

**Gender Justice – Fall 2017
Columbia Law School
Professor Katherine Franke**

IV. Gendering Violence and Trauma

November 27th – Guest Speaker – Sara Darehshori, Senior Counsel, US Program, Human Rights Watch

- Human Rights Watch, Report: *Embattled: Retaliation against Sexual Assault Survivors in the US Military*. (2015).
- Human Rights Watch, Report: *Booted: Lack of Recourse for Wrongfully Discharged US Military Rape Survivors*. (2016).



HUMAN
RIGHTS
WATCH

EMBATTLED

Retaliation against Sexual Assault Survivors in the US Military



Detailed Recommendations for the Department of Defense

Regarding Special Victim Counsel (SVC) and Victims' Legal Counsel (VLC):

Human Rights Watch research indicates that the Department of Defense's Special Victims Counsel/Victims Legal Counsel (SVC/VLC) programs have made a significant and positive difference in the experience of survivors who report sexual assaults. Counsel play a critical role in ensuring that survivors have information about the criminal justice process, have their voices heard in key proceedings affecting their rights, and have an advocate to help them respond to threats of retaliation.

Marine Sergeant Williams¹ called her Victim Legal Counsel her “guardian angel” who supported her and put her own reputation and career on the line to help her through the legal process.² Air Force Master Sergeant Clark told Human Rights Watch that only consulting with an SVC had made her consider converting her restricted (confidential) report of a sexual assault into an unrestricted one.³ She described the role of the SVC: “They [the military officials] want you to jump into this pool and the SVC is the person who is supposed to make sure you come up for air.”⁴ Another survivor, Marine Corporal Miller said that she consulted with a VLC who spoke to her about making her report unrestricted and then came through on his assurances that he would pursue an immediate expedited transfer. “I showed up and he moved the mountains for me,” Miller said.⁵

¹ Given the sensitive nature of the topic and confidentiality concerns expressed by many interviewees, all survivors names have been randomly assigned pseudonyms.

² Human Rights Watch telephone interview with Sgt Leslie Williams, January 9, 2015.

³ Human Rights Watch telephone interview with MSgt Kelly Clark, November 5, 2014.

⁴ Ibid.

⁵ Human Rights Watch telephone interview with Cpl Emma Miller, January 27, 2015. The client of an Army SVC also wrote that she was “proud to be part of the same service” as her SVC and “would not have made it through the process” without her SVC's support. Email communication from [name withheld] to [name withheld]; December 22, 2014, on file at Human Rights Watch.

We include the following recommendations in order to strengthen a promising program and ensure that it is utilized to its full potential. The National Defense Authorization Act for Fiscal Year 2014, which directed the creation of Special Victims' Counsel programs, indicated that the types of legal assistance provided by SVCs to victims could include a range of functions, from accompanying them at proceedings related to the military investigation or prosecution of the offense, to advising them on their eligibility for medical services.⁶ Many of these functions are directly related to the criminal justice process, and the secretary of defense instructed the services to establish programs to provide such assistance "throughout the justice process."⁷ However, Congress also gave the Secretary of Defense the authority to permit other types of legal assistance.⁸

Human Rights Watch encourages the Secretary to use this authority to take a more expansive approach because much of the legal assistance that sexual assault victims need, however, is not tied to the justice process. In fact, because many assaults are not prosecuted, victims often do not go through the entire justice process. Moreover, as we have documented, their problems may extend long after any investigation is over.

The Services have recognized this in the course of implementing the SVC/VLC programs, and many SVCs and VLCs provide a wide range of advocacy services depending on the needs of survivors.⁹ In our research, we heard of SVCs and VLCs assisting in many ways outside the courtroom: from negotiating with a landlord to get a victim out of a lease so she could transfer to a new duty station, to working with commanders to find suitable alternate duties for survivors who need to change their workplaces.

We encourage the Department of Defense to support this work: sexual assault affects many dimensions of victims' lives, both during and long after the criminal justice process concludes. The scope and duration of their representation should reflect this reality.

⁶ National Defense Authorization Act for Fiscal Year 2014, Pub.L. 113-66, sec. 1716. <http://www.gpo.gov/fdsys/pkg/PLAW-113publ66/html/PLAW-113publ66.htm> (accessed April 22, 2015).

⁷ Secretary of Defense, "Sexual Assault Prevention and Response," memorandum to the secretaries of the military department, August 14, 2013, http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf.

⁸ National Defense Authorization Act for Fiscal Year 2014, section 1716.

⁹ Human Rights Watch group interview with Navy VLCs, Jacksonville, FL, December 10, 2014; Human Rights Watch group interview with Air Force SVCs, Washington, DC, December 4, 2014.

1. *Improve outreach about SVCs so that survivors are more aware of the services they offer and have access to them before reporting to investigators.*

Those who have SVCs or VLCs have expressed satisfaction with their service, but many are unaware that they exist and what their function is. Lawyers estimate that when they give a presentation to large groups of service members “at least half” the people there have not heard of them.¹⁰ Though victims are required to be informed of their right to a lawyer, that requirement may be fulfilled by giving the victim a pamphlet, and it may be “one of five pamphlets” handed to them.¹¹ Though SVCs would like to do more outreach, they do not have time. As one Air Force SVC explained, they do outreach but are prevented from doing as much as they would like because of their workload.¹²

SVCs and VLCs told Human Rights Watch that their clients come to them at different points in the process, and often after the survivors have had their first interviews with law enforcement.¹³ This means that many survivors lack representation to protect their rights in the first stage of the legal process.

During the first interview with law enforcement many of their interests may be compromised: in describing the circumstances of the assault they may admit to prohibited activities, such as underage drinking, creating the possibility that they will face charges or disciplinary action; they may waive the confidentiality of their medical records or may agree to other requests, such as turning over all of the data on their cell phones, that could compromise their privacy.

SVCs are equipped to ensure that when survivors cooperate with law enforcement that they do so in a way that protects their rights, for example, by ensuring that the requests for information are narrowly tailored.

2. *Require investigators to have victims speak with an SVC/VLC before waiving any right or beginning an investigative interview.*

Current policy requires that most military criminal investigative organizations inform sexual assault victims of their right to speak with an SVC/VLC prior to beginning an

¹⁰ Human Rights Watch telephone interview with Air Force SVC #1, June 19, 2014; Human Rights Watch group interview with Navy VLCs, Jacksonville, FL, December 11, 2015.

¹¹ Human Rights Watch telephone interview with Marine Corps VLC #1, January 5, 2015.

¹² Human Rights Watch group interview with Air Force SVCs, Washington, DC, December 4, 2014.

¹³ Ibid., Human Rights Watch group interview with Navy VLCs, Jacksonville, FL, December 10, 2014.

interview.¹⁴ However, as some SVCs told Human Rights Watch, there is a difference between notification and a proactive duty to ensure consultation happens before any rights are waived or an investigative interview commences.¹⁵ The nature of that notification varies, with some victims reporting that the notification they received was cursory.

Marine Leslie Williams said Navy Criminal Investigative Service (NCIS) agents told her, “By the way, if you want an attorney you can have one.” She said they “didn’t initially talk about all the ways that a VLC could be helpful... that there would be all this legal jargon, all this stuff you won’t be able to do anything about.”¹⁶ Some SVCs speculated that some victims might not understand why they would need a lawyer and, without further information, would view it as an impediment or be afraid that requesting one would signal some wrongdoing on their part.¹⁷

One survivor told us when OSI informed her of the SVC program they “made it sound like ‘you have done something wrong, you need a lawyer.’”¹⁸ In fact, the SVCs themselves are best placed to tell victims about the services they provide and ensure that victims make a fully informed decision about whether to accept representation.¹⁹

3. Require the services to provide victims with SVC/VLC consultation prior to an administrative discharge.

Whether due to pressure from others to leave the military following a sexual assault, or due to their own desire to leave the military behind, many survivors are under a considerable amount of pressure when they are going through the administrative separation process and may also be suffering from trauma caused by the sexual assault or experience of retaliation.

Human Rights Watch heard from survivors who accepted discharges without fully understanding the ramifications that an administrative discharge or the discharge

¹⁴ Army Criminal Investigative Command (CID) and Navy Criminal Investigative Service (NCIS) testified before the Judicial Proceedings Panel that they were required to inform victims of their right to an attorney at the beginning of their interview; Air Force Office of Special Investigations (AFOSI) testified that they are required to do so “during the interview” but not necessarily at the beginning.

¹⁵ Human Rights Watch group interview with Air Force SVCs, Washington, DC, December 4, 2014.

¹⁶ Human Rights Watch telephone interview with Sgt Leslie Williams, January 9, 2015.

¹⁷ Human Rights Watch group interview with Air Force SVCs, Washington, DC, December 4, 2014.

¹⁸ Human Rights Watch telephone interview with Amn Lena Stewart, November 17, 2014.

¹⁹ Implementing this recommendation would require clarification that this consultation would not constitute solicitation of clients, which is prohibited by SVC policies.

characterization (e.g. Honorable, General, Other than Honorable, Bad Conduct, or Dishonorable) would have for them in terms of their eligibility for benefits or how they would be perceived by future potential employers.²⁰ In the aftermath of trauma, survivors may also not be in the best position to challenge their superiors. As one lawyer said, if a service member is “threatened with a charge of adultery,” or if the alternative is being in a unit with the perpetrator, they may be willing to accept an unfavorable discharge just to “get out quickly.”²¹

A General Discharge Under Honorable Conditions may not sound bad, but in fact means the survivor may be deprived of some rights and privileges available to honorably discharged veterans and “may encounter some prejudice in situations in which the characterization of service may have a bearing.”²² Having legal representation is critical to preventing irreparable damage.

Victims’ counsel reported being able to upgrade a general discharge to honorable after explaining to command the reasons for the victims’ self-destructive behavior following their assault, which had important consequences for benefits.²³ Army Captain Sommer testified before the Judicial Proceedings Panel that he was able to negotiate an honorable discharge for a survivor facing a misconduct discharge for drug use related to the trauma of the sexual assault.²⁴ Captain Sommer testified, “At a time when a different decision could have set this young man on a very different path, the Army took care of one of its own and that was something that was facilitated through the SVC Program.”²⁵ However, by the time of discharge, many victims may no longer have counsel assigned to them, because officially the SVC is assigned to enhance victims’ rights in the criminal justice process.²⁶

²⁰ Human Rights Watch telephone interview with SN Mindy Lee, November 3, 2014.

²¹ Human Rights Watch telephone interview with military law practitioner, May 7, 2014.

²² Notification of Intent to Discharge, October 29, 2013, on file at Human Rights Watch.

²³ Human Rights Watch telephone interview with Marine VLC #1, January 5, 2015; Human Rights Watch telephone interview with Army SVC #1, December 9, 2014; Human Rights Watch interview with Army SVC #6, February 5, 2015; Human Rights Watch interview with Army SVC #7, February 5, 2015.

²⁴ Army CPT Jesse Sommer, The Fourth Public Meeting of the Judicial Proceedings Panel, Arlington, VA, November 14, 2014, transcript p. 197, http://jpp.whs.mil/Public/docs/05-Transcripts/20141114_Transcript_Final.pdf (accessed April 29, 2015).

²⁵ Army CPT Jesse Sommer, The Fourth Public Meeting of the Judicial Proceedings Panel, Arlington, VA, November 14, 2014, transcript p. 198, http://jpp.whs.mil/Public/docs/05-Transcripts/20141114_Transcript_Final.pdf (accessed April 29, 2015).

²⁶ The SVC/VLC-client relationship generally terminates when the criminal case is concluded. See Special Victim Counsel Programs –Victim Services Comparison chart, based on JPP RFI set 1, November 6, 2014, http://jpp.whs.mil/Public/docs/03_Topic-Areas/04-SVC_VictimAccess/20141212/19_SummaryChart_SVCProgramData.pdf.

4. *Strengthen capacity of SVCs to respond to retaliation in different forms and expand access to their services.*

Human Rights Watch found that many SVCs and VLCs are actively working to address professional and social retaliation, with great effect. On the professional side, Human Rights Watch was told of cases in which counsel successfully persuaded command to take into account the victim's mitigating circumstances. For example, an Army SVC appealed an evaluation that overly emphasized collateral misconduct of a victim resulting in an investigation into the battalion commander who prepared the evaluation.²⁷ **This type of work is essential to combatting retaliation and Human Rights Watch recommends that the Department of Defense and the services reinforce such work by incorporating advocacy to address retaliation explicitly into the descriptions of the scope of SVC representation.**

Some SVCs/VLCs also assist their clients when the retaliation requires going to the Inspector General or filing a congressional complaint. With the exception of the Air Force, the heads of the service SVC/VLC programs told Human Rights Watch that they do allow the SVCs/VLCs to assist with these complaints.²⁸ Only the Air Force explicitly does not allow its Special Victim Counsel to assist with Inspector General complaints because it is regarded as a conflict of interest.²⁹ Human Rights Watch received some indication that a revision of the policy was under consideration. Other advocates who work with survivors said that SVCs/VLCs in other branches had told them they were not able to help with IG complaints,³⁰ indicating a need for clear guidance on this issue.

Legal assistance may be particularly helpful as IG complaints are legally complex. The criteria necessary to meet the standard to trigger a whistleblower investigation may be difficult for a service member to understand. Most assault survivors are very junior enlisted personnel, often in their teens without a college education who, according to an SVC, "don't know how to write about this or file a complaint."³¹ An Army lieutenant colonel who filed a reprisal claim said, "It was difficult for me to file a reprisal claim and I am a lieutenant colonel. I can't imagine how hard it is for others."³² For these reasons, Human

²⁷ Human Rights Watch telephone interview with Army SVC #1, December 9, 2014.

²⁸ Human Rights Watch group interview with Air Force SVCs, Washington, DC, December 4, 2014; Human Rights Watch group interview with Navy VLCs, Jacksonville, FL, December 10, 2014.

²⁹ Human Rights Watch group interview with Air Force SVCs, Washington, DC, December 4, 2014.

³⁰ Email communication from Protect Our Defenders to Human Rights Watch, April 16, 2015.

³¹ Human Rights Watch telephone interview with Air Force SVC #1, June 19, 2014.

³² Human Rights Watch telephone interview with LTC Sheila Anderson, November 12, 2013.

Rights Watch recommends that all of the branches ensure that it is clear in their policies and in their training for attorneys that assisting with IG complaints falls within the purview of SVCs/VLCs.

There are a variety of other areas in which counsel may be able to help stop or mitigate retaliation. An Air Force SVC asked a commander to speak to a supervisor about not “telling people the victim made it up.”³³ A Marine survivor told Human Rights Watch that she feared retaliation from her command for a grievance her SVC planned to file regarding the commander’s decision to drop the sexual assault charges against the perpetrator. She said her VLC told her, “This is not going to come down on you. I’m writing the letter,” and the VLC came with her to explain the action to her immediate chain of command so that they would understand and not resent the action.³⁴

However, SVCs themselves do not have authority to stop retaliation so the success of their efforts depends largely on the good will of the commander. Human Rights Watch urges the Department of Defense and the services to recognize formally that this is a key responsibility and authority of SVCs/VLCs in order to ensure that this protection is available to all victims and that commanders view these interventions favorably. This recommendation supplements others aimed at improving the chain of command’s response to retaliation and to strengthening mechanisms to counter retaliation so that victims have recourse for retaliation that is independent of their chain of command.

5. Co-locate counseling and SARCs/SHARPS with legal services offices.

Wherever possible co-location of these offices allows for easier referrals for services and allows survivors to access SARC/SHARP (Sexual Assault Response Coordinators/Sexual Harassment and Assault Response and Prevention) services without disclosing their survivor status simply by entering a particular building. SVCs working on Joint Base Lewis-McChord spoke positively of the SHARP resource center where services are co-located.³⁵ SARCs and VLCs explained how co-location strengthened relations between the different service providers, enhancing their communication and ability to service clients.

³³ Human Rights Watch group interview with Air Force SVCs, Washington, DC, December 4, 2014.

³⁴ Human Rights Watch telephone interview with Sgt Leslie Williams, January 9, 2015.

³⁵ Human Rights Watch interview with Army SVC #5, February 5, 2015; Human Rights Watch interview with Army SVC #6, February 5, 2015.

A victim advocate or counselor was able to walk their client to an SVC, which was more successful than simply giving them contact information and hoping they follow up.³⁶ Marie Brodie, Installation Sexual Assault Response Coordinator at Marine Corps Base Camp Lejeune, testified to the JPP that resources on her base are not co-located and that it can be an issue because “when you think about the ranks that normally report sexual assault, many times that Marine or Sailor does not have transportation and needs assistance to get to those appointments.”³⁷

6. Establish uniform practice and procedures concerning SVCs’ participation in military judicial proceedings, including timely disclosure requirements of pleadings. Ensure SVCs are available on all major bases and can meet with clients in person at least once.

The Judicial Proceedings Panel heard extensive testimony on the inconsistency in how military judges treat SVCs.³⁸ In some cases, they are fully integrated into proceedings. In others they are prevented from speaking and denied access to critical information. The SVCs’ schedules may be considered immaterial to the scheduling of hearings at which their clients’ rights will be at stake.³⁹ They may even have to file Freedom of Information Act (FOIA) requests in order to obtain documents, such as investigation reports, that are readily available to the prosecutor and defense counsel.⁴⁰ SVCs cannot adequately inform their clients or advise them without a full picture of the case and without adequate notice of issues that may impact them. Major Tilney, Regional Victims’ Legal Counsel in the Marines Corps testified:

There [are] no clear cut rules for us in how we operate within the courts. Every single time we step into a court to approach the military judge, it is almost as, “Hi, Your Honor. This is who I am. This is our role. How do we participate effectively

³⁶ One VLC said that the majority of the clients come through the SARC, and that being collocated with the SARC provided “one-stop shopping.” Human Rights Watch group interview with Navy VLCs, Jacksonville, FL, December 10, 2014.

³⁷ Marie Brodie, Installation Sexual Assault Response Coordinator at Marine Corps Base Camp Lejeune, The Fifth Public Meeting of the Judicial Proceedings Panel, Arlington, VA, December 12, 2014, transcript p. 85, http://jpp.whs.mil/Public/docs/05-Transcripts/20141212_Transcript_Final.pdf (accessed April 29, 2015).

³⁸ See testimony of Navy CDR Colleen Shook, Army CPT Jesse Sommer, Marine Maj Marc Tilney, and before The Fourth Public Meeting of the Judicial Proceedings Panel, Arlington, VA, November 14, 2014, transcript pp. http://jpp.whs.mil/Public/docs/05-Transcripts/20141114_Transcript_Final.pdf (accessed April 29, 2015).

³⁹ Navy CDR Colleen Shook, The Fourth Public Meeting of the Judicial Proceedings Panel, Arlington, VA, November 14, 2014, transcript pp. 235-236, http://jpp.whs.mil/Public/docs/05-Transcripts/20141114_Transcript_Final.pdf (accessed April 29, 2015).

⁴⁰ Marine Maj Marc Tilney, The Fourth Public Meeting of the Judicial Proceedings Panel, Arlington, VA, November 14, 2014, transcript pp. 233-234, http://jpp.whs.mil/Public/docs/05-Transcripts/20141114_Transcript_Final.pdf (accessed April 29, 2015).

without being a disruption in your courtroom?” [We have to] let it be known that we might have to stand up and interrupt their key points in order to protect our client's rights. And sometimes military judges are very receptive of this. Other times, they will direct me to the bailiff and make me aware of that position [that such interruptions could result in arrest for contempt of court].⁴¹

Human Rights Watch spoke with an Army SVC who was forced to make an objection from behind the bar (where the public or those who have no role in the proceedings are located) because her clients interests were at stake and no provision had been made for her to participate.⁴² Others have had to address the court from the jury box.⁴³

Ensuring SVCs are available on all major bases is essential because so much of the SVCs workload depends on relationship building, both with the clients and with their staff JAG counterparts who frequently assist SVCs in liaising with commanders.

In the absence of a physical SVC presence, provision should be made to allow SVCs to meet with their clients in person as often as feasible, and at least once, in order to establish trusting attorney-client relationships in the context of these sensitive issues.

Regarding Mental Health:

As discussed in Human Rights Watch’s report, [*Embattled: Retaliation against Sexual Assault Survivors in the US Military*](#), sexual assault survivors told Human Rights Watch that they faced negative repercussions for seeking mental health care to address the trauma of sexual assault.

Survivors and their attorneys said that access to mental health care was compromised by the potential for those records to be disclosed during the criminal proceedings against their perpetrator; their commanders’ ability to access their medical records and to learn that they had sought mental health care; the general stigma around mental health care in

⁴¹ Ibid.

⁴² Human Rights Watch interview with Army SVC #7, February 5, 2015.

⁴³ Ryan Guilds, The Third Public Meeting of the Judicial Proceedings Panel, Washington, DC, October 10, 2014, transcript p.319, http://jpp.whs.mil/Public/docs/05-Transcripts/20141010_Transcript_Final.pdf (accessed April 29, 2015).

the military; and the difficulty of scheduling appointments due to conflicting work schedules and their supervisors and peers' objections to their absences.

The recommendations below are aimed at addressing these obstacles within the context of the military environment, in which privacy must be balanced against the military's legitimate interest in monitoring the health of their troops and their readiness to fulfill their duties. We believe providing survivors with as many options for meeting their mental health care needs is key to ensuring that they get the help they need to recover and to perform their duties to the best of their abilities.

1. Improve access to civilian mental health care.

Work closely with local rape crisis centers on training and outreach on base to ensure their services are accessible and known to service members.

Civilian mental health care may provide the best solution for some survivors. Seeking care off base may provide greater privacy and alleviate concerns about stigma and negative career repercussions.

The potential career impact of seeking mental health treatment has a definite chilling effect on survivors accessing needed care through the military system.⁴⁴ "I didn't want to go to mental health because I knew it was a career ender," said survivor Amy Johnson, echoing the sentiments of many interviewees.⁴⁵ Seaman Collins told Human Rights Watch that after being assaulted at the start of her Navy career, she began having nightmares and would wake up thinking that the perpetrator was on top of her. She decided against seeking therapy. She told Human Rights Watch, "I was terrified of being diagnosed with something and cutting short my dream career. I was only in A-school so I thought I would be kicked out."⁴⁶

⁴⁴ In addition to arising in Human Rights Watch's interviews, the Response Systems Panel noted that, in their hearings, "Victims specifically noted concerns that mental health counseling may negatively impact their careers." See Response Systems to Adult Sexual Assault Crimes Panel, Report of the Response Systems to Adult Sexual Assault Crimes Panel through the Secretary of Defense and to the Committees on Armed Services of the Senate and the House of Representatives (RSP Report), June 27, 2014, p. 32, http://responsesystemspanel.whs.mil/Public/docs/Reports/oo_Final/RSP_Report_Final_20140627.pdf (accessed May 4, 2015).

⁴⁵ Human Rights Watch telephone interview with LCpl Amy Johnson, January 11, 2015.

⁴⁶ Human Rights Watch telephone interview with SN Nicole Collins, October 23, 2014; Human Rights Watch group interview with Navy VLCs, Jacksonville, FL, December 10, 2014.

Seeing a civilian therapist can provide some distance, while the ethical obligations of civilian therapists would ensure that disclosures could be made to appropriate authorities if a service member's state of mind posed an imminent threat to their safety or that of others.

However, it can be difficult for survivors to get coverage for off-base mental health care, and in some locations—especially deployed locations—appropriate care may be unavailable.⁴⁷ The military can help facilitate access to care by expediting the process for survivors who want to use their military insurance to see private providers, and by coordinating with local rape crisis centers to make sure survivors are aware of resources in the community.

Likewise, a strong relationship with community rape crisis centers means that the centers are better equipped to help military survivors. A counselor at a rape crisis center with a generally positive working relationship with the military base in the community told Human Rights Watch, “We know about military policies so we can advise servicemembers about their options. This relationship is very much needed at smaller installations where it is least likely to exist.”⁴⁸

Though the military requires its bases to establish a relationship with local rape crisis centers, what that means varies a great deal in practice. For some, the relationship existed primarily on paper. The rape crisis centers were not welcome on base and they did not know if the service members were even aware that the option of counseling off base was available.⁴⁹

Though victims have a legal right to a civilian advocate during proceedings in some locations, the local rape crisis center was not made aware of military proceedings and they are not given any information about investigations.⁵⁰ Another rape crisis center near an installation reported that they had strong relations with some services, but were completely shut out of others.⁵¹ Conversely, SARCs, survivors, and rape crisis personnel

⁴⁷ Human Rights Watch interview with counselor at community center, Fayetteville, NC, December 8, 2014.

⁴⁸ Human Rights Watch interview with community rape crisis center, December 8, 2014. Also, the Response Systems Panel recommended that the Service Secretaries “expand requirements for installation commanders to liaison with victim support agencies.” RSP Report, p. 35, http://responsessystemspanel.whs.mil/Public/docs/Reports/oo_Final/RSP_Report_Final_20140627.pdf (accessed April 24, 2015)

⁴⁹ Human Rights Watch group interview with rape crisis center staff, December 10, 2014.

⁵⁰ *Ibid.*, 2014

⁵¹ Human Rights Watch telephone interview with rape crisis center administrator, June 9, 2014.

with close working relations with the base felt the connection was “hugely beneficial” as it enabled survivors to get counseling they needed with less concern about confidentiality.⁵²

2. *Expand the number of mental health providers trained to handle sexual assault cases and improve training to therapists to reinforce information about proper recordkeeping and disclosure.*
3. *Reinforce mental health providers’ obligation to consult with patients and advise them of risks of disclosure before complying with any waivers to disclose medical records.*

For a number of reasons, including ease of access and providers’ familiarity with military life, some survivors may prefer to see mental health care on-base. However, our research identified important areas for improvement, including in the number of counselors trained to deal with sexual assault who are sensitive to the risk of exposure of records during criminal proceedings.

Survivors told Human Rights Watch of encountering dismissive and victim-blaming attitudes in military mental health professionals. Navy Petty Officer Lewis told Human Rights Watch that her first doctor said, “Your reported that?” after hearing the story of her sexual assault.⁵³ Army Captain Rivera said a male counselor on base told her, “You know better than to be the only female at a social function.” The attitude, she said was, “That was it. Had to suck it up and move on.”⁵⁴ The Response Systems to Adult Sexual Assault Crimes Panel commented on the availability of appropriate counseling in its final report:

Despite the variety of mental health professionals who work with military Service members, sexual assault victims who appeared before the Panel described having difficulty obtaining timely mental health appointments and difficulty receiving consistent care from mental health providers.⁵⁵

Training on sexual assault should also include education about ways to protect survivors’ rights and interests in the context of criminal proceedings against the perpetrator, as is

⁵² Human Rights Watch telephone interview with SARC, February 9, 2015.

⁵³ Human Rights Watch telephone interview with PO3 Sasha Lewis, November 17, 2014.

⁵⁴ Human Rights Watch telephone Interview with CPT Ruth Rivera, November 20, 2014.

⁵⁵ RSP Report, p. 35, http://responsesystemspanel.whs.mil/Public/docs/Reports/oo_Final/RSP_Report_Final_20140627.pdf. Similarly a survivor told us if she missed an appointment, she had to wait a month to reschedule. Human Rights Watch interview with SPC Bonnie Thomas, Fayetteville, NC, December 8, 2014.

often included in training for community rape crisis counselors. Some SVCs and VLCs told Human Rights Watch that if clients do seek counseling they ask their clients to limit discussion of the details of the assault itself, and some attorneys remind the mental health providers themselves of how the notes of their session may be used⁵⁶ or ask clients to review their medical records for accuracy.⁵⁷

This is not always well received. One survivor told Human Rights Watch that a military mental health provider became angry when she refused to discuss details about the assault itself due to pending criminal proceedings.⁵⁸ With better training, mental health providers can act as advocates for patients by ensuring that providers' record keeping and disclosure practices protect client privacy, and by educating their clients about their privacy rights so they do not agree to waive those rights and give investigators or others access without full and informed consent.

4. Expand outreach about the availability of Military Sexual Trauma (MST) counseling to active service members at Department of Veterans Affairs Vet Centers.

A recent policy change opens up a new option for military sexual assault survivors to seek counseling.⁵⁹ Vet Centers, established as an alternative way for combat veterans to get counseling and support outside of the formal VA hospital environment, can now provide free counseling to active duty survivors of military sexual trauma if they have served in combat or a war zone.

This option has several advantages. Vet Centers are generally informal, less intimidating environments; counselors take few if any notes; they are attuned to the needs of service members, and have trained military sexual trauma counselors. While this option is currently available, awareness of it is limited. Survivors and SVCs interviewed did not indicate they knew of the option, and two military sexual assault staffers interviewed

⁵⁶ Human Rights Watch telephone interview with Air Force SVC #1, June 19, 2014; Human Rights Watch interview with Army SVC #3, February 2, 2015.

⁵⁷ Human Rights Watch telephone interview with Marine Corps VLC#1, January 5, 2015.

⁵⁸ Human Rights Watch telephone interview with SrA Anna Hall, November 21, 2014.

⁵⁹ US Department of Veterans Affairs, "Active Duty Servicemembers Now Eligible for Vet Center Counseling," March 3, 2014, http://www.amarillo.va.gov/pressreleases/Active_Duty_Service_Members_Now_Eligible_for_Vet_Center_Counseling.asp (accessed May 1, 2015).

relayed that they were completely unaware of the program.⁶⁰ Vet Center staff told us they did not have many active duty clients.⁶¹

5. Co-locate behavioral health facilities in buildings with multiple functions to help preserve confidentiality of those who enter the facilities.

Many interviewees said they found it difficult to keep the fact that they were in care private, in part due to peers observing them enter a building solely dedicated to mental health services on base. Navy Seaman Lee said that when she was in outpatient therapy her command required her to have an escort to the hospital who would walk her directly to the mental health clinic.⁶² Co-locating mental health services with medical services or with other offices can help survivors maintain their privacy and avoid the stigma that so many interviewees told us was associated with seeking mental health treatment.

6. Expand availability of appointments after working hours so service members can seek help while they are not on duty.

7. Ensure that commanders communicate to front-line supervisors that service members should not face negative repercussions for absences due to medical appointments.

Survivors told Human Rights Watch that despite the fact that their medical appointments were a legitimate reason for absence from work, they made every effort to schedule their mental health appointments on off-hours to avoid scrutiny by their supervisors and peers. That did not always work out. Marine Amy Johnson said that even though she scheduled appointments during lunch, her supervisors accused her of purposely making medical appointments to avoid her duties and would bring up the fact that “marine goes to too many appointments” in monthly discussions about her performance.⁶³ Kim Martin, Navy, said she attempted to schedule her appointments on non-working days. When that was not possible, her supervisors would never say outright she could not go but would ask:

⁶⁰ Human Rights Watch interview at community counseling center, December 8, 2014; Human Rights Watch interview with Air Force SARC #1, October 10, 2014.

⁶¹ Human Rights Watch telephone interview with Vet Center Coordinator, April 28, 2014.

⁶² Human Rights Watch telephone interview with SN Mindy Lee, November 3, 2014.

⁶³ Human Rights Watch telephone interview with LCpl Amy Johnson, January 11, 2015.

“Why do you have all these appointments?”⁶⁴ Survivors also report having to wait weeks in order to get an appointment.⁶⁵

Expanding availability of appointments in general, and during non-working hours, would go far in helping survivors protect their privacy. Survivors will at times need to miss work to seek care and should be supported in doing so. Human Rights Watch interviews indicate that this support is often lacking. Gabrielle Bouvier said her supervisors told her that she had to forgo counseling because “work was more important” and she “was such an asset.”⁶⁶

An Army Special Victim Counsel told Human Rights Watch that a male client who filed a restricted report discovered that his unit had a non-commissioned officer following him to his medical appointments. The attorney said the client eventually opted to make his report unrestricted after harassment from his unit which saw him as a “dirtbag” because of his absences and inability to perform his regular duties. Despite the conversion to an unrestricted report which notified the command of the reason for the medical issues and appointments, the attorney said her client continued receiving administrative discipline for his perceived failings, including an Article 15, and the unit moved to administratively separate him.⁶⁷

8. *Expand possibilities for voluntary in-patient treatment when appropriate and as an alternative to leaving the service for those who wish to remain in the military but may temporarily be incapable of performing their duties.*
9. *Create Defense Department inpatient facilities to assist with trauma arising from sexual assault and ensure that they have sufficient capacity and specialized treatment for male survivors.*

Some interviewees told Human Rights Watch that they found it difficult to cope in the wake of the assault, even with outpatient care. They saw their performance at work suffer and some turned to coping mechanisms that were ultimately self-destructive, including excessive alcohol and drug use. Some survivors may benefit from a period of voluntary inpatient treatment that would provide them with the intensive help away from an

⁶⁴ Human Rights Watch telephone interview with SN Kim Martin, October 8, 2014.

⁶⁵ Human Rights Watch interview with PFC Bonnie Thomas, January 14, 2014.

⁶⁶ Human Rights Watch telephone interview with PO3 Gabrielle Bouvier, October 15, 2014.

⁶⁷ Human Rights Watch interview with Army SVC #5, February 5, 2015.

environment that may be closely associated with the sexual assault. Advocates emphasized to Human Rights Watch that the service members in these situations are often good soldiers and capable of returning to perform at the highest levels if given the appropriate care and time to recuperate.⁶⁸

To that end, Human Rights Watch recommends the military create its own inpatient facilities to provide treatment for conditions arising from military sexual trauma with an orientation toward enabling survivors to continue military service if they wish. The services currently rely on the Department of Veterans Affairs' facilities to provide such services to active duty survivors. This approach has significant limitations. In particular, while more than half of military sexual assault survivors are men, the VA has few facilities that provide inpatient MST treatment for male survivors.⁶⁹

Other:

1. *Provide training and intervention for junior enlisted personnel in supervisory positions about responding to sexual assault in their unit, the effects of trauma, and the appropriate response to peer retaliation.*
2. *Monitor treatment of victims by their peers and immediate supervisors and collect data on incidents of retaliation.*

The majority of victims are low-ranking enlisted personnel. Their supervisors may be just a few years older than they are. Such supervisors may not have benefitted from the same training that more senior officers have received and thus may not understand how to manage a sexual assault victim in their unit. Lawyers for survivors indicated that problems are often found at this level of management. Supervisors may view the victim as “a nail sticking out that has to be hammered down” or a “malingerer” rather than as someone who needs extra support and accommodation in order to go to legal or medical appointments.⁷⁰ That attitude can infect the unit and create a hostile environment.

Junior personnel who have reported a sexual assault are often not comfortable approaching managers with rank higher than their supervisors in order to report on retaliation for fear of being branded a trouble maker and creating even more resentment.

⁶⁸ Email communication from Protect Our Defenders to Human Rights Watch, April 16, 2015.

⁶⁹ Government Accountability Office, “Male Servicemember Sexual Assault Victims,” March 2015, footnote 50, p. 25, <http://www.gao.gov/assets/670/669096.pdf> (accessed April 30, 2015).

⁷⁰ Human Rights Watch telephone interview with Marine Corps VLC #1, January 5, 2015.

Moreover, they may fear not being believed. As one survivor who was assaulted in boot camp said, “They are drill instructors, and you cannot say ‘no’ or anything about them or to them,” explaining it is the “fear of the authority they have” and that “it would be our word against theirs and we wouldn’t win. They could say we did something we didn’t do and we would get punished for it.”⁷¹ As a result, more senior leaders may be unaware of the problem.

Therefore, it is important to train first-line supervisors in how to respond appropriately to incidents of sexual assault and to retaliation. DoD SAPRO has indicated that they are initiating such training.⁷² First-line supervisors may also benefit from increased training on manifestations of trauma and counterintuitive behavior of victims to counter perceptions they may have about how victims should behave. For unrestricted reports, it may be worth a direct intervention with the supervisor after the report to forestall any potential negative outcomes. In addition, Sexual Assault Response Coordinators and victims’ counsel should monitor the treatment of survivors after their assault and intervene if necessary (and after consultation with the survivor), as they are in a better position to raise concerns with leadership.

3. Aggressively investigate and respond to allegations of reprisal and publicly highlight measures taken against those responsible for retaliatory action.

The climate set by command at all levels has a profound effect on how victims are treated. Experts on workplace ethics indicate that the response to retaliation is “a leading indicator of the health and well-being of an organizational culture going forward. When you have high levels of retaliation, it’s not long before you start to have an erosion of culture and an erosion of trust within the organization.”⁷³ In order to build trust, transparency is essential. Ethics experts recommend publishing statistics on a regular basis to demonstrate that the organization responds to all complaints and to show that action is taken to address the problem. To date, the services have not collected data on incidents of retaliation and the response to it, though in the April 10 hearing DoD SAPRO indicated it may be beginning to collect this information.⁷⁴

⁷¹ Sworn statement to Army Criminal Investigation Division by Shannon West (pseudonym).

⁷² Army MG Jeffrey Snow, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, DC, April 10, 2015, transcript p.73 (unofficial transcript on file with Human Rights Watch).

⁷³ Dr. Patricia Harned, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, DC, April 10, 2015, transcript p. 152 (unofficial transcript on file with Human Rights Watch). Testimony of Dr. Patricia Harned, Transcript of the Judicial Proceedings Panel, April 10, 2015, p. 152.

⁷⁴ Dr. Galbreath and Army MG Jeffrey Snow, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, DC, April 10, 2015, transcript pp. 75, 77-78 (unofficial transcript on file with Human Rights Watch).

The victims we interviewed who had faced retaliation almost never saw their tormentors held to account, even when supervisors were aware of the abuse. This was frustrating for the victims, but also meant that others did not see any signal from leadership that harassment was inappropriate, thus allowing the problem to persist. In order to change perceptions and culture, it is necessary for people to see that articulated values are implemented in practice.⁷⁵

4. *Allow survivors to defer a performance evaluation, promotion consideration or skills test for a period of time if their ability to perform or duties have been impacted by issues relating to sexual assault; create an instruction for Performance or Promotion Review Boards on how to take into account a sexual assault in an evaluation when it has impacted the victim's performance relative to their peers.*

Reporting a sexual assault may create significant challenges for keeping a servicemember on a chosen career path. Performance may suffer following a trauma and other negative repercussions may flow from missing work to participate in judicial proceedings or seek counseling. In an effort to remove survivors from a hostile work environment, they may be moved out of their area of specialty, putting them at a disadvantage for promotions.

Participation in legal proceedings, or taking away their weapon, may mean they are unable to deploy. Several survivors told us they missed advanced training after their assault. All of this, even if done with good intentions, may render survivors, through no fault of their own, less competitive with their peers for promotion considerations. In order to accommodate these issues, the services should consider extending the time period necessary for qualifications or deferring promotion consideration. In addition, Performance Review Boards should be instructed in how to weigh external factors pertaining to the sexual assault report in evaluations for promotion. For example, time in which they are “unrated” because they are removed from their area of specialty may not be considered against them.

⁷⁵ Dr. Patricia Harned, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, DC, April 10, 2015, transcript pp. 166-168 (unofficial transcript on file with Human Rights Watch).

5. *Train broader leadership on the impact of trauma, counter-intuitive victim behaviors, and protection of those alleging sexual assault.*

In a number of instances, survivors have reported that harassment worsened when their cases did not lead to criminal convictions. After a not guilty verdict came in, a Navy petty officer said her command “constantly called [her] a liar and wouldn’t allow [her] to go to a support group or counseling.... Every day at least one person called me a liar.” An Air Force SVC reported that after a sexual assault prosecution resulted in an acquittal, a victim's unit leadership (commander and first sergeant) were confused about what an acquittal meant and initially thought that it meant that the victim had made a false report. The SVC counselled them that an acquittal is not proof that the accuser lied.⁷⁶ Misperceptions like this can lead to commanders taking retaliatory actions such as launching command-directed investigations into whether victims made false statements to investigators.

In addition, commanders may not fully understand counter-intuitive behavior after an assault (such as maintaining relations with a perpetrator after the assault) and may misinterpret their behavior as a sign that they are not credible, leading to poor treatment of survivors. Additional training on how victims may behave following a traumatic experience, including the impact of trauma on memory, may assist in creating a more supportive environment.

6. *Require commander consultation with SARCs/SHARPS or SVCs on how to address retaliation on a case-by-case basis as there is no “one-size-fits-all” solution.*

Different survivors have different views on what is helpful. As a result, a commander may take action with good intentions that is not perceived that way by the survivor. For example, an Army victim’s lawyer told Human Rights Watch that after her client reported a rape, her client’s commander ordered her confined to the barracks where the assault occurred instead of allowing her to go home to her husband. The commander was making a misguided attempt to protect her from her husband (though he was not the assailant and had no history of domestic violence). Being in the barracks where she was assaulted was the last place the victim wished to be. Her lawyer was able to intervene to assist her. Some victims also welcome a change in work assignment if it allows them to be removed from an unpleasant work environment; for others a new job may seem punitive.

⁷⁶ Human Rights Watch interview with Air Force SVC #2, November 24, 2014.

Meanwhile, while many survivors indicated that they would like to see those who retaliate held to account, some fear that doing so may lead to further ostracism or resentment. Input from the Sexual Assault Response Coordinator or the victim's lawyer may help commanders take appropriate action. Moreover, SARCs and SHARPS may be able to make suggestions on handling difficult situations. For example, an Air Force commander sought advice from the SARC about how to deal with pervasive gossip in the workplace. At her suggestion, he told the unit that "no one knows what happened except the two people involved" and that gossip would not be tolerated. He said "if they had time in the day to gossip, they had time to do extra work" and gave them all additional assignments. This ended the gossip and made the victim feel supported by her commander.⁷⁷

- 7. Provide a mechanism for the Defense Department's Sexual Assault Prevention and Response Office (SAPRO) to receive and then enquire into generalized (non-case specific) information about problematic units or commands for the purpose of targeting remedial training and other efforts.*

One obstacle to addressing retaliation is reluctance by victims who have experienced retaliation after reporting a sexual assault to come forward. An ethics expert explained, "If it [reporting] didn't work well the first time, they are not going to come back for more."⁷⁸ In a small unit, it may be impossible for the survivor to raise concerns without being identified.

An essential element of a program that successfully eliminates retaliation involves providing a means to report retaliation confidentially and anonymously.⁷⁹ Therefore survivors, Sexual Assault Response Coordinators, victim advocates, counselors (civilian or military), and victims' legal counsel should have a centralized place to which they can raise their concerns about units or commanders anonymously. This will also allow the services to pinpoint areas where more training or intervention might be necessary.

⁷⁷ Human Rights Watch telephone interview with SARC Shelly Park, February 9, 2015.

⁷⁸ Dr. Patricia Harned, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, DC, April 10, 2015, transcript p. 156 (unofficial transcript on file with Human Rights Watch).

⁷⁹ *Ibid.*, p. 153.

8. *More strictly enforce confidentiality of information on a restricted (confidential) sexual assault report.*

Witnesses we interviewed raised concerns that information about a reported sexual assault is not always kept confidential (or “restricted”). Victims told Human Rights Watch that they heard their commanders talk openly about their cases to others or saw their case referenced in an email copied to people who did not need to know about it. Victims’ lawyers report that the “need to know” basis for information about restricted reports is “too expansive” and that too many people are able to read email traffic about sexual assault reporting.⁸⁰

Despite regulations allowing a sexual assault response coordinator (SARC) to withhold information “that could reasonably lead to personal identification of the victim,”⁸¹ advocates report that in practice in smaller units, it is “too easy to figure out” who the victim is based on reference to gender, ethnicity or pay grade in sexual assault information reported to the command.⁸² When it becomes clear that information has been inappropriately released, disciplinary action should be taken against those found responsible. Moreover, who “needs to know” should be more clearly defined.

In addition, a number of survivors we interviewed did not wish to report but inadvertently had their case made unrestricted. Hospital staff may sometimes call a workplace and indicate they have someone there, unintentionally triggering a report.⁸³ Victims may be forced to disclose if they miss formation because they are at the hospital seeking medical care.⁸⁴ Although DoD guidelines allow victims to keep a report restricted even if they tell a friend,⁸⁵ not all the branches have clear instructions on this.⁸⁶

⁸⁰ Human Rights Watch group interview with Navy VLCs, Jacksonville, FL, December 10, 2014.

⁸¹ Department of Defense, “Instruction 6495.02: Sexual Assault Prevention and Response (SAPR) Program Procedures,” March 28, 2013, section 4 (1)(d) updated February 12, 2014, <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf> (accessed April 22, 2015).

⁸² Human Rights Watch group interview with Navy VLCs, Jacksonville, FL, December 10, 2014; Human Rights Watch telephone interview with rape crisis center counselor, October 27, 2014.

⁸³ Human Rights Watch group interview with Navy VLCs, Jacksonville, FL, December 10, 2014.

⁸⁴ Human Rights Watch telephone interview with Amn Carla Rodriguez, February 4, 2014.

⁸⁵ Department of Defense, “Instruction 6495.02: Sexual Assault Prevention and Response (SAPR) Program Procedures,” March 28, 2013, section 4 (1)(d) updated February 12, 2014, <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf> (accessed April 22, 2015).

⁸⁶ In fact, Navy instructions run counter to the DOD guidelines in certain cases: if the friend is in the same workplace, the disclosure is viewed as trumping confidentiality and can trigger an investigation.

Practical considerations may also force people to reveal their sexual assaults. Transfers are only available to servicemembers who make unrestricted reports. It may also become difficult to explain medical or legal appointments or trauma-related behavior to supervisors if they are not aware of the assault. Victims should have a mechanism to remedy an inadvertent disclosure.

9. Recognize leaders who effectively respond to reprisals.

Actions of leadership in response to retaliation are the most important factors in ending retaliation. According to studies, when leaders set a good example and hold others accountable, the difference in retaliation is “dramatic.”⁸⁷ When leaders display these actions, retaliation is reduced by as much as 53 percent.⁸⁸ Therefore, in accordance with best practices, it is important to implement performance goals for senior leaders and supervisors based on ethics-related action with regular reviews and incentives. This will enable leadership to consistently discuss and hold people accountable for upholding policies prohibiting retaliation. This will be a far more effective tool than only changing policy.

10. Instruct commanders to consider favorably requests by victims to transfer housing when possible, particularly if they were assaulted there.

A number of interviewees told Human Rights Watch that their command resisted requests for a change of housing even if the assault occurred in barracks or the perpetrator lived there too.⁸⁹ This was sometimes devastating to the survivor. Stephanie Green, who was raped in the barracks, described in a written account the distress created by how the Army handled her housing situation: “They told me they couldn't make him switch barracks so I ended up becoming severely depressed and was admitted to inpatient at an acute hospital....When I came back the nightmares and flashbacks were worse so they moved me right across the street. When I first reported it they told me I need to get over it, everyone is dealing with things and they're fine, so I should be.”⁹⁰

⁸⁷ Dr. Patricia Harned, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, DC, April 10, 2015, transcript p. 154 (unofficial transcript on file with Human Rights Watch).

⁸⁸ Ibid.

⁸⁹ Written testimony of Stephanie Green (provided by Protect Our Defenders), on file with Human Rights Watch; Human Rights Watch telephone interview with Sharon Wright, December 5, 2014; Human Rights Watch interview with SVC #1.

⁹⁰ Written testimony of Stephanie Green (provided by Protect Our Defenders), on file with Human Rights Watch.

Another survivor posting on My Duty to Speak wrote that her request for a move was granted after initial resistance, but that she was moved to an area where accused offenders were often housed pending processing. She wrote: “I had to stay in the same barracks where they stayed during duty and they even placed a person who was convicted of sexual assault to work in the barracks where he had access to make keys to every room.”⁹¹ Another Airman who sought to move to get away from her perpetrator was told she “only wanted to be moved off base to take advantage of the system” and “she is just an Airman and they cannot accommodate her every need.” She had to live in a room within direct eyesight of his and could hear him when he used the smoking lounge, which was located below her window.⁹² While a change in accommodation is not always possible, commanders should be instructed to look upon the requests favorably.

11. For victims in areas of narrow specialties, consider the option of a career field change, if requested by a victim.

In some instances, a specialty is so narrow that it may be difficult for a survivor to avoid her or his perpetrator while staying in that specialty or to have a fresh start in a new base. As a Navy Petty Officer said of her field, “My community is very small and many of my peers, subordinates, and seniors are aware of what happened to me.”⁹³ After she reported her assault, she received calls asking questions about the incident from her peers across the country. For others, the limited locations that use a particular specialty may mean that even if a survivor is transferred away from the perpetrator now, they are likely to end up being co-located in another assignment. Giving servicemembers the option of training in a new specialty may increase their ability to continue their military career.

12. Allow collateral duty Victim Advocates sufficient time and material support (such as access to cell phones or transportation) to perform their advocacy duties without negatively impacting their regular duties and include feedback from victims as part of their performance evaluations.

Victim Advocates may be required to spend a significant amount of time with a victim during legal proceedings. Because collateral duty Victim Advocates are not evaluated on their performance as an advocate, some may be concerned about taking time to perform

⁹¹ Anonymous Coast Guard member, “Raped and Still Paying for It,” posted on *My Duty to Speak*, February 8, 2015, <http://mydutytopeak.com/2015/02/08/raped-and-still-paying-for-it/> (accessed April 22, 2015).

⁹² Human Rights Watch interview with Air Force SVC #1, November 24, 2014; memo on file with Human Rights Watch summarizing meeting with first sergeant written the day after the meeting in 2013.

⁹³ PO1 Lisa Cox, letter to admiral [name withheld] on file at Human Rights Watch.

their advocate function if it takes them away from their other duties for which they are evaluated. They may view their collateral duty as a “pain,” especially since some people did not volunteer for the position but were “voluntold.”⁹⁴

A SHARP advocate who covered a larger area expressed concern about access to a car in order to be able to meet the victim or attend proceedings.⁹⁵ The SHARP Advocate also expressed concern about the selection criteria for advocates indicating that in his training class several people were there to “check a box” and did not take training seriously.⁹⁶ In contrast, a VLC told Human Rights Watch that if a victim advocate is committed and has the time to take a survivor under his or her wing, it can help stop retaliation.⁹⁷ Allowing victims to provide feedback and including advocate performance as part of an evaluation may help weed out weaker advocates and mitigate any perceived disadvantage of taking time away from regular duties.

13. Vary sexual assault trainings from standard PowerPoint presentations to better engage audiences (i.e., employ more interactive trainings, workshops, theater).

One suggestion that regularly arose in interviews was making mandatory sexual assault training more engaging. An officer said there was a “risk of fatigue” from hearing the same PowerPoint presentations over and over.⁹⁸ Others suggested bringing in speakers.⁹⁹ A theater group in North Carolina was praised for its interactive trainings.¹⁰⁰ Services should seek out particularly engaging and effective training programs and use them as models for other places and alternatives to rote training.

14. Allow victims who have made restricted reports to request expedited transfer through their SVC.

Even if survivors do not make unrestricted reports of sexual assault, it may still be difficult for them to have to interact with their perpetrator on a regular basis. For various reasons (including fear of punishment for collateral misconduct) survivors may not wish to make an

⁹⁴ Human Rights Watch telephone interview with rape crisis center administrator, October 20, 2014.

⁹⁵ Human Rights Watch interview with Army SHARP Advocate, [location withheld], April 8, 2014.

⁹⁶ Ibid.

⁹⁷ Human Rights Watch group interview with Navy VLCs, Jacksonville, FL, December 11, 2015.

⁹⁸ Human Rights Watch telephone interview with 2LT Heather Moore, September 25, 2014.

⁹⁹ Human Rights Watch telephone interview with Robin Taylor October 20, 2014.

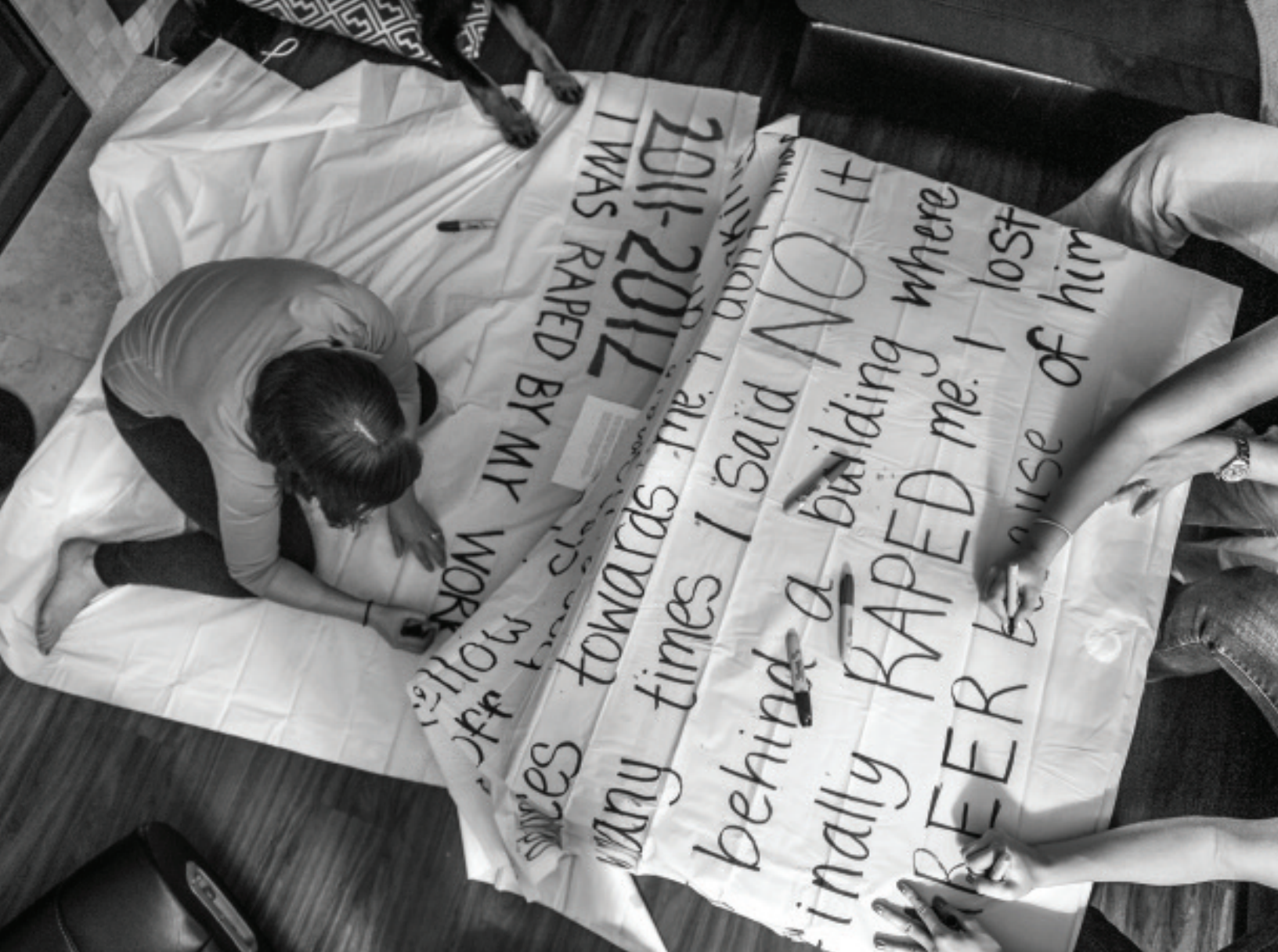
¹⁰⁰ Human Rights Watch telephone interview with rape crisis center administrator, October 27, 2014.

unrestricted report. This should not prevent them from availing themselves of protections available to other survivors.

15. Expand the requirement to provide a victim with a record of trial to include cases where the court martial resulted in an acquittal.

For many survivors, one of the most difficult aspects of the military justice process is not understanding the reasons for a decision not to punish a perpetrator. Survivors are often excluded from courts martial and do not have access to testimony heard by the panel. Although survivors currently have a right to a transcript when there is a conviction, they do not have the same right for an acquittal, which can be frustrating.¹⁰¹

¹⁰¹ Human Rights Watch interview with Air Force SVC #1, November 24, 2014; Lt Col Andrea M. de Camara, The Fourth Public Meeting of the Judicial Proceedings Panel, Arlington, VA, November 14, 2014, transcript pp. 106-107, http://jpp.whs.mil/Public/docs/05-Transcripts/20141114_Transcript_Final.pdf (accessed April 29, 2015).



Sexual assault in the US military and the failure to bring those responsible to justice has received considerable attention in recent years. Less well known is that victims too often have to choose between reporting their assaults and keeping their military careers. Department of Defense statistics indicate that 62 percent of service members who report sexual assault say they experienced retaliation.

Embattled is primarily based on more than 250 interviews, including with sexual assault survivors, and numerous public records. It documents the many forms that retaliation against victims takes, including physical and psychological abuse; poor performance evaluations and disciplinary actions; and referrals by commanding officers for discharge from the military. In addition, sexual assault survivors may be prosecuted for “collateral charges”—minor offenses (like underage drinking or adultery)—based on information that came to light only because they chose to report their assaults.

Mechanisms that should provide recourse for military sexual assault survivors who experience retaliation fall far short. While data suggest that thousands of survivors have experienced the type of professional retaliation that would be covered by the Military Whistleblower Protection Act, an analysis of public records did not identify any cases in which the law benefitted a survivor. Those who mistreat survivors rarely face consequences for their actions.

Recent efforts to address retaliation have made important improvements, but real change will require the US Congress to bring military whistleblower protections in line with those afforded to civilians. Real justice for survivors requires the military to take concerted action to ensure that those who commit or condone retaliation are held accountable.

(above) US military sexual assault survivors make banners inscribed with their sexual assault experiences in the US Navy. They later hung the banners in front of Naval Base San Diego.

(front cover) A US Army specialist and military sexual assault survivor on her bed in Fayetteville, North Carolina.

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HUMAN
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BOOTED

Lack of Recourse for Wrongfully Discharged US Military Rape Survivors



Booted

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Military Rape Survivors**

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Booted

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Glossary

TERM	DEFINITION
Adjustment Disorder	The development of marked distress or significant impairment in functioning in response to a stressor. It can often resemble post-traumatic stress disorder (PTSD). This is sometimes used as grounds for an administrative discharge.
Administrative Punishment/ Administrative Action	The least severe form of command action; it can range from verbal counseling to a written reprimand and demotion.
Administrative Separation or Discharge	Early termination of military service based upon conduct on the part of the service member.
Article 15	Non-judicial punishment administered by a commander for UCMJ offenses as an alternative to a court-martial.
Absent Without Leave (AWOL)	Away from military duties without notice or permission. Also known as Unauthorized Absence (UA).
Boards for Correction of Military Records	Ultimate administrative authority responsible for correcting errors and removing injustices in military records. Each branch has a designated board.
Board for Correction of Naval Records	Ultimate administrative authority responsible for correcting errors and removing injustices in Navy and Marine Corps records.
Captain's Mast	The term for non-judicial punishment in the Navy, similar to Article 15 punishments. Also called an Admiral's Mast depending on the level of the commander conducting the disciplinary hearing.
Chaptered Out	The process of being administratively separated or discharged.
Collateral Misconduct	Victim misconduct that might be in time, place, or circumstance associated with the victim's sexual assault incident.
Court Martial	Military trial proceedings.
Discharge	Order issued on the termination of a service member's military service. Forms of discharge include: Honorable (the quality of the member's service generally met standards of acceptable conduct); General Under Honorable Conditions Discharge (denoting that significant negative aspects of the service member's conduct outweighed positive aspects of conduct); Under Other Than Honorable Conditions (based on a pattern of misconduct that constitutes a significant departure from conduct expected from service members or one or more acts of misconduct); Bad Conduct Discharge (adjudged by a general or special court-martial); Dishonorable Discharge (a person has been adjudged by a general court martial).

TERM	DEFINITION
	The categorization of discharge impacts ability to get benefits from the Department of Veterans Affairs and may impact the ability to find employment or re-enlist.
Discharge Review Board	A panel designated by each service that has the authority to review discharges.
DOD	Department of Defense
GAO	Government Accountability Office, an independent, nonpartisan agency that works for Congress, which investigates how the federal government spends taxpayer dollars.
GOMOR	General Officer Memorandum of Reprimand
Integrated Disability Evaluation System (IDES)	Medical retirement process, which provides additional protections for service members such as multiple opportunities to appeal or rebut medical evaluations or determinations regarding fitness for duty
Involuntary Separation	Also known as an administrative discharge, being released from active duty under other than adverse conditions.
Judge Advocate (JAG)	A military attorney who is an officer of the Judge Advocate General's Corps of the Army, Navy, Air Force, Marine Corps, and the United States Coast Guard who is designated as a judge advocate.
Judicial Proceedings Panel	Panel created by the Secretary of Defense at the direction of Congress to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault cases and related offenses since the amendments made to the Uniform Code of Military Justice by section 541 of the National Defense Authorization Act for Fiscal Year 2012 for the purpose of developing recommendations for improvements to such proceedings.
LOR	Letter of reprimand; a more formal letter of admonishment included in the personnel record of a service member. They may be held locally for a limited time period or put in the service member's permanent record.
Medical Review Board Process	The Medical Review Board Process is a process by which a service member may be administratively separated or retired from the military when they have a medical condition (including a mental health condition) that render them unfit for service. A medical evaluation board assesses fitness for continued duty. If the service member is not fit for duty because of injuries sustained or exacerbated in service, they may be eligible for benefits. The process may be initiated by a service member who voluntarily seeks medical care or by a commander who believes the member is unfit for service and refers them for an examination.
Military Sexual Trauma (MST)	Sexual assault or repeated, threatening sexual harassment that occurs while in the military.
NJP	Non-judicial punishment under the Uniform Code of Military Justice, also known as an Article 15, or Captain's Mast.
NCIS	Naval Criminal Investigative Services, responsible for investigation of serious criminal offenses in the Navy.
NCO	Non-Commissioned Officer

TERM	DEFINITION
NVLSP	National Veterans Legal Services Program
Personality Disorder	Considered a pre-existing mental condition, characterized by deeply ingrained maladaptive patterns of behavior that typically appear by adolescence.
PTSD or PTS	Post-Traumatic Stress Disorder, also known as Post-Traumatic Stress
Restricted Reporting	A process used by a service member to report or disclose that they are the victim of a sexual assault to specified officials on a requested confidential basis. Under these circumstances, the victim's report and any identifying details provided to healthcare personnel, the SARC, or a victim advocate, will not be reported to law enforcement to initiate the official investigative process unless the victim consents or an established exception is exercised under Defense Department regulations. Restricted reporting applies to service members and their military dependents 18 years of age or older.
Response Systems to Adult Sexual Assault Crime Panel	Panel created by the Secretary of Defense at the direction of Congress in 2013 in order to conduct a 12-month independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses for the purposes of developing recommendations regarding how to improve the effectiveness of such systems.
ROTC	Reserve Officer Training Corps
Sexual Assault	Intentional sexual contact, characterized by the use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent. Sexual assault includes rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (oral or anal sex), or attempts to commit these offenses.
SAPR	Sexual Assault Prevention and Response
SAPRO	Sexual Assault Prevention and Response Office; serves as the DOD's single point of authority, accountability, and oversight for the Sexual Assault and Prevention and Response Program, except for legal processes and criminal investigative matters that are the responsibility of the Judge Advocates General of the Military Departments and the Inspectors General, respectively.
SARC	Sexual Assault Response Coordinator. The single point of contact at an installation or within a geographic area who oversees sexual assault awareness, prevention, and response training; coordinates medical treatment, including emergency care, for victims of sexual assault, tracks the services provided to a victim of sexual assault from the initial report through the final disposition and resolution.
SVC	Special Victims' Counsel in the Army and Air Force. The Special Victim Counsel Program was created by the Services and mandated by Congress to support victims of sexual assault and enhance their rights within the military justice system while neither causing unreasonable delay nor infringing upon the rights of the accused. An SVC's primary duty is to represent client's rights and interests during the investigation and court-martial process. In general, SVC services include, but are not limited to, accompanying and advising the victim during interviews, examinations, and hearings, advocating to government counsel and commanders

TERM	DEFINITION
	on behalf of the victim, and advising the victim on collateral civil matters which stem from the alleged sexual assault.
Traumatic Brain Injury	A brain injury acquired when a bump, blow, jolt or other head injury causes damage to the brain
Uniform Code of Military Justice (UCMJ)	Uniform Code of Military Justice; federal law enacted by Congress serving as foundation for military law for all branches of the military.
Unrestricted Reporting	A process a service member uses to disclose, without requesting confidentiality or restricted reporting, that they are the victim of a sexual assault. Under these circumstances, the victim's report and any details provided to healthcare personnel, the SARC, a victim advocate, command authorities, or persons are reportable to law enforcement and may be used to initiate the official investigative process.
Veteran	Any person who served for any length of time in any military service branch
VA	Department of Veterans Affairs; government-run system that provides a variety of benefits to eligible military veterans.
VHA	Veterans Health Administration
Victims' Legal Counsel (VLC)	Victims' Legal Counsel in the Marine Corps and Navy that is equivalent to the Special Victim Counsel in the Army, Air Force, and Coast Guard. See SVC above.

Ranks

AIR FORCE

ENLISTED (IN ASCENDING ORDER)		OFFICERS (IN ASCENDING ORDER)	
Amn	Airman (E-2)	2d Lt	Second Lieutenant (O-1)
A1C	Airman First Class (E-3)	1st Lt	First Lieutenant (O-2)
SrA	Senior Airman (E-4)	Capt	Captain (O-3)
SSgt	Staff Sergeant (E-5)	Maj	Major (O-4)
TSgt	Technical Sergeant (E-6)	Lt Col	Lieutenant Colonel (O-5)
MSgt	Master Sergeant (E-7)	Col	Colonel (O-6)
SMSgt	Senior Master Sergeant (E-8)	Brig Gen	Brigadier General (O-7)
1stSgt2	E-8 First Sergeant (E-8)	Maj Gen	Major General (O-8)
CMStgt	Chief Master Sergeant (E-9)	Lt Gen	Lieutenant General (O-9)
1stSgt3	E-9 First Sergeant (E-9)	Gen	General (O-10)
CCM	Command Chief Master Sergeant (E-9)		

ARMY

ENLISTED (IN ASCENDING ORDER)		OFFICERS (IN ASCENDING ORDER)	
PV2	Private (E-2)	2LT	Second Lieutenant (O-1)
PFC	Private First Class (E-3)	1LT	First Lieutenant (O-2)
SPC	Specialist (E-4)	CPT	Captain (O-3)
CPL	Corporal (E-4)	MAJ	Major (O-4)
SGT	Sergeant (E-5)	LTC	Lieutenant Colonel (O-5)
SSG	Staff Sergeant (E-6)	COL	Colonel (O-6)
SFC	Sergeant First Class (E-7)	MG	Major General (O-8)
MSG	Master Sergeant (E-8)	LTG	Lieutenant General (O-9)
1SG	First Sergeant (E-8)	GEN	General (O-10)
SGM	Sergeant Major (E-9)		
CSM	Command Sergeant Major (E-9)		

COAST GUARD

ENLISTED (IN ASCENDING ORDER)	
SR	Seaman Recruit (E-1)
SA	Seaman Apprentice (E-2)
SN	Seaman (E-3)
FN	Fireman (E-3)
PO ₃	Petty Officer 3 rd Class (E-4)
PO ₂	Petty Officer 2 nd Class (E-5)
PO ₁	Petty Officer 1 st Class (E-6)
CPO	Chief Petty Officer (E-7)
SCPO	Senior Chief Petty Officer (E-8)
MCPO	Master Chief Petty Officer (E-9)
CMDCM	Command Master Chief PO (E-9)
AMCPO	Area Command Master Chief PO (E-9)

OFFICERS (IN ASCENDING ORDER)	
ENS	Ensign (O-1)
LTJG	Lieutenant Junior Grade (O-2)
LT	Lieutenant (O-3)
LCDR	Lieutenant Commander (O-4)
CDR	Commander (O-5)
CAPT	Captain (O-6)
RDML	Rear Admiral (O-7)
RADM	Rear Admiral (O-8)
VADM	Vice Admiral (O-9)
ADM	Admiral (O-10)

MARINE CORPS

ENLISTED PRIVATE (E-1)	
PFC	Private First Class (E-2)
LCpl	Lance Corporal (E-3)
Cpl	Corporal (E-4)
Sgt	Sergeant (E-5)
SSgt	Staff Sergeant (E-6)
GySgt	Gunnery Sergeant (E-7)
MSgt	Master Sergeant (E-8)
1stSgt	First Sergeant (E-8)
MGySgt	Master Gunnery Sergeant (E-9)
SgtMaj	Sergeant Major (E-9)

OFFICERS	
2ndLt	Second Lieutenant (O-1)
1stLt	First Lieutenant (O-2)
Capt	Captain (O-3)
Maj	Major (O-4)
LtCol	Lieutenant Colonel (O-5)
Col	Colonel (O-6)
BGen	Brigadier General (O-7)
MajGen	Major General (O-8)
LtGen	Lieutenant General (O-9)
Gen	General (O-10)

NAVY

ENLISTED	
SA	Seaman Apprentice (E-2)
SN	Seaman (E-3)
PO3	Petty Officer 3 rd Class (E-4)
PO2	Petty Officer 2 nd Class (E-5)
PO1	Petty Officer 1 st Class (E-6)
CPO	Chief Petty Officer (E-7)
SCPO	Senior Chief Petty Officer (E-8)
MCPO	Master Chief Petty Officer (E-9)
CMDCM	Command Master Chief Petty Officer (E-9)
FLTCM/FORCM	Fleet/Force Master Chief Petty Officer (E-9)

OFFICERS	
ENS	Ensign (O-1)
LTJG	Lieutenant Junior Grade (O-2)
LT	Lieutenant (O-3)
LCDR	Lieutenant Commander (O-4)
CDR	Commander (O-5)
CAPT	Captain (O-6)
RDML	Rear Admiral (O-7)
RADM	Rear Admiral (O-8)
VADM	Vice Admiral (O-9)
ADM	Admiral (O-10)

Summary

Why should I be discharged because I was raped? I did what I was supposed to do. Had I never come forward I truly believe I would still be in the Air Force.

—A1C Juliet Simmons, November 2012

That hurt equal or more than the assault, people I was willing to die for didn't take me seriously.

—Corporal Andrea Warnock, administratively discharged after reporting a sexual assault, March 2014

I was told that if I wanted butterflies and unicorns that I should have been a preschool teacher.

—A young enlisted Coast Guard seaman who reported ubiquitous porn on her office's desktops, February 2013

[T]he Navy discarded me like a piece of scrap iron or less; truthfully, this ordeal continues to haunt me ... I am a broken man.

—Navy seaman apprentice Ken Olsen, given an Other Than Honorable Discharge after reporting a shipmate sexually assaulted him, October 2012

Juliet Simmons was drugged and raped in her US Air Force barracks in August 2007. She reported her assault through the proper channels, though her first sergeant made it clear he did not believe her. Although she continued to do her job, got outstanding performance evaluations, and passed her required tests, she was sent for an appointment with an Air Force mental health provider and told she was being discharged for a "Personality Disorder not specified." Though she appealed, and provided 27 letters from officers and enlisted service members in support of allowing her to stay in the Air Force, she was administratively discharged six days later with a General Under Honorable Conditions discharge. Later, Simmons tried to resume her military career but has been unable to do so due to her type of Air Force discharge.

Amy Quinn joined the Navy in 2002 when she was age 19 out of a sense of duty following the 9/11 attacks on the United States. She initially thrived, performing well and receiving awards. Her trouble started after she rejected the advances of her master chief. After that, others told her he was looking for her to make a mistake so he could kick her out of “his” Navy. When a Navy technician later raped her, she did not report for fear of what would happen since she was already labeled a troublemaker. Later, on deployment, when she fell asleep in a chair due to medications she was taking, her shipmates sprayed her body with aircraft cleaner and set her on fire with a lighter. Her fire-retardant clothing protected her from physical injury, but the perpetrators were only given an oral reprimand and, when she complained to a supervisor, she was told she was overreacting. After being transferred to a different unit, she was verbally harassed and her breast was groped by a first class petty officer. After her request for a transfer was refused, she was ordered to work the night shift with the same officer. When she refused, she was ordered by her superior to spend six to eight hours standing at attention each day. A few days later, she was discharged for having a “Personality Disorder,” the first she had heard of it. She was told this discharge was a favor, the only way to get what she wanted—to be away from the ship—and that it would not have any ramification. Later, potential employers rejected her for jobs in security and law enforcement because, even though her discharge was honorable, they could not hire someone whose papers said “Personality Disorder.”¹

Tom O’Brien was gang-raped by three male soldiers while he was on his second tour of duty in the Army in 1982. The soldiers threatened to kill him if he reported. Afterwards, he coped by drinking heavily and as a result was so drunk he failed to report to base. He was then court-martialed for being Absent Without Leave (AWOL) and received a Bad Conduct discharge. In the following years, he continued to drink heavily and was repeatedly arrested. Efforts to get benefits from the US Department of Veterans Affairs (VA) for post-

¹ Human Rights Watch telephone interview with Amy Quinn, September 16, 2015; also written testimony on file at Human Rights Watch.

traumatic stress disorder (PTSD) failed because the sexual trauma that caused the PTSD occurred during a period of service determined to be dishonorable.²

Based on over 270 in-person and telephone interviews, examination of documents that US government agencies produced in response to public record requests, and data analysis, this report covers the impact of “bad discharges” on military personnel who were separated from the military after reporting a sexual assault. It looks at the lasting impact of bad discharges on sexual assault victims and the remedies available to correct any injustice.

Over the past several years, in response to public pressure, the US military has made a concerted effort to improve how it handles sexual assault cases. Many of the reforms have provided important additional resources and protections for service members who are sexually assaulted while in service. Other policy changes have made it more difficult to quickly dismiss service members for mental health conditions.

However, virtually nothing has been done to address the ongoing harm done to thousands of veterans who reported sexual assault before reforms took place and lost their military careers as a result of improper administrative discharges.

“Personality Disorder” discharges—a term used to describe a mental health condition that can disqualify someone from military service—were once “the fastest and easiest way to get rid of someone” in the military.³ The use of personality disorder discharges declined dramatically in 2010 after government studies revealed proper procedures were often not followed. Nonetheless, these, and other types of questionable mental health discharges, are still in use and they comprise part of the discharges examined in this report because of the continuing harm suffered by veterans who received these discharges and have no recourse to correct their records.

² Letter from Department of Veterans Affairs to Tom O’Brien, VA File Number 28 [number withheld], October 16, 2013, on file at Human Rights Watch. In order to destigmatize what many believe is an appropriate response to trauma, Post-Traumatic Stress Disorder is sometimes referenced simply as Post-Traumatic Stress (PTS). We reference it as PTSD in this report because that is the term used by the military and Department of Veterans Affairs.

³ US Commission on Civil Rights, Briefing: Sexual Assault in the Military, Testimony of Major Bridget Wilson, January 11, 2013, <http://www.eusccr.com/Transcript%20of%20briefing%20on%20Military%20Sexual%20Assault-FINAL.pdf>, p. 57.

Moreover, the reforms have not fixed every type of problematic discharge from the military for sexual assault survivors. Many were discharged with a less than honorable discharge (also known as “bad paper”) for misconduct related to their sexual assaults, which can exclude veterans from virtually all benefits. In the course of reporting a sexual assault, the victim may reveal conduct that is prohibited under the Uniform Code of Military Justice (such as adultery or fraternization), which may lead to a discharge. Prior to 2011, male service members in particular risked being thrown out of service for homosexual conduct for reporting rape by a male, even though the conduct was non-consensual. Symptoms of trauma may also impact performance and lead to a misconduct discharge. All of these types of discharges can create lasting harm and are nearly impossible to remedy.

Veterans are required to show their discharge papers at virtually every juncture: when seeking employment, applying to school, trying to get health care at the VA, applying for a home loan or housing assistance, even for getting a veteran license plate or a discount at a gym. Because the vast majority of veterans are discharged honorably (over 85 percent), a less than honorable discharge is deeply stigmatizing and may result in discrimination, as the services themselves warn departing service members.

Bad Discharges

The profound toll these discharges take on veterans and their families is clear: “bad paper”—as any discharge that is less than honorable is known—has been correlated with high suicide rates, homelessness, and imprisonment.⁴ Those with “Personality Disorder” or other mental health discharges must live with the additional stigma of being labelled—sometimes erroneously—“mentally ill.”

Characterization of discharge also has an enormous impact on access to veterans’ benefits. Benefits are crucial to reintegration after leaving service, particularly for those

⁴ Mark A. Reger et al., “Risk of Suicide Among US Military Service Members Following Operation Enduring Freedom or Operation Iraqi Freedom Deployment and Separation from the US Military,” *JAMA Psychiatry* 72 (2015): 561-569, accessed February 17, 2016, doi:10.1001/jamapsychiatry.2014.319; Margaret E. Noonan and Christopher J. Mumola, “Veterans in State and Federal Prison, 2004,” *Bureau of Justice Statistics Special Report*, May 2007, <http://www.bjs.gov/content/pub/pdf/vsfpo4.pdf> (accessed March 1, 2016), p.9 (35-40 percent of veterans in state and federal prison have a less than fully honorable discharge); Adi V. Gundlapalli et al., “Military Misconduct and Homelessness Among US Veterans Separated From Active Duty, 2001-2012,” *Journal of the American Medical Association* 314 (2015): 832-834, accessed March 1, 2016, doi:10.1001/jama.2015.8207 (“Although only 5.6% (n = 24,992) separated for misconduct, they represented 25.6% of homeless veterans at first VHA encounter.... Incidence of homelessness was significantly greater for misconduct vs normal separations at first VHA encounter.”).

who have experienced trauma and may need support. Having a less than honorable discharge may mean no access to benefits such as education assistance, service-connected disability compensation, pension, health care, vocational rehabilitation, re-employment protection, or home loans.⁵

It may also exclude a veteran from a wide range of state benefits, such as employment preferences, vocational training, or housing assistance. It also diminishes the status of those who served in other ways: veterans with a less than honorable discharge are not permitted to wear their uniforms or receive a military burial. Veterans discharged honorably for personality disorder or for another pre-existing mental health condition may also be denied benefits if they were in service for fewer than 24 months at the time of discharge, which is frequently the case.⁶

In contrast, service members who are injured or become ill while on active duty (including those who are unable to perform their duties because of PTSD) may be eligible for military disability retirement, which carries no stigma and could entitle them to lifetime retirement pay and health insurance for themselves and their dependents.

Despite the high stakes for veterans, there is little meaningful opportunity to appeal a bad discharge (also called applying for an “upgrade”). US service members are prohibited by longstanding Supreme Court precedent from suing the military for injuries or harm that “arise out of or are in the course of activity incident to service.”⁷

Veterans must rely on administrative remedies to correct injustices to their records, but those structures are overwhelmed and regularly fail the veterans they are meant to serve. The vast majority of applicants seeking to alter their discharge status (well over 90 percent and in some years as high as 99 percent) are rejected, often without meaningful review or opportunity to be heard by the military board charged with reviewing their applications. Some military lawyer practitioners refuse to take these cases because they are viewed as a

⁵ Former service members can access health care for problems related to trauma from sexual assault or harassment while in service even if they are not otherwise eligible for health care. 38 USC Section 1720D.

⁶ According to congressional testimony from Dr. Jack Smith, 49 percent of PD discharges between 2002 and 2007 involved service members in their first year of service. US House of Representatives, Committee on Veterans' Affairs, Personality Disorder Discharges: Impact on Veterans' Benefits, testimony of Dr. Jack W. Smith, Deputy Assistant Secretary of Defense for Clinical and Program Policy, US Department of Defense, September 15, 2010.

⁷ *Feres v. United States*, 340 US 135 (1950).

waste of time. Judicial oversight is virtually non-existent because the courts give special deference to military decisions.

Mental Health or Misconduct Discharges

In recent years, media have drawn public attention to the military practice of administratively discharging combat veterans with PTSD for “Personality Disorder” (PD) or misconduct stemming from PTSD, thus denying them access to benefits to which they are entitled.

The Department of Veterans Affairs only provides disability benefits for disabilities resulting from diseases or injuries incurred or aggravated while in service. PDs are characterized by deeply ingrained maladaptive patterns of behavior that typically appear by adolescence and therefore are not considered service-related. Because a PD usually arises before joining the military, it disqualifies a person from service. If PD is diagnosed after service has begun and a doctor determines it renders the service member unfit for duty, a service member with fewer than eight years of service may be discharged without benefits because PD is considered a pre-existing condition, even if it is diagnosed during the course of service.

Accurately diagnosing PD is difficult and requires, at a minimum, conducting multiple interviews with a patient. Its symptoms can be similar to those of PTSD and for that reason professional guidelines warn doctors about diagnosing those who have been exposed to trauma with PD. Yet between FY 2001 and FY 2010, over 31,000 service members (a disproportionate number of them female) were discharged on grounds of personality disorder, often after only a single cursory interaction with a doctor.

Public concern led to reforms and the number of PD discharges plummeted. Yet the military has failed to retroactively review and correct the potentially erroneous discharges already handed out. As a result, thousands of veterans are living with discharge papers that may deny them benefits and subject them to stigmatization. Moreover, sexual assault survivors still regularly report being administratively separated for “Personality Disorder.”

Repercussions of being labelled with a psychiatric disorder can include plummeting self-confidence, loss of a job, failure to get custody of one’s children, inability to get security

clearances, loss of credibility in criminal proceedings, and deprivation of rights to make decisions about medical and legal affairs.⁸

Other types of discharges continue even as PD discharges have decreased. Discharges for other types of non-disability mental health conditions and misconduct have been on the rise.⁹ Yet similar concerns exist that some service members may be being unfairly penalized with bad discharges for conduct arising from their response to a traumatic event, including sexual assault.

PTSD symptoms, such as an exaggerated startle response, an inability to control reflexive behavior, irritability, or attraction to high risk behavior, may also lead to misconduct or difficulty in performing at work.¹⁰ PTSD is associated with substance abuse that can result in discharge. Yet military command may not see these disciplinary infractions as symptoms of mental illness. As a result, those service members may receive bad discharges for misconduct and, as a result of the bad discharge, never get the assistance they need because they are ineligible for veterans' services.

Public awareness of this problem has been raised in the context of combat veterans. However, similar awareness has not occurred for sexual assault survivors, despite the fact that they face similar problems. PTSD is more prevalent among sexual assault survivors than among combat veterans: an estimated one in three sexual assault survivors experience PTSD, as opposed to a 10 to 18 percent prevalence rate of PTSD for combat veterans.¹¹

⁸ Paula J. Caplan and Kade Patterson, "Recent Case Raises Hopes for Reducing Harm from Psychiatric Labelling: A Blow against 'Weaponized Diagnosis,'" *APORIA*, 7 (2015): 29-36, http://www.oa.uottawa.ca/journals/aporia/articles/2015_07/commentary.pdf (accessed February 12, 2016).

⁹ Lolita C. Baldor, "Misconduct Forces More Soldiers Out," Associated Press, February 17, 2014, <http://news.yahoo.com/ap-exclusive-misconduct-forces-more-soldiers-145434065.html> (accessed January 26, 2015); Vietnam Veterans of America, "Casting Troops Aside: The United States Military's Illegal Personality Disorder Discharge Problem," March 2012, <http://www.vva.org/PPD-Documents/WhitePaper.pdf>.

¹⁰ Diane Swick et al., "Impaired Response Inhibition in Veterans with Post-Traumatic Stress Disorder and Mild Traumatic Brain Injury," *Journal of the International Neuropsychological Society* 18 (2012): 917-926, accessed February 17, 2016, doi:10.1017/S1355617712000458.

¹¹ Studies have found that 10-18 percent of combat troops serving in Operation Enduring Freedom (Afghanistan; OEF) or Operation Iraqi Freedom (Iraq; OIF) have probable PTSD following deployment. Terry L. Schell and Grant N. Marshall, "Survey of individuals previously deployed for OEF/OIF," in *Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery*, ed. Terri Tanielian and Lisa H. Jaycox (Santa Monica, CA: RAND Corporation, 2008), pp. 87-115. Some estimate the rate of sexual assault survivors who experience PTSD to be as high as 50 percent.

Need for Protections

Human Rights Watch recognizes that trauma may negatively impact a survivor's performance or lead to misconduct that the military is justified in addressing. The military also has particular battle-readiness needs and fitness for duty requirements that may make it less adaptable to meeting victims' needs than most other institutions. However, processes do exist to separate those who are unable to stay in service for medical reasons. Protections should be in place to ensure that discretion to administratively dismiss service members is not abused, is not exercised in a way that tramples the rights of individual service members, and if an unfair discharge is made, there is actual redress to fix the problem.

Some protections do exist for service members who are being administratively separated (such as the right to consult with counsel and submit a statement), though few take advantage of them. Deeply traumatized and often very young service members may not be in any condition to make such an important decision in the aftermath of a sexual assault. Many are so traumatized that when their superior officer raises the possibility of a discharge they do not fully comprehend the characterization of the separation and would "take anything just to get out."¹² Others are reluctant to question their superiors' decision. All too often they fail to appreciate the consequences of a bad discharge or mistakenly believe that it will be easy to upgrade later.

As one Navy survivor said,

I was 18 years old, was a mental mess, and was terrified to be back aboard [the ship] any longer than I had to. I wasn't protected, I wasn't helped, I wasn't safe from any type of harm!! So how did I actually know what I was signing or even in fact what an OTH [Other Than Honorable] discharge was to mean? How was I to know that from all the sexual attacks that I had to suffer and the harassment, assaults, threats to my life and safety that for all

Kaitlin A. Chivers-Wilson, "Sexual assault and posttraumatic stress disorder: A review of the biological, psychological and sociological factors and treatments," *McGill Journal of Medicine* 9 (2006): 111–118.

¹² Human Rights Watch telephone interview with SN Nicole Collins, October 23, 2014.

these years the [discharge would be] a huge factor to how I lived and how my life ended up?¹³

The inherent inequity in the discharge process makes it even more important that post-discharge mechanisms offer a meaningful opportunity for a hearing and impartial review to correct any injustice that might occur. Unfortunately, our investigation found that existing mechanisms for remedying injustices after discharge fall far short and have not been addressing the problems that our research has found.

Unfair Process, Little Recourse

The military's response to concerns about past wrongful discharges has been to leave correction of injustices to the respective branch's Discharge Review Board (DRB) or Board for Correction of Military Records (BCMR), which were created by Congress in 1946.¹⁴ However, well over 90 percent of those applying to the Boards are rejected with almost no opportunity to be heard or meaningful review. Data provided by the Navy in response to a public records request show that between January 2009 and December 2012 the BCNR granted upgrades to just 1 percent of the 4,189 Other Than Honorable discharges it reviewed.¹⁵ Because of the low likelihood of success, a military law expert described the Boards as "a virtual graveyard."¹⁶

Sexual assault survivors who seek a record change through the service Boards face various hurdles that severely limit their due process rights. Under US law, when a property or liberty interest is at stake, basic due process requires notice and an opportunity to be heard before an impartial tribunal. Liberty interests may be implicated "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing" as long as it is accompanied by loss of a tangible benefit, such as employment

¹³ Narrative from SR Heath Phillips, on file at Human Rights Watch.

¹⁴ The Army, Air Force, and Coast Guard each have a Board for Correction of Military Records. The Navy (including the Marines) has a Board for Correction of Naval Records (BCNR). References to Boards for Correction of Military Records as used in this report encompass all the boards, including the BCNR.

¹⁵ Response from Department of the Navy Board for Correction of Military Records to Human Rights Watch FOIA request, December 17, 2013, on file at Human Rights Watch. The overall rate of relief (full and partial) for the BCNR is seven percent. See testimony of Jon Ruskin, Counsel, BCNR, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, D.C., April 10, 2015, http://jpp.whs.mil/Public/docs/05-Transcripts/20150410_Transcript_Final.pdf, transcript p. 341.

¹⁶ Human Rights Watch interview with military law advisor at a major veterans' service organization, Washington, D.C., May 27, 2014.

opportunities. Denial of government benefits is considered a property interest entitling a claimant to a hearing.

Though service members with bad discharges have their benefits and reputations at stake, their cases are afforded very limited review. BCMRs virtually never have hearings, a complete record of proceedings is not created, and cases are decided by civilians with no oversight from an administrative law judge.

Given the broad jurisdiction of the boards to review all errors in a service member's record, it is not surprising they receive thousands of applications a year. In 2012 alone, the Department of Defense (DOD) BCMRs for the Army, Navy, Air Force, and Marines received 36,638 applications for record corrections. Statutory deadlines requiring the BCMRs to complete 90 percent of their cases within 10 months create enormous pressure to move cases quickly.¹⁷ Nearly half are closed administratively without Board review for reasons that may be opaque to the applicant.¹⁸ Information provided by the Boards to Human Rights Watch indicates all the BCMRs combined held two personal appearance hearings in five years, despite deciding tens of thousands of cases during that time.¹⁹

Applicants must therefore rely on the Boards to consider fully their written submissions and evidence when making a decision. Lawyers for veterans say their cases often include "personal statements, affidavits, briefs, and hundreds of documents."²⁰ Yet Board members often spend only a few minutes deciding a case and may reach a decision without actually reading the submitted material.

In response to public records requests, the Army and Navy BCMRs indicated that Board members do not review cases in advance of their sessions and rely heavily on military staff to decide cases. The information sheet provided to Army BCMR members informs them

¹⁷ 10 USC sec. 1557.

¹⁸ Response from Department of the Navy Board for Correction of Military Records to Human Rights Watch FOIA request, December 17, 2013, on file at Human Rights Watch.

¹⁹ Response from Department of the Army to Human Rights Watch FOIA request, December 30, 2013, on file at Human Rights Watch.

²⁰ Human Rights Watch interview with NVLSP lawyers, December 9, 2015.

that when they arrive in the Board conference room, “[t]here are usually about 90 cases divided into three stacks by potential decision—Grant, Partial Grant, and Deny.”²¹

The Army BCMR often decides 80 cases in a half day of sitting.²² Nor do the other Boards spend significant time on deliberations. It is estimated that the Army Board averages three minutes and 45 seconds per case, and the Navy averages six minutes and forty-five seconds per case.²³ For the Air Force, deliberations average five to six minutes, though they do receive some material before the session, unlike the Army and Navy. Given what is at stake and the amount of information to be considered, that is woefully inadequate.

Decisions cannot be arbitrary,²⁴ and Boards must treat similar cases consistently, or explain why they are not doing so. However, according to information provided to Human Rights Watch by the Boards, they make little effort to consider prior rulings when deciding cases unless an applicant raises a specific case. This is difficult to do because Defense Department BCMR decisions are published in rudimentary electronic reading rooms in different formats without indices, making it hard for applicants or their lawyers to find cases on which to base their arguments. The Navy and Coast Guard no longer post sexual assault cases in the reading room. The Army does so only with the victim’s consent.²⁵

The potential for arbitrariness makes judicial oversight all the more important. However, few cases make it that far. Lawyers say by the time their client gets the BCMR decision,

²¹ Subject: Army Board for the Correction of Military Records (ABCMR) Board Member Information and Helpful Hints, DAIM-ODP, October 28, 2013, on file at Human Rights Watch.

²² Response from Department of the Navy Board for Correction of Naval Records to Raymond J. Toney FOIA request, May 19, 2009, on file at Human Rights Watch, stating, “Board sessions are conducted two times a week with an average of 80 cases decided by each Board,” and, “Boards usually sit twice a week on Tuesday and Thursday from 8:00 am until they are finished with the cases on the docket, typically about 1:00 pm.”

²³ See Alyssa Figueroa, “A Losing Battle: How the Army denies veterans justice without anyone knowing,” *Fusion*, <http://interactive.fusion.net/a-losing-battle/index.html>; US Commission on Civil Rights, Briefing: Sexual Assault in the Military, Testimony of Rachel Natelson, Legal Director, Service Women’s Action Network, January 11, 2013, <http://www.eusccr.com/Transcript%20of%20briefing%20on%20Military%20Sexual%20Assault-FINAL.pdf>, p. 16.

²⁴ The courts use an “unusually deferential” application of the arbitrary and capricious standard to decisions of the BCMRs as they are reluctant to second-guess the Secretary’s personnel decisions. As a result, “only the most egregious decisions may be prevented” by judicial review. *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1511, 1514-15 (1989).

²⁵ Eighth Public Meeting of the Judicial Proceedings Panel on Sexual Assault in the Military, Judicial Proceedings Panel Request for Information Set #3, Question 80(e), May 13, 2015, http://jpp.whs.mil/Public/docs/07-RFI/Set_3/Responses/Q80_Responses_20150513.pdf.

they are frustrated and do not want to go to court.²⁶ Hiring a lawyer to appeal is costly, and the chances of success are very low.

As a result, very few applicants challenge Board decisions in court. According to the Air Force BCMR, between 2009 and 2013, an average of 9 applicants per year—fewer than 0.5 percent of cases decided by the Air Force BCMR—sought judicial review. Of the 46 cases that received judicial review between 2009 and 2013, no decision was vacated, reversed, or modified. Eight cases were remanded and only two of those remands resulted in relief for the applicant. The remaining cases were denied after remand.²⁷ Winning a Board challenge on appeal is also extremely unlikely for the Army.

Between 2008 and 2013, out of tens of thousands of decisions, only 56 Army BCMR cases were remanded by federal courts resulting in partial relief for six applicants and granting of full relief to six others.²⁸ In short, judicial oversight of BCMR cases is so negligible and deferential as to be nearly non-existent, providing little incentive for Boards to create credible decisions that can withstand scrutiny.

²⁶ Human Rights Watch interview with NVLSP lawyers, Washington, D.C., May 27, 2014.

²⁷ Memorandum for SAF/AAIL (FOIA) from SAF/MRBC re: Freedom of Information Act Request—Case #2014-01025-F, December 5, 2014, on file at Human Rights Watch.

²⁸ Response from Department of the Army to Human Rights Watch FOIA request, December 30, 2013, on file at Human Rights Watch.

Key Recommendations

Human Rights Watch recommends that the US government adopt the following measures to assist and provide redress to US service members and veterans who are survivors of sexual assault who were wrongfully discharged (more detailed recommendations appear in Chapter VII of this report):

- Congress create a right to a hearing before the Boards for Correction for Military Records for applicants who have not had an opportunity to be heard at the Discharge Review Boards
- Congress require the BCMRs to summarize and index all decisions (including cases involving sexual assault) by subject to enable applicants to search for cases to support their claims
- The Secretary of Defense instruct the Boards to give special consideration to upgrade requests from victims of sexual assault who have experienced PTSD and to put in place evidentiary requirements for proving a sexual assault consistent with standards used by the Department of Veterans Affairs
- The Secretary of Defense develop a working group with representatives from each service's Board, military lawyers, and veterans' advocacy groups to study standards for granting relief, determine best practices and procedures, and make recommendations for uniform standards and procedures to be included in revised Defense Department instructions
- The Secretary of Defense issue a directive creating a presumption in favor of changing the reason for discharge from personality disorder to "Completion of Service" in cases where the victim has experienced trauma and has not otherwise been diagnosed with personality disorder by an independent physician