of an officer, the record is forwarded to the Secretary of the Army, or his designated Assistant Secretary, for final action. See UCMJ art. 71(b).

15. See *infra* notes 52-56.

16. UCMJ art. 57(a)(1).

17. *Id.* art. 58b(a).

18. MCM, *supra* note 2, R.C.M. 1003 discussion.

vening authority approves the sentence, whichever occurs earlier.¹⁹

Upon the soldier's request, the convening authority may defer adjudged²⁰ or automatic²¹ forfeitures until he takes action.²² At the time of his action, the convening authority may allow the soldier's dependents to receive all or part of the forfeitures for up to an additional six months after the convening authority takes action.²³ To accomplish this, the convening authority must disapprove all or part of any adjudged forfeitures and waive all or any part of the automatic forfeitures.²⁴ All waived forfeitures must go directly to the soldier's dependents, not to the soldier.²⁵

Financially, forfeitures are different from fines.²⁶ Forfeitures are withheld from a soldier's pay as they accrue, whereas fines are due immediately and will be collected from his pay to satisfy the debt.²⁷ Because a soldier never receives the forfeited "income," he does not pay taxes on it.²⁸ If the convening authority defers or waives forfeitures, however, the deferred or waived amount "remains wages generated by the member's military status, [and] is taxable income to the [soldier], even though paid to the member's dependents."²⁹ Therefore, federal and state income taxes and Federal Insurance Contribution Act tax will be withheld from the deferred or waived forfeiture amount before it is paid to the dependents.³⁰ Consequently, if the convening authority intends for the soldier's dependents to

receive \$500 per month, he must waive more than that amount to account for taxes.

Reduction in Grade

As with forfeitures, a reduction in grade takes effect either fourteen days after the sentence is adjudged or when the convening authority approves the sentence, whichever is earlier. For example, if a soldier is sentenced to reduction to E-1, a punitive discharge, and no confinement, the soldier retains his present grade for fourteen days, absent earlier action taken by the convening authority.³¹ Even if the sentence does not include a reduction, an enlisted soldier is automatically reduced to E-1 on the date the convening authority approves the soldier's sentence if the approved sentence includes either: (1) a punitive discharge, (2) confinement, or (3) hard labor without confinement.³²

Unlike forfeitures, there is no provision in the *MCM* that empowers the convening authority to waive automatic reduction in grade.³³ Consequently, if the convening authority wants to avoid automatic reduction, he must disapprove or suspend all elements of the sentence that trigger the automatic reduction.³⁴ This can be critical in cases involving retirement-eligible senior enlisted soldiers that have been sentenced to a short period of confinement. Even one day of confinement (as approved by the

19. UCMJ art. 58b.

20. *Id.* art. 57(a)(1).

21. *Id.* art. 57(b).

22. *See id.* art. 60.

23. *Id.* art. 58b.

24. *See id.* art. 58b(b). The convening authority must disapprove the adjudged forfeitures because the *MCM* only provides for him to waive automatic forfeitures. *See id.*

25. *Id.*

26. *See* U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION 7A paras. 480101-02 (Oct. 2001) [hereinafter DOD FMR], available at <http://www.dtic.mil/comptroller/fmr/07a/index.html>.

27. *Id.* para. 480104.

28. *Id.* para. 480303.

29. *Id.* para. 480306.C.1.

30. *Id.*

31. *See* UCMJ art. 57(a)(1) (2000). As a practical consequence, if the soldier requests voluntary excess leave within that fourteen day period, he may cash-in his accrued leave at the higher pay grade. *See generally* U.S. DEP'T OF ARMY, REG. 600-8-10, LEAVES AND PASSES para. 2-4 (1 July 1994) [hereinafter AR 600-8-10]. Another practical consequence can occur in cases involving co-conspirators that testify against one another. For example, if the first co-conspirator is sentenced to reduction to E-1 and he testifies in the subsequent trial of a co-conspirator within fourteen days, he will testify in the higher grade. *See* UCMJ art. 57(a). This may affect the witness's credibility or make it appear to a panel that he was not reduced in grade as punishment for his crimes.

32. UCMJ art. 58a.

33. *See id.* art. 58b.

convening authority) will reduce the soldier to E-1 and dramatically affect his retirement benefits.³⁵

Confinement

As a general rule, any period of pretrial confinement will be credited toward the adjudged confinement on a day-for-day credit.³⁶ Unless a soldier requests that confinement be deferred,³⁷ confinement starts to accrue the day it is adjudged, no matter where the accused is being held.³⁸ For example, if a soldier is sentenced to confinement, but is immediately admitted to a hospital for health or psychiatric treatment, his confinement accrues while he is in the hospital. The fact that the government elects to “confine” the soldier in the hospital instead of a confinement facility has no bearing on his confinement credit.³⁹

Serving a Sentence to Confinement: Good Conduct Credit

Soldiers can be devastated when they hear the military judge or president of the court-martial announce a lengthy sentence to confinement. It is important that convicted soldiers realize they can shorten the actual time in confinement if they abide by the

confinement facilities’ rules and regulations. Defense counsel should know and understand these rules and regulations in order to advise their clients how to minimize actual time spent in confinement.

When authorities at the confinement facility receive a soldier’s promulgating order, they read the order to the soldier and immediately inform him of his maximum and minimum release date.⁴⁰ His maximum release date is the date he will be released from confinement if he does not earn any abatements.⁴¹ His minimum release date is the date he will be released from confinement if he earns and retains all his abatements through good conduct time (GCT).⁴² Good conduct time is credit, in a specified number of days, automatically taken off a prisoner’s approved sentence if the soldier abides by the confinement facilities’ rules and regulations.⁴³ Soldiers can earn up to ten days of GCT per month, depending on the length of their sentence.⁴⁴ In an effort to motivate prisoners and to secure uniformity in computing GCT, prisoners are automatically credited at the beginning of their confinement with their GCT.⁴⁵

Prisoners who refrain from any misconduct while serving their confinement retain their GCT and leave the confinement facility no later than their minimum release date. Prisoners involved in misconduct, however, may forfeit all or portions of

34. *Id.* 58a(b); DOD FMR, *supra* note 26, para. 480201. This can be accomplished even if the accused has already served his confinement. The soldier would merely be returned to duty and reimbursed for any pay that was forfeited as a result of being confined. See UCMJ art. 58a.

35. See *infra* notes 132-40 and accompanying text.

36. See *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984).

37. See UCMJ art. 57a.

38. *Id.* art. 57(b). “Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial.” *Id.*

39. See *id.* art. 57a(a).

40. U.S. DEP’T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 3.5. (15 Aug. 1996) [hereinafter AR 190-47], available at http://www.usapa.army.mil/gils/epubs4.html;mark=214,37,43#WN_mark; Telephone interview with Mr. Terry Rush, Military Personnel Clerk, Inmate Registration, Fort Leavenworth Disciplinary Barracks (Mar. 21, 2001) [hereinafter Rush Interview].

41. U.S. DEP’T OF ARMY, REG. 633-30, APPREHENSION AND CONFINEMENT: MILITARY SENTENCES TO CONFINEMENT para. 2a(2)e (28 Feb. 1989).

42. *Id.* para. 2a(2)f.

43. See *id.* para. 6.

44. *Id.* para. 13a-e. Rates for abatement for GCT are as follows:

- a. Five days for each month of the sentence for a sentence of less than 1 year.
- b. Six days for each month of the sentence for a sentence of not less than 1 year and less than 3 years.
- c. Seven days for each month of the sentence for a sentence of not less than 3 years and less than 5 years.
- d. Eight days for each month of the sentence for a sentence of not less than 5 years and less than 10 years.
- e. Ten days for each month of the sentence for a sentence of 10 years or more, excluding life.

Id. To illustrate, if a soldier is sentenced to six months confinement and enters confinement on 1 January 2001, his maximum release date will be 30 June 2001 and his minimum release date will be 30 May 2001 (he will have earned $6 \times 5 = 30$ days of good conduct time). The exact release date is 30 May 2001 because the confinement facility calculates the actual days a prisoner serves in confinement by converting each adjudged “month” of confinement to thirty days. See, e.g., *id.* para. 14.

45. *Id.* para. 6a(3).

their credited GCT.⁴⁶ A soldier's maximum release date may not be extended unless he receives a consecutive court-martial sentence to confinement.⁴⁷

In addition to GCT, prisoners who work in certain jobs and "demonstrate excellence in work, educational or vocational training pursuits" may earn extra good credit time (EGCT).⁴⁸ The amount of EGCT a prisoner can earn varies per work assignment, but may not exceed seven days per month.⁴⁹ Additionally, a soldier may receive up to one day per month of special abatement for working twenty hours of overtime.⁵⁰

Consequently, a soldier can drastically shorten the amount of confinement he actually serves by earning GCT, EGCT, and special abatement. For example, a soldier sentenced to confinement for fifteen years could serve less than half that sentence if he works hard and stays out of trouble. He can receive ten days per month GCT, up to seven days per month EGCT, plus an additional special abatement of one day per month. This is without consideration of his opportunities to receive clemency or parole.

In addition to earning abatements, soldiers can reduce their adjudged sentences by being granted clemency or parole. While arguably the best chance for clemency occurs when the convicted soldier submits clemency matters to the convening authority pursuant to Rule for Courts-Martial (RCM) 1105,⁵¹ it is not the only time that clemency may be granted. After the convening authority has taken action, the Secretary of the Army⁵² or, if so designated, any GCMCA with personal jurisdiction over the convicted soldier may grant the convicted soldier clemency.⁵³ While "[t]here is no constitutional, statutory, or regulatory right" entitling a soldier to clemency or parole,⁵⁴ he may request either of these actions from the above-mentioned authorities.

The Secretary of the Army or his designee is empowered by Article 74(a), UCMJ, to "remit or suspend any part or amount of an unexecuted part of any sentence, including all uncollected forfeitures other than a sentence approved by the President."⁵⁵ In addition, the Secretary may, "for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial."⁵⁶

46. *Id.* para. 7a(2).

If, during the term of imprisonment, a prisoner violates the rules of the institution or commits any offense, all or any part of the good conduct time which has been earned on any unexpired sentence, regardless of where earned, may be forfeited upon approval by the commanding officer of the installation where the prisoner is confined.

Id.

47. *Id.* para. 7.

48. AR 190-47, *supra* note 40, para. 5.7.B.

49. *Id.* para. 5.7.C. The rate of abatement for EGCT is as follows:

- Level 1:* Those prisoners continuously employed 1 to 5 months receive 1 day per month.
- Level 2:* Those prisoners continuously employed 6 to 10 months receive 2 days per month.
- Level 3:* Those prisoners continuously employed 11 to 15 months receive 3 days per month.
- Level 4:* Those prisoners continuously employed 16 to 20 months receive 4 days per month.
- Level 5:* Those prisoners continuously employed 21 to 25 months receive 5 days per month.
- Level 6:* Those prisoners serving as assistant instructors/supervisor's assistants, following attainment of Level 5, may receive 6 days per month.
- Level 7:* Those trustees who have maintained level 6 for six months may be upgraded to 7 days per month.

Id.

50. *See* Rush Interview, *supra* note 40.

51. *See* United States v. Johnson-Saunders, 48 M.J. 74, 76 (1998).

52. UCMJ art. 74 (2000).

53. U.S. DEP'T OF ARMY, REG. 15-130, ARMY CLEMENCY AND PAROLE BOARD para. 3-1b (23 Oct. 1998) [hereinafter AR 15-130]. Once the convening authority has taken action on the record of trial pursuant to Article 60, UCMJ, however, any clemency action affecting a punitive discharge or dismissal is withheld to the Secretary of the Army, Assistant Secretary of the Army, or the Deputy Assistant Secretary of the Army (Army Review Boards Agency (ARBA)). *Id.*

54. *Id.* para. 1-1.

55. UCMJ art. 74(a).

56. *Id.* art. 74(b).

He may also direct a soldier to be reenlisted even after the execution of a punitive discharge.⁵⁷

Pursuant to 10 U.S.C. § 953,⁵⁸ the Secretary of the Army has also empowered the Army Clemency and Parole Board (ACPB) to review clemency requests.⁵⁹ The ACPB recommends clemency and parole actions to the Deputy Assistant to the Secretary of the Army (Army Review Boards Agency), who takes final action.⁶⁰

The ACPB considers an eligible prisoner⁶¹ for clemency based on the length of the prisoner's approved sentence.⁶² The ACPB uses the following criteria when reviewing clemency requests: (1) the nature and circumstances of the offense; (2) the prisoner's civilian and military history; (3) the prisoner's confinement disciplinary records; (4) personal characteristics of the prisoner (that is age, education, experience); (5) the prisoner's parole plan; and (6) "the views of any victim of the prisoner's offense."⁶³

"A prisoner . . . will be considered for parole when [he] first becomes eligible and annually thereafter."⁶⁴ A prisoner must request parole⁶⁵ and meet the following criteria to be eligible:

- (a) [He] has an approved court-martial sentence that includes an unsuspended dismissal or punitive discharge or he has been administratively discharged or retired.
- (b) [He] has an unsuspended court-martial sentence . . . to confinement for 12 months or more.
- (c) [He] has served one-third of his term of confinement, but in no case less than six months, or [he] has served ten years of a sentence to confinement for thirty years or more or a sentence to life.⁶⁶

Except for limited cases, the ACBP is the final parole approval authority.⁶⁷

57. AR 15-130, *supra* note 53, para. 1-4a(5).

58. 10 U.S.C.S. § 953 (LEXIS 2001).

59. AR 15-130, *supra* note 53, para. 2-2. The ACPB consists of five ARBA members. The chairperson is a civilian with extensive experience in the corrections field and the other members are active duty field grade officers. At least one of the field grade officers is from the Judge Advocate General's Corps. *Id.* para. 2-3.

60. *Id.* para. 1-4b.

61. Normally, the ARBA will only consider a prisoner for clemency if the prisoner's clemency file has been reviewed and the convening authority has taken action on the sentence. *Id.* para. 3-1c.

62. *Id.* para. 3-1d. The ACPB will consider an eligible prisoner for clemency as follows:

- (1) When the approved sentence to confinement is less than 12 months, there will be no clemency consideration. . . .
- (2) When the approved sentence to confinement is 12 months or more but less than 10 years, clemency consideration will be not later than 9 months from the date confinement began and at least annually thereafter.
- (3) When the approved sentence to confinement is 10 years or more but less than 20 years, clemency consideration will be not later than 24 months from the date confinement began and at least annually thereafter.
- (4) When the approved sentence to confinement is 20 years or more but less than 30 years, clemency consideration will be not later than 3 years from the date confinement began and at least annually thereafter.
- (5) When the approved sentence to confinement is 30 years or more, to include confinement for life, clemency consideration will be not later than 5 years from the date confinement began and at least annually thereafter.
- (6) A prisoner sentenced to death is not eligible for clemency. . . .

Id. para. 3-1d(1)-(6).

63. *Id.* para 3-2a.

64. *Id.* para. 3-1e.

65. Some prisoners who are near the end of their sentence may not apply for parole because being in a parole status entails numerous reporting requirements and restrictions on freedom. *See id.* para. 3-2a(5). In addition, when a soldier goes on parole, he must remain in the parole status for the entire remaining length of his sentence, in effect forfeiting any good time credit he may have already earned. *See id.* para. 4-5.

66. *Id.* para. 3-1e.

67. *Id.* para. 4-2b-c. The Secretary of the Army has withheld authority for parole in cases which (1) he has a personal interest; (2) involve national security; (3) are the subject of controversy or substantial congressional or press interest; or (4) "for any individual convicted of any single offense for which the maximum authorized confinement as determined by the current *Manual for Courts-Martial* is in excess of 35 years." *Id.* para. 4-2b.

Leave

Upon the soldier's request, the GCMCA may authorize the soldier to take *voluntary* excess leave when the soldier is not in confinement and meets the following criteria: (1) has been sentenced by a court-martial to a dismissal or punitive discharge, and (2) the sentence has not yet been approved.⁶⁸ Before he goes on voluntary excess leave, the soldier is entitled to pay and allowances for any period of unused accrued leave.⁶⁹ Once the member has completely used his accrued leave, he will be in an excess leave or leave without pay status⁷⁰ and will not be entitled to pay and allowances during the period of excess leave.⁷¹

The GCMCA may direct *involuntary* excess leave when: "(1) [the s]oldier is sentenced by court-martial to dismissal or a punitive discharge; (2) [the d]ischarge or dismissal is approved by the convening authority and is unsuspended; (3) [the s]oldier is awaiting completion of appellate review; [and] (4) [c]onfinement has been served, deferred, suspended [or the soldier is on parole]."⁷² Soldiers required to take involuntary excess leave and who have leave accrued credit may elect one or a combination of the following: "(1) [receive] pay and allowances during the period of accrued leave, with leave beyond that which was accrued charged as excess leave; or (2) [p]ayment for leave accrued to the soldier's credit on the day before excess leave begins with the total period of required leave charged as excess leave."⁷³ Any payments due to the service member are subject to any approved fines or forfeitures ordered executed by the convening authority.⁷⁴ "Excess leave ends upon final judgment . . . , when the sentence is ordered executed, or other appropriate action is [taken]."⁷⁵

68. AR 600-8-10, *supra* note 31, para. 5-23.

69. *See id.* Because voluntary excess leave can only be taken before the convening authority has approved the sentence, *id.*, any pay that the soldier is entitled to will not be subject to any fines. *See* DOD FMR, *supra* note 26, para. 480501 (fines effective upon execution of sentence). Fourteen days after the sentence is adjudged, however, the pay will be subject to any adjudged forfeitures. *See supra* note 16 and accompanying text.

70. *Id.* tbl. 5-11.

71. *Id.* para. 5-15n.

72. *Id.* para. 5-19a.

73. *Id.* para. 5-19e.

74. *See* DOD FMR, *supra* note 26, para. 4805.

75. AR 600-8-10, *supra* note 31, para. 5.19d.

76. AR 190-47, *supra* note 40, para. 10.18.

77. *Id.*

78. I JOINT FED. TRAVEL REGS., pt. P, U7502 (1 Dec. 2000), available at <http://www.dtic.mil/perdiem/jftr.pdf>. The former soldier makes the election. *Id.*

79. *Id.* U7500.

80. *Id.* U7506.

To ensure that soldiers released from confinement have a small amount of money to purchase necessities, the military services offer a discharge gratuity. Enlisted members who are released from confinement to parole, appellate review excess leave, or expiration of sentence, and whose sentence includes a punitive discharge may be furnished a gratuity of up to twenty-five dollars if they do not have any funds in their possession.⁷⁶ If needed, the military will also provide them with civilian clothing.⁷⁷ The gratuities may offer only a small token, but they are better than nothing.

Travel and Transportation Entitlements

"A former member, who has been discharged while in confinement in a U.S. military confinement facility, is entitled, on parole or final release, to transportation . . . from the confinement facility" to his home of record (HOR) or the place he entered active duty (PLEAD).⁷⁸ The mode of transportation is that which is the least expensive to the government (usually bus or plane).⁷⁹ This entitlement is also available to a soldier placed on involuntarily excess leave "while awaiting completion of appellate review of a court-martial sentence to a punitive discharge or dismissal."⁸⁰ In both situations, the benefit may extend to the member's dependents.⁸¹

A soldier sentenced by a court-martial to confinement for a period of more than thirty days and a punitive discharge is authorized shipment of his household goods (HHG) to his HOR or PLEAD.⁸² The service member, however, must ship his HHG within 180 days from the date the court-martial is com-

pleted.⁸³ He is not authorized non-temporary storage of HHG caused by moving out of government quarters.⁸⁴

Medical Services, Post Exchange, and Commissary

Active duty service members⁸⁵ and their dependents⁸⁶ have a statutory right to receive medical and dental care. In addition, all active duty members and their dependents are authorized commissary and post exchange benefits. Collectively, these are commonly referred to as the Uniformed Services benefits, and are available to all members and their dependents enrolled in the Defense Enrollment Eligibility Reporting System Procedures (DEERS) system and issued a military identification (ID) card.⁸⁷ Service members and their dependents are entitled to these benefits while the service member remains on active duty.⁸⁸ Therefore, when a soldier has been sentenced to a punitive discharge and is on involuntary excess leave, he and his dependents remain entitled to these benefits until execution of the punitive discharge.⁸⁹ The soldier and his dependents do not surrender their ID cards until the soldier is actually discharged from the service.⁹⁰

Transitional Compensation for Victims of Domestic Abuse

The military recognizes the conflict of interest that may confront victims of domestic abuse when the abusers are service members spouses. Service members convicted of abuse may be sentenced to confinement or a punitive discharge, rendering them with little or no income. The net effect is that by reporting domestic abuse and cooperating with authorities, the family often finds itself without financial support from the abuser. Congress has corrected this injustice through legislation aimed at compensating victims of domestic abuse—transitional compensation for abused dependents⁹¹ and the Uniformed Services Former Spouses' Protection Act (USFSPA).⁹²

A soldier's dependents may receive transitional compensation if the soldier is: (1) convicted of a dependent-abuse offense and sentenced to either a punitive discharge or total forfeiture of pay and allowances, or (2) administratively discharged from the service for misconduct involving a dependent-abuse offense.⁹³ Transitional compensation includes monetary payments made to either the spouse or child dependents,⁹⁴ and commissary and exchange benefits⁹⁵ for up to thirty-six months after the convening authority approves the sentence.⁹⁶ The dependents forfeit the transitional compensation if the spouse remarries or the former service member resides in the same household as the dependents.⁹⁷

81. *See id.* pt. C, U5240, para. F (1 Mar. 2001). "A member (with dependents) stationed in [the continental United States] who: is sentenced by a court-martial to: (1) confinement for more than 30 days, (2) receive a [punitive] discharge, or (3) dismissal from a Uniformed Service . . . is entitled to dependents' PCS travel and transportation allowances." *Id.*

82. *See id.* pt. D, U5370, para. H (1 Mar. 2001). Due to the specificity and complexity of these regulations, service members should consult the *Joint Federal Travel Regulations* and transportation officials for specific circumstances that may affect their HHG shipment.

83. *Id.* U5370, para. H6.

84. *Id.* U5370, para. H7.

85. 10 U.S.C.S. § 1074 (LEXIS 2001).

86. *Id.* § 1076.

87. *See generally* U.S. DEP'T OF ARMY, REG. 600-8-14, IDENTIFICATION CARDS FOR MEMBERS OF THE UNIFORMED SERVICES, THEIR FAMILY MEMBERS, AND OTHER ELIGIBLE PERSONNEL (29 July 1999).

88. *See id.* para. 1.4. These privileges can be limited due to misconduct, abuse, or fraud. *See id.* para. 1.5.

89. *See id.* paras. 1.1, 1.2, 1.4.

90. *Id.* para. 1.4.

91. 10 U.S.C.S. § 1059 (LEXIS 2001).

92. *Id.* § 1408(h). Transitional compensation for abused dependents and the USFSPA are mutually exclusive. Victims who qualify for benefits under both programs must choose to participate in one or the other. U.S. DEP'T OF DEFENSE, INSTR. 1342.24, TRANSITIONAL COMPENSATION FOR ABUSED DEPENDENTS para. 6.4 (23 May 1995).

93. 10 U.S.C.S. § 1059(b).

94. *Id.* § 1059(d).

95. *Id.* § 1059(j).

96. *Id.* § 1059(e)(2).

Section III: Collateral Disabilities

A soldier's dependents may also qualify to receive a portion of the soldier's retirement pay that he would have received had he not been discharged from the service. To qualify, the soldier must have been eligible to receive retirement benefits at the time of his punitive discharge, the punitive discharge must have resulted from a conviction of domestic abuse against the spouse or a dependent child, the spouse and soldier must have been married for ten or more years during which the soldier served in the military, and the spouse must have a court order awarding a portion of the soldier's retirement pay as a division of property of the marriage. Spouses who qualify for this provision may be awarded up to fifty percent of the soldier's retirement pay.⁹⁸

Trial counsel should be prepared to remind the judge or panel of these benefits.⁹⁹ The court may be more reluctant to impose a punitive discharge if it would hurt the soldier's dependents in the process. To combat this misconception, trial counsel may inform the court of the transitional compensation for abused dependents and the USFSPA by asking the judge to take judicial notice of these provisions. The court then can make a more informed decision on the appropriateness of sentencing the accused to a punitive discharge.

Soldiers may also suffer many collateral "civil disabilities" from a court-martial conviction. These include the loss of the right to vote,¹⁰⁰ the right to purchase or own firearms,¹⁰¹ VA entitlements,¹⁰² retirement eligibility,¹⁰³ parental rights,¹⁰⁴ and public employment eligibility.¹⁰⁵ Soldiers may also be required to register with the local police if convicted of a sex crime.¹⁰⁶

Voting Rights

In the United States, state law determines qualifications for voting in state and federal elections.¹⁰⁷ The Supreme Court has held that states may disenfranchise convicted felons from voting in state and federal elections.¹⁰⁸ Forty-six states and the District of Columbia have enacted laws that disenfranchise all convicted felons in prison.¹⁰⁹ Thirty-two states disenfranchise felons on parole, with twenty-nine of those states also disenfranchising felons on probation.¹¹⁰ Only fourteen states permanently deny felons the right to vote.¹¹¹ While many state statutes do not specifically address felons who have been con-

97. *Id.* § 1059(g).

98. Major William Pischnotte & Major Regina Quinn, *The Victim and Witness Assistance Program*, 39 A.F. L. REV. 57, 66 (1996) (citing 10 U.S.C.A. § 1408 (West 1995)).

99. *See, e.g.*, *United States v. Hollingsworth*, 44 M.J. 688, 693 (C.G. Ct. Crim. App. 1996).

100. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

101. 18 U.S.C.S. § 922 (LEXIS 2001).

102. 38 U.S.C.S. § 5303 (LEXIS 2001).

103. 10 U.S.C.S. § 3911 (LEXIS 2001).

104. Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479 (1999) [hereinafter Petersilia]. Currently, parental rights can be terminated in nineteen states if the offenses for which the parents were convicted suggest their unfitness to supervise or care for the child. *Id.* at 510.

105. *Id.* at 510.

Public employment is permanently denied in six states: Alabama, Delaware, Iowa, Mississippi, Rhode Island, and South Carolina. The remaining jurisdictions permit public employment in varying degrees. Of these states, ten leave the decision to hire at the discretion of the employer, while twelve jurisdictions apply a "direct relationship test" to determine whether the conviction offense bears directly on the job in question.

Id.

106. 42 U.S.C.S. § 14071 (LEXIS 2001).

107. U.S. CONST. art. I, § 2, cl. 1; art. I, § 4; art. II, § 1, cl. 2; amend XVII. *See* OFFICE OF THE PARDON ATTORNEY, U.S. DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE BY STATE SURVEY 6 (1996) [hereinafter STATE SURVEY]. This report can be obtained by writing or calling: Office of the Pardon Attorney, 4th Floor, 500 First Street, NW, Department of Justice, Washington, DC 20530-0001, (202) 616-6070.

108. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

109. THE SENTENCING PROJECT POLICY REPORTS, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES para. II.4 (1998), available at <http://www.hrw.org/reports98/vote/usvot98o.htm#FELONY> (only Maine, Massachusetts, Utah, and Vermont allow prisoners to vote).

110. *Id.* Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Iowa, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, Wyoming. Of these states, only California, Colorado, and New York do not also disenfranchise felons on probation. *Id.* tbl. 1.

victed in a federal court (such as a military court-martial), most states consider a federal felony conviction the same as a state felony conviction.¹¹²

Defense attorneys should inform clients of these collateral voting consequences before clients plead guilty. Trial counsel, on the other hand, should object to any broad claim by the defense that a felony conviction will permanently disenfranchise the accused. Such a claim would be overly broad and misleading because only fourteen states permanently disenfranchise convicted felons. The convicted soldier could be (or easily become) a resident of one of the other states.

Right to Own Firearms

Federal and state laws govern restrictions on the purchase and possession of firearms. Federal law prohibits “any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”¹¹³ A similar prohibition applies to any person who has been convicted of a misdemeanor crime of domestic violence.¹¹⁴ These rules

extend to soldiers convicted of the requisite crimes at courts-martial.¹¹⁵ These laws are enforced by the federal government through mandatory background checks conducted during the sale of firearms. In accordance with the Brady Handgun Violence Prevention Act, all federally licensed firearm dealers must conduct a check through the National Instant Criminal Background Check System (NICS) to ensure that potential buyers are legally qualified to possess firearms.¹¹⁶ The Federal Bureau of Investigation’s (FBI) Criminal Justice Information Services Division (CJIS) performs the NICS checks in coordination with the National Criminal Information Check (NCIC) system.¹¹⁷ A court-martialed soldier convicted of a reportable offense entered into the NCIC/NICS will be denied the sale of a firearm.¹¹⁸

State laws also regulate the possession of firearms by convicted felons. These laws vary with respect to the restrictions they place on convicted felons owning or possessing firearms. For example, thirty-one states have enacted laws that permanently deny or restrict a convicted felon’s right to own a firearm.¹¹⁹ In contrast, eighteen states deny or restrict this right only when the felon was convicted of a violent felony offense.¹²⁰ Convicted soldiers must therefore look to the law of their state of residence to determine their firearm restrictions.

111. *Id.* Alabama, Arizona (second felony), Delaware, Florida, Iowa, Kentucky, Maryland (second felony), Mississippi, Nevada, New Jersey, Tennessee, Virginia, Washington, and Wyoming. Texas denies felons the right to vote for two years after they have completely served their sentence. *Id.* tbl. 1.

112. STATE SURVEY, *supra* note 107.

113. 18 U.S.C.S. § 922(h). The prohibition also extends to fugitives from justice, unlawful users or addicts of marijuana or any depressant or stimulant drug, and those “who [have] been adjudicated as a mental defective or who [have] been committed to any mental institution.” *Id.* § 922(g).

114. *Id.* § 922 (g)(9).

115. The statute has an exception for service members, allowing them to possess weapons (military weapons only) in relation to their military duties. The exception does not apply to soldiers convicted of misdemeanor crimes of domestic violence. *Id.* § 925(a).

116. *Id.* § 922.

117. Telephone interview with Mr. David Lavezza, CJIS (Jan. 22, 2001) [hereinafter Lavezza Interview]. The NCIC is a computerized record collecting system that the FBI has used since 1967 to gather criminal history information data nationwide and distribute to law enforcement agencies throughout the United States. 28 C.F.R. § 20.31(a) (LEXIS 2001). The system works by having law enforcement agencies throughout the nation report criminal data information on suspects that they arrest or later convict. When law enforcement personnel arrest a suspect, they send a copy of his fingerprints to the CJIS, and the CJIS enters the suspect’s personal information and suspected crime into the NCIC. On final disposition of the case, the reporting agency sends the CJIS an update, which the CJIS then enters into the NCIC. Participating law enforcement agencies can then use the NCIC to check the criminal history of any suspect. Lavezza Interview, *supra*.

118. The Army’s military law enforcement agencies (Military Police Investigation and Criminal Investigation Division) report and receive information from the CJIS. *Army Regulation 190-45* and *CIDR 195-1* establish procedures for submitting criminal history data to the CJIS. See U.S. DEP’T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING para. 4-10 (20 Oct. 2000); U.S. ARMY CRIMINAL INVESTIGATION COMMAND, REG. 195-1, CRIMINAL INVESTIGATION OPERATIONAL PROCEDURES (1 Oct. 1994).

Military confinement facilities also report criminal information to the CJIS. See AR 190-47, *supra* note 40, para. 10.2. Individual confinement facilities submit fingerprint cards to the CJIS once they receive a prisoner’s judicially approved sentence that includes either: (1) a dismissal or punitive discharge, or (2) conviction of an offense that carries a possible sentence of confinement of one year or more. *Id.* para. 10.2b. If a prisoner whose sentence meets the above criteria is released from confinement before completion of final appellate review, the confinement facility forwards a final disposition form to the CJIS. *Id.* para. 10c.

For an in depth analysis of the relationship between the NCIC and the military’s criminal record reporting system, see Major Michael J. Hargis, *Three Strikes and You Are Out—The Realities of Military and State Criminal Record Reporting*, ARMY LAW., Sept. 1995, at 3.

119. Petersilia, *supra* note 104, at 511.

120. *Id.*

Veterans Benefits

A convicted soldier's VA entitlements depend on the type of court-martial he faced and whether he has previously received a discharge under honorable conditions. Conviction by a general court-martial automatically bars a soldier from all VA benefits.¹²¹ In contrast, the VA reviews the eligibility for VA benefits of a soldier convicted by special court-martial on a case-by-case basis.¹²² Whether convicted by a general or special court-martial, a soldier does not lose his VA benefits from any prior honorable enlistment.¹²³

Megan's Law

In 1994, Congress passed The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act,¹²⁴ commonly referred to as Megan's Law.¹²⁵ The Act requires all states to establish a registry database for persons convicted of a "sexually violent offense" or a crime against a minor.¹²⁶ The individual states must coordinate their programs with the National Sex Offender Registry (NSOR) administered by the FBI.¹²⁷ Since 1996, all states have enacted registration laws requiring sex offenders to register with law enforcement officials upon entering the state's jurisdiction.¹²⁸ Each state enters the information into its state registry and into the NSOR. Public access to these registries varies from state to state, with

many states offering Internet access.¹²⁹ The rationale behind community notification is multifold: to assist law enforcement in investigations, to establish supporting evidence to legally hold known offenders, to deter sex offenders from committing additional offenses, and to help citizens protect themselves and their children.¹³⁰

These registries are linked into the FBI's NSOR/NCIC. Soldiers convicted at courts-martial of qualifying offenses will be registered with the NSOR.¹³¹ Defense counsel should inform their clients of this fact, and on sentencing defense counsel should argue that the registration program reduces their client's risk to society.

Retirement Eligibility

Army Regulation 635-200 (enlisted) and *AR 600-8-24* (officers and commissioned warrant officers) regulate the Army's retirement plan.¹³² Service members of the "Regular Army, [Army National Guard], or [Army Reserve component] who have completed 20, but less than 30 years of active Federal service in the US Armed Forces," at the discretion of the proper authority,¹³³ may be retired at the service member's request.¹³⁴ Soldiers with thirty years of service or more will be retired at their request.¹³⁵ Regular Army soldiers must be on active duty

121. 38 U.S.C.S. § 5303(a) (LEXIS 2001).

122. *See id.* § 5303(e); *United States v. Hopkins*, 25 M.J. 671 (A.F.C.M.R. 1987).

123. *See* 38 U.S.C.S. § 5303(a) (limiting the bar of VA entitlements from a general court-martial conviction to "the period from which discharged or dismissed").

124. 42 U.S.C.S. § 14071 (LEXIS 2001).

125. The legislation was enacted in response to the brutal slaying of seven year-old Megan Kanka who was violently raped and murdered by her neighbor, Jesse Timmendequas. Unbeknownst to Megan and her family, Timmendequas was a twice-convicted child sex offender at the time of the murder that had just recently been released from prison. Kerri L. Arnone, *Megan's Law and Habeas Corpus Review: Lifetime Duty with No Possibility of Relief*, 42 ARIZ. L. REV. 157, 160 n.24 (2000).

126. 42 U.S.C.S. § 14071(a)(1).

127. *Id.*

128. Elizabeth A. Pearson, *Status and Latest Developments in Sex Offender Registration and Notification Laws*, NAT'L CONF. ON SEX OFFENDER REGISTRIES 45 (U.S. Dep't. of Justice ed., 1998), available at <http://www.ojp.usdoj.gov/bjs/crs.htm#nsor>.

129. For a state by state summary of dissemination and community notification information, see BUREAU OF JUSTICE STATISTICS, SUMMARY OF STATE SEX OFFENDER REGISTRY DISSEMINATION PROCEDURES: UPDATE 1999 (1999), available at <http://www.ojp.usdoj.gov/bjs/crs.htm>.

130. KlaasKids Foundation, *Megan's Law Amendments by State*, at <http://www.klaaskids.org/pg-legmeg.htm> (last visited Mar. 22, 2001). This Web site provides a state-by-state total of registered offenders and details how states provide access to registration information. *See id.*

131. Lavezza Interview, *supra* note 117. *See supra* notes 117-18 and accompanying text.

132. U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS, ENLISTED PERSONNEL (1 Nov. 2000) [hereinafter AR 635-200]; U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (21 July 1995) [hereinafter AR 600-8-24].

133. The Commander, U.S. Total Army Personnel Command, is the retirement authority for enlisted personnel. AR 635-200, *supra* note 132, para. 12-2. The Secretary of the Army is the approval authority for officer retirements. AR 600-8-24, *supra* note 132, para. 6-14.

134. AR 635-200, *supra* note 132, para. 12-4; *see also* AR 600-8-24, *supra* note 132, para. 6-14c. These regulations implement the provisions of 10 U.S.C.S. §§ 3911 and 3914 for officers and enlisted soldiers, respectively.

when they retire.¹³⁶ Therefore, enlisted soldiers separated by a punitive discharge are ineligible for retirement.

Other than requesting clemency, soldiers have no venue to appeal the loss of retirement benefits that result from the court-martial's sentence of a punitive discharge or dismissal. Although military courts recognize that the loss of retirement benefits is an important collateral consequence of a punitive discharge or dismissal, they consistently have held that they do not have jurisdiction to consider an appeal for the loss of retirement eligibility.¹³⁷ The military courts consider retirement eligibility an administrative, rather than punitive matter.¹³⁸ Therefore, the military courts will not hear, for example, Fifth Amendment claims of lack of due process for taking retirement benefits; nor will the military courts hear arguments that a dismissal, and the subsequent loss of retirement benefits, is equivalent to an excessive fine in violation of the Eighth Amendment.¹³⁹ Additionally, a dismissed officer or punitively discharged soldier has no cause of action in Federal Claims Court for the administrative decision denying him retirement. This is because no administrative decision on whether to retire that person is ever made in the process of approving a punitive discharge or dismissal.¹⁴⁰

Defense counsel who are properly knowledgeable of the devastating impacts of a punitive discharge can better plan a multi-layer strategy to save a client's retirement benefits. The attorney must fully explain the effects of the loss of retirement benefits to the panel during sentencing. As a result, the panel may not adjudge a punitive discharge or, perhaps, may recommend that the convening authority disapprove or suspend the punitive discharge. Understanding the retirement consequences of a punitive discharge will also assist the defense attorneys in preparing effective clemency requests for the convening authority and for the Clemency and Parole Board (enlisted clients) or the Secretary of the Army (officer clients).

Being a trial attorney, whether a defense or trial counsel, entails much more than preparing for and presenting a case at trial. It mandates knowing all the legal and practical consequences of a court-martial conviction. Defense counsel must know these ramifications to properly advise their clients. Most accused soldiers do not even think about the collateral consequences of a conviction until after their trial is over. A complete understanding of the practical and legal consequences of a court-martial may affect the soldier's decision on whether to plead guilty. For example, a senior noncommissioned officer may decide to accept a deal that offers no confinement to avoid the risk of automatic reduction to E-1. Conversely, a person charged with indecent acts upon a minor may decide to contest the case to reduce the risk of having to register as a sex offender for the rest of his life. Regardless of the issue, it is imperative that defense counsel correctly advise their clients so that the clients can make an informed decision.

Trial counsel must also know and appreciate the collateral consequences of a court-martial conviction. Trial counsel are not only responsible for prosecuting criminals, they also are charged with the administration of justice. Without knowing the full consequences of a court-martial conviction, trial counsel cannot fully advise the command of all of the potential ramifications of a court-martial sentence. Commanders need to know this information to make just and fair decisions on individual cases. This information may not alter the command's final decision on whether to refer the case to court-martial; however, it may affect the level of court-martial the case is referred to or whether the command grants some form of post-trial clemency.

135. 10 U.S.C.S. §§ 3917-3918 (LEXIS 2001).

136. *See id.* §§ 3914, 3917.

137. *See, e.g.,* United States v. Reed, 54 M.J. 37 (2000); United States v. Sumrall, 45 M.J. 207 (1996); United States v. Ives, 45 M.J. 22, 23 (1996) (denial of petition for grant of review).

138. *See, e.g.,* Sumrall, 45 M.J. at 211-12.

139. *See, e.g.,* Reed, 54 M.J. at 37.

140. *See* Seaver v. Commandant, U.S. Disciplinary Barracks, 998 F. Supp 1215, 1218 (D. Kan. 1998).