

United States Army Defense Appellate Division

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CONVICTIONS**

Mr. Steven E. Berkowitz

with assistance from

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A Journal For Military Defense Counsel
THE ADVOCATE

CHIEF, DEFENSE APPELLATE DIVISION

COL William G. Eckhardt

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DEPARTMENT OF THE ARMY
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REPLY TO
ATTENTION OF

JALS-DA

23 September 1982

SUBJECT: Project: The Administrative Consequences of Courts-Martial

DISTRIBUTION

1. With this special issue, The Advocate hopes to fill a vacuum in the present literature by providing a practical "desk book" addressing administrative remedies and other administrative consequences of courts-martial. Hopefully, the Project will serve as a ready reference in every SJA office.
2. The Project should benefit all JAGC officers who counsel convicted soldiers or their dependents. It will assist defense attorneys in advising their clients on what will happen after the "dust settles." The Project will aid legal assistance attorneys in providing timely advice in responding to inquiries by the convicted soldier or his family concerning such topics as the shipment of household goods. Responsibility for advising the convicted soldier on clemency and discharge upgrading varies by installation. Attorneys charged with this task will find the Project an essential tool.
3. The Project deals in part with topics which go beyond the scope of client representation presently authorized by law and regulation. Army Regulations limit the appearance of active duty judge advocates before certain administrative boards. Similarly, judge advocates are not authorized to appear as counsel in assisting the convicted soldier in collaterally attacking his court-martial conviction. Only under the most exceptional circumstances may a judge advocate represent or provide advice to someone not on active duty. A familiarity with these topics, however, is essential. For example, legal assistance officers may do almost everything connected with a discharge upgrading application short of actual appearance and defense counsel should be aware of the impact their tactics have on subsequent collateral attack. The point is this: all active duty judge advocates should review pertinent regulations and local policies which affect the scope of representation they may provide.
4. The Advocate wishes to thank the Army Board for the Correction of Military Records, the Army Clemency Board, the Army Discharge Review Board, and the Office of the Pardon Attorney for their information and assistance. We also acknowledge the hard work of Mr. Steven E. Berkowitz, the DAD summer intern, who was the principal author of this Project.

A handwritten signature in cursive script, reading "William G. Eckhardt".

WILLIAM G. ECKHARDT
Colonel, JAGC
Chief, Defense Appellate Division

PROJECT: THE ADMINISTRATIVE CONSEQUENCES OF COURTS-MARTIAL

Members of the Armed Services who are convicted by courts-martial frequently have questions concerning the effect of their punishment on pay and allowances, the shipment of household goods and personal belongings at government expense, and, most important, what actions can be taken to reduce the severity of their sentence. These are important concerns of the court-martialed soldier; yet defense counsel are often not equipped with the necessary expertise or reference materials to answer these inquiries. Project: The Administrative Consequences of Courts-Martial is intended to provide a source of answers for client's questions when the trial is completed and the sentence is about to be executed.

The Project will serve as a desk book for military attorneys. We recommend that readers place it in a separate loose-leaf binder since material will be added and existing material updated from time to time by the staff of The Advocate.

The Project is not intended to be used as cited authority. It is merely a guide to the avenues of relief available to a court-martialed soldier. It is only the first step in providing legal assistance for the post court-martial administrative process, and other sources should be consulted. Anyone assisting an applicant before an Army Administrative Board should familiarize himself* with the regulations covering those Boards. Army Reg. 15-180, Boards, Commissions and Committees - Army Discharge Review Board (C2 1 Jan. 82); Army Reg. 15-185, Boards, Commissions and Committees - Army Board for Correction of Military Records (C1 1 June 82) and Army Reg. 15-130, Boards, Commissions and Committees - Army Clemency Board (15 May 79), as well as Army Reg. 190-47, Military Police - The United States Army Correctional System (C1 1 Dec. 80) are all essential sources. The Standard Operating Procedures of the Army Discharge Review Board and those of the Army Clemency Board (to be published in the Federal Register in early 1983) also should be consulted for an official view of the Board's standards. Finally, an applicant bringing a case either before the Army Discharge Review Board or the Army Board for the Correction of Military Records may wish to familiarize himself with cases similar to his own by using the Armed Forces Discharge Review Board/Correction Boards Reading Room located at the Pentagon concourse.

*Throughout this Project the masculine pronoun will be used exclusively and is intended to apply to both male and female soldiers.

An excellent treatise for applicants and those assisting applicants in seeking an upgrade of a discharge is the excellent work by David F. Addleston and others of the Veterans Education Project, National Veterans Law Center entitled, Military Discharge Upgrading (1982). This superb work is a necessary tool in the preparation of any case before the Army Discharge Review Board or the Board for Correction of Military Records.

The section of the Project dealing with the standards of the various Boards or authorities should not be viewed as official guidelines and should not be cited to the Boards. However, the standards do provide guidance in determining whether to grant relief and to gauge the chances for success in a particular application. Most importantly, this section explains what areas are not considered by the clemency and discharge authorities. For example, court-martialed members frequently write to the various authorities and argue the facts of their cases in order to prove their innocence. This is not what the Boards and other authorities consider in reading an application, and letters should generally follow the standards listed herein.

The Project is designed to aid the court-martialed soldier in presenting the best possible case to the appropriate authorities. However, even under these circumstances, the chance of significant relief will be slight in most instances. Defense counsel should therefore give their clients a realistic assessment of their chances for success. Counsel should be familiar with changing views on the stigmatism of a punitive discharge. See Lance, A Criminal Punitive Discharge - An Effective Punishment?, 79 Mil.L.Rev. 1, 72-104, and Rhodes, Banishment from the Army: An Analysis of the Army's Response to the Criminal Offender through Punitive Discharges, 20 (May 1976) (unpublished thesis available at the editorial offices of The Advocate). Yet, if the Project is successful in helping the court-martialed soldier argue the relevant criteria to the proper authorities, hopefully his chances for success, in an appropriate case, will be increased.

On the back cover we have prepared a time chart indicating when applications to the boards and officers involved in discharge upgrading may be filed. The chart is also printed on plain paper on the last page of the Project so that it may be reproduced locally.

This issue would not have been possible without the help and cooperation of several organizations. The author expresses his appreciation to the Army Discharge Review Board, Army Clemency Board, Army Board for Correction of Military Records, and the Office of the Pardon Attorney of the Department of Justice for their help in editing the sections covering their respective areas of responsibility. Appreciation also is expressed to the Army Finance and Accounting Center, the attorneys at the U.S. Army Disciplinary Barracks and the U.S. Army Retraining Brigade, the staff of

the transportation office of Fort Myer, Virginia, and the attorneys at the Criminal Law Division, Office of the Judge Advocate General, for their assistance. The help of the Veterans Administration and the Veterans Education Project in assisting in the preparation of what is perhaps the Project's most important section is greatly appreciated.

Finally the author wishes to give special thanks to the attorneys of The Advocate and the Defense Appellate Division. Through our collective efforts a void has been filled in the field of reference publications pertaining to client assistance in the military. It is also our collective hope that attorneys in the field and, most importantly, the service member clients we serve, will find these materials useful.

STEVEN E. BERKOWITZ

CHAPTER ONE: DISCHARGE UPGRADING

To upgrade an administrative discharge, or a bad-conduct discharge issued by a special court-martial, application should be made to the Army Discharge Review Board [ADRB]. Application for upgrading any discharge issued by a general court-martial [GCM], including any dismissal, should be made to the Army Board for the Correction of Military Records [ABCMR]. The ADRB and the ABCMR are also empowered to change the reasons for which the discharge was issued, to change the date on which a term of service expired, and to alter various other records. The Judge Advocate General, the Secretary of the Army, and the Army Clemency Board are also empowered to upgrade a discharge. See Chapter 2, infra.

PART I: THE ARMY DISCHARGE REVIEW BOARD.

The ADRB can upgrade an administrative discharge, or a bad-conduct discharge issued by a special court-martial. The Board has no jurisdiction over discharges or dismissals issued by a GCM.

The ADRB cannot revoke a discharge or dismissal, reinstate a person in the Army, or recall a person to active duty.¹ It also may not change reenlistment codes. This can only be done by the U.S. Army Enlistment Eligibility Activity or the ABCMR. The ADRB may not downgrade a discharge, nor change the reason for a discharge to "physical disability."²

Section A: When to Apply:

Application should be made within fifteen (15) years after the date of discharge.

Section B: How to Apply:

First, request that the relevant³ military records of the former service member be sent to the applicant from the National Personnel Records Center [NPRC]. An applicant will be better able to prepare a strong application if he has the records in his possession prior to filing with the Board. Standard Form [SF] 180 ("Request Pertaining to

1. Army Reg. 15-180, Boards, Commissions and Committees, The Army Discharge Review Board, para. 3c (3 April 1978) [hereinafter cited as AR 15-180]. The ABCMR has some power in these areas, though it is rarely used.

2. This power is possessed by the ABCMR.

3. To determine what records will be "relevant," see text at notes 16 to 23 infra.

Military Records"), available at any Veteran's Administration regional office, can be used for this purpose and should be sent to:

National Personnel Records Center
9700 Page Boulevard
St. Louis, MO 63132

[Note: Copies of forms referred to in this chapter are attached at Appendix 1-A.]

Once a request for review has been filed with the ADRB, all records are sent from NPRC to the ADRB, and future requests for records must be made directly to the ADRB. However, this will cause a delay in the processing of the review.

If the applicant has a claim pending at the Veterans Administration [VA], much of his or her Official Personnel Folder will be at that agency. VA Form 07-3288 ("Request for Records") and, if necessary, VA Form 2-22(a) ("Power of Attorney"), available at regional offices of the VA, should be sent to the nearest VA regional office. Copies of records will be provided without charge at the discretion of the VA. The NPRC does not charge for copies.

Medical records can be obtained from the NPRC "unless it appears that such release might prove detrimental to [the applicant's] physical or mental health."⁴ If this is of concern to the applicant, the signature of a doctor or psychiatrist in box 6(B) of SF 180, with the authorization of the applicant (Box 5), will make the release of such records more likely.

Records of investigation can be obtained from the agency or section that conducted the investigation, either by a letter and SF 180 (unlikely to work), or by a request under the Freedom of Information Act. If the ADRB are using the records, request can be made to the ADRB.

Pay Records can be obtained by filing SF 180 with:

Finance Center
United States Army Finance Support Agency (FINCS-A)
Indianapolis, IN 46249

Second, submit DD Form 293 ("Application for Review of Discharge or Dismissal from the Armed Forces of the United States"), available at military installations of any branch of the service, or at any Veterans Administration regional office to:

4. National Personnel Records Center Regulation 164.110, chapter 3, paragraph 3, cited in D. Addlestone, et al. Military Discharge Upgrading [hereinafter Addlestone], § 6.6.2 1-2

Commander
U.S. Army Reserve Components Personnel and
Administrative Center [USARCPAC]
9700 Page Boulevard
St. Louis, MO 63132

USARCPAC will forward the application to the Army Discharge Review Board. Do not send the application directly to the ADRB.⁵ DD Form 293 must include the grade and organization of the applicant, his or her assignment at the date of discharge, the date and place of discharge, the type and nature of the discharge, the basis of the applicant's contentions, the type of correction requested,⁶ the type of hearing requested, (see Section E infra at 1-5), the name of counsel, if any, and the address to which correspondence from the ADRB can be directed.

The applicant must sign the form. If he or she is deceased, the form can be signed by the surviving spouse, next of kin, or legal representative. If the applicant is mentally incompetent, the form may be signed by a spouse, next of kin, legal guardian or legal representative. Proof of death or incompetency must be submitted with the application.

Documentary support for the applicant's request should be submitted either with the application or as one commentator recommends submitted along with a brief after the application is filed, but at least 30 days before the hearing date.⁷ The ADRB should be notified that a brief is forthcoming. The brief should include: any mitigating factors which the applicant wishes to bring before the ADRB, the applicant's military

5. When case review is in progress, correspondence should be sent directly to the ADRB. Send to: Army Discharge Review Board, Washington, D.C. 20310

6. As with the ABCMR it may be advisable to ask for the greatest possible relief - having the discharge upgraded to an Honorable Discharge. The ADRB may grant only partial relief and will not grant relief greater than that requested. Additionally, under the settlement in Urban Law Institute of Antioch College, Inc. v. Secretary of Defense, (No. 76-0530 D. D.C. January 31, 1977), the ADRB must disclose the reasons why partial and not total relief was granted. Therefore, a request for an Honorable Discharge may not be denied without at least some explanation by the ADRB of its reasons.

7. Addelstone, supra note 4 at § 2.10.0.

and post-service record, and an explanation as to why these factors warrant upgrading the discharge. The brief should contain the applicant's arguments why, under the facts of his case, relief should be granted and legal authority (to include past ADRB decisions, see section D infra at 1-5) to support the requested relief.

With the application, evidence of post-service conduct, including proof of education (certificates, diplomas, transcripts), proof of family responsibility (birth or marriage certificate), proof of good citizenship (lack of a police record), proof of rehabilitation (enrollment in, or completion of, drug or alcohol rehabilitation programs) and/or affidavits, especially those of clergy and community leaders attesting to applicant's good standing in the community should be submitted. A cover letter also may be submitted requesting that the ADRB send to the applicant any: (1) case brief or summary prepared by the staff of the ADRB; or (2) FBI or other investigative reports that the ADRB has in its possession. The letter should explain that these documents are needed to adequately prepare the applicant's case. This request can be made again when the brief is filed.⁸

Section C: Preparing the Case

Upgrades of bad-conduct discharges occur, though rarely.⁹ Upgrades of less severe discharges are much more common. An applicant is more likely to be successful if he is represented by counsel.¹⁰ A personal appearance will also enhance the probability of success and should be requested. See note 13, infra. If no personal appearance is made and no documentation, other than evidence which was available at the court-martial, is submitted, the ADRB will assume that the record at the court-martial was correct. The ADRB's decision will then be made based on that record alone. In such a case the discharge will not be upgraded unless it is obviously improper or inequitable.

The ADRB is not bound by stare decisis; i.e. they are not required to follow older ADRB cases. However, they do have a duty to be consistent. Therefore, they must at a minimum distinguish other cases mentioned by

8. Addlestone, supra, note 4 at § 9.2.4.5.

9. The percentage of Bad-Conduct Discharges upgraded since 1950 has hovered around one percent, according to the ADRB.

10. See Addlestone, supra note 4 at § 9.2.9. note 64.

the applicant. A discharge must be equitable, so there is a duty to treat like cases alike. According to the ADRB's Standard Operating Procedures, "The Board must strive for uniformity in its adjudicative deliberations." While circumstances can vary, there are certain parameters which apply to all cases and by which these various cases can be evaluated. Thus, there does exist what might be called a "worldwide standard for the considerations of discharge review appeals."¹¹

Section D: Research

The ADRB keeps its decisions on file at the Armed Forces Discharge Review/Correction Board Reading Room, Pentagon Concourse, Washington, D.C. 20310. There have been thousands of ADRB cases over the years. Most of these are not on point, however, because they involve efforts to challenge administrative rather than punitive discharges. The cases are indexed quarterly according to issue.¹² Research by using the indices can be time consuming. A more efficient alternative is to consult D. Addlestone, et al. Military Discharge Upgrading [hereinafter Addlestone] published by the Veteran's Education Project, on the particular issue for relevant case citations. See note 4 supra. That manual can also provide a useful method of gauging the chances of success with a particular issue or fact pattern. The indices may be similarly utilized. Copies of cases are free at the reading room. If the applicant or his counsel are outside the Washington, D.C. area, copies of cases can be ordered by case number. There is a limit of 25 free copies per month per person.

Section E: Hearings

An applicant should request a personal hearing, as the chance for success is much higher with a personal appearance.¹³ It is also advisable to have counsel.

There are three types of hearings conducted by the board: 1) by a panel of the ADRB in Washington, D.C.; 2) by a traveling panel; or 3) by

11. 44 Fed. Reg. 25,067, 25,068 (1979).

12. There are copies of the indices in each state. To find the location in a particular state, contact the American Red Cross or other Veteran's service organization.

13. See Addlestone, supra note 4 at § 9.2.7.5.1.

examination of the applicant by a hearing examiner, which is videotaped and played before the ADRB in Washington, D.C.¹⁴

An applicant is permitted to withdraw his application at any time prior to the hearing date without prejudice. Failure to appear at a personal hearing will constitute a waiver of the right to a personal hearing. In such a case, the ADRB will decide the case on the record, unless the applicant has a good cause for not appearing and for not notifying the ADRB of his absence in advance. Good cause is any reason which is beyond the control of the applicant. Therefore, if the applicant knows he will be unable to appear, he must notify the ADRB and request rescheduling. If during the hearing the applicant discovers he needs more time to gather evidence, a continuance will usually be granted.¹⁵

Section F: Standards

[Note: This section is written to provide an insight into issues considered by the ADRB in general. It is not intended as a complete list of relevant factors, nor as a prediction of what action the ADRB will take in a particular case.]

The Army Discharge Review Board examines two major factors in deciding whether to upgrade a discharge - propriety and equity.

(A) Propriety. The ADRB looks at whether the discharge was originally given in a proper manner. An error does not necessarily require that the discharge be upgraded. The error must be prejudicial. The ADRB will not second guess the findings of a court-martial in this area. Prejudicial error is an error of law, procedure, fact, or discretion, where "there is substantial doubt that the discharge would have remained the same if the error had not been made."¹⁶

The Standard Operating Procedures of the ADRB list areas where prejudicial error might exist. The ADRB has some discretion here. For example, an error might exist where there are unrebutted, substantial

14. For a list of locations where traveling panels or hearing examiners have sat in the past, see appendix 1-B.

15. The applicant should keep in mind that if his hearing is rescheduled by a traveling panel, he may not have a chance to present his case until the next time the ADRB sits in that city.

16. ADRB Standard Operating Procedures, 4 Fed. Reg. at 25,069.

allegations of command influence in the case, where the ADRB determines that a regulation requiring transfer or some form of observation or counseling prior to discharge was intentionally violated, or if the discharge was based upon a service record which contained either an adverse action that should have been removed, or a record of pre-service misconduct (unless that conduct is the basis of the discharge).

Addlestone lists several common errors at court-martial that may be prejudicial. These include (1) the failure to prepare a verbatim record; (2) denial of a request for enlisted members, or denial of a request for trial by judge alone; (3) trial of a nonservice-connected offense; (4) speedy trial violations; (5) trial by a special court-martial with fewer than three members; and (6) use of defective evidence, confessions, or pleas.¹⁷

(B) Equity. The ADRB also determines whether the discharge was given in a manner consistent with current standards applicable service-wide. The ADRB will occasionally look beyond judicial determinations and will consider factors the courts ignore. Thus, because the legal errors which are likely to render the award of a punitive discharge improper are also likely to be addressed during appellate review, any relief granted is more likely to be based on equity.

A discharge is considered equitable unless:

(1) the policies under which it was adjudged differ from those used service-wide if the current service-wide policies enhance the rights of the member, and if substantial doubt exists whether the same discharge would result if the new procedures were used; or

(2) it is inconsistent with the standards of discipline in the military.

Even if the discharge is otherwise equitable (and proper) at the time of issuance, the ADRB may decide that relief is warranted. Such a decision would be based on consideration of the applicant's service record, and other evidence offered the ADRB in conjunction with several quality of service and capability factors.

Quality of Service Factors:¹⁸

17. Addlestone, supra note 4 at § 20.6.

18. AR 15-180, supra note 1 at Appendix C-3(c)(1).

- (a) Service history - date of enlistment, period of enlistment, rank achieved, conduct and efficiency ratings.
- (b) Awards or decorations.
- (c) Letters of commendation or reprimand.
- (d) Combat service.
- (e) Wounds received in action.
- (f) Level of responsibility at which the applicant served.
- (g) Other acts of merit that may not have resulted in formal recognition through an award or commendation.
- (h) Length of service during service period that is the subject of discharge review.
- (i) Prior military service, type of discharge received, outstanding post-service conduct.
- (j) Convictions by court-martial.
- (k) Non-judicial punishment.
- (l) Convictions by civil authorities while serving in the Army (if in the service records).
- (m) Records of unauthorized absence.
- (n) Records of discharge in lieu of court-martial.

Capability Factors:¹⁹

- (a) The "total man" - Factors include: age; educational level; aptitude test scores; whether the applicant met military standards of acceptability for service; and any indications of the individual's ability to serve satisfactorily and adjust to the Army.

¹⁹. AR 15-180, supra note 1 at Appendix C-3(c)(2).

(b) Family and Personal Problems - Factors include any matters in extenuation or mitigation of the reason for discharge that may have affected applicant's ability to serve satisfactorily.

(c) Arbitrary or Capricious Acts - Actions by individuals in authority which constitute a clear abuse of authority, and which contributed to a decision to discharge. This category is used primarily in administrative discharge cases.

(d) Discrimination - Any evidence of racial, ethnic, or sexual discrimination that can be found in the applicant's service record. As this factor is not determinative, but rather merely a consideration for the ADRB, the level of discrimination need not be sufficient for a claim of violation of civil rights.

The Standard Operating Procedures also mention other areas for consideration by the ADRB:²⁰

(A) Post-Service Conduct - The ADRB examines the individual's behavior in its entirety. If the applicant can show that the act in question was the exception to an otherwise law-abiding lifestyle, his case will be stronger. The ADRB can assign this factor any weight it wants, though it usually will not outweigh the applicant's in-service conduct.²¹

(B) Institutional Discrimination - The ADRB considers different "tolerance" levels of commanders, at different times, that may cause punishment to be applied in an unequal fashion.

(C) Stacking of Offenses - In some instances, a number of offenses will be charged based on a single incident. The Standard Operating Procedures of the ADRB present as an example an individual charged with AWOL for more than three but less than thirty days, breaking restriction, and failure to repair simultaneously. A special court-martial may be held on the most serious charged AWOL, but the others are listed to "make the circumstances appear to be of greater magnitude than they truly are." The Standard Operating Procedures give the ADRB extensive leeway in this area. However, "Board members must insure that they are not unduly and incorrectly influenced when it is apparent that stacking has occurred." The ADRB is directed to give consideration to the nature,

20. (ADRB Standard Operating Procedures). 44 Fed. Reg. 25,070 - 25,073 (1979)

21. See text at note 8 supra.

seriousness, and circumstances under which the offenses occurred before concluding that "stacking" exists, and must also determine whether the "stacking" had any effect on the discharge process.²²

Section G: Aggravating Factors²³

The applicant should bear in mind that some outside factors will make his case appear worse, and lessen his chances for success. Such factors include the service member's desire to terminate his term of service prematurely, other offenses on his record, the service member's failure to utilize the chain of command to solve his problems, the service member's failure to attempt to rehabilitate himself, and an above average capacity (maturity, higher education level, high aptitude test scores, and demonstrated ability to perform).

Section H: Reconsideration

The Army Discharge Review Board will reconsider a case only if:

- (A) the only previous consideration of the case was on the ADRB's motion;
- (B) there was no personal hearing initially, and one is now requested (unless this was due to a failure by the applicant to appear);
- (C) there have been changes in Army disciplinary policy that have been made expressly retroactive;
- (D) the discharge was under policies that are different than those used service-wide if the servicewide policies enhance the rights of the individual;
- (E) the applicant now has counsel, but was not represented earlier;
- (F) the previous consideration was not under uniform standards; or
- (G) substantial, new, and relevant evidence is available which was not previously available to the applicant.

22. ADRB Standard Operating Procedures, 44 Fed. Reg. at 25,072.

23. See Addlestone, supra note 4 at § 20.3 for a more detailed examination of mitigating and aggravating factors.

Section I: Review by the Secretary of the Army

Action by the ADRB is final, except: (1) when a minority of the ADRB requests their opinion be forwarded for consideration to the Secretary of the Army [SECARM]; (2) when special cases are selected to be forwarded to SECARM to provide him information on the discharge function; (3) in specific cases in which SECARM has an interest; or (4) in any case which the President of the Army Discharge Review Board feels is of significant interest.

Review authority has been delegated by SECARM to the Deputy Assistant Secretary of the Army (Review Boards and Personnel Security). The Secretary has no formal standards by which he must review ADRB cases. Secretarial review of ADRB cases is rare. No right is provided by regulation to review the ADRB's decision prior to Secretarial review, nor is there a right to submit additional evidence to the Secretary or appear in person.²⁴

Section J: Effect of Denial

The applicant is still free to apply to the Army Board for the Correction of Military Records, or to seek clemency.²⁵

24. This procedure may be illegal. See Addlestone, supra note 4 at § 9.2.15.2.

25. See Chapter 2, infra.

Part II: THE ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

The ABCMR is the primary forum for upgrading punitive discharges. The ABCMR has broad power to "consider all applications properly before it for the purpose of determining the existence of an error or an injustice."²⁶ The ABCMR has the "jurisdiction to review and determine all matters properly brought before it consistent with existing law."²⁷ This includes the power to change any aspect of a court-martial sentence, such as the upgrading of a punitive discharge. However, the Army Board, to date, has never disturbed the finality of a court-martial conviction.

Section A: When to Apply

A claimant must file within three years after discovery of the error or injustice,²⁸ but this requirement can be waived by the ABCMR in the interest of justice. A claimant must exhaust all other administrative remedies before filing with the ABCMR.²⁹ Consequently, a service member who received a bad-conduct discharge from a special court-martial must first apply with the Discharge Review Board. However, a service member who received a punitive discharge from a general court-martial may apply directly to the ABCMR.

Section B: How to Apply

First, request that copies of the applicant's relevant³⁰ military records be sent to him from the National Personnel Records Center [NPRC]. An applicant will be better able to prepare a strong application if he has the records in his possession prior to filing with the Board. Standard Form [SF] 180 ("Request Pertaining to Military Records"), available at any Veterans Administration regional office, can be used for this purpose and be sent to:

National Personnel Records Center
9700 Page Boulevard
St. Louis, MO 63132

26. Para. 4, Army Reg. 15-185 Boards, Commissions, and Committees, Army Board for Conviction of Military Records, (18 May 1977) [hereinafter cited as AR 15-185].

27. Id. at para. 5.

28. Id. at para. 7.

29. Id. at para 8.

30. To determine what records will be "relevant," see text at notes 51 to 59 infra.

Once a request for review has been filed with the ABCMR, all records are sent from NPRC to the Board, and future requests for records must be made directly to the Board, who will return the records to the custodian for reproduction, thus delaying the processing of the application.

If the applicant has a claim pending at the Veterans Administration, much of his or her Official Personnel Folder will be at that agency. VA Form 07-3288 ("Request for Records") and, if necessary, VA Form 2-22(a) ("Power of Attorney"), available at regional offices of the VA, should be sent to the nearest VA regional office. Copies of records will be provided without charge at the discretion of the Veterans Administration. The National Personnel Records Center does not charge for a copy of the records.

Medical records can be obtained from the NPRC "unless it appears that such release might prove detrimental to [the applicant's] physical or mental health."³¹ Under these circumstances, the signature of a doctor or psychiatrist in Box 6(B) of SF 180, with the authorization of the applicant (Box 5), will make the release of such records more likely.

Records of investigation can be obtained from the agency or section that conducted the investigation, either by a letter and SF 180 (unlikely to work), or by a request under the Freedom of Information Act. If the ABCMR is using the records, request can be made to the Board.

Pay Records can be obtained by filing SF 180 with:

Finance Center
United States Army Finance Support Agency (FINCS-A)
Indianapolis, IN 46249

The application for correction should be submitted on DD Form 149 ("Application for Correction of Military or Naval Records").³² These forms may be obtained from The Adjutant General, Washington, D.C. 20301, from VA regional offices, and through publication supply channels (for those applicants on active duty). Former service members should address their application to:

Commanding General
U.S. Army Reserve Components Personnel
& Administration Center
Attn: A 602-PSP
9700 Page Blvd
St Louis, MO. 63132

.....
31. Addlestone, supra note 4 at § 6.6.2.

32. Army Reg. 15-185, supra note 26 at para. 6.

Active duty claimants should submit their application to:

Army Board for Correction of Military Records
Department of the Army
Washington, D.C. 20301

Active duty officers should consider sending their applications through their branch to the ABCMR if they feel it is likely to receive a favorable indorsement. This can facilitate the correction process.

An honorable discharge should be the relief sought in Box 11 of DD Form 149. While the Board may award other discharges, it is unlikely to give a discharge higher than requested. Thus, if an applicant deserves a honorable discharge but only applies for a general discharge, he will likely receive only a general discharge.

The applicant must sign the form. If this is not possible, however, the application may be signed by such person as the Board "shall determine to be competent and suitable and to have a proper interest therein."³³ If the applicant is mentally incompetent, the form may be signed by a spouse, next of kin, legal guardian or legal representative. Proof of death or incompetency must be submitted with the application.

Documentary support for the applicant's request should be submitted along with the application. A brief, if one is to be submitted, should also accompany the application. Although a brief may be submitted after the application is filed, this may cause further delay, should the Board seek additional advisory opinions in regard to issues or facts raised for the first time in the brief. In no event should a brief be submitted later than 30 days prior to the hearing date.³⁴ The brief should include any mitigating factors which the applicant wishes to bring before the Board, the applicant's military and post-service record, and an explanation as to why these factors warrant upgrading the discharge. The brief should contain the applicant's arguments why, under the facts of his case, relief should be granted and legal authority (to include past ABCMR decisions, see section D infra at 1-16) to support the requested relief.

With the application, evidence of post-service conduct, including proof of education (certificates, diplomas, transcripts), proof of family responsibility (birth or marriage certificate), proof of good citizenship (lack of a police record), proof of rehabilitation (enrollment in, or

33. Id. at para 6c.

34. See Addlestone, supra note 4 at § 9.4.6.

completion of, drug or alcohol rehabilitation programs) and/or affidavits, especially those of clergy and community leaders attesting to applicant's good standing in the community should be submitted. A cover letter also should be submitted requesting that the ABCMR send to the applicant any: (1) case brief or summary prepared by the staff of the Board; (2) legal or medical advisory opinions; and (3) FBI or other investigative reports that the Board has in its possession. The letter should explain that these documents are needed to adequately prepare the applicant's case. This request can be made again when the brief is filed.³⁵

Section C: Preparing the Case

An applicant is most likely to be successful in an attempt to have a discharge upgraded if he is represented by counsel.³⁶ A personal appearance will also enhance the probability of success and should be requested. If no personal appearance is made and no documentation, other than evidence which was available at the court-martial, is submitted, the Board will, in all probability, assume that the record at the court-martial was correct. The Board's decision will then be made based on that record alone. In such a case the discharge will not be upgraded unless it is obviously improper or inequitable.

The ABCMR is not bound by stare decisis; i.e. they are not required to follow older Board cases. However, they do have a duty to be consistent. Therefore, they, at a minimum, must distinguish other cases mentioned by the applicant. A discharge must be equitable, so there is a duty to treat like cases alike. While circumstances can vary, there are certain parameters which apply to all cases and by which these various cases can be evaluated.

Additionally, under the settlement in Urban Law Institute of Antioch College, Inc. v. Secretary of Defense (No. 76-0530 D.D.C. January 31, 1977), the Board must explain why certain past board cases are not being followed. For this reason it is essential to mention previous Board cases similar in fact to the applicant's case in the applicant's arguments.

35. Addlestone, supra, note 4 at § 9.2.4.5.

36. Cf. Addlestone, supra note 4 at § 9.2.9. note 64.

Section D: Research

The Board keeps its decisions on file at the Armed Forces Discharge Review/Correction Board Reading Room, Pentagon Concourse, Washington, D.C. 20310. There have been thousands of ABCMR cases over the years. Most of these are not on point, however, because they involve efforts to challenge administrative rather than punitive discharges. The cases are indexed quarterly according to issue.³⁷ Research by using the indices can be time consuming. A more efficient alternative is to consult Addlestone, et al. Military Discharge Upgrading [hereinafter Addlestone] published by the Veteran's Education Project, on the particular issue for relevant case citations. See note 4 supra. That manual can also provide a useful method of gauging the chances of success with a particular issue or fact pattern. The indices can also be utilized for the same purposes. Copies of cases are free at the reading room. If the applicant or his counsel are outside the Washington, D.C. area, copies of cases can be ordered by case number. There is a limit of 25 free copies per month per person.

Section E: Composition of the Board

The Board consists of senior civilian officers or employees of the Dept. of the Army, as may be appointed by the Secretary of the Army. Approximately 30 eligible individuals are periodically designated to serve as Board members, and from this group, a panel of members are approved by the Secretary for an individual case. Since membership on the board is considered an "extra duty," each panel normally convenes for only one entire day per week. Three members present constitute a quorum of the Board, of whom one is designated as chairman by the Secretary.³⁸

Section F: Hearings

Although a hearing is rarely authorized, it should normally be requested since a hearing greatly enhances an applicant's chances for success. When a hearing is authorized, the applicant may appear "before the Board either in person or by counsel of his own selection or in per-

37. There are copies of the indices in each state. To find the location in a particular state, contact the American Red Cross or other Veterans service organization.

38. Army Reg. 15-185, supra n.25 at para. 3.

son with counsel."³⁹ The applicant may present witnesses in his behalf at the hearing.⁴⁰ The proceedings of the Board and all the testimony is recorded verbatim.⁴¹

An applicant is permitted to withdraw his application at any time prior to the hearing date without prejudice. Failure to appear at a personal hearing will constitute a waiver of the right to a personal hearing. In such a case, the Board will decide the case on the record, unless the applicant had good cause for not appearing and for not notifying the Board of his absence in advance. Good cause is any reason which is beyond the control of the applicant. Therefore, if the applicant knows he will be unable to appear, he must notify the Board and request rescheduling. If during the hearing the applicant discovers he needs more time to gather evidence, a continuance may be granted.

Section G: Action on Application

Only members of the Board and its staff are present during deliberations.⁴² After the hearing, the board will make written findings and recommendations with a majority vote of the members present constituting the action of the Board.⁴³ If there is a disagreement among the members, a minority report may be submitted.⁴⁴ Upon completion of the proceedings, a complete record is prepared, containing all the documents, briefs, evidence and arguments filed in the case, along with the findings and recommendations.⁴⁵ The record is then sent to the Secretary of the Army or his designee for his determination.⁴⁶ After action by the Secretary

39. Id. at para. 11.

40. Id. at para. 14.

41. Id. at para. 17.

42. Id. at para. 19.

43. Id. at para. 19(3).

44. Id. at para. 19b.

45. Id. at para. 19c.

46. Id. at para. 20.

of the Army, or his designee the applicant or his counsel is entitled, upon request, to inspect the record and receive a copy of the boards findings, conclusions and recommendations.⁴⁷ After final adjudication, further consideration will be granted upon presentation by the applicant of newly discovered relevant the evidence not previously considered by the Board and then only upon recommendation of the Board and approval by the Secretary of the Army."⁴⁸

Section H: Standards

[Note: This section is written to provide an insight into issues considered by the board in general. It is not intended as a complete list of relevant factors, nor as a prediction of what action the board will take in a particular case].

The ABCMR reviews applications on the basis of two basic grounds: questions of law and of equity. However, most applications submitted are based upon considerations of equity.

The ABCMR upgrade rate for punitive discharges is unavailable. The ABCMR considers each application on a case by case basis, so it is difficult to evaluate the decision-making process. However, it is possible to offer some general observations:

(A) The board is sensitive to sentences which were predicated upon disciplinary standards or social mores which have been altered over time. (For example, a soldier who received a punitive discharge for the simple possession of marijuana during the Vietnam era).

(B) An applicant would be ill advised to simply submit the DD Form 149, if his application is predicated upon considerations of equity. Letters of recommendation and evidence of good citizenship can be as important as "good E&M" is at a court-martial. "ABCMR looks to the applicant's civilian background, innate abilities, prior service, in-service accomplishments, and post service experience, weighing any positive factors gleaned from these time periods against the nature of the

47. Id. at para. 2lf.

48. Id. at para. 22.

offenses which led to the bad-conduct discharge or dishonorable discharge. Vague considerations of equity pervade ABCMR opinions, and the board's sensitivity to the stigma of a bad-conduct discharge finds recurrent expression in phrases such as the 'length of time suffered.' No single factor will likely be determinative; behavior patterns which permit a conclusion that the applicant is a "good guy" are paramount."⁴⁹

(C) The nature of the offense itself may be determinative. "A board frequently upgrades in part because of a finding that the offense was purely military in nature. Military offenses, however, are not always viewed by the boards as less serious than civilian-type crimes. Some military offenses (e.g. those thought by the boards to threaten the very fabric of military society) are particularly difficult to mitigate. However, many offenses, when viewed in the context of a veteran's whole life, can appear relatively minor, in light of the severity of the punishment of a bad-conduct discharge or dishonorable discharge already endured for many years."⁵⁰

(D) The overall character of service is considered. Lack of prior offenses, good performance reports, previous service, or participation isolated, foreign, or difficult duty, may help.⁵¹

(E) Good conduct while in confinement increases the chance of success, as does serving a sentence disproportionate to the crime. The Board does not favor the accumulating of minor offenses.⁵²

49. Addlestone, supra, § 20.3.

50. Id. § 20.3.3.1.

51. Id. at § 20.3.3.3.

52. Id. at § 20.3.3.3. See also text in Part I infra.

(F) Mitigating factors which the board has relied on in past decisions include an applicant's youth, social background, aptitude, family and personal problems, alcohol or drug induced behavior, and outside pressures.⁵³

(G) It may be beneficial for the applicant to explain why a particular offense took place. For instance, soldiers with eight years experience who suddenly went AWOL for ten months because of a sudden death or serious illness in the family should bring those circumstances to the Board's attention.

(H) Finally, post-trial conduct, such as an applicant's family life, employment records, education records, evidence of rehabilitation from drug or alcohol abuse and civic contributions, coupled with the actual need for VA benefits, may lead the board to conclude that the applicant has "suffered enough."⁵⁴

Section I: Aggravating Factors⁵⁵

The applicant should bear in mind that some outside factors will make his case appear worse, and lessen his chances for success. Such factors include the servicemembers's desire to terminate his term of service prematurely, other offenses on his record, the servicemember's failure to use the chain of command to solve his problems, the servicemember's failure to attempt to rehabilitate himself, and an above average capacity, (maturity, higher education level, high aptitude test scores, and demonstrated ability to perform).

Section J: Effect of Denial

The applicant can apply to the Board for reconsideration.

53. Id. at § 20.3.3.3.

54. Id.

55. See Addleston, supra note 4 at § 20.3 for a more detailed examination of mitigating and aggravating factors.

Appendix 1-A

Forms for Discharge Upgrading

- | | |
|-----------------------------------|---|
| (a) Standard Form 180 | Request Pertaining to Military Records |
| (b) Dept. of Defense Form 293 | Application for Review of Discharge or Dismissal |
| (c) Dept. of Defense Form 149 | Application for Correction of Military or Naval Record |
| (d) Veteran's Admin. Form 07-3288 | Request For and Consent to Release of Information from Claimant's Records |
| (e) Veteran's Admin. Form 2-22a | Appointment of Attorney or Agent as Claimant's Representative |

REQUEST PERTAINING TO MILITARY RECORDS

Please read instructions on the reverse. If more space is needed, use plain paper.

DATE OF REQUEST

PRIVACY ACT OF 1974 COMPLIANCE INFORMATION. The following information is provided in accordance with 5 U.S.C. 552a(e)(3) and applies to this form. Authority for collection of the information is 44 U.S.C. 2907, 3101, and 3103, and E.O. 9397 of November 22, 1943. Disclosure of the information is voluntary. The principal purpose of the information is to assist the facility servicing the records in locating and verifying the correctness of the requested records or information to answer your inquiry. Routine uses of the information as established and published in accordance with 5 U.S.C. 552a(e)(4)(D)

include the transfer of relevant information to appropriate Federal, State, local, or foreign agencies for use in civil, criminal, or regulatory investigations or prosecution. In addition, this form will be filed with the appropriate military records and may be transferred along with the record to another agency in accordance with the routine uses established by the agency which maintains the record. If the requested information is not provided, it may not be possible to service your inquiry.

SECTION I—INFORMATION NEEDED TO LOCATE RECORDS (Furnish as much as possible)

1. NAME USED DURING SERVICE (Last, first, and middle)	2. SOCIAL SECURITY NO.	3. DATE OF BIRTH	4. PLACE OF BIRTH
5. ACTIVE SERVICE, PAST AND PRESENT (For an effective records search, it is important that ALL service be shown below)			
BRANCH OF SERVICE <i>(Also, show last organization, if known)</i>	DATES OF ACTIVE SERVICE		Check one
	DATE ENTERED	DATE RELEASED	OFFICER <input type="checkbox"/> ENLISTED <input type="checkbox"/>
6. RESERVE SERVICE, PAST OR PRESENT <i>If "none," check here</i> <input type="checkbox"/>		7. NATIONAL GUARD MEMBERSHIP <i>(Check one)</i> <input type="checkbox"/> a. ARMY <input type="checkbox"/> b. AIR FORCE <input type="checkbox"/> c. NONE	
a. BRANCH OF SERVICE	b. DATES OF MEMBERSHIP FROM _____ TO _____	c. Check one OFFICER <input type="checkbox"/> ENLISTED <input type="checkbox"/>	d. SERVICE NUMBER DURING THIS PERIOD
d. STATE	e. ORGANIZATION	f. DATES OF MEMBERSHIP FROM _____ TO _____	g. Check one OFFICER <input type="checkbox"/> ENLISTED <input type="checkbox"/>
8. IS SERVICE PERSON DECEASED <input type="checkbox"/> YES <input type="checkbox"/> NO <i>If "yes," enter date of death:</i>		9. IS (WAS) INDIVIDUAL A MILITARY RETIREE OR FLEET RESERVIST <input type="checkbox"/> YES <input type="checkbox"/> NO	

SECTION II—REQUEST

1. EXPLAIN WHAT INFORMATION OR DOCUMENTS YOU NEED, OR, CHECK ITEM 2; OR, COMPLETE ITEM 3	2. IF YOU ONLY NEED A STATEMENT OF SERVICE <input type="checkbox"/> check here									
3. LOST SEPARATION DOCUMENT REPLACEMENT REQUEST <i>(Complete a or b, and c)</i>	<table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td><input type="checkbox"/> a. REPORT OF SEPARATION (DD Form 214 or equivalent)</td> <td>YEAR ISSUED</td> <td rowspan="2"><i>This contains information normally needed to determine eligibility for benefits. It may be furnished only to the veteran, the surviving next of kin, or to a representative with veteran's signed release (Item 5 of this form).</i></td> </tr> <tr> <td><input type="checkbox"/> b. DISCHARGE CERTIFICATE</td> <td>YEAR ISSUED</td> <td><i>This shows only the date and character at discharge. It is of little value in determining eligibility for benefits. It may be issued only to veterans discharged honorably or under honorable condition; or, if deceased, to the surviving spouse.</i></td> </tr> <tr> <td colspan="3">c. EXPLAIN HOW SEPARATION DOCUMENT WAS LOST</td> </tr> </table>	<input type="checkbox"/> a. REPORT OF SEPARATION (DD Form 214 or equivalent)	YEAR ISSUED	<i>This contains information normally needed to determine eligibility for benefits. It may be furnished only to the veteran, the surviving next of kin, or to a representative with veteran's signed release (Item 5 of this form).</i>	<input type="checkbox"/> b. DISCHARGE CERTIFICATE	YEAR ISSUED	<i>This shows only the date and character at discharge. It is of little value in determining eligibility for benefits. It may be issued only to veterans discharged honorably or under honorable condition; or, if deceased, to the surviving spouse.</i>	c. EXPLAIN HOW SEPARATION DOCUMENT WAS LOST		
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<input type="checkbox"/> b. DISCHARGE CERTIFICATE	YEAR ISSUED		<i>This shows only the date and character at discharge. It is of little value in determining eligibility for benefits. It may be issued only to veterans discharged honorably or under honorable condition; or, if deceased, to the surviving spouse.</i>							
c. EXPLAIN HOW SEPARATION DOCUMENT WAS LOST										
4. EXPLAIN PURPOSE FOR WHICH INFORMATION OR DOCUMENTS ARE NEEDED	6. REQUESTER a. IDENTIFICATION <i>(check appropriate box)</i> <input type="checkbox"/> Some person identified in Section I <input type="checkbox"/> Surviving spouse <input type="checkbox"/> Next of kin <i>(relationship)</i> _____ <input type="checkbox"/> Other <i>(specify)</i> _____ b. SIGNATURE <i>(see instructions 3 and 4 on reverse side)</i>									
5. RELEASE AUTHORIZATION, IF REQUIRED <i>(Read instruction 3 on reverse side)</i> I hereby authorize release of the requested information/documents to the person indicated at right (item 7). VETERAN SIGN HERE <input type="checkbox"/> <i>(If signed by other than veteran, show relationship to veteran.)</i>	7. Please type or print clearly — COMPLETE RETURN ADDRESS Name, number and street, city, State and ZIP code _____ _____ _____ TELEPHONE NO. <i>(include area code)</i> <input type="checkbox"/>									

INSTRUCTIONS

1. Information needed to locate records. Certain identifying information is necessary to determine the location of an individual's record of military service. Please give careful consideration to and answer each item on this form. If you do not have and cannot obtain the information for an item, show "NA," meaning the information is "not available." Include as much of the requested information as you can. This will help us to give you the best possible service.

2. Charges for service. A nominal fee is charged for certain types of service. In most instances service fees cannot be determined in advance. If your request involves a service fee you will be notified as soon as that determination is made.

3. Restrictions on release of information. Information from records of military personnel is released subject to restrictions imposed by the military departments consistent with the provisions of the Freedom of Information Act of 1967 (as amended 1974) and the Privacy Act of 1974. A service person has access to almost any information contained in his own record. The next of kin (see item 4 of instructions) if the veteran is deceased and Federal officers for official purposes are authorized to receive information from a military service or medical record only as specified in the above cited Acts. Other requesters must have the release authorization, in item 5 of the form, signed by the

veteran or, if deceased, by the next of kin. Employers and others needing proof of military services are expected to accept the information shown on documents issued by the Armed Forces at the time a service person is separated.

4. Precedence of next of kin. The order of precedence of the next of kin is: unmarried widow or widower, eldest son or daughter, father or mother, eldest brother or sister.

5. Location of military personnel records. The various categories of military personnel records are described in the chart below. For each category there is a code number which indicates the address at the bottom of the page to which this request should be sent. For each military service there is a note explaining approximately how long the records are held by the military service before they are transferred to the National Personnel Records Center, St. Louis. Please read these notes carefully and make sure you send your inquiry to the right address. (If the person has two or more periods of service within the same branch, send your request to the office having the record for the last period of service.)

6. Definitions for abbreviations used below:

NPRC—National Personnel Records Center PERS—Personnel Records
 TDRL—Temporary Disability Retirement List MED—Medical Records

SERVICE	NOTE	CATEGORY OF RECORDS	WHERE TO WRITE ADDRESS CODE	▼
AIR FORCE (USAF)	<i>Air Force records are transferred to NPRC from Code 1, 90 days after separation and from Code 2, 30 days after separation.</i>	Active members (includes National Guard on active duty in the Air Force), TDRL, and general officers retired with pay.		1
		Reserve, retired reservist in nonpay status, current National Guard officers not on active duty in Air Force, and National Guard released from active duty in Air Force.		2
		Current National Guard enlisted not on active duty in Air Force.		13
		Discharged, deceased, and retired with pay (except general officers retired with pay).		14
COAST GUARD (USCG)	<i>Coast Guard officer and enlisted records are transferred to NPRC 3-6 months after separation</i>	Active, reserve, and TDRL members.		3
		Discharged, deceased, and retired members (see next item).		14
		Officers separated before 1/1/29 and enlisted personnel separated before 1/1/15.		6
MARINE CORPS (USMC)	<i>Marine Corps records are transferred to NPRC 4 months after separation</i>	Active and TDRL members, reserve officers, and Class II enlisted reserve.		4
		Class III reservists and Fleet Marine Corps Reserve members.		5
		Discharged, deceased, and retired members (see next item).		14
		Officers and enlisted personnel separated before 1/1/1896.		6
ARMY (USA)	<i>Army records are transferred to NPRC as soon as processed (about 30 days after separation)</i>	Reserve, living retired members, retired general officers, and active duty records of current National Guard members who performed service in the U.S. Army before 7/1/72.*		7
		Active officers (including National Guard on active duty in the U.S. Army).		8
		Active enlisted (including National Guard on active duty in the U.S. Army) and enlisted TDRL.		9
		Current National Guard officers not on active duty in the U.S. Army.		12
		Current National Guard enlisted not on active duty in the U.S. Army.		13
		Discharged and deceased members (see next item).		14
		Officers separated before 7/1/17 and enlisted separated before 11/1/12.		6
		Officers and warrant officers TDRL.		8
NAVY (USN)	<i>Navy records are transferred to NPRC 6 months after retirement or complete separation.</i>	Active members (including reservists on active duty)—PERS and MED		10
		Discharged, deceased, retired (with and without pay) less than six months, TDRL, drilling and nondrilling reservists	PERS only	10
			MED only	11
		Discharged, deceased, retired (with and without pay) more than six months (see next item)—PERS & MED		14
Officers separated before 1/1/03 and enlisted separated before 1/1/1886—PERS and MED		6		

* Code 12 applies to active duty records of current National Guard officers who performed service in the U.S. Army after 6/30/72.

Code 13 applies to active duty records of current National Guard enlisted members who performed service in the U.S. Army after 6/30/72.

ADDRESS LIST OF CUSTODIANS (BY CODE NUMBERS SHOWN ABOVE)—Where to write / send this form for each category of records

1	USAF Military Personnel Center Military Personnel Records Division Randolph AFB, TX 78148	5	Marine Corps Reserve Forces Administration Center 1500 E. Bannister Road Kansas City, MO 64131	8	USA MILPERCEN Attn: DAPC-PSR-R 200 Stovall Street Alexandria, VA 22332	12	Army National Guard Personnel Center Columbia Pike Office Building 5600 Columbia Pike Boulevard Falls Church, VA 22041
	2		Air Reserve Personnel Center 7300 East 1st Avenue Denver, CO 80280		6		Military Archives Division National Archives & Records Service General Services Administration Washington, DC 20408
3	Commandant U.S. Coast Guard Washington, DC 20590	7	Commander U.S. Army Reserve Components Personnel & Administration Center 9700 Page Boulevard St. Louis, MO 63132	10		Chief of Naval Personnel Department of the Navy Washington, DC 20370	14
4	Commandant of the Marine Corps Headquarters, U.S. Marine Corps Washington, DC 20380		11		Naval Reserve Personnel Center New Orleans, LA 70146		

**APPLICATION FOR REVIEW OF DISCHARGE OR DISMISSAL
FROM THE ARMED FORCES OF THE UNITED STATES**

OMB
APPROVED 22-R-0014

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: 10 U.S.C. 1553, Executive Order 9397, 22 Nov 43 (SSN)
PRINCIPAL PURPOSES: To apply for upgrading of type of discharge issued.
ROUTINE USES: Placed in applicant's file. Used in applicant's case in determining the relief sought. To compare facts presented with evidence in the record.
DISCLOSURE: Voluntary. If information is not furnished, applicant may not secure benefits from the Board.

SEE INSTRUCTIONS ON REVERSE BEFORE COMPLETING THIS FORM. TYPE OR PRINT.

BRANCH OF SERVICE

ARMY NAVY MARINE CORPS COAST GUARD AIR FORCE

1. LAST NAME · FIRST NAME · MIDDLE INITIAL		2. SERVICE NO./SSN	3. SEPARATION RATE OR GRADE
4. SEPARATION UNIT AND LOCATION		5. NATURE OF DISMISSAL OR TYPE OF DISCHARGE RECEIVED	6. SEPARATION DATE

7. I REQUEST THE FOLLOWING CORRECTIVE ACTION BE TAKEN (See instructions)

UPGRADE DISCHARGE TO: HONORABLE GENERAL CHANGE REENLISTMENT CODE (Air Force Only)
 CHANGE DISCHARGE REASON (Explain) _____ OTHER (Explain) _____

8. REASON FOR REVIEW OF DISCHARGE (State in your own words the reasons you feel your discharge should be changed -- use additional sheets if necessary) (See instructions)

9. SUPPORTING DOCUMENTS (See instructions)

10. PERSONAL APPEARANCE: I DESIRE TO APPEAR BEFORE THE BOARD (No expense to the GOVERNMENT) (See instructions)

AT WASHINGTON, D.C. HEARING EXAMINER (Army Only) CLOSEST TO: _____ (City and State)
 BEFORE THE TRAVELING/REGIONAL BOARD CLOSEST TO _____ (City and State)
 I DO NOT DESIRE TO APPEAR BEFORE THE BOARD AND HAVE LEFT THE ABOVE BLANK. I DESIRE TO HAVE MY DISCHARGE REVIEWED BASED ON MY MILITARY RECORDS AND WHATEVER DOCUMENTATION I HAVE SUBMITTED.

11. REPRESENTATIVE:

I DESIRE TO BE REPRESENTED BY, AND AUTHORIZE RELEASE OF MY RECORDS TO: (No expense to the GOVERNMENT) (See instructions)
 NAME: _____ ADDRESS: (Include ZIP Code) _____
 I DO NOT DESIRE TO BE REPRESENTED AND HAVE LEFT THE ABOVE BLANK.

I make the foregoing statements as a part of my application with full knowledge of the penalties involved for willfully making a false statement. (U.S. Code, Title 18, Section 1001, formerly Section 80, provides a penalty as follows: A maximum fine of \$10,000 or maximum imprisonment of 5 years, or both.)

STREET OR RFD	CITY, STATE AND ZIP CODE
<i>(IF YOU MAKE A CHANGE IN RESIDENCE, NOTIFY THE APPROPRIATE BOARD IMMEDIATELY)</i>	

DATE	SIGNATURE OF APPLICANT
------	------------------------

NOTE: IF VETERAN IS DECEASED OR INCOMPETENT, the application may be signed by a person other than the one whose name appears in block 1 above; indicate status in box below. Legal proof of death or incompetency and satisfactory evidence of the relationship between the discharged person and the petitioner must accompany application.)

NEXT-OF-KIN LEGAL REPRESENTATIVE SURVIVING SPOUSE

UPON COMPLETION, MAIL THIS APPLICATION AS FOLLOWS:

ARMY	NAVY & MARINE CORPS	COAST GUARD	AIR FORCE
CO, USARCPAC 9700 Page Blvd St. Louis, MO 63132	Navy Discharge Review Board 801 No. Randolph St. Arlington, VA 22203	Commandant (CED) U.S. Coast Guard Headquarters Washington, DC 20591	National Personnel Records Center, GSA (Military Personnel Records) 9700 Page Blvd St. Louis, MO 63132

INSTRUCTIONS

Copy of Military Record. Should you desire to have copies of your records, you must submit a General Services Administration Standard Form 180 (GS SF 180) before you submit this form. Once this DD Form 293 is submitted, your records will be obtained by the Board. Official records and copies of records obtained by the Board will be available to applicants only at the hearing locations.

Item 1 thru 6. - Self Explanatory.

Item 7. Indicate the corrective action you are requesting. You must check at least one block and can check more blocks if desired. Due to certain limitations in the Board's authority, the Board cannot: (a) review discharges issued as a result of General Court-Martial (Use DD Form 149); (b) review discharges issued more than fifteen years prior to the application (DD Form 293) submission date; (c) review a Release from Active Duty until a final discharge is issued; (d) change a reenlistment code (except Air Force); (e) change the reason for a discharge from or to physical disability; or (f) determine eligibility for veteran's benefits.

Item 8. State here your reasons why you feel your discharge should be changed. Briefly summarize each of your contention (reasons) and/or issues of fact, law, or discretion that you want the Board to address and resolve. Additions or modifications may be made at any time up to the date of review of your case by the Board.

Item 9. Evidence not in your official records should be submitted to the Board before hearing date. Review Boards do not locate witnesses nor do they secure evidence for applicants. Legal briefs or counsel submissions should also be submitted in advance of hearing date. Documents that may be helpful are statements, affidavits, and depositions such as: character references; police clearances; educational achievement; exemplary post-service conduct; medical reports; employment record; verification of alcoholism or drug abuse; award of Department of Labor Exemplary Rehabilitation Certificate; explanation of disciplinary problem or discharge problem; brief of counsel arguing error or injustice. Witnesses may appear in person at no cost to the Government.

Item 10. If you state on your application that you will appear before the Board in person and fail to do so without previous satisfactory arrangements with the Board, such failure will be considered as a waiver of appearance and your case will be reviewed on the evidence contained in your military record.

AIR FORCE, NAVY, AND MARINE CORPS: The Discharge Review Boards meet daily in Washington, D.C., for personal appearance hearings and documentary reviews. If you request a review based on records only or a hearing in Washington, DC, your case will be scheduled there at the earliest date possible. Personal appearance hearings are also scheduled before the Traveling Boards in various cities throughout the 48 contiguous

states as the population of requests on hand requires. If you ask for a hearing before the Traveling Board, it will be scheduled after your case is prepared and when the Traveling Board is next in your area. You will ordinarily not have to travel more than 300 miles for your hearing.

ARMY: Panels of the Review Board meet daily in Washington, DC and other locations and on an irregularly scheduled basis at major cities and other smaller metropolitan areas of the U.S. at least once each year. You may appear before the Board in Washington, DC, or in front of a Traveling Panel elsewhere in the U.S. or you may also appear in front of a Hearing Examiner who will video tape testimony for presentation to the Board in Washington, DC. For Hearing Examiners you must be accompanied by counsel or representative. Normally ex-Army members will not have to travel in excess of 200 miles if you are heard by a Traveling Panel or Hearing Examiner. Generally speaking, scheduled cases are heard as follows: (1) Personal Appearance, Washington, DC, within six months; (2) Personal Appearance by Traveling Panel or Hearing Examiner, within twelve months; (3) Representation by counsel or other person/organization only at Washington, DC, within three months; and (4) Without personal appearance or representation, review based on military records and documents submitted by applicant, within 30 days.

Block 11. The services do not provide counsel, representation, or evidence for applicant, nor do they defray cost of such under any circumstances. However, certain agencies recognized by the VA, some state, county, and city organizations, private organizations, and some schools of law do provide assistance in presenting your appeal. If you wish to be assisted, you are responsible for obtaining representation and may:

- a. Obtain a lawyer at your own expense.
- b. Contact an appropriate state, county, city, private or law school organization.
- c. Obtain representation from any other agency or individual who is willing to assist you.
- d. Select one of the following organizations which regularly furnish representation at no charge to you. Representatives may or may not be lawyers.
 - (1) American Red Cross
 - (2) American Legion
 - (3) Disabled American Veterans
 - (4) Jewish War Veterans of the U.S.A.
 - (5) Veterans of Foreign Wars

An appearance by your representative will not be scheduled in your absence unless your representative requests it. In this event, if a. or c. apply, power of attorney is mandatory.

**APPLICATION FOR CORRECTION OF MILITARY OR NAVAL RECORD
UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SEC. 1552**
(See instructions on reverse side BEFORE completing application.)

*Form Approved - Office of
Mgmt & Budget No. 22-RD009*

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: Title 10, U.S. Code 1552, Executive Order 9397, 22 Nov 43 (SSN)
PRINCIPAL PURPOSE: To apply for correction of a military or naval record.
ROUTINE USES: To docket a case. Reviewed by board members to determine relief sought. To determine qualification to apply to board. To compare facts present with evidence in the record.
DISCLOSURE: Voluntary. If information is not furnished, applicant may not secure benefits from the Board.

BRANCH OF SERVICE ARMY NAVY AIR FORCE MARINE CORPS COAST GUARD

1. NAME (Last, first, middle initial) (Please print)		2. PRESENT RATE, GRADE	3. SERVICE NUMBER	4. SOCIAL SECURITY NUMBER
5. TYPE OF DISCHARGE (If by court-martial, state type of court.)		6. PRESENT STATUS, IF ANY, WITH RESPECT TO THE ARMED SERVICES (Active duty, retired, Reserve, etc.)		7. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY
8. ORGANIZATION AT TIME OF ALLEGED ERROR IN RECORD			9. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. (No expense to the Government) <input type="checkbox"/> YES <input type="checkbox"/> NO	

10. NAME AND ADDRESS OF COUNSEL (If any)

11. I REQUEST THE FOLLOWING CORRECTION OF ERROR OR INJUSTICE:

12. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST IN THE FOLLOWING PARTICULARS.

13. IN SUPPORT OF THIS APPLICATION I SUBMIT AS EVIDENCE THE FOLLOWING: (If Veterans Administration records are pertinent to your case, give Regional Office location and Claim Number.)

14. a. THE DATE OF THE DISCOVERY OF THE ALLEGED ERROR OR INJUSTICE WAS _____ b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THIS APPLICATION.

15. APPLICANT MUST SIGN IN THE SPACE PROVIDED. IF THE RECORD IN QUESTION IS THAT OF A PERSON WHO IS DECEASED OR INCOMPETENT, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY APPLICATION. IF APPLICATION IS SIGNED BY SPOUSE, WIDOW OR WIDOWER, NEXT OF KIN OR LEGAL REPRESENTATIVE, INDICATE RELATIONSHIP OR STATUS IN APPROPRIATE BOX. SPOUSE WIDOW WIDOWER NEXT OF KIN LEGAL REP. OTHER (Specify) _____

16. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILFULLY MAKING A FALSE STATEMENT OR CLAIM. (U.S. Code, Title 18, Sec. 247, 1001, provides a penalty of not more than \$10,000 fine or not more than 5 years imprisonment or both.)

17. COMPLETE ADDRESS, INCLUDING ZIP CODE (Applicant should forward notification of all changes of address)

DOCUMENT NUMBER
(DO NOT WRITE IN THIS SPACE)

18. SIGNATURE (Applicant must sign)

INSTRUCTIONS

1. For detailed information see:
 - Air Force Regulation 31-3
 - Army Regulations 15-185
 - Coast Guard, Code of Federal Regulations
Title 33, Part 52
 - Navv, NAVEXOS P-473, as revised
2. Submit original only of this form.
3. Complete all items. If the question is not applicable, mark—"None".
4. If space is insufficient, use "Remarks" or attach additional sheet if necessary.
5. Various veterans and service organizations furnish counsel without charge. These organizations prefer that arrangements for representation be made through local posts or chapters.
6. List all attachments or inclosures.
7. ITEMS 9 and 10. Personal appearance of you and your witnesses or representation by counsel is not required to insure full and impartial consideration of applications. Appearances and representations are permitted, at no expense to the Government when a hearing is authorized.
8. ITEM 11. State the specific correction of record desired.
9. ITEM 12. In order to justify correction of a military or naval record, it is necessary for you to show to the satisfaction of the Board, or it must otherwise satisfactorily appear, that the alleged entry or omission in the record was in error or unjust. Evidence may include affidavits or signed testimony of witnesses, executed under oath, and a brief of arguments supporting application. All evidence not already included in your record must be submitted by you. The responsibility for securing new evidence rests with you.
10. ITEM 14. 10 U.S.C. 1552b provides that no correction may be made unless request is made within three years after the discovery of the error or injustice, but that the Board may excuse failure to file within three years after discovery if it finds it to be in the interest of justice.

MAIL COMPLETED APPLICATIONS TO APPROPRIATE ADDRESS BELOW

ARMY	NAVY AND MARINE CORPS	COAST GUARD	AIR FORCE
<i>(For Active Duty Personnel)</i> Army Board for Correction of Military Records Department of the Army Washington, D.C. 20310 <i>(For Other than Active Duty Personnel)</i> CO, USARCPAC 9700 Page Blvd. St. Louis, MO. 63132	Board for Correction of Naval Records Department of the Navy Washington, D.C. 20370	U.S. Coast Guard ATTN: Senior Member Board for Correction of Coast Guard Records Washington, D.C. 20591	USAFMPC/DPMD0A1 Randolph AFB, Tex. 78148

REMARKS *(Applicant has exhausted all administrative channels in seeking this correction and has been counseled by a representative of his/her servicing military personnel office. (Applicable only to active duty and reserve personnel.))*

REQUEST FOR AND CONSENT TO RELEASE OF INFORMATION FROM CLAIMANT'S RECORDS

NOTE: The execution of this form does not authorize the release of information other than that specifically described below. The information requested on this form is solicited under Title 38, United States Code, and will authorize release of the information you specify. The information may also be disclosed outside the VA as permitted by law or as stated in the "Notices of Systems of VA Records" published in the Federal Register in accordance with the Privacy Act of 1974. Disclosure is voluntary. However, if the information is not furnished, we may not be able to comply with your request.

TO	Veterans Administration	NAME OF VETERAN (Type or print)	
		VA FILE NO. (Include prefix)	SOCIAL SECURITY NO.

NAME AND ADDRESS OF ORGANIZATION, AGENCY, OR INDIVIDUAL TO WHOM INFORMATION IS TO BE RELEASED

VETERAN'S REQUEST

I hereby request and authorize the Veterans Administration to release the following information, from the records identified above to the organization, agency, or individual named hereon:

INFORMATION REQUESTED (Number each item requested and give the dates or approximate dates—period from and to—covered by each.)

PURPOSES FOR WHICH THE INFORMATION IS TO BE USED

NOTE: Additional items of information desired may be listed on the reverse hereof.

DATE	SIGNATURE AND ADDRESS OF CLAIMANT, OR FIDUCIARY, IF CLAIMANT IS INCOMPETENT
------	---

VETERANS ADMINISTRATION

1. VA FILE NO(S). (Include prefix)

**APPOINTMENT OF ATTORNEY OR AGENT
AS CLAIMANT'S REPRESENTATIVE**

PRIVACY ACT NOTICE: The information requested on this form is solicited under Sections 3403 and 3404, Title 38, United States Code. It will provide necessary written authority for the designated individual to act as the claimant's attorney or agent for the preparation, presentation, and prosecution of a claim for VA benefits. Submission is voluntary but substitution of a power of attorney in different form would require individual legal determination as to sufficiency with resultant delay. The information may be disclosed outside the VA as permitted by law, or as stated in the "Notices of Systems of VA Records" which have been published in the Federal Register in accordance with the Privacy Act of 1974.

2. NAME OF CLAIMANT (Veteran, guardian, beneficiary, dependent, or next of kin)

3. ADDRESS OF CLAIMANT (No. and street or rural route, city or P.O., State, and ZIP Code)

4. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN

5. SERVICE NO(S).

6. BRANCH OF SERVICE

ARMY NAVY AIR FORCE MARINE CORPS COAST GUARD OTHER (Specify)

7A. HAS CLAIMANT EVER FILED A CLAIM FOR DISABILITY INSURANCE BENEFITS?

YES NO (If "Yes," answer questions 7B, 7C and 7D.)

7B. CLAIM FOR DISABILITY INSURANCE BENEFITS MADE UNDER

NSLI USGLI BOTH USGLI AND NSLI

7C. POLICY NO(S). (Include letter prefix)

7D. GIVE LOCATION OF VA OFFICE WHERE CLAIM FOR DISABILITY INSURANCE BENEFITS HAS BEEN FILED

8. NAME OF PERSON DESIGNATED AS (Check appropriate box)

ATTORNEY AGENT

9. ADDRESS OF PERSON DESIGNATED AS ATTORNEY OR AGENT (No. and street or rural route, city or P.O., State, and ZIP Code)

I, the above-named claimant, under the conditions of Section 3404, Title 38, U.S.C. hereby appoint the above-named person, shown in Item 8, as my attorney to present and prosecute my claim for any and all benefits from the Veterans Administration based on the service of the above-named veteran, hereby ratifying and confirming all that my said attorney may or shall lawfully do or cause to be done by virtue hereof.

It is understood and agreed that no fee or compensation shall be charged or received for services rendered under this power of attorney unless approved and paid by the Veterans Administration pursuant to Section 3404, Title 38, U.S.C. A fee of ten dollars (\$10) in an original claim for monetary benefits under the statutes administered by the Veterans Administration and a fee of two dollars (\$2) in a claim for increase for such benefits will be payable to the recognized agent or attorney of record in an allowed claim. Exceptions: No fee may be charged or collected by a person recognized only for a particular claim, nor by anyone in an accrued or burial claim. Executed and accepted subject to the foregoing conditions.

10. DATE OF SIGNATURE OF PERSON DESIGNATED AS ATTORNEY OR AGENT

11. SIGNATURE OF PERSON DESIGNATED AS ATTORNEY OR AGENT

12. DATE OF SIGNATURE OF CLAIMANT

13. RELATIONSHIP (If other than veteran)

14. SIGNATURE OF CLAIMANT

STATE _____

SS

COUNTY _____

I, the undersigned officer, do hereby certify that the above-named claimant, party to the foregoing power of attorney, personally appeared before me in my county and State aforesaid, and then and there executed and acknowledged the same to be (his) (her) voluntary act and deed.

15. DATE OF SIGNATURE OF OFFICER

16. SIGNATURE OF OFFICER

17. ADDRESS OF OFFICER

18. TITLE OF OFFICER

Appendix 1-B

Previous Army Discharge Review Board Traveling Panel and Hearing
Examiner Locations.

[Note: To find out if and when a panel will visit your city, contact the ADRB, Washington, D.C. 20310].

Traveling Panels*

Every Two Months

San Francisco, CA
Los Angeles, CA

At Least Once Per Year

Boston, MA
Buffalo, NY
Charlotte, NC
Cincinnati, OH
Columbus, OH
Dallas-Fort Worth, TX
Denver, CO
Hartford, CT
Houston, TX
Kansas City, MO
Miami, FL
Milwaukee, WI
Minneapolis, MN
Montgomery, AL
Nashville, TN
New Orleans, LA
Norfolk, VA
Portland, OR
St. Louis, MO
Salt Lake City, VT
Seattle, WA
Syracuse, NY
Tampa-St. Petersburg, FL

*Source: Addleston, note 4, supra at § 9.2.7.2.

Hearing Examiner**

At Least Once Per Year

Albany, NY
Alberquerque, NM
Augusta, ME
Birmingham, AL
Boise, ID
Charlotte, NC
Charlottesville, VA
Columbia, SC
Des Moines, IO
El Paso, TX
Green Bay, WI
Harrisburg, PA
Honolulu, HI
Jackson, MS
Jacksonville, FL
Louisville, KY
Madison, WI
Minneapolis, MN
New Orleans, LA
Phoenix, AZ
Providence, RI
Salt Lake City, VT
San Antonio, TX
San Diego, CA
San Juan, PR
Spokane, WA

The ADRB will also consider sending a hearing examiner to any location in which a group of veterans seeking upgrading of discharges is located. Veterans should direct their request to the Board at:

ADRB
Washington, DC 20310

**Source: Addleston, note 4, supra at § 9.2.7.2. To find the exact dates an examiner will be in a particular location, contact ADRB, Washington, DC 20310.

Appendix 1-C

Legal Assistance Sources

Legal assistance for veterans seeking to upgrade their discharge or some other form of clemency is provided by many sources, including legal aid societies, law school clinics, and veterans service organizations. Many of these sources will provide legal services free of charge. Some individual attorneys in private practice also work in this area.

An applicant can contact a local bar association, a lawyer referral service, or a local Veterans Administration office for referral to service organizations which may represent clients in clemency or discharge upgrade cases. The Veteran's Affairs Department of the applicant's state or a local branch of the American Civil Liberties Union also may be able to refer the applicant to local sources of legal aid. He could also contact the service officer of a local Veterans Organization for referral to sources of aid.

The Veterans Education Project is currently preparing a directory of legal assistance sources for Veterans. This directory will contain over 300 sources and will be on sale in the Fall of 1982. If a veteran has no access to a directory he can write to:

Veterans Education Project
P.O. Box 42130
Washington, D.C. 20015

the veteran should explain his problem, state the relief sought, and give his address. The Veterans Education Project will send him the names of sources of legal assistance applicant's area. Copies of the legal assistance directory can be purchased by writing to that address.

Several large veterans organizations provide non-legal assistance to veterans seeking to upgrade their discharge. These organizations, however, do not provide assistance for applicants seeking other forms of clemency. The organizations will assist in the preparation of documents and will appear with the applicant before the Boards. There is no charge for these services. Applicants should direct their inquiries to the veterans service officer at the organization.

The following is a partial listing of some of the larger organizations:

[Note: An applicant does not have to be a member of these organizations to receive their assistance.]

<u>Organization</u>	<u>Address to Which Application Should be Made</u>
A. <u>American Legion</u>	Either through a local post, or to: American Legion 1608 K Street, N.W. Washington, D.C. 20006
B. <u>American Red Cross</u>	Contact a local chapter. If the chapter has a paid staff that is experienced in discharge upgrade matters, they will handle the case. If the chapter is too small and/or has only volunteer workers, the matter will be referred to a nearby chapter with experienced staff. The aid provided is non-legal, although legal questions will be referred to attorneys at the national headquarters.
C. <u>AMVETS</u>	Either through local organization, or to: AMVETS 4647 Forbes Boulevard Lanham, Maryland 20706
D. <u>Disabled American Veterans</u>	Disabled American Veterans have offices at most VA regional offices. Applications can also be made to: Disabled American Veterans Office of the Secretary of the Army Room 1C515, The Pentagon Washington, D.C. 20310
E. <u>Jewish War Veterans of the United States of America</u>	Apply to local offices or to the national headquarters at: Jewish War Veterans of the United States of America 1712 New Hampshire Ave., N.W. Washington, D.C. 20009

F. Veterans of Foreign Wars

Either to a local post or:

Veterans of Foreign Wars
National Veterans Service
200 Maryland Ave., N.E.
Washington, D.C. 20002

CHAPTER TWO: CLEMENCY

Clemency can be awarded to remit part or all of a sentence (The Judge Advocate General (TJAG), Secretary of the Army, Army Clemency Board); place a USDB prisoner on parole (Army Clemency Board); remit or upgrade a discharge (TJAG, Secretary of the Army, Army Clemency Board); revoke an officer dismissal (Secretary of the Army, Army Clemency Board); restore lost civil rights (Presidential Pardons); or restore veteran's benefits and other entitlements (TJAG, Secretary of the Army, Army Clemency Board; Presidential pardons).

<u>Action</u>	<u>Authority</u>	<u>When to apply</u>
remit all/part of sentence to confinement at hard labor.	TJAG	Prior to completion of appellate review
	Army Clemency Board	Automatic prior to end of confinement/parole
	Secretary of the Army	No time limit
Parole	Army Clemency Board	After 1/3 sentence ¹
Restoration to duty	Army Clemency Board	After 1/3 sentence ²
Remit/upgrade a discharge ³	TJAG	Prior to completion of appellate review
	Army Clemency Board	Automatic prior to end of confinement/parole
	Secretary of the Army	No time limit

1. See part II below, page 2-8.

2. See part II below, page 2-7.

3. Application can also be made to the Army Discharge Review Board and/or the Army Board for Correction of Military Records, once the discharge is issued. See Chapter 1, supra.

Remit/suspend dismissal ⁴	Army Clemency Board	Automatic review prior to end of confinement/ parole
	Secretary of the Army	No time limit
Restore entitlements	TJAG	Prior to completion of appellate review
	Secretary of the Army	No time limit
	Army Clemency Board	Automatic review prior to completion of sen- tence
	Presidential Pardon	Three years after com- pletion of sentence (confinement <u>plus</u> parole) ⁵
Restore civil rights	Presidential Pardon	Three years after com- pletion of sentence (confinement <u>plus</u> parole) ⁶

Part 1: THE JUDGE ADVOCATE GENERAL AND THE SECRETARY OF THE ARMY.

This part discusses the clemency powers exercised by TJAG and the Secretary of the Army, pursuant to Article 74, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 874. TJAG also has power, pursuant to Article 69, UCMJ, to review the record of a court-martial not awarding a punitive discharge and not sentencing the accused to confinement over one year. This section does not discuss this latter power.

4. See note 3, supra.

5. The waiting period is longer for more serious offenses. See part III infra, page 2-17.

6. See note 5, supra.

The powers of TJAG and the Secretary are similar, with two major exceptions:

(A) TJAG can remit, suspend or upgrade a discharge. However, he has no such power for a dismissal. TJAG cannot mitigate a death sentence or give any clemency to a general officer. Applicants seeking the upgrade of a discharge, reduction of a death sentence, or who are general officers should apply to the Secretary of the Army.⁷

(B) TJAG can grant clemency only prior to the completion of appellate review. Once the highest military court has ruled on the applicant's case or the applicant has ceased raising appeals, all clemency decisions are made by the Secretary of the Army and/or the Army Clemency Board.⁸

Section A: Powers of Authority

TJAG and the Secretary have the authority to remit part or all of the unexecuted portion of a sentence and to restore lost entitlements by upgrading, remitting, or suspending a discharge. Only the Secretary can remit or suspend a dismissal.

Section B: When to Apply

(A) The Judge Advocate General - Application must be made prior to the completion of appellate review.

(B) The Secretary of the Army - There is no time limit for applications for clemency to the Secretary. As such, the Secretary serves as a last resort for clemency in all situations except Presidential pardons.

Section C: How to Apply

Clemency appeals to both TJAG and the Secretary are handled by the Criminal Law Division, Office of the Judge Advocate General (OTJAG), which recommends clemency or no clemency to TJAG or to the Assistant Secretary of the Army (Manpower and Reserve Affairs) who has been dele-

7. Army Reg. 10-5, Organizations and Functions, Department of the Army, para. 2-36(h)(12), (1 January 1981); Army Reg. 27-1, Legal Services, Judge Advocate Legal Service, para 9(c)(5), (1 June 1976), Army Reg. 190-47 Military Police, US Army Correctional System, para. 6-19(d) (1 October 1978).

8. Id.

gated authority by the Secretary to act in clemency cases. Usually, no personal appearance by the applicant before TJAG or the Secretary is allowed.

(A) The Judge Advocate General - Clemency appeals are handled by the Criminal Law Division, OTJAG Write to:

The Judge Advocate General
Attn: DAJA-CL
Washington, DC 20310

The appellant should state in the letter that he is seeking clemency from TJAG pursuant to Article 74, UCMJ, to distinguish the appeal from one to the Secretary of the Army pursuant to the same authority as both types of appeals are handled by the Criminal Law Division.

(B) The Secretary of the Army - Clemency appeals to the Secretary are also handled by Criminal Law Division, OTJAG Write to:

Secretary of the Army
Thru: DAJA-CL
Washington, DC 20310

State in the letter that the clemency is being sought from the Secretary, pursuant to Article 74, UCMJ, to distinguish the appeal from one to TJAG, as there are circumstances in which the Secretary can grant clemency but not TJAG.⁹

Subsection 1: Applications in general

The letter of application should state reasons why clemency should be granted. The applicant should not argue issues of fact or law involved in the case nor try and prove innocence or establish legal error. These are issues for the military appellate courts to decide. Reasons for clemency should involve issues of the character and behavior of the individual and his overall service record (see Section D, *infra.*). Facts of the case should be mentioned only if they raise mitigating factors to explain the applicant's behavior such as youth, immaturity or lack of mental capacity. Evidence supporting the request for clemency can and should be submitted with the letter.

⁹. See page 2-3, *supra.*

Section D: Standards

The Secretary of the Army has delegated his clemency responsibility to the Assistant Secretary of the Army (Manpower and Reserve Affairs) [ASA (M&RA)]. The Criminal Law Division, OTJAG reviews the application to both ASA (M&RA) and TJAG and makes a recommendation regarding the granting of clemency. TJAG and the ASA (M&RA) both have great discretion in deciding whether to grant clemency as well as the type and amount of clemency to give. There are no official standards for either the TJAG or ASA (M&RA) to follow. However, the following factors may be considered:

(A) A substantial period of productive military service, including rank achieved, awards, decorations, and letters of commendation mentioning acts that did not receive official recognition.

(B) Absence of a disciplinary record. If the act in question is not typical of the applicant's behavior, clemency is more likely.

(C) Cooperation with law enforcement officials in the investigation of the crime for which clemency is being sought.

(D) A substantial post-conviction educational effort. This is less important for a TJAG clemency decision than a later Secretarial decision because the time limit on TJAG action may be too short for much of an educational effort.

(E) Personal hardship of a serious nature. Evidence should be submitted of financial difficulties that the applicant has, or that would arise if clemency were not granted, the number of dependents the applicant has (and any hardship they would experience if clemency were denied), or any severe medical problems of the applicant.

(F) Letters of recommendation for clemency from any interested party.

Even if the applicant has all of these in evidence, clemency may still not be awarded. The chances of gaining clemency are small, so any type of evidence that may help should be used, including evidence of rehabilitation from drugs, alcohol, or other problems, and evidence of good conduct while in prison.

One factor that will be considered is whether the sentence (confinement, discharge, loss of benefits, grade reduction) is disproportionate to the offense. This is often an issue in appellate review, so TJAG

is likely to defer to the courts. Because ASA (M&RA) is likely to review clemency applications after appellate review is completed, clemency for this reason is more likely than with TJAG.¹⁰ The Assistant Secretary does give deference to decisions by the appellate courts, but clemency is still given on occasion. Evidence or arguments that the sentence was too severe due to the general nature of the offense or to mitigating circumstances, such as age, maturity, or mental capacity when the offense was committed, should be submitted with the letter of application. The applicant should not argue his innocence. That is a question for the courts. He should simply argue that he is less deserving of punishment than his sentence reflects.

Section E: Discharge Upgrading

Both the Secretary and TJAG can upgrade, remit or suspend a discharge. The Secretary can do the same for a dismissal. Overall, few discharges are upgraded. These are most likely to come, according to Addlestone,¹¹ (A) if the discharge should have been upgraded under the Laird Drug Policy of 1971, (B) if the request is made to upgrade a punitive discharge from a GCM to an administrative discharge (but not to a bad-conduct discharge, as ADRB can only upgrade a bad-conduct discharge from a special court-martial) so that the ADRB has jurisdiction and the applicant can make a personal appearance before the ADRB and increase his chances of an upgrade or (C) if under current standards the punishment would be viewed as arising out of discrimination or a demand for a scapegoat. This latter factor refers to the order awarding Honorable Discharges to eleven Japanese-Americans court-martialed in World War II for a civil rights protest. The Honorable Discharges were given for the applicants many years of honorable civilian conduct, and because they had all served long sentences (shortened to an extent by previous clemency).¹²

Section F: Effect of Denial

There is no limit to the number of times an applicant can seek clemency, except that TJAG cannot act after appellate review has been completed.¹³ An application for reconsideration should include evidence or arguments not previously brought before the particular authority. Con-

10. See text at note 12, infra.

11. Addlestone, supra chapter 1, note 4 at § 20.4.4.

12. OTJAG, Criminal Law Division, Clemency Opinion No. 1980/5179 2 Dec. 1980 [available at: DAJA-CL, Washington, DC 20310].

13. See note 8, supra.

tinuous application without new evidence or arguments is unlikely to be successful, unless a change in the government policy with regard to particular clemency issues is made.

Clemency - If TJAG denied the application the applicant can apply to the Secretary. Because both applications are handled by Criminal Law, OTJAG, however, this may be unsuccessful. If he is in confinement or on parole, the Army Clemency Board will automatically review his case annually. The applicant can also seek a Presidential pardon.

Discharge Upgrade - If TJAG denies the application, requests can be made through the Secretary. The Army Clemency Board will automatically review the case of a prisoner at the U.S. Disciplinary Barracks (USDB), or Installation Detention Facility (IDF), a civilian prison or on parole annually. Once the discharge is given, application can be made to ADRB or ABCMR.¹⁴

Part II: ARMY CLEMENCY BOARD

Section A: General Considerations

Subsection 1: Clemency Eligibility

If the servicemember is serving a sentence at the USDB, at an IDF, or at a federal prison or is on parole from them, he is automatically considered for clemency by the Army Clemency Board at least once a year.¹⁵

Schedule of Considerations for Clemency¹⁶

<u>Sentence</u>	<u>Amount of time after Date of Adjudged Sentence</u> ¹⁷
Eight months or less	As soon as possible - usually four months

14. See Chapter 1, supra.

15. Army Reg. 15-130, Boards, Commissions, and Committees, The Army Clemency Board, para. 5 (15 May 1979).

16. Army Reg. 190-47, Military Police, US Army Correctional System, para. 6-14(f) (11 November 1980).

17. If some of the sentence is not served, the date of consideration is postponed by the length of time not served.

Over eight months to less than two years	Four to six months, and annually thereafter
Two years or more	Six to eight months, and annually thereafter
On parole	11 months after release on parole, and annually thereafter
Returned to prison/USDB after parole violation	12 months after return

The Board will not consider a case for clemency after the term of sentence (including parole) expires.

An applicant can also request special consideration from the Board by applying through the Commandant, USDB; Commander, IDF or the Warden if he is confined at a federal prison or by applying directly to the Board.¹⁸

Subsection 2: Parole Eligibility

Parole consideration is not automatic. Application must be made to the Commandant, USDB; Commander, IDF; or to the Board.

Schedule of Consideration for Parole¹⁹

<u>Sentence</u>	<u>Amount of Term that must be served before Parole will be considered.</u>
One year or less	No eligibility except for exceptional circumstances
More than one year to less than three years	One-third of term, but <u>not less</u> than six months
Three years or more	One-third of term (at the most)
Death sentence	No parole

18. If the applicant is at USDB, and applies directly to the Board for special consideration, the Board will normally send the application to the Commandant, USDB, for his recommendation. If the applicant is at an IDF, the recommendation of the Commander will be used.

19. Army Reg. 190-47, Military Police, US Army Correctional System, para. 12-5(a) (Cl, 1 November 1980).

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The Army Clemency Board will consider an application for parole annually for each petitioner.

The Army Clemency Board will waive the time limits for eligibility in "exceptional circumstances."²⁰ There are no set guidelines as to what constitutes "exceptional circumstances." It is in the discretion of the Commandant, USDB or Commander, IDF, to grant a special request and send it to the Army Clemency Board with his recommendation. If the request is turned down, application can be made directly to the Board. The Board, however, will usually follow the Commandant's judgment. Both the Board and Commandant or Commander have a great deal of discretion. Special consideration by the Board is rare. Pregnancy while in prison, for example, has not been considered sufficient cause for parole.

Section B: Powers and Authority of the Board

The Army Clemency Board does not have the power to impose clemency action itself. Rather, it makes recommendations to the Deputy Assistant Secretary of the Army (Review Boards and Personnel Security) [DASA (RB& PS)], who has been delegated power to grant clemency by the Secretary of the Army. The Deputy Assistant Secretary has discretion whether to follow the recommendations of the Board, and places no more value on the recommendations of the Board than he does on those of the Commandant, USDB, or the Commander of the IDF.

Section C: How to Apply

Subsection 1: Clemency

There is no need to apply for automatic annual review. Special consideration can be requested either through the Commandant, USDB, or Commander, IDF, who will make a recommendation for or against clemency and forward the application to the Board. An applicant may apply directly to the Board at:

Army Clemency Board
Washington, D.C. 20310

However, if appeal is made directly to the Board, it will normally refer the matter back to the Commandant, USDB, or Commander, IDF, for his recommendation. With a request for special consideration, evidence should be submitted to support arguments in accord with the Board's standards. See Section H, infra.

20. Id. at para. 12-5(1).

Subsection 2: Parole

Parole considerations are not automatic. To be considered for parole, the applicants should submit DA Form 1704-R ("Parole Statement"), available at the USDB or an IDF, to the Commandant, USDB, Commander, IDF, or to the warden of a federal prison. The applicant should state that he wants parole, where he proposes to reside if paroled, and what employment he will have. Parole is much more likely to be granted if the applicant has employment waiting for him on the outside.

The Disposition Board at the USDB reviews USDB parole applications, makes a recommendation, and forwards the case to the Army Clemency Board. The commander performs this function for IDF applications. Once the Army Clemency Board makes a recommendation, DASA (RB&PS) will take final action.

Subsection 3: Restoration to Duty

Restoration is one form of clemency that can be requested from the Board.

- (A). if at USDB - submit DA form 198 ("Restoration Statement") to the Commandant.
- (B). if at IDF - submit DA Form 198, or local equivalent form to the Commander.

The Commandant or Commander will make a recommendation on restoration to duty to the Army Clemency Board. The Board will then make a recommendation to the Deputy Assistant Secretary, who will take final action.

Restoration creates a new term of service. This term of service has no effect on the previous term during which the applicant was convicted, and has no effect on appellate review of the charges stemming from the first term.

Section D: Decision Process

The Board can consider any type of evidence. The out-of-service conduct of the service member is examined, and an FBI investigation is made on the serviceman's record (if any) with civilian law enforcement authorities. The results of this investigation are available for Board consideration.

Any evidence the Board receives is placed in the applicant's file, and is available to the Board for consideration. The Board is free to

consider or not consider the evidence, and to assign to it any weight the Board desires. Evidence of good conduct is included in the file. If the service member is on parole, the Board's unofficial policy is to include a report by the parole officer of the parolee's conduct and adjustment to society.

There is no right of personal appearance before the Board. The service member (if on parole), character witnesses, and other interested parties can come to Washington, D.C. (at their own expense however), and talk with the chairman of the Army Clemency Board. If the witness can not come to Washington, D.C., letters from them supporting the service member will be included in the case file for the Board to consider if it wishes. Testimony may be made available to the Board in the form of a transcript or tape recording.

A service member may make arrangements to be accompanied by legal counsel by speaking to the Board chairman. The statements of counsel will be made available on tape or as a transcript to the Board for consideration. The presence of counsel may not materially affect the chances for success before the Board, however.

Section E: Relief to be Requested²⁰

Subsection 1: Discharge upgrade

An applicant can ask for the highest relief available, including an honorable discharge, when seeking clemency. Discharge upgrades are rare. It is extremely unusual for a dishonorable discharge or a bad-conduct discharge adjudged by general court-martial to be upgraded to an honorable discharge. It is almost as rare for them to be upgraded to a general discharge. Dishonorable discharges however, are often upgraded to bad-conduct discharges. The Board feels that awarding a higher form of discharge than a bad-conduct discharge would tend to minimize the seriousness of the offense that has been committed, and would lessen the value of an honorable discharge which is something that most service members have to earn. Bad-conduct discharges can be suspended by USDB, and the prisoner sent to the US Army Retraining Brigade. If a service member is sent there but does not perform satisfactorily, a suspended bad-conduct discharge can be reinstated, or an administrative discharge including an honorable or general discharge but more likely a discharge under less than honorable conditions can be awarded. The Clemency Board tends to upgrade to a bad-conduct discharge only. ²¹

20. See also Section B (Parole), and Section C (Restoration of Duty), infra.

21. The service member can always apply to ABCMR for a further upgrade.

Subsection 2: Restoration to Duty²²

The Board has the option of sending an applicant who is to be restored to duty to the US Army Retraining Brigade (USARB) at the lowest enlisted rank, with restoration to rank previously obtained upon completion of the term with USARB, or to restore the applicant to his previous rank immediately without sending him to USARB. An applicant should request the latter treatment from the Board. Evidence of rehabilitation would aid in the applicant's chances.

Section F: Standards

Subsection 1: General Considerations

The official standards and operating procedures of the Army Clemency Board are in the process of being prepared and should be published by early 1983 in the Federal Register. Some guidelines exist in the areas of parole²³ and reconsideration.²⁴

The Board will consider several factors, the most important of which is the offense for which the serviceman was sentenced. The nature of the crime and the amount of time served are examined as the Board determines whether enough punishment has been served. The Board subscribes to a theory of punishment involving rehabilitation (whether the applicant has improved his character and lessened the likelihood of committing another crime) and to some degree, retribution (the theory that one who commits a crime should be punished regardless of other considerations). As such, clemency is less likely the more serious the offense, the less the time served, the less severe the punishment, or in the absence of mitigating factors.

The Board will consider mitigating factors. Whether a weapon was used in the offense, the extent of injury of the victim, and whether the applicant was a mere accomplice rather than a significant actor in the offense can all be important in a decision to grant clemency. The age of the applicant at the time of the offense for which he was confined is also a factor.

22. See Section C, supra.

23. Army Reg. 190-47, para. 12-2 supra. See page 2-13, infra, for discussion of standards.

24. Id. at para. 6-15 see text at pages 2-14 infra, for discussion of standards.

The applicant's record in military and in civilian life is also a factor. The Board considers whether the act in question was a once in a lifetime event or is a typical example of the applicant's behavior. Previous trouble with law enforcement agencies can hurt an applicant's chances, as can a series of Article 15 punishments while in the military. Affidavits attesting to the applicant's general good character and behavior will aid the applicant.

The Board will consider the individual's record while incarcerated. Good behavior and/or violations of USDB, IDF, or prison regulations are factors.

The Board will look for evidence of rehabilitation. Evidence of education should be submitted such as diplomas, transcripts or certificates of education. Evidence of financial responsibility such as a good credit rating or a birth or marriage certificate show rehabilitation, as does evidence of good standing in the community. Awards, letters of commendation, or affidavits can be used to prove good standing. Evidence of rehabilitation from drug or alcohol problems may also increase the applicant's chances. If the applicant pleaded not guilty to his offense, the Board will examine the Staff Judge Advocate's (SJA) review of the court-martial, and the defense rebuttal to that review. If the applicant pleaded guilty, this report is not examined. As the applicant was found guilty, the defense rebuttal tends to have less weight than the SJA review, though the Board still searches for mitigating (and aggravating factors) according to the standards above.

One factor the Board considers important is whether the applicant took the stand in his own defense. The Board feels that the accused should feel strong enough about his innocence to speak in his own defense. If the applicant did not take the stand, the Board is more likely to feel his conviction was correct.

Subsection 2: Additional Considerations for Parole

Important factors considered in parole determinations are the future plans of the applicant once on parole if he is not to be restored to active duty. Where the applicant will reside and whether he will have employment can be determinative in whether parole will be granted. The type of employment and its stability may also influence the Board.

Subsection 3: Additional Considerations for Restoration to Duty

The Board places additional emphasis on the ability of the applicant to adjust to military life. Under applicable regulations²⁵ the Board will look at: (A) the effect restoration will have on the esprit and good name of the service; (B) the applicant's civilian and military confinement record, and; (C) the seriousness of crime.

"Conviction of a crime generally recognized as a felony or serious offense in civil law, or a serious crime perpetrated under circumstances showing disregard for the rights and privileges of others that is willfully malicious, brutal, heedless, and lacking in serious provocation; desertion, or absence without leave with intent to avoid hazardous or important service; or, regardless of offense for which convicted, a history of repeated drunkenness, narcotic addiction, or continued difficulty in adjusting to military life."²⁶ Serious crimes of this magnitude will disqualify the applicant from restoration to duty except in exceptional circumstances.

Exceptional circumstances include the following factors:

- (A) A demonstrated behavioral change from that evidenced when the offense was committed, combined with an established motivation for honorable service.
- (B) A demonstrated ability to perform military duties in a creditable manner and a positive potential for honorable service. The Board needs some assurance that the applicant will perform his duties if restored.
- (C) A substantially clean civilian and military record. The Board is more likely to restore the applicant to active duty if the offense for which the applicant was confined was a rare blemish on an otherwise clean record, rather than typical of the individual's behavior.

25. Army Reg. 190-47, para. 6-15 supra.

26. Id. at para. 6-15(b).

- (D) A reputation for honesty, integrity and good behavior. Affidavits from citizens in the general population, and from military personnel in particular, attesting to the applicant's reputation should be submitted.
- (E) Age at the time of the offense for which the applicant was convicted.²⁷

Evidence of the above should be submitted with an application for restoration in any case, but must be submitted if the applicant is otherwise disqualified for restoration under the regulations.

Subsection 4: Effect of Denial

The applicant's case will be reviewed automatically on an annual basis. Parole and restoration to duty eligibility continues. The applicant can also seek special consideration from the Board, or seek clemency from the Secretary.

Part III: PRESIDENTIAL PARDONS

Section A: General Considerations

The President has the power, under Article II, Section 2, clause 1, of the Constitution of the United States to grant a pardon to persons convicted of violating federal law. The pardon does not erase or expunge a record of conviction. An applicant would therefore still be required to report his conviction upon request to employers. The pardon is a symbol of forgiveness by the government. It does not indicate innocence of the offense pardoned, unless specifically given for that reason.

The President also has the power to commute (reduce) sentences. This is very rarely exercised since the Pardon Attorney generally defers to the Army Clemency Board for military offenders.

A pardon restores civil rights lost by conviction. It restores eligibility for Veterans Administration entitlements. If the applicant has lost state created rights or state entitlements, the pardon may or may not restore those rights and benefits. Contact the relevant state agency or a veteran's legal service organization to determine the effect of a pardon on the applicant's status.

27. Id.

A pardon does not change the nature of a military discharge. This can only be done by the ADRB, the ABCMR, the Secretary of the Army, the Army Clemency Board or TJAG (See Chapter I and Chapter II, Parts 1 and 2).

Section B: How to Apply

Application forms can be obtained from:

Pardon Attorney
U.S. Department of Justice
320 First Street, N.W.
Washington, D.C. 20530

The forms should be filed with:

Commander
U.S. Army Reserve Components Personnel and Administrative
Center (USARCPAC)
9700 Page Boulevard
St. Louis, MO 63132

The petition should include the name of the petitioner, his current age, the court and location at which he was convicted, the crime for which he was convicted, the date of sentence, the sentence imposed, the date the sentence commenced, and the place of confinement.

Also included should be the age of the petitioner when he committed the offense, the date of release from confinement, his marital status, prior and subsequent criminal records, (if any), and letters of recommendation.²⁸ All applications must be accompanied by at least three character affidavits from persons not related to the petitioner. These are important since the Federal Bureau of Investigation will begin its investigation by interviewing the authors of the affidavits. Any other evidence, in line with the standards in Section E, infra, should be submitted.

Section C: Decision Process

USARCPAC will forward the application to the Secretary of the Army, through the Criminal Law Division, OTJAG, who will review the application, and the petitioner's military records, and make a recommendation for or

28. 28 CFR 1.2 (1982)

against clemency. The application is then forwarded to the Department of Justice, Office of the Pardon Attorney, which makes its own determination based on the application and the results of an investigation by the FBI. The FBI will interview the petitioner, his character references, neighbors, employers, etc.

While the Pardon Attorney gives consideration to the Secretary of the Army's recommendation, it is not dispositive as the Secretary does not have access to the FBI report on the petitioner's post-service activities. The Secretary bases his decision on the petitioner's military service, while clemency is based on rehabilitation since the end of the sentence. The President has complete discretion whether to follow the recommendations of the pardon attorney.

Section D: Eligibility

Application can be made three years after the date of release from confinement. If the petitioner was not confined, application can be made three years after the date of conviction.²⁹

A longer waiting period of five years is required for any offense in which a gun was used or for a narcotics offense. There is no distinction in the length of the waiting period for narcotic crimes of possession versus crimes of sale, though in the actual consideration for clemency simple possession is less severe than possession with intent to sell, or actual sale. The waiting period is designed to provide a reasonable time to determine the ability of the petitioner to live in the community free of arrests and conviction. Offenses committed subsequent to the offense in question thus affect eligibility by extending the waiting period three additional years (five for more serious offenses) after the latest offense.

No petition can be submitted by someone on probation or parole.

If the petitioner is unsure of his eligibility, he should submit the application. The Officer of the Pardon Attorney will determine if the petitioner is eligible.

Section E: Standards

A decision to recommend to the President that a pardon be given is based on the petitioner's overall behavior and character, especially

29. 28 CFR 1.3 (1982)

after conviction of the offense for which he is seeking a pardon. There is no difference between the standards for civilian petitioners and petitioners formerly in the military. Factors considered include the petitioner's prior and subsequent arrest record, his overall reputation in the community, any mitigating factors in the commission of the crime (lack of maturity, age, or capacity, etc.) and the petitioner's life in general after the confinement or discharge/dismissal. Evidence of rehabilitation from narcotics, alcohol, or behavioral problems will be viewed favorably. Steady employment, and a responsible employment position will help. Evidence of family responsibility, including birth and marriage certificates, as well as any evidence or statements from references that the petitioner takes good care of his family, should be submitted. Financial responsibility, as indicated by a good credit rating, prompt payment of rent, and similar factors will also help the petitioner's chances.

The nature and seriousness of the offense and the nature and length of punishment are also factors. An applicant with a more serious crime, or less severe adjudged punishment, is less likely to receive clemency than lesser crimes or harsher punishments. A crime of violence, or any offense in which a gun was used, is considered serious. Narcotics cases vary, simple possession for personal use being less serious than possession with intent to sell or actual sale.

One factor that will serve as a plus in the petitioner's application will be if he has been allowed to reenlist in the military. That the military would take the petitioner back indicates rehabilitation and forgiveness, and makes a pardon more likely.

Section F: Success Rates

Chances for receiving clemency are fair. Cases are not always decided in the same year in which the application was made. The following chart indicates success rates.³⁰

Fiscal Year	Received	Granted		Denied	Pending
		Pardons	Commutations		
1976 . . .	604	78	11	244	658
1977 . . .	722	129	8	300	863
1978 . . .	641	162	3	836	508
1979 . . .	710	143	10	448	617
1980 . . .	523	155	11	500	474
1981 . . .	548	76	7	260	679

30. Source: Department of Justice Annual Report (1981).

Section G: Effect of Denial

The authority to grant pardons is with the President alone. He has total discretion, though will tend to follow the Pardon Attorney's recommendations. There is no appeal from a denial of a pardon. Re-application can be made two years after the date of denial. Chances of receiving a pardon will increase over the two years if there is evidence of more rehabilitation, stable family life, stable finances, more education and/or more employment. Chances may also change with the Presidential administrations, though the effect of this on a particular application is impossible to predict.

Appendix 2-A

Forms for Clemency

- | | |
|---------------------------------------|--|
| (a) Standard Form 180 | Request Pertaining to Military Records |
| (b) Office of Pardon Atty.
Form 13 | Petition for Pardon after Completion
of Sentence |
| (c) Office of Pardon Atty.
Form 11 | Character Affidavit on Behalf of Pardon
Applicant |

REQUEST PERTAINING TO MILITARY RECORDS

Please read instructions on the reverse. If more space is needed, use plain paper.

DATE OF REQUEST

PRIVACY ACT OF 1974 COMPLIANCE INFORMATION. The following information is provided in accordance with 5 U.S.C. 552a(e)(3) and applies to this form. Authority for collection of the information is 44 U.S.C. 2907, 3101, and 3103, and E.O. 9397 of November 22, 1943. Disclosure of the information is voluntary. The principal purpose of the information is to assist the facility servicing the records in locating and verifying the correctness of the requested records or information to answer your inquiry. Routine uses of the information as established and published in accordance with 5 U.S.C. 552a(e)(4)(D)

include the transfer of relevant information to appropriate Federal, State, local, or foreign agencies for use in civil, criminal, or regulatory investigations or prosecution. In addition, this form will be filed with the appropriate military records and may be transferred along with the record to another agency in accordance with the routine uses established by the agency which maintains the record. If the requested information is not provided, it may not be possible to service your inquiry.

SECTION I—INFORMATION NEEDED TO LOCATE RECORDS (Furnish as much as possible)

1. NAME USED DURING SERVICE (Last, first, and middle)		2. SOCIAL SECURITY NO.	3. DATE OF BIRTH	4. PLACE OF BIRTH
5. ACTIVE SERVICE, PAST AND PRESENT (For an effective records search, it is important that ALL service be shown below)				
BRANCH OF SERVICE <i>(Also, show last organization, if known)</i>	DATES OF ACTIVE SERVICE		Check one	
	DATE ENTERED	DATE RELEASED	OFFICER	EN-LISTED
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
6. RESERVE SERVICE, PAST OR PRESENT <i>If "none," check here</i> <input type="checkbox"/>				
a. BRANCH OF SERVICE	b. DATES OF MEMBERSHIP		c. Check one	d. SERVICE NUMBER DURING THIS PERIOD
	FROM	TO	OFFICER	EN-LISTED
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
7. NATIONAL GUARD MEMBERSHIP (Check one): <input type="checkbox"/> a. ARMY <input type="checkbox"/> b. AIR FORCE <input type="checkbox"/> c. NONE				
d. STATE	e. ORGANIZATION	f. DATES OF MEMBERSHIP		g. Check one
		FROM	TO	OFFICER
				EN-LISTED
				<input type="checkbox"/>
				<input type="checkbox"/>
8. IS SERVICE PERSON DECEASED			9. IS (WAS) INDIVIDUAL A MILITARY RETIREE OR FLEET RESERVIST	
<input type="checkbox"/> YES <input type="checkbox"/> NO <i>If "yes," enter date of death:</i>			<input type="checkbox"/> YES <input type="checkbox"/> NO	

SECTION II—REQUEST

1. EXPLAIN WHAT INFORMATION OR DOCUMENTS YOU NEED, OR, CHECK ITEM 2; OR, COMPLETE ITEM 3			2. IF YOU ONLY NEED A STATEMENT OF SERVICE check here <input type="checkbox"/>	
3. LOST SEPARATION DOCUMENT REPLACE- MENT REQUEST <i>(Complete a or b, and c)</i>	<input type="checkbox"/> a. REPORT OF SEPARATION (DD Form 214 or equivalent)	YEAR ISSUED	This contains information normally needed to determine eligibility for benefits. It may be furnished only to the veteran, the surviving next of kin, or to a representative with veteran's signed release (item 5 of this form).	
	<input type="checkbox"/> b. DISCHARGE CERTIFICATE	YEAR ISSUED	This shows only the date and character at discharge. It is of little value in determining eligibility for benefits. It may be issued only to veterans discharged honorably or under honorable condition; or, if deceased, to the surviving spouse.	
	c. EXPLAIN HOW SEPARATION DOCUMENT WAS LOST			
4. EXPLAIN PURPOSE FOR WHICH INFORMATION OR DOCUMENTS ARE NEEDED			6. REQUESTER	
			a. IDENTIFICATION (check appropriate box)	
			<input type="checkbox"/> Some person identified in Section I <input type="checkbox"/> Surviving spouse <input type="checkbox"/> Next of kin (relationship): _____ <input type="checkbox"/> Other (specify): _____	
5. RELEASE AUTHORIZATION, IF REQUIRED <i>(Read instruction 3 on reverse side)</i> I hereby authorize release of the requested information/documents to the person indicated at right (item 7). VETERAN SIGN HERE <input type="checkbox"/> _____ <i>(If signed by other than veteran, show relationship to veteran)</i>			b. SIGNATURE (see instructions 3 and 4 on reverse side)	
			7. Please type or print clearly — COMPLETE RETURN ADDRESS	
			Name, number and street, city, State and ZIP code	
			TELEPHONE NO. (Include area code) <input type="checkbox"/>	

INSTRUCTIONS

1. Information needed to locate records. Certain identifying information is necessary to determine the location of an individual's record of military service. Please give careful consideration to and answer each item on this form. If you do not have and cannot obtain the information for an item, show "NA," meaning the information is "not available." Include as much of the requested information as you can. This will help us to give you the best possible service.

2. Charges for service. A nominal fee is charged for certain types of service. In most instances service fees cannot be determined in advance. If your request involves a service fee you will be notified as soon as that determination is made.

3. Restrictions on release of information. Information from records of military personnel is released subject to restrictions imposed by the military departments consistent with the provisions of the Freedom of Information Act of 1967 (as amended 1974) and the Privacy Act of 1974. A service person has access to almost any information contained in his own record. The next of kin (see item 4 of instructions) if the veteran is deceased and Federal officers for official purposes are authorized to receive information from a military service or medical record only as specified in the above cited Acts. Other requesters must have the release authorization, in item 5 of the form, signed by the

veteran or, if deceased, by the next of kin. Employers and others needing proof of military services are expected to accept the information shown on documents issued by the Armed Forces at the time a service person is separated.

4. Precedence of next of kin. The order of precedence of the next of kin is: unmarried widow or widower, eldest son or daughter, father or mother, eldest brother or sister.

5. Location of military personnel records. The various categories of military personnel records are described in the chart below. For each category there is a code number which indicates the address at the bottom of the page to which this request should be sent. For each military service there is a note explaining approximately how long the records are held by the military service before they are transferred to the National Personnel Records Center, St. Louis. Please read these notes carefully and make sure you send your inquiry to the right address. (If the person has two or more periods of service within the same branch, send your request to the office having the record for the last period of service.)

6. Definitions for abbreviations used below:

NPRC—National Personnel Records Center PERS—Personnel Records
TDRL—Temporary Disability Retirement List MED—Medical Records

SERVICE	NOTE	CATEGORY OF RECORDS	WHERE TO WRITE ADDRESS CODE	
AIR FORCE (USAF)	<i>Air Force records are transferred to NPRC from Code 1, 90 days after separation and from Code 2, 30 days after separation.</i>	Active members (includes National Guard on active duty in the Air Force), TDRL, and general officers retired with pay.	1	
		Reserve, retired reservist in nonpay status, current National Guard officers not on active duty in Air Force, and National Guard released from active duty in Air Force.	2	
		Current National Guard enlisted not on active duty in Air Force.	13	
		Discharged, deceased, and retired with pay (except general officers retired with pay).	14	
COAST GUARD (USCG)	<i>Coast Guard officer and enlisted records are transferred to NPRC 3-6 months after separation</i>	Active, reserve, and TDRL members.	3	
		Discharged, deceased, and retired members (see next item).	14	
		Officers separated before 1/1/29 and enlisted personnel separated before 1/1/15.	6	
MARINE CORPS (USMC)	<i>Marine Corps records are transferred to NPRC 4 months after separation</i>	Active and TDRL members, reserve officers, and Class II enlisted reserve.	4	
		Class III reservists and Fleet Marine Corps Reserve members.	5	
		Discharged, deceased, and retired members (see next item).	14	
		Officers and enlisted personnel separated before 1/1/1896.	6	
ARMY (USA)	<i>Army records are transferred to NPRC as soon as processed (about 30 days after separation)</i>	Reserve, living retired members, retired general officers, and active duty records of current National Guard members who performed service in the U.S. Army before 7/1/72.*	7	
		Active officers (including National Guard on active duty in the U.S. Army).	8	
		Active enlisted (including National Guard on active duty in the U.S. Army) and enlisted TDRL.	9	
		Current National Guard officers not on active duty in the U.S. Army.	12	
		Current National Guard enlisted not on active duty in the U.S. Army.	13	
		Discharged and deceased members (see next item).	14	
		Officers separated before 7/1/17 and enlisted separated before 11/1/12.	6	
		Officers and warrant officers TDRL.	8	
NAVY (USN)	<i>Navy records are transferred to NPRC 6 months after retirement or complete separation.</i>	Active members (including reservists on active duty)—PERS and MED	10	
		Discharged, deceased, retired (with and without pay) less than six months, TDRL, drilling and nondrilling reservists	PERS only	10
			MED only	11
		Discharged, deceased, retired (with and without pay) more than six months (see next item)—PERS & MED	14	
Officers separated before 1/1/03 and enlisted separated before 1/1/1886—PERS and MED	6			

* Code 12 applies to active duty records of current National Guard officers who performed service in the U.S. Army after 6/30/72.

Code 13 applies to active duty records of current National Guard enlisted members who performed service in the U.S. Army after 6/30/72.

ADDRESS LIST OF CUSTODIANS (BY CODE NUMBERS SHOWN ABOVE)—Where to write / send this form for each category of records

1	USAF Military Personnel Center Military Personnel Records Division Randolph AFB, TX 78148	5	Marine Corps Reserve Forces Administration Center 1500 E. Bannister Road Kansas City, MO 64131	8	USA MILPERCEN Attn: DAPC-PSR-R 200 Stovall Street Alexandria, VA 22332	12	Army National Guard Personnel Center Columbia Pike Office Building 5600 Columbia Pike Boulevard Falls Church, VA 22041
2	Air Reserve Personnel Center 7300 East 1st Avenue Denver, CO 80280	6	Military Archives Division National Archives & Records Service General Services Administration Washington, DC 20408	9	Commander U.S. Army Enlisted Records and Evaluation Center Ft. Benjamin Harrison, IN 46249	13	The Adjutant General (of the appropriate State, DC, or Puerto Rico)
3	Commandant U.S. Coast Guard Washington, DC 20590			10	Chief of Naval Personnel Department of the Navy Washington, DC 20370		
4	Commandant of the Marine Corps Headquarters, U.S. Marine Corps Washington, DC 20380	7	Commander U.S. Army Reserve Components Personnel & Administration Center 9700 Page Boulevard St. Louis, MO 63132	11	Naval Reserve Personnel Center New Orleans, LA 70146	14	National Personnel Records Center (Military Personnel Records) 9700 Page Boulevard St. Louis, MO 63132

PETITION FOR PARDON AFTER COMPLETION OF SENTENCE

Petitioner shall typewrite or print the answers in ink or ballpoint pen. Each question must be answered fully, truthfully, and accurately. If the space for any answer is insufficient, petitioner may complete his answer on an attachment. Submission of false information is punishable by imprisonment of up to five years and a fine of not more than \$10,000. 18 U.S.C. 1001.

THE PRESIDENT OF THE UNITED STATES:

The undersigned petitioner prays that he be granted a pardon and in support thereof states as follows:

PRELIMINARY INFORMATION

1. State full name: _____
First Middle Last

Address: _____
No. Street City State Zip Code

Telephone number (include area code): _____

Social Security No. _____ Date of Birth: _____

Are you a United States citizen? _____ If not, state nationality and give alien registration number: _____
(yes/no)

If you have ever been known by any other name, state in full every other name by which you have been known, including name under which you were convicted, the reason therefor, and the inclusive dates so known, and, if married woman, give maiden name:

Marital status: _____
For each marriage give the following: Name of spouse, date and place of marriage, and if applicable, date and place of divorce:

List your children by name and age: _____

If not supporting family, explain: _____

OFFENSE(S) FOR WHICH PARDON IS SOUGHT

2. Petitioner was convicted in the United States District Court for the _____
(Eastern, Western, etc.)

District of _____ at _____ on a plea of _____
(State) (City)

_____ of the crime of _____ and was _____
(Guilty, not guilty, etc.) (Describe specifically)

sentenced on _____, 19 _____ to _____ for _____
(imprisonment, probation)

_____ and/or to pay a fine of _____. Petitioner was _____
(length of sentence)

_____ years of age when the crime was committed.

EMPLOYMENT

Attach additional sheets if necessary

7. Name of present employer: _____

Address: _____

Type of business: _____ Your position: _____

Dates of employment: From: _____, 19____ to present.

for the last 10 years,

List all prior employment, furnishing the name and address of employer:

Type of business: _____ Your position: _____

Dates of employment: from: _____ to: _____

Name and address of employer: _____

Type of business: _____ Your position: _____

Dates of employment: from: _____ to: _____

Have you ever been discharged from employment for any reason: _____ (yes/no). Have you ever resigned after being informed that your employer intended to discharge you for any reason? _____ (yes/no). If you answered yes to either question, explain fully:

PRIOR AND SUBSEQUENT CRIMINAL RECORD

8. Have you ever been arrested, taken into custody, held for investigation or questioning, or charged by any law enforcement authority, whether Federal, state, local or foreign, either as a juvenile or adult? _____ (yes/no). For each incident list date, nature of offense charged, law enforcement authority involved, location and disposition (Any omission will be construed as falsification):

CIVIL AND FINANCIAL INFORMATION

9. Are you in default in any way in the performance or discharge of any debt or obligation imposed upon you? _____ (yes/no). Within the last 10 years, have any liens (including Federal or state tax liens) or any lawsuits been filed against you, or have you been a party to a bankruptcy proceeding? _____ (yes/no). Do you have any pending matters with the Federal or state governments? _____ (yes/no). If you answered yes to any question, explain fully:

MILITARY RECORD

10. Have you ever served in the armed forces of the United States: _____ (yes/no). If so, state nature of your separation(s) from the service: _____. If other than honorable, specify type thereof and circumstances surrounding your release(s): _____

List inclusive dates of service: _____

Serial number(s): _____ Branch(es) of service: _____. While serving in the armed forces, were any charges or complaints ever made or filed against you, or were you the recipient of non-judicial punishment, or the defendant in any court martial? _____ (yes/no). If yes, state fully the nature of the charge, relevant facts, disposition of the proceedings, the date thereof, and the name and address of the authority in possession of the records thereof. (If you were convicted of an offense by court martial, complete, with appropriate modifications, paragraph 2 also):

REASONS FOR PARDON

11. State briefly your reasons for seeking a pardon (You are not expected to reargue your case, assert innocence or otherwise attack the validity of your conviction.):

12. CERTIFICATION AND PERSONAL OATH

I hereby certify that all answers to the above questions and all statements contained herein are true, and I understand that any misstatements of material facts contained in this petition will cause adverse action on my application for Executive clemency in addition to any other penalties provided by law.

In petitioning the President of the United States for pardon, I do solemnly swear that I will be law abiding and will support and defend the Constitution of the United States against all enemies, foreign and domestic, and that I take this obligation freely and without any mental reservation whatsoever, So Help Me God.

Respectfully submitted this _____ day of _____, 19 _____

(signature of petitioner)

Subscribed and sworn to before me this _____ day of _____, 19 _____

Notary Public

UNITED STATES
DEPARTMENT OF JUSTICE
CHARACTER AFFIDAVIT
ON BEHALF OF

(print or type name of petitioner)

In support of the application of the above petitioner to the President
of the United States for pardon, I, _____,
(print or type name of affiant)

residing at _____,
No. Street City State Zip Code

whose occupation is _____

certify that I have personally known the petitioner for _____ years. Except
as otherwise indicated below, he has conducted himself, since his conviction,
in a moral and law-abiding manner. My knowledge of petitioner's reputation,
conduct and activities, including whether he has been arrested or had any
other trouble with public authorities and has been steadily employed, is as
follows: _____

I do solemnly swear that the foregoing information is true and correct
to the best of my knowledge and belief.

(signature of affiant)

Subscribed and sworn to before me this _____ day of _____, 19__.

Notary Public.

UNITED STATES
DEPARTMENT OF JUSTICE
CHARACTER AFFIDAVIT
ON BEHALF OF

(print or type name of petitioner)

In support of the application of the above petitioner to the President
of the United States for pardon, I, _____
(print or type name of affiant)

residing at _____
No. Street City State Zip Code

whose occupation is _____

certify that I have personally known the petitioner for _____ years. Except
as otherwise indicated below, he has conducted himself, since his conviction,
in a moral and law-abiding manner. My knowledge of petitioner's reputation,
conduct and activities, including whether he has been arrested or had any
other trouble with public authorities and has been steadily employed, is as
follows: _____

I do solemnly swear that the foregoing information is true and correct
to the best of my knowledge and belief.

(signature of affiant)

Subscribed and sworn to before me this _____ day of _____, 19____.

Notary Public.

CHAPTER 3: PAY, ALLOWANCES, AND ENTITLEMENTS

This chapter deals in large part with the provisions of the Department of Defense Pay and Allowances Entitlement's Manual and the Members of the Uniformed Services, Joint Travel Regulations (JTR). The pay manual and the JTR are complex and are frequently changed. Accordingly, in all cases, counsel should carefully examine the actual language or relevant provisions before giving detailed legal advice. This chapter seeks to provide counsel with a ready reference tool. Hopefully, the Project will lead the researcher to the relevant sections of the pay manual and the JTR quickly, and aid in their understanding. However, The Advocate's interpretation of those references are unofficial. This chapter does not reflect the official position of the Department of Defense or the Department of the Army. This chapter is not intended to be used as cited authority on the interpretation of the pay manual or the JTR. Rather, it is designed as a desk book for attorneys who assist soldiers who have been court-martialed.

A review of this chapter and of the complex references cited leads to one important conclusion which cannot be over emphasized:

TRIAL DEFENSE ATTORNEYS SHOULD ADVISE THEIR CLIENTS TO SETTLE THEIR PERSONAL AFFAIRS BEFORE THE DATE OF TRIAL IN ORDER TO USE BENEFITS WHILE THEY ARE STILL ENTITLED TO THEM.

PART I: PAY AND ALLOWANCES

Section A: Entitlement to Basic Pay in General

If a sentence includes no forfeitures, or partial forfeitures, the following rules apply:

Basic pay is normally paid to service members in military confinement, but will not be paid in certain circumstances.¹

(A) Basic pay will not be paid after the member's expiration of term of service (ETS) even if he is confined after his date of ETS. If

1. Para. 10316, Department of Defense Military Pay and Allowances Entitlements Manual (1 January 1967) C65 2 December 1981.

the member is acquitted or returns to full duty status, however, pay and allowances accrue for the time in confinement.²

If the enlistment expires before the trial and if the service member is retained to await a court-martial, pay will not accrue unless (a) the member is acquitted, (b) the charges are dismissed or (c) the member is returned to full duty. If any of these occur, pay and allowances accrue until discharge.³

If the service member is confined serving a sentence awarded by a court-martial, pay and allowances end at ETS unless the sentence is set aside or overturned. Similarly, if the service member is confined or on parole pending appellate review and ETS has passed, payment and allowances are not paid unless the sentence is set aside or overturned.⁴

If the sentence is set aside or overturned and a new trial or rehearing is not ordered or if a new trial results in acquittal, any pay and allowances lost as a result of the reduction in grade and confinement are paid and pay and allowances accrue when the member is restored to full duty status.⁵

If the sentence is set aside or overturned and a new trial or rehearing is not ordered or if a new trial results in acquittal and ETS has passed while the member was in confinement, the members will receive pay and allowances for the time confined after ETS.⁶

2. Id. at para. 10317.

3. Id.

4. Id.

5. Id. at para. 10317(c), and at para. 70509 (C50 19 December 1977).

6. Id. at para. 70509.

If a new trial or rehearing is ordered and if a new sentence includes forfeitures, the member is credited with any amount forfeited under the first sentence. If forfeitures under the old sentence are set aside, the member is entitled to full pay and allowances for the period from the convening authority's action on the original sentence until the convening authority's action on the second sentence. If a previously approved DD or BCD is not imposed by a new trial, the pay and allowances that would have been paid had the BCD or DD not been imposed will be paid. If a previously adjudged dismissal is not imposed, an administrative discharge is substituted. If the member is reappointed by the President, the time between dismissal and the reappointment is considered time of actual service, and pay and allowances are paid for that time.⁷

(B) Basic pay will not be paid to a service member under a sentence including total forfeiture of pay and allowances. Pay will be paid from the time of conviction until the time sentence is approved by the convening authority. Only unforfeited pay for periods after that date will be paid.⁸ See Section C: Forfeitures, supra p. 3-8.

(C) If the service member is being held in confinement by civilian authorities as a witness in a civilian court, or due to an absence excused as unavoidable, he will be paid. If the service member is being held for a foreign civil offense and is under controls of U.S. authority, he will be paid regardless of whether the absence is avoidable. If he is under control of civil authorities, foreign or domestic, he will only receive pay if the absence is unavoidable.⁹

Whether an absence is unavoidable is determined by several factors. If the service member is being held by civilian authorities, or by military authorities for civil authorities, the absence is deemed unavoidable in the following situations:

7. Id. at para. 70509 (5)(1).

8. Id. at para. 70501 (C62 12 November 1980).

9. Table 1-3-2, Rules 4-8 (C65 2 December 1981).

(1) If the member is tried and acquitted;

(2) If the charges are dismissed or the member is released without trial, and the charges are not due to the member's misconduct;

(3) If the member is released without trial upon agreement to make restitution, and his commander decides that the absence was not due to the member's misconduct;

(4) If the member is released on bail and the trial is postponed indefinitely, and the case will not be prosecuted;

(5) If the member is released because the case was discontinued by the prosecutor or plaintiff, or because the jury failed to agree;

(6) If the member is absent without leave, and the absence could not be avoided by the member, or by military authorities, and was not due to the member's misconduct, or

(7) If the member is in confinement under civilian authorities, is tried and found not guilty by reason of insanity, and is sent to a state mental institution.¹⁰

An absence is not unavoidable:

(1) If the member is tried and convicted;

(2) If the member is released on bond (not in a full duty status) pending appeal and the appeal does not result in acquittal;

(3) If the member is discharged because of imprisonment or conviction by a civilian court, or

(4) Is in confinement due to a failure to obey a decree of a civilian court.¹¹

(D) Basic pay is not paid to service members on excess leave.¹²

10. Id. at Table 1-3-3, Rules 1-5, 10-11 (C65 2 December 1981).

11. Id., Rule 6-9.

12. Id. at para. 10306 (C62 12 November 1982). Some allowances can be paid, see p. 3-7 and p. 3-12, supra.

Section B: Allowances

Allowances will not be paid after the expiration of term of service of the service member, even if ETS passes when the member is in confinement. Allowances will be paid for time served if the sentence is set aside or overturned and the member is later acquitted, or if a sentence of forfeiture of allowances is set aside and a new sentence is given providing for no or for partial forfeitures.¹³

If a sentence includes partial forfeitures or no forfeitures, the following rules apply.

Subsection 1: Basic Allowances for Subsistence (BAS)

1.a: Officers

Officers are entitled to BAS if they are otherwise entitled to Basic Pay. If an officer is in confinement, awaiting trial by court-martial, serving a court-martial sentence to forfeit basic pay but not allowances, or serving a sentence to total forfeitures if the sentence is set aside and a new trial or rehearing is ordered, BAS will be paid.¹⁴

Officers in excess leave will not receive BAS.¹⁵

1.b: Enlisted Members

Enlisted members are entitled to BAS when rations in kind are not available and permission to mess separately is granted, or when assigned to duty under emergency conditions where no mess facilities of the U.S. are available.¹⁶ As mess facilities are available at USDB or Installation Detention Facilities, enlisted members at these places, or in civilian penal institutions, are not entitled to BAS.

13. Id. at para. 70509.

14. Id. at Table 3-1-1, Rule 12, and at paragraphs 20101, 30121.

15. Id. at Table 3-1-1, Rule 3.

16. Id. at paragraphs 30131-30134 (C68 3 May 1982).

If an enlisted member is on excess leave or in an unauthorized absence status he is not entitled to BAS.¹⁷

Subsection 2: Basic Allowance for Quarters (BAQ)

2.a: Members without Dependents

If a service member is in confinement pursuant to a sentence of a court-martial, BAQ will accrue and be paid if the member is acquitted, the charges are withdrawn, or the sentence is set aside or disapproved and the member is otherwise entitled to BAQ.¹⁸ If the member is not receiving BAQ on the date before confinement commences, or assignment to government quarters was not terminated before or during the period of confinement, then no BAQ will accrue.¹⁹ A service member restrained in a status of arrest,²⁰ or in retraining or rehabilitation is otherwise entitled to partial BAQ.²¹

A member without dependents is not entitled to BAQ while on excess leave.

2.b: Members with Dependents

2.b.i: In general

A member with dependents is entitled to BAQ when

(A) adequate quarters are not furnished for the member and his dependents without payment, or for the dependents alone²² or (B) the

17. Id. at Table 3-1-6, Rules 3.4 (C68 3 May 1982).

18. Id. at Table 3-2-3, Rule 27(B) and at para. 30214(b)(12) (C66 9 December 1981).

19. Id. at Table 3-2-3, Rule 27(C).

20. Id. at para. 30214(b)(9).

21. Id. at (b)(12).

22. Id. at para. 30221(A)(1), (2) (C57 26 October 1979).

dependents are not en route or do not accompany the member to his Permanent Duty Station, or the vicinity thereof, so as to preclude assignment of government quarters.²³

Government quarters at Fort Leavenworth, Kansas, are not provided to the dependents of a prisoner at USDB, so the dependents are entitled to BAQ. If allowances were not forfeited, they will be paid to the member. If allowances were forfeited, BAQ can be paid to the dependents (see below).

2.b.ii: Payments to Dependents

In certain situations where the servicemember is not entitled to pay, his dependents may receive BAQ.

(A) Unauthorized Absences in the Hands of Civil Authorities

BAQ will be paid to the dependents for up to two months from the first day of the absence unless the member is assigned government quarters. The member must be absent for more than 29 consecutive days. Application must be made within three months after the absence commenced, although this requirement may be waived if the dependents did not receive timely notice of their right to apply for BAQ from the Army. Application must then be made within two months of notice. Payment is made to the dependent.²⁴

(B) Pre-trial Confinement in a Foreign Country

(1) For enlisted members in grade E-1 to E-4 (4 years of service or less) BAQ will be paid to the dependents for up to two months from the first day of confinement, unless the member is assigned government quarters. The confinement must be for more than 29 consecutive days. Application must be made within three months after confinement commenced, although this may be waived if the dependents did not receive timely notice of their right to apply for BAQ from the Army. Payment for subsequent months may be given on a showing of hardship on the dependents. Applications are decided on a case-by-case basis.²⁵

23. Id. at (a)(3).

24. Id. at 30251(A) (C55 12 January 1979).

25. Id. at (B)(1).

(2) Enlisted members in grades E-4 (over 4 years service) and above, cases are decided on a case-by-case basis for any length of time.²⁶

(C) How to Apply

Write to: Commander
U.S. Army Finance and Accounting Center [USAFAC]
ATTN: FINCY-A
Indianapolis, IN 46249²⁷

With the letter, the dependents should submit evidence of financial difficulty, such as copies of bills, promissory notes, or other indicators of indebtedness, as well as stating in the letter the number of dependents seeking aid, and the total income of the dependents' household.

2.b.iii: Excess leave

BAQ will be paid to the member for two months, unless it is anticipated that the member will not return to duty, such as a member on excess leave pending appellate review of a court-martial.²⁸

Subsection 3: Family Separation Allowance (FSA)

FSA is paid when a servicemember must maintain two homes, one for himself, one for his dependents, when transportation of dependents to the PDS or a place near that station is not authorized, the dependents do not live near the PDS,²⁹ and adequate housing is not available to the member, and inadequate housing is not assigned him and his dependents.³⁰

26. Id. at (B)(2).

27. Id.

28. Id. at para. 30251(C).

29. Id. at para. 30313. "Near" the PDS is within 50 miles or one and one half hours drive of the PDS one way. Any questionable cases, where the dependents lives within 50 miles or one and one-half hours but access is otherwise difficult, are decided by the Commander, USAFAC. (C67 22 March 1982).

30. Id. at para. 30303 (C55 12 January 1979).

When a servicemember is in military confinement, FSA credit continues for up to 60 days.³¹ An additional payment of \$30 per month is authorized as FSA-R when the dependents do not live near the PDS, and transportation of the dependents is not authorized at government expense.³² FSA-R credit continues during the period the member is confined up to ETS.³³

Section C: Forfeitures

In most cases, forfeitures of pay and allowances may be applied at the time the sentence is approved—i.e. the money is withheld from pay and allowances sent to the member pending appellate review and final approval of the sentence.³⁴ If the sentence is set aside or overturned, the money may be released. If the forfeitures adjudged cannot be applied until the sentence is ordered executed,³⁵ the money is collected after the sentence is final. The treatment of forfeitures depends on the type of sentence, including length of confinement and type of discharge.

Forfeitures are a loss of entitlement to the pay concerned. They therefore take precedence over all debts, including fines.³⁶

Subsection 1: Sentence of Total Forfeitures and Confinement

(A) If the sentence as adjudged is approved by the convening authority, pay and allowances accrue. The forfeited money is withheld from the time the convening authority approves the sentence until the sentence is ordered executed, and then collected.³⁷

31. Id. at Table 3-3-2 Rule 11.

32. Id. at para. 30304 (C55 12 January 1979).

33. Id. at Table 3-3-3, Rule 3 (C66 9 December 1981).

34. Id. at para. 70501(e) (C62 12 Nov. 1980).

35. Id. at (f).

36. Id. at para. 70507 (C51 3 April 1978). Generally, forfeitures imposed by courts-martial are paid to the Soldiers' and Airmans' Permanent Fund. See para. 70511 (C50 19 December 1977).

37. Id. at para. 70505(b) (C51 3 April 1978) and at Table 7-5-2, Rules 1, 4 (C42 19 March 1976) and Table 7-5-3 Rules 1, 4 (C45 2 October 1976).

(B) If the forfeitures are deferred by the convening authority, all pay and allowances accrue and are paid to the prisoner until the sentence is ordered executed. The forfeitures are then collected from any pay and allowances which accrue after the sentence is ordered executed.³⁸

(C) (1) DD Suspended. If a dishonorable discharge is suspended, and the remainder of the sentence executed, pay and allowances accrue and are not paid, but are withheld until appellate review is complete. Forfeitures are collected when the sentence is executed.³⁹

(2) BCD Suspended

If a bad-conduct discharge is suspended and if the remainder of the sentence is executed, pay and allowances accrue until the BCD suspension is vacated, and the BCD is ordered executed. Since forfeitures are collected when the sentence is first executed, the member receives no pay between the time the BCD is suspended and the sentence is executed, and the time the vacated suspension is executed.⁴⁰

Subsection 2: Sentence of Partial Forfeitures and Confinement

(A) If the sentence as adjudged is approved by the convening authority, pay and allowances are paid to the service member, minus the amount forfeited which is withheld, then collected once the sentence is executed.⁴¹

(B) If the forfeitures are deferred, all pay and allowances are paid to the member until the sentence is executed. The amount forfeited is then collected.⁴²

(C) (1) DD Suspended/Enlisted Members. If a dishonorable discharge is suspended, if the remainder of the sentence is executed, and if the servicemember is an enlisted member, pay and allowances accrue but are

38. Id. at Table 7-5-2, Rules 2, 5, and Table 7-5-3, Rules 2, 5.

39. Id. at Table 7-5-2, Rules 3, 6.

40. Id. at Table 7-5-3, Rules 3, 6.

41. Id. at Table 7-5-2, Rules 7, 10. Table 7-5-3, Rules 7, 10 and at para. 70505(b).

42. Id. at Table 7-5-2, Rules 8, 11, Table 2-5-3, Rules 8, 11.

not paid until the end of appellate review and the execution of the sentence. All amounts accrued in excess of forfeitures are paid to the member at that time. Pay and allowances do not accrue for enlisted members while in confinement under a suspended dishonorable discharge after the date the sentence is affirmed and ordered executed.⁴³

(2) Dismissal Suspended/Officers

If a dismissal is suspended and the remainder of the sentence is executed and if the servicemember is an officer, pay and allowances do not end with the execution of the sentence, but accrue until ETS. Pay and allowances are not paid, however, until the end of appellate review and the execution of the sentence. All amounts accrued in excess of forfeitures are paid to the member at that time. After the sentence is executed, pay and allowances are paid to the officer, minus the amount forfeited.⁴⁴

(3) BCD Suspended

If a bad-conduct discharge is suspended and, if the remainder of the sentence is ordered executed, pay and allowances accrue unless the suspension of the BCD is vacated, and the BCD is ordered executed. They are paid to the servicemember, minus the amount forfeited. If the suspension is vacated, once the discharge is executed, no pay and allowances accrue.⁴⁵

Subsection 3: Sentence to Forfeitures and Discharge Only

(A) If the sentence as adjudged is approved by the convening authority, pay and allowances accrue until the sentence is finally approved or affirmed and ordered executed and are paid to the member until that time. The forfeitures are collected after the sentence is executed.⁴⁶

(B) If the sentence includes a DD or BCD that is suspended, pay and allowances accrue until the suspension is vacated and the discharge is ordered executed. Pay and allowances are paid to the servicemember at that time, minus the amount forfeited.⁴⁷

43. Id. at para. 70506 (C51 3 April 1978) and Table 7-5-2 Rules 9, 12.

44. Id. at Table 7-5-2, Rules 9, 12.

45. Id. at Table 7-5-3, Rules 9, 12.

46. Id. at Table 7-5-2 Rule 13, Table 7-5-3, Rule 13.

47. Id. at Table 7-5-2 Rule 14, Table 7-5-3, Rule 14.

Subsection 4: Sentence to Confinement Only

(A) If the sentence as adjudged is approved by the convening authority, pay and allowances accrue until ETS and are then paid to the member.⁴⁸

(B) (1) DD Suspended/Enlisted Member. If the sentence includes a dishonorable discharge that is suspended, if the remainder of the sentence is ordered executed, and, if the servicemember is an enlisted member, pay and allowances accrue and are paid until the sentence is ordered executed. Pay and allowances do not accrue beyond the date the sentence is approved or affirmed and ordered executed while an enlisted member is in confinement under a suspended DD.⁴⁹

(2) Dismissal Suspended/Officer

If the sentence includes a dismissal that is suspended, if the remainder of the sentence is ordered executed, and, if the servicemember is an officer, pay and allowances in excess of forfeitures accrue until ETS and are paid to the member as they accrue.⁵⁰

(3) BCD Suspended

If the sentence includes a BCD that is suspended and if the remainder of the sentence is ordered executed, pay and allowances accrue until the suspension is vacated and the BCD is ordered executed, and then are paid to the member.⁵¹

Subsection 5: Effect of New Trial or Rehearing

If a sentence to forfeitures is set aside or disapproved and a new trial or rehearing results in a new sentence to forfeitures, the servicemember is credited for any amount forfeited under the first sentence. The member is entitled to full pay and allowances from the period between

48. Id. at Table 7-5-2 Rules 15, 17 and Table 7-5-3 Rules 15, 17 and at paragraphs 10316, 10317.

49. Id. at Table 7-5-2 Rules 16, 18, and para. 70506.

50. Id. at Table 7-5-2 Rules 16, 18.

51. Id. at Table 7-5-3 Rules 16, 18.

the convening authority's action on the first sentence and his action on the subsequent sentence.⁵²

If a sentence to forfeitures is set aside or disapproved and if a new trial or rehearing is not ordered or a new trial or rehearing is ordered which results in no imposition of a sentence to forfeitures, the servicemember is entitled to the full pay and allowances he would have received had the first sentence not been executed, at the grade and rank he held prior to any reduction due to the first sentence.⁵³

Section D: Fines

Fines are a debt to the United States. They may be collected involuntarily from the current pay of enlisted members. They are collected after all other prior debts for the pay period have been collected, unless the prior debts total two-thirds of the member's pay for any month. If so, the fines may not be applied but are deferred until the member has enough pay for the fines to be applied.⁵⁴

Fines can be involuntarily collected from the final pay but not the current pay of officers.⁵⁵

Section E: Detentions of Pay

Detentions of pay can be withheld from the current pay of any member, regardless of rank. They are withheld after all other prior debts are collected, unless the prior debts total two-thirds of the member's pay for any month. If so, the detentions may not be withheld but are deferred until the member has enough pay for the detentions to be applied.⁵⁶

52. Id. at para. 70509(b)(1) (C50 19 December 1977).

53. Id. at para. 70509(A) and (B)(2).

54. Id. at para. 70507(B) (C51 3 April 1978).

55: Id.

56. Id. at para. 70507(C)

Section F: Summary of Entitlements of a Servicemember on Excess Leave

[Note: See also the sections on the individual entitlements and forfeitures].

- | | |
|---|--|
| (A) Basic Pay | not entitled ⁵⁷ |
| (B) Basic Allowance for subsistence (BAS) | not entitled ⁵⁸ |
| (C) Basic Allowance for Quarters (BAQ)
(no dependents) | not entitled ⁵⁹ |
| (D) Basic Allowance for Quarters (BAQ)
(with dependents) | up to 2 months, but not
entitled if on appellate
leave ⁶⁰ |
| (E) Family Separation Allowance | not entitled, as member
has no permanent station
to which he is assigned ⁶¹ |

PART II: TRAVEL AND TRANSPORTATION

Section A: Personal Transportation

(A) If the servicemember is discharged under less than honorable conditions but is not confined, he is entitled to travel and transportation allowances (including meal tickets) from the place of separation to the place from which he was ordered to active duty or to his home of record (the member's choice), by the least expensive mode of common carrier transportation available or by a payment of cash in an amount equal to the cost of the least expensive means of common-carrier transportation that could have been used.⁶²

57. Id. at para. 10306.

58. Id. at Table 3-1-1, Rule 3, and Table 3-1-6, Rule 3.

59. Id. at para. 30251(C).

60. Id. at para. 30251(C).

61. See id. at para. 30303 for qualification requirements, see also para. 10306.

62. Members of the Uniformed Services, Joint Travel Regulations § M5301 (C347 I November 1981) [hereinafter J.T.R.]. (The least expensive mode of transportation is usually by bus within CONUS, or by airplane from overseas).

(B) If the servicemember is released on parole or if released at the end of a sentence from the US Disciplinary Barracks or a detention facility, he is entitled to travel and transportation allowances (including meal tickets) by the least expensive means of common carrier transportation from the place of separation to the place at which the member was ordered to active duty or the member's home of record, or the place authorized as residence for the member as a parolee, or a cash payment equivalent to the cost of such transportation.⁶³

(C) If the servicemember is released on parole or at the end of a sentence from a confinement facility outside the United States, he is entitled to travel and transportation (including meal tickets) by the least expensive mode of common carrier transportation available from the place of confinement or the nearest US military facility to the place of confinement to the post of debarkation in CONUS (or another country) where the member entered active duty or to his home of record.⁶⁴ No provision is made for transportation from the post of debarkation to the home of record or place where the member entered active duty.

(D) If the servicemember is released on parole or at the end of a sentence from a civil confinement facility in the United States, including federal, state, county, or local facilities, he is not entitled to travel and transportation allowances.⁶⁵

(E) If the servicemember is traveling in connection with a disciplinary action (to a court-martial or to a place of confinement) government conveyance is used. If no government conveyance is available, transportation and meal tickets are used. If these are not available, the member will be reimbursed for his expenses for the actual mode of transportation used, although the government will not pay more than what it would cost them to procure this mode of transportation.⁶⁶

(F) The member can be transported to other than his home of record or the place at which he was ordered to active duty if:

63. Id. at § M5302.

64. Id. at § M5303.

65. Id. at § M5305.

66. Id. at § M5650 (C335 1 January 1981). Expenses for meals are limited by id. at § M2052-3 (C334 1 December 1980).

(1) the destination is approved by the commanding officer of his duty station (or other competent authority) and

(2) the cost to the government does not exceed the cost to either the home of record or the place ordered to active duty.⁶⁷

Section B: Transportation of Dependents

Subsection 1: Within the United States

Members of the military service who are transferred to a new permanent duty station (PDS) in general are entitled to transportation of dependents from the old duty station to the new permanent station.⁶⁸ There is no entitlement for members in grades E-4 (2 years of service or less) or below, so members reduced to an ineligible grade will not be able to receive transportation to the place of confinement for dependents.⁶⁹

As government housing is not provided the dependents of a prisoner in confinement at USDB or a detention facility, there is little reason to transport them to the new duty station (the place of confinement). No transportation is provided the dependents from the old duty station to any other location.

Subsection 2. Outside the United States

Any member without regard to rank or grade whose duty station is overseas, may request transportation of his dependents to CONUS, Alaska, Hawaii, Puerto Rico, or any other territory or possession of the United States if:

(A) the servicemember is discharged outside the US under other than honorable conditions,

(B) the servicemember is returned to the US for discharge under other than honorable conditions,

(C) the servicemember is sentenced to confinement in civilian or military facilities overseas,

67. Id. at § M5304.

68. Id. at § M7000 (C340 1 June 1981).

69. Id. at § M7000(1). Members serving outside the United States are entitled to transportation of dependents despite a grade reduction, see id. at §§ M7000(1) and M7107 (C340 1 June 1981) and Subsection 2, infra.

(D) the servicemember is returned to the US to serve a sentence at confinement in a civil or military confinement facility,

(E) the servicemember is sentenced to confinement in foreign civilian facilities,

(F) the servicemember is dropped, dismissed, sent to prison under a sentence, or transferred as a prisoner to a place of detention, or

(G) the servicemember is transferred to a different station to await trial by court-martial, or is a deserter or a straggler.

Provided that:

(A) his request is supported by a statement of the approving authority that the best interests of the government and of the dependents will be served by the return of the dependents to CONUS or other destination; and

(B) the transportation authorized is not for a distance greater than that from the member's last duty station to the place where he was ordered to active duty or his home of record.⁷⁰

The approving authority determines the designated place to which transportation is authorized, determines whether a reasonable relationship exists between the conditions and circumstances in each case, and determines the destination to which transportation is authorized.⁷¹

Dependents may also be returned to the United States for reasons of national interest,⁷² or if the dependent becomes involved in a situation embarrassing to the US, prejudicial to order, morale, or discipline in the command, or giving rise to such adverse public feeling that the safety of the dependent is in danger.⁷³

70. Id. at § M7103(2)(8).

71. Id.

72. Id. at § M7106 (C340 1 June 1981).

73. Id. at § M7102 (C 344 1 October 1981).

If the overseas servicemember is reduced to a grade previously ineligible for transportation of dependents (grade E-4 (2 years of service) or below), he is entitled to transportation for his dependents as if he were not reduced.⁷⁴

Section C: Household Goods.

In general, shipment of goods at government expense is only available for members stationed overseas.

Subsection 1. Separation from Service under less than Honorable Conditions or Sentenced to Confinement Within the United States.

If the servicemember is separated from the service under less than honorable conditions or is separated under a punitive discharge or is sentenced to confinement, he is not entitled to shipment of household goods (HHG) (subject to subsections 2 and 3, infra) and not entitled to non-temporary storage of his HHG, if the discharge or court-martial occurs in the United States.⁷⁵ The servicemember must arrange to transport his HHG to his destination himself. If not moved, the goods will be removed from government quarters and stored by the government for up to six months. They will then be disposed of. If the servicemember is unable to arrange for shipment himself, he should give a written power of attorney to a friend, next of kin, legal representative, or mover to transport the items. No form is necessary for this, as a signed letter authorizing the designee to move or supervise a move will suffice.

74. Id. at § M7107 (C 340 1 June 1981). § M7000 authorizes the return transportation of dependents of overseas servicemembers of all grades. Prior to 17 October 1978, dependent travel was limited to grade E4 with over two years of service, thus the provisions of § M7107 provide an entitlement for those individuals serving overseas as of the date of amendment to § M7000.

75. Id. at § M8261 (C347 1 January 1982).

Subsection 2: Separation Under less than Honorable Conditions,
Outside US, Dependents Transported.

[Note: If dependents are not transported from overseas to be the United States, see Subsection 3 below].

If an overseas servicemember is separated from the service under less than honorable conditions or with a punitive discharge, he is entitled to shipment of household goods, but not for a distance greater than that from his last or former PDS to his home of record or to the place at which he was ordered to active duty.⁷⁶

If the servicemember is at grade E-4 (2 years of service or less) or lower (including reduced grade), he can ship at the E-4 (over 2 years of service) weight allowance. The member is not entitled to non-temporary storage of his goods if he is of rank E-4 (2 years of service or less) or below.⁷⁷

Shipment is only authorized for a distance no greater than that from the member's last or former duty station to his home of record or the place of entry on active duty. The dependents, or some other agent of the member, must transport any additional distance at the member's expense.⁷⁸

Subsection 3: Separation Under Less than Honorable Condition Outside U.S. and Dependents Not Transported; or Sentenced to Confinement Outside of the United States.

If the servicemember's duty station is outside the United States when sentenced or discharged/dismissed and his dependents are not transported at government expense, he is entitled to shipment if one of the following conditions apply:

76. Id. at § M8303 (C344 1 October 1981) the member must be entitled to transport his dependents under § M7103 of the Members of the Uniformed Services, Joint Travel Regulations. See text at note 69, supra.

77. Id. at § M8303.

78. Id.

(A) the servicemember is discharged outside of the United States under less than honorable conditions,

(B) the servicemember is returned to the United States for discharge under less than honorable conditions,

(C) the servicemember is sentenced to confinement in a civil or military confinement facility overseas,

(D) the servicemember is returned to the United States to serve a sentence in a civil or military confinement facility,

(E) the servicemember is sentenced to confinement in foreign civil confinement facilities,

(F) the servicemember is dropped, discharged, sent to prison under a sentence, or transferred as a prisoner to a place of detention, or

(G) the servicemember is transferred to a different station to await court-martial, or is a deserter, or a straggler.⁷⁹

If any of these categories apply to the servicemember, he may ship his HHG at the weight allowance at his grade at return or at his grade when ordered to duty outside the US, whichever is greater. This means that an E-4, for example, sent overseas who is promoted to E-5, but reduced in rank to grade E-1 pursuant to a sentence of court-martial, may ship his goods at the E-1 weight limit or the E-4 limit, but not at the E-5 weight limit.⁸⁰

Shipment is limited to the distance from the duty station to the home of record or the place at which the member was ordered to active duty. The member must arrange for shipment of any greater distance at his own expense.⁸¹

79. Id. at § M8261.

80. Id.

81. Id.

If a member who has previously shipped his HHG at government expense is not discharged but returns to duty following confinement, he is not entitled to shipment of his goods to his new permanent duty station at government expense.⁸²

Subsection 4: Shipment of a Privately Owned Vehicle.

If the member whose duty station is in CONUS is discharged or if he is sentenced to confinement he is not entitled to shipment of a privately owned vehicle (POV) at government expense, as entitlement is limited to transfers to, from or between overseas duty stations.⁸³

If the servicemember is discharged or sentenced to confinement outside of the United States, he is entitled to shipment of a POV if he fits into one of the following categories:

(A) the servicemember is discharged outside of the United States under less than honorable conditions,

(B) the servicemember is returned to the United States for discharge under less than honorable conditions,

(C) the servicemember is sentenced to confinement in a civil or military confinement facility overseas,

(D) the servicemember is returned to the United States to serve a sentence in a civil or military confinement facility,

(E) the servicemember is sentenced to confinement in foreign civil confinement facilities,

(F) the servicemember is dropped, discharged, sent to prison under a sentence, or transferred as a prisoner to a place of detention, or

(G) the servicemember is transferred to a different station to await court-martial, or is a deserter, or a straggler.⁸⁴

82. Id.

83. See id. at § M11002 (C347 1 January 1982) and para. 12-6 Army Reg. 55-71, Travel and Transportation, Transportation of Personal Property and Related Services (1 June 1980).

84. J.T.R., op. ct. at § 11002.

The POV can be shipped to a port in the United States normally serving the location to which the member is assigned. The member must have been of a grade or rank entitled to shipment of a POV when ordered to duty outside of the United States to be entitled to shipment under these conditions.⁸⁵ Shipment is limited to one vehicle.⁸⁶

Subsection 5: Shipment of a Mobile Home.

Shipment of a mobile home is only authorized within the United States and not from overseas to CONUS. It is also only authorized when the member is otherwise entitled to shipment of household goods at government expense. As such, members sentenced by a court-martial or discharged under less than honorable conditions are not entitled to shipment of a mobile home at government expense.⁸⁷

Subsection 6: How to Apply for Household Goods Shipment.

Form DD 1299 (Application for Shipment and/or Storage of Personal Property) and Form DD 1701 (Inventory of Household Goods) should be filed with the Transportation Officer at the member's duty station. The Transportation Officer should be consulted concerning the distances to which shipment is authorized, the location to which the household goods will be shipped, and the date they will arrive. Above all, the member should provide the name of the person to whom the goods will be shipped, or any person authorized to take the goods from the shipping personnel at the port serving the new PDS.

If the member is unable to file these forms with the transportation officer, a dependent, relative, friend, or legal representative, with a power of attorney, may do so.

If the household goods are to be shipped with the dependent, a copy of the dependent's travel orders should be provided to the transportation officer. A copy of the member's travel orders should also be provided, unless those of the dependent refer to the member's orders.

85. 1 Members of the Uniformed Services, Joint Travel Regulations § M11002(10) (C326 1 April 1980).

86. Id. at § M11002(1) (C347 1 January 1982).

87. Id. at § M1000 (C344 1 October 1981).

Section D: Private Shipment.

If the member must make his own shipping arrangements, he should do so within six months after his departure from the old duty station. If the member is not entitled to non-temporary storage of his goods, the goods will not be stored over six months by the government. A relative, friend, legal representative, or other organization (including the actual moving company) should be given a power of attorney to be allowed by the government to remove the HHG from government property. (No form for this is needed - a signed letter will suffice.)

Section E: Excess Leave.

A member on excess leave pending appeal has no entitlement to shipment of household goods, or a privately owned vehicle if he is removed from active duty within the United States. Shipment of goods and transportation of dependents from outside the United States is authorized if under the conditions described in Section C, Subsections 2 and 3, supra.

CHAPTER FOUR: COLLATERAL ATTACK OF COURT-MARTIAL CONVICTIONS

This chapter discusses the grounds on which a court-martial conviction may be collaterally attacked in a civilian court and provides an overview of the general principles governing collateral attacks on court-martial convictions.

PART 1: COLLATERAL ATTACK GENERALLY

The Supreme Court has repeatedly recognized that, out of necessity, military law is a "jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."¹ Congress has not "deemed it appropriate to confer on [the Supreme] Court 'appellate jurisdiction to supervise the administration of criminal justice in the military.'"² However, a court-martial conviction may be amenable to collateral attack in a federal court if its acts are not "within the scope of its jurisdiction and duty."³ When collaterally attacking a court-martial conviction, a petitioner is seeking a declaration that the judgment is void.⁴ This means that

the judgment must be deemed without res judicata effect: because of lack of jurisdiction or some other equally fundamental defect, the judgment neither justifies nor bars relief from its consequences.⁵

1. Schlesinger v. Councilman, 420 U.S. 738, 746 (1975), citing Burns v. Williams, 346 U.S. 137, 140 (1953). For a more elaborate discussion of collateral attack of court-martial conviction see generally, Peck, The justices and the generals: The Supreme Court and Judicial Review of Military Activities, 70 Mil.L.Rev. 1 (1975); Strassberg, Civilian Justice, 66 Mil.L.Rev. 1 (1974).

2. Schlesinger v. Councilman, 420 U.S. at 746, citing Noyd v. Bond, 395 U.S. 683, 694 (1969). The Department of Defense, however, has recently proposed legislation which would allow direct review of court-martial convictions by the United States Supreme Court.

3. Id.

4. Id.

5. Id. at 747.

The most common form of collateral attack on court-martial convictions has been and remains the habeas corpus procedure.⁶ Federal courts will review military "determinations" and court-martial convictions "by way of an application for a writ of habeas corpus to insure that rights guaranteed by the constitution or by military regulations are protected."⁷

When civilian judicial review of a military court-martial concerns protection of individual constitutional rights, the duty of federal civil courts to protect these rights is not diminished merely because a judicial proceeding has been conducted by the military.⁸

Likewise, the Supreme Court has said

[The] grounds upon which military judgment[s] may be impeached collaterally are not necessarily invariable Lacking a clean statement of congressional intent one way or the other, the question whether a court-martial judgment properly may be deemed void ... may turn on the nature of the alleged defect, and the gravity of the harm from which relief is sought.⁹

PART 2: THE SCOPE OF HABEAS CORPUS

The general rule for habeas corpus proceedings attacking actions of military courts-martial is that "the scope of a civilian court's review of military proceedings should be limited to a rather narrow area."¹⁰ A civilian court is empowered to look into the "elementary matters of a

6. Id.

7. *Vallecillo v. David*, 360 F.Supp. 896, 900 (D.N.J. 1973).

8. Id.

9. *Schlesinger v. Councilman*, 420 U.S. at 753.

10. *DeCoster v. Madigan*, 223 F.2d 906, 909 (7th Cir. 1955).

court-martial's jurisdiction" over an accused and "the offense charged and its power to impose the sentence awarded."¹¹ However, the permissible scope of federal civilian court review of court-martial convictions has been expanded beyond this traditional view.

The principles to be applied in determining whether a military decision is reviewable can be summarized as follows: A civilian court should not review "internal military affairs" unless it is alleged that there has been a deprivation of a constitutional right or that the military has acted in violation of applicable statutes or its own regulations.¹² In addition, it must be shown that military corrective measures have been exhausted.

When presented with a sufficient allegation, a federal district court is under an obligation to examine the substance of that allegation, using the stated policy reasons behind the general rule that military courts-martial convictions are nonreviewable.¹³ In making such an examination, four factors must be considered:

- (A) The nature and strength of the plaintiff's challenge to the military determination.
- (B) The potential injury to the plaintiff if review is refused.
- (C) The type and degree of anticipated interference with the military function.
- (D) The extent to which the exercise of military expertise or discretion is involved.¹⁴

Generally speaking, court-martial convictions alleged to involve errors of constitutional proportion have consistently been held to be subject to collateral attack by means of habeas corpus review.

11. Id.

12. *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971); *Cushing v. Tetter*, 478 F.Supp. 960 (D.R.I. 1979).

13. *Mindes v. Seaman*, 453 F.2d at 201.

14. Id.

As a general rule, a writ of habeas corpus is designed to secure the release by judicial decree of persons who are "restrained of their liberty or kept from the control of persons entitled to their custody."¹⁵ An actual or physical restraint is usually required to justify interference by habeas corpus.¹⁶

However, at least one federal circuit court has held that the fact that a petitioner has not been imprisoned does not eliminate the possibility of a collateral attack via a habeas corpus petition. A petitioner who received a dishonorable discharge with no imprisonment was able to collaterally attack his conviction because a dishonorable discharge can cause "lasting, serious harm in civilian life."¹⁷

The habeas corpus petitioner has the burden of proof to establish his right to the relief sought by a "fair preponderance of all the credible evidence and from the reasonable deductions and inferences which can be drawn therefrom."¹⁸

Habeas corpus proceedings may also be used to test the jurisdiction of the military to detain a member of the military.¹⁹

Another type of collateral attack in federal court is mandamus. Where the military violates its own regulations and in so doing fails to perform a "clear cut duty imposed" by the regulation, a writ of mandamus may be issued to compel the fulfilling of the obligation.²⁰ Federal courts have jurisdiction

"to review procedures employed by the military to determine if they comport with the requirements of procedural due process in light of the context in which the procedures operate."²¹

15. 39 Am. Jur. 2d, Habeas, Corpus, § 8 (1968), citing Parker v. Ellis, 362 U.S. 574 (1959).

16. Id. at § 25.

17. Hathaway v. Secretary of the Army, 641 F.2d 1376, 1380 (9th Cir. 1981), citing Schlesinger v. Councilman, 420 U.S. at 752.

18. Vallecillo v. David, 360 F.Supp. at 898.

19. Id. at 897

20. Id. at 900.

21. O'Mara v. Zebaowski, 447 F.2d 1085, 1088 (3d Cir. 1971).

PART 3: EXHAUSTION OF MILITARY REMEDIES

Section A: Exhaustion Generally

An essential element in any successful collateral attack on a military conviction is that the petition for extraordinary relief should not be entertained by federal civilian courts until "all available intra-service corrective measures have been exhausted."²² The necessity that a petitioner exhaust all the available military remedies before he petitions for a writ of habeas corpus in the federal civilian courts is well established in the opinions of the various federal courts that have addressed the issue.

The Supreme Court, in Gusik v. Schilder,²³ stated the following general rule as to the exhaustion of all available military remedies:

[t]he general rule [is] that habeas corpus petitions from military prisoners should not be entertained by federal civilian courts until all available remedies within the military court system have been invoked in vain.²⁴

The policy underlying this rule is that "any interference by the federal court may be wholly needless [, as t]he procedure established to police errors of the tribunal whose judgment is challenged may be adequate for the occasion."²⁵

The principle of exhaustion is not a suspension of the writ of habeas corpus. It is a procedure by which the filing of a writ of habeas corpus is deferred "until other [military] corrective procedures are shown to be futile."²⁶

22. Adkins v. United States Navy, 507 F.Supp. 891, 895 (S.D. Texas 1981).

23. 340 U.S. 128 (1950).

24. Scott v. Schlesinger, 498 F.2d 1093, 1096 (5th Cir. 1974).

25. Gusik v. Schilder, 340 U.S. at 132.

26. Id.

The extraordinary remedy of mandamus is not appropriate where other avenues of relief are available (such as in the Court of Claims and Court of Military Appeals).²⁷

A plaintiff challenging a military discharge will find the doors of two federal courts closed pending exhaustion of available administrative remedies.²⁸

The principle of exhaustion of appellate and administrative remedies also applies to petitioners for mandamus a mere assertion of a constitutional violation is not sufficient to warrant a writ of mandamus; the error must be one that is not correctable by normal appellate processes.²⁹

Section B: Exceptions to Exhaustion Requirement

Subsection 1: Futility

At least two federal courts limited the exhaustion of all available remedies doctrine to cases where the outcome would not be predictably futile.³⁰

In the situation in which a new constitutional right or rule has been formulated subsequent to the completion of regular proceedings in the military courts,

[t]he interests served by the exhaustion requirement can be fully satisfied by requiring that the subsequently identified claim first be presented to the military courts if a means, such as post-conviction relief, exists for doing so.³¹

27. *Parrish v. Seamans*, 485 F.2d 571 (4th Cir. 1973).

28. *Diliberti v. Brown*, 583 F.2d 950, 951 (7th Cir. 1978).

29. *Oswald v. McGarr*, 620 F.2d 1190 (7th Cir. 1980).

30. *Dooley v. Ploger*, 491 F.2d 608 (4th Cir. 1974).

31. *Gosa v. Mayden*, 413 U.S. 665, 715 (1973).

But if it is obvious that the military courts will reject the subsequently identified constitutional claim, the post-conviction "resort to the military courts would, of course, be futile and is therefore unnecessary."³²

It is important to note that a constitutional issue may be waived in "the course of a court-martial proceeding as well as in a civil court."³³

Subsection 2: "Deliberate Bypass" Test

The doctrine of deliberate bypass, or waiver, is complementary to exhaustion of remedies. Under either doctrine, a petitioner challenging the validity of his restraint must exhaust all the state and military remedies available before seeking federal collateral relief.³⁴ However, the failure to use military remedies "unavailable at the time collateral relief is sought bars any such relief only if the failure was a deliberate bypassing of those remedies."³⁵

The test to be applied for such deliberate bypass or waiver is "an awareness of the availability of a state³⁶ [or military] remedy and a decision not to use it made by the petitioner himself."³⁷ There must be a clear avoidance of the adjudication by the military court made deliberately by the petitioner.³⁸ This deliberate bypass, or waiver, can take the form of a failure by petitioner's counsel to make appropriate objections at the court-martial.³⁹

32. Id.

33. *Marymont v. Joyce*, 352 F.Supp. 547, 552 (W.D. Ark., 1972).

34. *Angle v. Laird*, 429 F.2d 892, 894 (10th Cir. 1970).

35. Id.

36. *Watkins v. Crouse*, 344 F.2d 927 (10th Cir. 1965) (non-military appellant confined in Kansas State Penitentiary).

37. *Angle v. Laird*, 429 F.2d at 894, citing *Watkins v. Crouse*, 344 F.2d 927.

38. Id.

39. Id.

A servicemember convicted by a military court may petition for federal habeas corpus "on the basis of a claim which he failed to raise before the military courts because he either was unaware of or did not otherwise willingly fail to raise that claim."⁴⁰

As with state petitioners, the integrity of the exhaustion requirement is adequately protected by a rule prohibiting a deliberate bypass of an available military tribunal. A more stringent rule would serve only to bar presentation of valid federal claims without any countervailing justification for doing so.⁴¹

PART 4: PRACTICAL CONSIDERATION FOR DEFENSE COUNSEL

To assist in later collateral attack of a court-martial conviction based on constitutional error, trial defense counsel should preserve the error by clearly raising it at trial. Even errors described as meritless by military courts should be considered, as they may find a more favorable hearing in federal district court. Trial defense counsel's responsibility to the accused includes preserving constitutional errors for collateral attack in federal court. The failure to do so could conceivably leave trial defense counsel open to an allegation of malpractice. Of course, this consideration must be balanced against tactical considerations and the "futility" exception discussed above.

The doctrine of exhaustion makes it imperative that appellate defense counsel advise their clients to exhaust their military appellate remedies, i.e. file a petition for grant of review with the Court of Military Appeals, to insure that they may later collaterally attack their conviction. Advising appellants to exhaust their post-appellate administrative would also be appropriate.⁴² This would remove any possibility that a petition for federal habeas corpus would be unsuccessful on the grounds that appellant had failed to exhaust all available military remedies.

PART 5: CONCLUSION

In conclusion, it is important to keep in mind that while federal district courts have no appellate jurisdiction with respect to a court-martial decision, they do have the power to "correct a deprivation of

40. Gosa v. Mayden, 413 U.S. at 714.

41. Id.

42. Gusik v. Schilder, 340 U.S. at 132.

any basic constitutional right by a court-martial."⁴³ If a factual determination is involved, however, the federal court's inquiry is usually restricted to the issue of whether the military court gave "full and fair consideration to the constitutional issues."⁴⁴

It is particularly important for defense counsel to keep in mind that a constitutional question may be waived in the course of a court-martial proceeding,⁴⁵ that as a general rule habeas corpus petitions from military prisoners should not be considered by federal courts until all the available remedies within the military court system have been exhausted,⁴⁶ and that the doctrine of deliberate bypass, or waiver, allows a petitioner to collaterally attack a court-martial conviction even having bypassed an available remedy if he was unaware of the claim or did not willingly fail to raise it.⁴⁷

43. *Marymont v. Joyce*, 353 F.Supp. at 132.

44. *Id.*, citing *Kennedy v. Commandant*, 377 F.2d 339, 342 (10 Cir. 1967).

45. *Marymont v. Joyce*, 352 F.Supp. at 552.

46. *Adkins v. United States Navy*, 507 F.Supp. at 895.

47. *Angle v. Laird*, 429 F.2d at 892.

EVENT	DATE OF COURT-MARTIAL	APPELLATE REVIEW	END OF APPELLATE REVIEW	CONFINEMENT	DATE OF RELEASE ON PAROLE	PAROLE	DATE OF END OF SENTENCE	EXCESS LEAVE	DATE OF DISCHARGE	YEARS AFTER DISCHARGE/DISMISSAL	NO LIMIT	
										3 YEARS	15 YEARS	18 YEARS
CLEMENCY												
T.J.A.G. Other than Discharge ART 74 UCMJ (UPGRADE)		↑										
SECARM ART 74 UCMJ (Other than Discharge Upgrade)					↑							
ARMY CLEMENCY BOARD					↑							
PRESIDENTIAL PARDON										1.	↑	
DISCHARGE UPGRADING												
ARMY DISCHARGE REVIEW BOARD											↑	
ARMY BOARD FOR CORRECTION OF MILITARY RECORDS										2.	↑	3.
ARMY CLEMENCY BOARD						↑						
SECARM												↑
T.J.A.G.		↑								2. ROUTINELY WAIVED	3. Three years after exhaustion of other administration remedies.	

EVENT	DATE OF COURT-MARTIAL	APPELLATE REVIEW	END OF APPELLATE REVIEW	CONFINEMENT	DATE OF RELEASE ON PAROLE	PAROLE	DATE OF END OF SENTENCE	EXCESS LEAVE	DATE OF DISCHARGE	YEARS AFTER DISCHARGE/DISMISSAL				NO LIMIT	
										3 YEARS	15 YEARS	18 YEARS			
CLEMENCY															
T.J.A.G. Other than Discharge ART 74 UCMJ (UPGRADE)		↑													
SECARM ART 74 UCMJ (Other than Discharge Upgrade)				↑											
ARMY CLEMENCY BOARD					↑										
PRESIDENTIAL PARDON															1. ↑
DISCHARGE UPGRADING															
ARMY DISCHARGE REVIEW BOARD															↑
ARMY BOARD FOR CORRECTION OF MILITARY RECORDS															2. ↑
ARMY CLEMENCY BOARD															3. ↑
SECARM															
T.J.A.G.		↑													3. Three years after exhaustion of other administration remedies.