

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 5**

Retaliation

92. DoD and Services: Based on the information previously provided to JPP RFI 74, there are multiple channels for a victim to report allegations of retaliation (chain of command, law enforcement, Victim Advocates, SARCs, SVC, IG, hotlines run by the Services or DoD IG), but there is not a standard form used among those reporting agencies.

- a. Are forms used by any agency for sexual assault victims to report retaliation? Please provide a copy of those forms and the procedures to submit the report.**

DoD	<p>(DoD IG) The DoD Hotline reprisal complaint form is used for filing a complaint under 10 U.S.C. 1034 alleging reprisal for reporting a sexual assault. The DoD hotline general complaint form is used for reporting ostracism or maltreatment under section 1709 of the NDAA of 2014. (Attachments 1 & 2)</p> <p>ENCLOSURE(S): Attachment 1 – DoD Hotline FWAC Complaint Form Self Attachment 2 – DoD Hotline Reprisal Complaint Form</p>
USA	<p>(DAIG) The Department of the Army Inspector General (DAIG) has a standardized process and form for submitting Military Whistleblower Reprisal complaints which is found in the DAIG Assistance & Investigations Guide, Part II, Chapter 9, Section 9-1. This process is focused on the information requirements necessary to support a reprisal complaint regardless of the nature of an underlying protected communication. Upon initiating a potential reprisal complaint, the receiving IG will provide the complainant with a questionnaire and checklist listing the information necessary to evaluate the complaint under 10 USC 1034. A copy of the questionnaire is attached.</p> <p>(HQDA/OTJAG) Currently the Army does not have a formal form that is used for victims to report retaliation.</p> <p>ENCLOSURE: WBR Army Intake Case Processing Checklist Questionnaire (May 2013)</p>
USAF	<p>The Air Force IG uses AF Form 102 to register all complaints filed with the IG. There is no separate form for reporting allegations of reprisal related to sexual assault. The form itself is fairly self-explanatory, and questions on it guide a victim to provide the information necessary to allow the IG to determine if reprisal occurred. Please see Tab 2.</p> <p>ENCLOSURE: Tab 2, IG Form</p>
USN	<p>The IG utilizes the attached form (TAB B) for all complaints. There are no other existing standard forms for reporting retaliation. Sexual assault victims can inform: 1) their Sexual Assault Response Coordinator/Sexual Assault Prevention and Response Victim Advocate (SARC/SAPR VA) - who would report to the Case Management Group (CMG) members; 2) NCIS – who, regardless of severity, initiate a separate investigation of a sexual assault victim’s claim of a criminal retaliatory act;</p>

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 5**

	<p>document information via an investigative report maintained in the case file; and provide updates to the impacted command, the victim and at monthly CMG meetings; 3) Victims' Legal Counsel (VLC) – talk to their clients about retaliation and can assess the type of retaliation being reported and direct the victim toward appropriate existing reporting mechanisms, or address the issue directly with the command, where appropriate. VLC have had success in addressing reports of command retaliation directly with chains of command, including commanding officers, on behalf of victims.</p> <p>Because retaliation takes many forms (e.g., command retaliation, social ostracism, maltreatment, personal threats), a flexible approach has been effective; for example, command retaliation, when reported, generally is not coming from a commanding officer directly but from a member of the chain of command in a lower supervisory level. In such cases, the commanding officer, once advised, is often very effective in immediately correcting the retaliatory behavior. Where command retaliation is evident and VLC have been unable to work with a command to remedy the retaliation, victims are assisted with filing formal complaints via existing means (e.g., Article 138 complaint against a commanding officer, IG complaint). When the retaliation being reported is that of social ostracism or maltreatment, VLC have had success in addressing the complaint directly with various members of the chain of command, to include senior enlisted leaders. When a victim feels social ostracism cannot be effectively curtailed via the chain of command, they may opt for an expedited transfer rather than filing more formal complaints and awaiting action through a longer process. Where retaliation takes the form of a personal threat or harassment against the victim, victims are encouraged to report the threatening behavior to law enforcement and the chain of command, as appropriate. Victim's legal counsel, could, if necessary, consistent with rules of professional responsibility, report such activity if an individual was in imminent danger.</p> <p>ENCLOSURE: Tab B, IG Hotline Form</p>
USMC	<p>The enclosed IGMC Complaint Form, enclosure (3) is available for sexual assault victims to report retaliation. The DoDIG Online Hotline Complaint Form may also be used to report retaliation and is available online at http://www.dodig.mil/HOTLINE/hotlinecomplaint.html</p> <p>No forms are used by HQMC SAPR for reporting retaliation.</p> <p>ENCLOSURE: Enclosure (3), Inspector General of the Marine Corps Complaint Form</p>
USCG	<p>No specific form is used; an initial report can be made in any form.</p>

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 5**

- b. If DoD developed standardized procedures for victims of sexual assault to report retaliation, should that information be recorded on a new form, an existing form such as the DD 2910, DSAID Information form, or another form? Please provide the rationale for any preference.**

DoD	<p>(DoD IG) Complaints filed with the DoD Hotline are made on the forms described above.</p> <p>(DoD SAPRO) Complaints filed with the DoD Hotline are made on the forms described above. The present purpose of the DD Form 2910 is to elect a reporting option and to document that the victim has received the required notifications; e.g., Expedited Transfer, Military Protective Order, Special Victims' Counsel/Victims' Legal Counsel, retention periods for the DD Form 2910 and 2911.) It has never been used by the victim to request any of the victim services, such as Expedited Transfer, Military Protective Order, or Special Victims' Counsel/Victims' Legal Counsel. At this point, DoD recommends that the DD 2910 or the DSAID information form (DD 2965) NOT be used for retaliation reports. These forms are typically used at the outset of a sexual assault report; allegations of retaliation associated with reporting usually occur sometime after the initial contact with the SARC and/or Victim Advocate. DoD forms already exist for retaliation reporting with the DoD IG, Service IGs, and MCIOs, so there is no need to create a new, separate form. Discussion on the reporting vehicles and means for data capture will continue during the Implementation Planning Phase of the forthcoming (Jan 2016) Retaliation Prevention and Response Strategy.</p>
USA	<p>The DD 2910, and DSAID information form should be used as the system of record for reports of retaliation for sexual assault. These forms are already being used by the SARCs, thus will reduce training required. Additionally, this will allow the SARC to establish a linkage between a sexual assault and a retaliation case. Further, the use of a single system would allow for data queries to take place without any issue of incompatibility between systems.</p>
USAF	<p>(SAF/IG) For the AF/IG, a report of retaliation that fits the legal description of reprisal is best reported on the current AF Form 102. This is because the form is designed to assist the victim in providing the information necessary by the IG to establish the elements of reprisal. Forms such as the DD 2910 are appropriate for their function, the reporting of a sexual assault. However, reprisal cannot take place until after the sexual assault has been reported, so putting the question of reprisal on the form would not make sense.</p> <p>The Air Force Inspector General AF Form 102 is designed to facilitate the intake and initial analysis of the full spectrum of complaints to include retaliation. This form is designed to support codified processes and procedures in such a manner to allow IGs to expeditiously analyze the issues, input the required information into the Automated Case Tracking System (ACTS – AF/IG's case management system) and develop resolution strategies for each of the issues raised. Utilizing a standardized form for one very specific type of complaint would unnecessarily increase the complexity of processing complaints. It is common for complainants to bring multiple issues to the IG when filing a complaint. The proposed option would likely</p>

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 5**

	<p>require completing two complaint forms to address all issues and thereby complicate tracking all issues associated with one case to completion.</p> <p>(AF/CVS) The DD2910 is used to advise victims of their rights when making a report of sexual assault. This is the appropriate place to add information regarding retaliation and where a victim could report retaliation. Most often, this form is completed at the beginning of relationship between the SARC or VA and the victim. At this point the victim could be informed of what they should do and the resources available if they face retaliation. The Air Force would consider working with all the appropriate agencies to determine the feasibility in creating a single document to collect information on an actual report of retaliation.</p>
USN	<p>The Navy is committed to addressing issues of retaliation. If it is determined that a new form will assist in that endeavor, we are certain we can make such a process work. To inform such a decision, consideration should be given to the scope of potential reporters and activities to be included.</p> <p>If the panel is seeking information on retaliation in general (for victims, witnesses, first responders, and others reporting sexual assault allegations) and believes a single form is necessary, then such a form could be utilized. While victims of sexual assault are at the forefront of the discussion of retaliation, they are not the only individuals within the Services who are subject to retaliation. Creating a new form would help facilitate the expansion of any new retaliation prevention program to include reports of retaliation from victims of all crimes, not just sexual assault, and could help evaluate the scope of retaliation even beyond victims.</p> <p>The issues involved in creating such a form, capable of accurately capturing the widely varying nature of retaliation complaints in a meaningful way, and ensuring accurate utilization across the DoD, would, we believe impose a significant burden that should be weighed against the benefit derived from the information collected. We believe such a form would be redundant with other systems currently in place and would not add substantive value to the process.</p> <p>If the information sought relates only to sexual assault victims then it would be prudent to annotate any reports of retaliation on the existing DD 2910. Since the DD 2910 already captures sexual assault information that would be an appropriate place. When it occurs, criminal retaliation is often reported after the initiation of an investigation. As such, notification to the SARC would ensure the allegation is annotated on the DD 2910. Investigative data captured for criminal retaliatory acts is documented in an NCIS Report of Investigation as are adult sexual assault investigations.</p> <p>In either case, means of documenting and tracking different forms of retaliation may be necessary (i.e. command retaliation and social ostracism) that would require specific filing/tracking requirements. One concern is that any standardized procedure would create requirements that could serve to slow the process of remedying the actual retaliation (for example between the VLC and the command). Further, requiring a victim to complete and file any additional forms to formally report</p>

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 5**

	retaliation will have a chilling effect on reporting in general because victims may not be comfortable putting in writing a complaint against the command or colleagues, or may worry about inspiring further retaliation if they do.
USMC	<p>For victims to report retaliation, the Marine Corps recommends using existing complaint submission processes and forms rather than creating anything additional. Both DoD IG and IGMC already have established complaint submission processes. The IG forms that are currently in use are broad enough to handle all types of complaints.</p> <p>Because retaliation against sexual assault victims is already tracked and monitored by Sexual Assault Response Coordinators (SARC), the DSAID process should allow SARCs to document the status of the victim and investigation. The DD Form 2910 captures the status as of the initial contact with the victim. For the Marine Corps, the Safety Screening Tool will be utilized to monitor whether or not a victim is experiencing retaliation. If a victim is experiencing retaliation and opts to report it, he/she will be referred to the appropriate agency to report the retaliation. The referral will be annotated on the Services Provided Log and the status reported and tracked at the Monthly Case Management Group. As the official system of record for sexual assault, DSAID should be the repository for tracking retaliation from the initial contact with the victim through case closure. Retaliation could occur at any point so the process would need to include the requirement to document status after each contact with the victim.</p> <p>In sum, if DoD develops a standardized process for reporting, it should use the current Service and/or DoD Inspector General complaint process. Reports of retaliation are already tracked and monitored by installation SARCs. DSAID only needs to be able to capture the status of the retaliation complaint after each contact with the victim; it should not replace the IG complaint process as the means of reporting retaliation.</p>
USCG	The Coast Guard would be open to adopting a standardized form used by other services. However, the Coast Guard would have difficulty implementing a DSAID-based form because it does not have full access to DSAID (at present only the SARC has access).

c. Would it be beneficial for victims and/or the Services to establish an option for victims to file either an informal or formal retaliation report, similar to the options for Equal Opportunity complaints? Please explain why.

DoD	(DoD IG) WRI does not handle informal complaints, but we believe that alternative dispute resolution akin to the EO and EEO processes can be beneficial by promoting just and efficient resolution of reprisal complaints.
USA	It would be very beneficial for the victim and Army to have the option of informal or formal retaliation reporting. This would allow the victim and command the opportunity to resolve cases at the lowest level as an informal case, while the formal case would provide the command the opportunity to properly investigate the report and hold those responsible appropriately accountable.
USAF	(SAF/IG) The benefit of an informal/formal complaint of reprisal for reporting

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 5**

	<p>sexual assault is not clear. Any position on the benefits of an informal process would require more information on the proposal and is closely tied to the definition of a retaliation report. The current AF definitions are as follows:</p> <p>Retaliation – Retaliation is the taking or threatening to take an adverse personnel action, or withholding or threatening to withhold a favorable personnel action, with respect to a military member because the member reported a criminal offense. Based on the definition of reprisal in DoDI 7050.06 (see below), retaliation is a subset of reprisal.</p> <p>Reprisal – Taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, for making, preparing to make, or being perceived as making or preparing to make a protected communication.</p> <p>As a protected communication includes reporting a criminal offense, retaliation is a subset of reprisal. The handling of reprisal complaints is governed under 10 USC 1034. It is unclear how an informal retaliation report would be executed consistent with the requirements of the statute. However, retaliation allegations of ostracism or maltreatment (as defined by the Air Force, neither fall under the definition of reprisal) might be addressed through an informal process, but as both are command issues further comment is beyond the scope of the IG.</p> <p>(AF/CVS) Although it is not called formal and informal specifically, victims already have this option. If a victim reports retaliation to the SARC the SARC will inform them of their options in reporting to the appropriate organization (IG, OSI...) or if the victim wants it handled at the lowest level, without IG, OSI or other involvement, the SARC can go directly to the commander or first sergeant and request an informal resolution. Equal Opportunity could assist in providing mediators in cases where the victim does not want to engage in a formal investigation.</p> <p>(Air Force Community Legal Services Special Victims Counsel Program (CLSV/SVC)) Allowing victims to file informal and formal reports captures more data and gives an accurate picture of all types of retaliation. An informal process, modeled upon the EO informal process, promotes resolution at the lowest level of management using a non-adversarial approach. Many victims experience retaliation, and more accurately, ostracism, from peers and, after discussion with the victim, commanders are often the right leaders to resolve their concerns. Also, an informal process produces a fast resolution which is often preferred when peer retaliation or ostracism occurs. When the Commander or supervisory staff is named in the complaint or otherwise unable to resolve the complaint then a formal reporting process, as with an unrestricted report of sexual assault, can trigger a report to the appropriate agency.</p>
USN	<p>There are currently multiple avenues by which a victim (or witness) can report retaliation, which gives that individual the greatest choice as to what to report, and to whom. For example, a victim may wish to resolve issues of peer retaliation or ostracism using informal measures. Any reporting system should respect the desires</p>

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 5**

	<p>of the victim.</p> <p>Due to the nature of sexual assault offenses, we do not recommend an Equal Opportunity type system. While a structure for resolution is seen as advantageous to both commands and individuals, and an option for an informal resolution process may be beneficial, we believe limiting victim choices to “formal” or “informal” narrows the scope of available responses and may lead to reduced reports.</p> <p>Such a system would, potentially, limit the existing ability of SARCs, SAPR VAs and VLCs. For instance, where a victim is represented by VLC, victims already have access to both informal (e.g., advising VLC directly) and formal (e.g., Article 138, 1150, IG, Congressional Communication) methods to report retaliation and it would not be beneficial for victims to be required to file separate retaliation reports. We believe it would be redundant to add another layer of reporting options (or requirements) when the ultimate complaint will likely still need to go through one of the established modes for addressing such complaints.</p> <p>However, such an option may permit command visibility but preclude involvement in keeping with the spirit of informal Equal Opportunity reports. This would allow commands to monitor the frequency of retaliation reports and may empower victims who have chosen not to utilize VLC services or other avenues of reporting to resolve retaliation complaints at a level they deem appropriate. Navy is open to adding an informal process, as long as doing so does not devalue or adversely impact the current processes.</p> <p>If this option is considered it should be limited to non-criminal acts. If a victim reports retaliatory acts that are criminal in nature, the MCIO is mandated to investigate the act, regardless of severity. Criminal retaliation, associated with a report of sexual assault, will often reveal information pertinent to the ongoing sexual assault investigation. Given the potential impact of such information on a sexual assault investigation, it should be gathered by the MCIO and documented in the criminal investigation.</p>
USMC	<p>There is no formal/informal reporting process. It would be beneficial for the DoD and Services to establish an option for victims to obtain resolution to their retaliation complaints either formally or informally. Similar to the MEO process, the complainant would retain the ability to address concerns at the lowest level using the direct approach, informal third party, or mediation via the Equal Opportunity Advisor (EOA). However, if the complainant desires direct command involvement and oversight the complainant would be able to elect the formal option. As with the MEO process, the commander would have the ability to override the complainant’s desires if the commander determined a formal investigation is required in order to maintain good order and discipline.</p> <p>However, currently, the option to informally resolve acts of reprisal (which is included in the legal definition of retaliation) would not currently align with 10 USC 1034 because the informal option does not address the legal requirements for: IGs to determine the investigative merit of all complaints of reprisal, IG investigative</p>

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 5**

	<p>timelines, or Service Secretary oversight and approval of reprisal investigations.</p> <p>The FY2014 NDAA amendment (Sec 1709) to 10 USC 1034 imposes a 1-year statute of limitations on reporting reprisal to the IG from the date the complainant becomes <u>aware</u> of the unfavorable personnel action. If the complainant chooses to informally resolve this type of retaliation (reprisal), they are <u>aware</u> of the UPA and that would have to begin the statute of limitations within which the IG must operate, hence why an informal option is not workable.</p> <p>Additionally, the IG has 180 days from the date of an allegation of reprisal to complete its investigation. If an informal resolution process were to be instituted, would the start date of that informal process be considered the date of allegation or would it be the date the person formally reported it to the IG? If the former, there would need to be a legal change in order for the IG to still have the required 180 days to investigate post-informal resolution process.</p> <p>10 USC 1034 also imposes timelines on each Service Secretary to oversee investigations of reprisal. The law would need to be altered to make it clear that an informal resolution process would not trigger such oversight.</p> <p>Finally, the informal resolution process would not just impact reprisal or retaliation complaints. The IG also has authority to investigate other types of retaliation (ostracism and maltreatment), particularly if they involve a senior official or are made <u>with</u> a reprisal complaint. As such, the ramifications of an informal resolution process for ostracism and maltreatment complaints would need to be carefully crafted such that it does not interfere with the IG's process or authority to investigate matters that are IG appropriate (while referring those items that are not to other venues).</p>
USCG	<p>An Equal Opportunity-like process would be useful for addressing many low-level retaliation complaints; for example, complaints of social ostracism, which are not well suited for criminal investigation. Nothing currently precludes individuals from using the Equal Opportunity/Civil rights process to seek relief for retaliation complaints, but the process could be customized to better address these complaints, and members could be educated about this option. A customized process should be optional for the victim, should have built-in confidentiality, should provide for appeal or formal process for victims whose complaints are not resolved in an informal setting, and should not interfere with the victim's ability to avail him/herself of the option for expedited transfer. The Coast Guard also notes that creating a process totally separate from the existing Equal Opportunity/Civil Rights program would severely strain already limited resources. Instead, the existing Equal Opportunity process could be modified to accommodate reports of retaliation. The Coast Guard's Civil Rights Manual is available at: http://www.uscg.mil/directives/cim/5000-5999/CIM_5350_4C.pdf.</p>