

# JUDICIAL PROCEEDINGS PANEL

REPORT ON  
RETALIATION RELATED TO  
SEXUAL ASSAULT OFFENSES



*February 2016*

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# JUDICIAL PROCEEDINGS PANEL

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*Report of the Judicial Proceedings  
Since Fiscal Year 2012 Amendments Panel*

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**Retaliation Related to Sexual Assault Offenses**

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*February 2016*



## JUDICIAL PROCEEDINGS PANEL

**Elizabeth Holtzman**  
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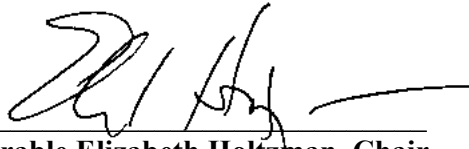
Dear Chairs, Ranking Members, and Mr. Secretary:

We are pleased to submit this report of the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP) on retaliation related to sexual assault offenses. This report summarizes the JPP's review of retaliation against Service members who have reported a sexual assault, who were victims of a sexual assault and are considering reporting it, or who have intervened on behalf of a victim of a sexual assault. Included in this report are 13 recommendations to improve the processes for reporting, investigating, monitoring, resolving, tracking, and preventing retaliation.

To gather information for this report, the JPP held public meetings to hear from civilian and military experts and practitioners. The JPP also received responses to written requests for information from DoD and the Services about retaliation policies and procedures. The JPP expresses sincere appreciation to everyone who contributed to this report.

The JPP looks forward to continuing its review of military judicial proceedings for sexual assault crimes and addressing other topics in future reports.

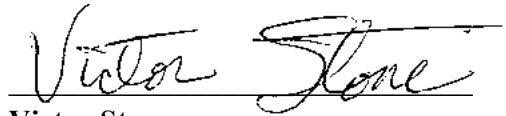
Respectfully submitted,



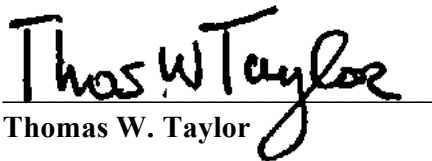
**Honorable Elizabeth Holtzman, Chair**



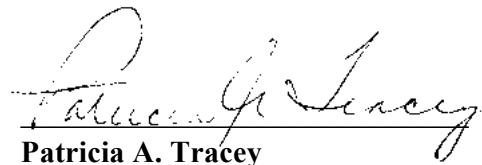
**Honorable Barbara S. Jones**



**Victor Stone**



**Thomas W. Taylor**



**Patricia A. Tracey**

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# Executive Summary

## RETALIATION RELATED TO SEXUAL ASSAULT OFFENSES

Retaliation related to sexual assault offenses is intertwined with the issues at the heart of the Judicial Proceedings Panel's (JPP's) mandate. The JPP examined the issue of retaliation against Service members who have reported a sexual assault, who were victims of a sexual assault and are considering reporting it, or who have intervened on behalf of a victim of a sexual assault.

Retaliation encompasses a broad range of behaviors. It includes *social retaliation*, such as harassing or isolating a Service member because he or she reported a sexual assault; *professional retaliation*, such as interfering with a Service member's promotion because he or she reported a sexual assault; and *criminal retribution*, such as assaulting or threatening a Service member because he or she reported a sexual assault. These behaviors can occur any time after the underlying sexual assault. In some cases, Service members experience retaliation before the sexual assault is reported. In other cases, Service members experience retaliation during the investigation, prosecution, and post-adjudication stages of the judicial process.

The negative effects of retaliation in the military are clear. Retaliation not only harms the victims in these situations but also damages unit cohesion and mission readiness. Fear of retaliation can also undermine other victims' willingness to report sexual assault in the future, allowing the cycle of sexual assault to continue.

On the other hand, the scope of the problem of retaliation in the military is unclear. A 2014 survey by the RAND Corporation indicated that 62% of active duty women who reported unwanted sexual contact to a military authority in 2014 perceived some form of retaliation; a survey from fiscal year 2012 yielded the same result. However, individuals testifying before the JPP gave varying accounts about the nature and prevalence of the problem. Furthermore, there are currently no centralized mechanisms for reporting and tracking retaliation complaints and outcomes in the military, and the Department of Defense (DoD) and the Services are still developing policies and procedures for defining, responding to, and monitoring the problem.

The JPP is concerned about the lack of data on retaliation against victims of sexual assault. Though surveys indicate that retaliation may be prevalent among Service members who report a sexual assault, more precise data are needed.

The JPP recommends that DoD and the Services improve policies for reporting and monitoring retaliation against sexual assault victims. While the Services should continue to provide multiple channels for victims to report retaliation, it is essential that one person be responsible for collecting retaliation reports from all reporting channels and monitoring each case. That responsibility should belong to the sexual assault response coordinator.

The Services should also implement a standardized form to ensure that uniform information is collected from each victim. The form should be updated to reflect the status of the retaliation case throughout the investigative and judicial process.



In addition, the JPP recommends that the Services improve mechanisms for tracking retaliation complaints and outcomes beyond the installation level. This data should be used to inform future policymaking on preventing and handling retaliation.

The JPP also recommends that command leadership take further actions to address retaliation in their ranks. Leaders must convey the message that retaliation will not be tolerated. Complaints of retaliation must be thoroughly investigated by the appropriate authority. Service members who engage in retaliatory behaviors must be held accountable. Service members at all levels of the command must be trained on retaliation and its harmful effects.

DoD and the Services have taken some steps to respond to retaliation, but the JPP believes that more needs to be done. Sexual assault cannot be effectively addressed without also addressing retaliation.

# Summary of JPP Recommendations on Retaliation Related to Sexual Assault Offenses\*

*Recommendation 24:* In the Department of Defense's strategy addressing retaliation related to sexual assault, the Secretary of Defense specify (1) processes for reporting and investigating retaliation, (2) responsibility for the collection and monitoring of reports, and (3) mechanisms for tracking retaliation complaints and outcomes.

- Section 539 of the Fiscal Year 2016 National Defense Authorization Act requires the Secretary of Defense to establish a comprehensive strategy to prevent retaliation carried out by Service members against other Service members who report sexual assault or intervene on behalf of victims of sexual assault.
- In May 2015, the Secretary of Defense directed the Acting Under Secretary of Defense for Personnel and Readiness to collaborate with the Services and the DoD Office of Inspector General to establish a comprehensive retaliation prevention strategy. A report detailing the strategy is expected to be released in the second quarter of fiscal year 2016.
- To effectively address and respond to retaliation, DoD must develop uniform processes across all the Services for reporting, monitoring, and tracking retaliation complaints and outcomes. Specific changes to these processes are detailed in the recommendations below.

*Recommendation 25:* The Secretary of Defense and Service Secretaries develop a standardized form for reporting retaliation. The standardized form should be linked to DD Form 2910 in the Defense Sexual Assault Incident Database to properly track retaliation allegations related to sexual assault offenses, should provide victims of retaliation with the option to file an informal or formal retaliation report, and should be updated throughout the investigative and judicial process to ensure that the retaliation allegation is monitored and resolved.

- A standardized form would ensure that victims of retaliation provide complete information when reporting retaliation. In addition, linking the standardized retaliation report form to DD Form 2910 would enable the retaliation complaint to be analyzed and monitored in the context of the underlying report of sexual assault.
- Providing victims of retaliation the option to file an informal retaliation complaint would enable commands to quickly address and resolve complaints at the lowest possible level. Commanders would retain the authority to initiate a separate formal investigation if they discover egregious misconduct associated with the retaliation complaint.

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\* JPP Recommendations 1-11 are included in the JUDICIAL PROCEEDINGS PANEL INITIAL REPORT 11 (Feb. 2015), *available at* [http://jpp.whs.mil/public/docs/08-Panel\\_Reports/JPP\\_InitialReport\\_Final\\_20150204.pdf](http://jpp.whs.mil/public/docs/08-Panel_Reports/JPP_InitialReport_Final_20150204.pdf). JPP Recommendations 12-17 are included in the JUDICIAL PROCEEDINGS PANEL REPORT ON RESTITUTION AND COMPENSATION FOR MILITARY ADULT SEXUAL ASSAULT CRIMES 5 (Feb. 2016), *available at* [jpp.whs.mil/Public/docs/08-Panel\\_Reports/JPP\\_Rest\\_Comp\\_Report\\_Final\\_20160201\\_Web.pdf](http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Rest_Comp_Report_Final_20160201_Web.pdf). JPP Recommendations 18-23 are included in the JUDICIAL PROCEEDINGS PANEL REPORT ON ARTICLE 120 OF THE UNIFORM CODE OF MILITARY JUSTICE 5-7 (Feb. 2016), *available at* [jpp.whs.mil/Public/docs/08-Panel\\_Reports/JPP\\_Art120\\_Report\\_Final\\_20160204\\_Web.pdf](http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Art120_Report_Final_20160204_Web.pdf).

- Using the standardized form throughout the investigative process, until the final disposition of the case, would improve the tracking and monitoring of retaliation reports, investigations, and outcomes.

*Recommendation 26:* The Secretary of Defense and Service Secretaries continue to provide multiple channels for Service members to report retaliation. In addition, the Secretary of Defense and Service Secretaries formally task installation sexual assault response coordinators (SARCs) with consolidating information from reports on retaliation, recording information on retaliation reports in the Defense Sexual Assault Incident Database, and ensuring that information about the investigation and resolution of retaliation claims is properly and fully monitored.

- DoD policy provides multiple channels through which victims of sexual assault may make a report of sexual assault. Similarly, victims of retaliation should have multiple channels through which they can report instances of retaliation related to sexual assaults to ensure that they can make a report to someone in whom they feel comfortable confiding.
- Tasking sexual assault response coordinators (SARCs) with the responsibility to collect and monitor reports of retaliation establishes uniform responsibility for tracking the number and nature of complaints and ensuring that the complaints are followed up on, while minimizing the sharing of sensitive information. Sexual assault response coordinators (SARCs) should be responsible for ensuring that retaliation reports are addressed at the monthly case management group meetings.
- Entering information on retaliation into the Defense Sexual Assault Incident Database would enable DoD and the Services to maintain an accurate and up-to-date database of information on all retaliation complaints and outcomes.

*Recommendation 27:* Congress require the Secretary of Defense and Service Secretaries to track retaliation allegations related to sexual assault offenses and publish information regarding retaliation complaints, investigations, and final dispositions in the Department's annual report to Congress on sexual assault prevention and response.

- The scope and full nature of the problem of retaliation are not well understood. Complete and accurate data are needed to understand the number of cases of retaliation related to sexual assault reports and the Services' ability and procedures to respond to them. Data can be used to inform future policymaking on reporting, investigating, and resolving retaliation complaints.
- Data to be collected by sexual assault response coordinators (SARCs) and reported by the Services should include, but not be limited to, the following information:
  1. whether a victim claims professional or social retaliation;
  2. narrative of the allegation, including the date of the retaliation;
  3. recipient of each complaint—a supervisor or someone in the chain of command, an inspector general, a military investigator, the military police, or another individual or entity;
  4. gender of the victim of retaliation;

5. gender of the retaliator(s);
6. relationship between the victim of retaliation, victim of sexual assault, and the retaliator(s);
7. relationship, if any, between the retaliator(s) and the alleged perpetrator of the underlying crime;
8. whether the alleged retaliation is actionable under the Uniform Code of Military Justice;
9. outcome of the retaliation report; and
10. whether the outcome of the retaliation report was shared with the victim of retaliation.

*Recommendation 28:* The Secretary of Defense establish a policy that requires the DoD Office of Inspector General to investigate all complaints of professional retaliation related to sexual assault. The Secretary of Defense ensure that these investigations are prioritized and conducted by personnel with specialized training. The Secretary of Defense require the inspectors general to report the status of the investigations to the installation sexual assault response coordinators (SARCs) prior to each monthly case management group meeting.

- The investigations of professional retaliation complaints, currently conducted through the inspector general system, have many problems and limitations, including extensive delays and inadequate oversight. Requiring the DoD Office of Inspector General to investigate all professional retaliation complaints related to sexual assault would provide better insight into and control over these cases.
- In the past four years, the DoD Office of Inspector General and Service inspectors general have handled very few cases of retaliation related to sexual assault offenses. The recent increase in sexual assault reporting in DoD may presage a similar increase in the number of complaints about professional retaliation. DoD must ensure that adequate resources and properly trained personnel are available to effectively and efficiently receive, process, and investigate these complaints.
- Professional retaliation complaints related to sexual assault are different from other complaints of professional retaliation because they often involve a traumatized victim and allegations of a violent crime. Therefore, when the inspector general is handling a professional retaliation complaint relating to a sexual assault, it is critical that only designated DoD Office of Inspector General investigators and supervisors, who receive specialized sexual assault response training, conduct the investigation.
- To ensure that professional retaliation complaints are addressed at case management groups, the inspectors general should be required to provide monthly updates to the installation sexual assault response coordinator (SARC), who should be responsible for monitoring and tracking retaliation complaints.

*Recommendation 29:* The Service Secretaries establish policies to ensure that personnel assigned by commanders to investigate retaliation complaints are properly trained on issues regarding retaliation relating to sexual assault.

- In cases of social retaliation, commanders are often in the best position to direct the investigation of, and response to, complaints from victims of retaliation relating to sexual assault.
- Commanders must ensure that the personnel they assign to investigate complaints of retaliation relating to sexual assault are properly trained to perform their duties and understand the sensitivities of such investigations.

*Recommendation 30:* The Secretary of Defense and Service Secretaries expand the expedited transfer program to include job retraining for Service members who belong to small specialty branches and to be made available, on a case-by-case basis, to bystanders and witnesses of sexual assault who experience retaliation.

- Expedited transfers provide an effective tool for mitigating retaliation, but a victim from a small specialty career field may continue to experience retaliation even after moving to a new unit or duty location. Expedited transfer rules should permit these Service members to receive job retraining.
- Some bystanders or witnesses to sexual assault may experience retaliation for reporting or providing testimony about what they observed, and expedited transfer rules should permit commanders to reassign personnel who experience such retaliation, if warranted.

*Recommendation 31:* The Secretary of Defense establish specific guidelines clarifying what information can be released to a person who files a retaliation complaint related to a sexual assault.

- Guidance under the Privacy Act about the public release of disciplinary information is vague, and the amount of information released to victims of retaliation on the final disposition and disciplinary response to a retaliation complaint varies widely. In many circumstances, victims of retaliation receive no information about administrative actions taken against offenders.
- At a minimum, the victim of retaliation should be informed whether his or her retaliation allegation was substantiated, was unsubstantiated, or was dismissed because the investigating authority determined that the allegation did not rise to the level that warranted an investigation.
- Greater transparency about disciplinary actions taken in response to instances of retaliation would make clear to all Service members that retaliation will not be tolerated and would increase confidence that action will be taken in response to retaliation allegations.

*Recommendation 32:* The Secretary of Defense begin tracking the Services' implementation of the statutory requirement that general or flag officers review proposed involuntary separations of Service members who made unrestricted reports of sexual assault within the preceding year.

- Section 578 of the Fiscal Year 2013 National Defense Authorization Act directed the Secretary of Defense to develop a policy to require a general or flag officer, on request, to review the circumstances of, and grounds for, the proposed involuntary separation of a Service member who made an unrestricted report of sexual assault within the preceding year. However, DoD is not currently monitoring compliance with this requirement.
- Tracking general and flag officer reviews of proposed involuntary separations would provide important information about whether Service members are being subjected to involuntary separation in retaliation for reporting a sexual assault.

*Recommendation 33:* The Service Secretaries revise their regulatory definitions of maltreatment, which currently contain an overly narrow intent requirement.

- Regulatory definitions of maltreatment that were recently adopted by the Services require that an act be committed “with the intent to discourage reporting of a criminal offense or otherwise discourage the due administration of justice.” This intent requirement is overly narrow and is inconsistent with the definition of maltreatment in Article 93 of the Uniform Code of Military Justice. A less restrictive definition of maltreatment would appropriately cover a broader range of abusive, retaliatory acts.
- A better definition of maltreatment that would not require such a narrow intent requirement would be: “Maltreatment, which is a form of retaliation, is treatment by peers or by other persons that, when viewed objectively under all the circumstances, is abusive, cruel, humiliating, oppressive, demeaning, or harmful to an individual and is done to discourage the individual from reporting a criminal offense or because the individual reported a criminal offense. Maltreatment under this instruction does not require that the individual was subject to the orders of the accused as is required for maltreatment under Article 93, UCMJ.”

*Recommendation 34:* Congress refrain from creating an enumerated offense prohibiting social retaliation in the Uniform Code of Military Justice.

- Commanders currently have adequate means at their disposal to take disciplinary and administrative action against members of their command who engage in social retaliation.

*Recommendation 35:* The Secretary of Defense and Service Secretaries develop innovative and effective training on retaliation for commanders and all other Service members, including targeted training that may be used in response to problems of retaliation within an organization.

- Targeted training can be used to foster a command climate in which Service members understand the harm done by retaliation to its victims, to unit morale and cohesion, and to mission readiness.
- New and innovative approaches to retaliation training must be developed to reduce the number of Service members who disregard or ignore training.

- Commander training must educate leaders about the full range of options available for addressing retaliation, particularly when retaliatory acts are not prosecutable under the Uniform Code of Military Justice.

*Recommendation 36:* The Secretary of Defense revise the elements and burdens of proof for reprisal claims made under the Military Whistleblower Protection Act so that they parallel the elements and burdens of proof outlined in the Whistleblower Protection Act for DoD civilians.

- The elements and burden of proof established by DoD policy for adjudicating Service member reprisal claims under the Military Whistleblower Protection Act are not the same as the standards for similar complaints from DoD civilians made under the Whistleblower Protection Act.
- For DoD civilian complaints made under the Whistleblower Protection Act, the complainant must prove by a preponderance of the evidence that the disclosure was a “contributing factor” in the adverse personnel action. The burden then shifts to the agency to demonstrate by *clear and convincing evidence* that it would have taken the same personnel action absent the disclosure.
- For Service members’ complaints made under the Military Whistleblower Protection Act, all four elements—a protected communication; knowledge of the protected communication on the part of the responsible management official; a personnel action taken, threatened, or withheld; and a causal connection between the protected communication and the personnel action—must be established by a *preponderance of the evidence*.
- Legislative action would not be required to change DoD policy regarding the elements and burdens of proof for complaints made under the Military Whistleblower Protection Act.

# I. Introduction

Retaliation against victims of sexual assault in the military is closely related to the issues at the heart of the JPP's mandate. Retaliation can have severe and long-lasting effects on victims of sexual assault, it can discourage reporting by other military members who experience sexual assault, and it can damage unit morale and mission readiness.

Examining the issue of retaliation against victims of sexual assault presents several unique challenges. First, the scope of the problem is not well understood. A 2014 survey by the RAND Corporation indicated that 62% of active duty women who reported unwanted sexual contact to a military authority in 2014 perceived some form of retaliation.<sup>1</sup> However, individuals testifying before the JPP gave varying accounts about the nature and prevalence of the problem. Second, the procedures for responding to retaliation allegations are not as well-defined or well-established as the procedures for responding to sexual assault allegations. DoD and the Services have no centralized channel for reporting and tracking retaliation complaints and outcomes, and the policies for addressing retaliation span multiple agencies within the military. Third, as the issue of retaliation receives increased attention, the military is still developing its policies and procedures for defining, responding to, and monitoring the problem.

In its review of the problem of retaliation in the military, the JPP sought to gain a cross-section of perspectives from multiple stakeholders. The JPP heard from more than 35 witnesses at its public meetings in April, May, and June of 2015, including victims of retaliation, special victims' counsel, sexual assault response coordinators, victim advocates, commanders, noncommissioned officers, DoD personnel, and civilian experts. The JPP also submitted written requests for information to DoD and the Services about retaliation policies and procedures. The JPP conducted deliberative sessions from August 2015 through January 2016 to discuss the issues surrounding this topic.

In this report, the JPP considers the military's processes for reporting, investigating, resolving, tracking, and preventing retaliation. In its numerous recommendations, the JPP takes into account the wide range of retaliatory conduct that a victim of sexual assault may experience and the broad time frame in which a victim may experience retaliation.

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<sup>1</sup> See U.S. DEP'T OF DEF., SAPRO, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2014 at 10 (Apr. 22, 2015) [hereinafter FY14 SAPRO REPORT], available at [http://sapr.mil/public/docs/reports/FY14\\_Annual/FY14\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault.pdf](http://sapr.mil/public/docs/reports/FY14_Annual/FY14_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf); see also *infra* Section III.







# Overview of Retaliation

## A. DEFINITIONS AND FORMS OF RETALIATION

The JPP reviewed different forms of retaliation related to sexual assault incidents.<sup>2</sup> Retaliation is an “umbrella term”<sup>3</sup> that covers a broad spectrum of behaviors, which can be grouped into three categories: social retaliation, professional retaliation, and criminal retribution. As the table below shows, these three categories encompass many forms of retaliatory behavior against victims.

*Chart: Forms of Retaliation*

Social Retaliation	Professional Retaliation	Criminal Retribution
<ul style="list-style-type: none"> <li>• Disparate treatment by and among peers</li> <li>• Exclusion from social acceptance, privilege, or friendship</li> <li>• Workplace incivility</li> <li>• Individuals distancing themselves from the victim</li> <li>• Victim blaming</li> <li>• Victim not invited to/excluded from social activities or interactions</li> <li>• Harassing comments on social media</li> <li>• “Unfriending” on social media</li> </ul>	<ul style="list-style-type: none"> <li>• Interference with promotion</li> <li>• Unwarranted disciplinary action</li> <li>• Involuntary transfer or reassignment</li> <li>• Unwarranted negative performance evaluation</li> <li>• Unfair decision about pay, benefits, awards, or training</li> <li>• Making or threatening to make significant change in duties or responsibilities of a member not commensurate with the member’s grade</li> </ul>	<ul style="list-style-type: none"> <li>• Cruelty or maltreatment (Art 93)</li> <li>• Destruction of property (Art 109)</li> <li>• Stalking (Art 120a)</li> <li>• Assault (Art 128)</li> <li>• Threats (Art 134)</li> <li>• Obstruction of justice (Art 134)</li> <li>• Other state/federal crimes (Art 134)</li> </ul>

In Section 1709 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2014, Congress directed the Secretary of Defense to formally prescribe regulations prohibiting retaliation.<sup>4</sup> In response, all of the military Services issued regulations defining and prohibiting ostracism, maltreatment, and professional retaliation.<sup>5</sup>

2 While this report often refers to retaliation experienced by a victim of sexual assault, the JPP recognizes that other individuals may experience retaliation related to sexual assault, including friends of the victim and witnesses who intervene on behalf of the victim.

3 U.S. DEP’T OF DEF., SAPRO, RETALIATION OVERVIEW 1 (Apr. 10, 2015) [hereinafter SAPRO RETALIATION OVERVIEW], available at [http://jpp.whs.mil/Public/docs/03\\_Topic-Areas/06-Retaliation/20150410/12\\_SAPRO\\_Retaliation\\_InfoPaper.pdf](http://jpp.whs.mil/Public/docs/03_Topic-Areas/06-Retaliation/20150410/12_SAPRO_Retaliation_InfoPaper.pdf); see also National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 [hereinafter FY14 NDAA], § 1709(b), 127 Stat. 672 (2013) (requiring the Secretary of Defense to define retaliation to include, at a minimum, professional retaliation, ostracism, and maltreatment).

4 FY14 NDAA, *supra note 3*, at § 1709(a).

5 U.S. DEP’T OF THE AIR FORCE, AIR FORCE GUIDANCE MEMO. TO AFI 36-2909, PROFESSIONAL AND UNPROFESSIONAL RELATIONSHIPS

Social retaliation includes “ostracism and such acts of maltreatment . . . committed by peers of a member of the Armed Forces or by other persons because the member reported a criminal offense.”<sup>6</sup> Among examples of social retaliation are excluding the victim from social activities or interactions, blaming the victim, harassing the victim, or insulting the victim.<sup>7</sup>

Professional retaliation, also known as reprisal, consists of “taking or threatening to take an adverse personnel action, or withholding or threatening to withhold a favorable personnel action, with respect to a member of the Armed Forces because the member reported a criminal offense.”<sup>8</sup> Professional retaliation may involve interfering with the victim’s promotion; taking disciplinary actions against the victim; transferring or reassigning the victim; making unfair decisions concerning the victim’s pay, benefits, awards, and training; referring a victim for mental health evaluation; or changing the victim’s duties and responsibilities in a manner inconsistent with his or her grade.<sup>9</sup>

Criminal retribution may involve other offenses specifically criminalized by the Uniform Code of Military Justice (UCMJ), such as stalking, assaulting, or threatening the victim, or obstructing justice.<sup>10</sup> The JPP focused on the issues surrounding social and professional retaliation, while recognizing that retaliation can rise to the level of other criminal offenses.

## B. TIMING OF RETALIATION

Retaliation can occur before a sexual assault is formally reported, anytime during the investigative and judicial process, or even after the final adjudication of the sexual assault offense.

The JPP heard testimony from several victims who experienced retaliation before or when they reported a sexual assault. A former Army officer told the JPP that after she reported to her commander inappropriate touching by a senior ranking officer, the commander told her, “I can remove you for cause and end your career right now, or you can find a way to deal with it.”<sup>11</sup> Fearing the loss of her

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(June 19, 2015) [hereinafter AF GUIDANCE MEMO TO AFI 36-2909], *available at* [http://static.e-publishing.af.mil/production/1/af\\_ja/publication/afi36-2909/afi36-2909.pdf](http://static.e-publishing.af.mil/production/1/af_ja/publication/afi36-2909/afi36-2909.pdf); U.S. DEP’T OF THE ARMY, ARMY DIR. 2014-20, PROHIBITION OF RETALIATION AGAINST SOLDIERS FOR REPORTING A CRIMINAL OFFENSE (June 19, 2014) [hereinafter ARMY DIR. 2014-20], *available at* [http://www.apd.army.mil/pdf/files/ad2014\\_20.pdf](http://www.apd.army.mil/pdf/files/ad2014_20.pdf); U.S. DEP’T OF THE NAVY, SECNAV INSTR. 5370.7D, MILITARY WHISTLEBLOWER PROTECTION ACT (Dec. 4, 2014) [hereinafter SECNAV INSTR. 5370.7D], *available at* <http://doni.daps.dla.mil/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-300%20Manpower%20Personnel%20Support/5370.7D.pdf>; U.S. COAST GUARD, ALCOAST 208/14, MILITARY WHISTLEBLOWER PROTECTION (May 2014) [hereinafter ALCOAST 208/14], *available at* [http://jpp.whs.mil/Public/docs/07-RFI/Set\\_3/Responses/RFI\\_Attachment\\_Q88\\_USCG.pdf](http://jpp.whs.mil/Public/docs/07-RFI/Set_3/Responses/RFI_Attachment_Q88_USCG.pdf); *see also infra* Section II.D and Appendix A.

6 FY14 NDAA, *supra* note 3, § 1709(b); *see also* U.S. DEP’T OF DEF., REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE 115 (Nov. 25, 2014) [hereinafter FY14 POTUS REPORT], *available at* [http://www.sapr.mil/public/docs/reports/FY14\\_POTUS/FY14\\_DoD\\_Report\\_to\\_POTUS\\_SAPRO\\_Report.pdf](http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_SAPRO_Report.pdf).

7 SAPRO RETALIATION OVERVIEW, *supra* note 3, at 1.

8 FY14 NDAA, *supra* note 3, at § 1709(b); *see also* FY14 POTUS REPORT, *supra* note 6, at 115.

9 SAPRO RETALIATION OVERVIEW, *supra* note 3, at 1.

10 *See, e.g.*, 10 U.S.C. § 920a (UCMJ art. 120a) (Stalking); 10 U.S.C. § 928 (UCMJ art. 128) (Assault); MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) [hereinafter MCM], pt. IV, ¶ 110 (Threat, communicating); MCM pt. IV, ¶ 96 (Obstructing justice).

11 *Transcript of JPP Public Meeting 21* (May 19, 2015) (testimony of Ms. V.P.).

career, the victim chose not to report two out of the three incidents she experienced over the next year.<sup>12</sup>

Another victim, a former Coast Guard member, spoke of being sexually harassed by her senior enlisted supervisor, who made sexual comments and touched her inappropriately.<sup>13</sup> She described what was happening to her chief petty officer, but he took no action. When the situation worsened, she told her supervisor and the chief that the harassment needed to stop. In response, her supervisor verbally attacked and threatened her, stating that he would “go toe-to-toe with [her]” and “come at [her] with both barrels” if she made a report to the command.<sup>14</sup>

Victims may also experience retaliation when a sexual assault allegation is investigated or during subsequent legal proceedings. One victim testified that during the course of the investigation, everyone on the ship learned the intimate details of her assault. She told the JPP, “I was immediately treated differently by everyone. Nobody ever wanted to sit with me or to talk with me. Rumors were being spread around the ship about me[.]”<sup>15</sup>

A dependent spouse who testified before the JPP described how her husband experienced retaliation after she reported that her husband’s co-worker, a senior airman, had raped her.<sup>16</sup> This retaliation from his chain of command persisted throughout the judicial process, even after the accused pled guilty. She noted that the retaliation “was so stressful that during the trial I almost gave up and walked away. I didn’t want to testify. I didn’t want to be a part of any of it[.]”<sup>17</sup>

Finally, victims may experience retaliation even after the judicial process has ended. As one presenter explained to the JPP, “Often retaliation occurs after the victim’s case is over, and especially if the victim’s perpetrator was acquitted. Then the victim really is branded a liar, and there might be even more of an effort to drive them out . . . of the Service if their command views them as untruthful[.]”<sup>18</sup>

Irrespective of when the retaliation began, several victims told the JPP that they continued to experience retaliation and its effects for years after they were sexually assaulted. An Air Force master sergeant testified, “I just want everyone to know that these things that happen, they don’t happen for a day, or a week, or a month, they happen for years[.]”<sup>19</sup> Another victim, a retired Army captain, said, “Whistleblower retaliation and reprisal has now outlasted my military career, and I wonder when I get to move on with my life.”<sup>20</sup>

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12 *Transcript of JPP Public Meeting 22* (May 19, 2015) (testimony of Ms. V.P.).

13 *Transcript of JPP Public Meeting 159–61* (May 19, 2015) (testimony of Petty Officer First Class S.F.).

14 *Transcript of JPP Public Meeting 159–61* (May 19, 2015) (testimony of Petty Officer First Class S.F.).

15 *Transcript of JPP Public Meeting 42* (May 19, 2015) (testimony of Petty Officer Third Class D.M.).

16 *Transcript of JPP Public Meeting 191–98* (May 19, 2015) (testimony of Ms. A.H.).

17 *Transcript of JPP Public Meeting 198* (May 19, 2015) (testimony of Ms. A.H.).

18 *Transcript of JPP Public Meeting 93* (May 19, 2015) (testimony of Ms. Sara Darehshori, Senior Counsel, Human Rights Watch, U.S. Program).

19 *Transcript of JPP Public Meeting 78* (May 19, 2015) (testimony of Master Sergeant T.S.).

20 *Transcript of JPP Public Meeting 30* (May 19, 2015) (testimony of Ms. V.P.).

## C. EFFECTS OF RETALIATION

### 1. *Effects on the Victim*

The JPP heard testimony that retaliation can cause alienation, heightened stress, anxiety, depression, and suicidal thoughts in sexual assault victims.<sup>21</sup> Dr. Lilia Cortina, professor of psychology and women’s studies at the University of Michigan, testified that retaliation, including acts of social retaliation that often go undocumented—such as shunning, gossiping about, and blaming the victim—may have the purpose or effect of eroding the victim’s interpersonal relationships.<sup>22</sup>

As a result, retaliation can interfere with a victim’s healing process.<sup>23</sup> One presenter told the JPP that victims who do not receive support from their peers and community after reporting a sexual assault are more likely to develop post-traumatic stress disorder (PTSD).<sup>24</sup> Dr. Veronique Valliere, a clinical and forensic psychologist, further explained, “The primary mitigator of trauma in sexual assault is social support and being believed. No matter how heinous the sexual assault is, if the person has appropriate social support, and if they are believed by the people they care about, their chance of developing PTSD drops dramatically.”<sup>25</sup> Likewise, a Marine Corps sexual assault response coordinator (SARC) told the JPP that victims who are most successful in healing have certain common experiences: they turn to a support system soon after the sexual assault; they engage an advocate who is both competent and qualified to assist them; and they feel that they will be supported if they report the crime.<sup>26</sup>

The effects of retaliation on a victim can be particularly acute in the military environment because the accused and the victim often share the same community, the same peers, and the same mission.<sup>27</sup> According to Dr. Valliere, “When you are raped by a stranger, you don’t have to deal with that in day-to-day life. [In the military, the victim] deals with the rape and the impact on her community and also the ongoing influence of the offender on her life outside of that specific assault.”<sup>28</sup> Another presenter distinguished the effects of retaliation in the military from the effects of retaliation in the civilian world by noting that “in the military, unlike in the civilian world, if you experience retaliation, you can’t quit[.]”<sup>29</sup>

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21 *Transcript of JPP Public Meeting* 119–21 (Apr. 10, 2015) (testimony of Dr. Lilia M. Cortina, Professor, University of Michigan); *id.* at 192–93 (testimony of Dr. Matthew F. Soulier, University of California, Davis).

22 *Transcript of JPP Public Meeting* 114 (Apr. 10, 2015) (testimony of Dr. Lilia M. Cortina, Professor, University of Michigan).

23 *See Transcript of JPP Public Meeting* 243–44 (Apr. 10, 2015) (testimony of Ms. Marie A. Brodie, U.S. Marine Corps SARC, Marine Corps Base Camp Lejeune, North Carolina).

24 *Transcript of JPP Public Meeting* 15–16 (May 19, 2015) (testimony of Ms. Sara Darehshori, Senior Counsel, Human Rights Watch, U.S. Program).

25 *Transcript of JPP Public Meeting* 209 (Apr. 10, 2015) (testimony of Dr. Veronique N. Valliere, Valliere & Counseling Associates, Inc.).

26 *Transcript of JPP Public Meeting* 243–44 (May 19, 2015) (testimony of Ms. Marie A. Brodie, SARC, U.S. Marine Corps).

27 *See Transcript of JPP Public Meeting* 191 (Apr. 10, 2015) (testimony of Dr. Matthew F. Soulier, University of California, Davis).

28 *Transcript of JPP Public Meeting* 201 (Apr. 10, 2015) (testimony of Dr. Veronique N. Valliere, Valliere & Counseling Associates, Inc.).

29 *Transcript of JPP Public Meeting* 13 (May 19, 2015) (testimony of Ms. Sara Darehshori, Senior Counsel, Human Rights Watch, U.S. Program).

## 2. *Effects on the Unit and on Military Readiness*

Presenters explained how retaliation can have far-reaching effects beyond the harms done to the individual victim. Dr. Patricia Harned, chief executive officer of the Ethics and Compliance Institute (a nonprofit organization), testified that retaliation is a leading indicator of the health and well-being of an organization.<sup>30</sup> Retaliation and fear of reporting erode trust in an organization, reduce employee engagement, and affect employees' perceptions about the importance of ethical conduct within the organizational culture.<sup>31</sup>

Presenters told the JPP that retaliation in the military violates fundamental military values and undermines a commander's ability to maintain good order and discipline within the unit. A Coast Guard commander told the JPP that "[r]etaliation is in direct conflict with the Coast Guard's core values, honor, respect and the devotion to duty."<sup>32</sup> An Army commander stated that in addition to caring for victims, the Army must prevent incidents of retaliation and teach Service members to "treat each other with dignity and respect . . . because it is a core value of our Army and just simply the right thing to do."<sup>33</sup>

Commanders also testified that retaliation harms mission readiness. According to a Navy commander, "Retaliation will destroy unit cohesion and is counter to every aspect of the Navy's core values. And ultimately, this will affect mission accomplishment."<sup>34</sup> An Army commander further explained, "Sexual assault and harassment of any kind are cancers that destroy the very fiber of any organization and particularly military organizations that rely so heavily on small groups of close knit people who must trust each other with their lives. . . . [A] key aspect of care that must be addressed is retaliation[.]"<sup>35</sup>

## 3. *Effects on Reporting and the Judicial Process*

Sexual assault victims highlight fear of retaliation as a significant deterrent to reporting their victimization.<sup>36</sup> According to the 2012 Workplace and Gender Relations Survey of Active Duty Members, 47% of active duty women who did not report an unwanted sexual contact gave fear of retaliation as a reason for not coming forward; 43% indicated that they did not report in part because they had heard about the negative experiences of other victims who made a report; and 28% indicated that they did not report in part because of a concern that their performance evaluation or chance for

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30 *Transcript of JPP Public Meeting* 149 (May 19, 2015) (testimony of Dr. Patricia Harned, Chief Executive Officer, Ethics & Compliance Institute).

31 *Transcript of JPP Public Meeting* 148 (May 19, 2015) (testimony of Dr. Patricia Harned, Chief Executive Officer, Ethics & Compliance Institute).

32 *Transcript of JPP Public Meeting* 363 (May 19, 2015) (testimony of Jeffrey C. Westling, Commander, U.S. Coast Guard).

33 *Transcript of JPP Public Meeting* 376–77 (May 19, 2015) (testimony of Colonel Brian Foley, Garrison Commander, U.S. Army).

34 *Transcript of JPP Public Meeting* 356 (May 19, 2015) (testimony of Captain Heidi Fleming, Commanding Officer, U.S. Navy).

35 *Transcript of JPP Public Meeting* 376–77 (May 19, 2015) (testimony of Colonel Brian Foley, Garrison Commander, U.S. Army).

36 *Transcript of JPP Public Meeting* 99–100 (Sept. 18, 2015) (statement of Hon. Elizabeth Holtzman, Chair of the JPP).

promotion would suffer as a result.<sup>37</sup> As Dr. Valliere observed, “Each time retaliation occurs, the future victims get the message.”<sup>38</sup>

Retaliation and fear of retaliation may also deter a victim or witness from participating in an investigation or legal proceedings. Major General Jeffrey Snow, Director of DoD Sexual Assault Prevention and Response Office (SAPRO) from January 2014 to June 2015, noted that even behaviors that do not rise to the level of a criminal act can influence a victim’s decision to continue to participate in the military justice process.<sup>39</sup> A Marine Corps SARC noted that out of the 95 sexual assault reports that reached final legal adjudication at Camp Lejeune in 2014, 21% of victims chose not to participate in the investigation or judicial proceeding. She suspected that retaliation was a reason but commented that further research is needed to understand these victims’ decisions.<sup>40</sup>

A 2015 report by Human Rights Watch on retaliation against sexual assault victims in the military concluded that unless more is done to effectively address retaliation and fear of retaliation, recent dramatic improvements in sexual assault reporting rates may not be sustained.<sup>41</sup> Thus, in the view of the researchers, “ending retaliation is critical to effectively addressing sexual assault in the US military.”<sup>42</sup>

#### D. CURRENT PROHIBITIONS ON RETALIATION

To protect victims and others who report criminal conduct from professional retaliation, Congress enacted the Military Whistleblower Protection Act in 1988.<sup>43</sup> Since then, Congress, DoD, and the Services have provided specific protections for victims of sexual assault who experience retaliation.<sup>44</sup>

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37 See DEFENSE MANPOWER DATA CENTER, SURVEY NOTE ON 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS 106–07 (Mar. 15, 2013), available at [http://www.sapr.mil/public/docs/research/2012\\_workplace\\_and\\_gender\\_relations\\_survey\\_of\\_active\\_duty\\_members-survey\\_note\\_and\\_briefing.pdf](http://www.sapr.mil/public/docs/research/2012_workplace_and_gender_relations_survey_of_active_duty_members-survey_note_and_briefing.pdf); see also HUMAN RIGHTS WATCH, EMBATTLED: RETALIATION AGAINST SEXUAL ASSAULT SURVIVORS IN THE US MILITARY 29 (May 2015) [hereinafter HRW EMBATTLED], available at <https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military>.

38 *Transcript of JPP Public Meeting 209* (Apr. 10, 2015) (testimony of Dr. Veronique N. Valliere, Valliere & Counseling Associates, Inc.).

39 *Transcript of JPP Public Meeting 59* (Apr. 10, 2015) (testimony of Major General Jeffrey Snow, Director, DoD Sexual Assault Prevention and Response Office (SAPRO)).

40 See *Transcript of JPP Public Meeting 247–48* (May 19, 2015) (testimony of Ms. Marie A. Brodie, SARC, U.S. Marine Corps).

41 HRW, EMBATTLED, *supra* note 37, at 4.

42 *Id.*

43 National Defense Authorization Act for Fiscal Year 1989, Pub. L. No. 100-456, § 846, 102 Stat. 1918 (1988), codified at 10 U.S.C. § 1034, as amended; see also U.S. DEP’T OF DEF., DIR. 7050.06, MILITARY WHISTLEBLOWER PROTECTION (Apr. 17, 2015) [hereinafter DoDD 7050.06], available at [http://www.dodig.mil/Resources/PolicyReferences/whistleblower/DoDD\\_7050\\_06.pdf](http://www.dodig.mil/Resources/PolicyReferences/whistleblower/DoDD_7050_06.pdf).

44 In addition to the protections discussed in this section, legal protections for victims of retaliation are also found in the crime victims’ rights provisions under Article 6b of the UCMJ, enacted as required by the FY14 NDAA. Two of these rights, the right to be reasonably protected from the accused and right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under the UCMJ, are particularly relevant for individuals who experience retaliation after reporting a sexual assault. See 10 U.S.C. § 806b (UCMJ art. 6b).



### 1. *Military Whistleblower Protection Act*

The Military Whistleblower Protection Act (MWPA), as amended, prohibits individuals from (1) interfering with a Service member's lawful protected communication, or (2) taking or threatening to take any professional retaliatory actions against a Service member who makes a protected communication.<sup>45</sup> The MWPA and its implementing directive, DoD Directive 7050.06, provide the basic framework for investigating reprisal complaints. The statute and directive address the role of the inspectors general (IGs) in investigating acts of reprisal.<sup>46</sup> Both DoD IG and the Service IGs are authorized to investigate allegations of reprisal.<sup>47</sup> While individual Service IGs can establish their own internal procedures for receiving, reporting, and investigating reprisal complaints,<sup>48</sup> DoD IG maintains oversight of the Service IGs, ensuring that the investigator is outside the immediate chain of command of both the whistleblower and the accused.<sup>49</sup> DoD IG also reviews and approves the results of all Service IG investigations of whistleblower complaints.<sup>50</sup>

Section 1715 of the FY14 NDAA specified that the MWPA provides protections for sexual assault victims.<sup>51</sup> Under the provision, making a sexual assault report is included as a protected communication.<sup>52</sup>

The FY14 NDAA also expanded prohibited retaliatory personnel actions, which now include making or threatening to make a significant change in the duties or responsibilities of a Service member not commensurate with the member's grade.<sup>53</sup> In addition, the FY14 NDAA increased the time allowed for a Service member to make a whistleblower complaint from within 60 days of becoming aware of the adverse personnel action to within one year of becoming aware of the adverse personnel action.<sup>54</sup> This change is particularly helpful for sexual assault victims, who may delay reporting of retaliation because they are experiencing trauma from the sexual assault offense or dealing with the investigative and judicial process, as well as trying to navigate the system to file a MWPA complaint.

During the course of its deliberations, the JPP considered additional proposals to further amend the MWPA. These proposals are discussed later in this report.<sup>55</sup>

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45 10 U.S.C. § 1034(a)–(b).

46 See 10 U.S.C. § 1034 and DoDD 7050.06. Both 10 U.S.C. § 1034 and DoDD 7050.06 detail the roles of the IGs, but do not specifically require the IGs to be the investigating agency for professional retaliation.

47 DoDD 7050.06 encl. 2, ¶ 3(c)(1).

48 *Id.*

49 *Id.* at encl. 2, ¶ 1(c)(1).

50 *Id.* at encl. 2, ¶ 1(d).

51 FY14 NDAA, *supra* note 3, at § 1715. The FY14 NDAA revisions were the first significant advances to military whistleblower rights since 1988, when the MWPA was established. See Government Accountability Project, "GAP Praises House Approval of Military Whistleblower Protection Act Makeover," available at <https://www.whistleblower.org/blog/120013-gap-praises-house-approval-military-whistleblower-protection-act-makeover>. Despite these revisions, there are still several differences between the protections for military whistleblowers and DoD civilian whistleblowers. These differences will be addressed later in the report. See *infra* Section IX.

52 FY14 NDAA, *supra* note 3, at § 1715.

53 *Id.* at § 1714(a).

54 *Id.* at § 1714(b).

55 See *infra* Section IX.



## 2. *Punitive Service Regulations*

To strengthen whistleblower protections, DoD Directive 7050.06 requires the Service Secretaries to maintain regulations that make punishable, under Article 92 of the UCMJ, acts that are prohibited under the MWPA.<sup>56</sup> The FY14 NDAA also required that the Secretary of Defense prescribe regulations, or direct the Service Secretaries to prescribe regulations, that prohibit retaliation against individuals who report a criminal offense.<sup>57</sup>

In 2014, the Service Secretaries implemented new regulations prohibiting retaliation.<sup>58</sup> Their definitions of retaliation (reproduced in Appendix A) are similar, but not identical. Although DoD is planning to issue uniform definitions, it has not done so to date.

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56 DoDD 7050.06 encl. 2, ¶ 4(a).

57 FY14 NDAA, *supra* note 3, at § 1709(a).

58 AF GUIDANCE MEMO TO AFI 36-2909, *supra* note 5; ARMY DIR. 2014-20, *supra* note 5; SECNAV INSTR. 5370.7D, *supra* note 5; ALCOAST 208/14, *supra* note 5; *see also infra* Section VII.C.

# |||. Scope of the Problem

## A. VARYING ACCOUNTS OF THE PROBLEM

The JPP heard from many presenters about the prevalence of retaliation in the military. Several victims and special victims' counsel (SVCs) testified in detail about retaliation that they witnessed or personally experienced. Some SARCs, victim advocates (VAs), commanders, and noncommissioned officers (NCOs), in contrast, told the JPP that they had not witnessed widespread retaliation against victims of sexual assault.

### 1. *Victims' Personal Experiences*

The JPP heard testimony from 13 victims, each of whom had experienced extensive retaliation after reporting a sexual assault.<sup>59</sup> Most of them recounted social retaliation. An Air Force master sergeant, after reporting a sexual assault by a captain, testified that he was “regularly mocked, threatened, and . . . tormented by the captain who was allowed to walk by [his] office and look in on [him] and make fun of [him].”<sup>60</sup> According to another victim, retaliation became “an integral part of [his] career”; he added, “I have had my manhood questioned for not defending myself during the sexual assault. I have had my intelligence insulted.”<sup>61</sup> Although he transferred to a new unit, his story of reporting a sexual assault reached the new unit even before he had. He testified, “[T]he treatment I received when I arrived was unbearable. I was isolated . . . and considered a snitch[.]”<sup>62</sup>

Several victims also encountered professional retaliation. One victim testified that after his sexual assault report, he was assigned menial jobs not appropriate to his pay grade and experience. For example, for three months he was forced to wear a reflective vest and pick up trash on the base beautification detail.<sup>63</sup> Another victim, a former Army officer, told the JPP that the perpetrator of her sexual assault was the officer responsible for the entire battalion's training and mission readiness evaluations.<sup>64</sup> After she reported his inappropriate touching, the officer delayed the scheduling of her unit's evaluations and trainings, thereby affecting not only her own career advancement but also that of others within her unit.<sup>65</sup> A third victim reported that after she reported a sexual assault, she “began receiving counseling and disciplinary actions for minor mistakes that would not normally bear a formal punishment.”<sup>66</sup>

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59 See generally *Transcript of JPP Public Meeting 20–230* (May 19, 2015).

60 *Transcript of JPP Public Meeting 35* (May 19, 2015) (testimony of Master Sergeant T.S.).

61 *Transcript of JPP Public Meeting 186* (May 19, 2015) (testimony of Staff Sergeant N.L.).

62 *Transcript of JPP Public Meeting 187* (May 19, 2015) (testimony of Staff Sergeant N.L.).

63 *Transcript of JPP Public Meeting 35* (May 19, 2015) (testimony of Master Sergeant T.S.).

64 *Transcript of JPP Public Meeting 21–22* (May 19, 2015) (testimony of Ms. V.P.).

65 *Transcript of JPP Public Meeting 21–22* (May 19, 2015) (testimony of Ms. V.P.).

66 *Transcript of JPP Public Meeting 48–49* (May 19, 2015) (testimony of Ms. C.B.).

2. Other Stakeholders’ Perspectives

SVCs, SARCs, VAs, commanders, and NCOs who testified before the JPP expressed different opinions about the scope of the problem of retaliation. The table below represents these stakeholders’ interactions with victims of sexual assault who have experienced retaliation. While the information is anecdotal, the table captures their different perspectives.

Chart: Scope of the Problem: Perspectives of JPP Presenters<sup>67</sup>

	Army	Air Force	Navy	Marine Corps	Coast Guard
SVCs	Represented 9 clients since Dec. 2014, 4 of whom experienced retaliation	Represented 54 clients since 2013, 11 of whom experienced retaliation	Represented 49 clients since June 2014, 11 of whom experienced retaliation	Represented 60 clients since 2013, at least 3 of whom experienced retaliation	Represented 20 clients since 2013, 1 of whom experienced retaliation
SARCs	Aware of 4 reported retaliation complaints out of 54 cases reviewed at SARB since 2013	Aware of 1 retaliation case as of June 2015; since 2006, less than 1% of unrestricted cases at base have involved retaliation	Aware of 2 reports of social retaliation out of 14 cases reviewed at CMG as of June 2015	Aware of 1 open retaliation investigation out of an average of 65 cases reviewed at CMG as of June 2015	Has not dealt with many substantiated retaliation cases since 2005
VAs		Aware of 1 instance of retaliation out of about 35 sexual assault cases in 2 years			
CDRs	Aware of 0 retaliation reports to date	Aware of 1 open retaliation case (in 2015)	Not addressed	Aware of 1 reprisal case	Aware of 1 retaliation case
NCOs	Witnessed retaliation as a first responder earlier in career	Aware of 1 substantiated retaliation complaint out of 20 sexual assault cases over 24-year career	Has not received many retaliation reports from SARCs over 24-year career	Aware of 0 retaliation complaints out of 3 sexual assault cases over past 2 years	Aware of 0 retaliation complaints

Descriptions by some SVCs and victims’ legal counsel (VLCs)<sup>68</sup> appearing before the JPP of their clients’ experiences reinforced the testimony heard from victims. For example, a Navy VLC testified

67 See generally Transcript of JPP Public Meeting 231, 234, 237, 239–40, 242–43, 249–50 (May 19, 2015) (testimony of SARCs and Air Force VA); *id.* at 295–99, 304–05, 307–08, 314, 317 (testimony of NCOs); *id.* at 346, 359–62, 372, 374–75, 388 (testimony of commanders); Transcript of JPP Public Meeting 230–70 (June 18, 2015) (testimony of SVCs).

68 Victims’ counsel within the Navy and Marine Corps are known as victims’ legal counsel (VLC). For convenience, this report refers generally to victims’ counsel across the Services as “SVCs.”

that 11 of the 49 clients he represented experienced retaliation.<sup>69</sup> Most of these cases involved social retaliation: victims were ignored, isolated, and/or subject to rumors after reporting sexual assaults—to the point that the command climate became “unbearable.”<sup>70</sup> An Army SVC testified that four of the nine clients he represented between December 2014 and June 2015 experienced some type of retaliation, ranging from Facebook messages telling a male client to “man up and take it” to actual threats against a victim and the victim’s family.<sup>71</sup>

On the other hand, several presenters told the JPP that they were surprised to hear that so many victims experienced retaliation after reporting sexual assault. An Air Force SARC told the JPP that to her knowledge, less than 1% of the unrestricted cases at Seymour-Johnson Air Force Base involved retaliation.<sup>72</sup> A Coast Guard command master chief, whose primary responsibility is to travel to all of the Coast Guard units within the southeastern United States and assess the command climate, told the JPP that in two years, he had not heard any complaint of retaliation or ostracism from the crew members.<sup>73</sup> A Navy command master chief who has been involved with the Sexual Assault Prevention and Response (SAPR) program since 2009 stated that the dozen or so regional SARCs in his area of responsibility “have not dealt with a whole lot of retaliation.”<sup>74</sup>

When asked by the JPP about this limited knowledge of retaliation, a VA noted that, like sexual assault crimes, many incidents of retaliation may go unreported, and resources available for victims—such as victim advocates—may be underutilized.<sup>75</sup> An Army SARC commented that victims of retaliation may not come forward because they do not want to be labeled as troublemakers.<sup>76</sup> A Coast Guard SARC added that victims may be afraid that no one will believe them, especially because retaliation can be very subtle, very hard to identify, and very hard to prove.<sup>77</sup>

Like many of the SARCs, VAs, and NCOs, commanders appearing before the JPP generally recalled very few, if any, instances of retaliation in their commands. The installation commander from Eglin Air Force Base noted only one open retaliation complaint involving a sexual assault victim.<sup>78</sup> The chief of staff from Marine Corps Base Quantico similarly said that over the past two years, only one victim of

69 *Transcript of JPP Public Meeting 230* (June 18, 2015) (testimony of Lieutenant Commander James Toohey, Victims’ Legal Counsel, U.S. Navy).

70 *Transcript of JPP Public Meeting 230–31* (June 18, 2015) (testimony of Lieutenant Commander James Toohey, Victims’ Legal Counsel, U.S. Navy).

71 *Transcript of JPP Public Meeting 241* (June 18, 2015) (testimony of Captain George “Rob” Lavine III, Special Victims’ Counsel, U.S. Army).

72 *Transcript of JPP Public Meeting 234* (Apr. 10, 2015) (testimony of Ms. Nancy Pike, SARC, U.S. Air Force).

73 *Transcript of JPP Public Meeting 306–07* (May 19, 2015) (testimony of Command Master Chief Jason D. Griffin, U.S. Coast Guard).

74 *Transcript of JPP Public Meeting 304* (May 19, 2015) (testimony of Command Master Chief Kevin Goodrich, U.S. Navy).

75 *Transcript of JPP Public Meeting 338–39* (May 19, 2015) (testimony of Staff Sergeant LeeAnn B. Nelson, Uniformed Victim Advocate, U.S. Marine Corps).

76 *Transcript of JPP Public Meeting 278* (May 19, 2015) (testimony of Sergeant First Class Bridgett Joseph, SARC, U.S. Army).

77 *Transcript of JPP Public Meeting 276–77* (May 19, 2015) (testimony of Mr. Magnus Graham, SARC Coordinator, U.S. Coast Guard).

78 *Transcript of JPP Public Meeting 346–47* (May 19, 2015) (testimony of Brigadier General David Harris, Commander, U.S. Air Force).

sexual assault had come forward alleging professional retaliation.<sup>79</sup> The Army garrison commander for Fort Meade, Maryland, told the JPP that in December 2014, Fort Meade SARCs and VAs began asking victims if they had perceived any retaliation. No instances had been reported as of June 2015, though the commander noted that the sample size was small.<sup>80</sup>

The striking variation in the presenters' perspectives highlights essential challenges to understanding retaliation. These varying accounts help illustrate how perception influences one's understanding of the scope of the problem. An Air Force NCO commented that in many cases, "mild symptoms" of trauma from a sexual assault—including short-term absences or lack of focus—can be dealt with effectively at the immediate unit level.<sup>81</sup> However, long-term and more significant symptoms can be harder to manage, in part because the commander or supervisor lacks information about the case.<sup>82</sup> He concluded, "When you combine all those factors with a grieving, struggling victim, commanders and supervisors have to make very, very difficult decisions in order to document long term substandard performance and/or to protect mission impact. Mark downs on performance reports, reassignments to different duty sections, or other personnel actions are sometimes necessary. [These decisions] can be and many times are perceived as retaliation."<sup>83</sup>

## B. DATA AND SURVEY RESULTS

Assessing the scope of retaliation issues in the military is difficult because little objective data about the problem exist. The Services have not historically tracked or published data on retaliation complaints and report outcomes, and they could not provide the JPP with Service-wide data about retaliation complaints made since 2012.<sup>84</sup> The JPP thus could not determine the number of sexual assault victims who made a retaliation claim after filing an unrestricted report, the types of retaliation alleged, the entities that conducted the ensuing investigations, or the final disposition of each case.

At the JPP's April 2015 meeting, Dr. Nathan Galbreath, Senior Executive Advisor for DoD SAPRO, said that he was not aware of a central repository within or among the Services for obtaining data

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79 *Transcript of JPP Public Meeting 372* (May 19, 2015) (testimony of Colonel Allen Broughton, Chief of Staff, U.S. Marine Corps).

80 *Transcript of JPP Public Meeting 378–79* (May 19, 2015) (testimony of Colonel Brian Foley, Garrison Commander, U.S. Army).

81 *Transcript of JPP Public Meeting 299* (May 19, 2015) (testimony of Command Chief Master Sergeant Craig A. Neri, U.S. Air Force).

82 *Transcript of JPP Public Meeting 299* (May 19, 2015) (testimony of Command Chief Master Sergeant Craig A. Neri, U.S. Air Force).

83 *Transcript of JPP Public Meeting 299–300* (May 19, 2015) (testimony of Command Chief Master Sergeant Craig A. Neri, U.S. Air Force).

84 Services' Responses to JPP Request for Information 81 (May 6, 2015). The Navy reported that it was unable to provide an accurate Service-wide response, but provided information for some Navy commands. Of these commands, there were a total of 21 allegations of reprisal or retaliation from October 1, 2013 through February 2015 (eight were reported as professional retaliation, 12 as social retaliation, and one as both). In all but two of the cases, the victim who experienced the retaliation was female. In four of the 21 allegations of retaliation, the retaliator was the perpetrator of the underlying sexual assault report. One of these cases resulted in non-judicial punishment, five resulted in unidentified action, and four resulted in no action being taken. Naval Criminal Investigative Service (NCIS) reported an additional five allegations: of these, one was considered "actionable" under the UCMJ and was dealt with via non-judicial punishment, and three resulted in no action. See Navy's Response to JPP Request for Information 81 (May 6, 2015).

on retaliation.<sup>85</sup> He explained that DoD IG and the Service IGs keep information on professional retaliation, but data on social retaliation are “all over the place and . . . hard to put your finger on[.]”<sup>86</sup> When asked whether DoD SAPRO plans to centralize retaliation data, Major General Snow observed that pulling together all information about professional and social retaliation complaints “will cause [DoD] to do things in a way we have not typically done.”<sup>87</sup>

Although actual report data are not maintained, recent voluntary surveys of Service members provide a sense of the scope of retaliation concerns. In fiscal year 2014, the RAND Corporation conducted the Military Workplace Study (RMWS), and its results were highlighted in DoD’s 2014 *Report to the President of the United States on Sexual Assault Prevention and Response* (FY14 POTUS Report) and DoD’s April 2015 *Annual Report on Sexual Assault in the Military for Fiscal Year 2014* (FY14 SAPRO Report).<sup>88</sup>

According to the RMWS, 4.3% of active duty women indicated that they had experienced an unwanted sexual contact in the preceding year and reported it to a military authority.<sup>89</sup> Among this group, 62% perceived some form of retaliation as a result of reporting the situation.<sup>90</sup> A survey from fiscal year 2012 had yielded the same result on retaliation.<sup>91</sup>

The RMWS permitted respondents to report perceiving more than one type of retaliation. Of the 62% of active duty women who reported retaliation,

- 53% perceived social retaliation;
- 32% perceived professional retaliation;
- 35% perceived adverse administrative action; and
- 11% perceived a punishment for infraction.<sup>92</sup>

85 See *Transcript of JPP Public Meeting* 88–89 (Apr. 10, 2015) (testimony of Dr. Nathan Galbreath, Senior Executive Advisor of DoD SAPRO).

86 See *Transcript of JPP Public Meeting* 74 (Apr. 10, 2015) (testimony of Dr. Nathan Galbreath, Senior Executive Advisor of DoD SAPRO).

87 *Transcript of JPP Public Meeting* 89 (Apr. 10, 2015) (testimony of Major General Jeffrey Snow, Director of DoD SAPRO).

88 FY14 POTUS REPORT, *supra* note 6, at 117; FY14 SAPRO REPORT, *supra* note 1, at 9–10.

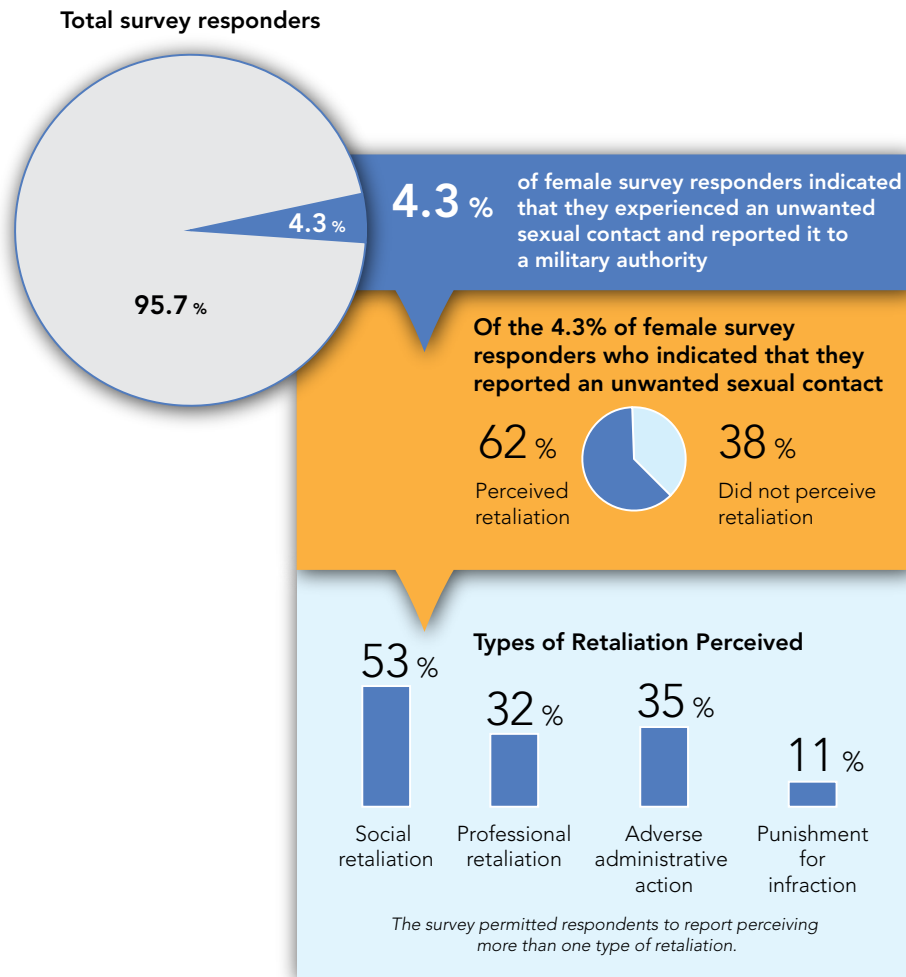
89 FY14 SAPRO REPORT, *supra* note 1, at 8, 10.

90 FY14 POTUS REPORT, *supra* note 6, at 117; FY14 SAPRO REPORT, *supra* note 1, at 10.

91 FY14 POTUS REPORT, *supra* note 6, at 116–17.

92 *Id.* at 117; FY14 SAPRO REPORT, *supra* note 1, at 10. The FY14 SAPRO REPORT noted that the RMWS provided the following as examples: professional retaliation—loss of privileges, denial of promotion/training, and transfer to a less favorable job; social retaliation—being ignored by co-workers and being blamed for the situation; adverse administrative actions—being placed on medical hold, placed on a legal hold, and transferred to a different assignment; infractions for which victims were cited—underage drinking or fraternization. It added: “Adverse administrative actions and punishment for infractions are not included under the category of ‘professional retaliation’ because these actions are not necessarily retaliatory. They could occur after a sexual assault report to address victim safety and health concerns or to address collateral misconduct under military law. However, if these actions are taken with the intention of penalizing a victim for reporting a sexual assault, they could be considered professional retaliation.” FY14 SAPRO REPORT, *supra* note 1, at 10, n.19.

Chart: 2014 RAND Military Workplace Study Results



The FY14 POTUS Report and the FY14 SAPRO Report both noted the limitations of a survey that measures “perceived” retaliation. The FY14 POTUS Report stated that “[b]ecause the survey is confidential and the identities of the respondents are not known to [DoD], there is no way to determine if the behavior being perceived by respondents is in fact directly related to the reporting of a sexual assault or for some other reason not known to the respondent.”<sup>93</sup> Similarly, the FY14 SAPRO Report observed that “the survey data collected provides broad perceptions of retaliation that do not necessarily align with actionable offenses that meet the elements of proof required for a charge of retaliation under military law.”<sup>94</sup>

The JPP asked the SARCs, commanders, and NCOs who did not witness widespread retaliation to explain the disparity between their experiences and the RMWS results. One presenter, an Army master sergeant, pointed to the limitations of measuring the scope of retaliation through surveys:

93 FY14 POTUS REPORT, *supra* note 6, at 117.

94 FY14 SAPRO REPORT, *supra* note 1, at 9, n.18.



there's a spectrum of retaliation that exists across the Services, and it could be as easy as . . . unfriending someone on Facebook, and then it can go all the way to the extreme of being . . . prevented from promotions. That's an extreme, but all of those extremes fit into that [survey] statistic . . . that's part of the trouble in trying to define how can we move forward in fixing this problem if the spectrum is so far reaching.<sup>95</sup>

### C. RECENT EFFORTS TO COLLECT DATA

In 2015, DoD and the Services initiated efforts to collect data on retaliation. In March, the Under Secretary of Defense for Personnel and Readiness directed each of the Services to provide data on retaliation allegations associated with sexual assault reporting during the period from October 2014 through February 2015.<sup>96</sup> The data requested included the type of retaliation, the person or entity to whom the complaint was made, the relationship between the victim and retaliator, and the retaliation report outcome.<sup>97</sup> The Under Secretary indicated that DoD SAPRO would consolidate and summarize the data call submissions for the FY14 SAPRO Report.<sup>98</sup>

However, the FY14 report, which was published in April 2015, included no specific data on retaliation allegations and report outcomes. Instead, it stated only DoD's intent to conduct a systematic review of retaliation allegations made to the Service commands and IGs.<sup>99</sup>

The JPP issued a data call in May 2015 requesting similar information from each of the Services on retaliation complaints and outcomes. Specifically, the JPP requested data from fiscal years 2012 to 2014 on the number of sexual assault victims who filed an unrestricted report, followed by a retaliation claim; the number and type of investigations into those complaints; the results of those investigations; the number of Service members who received adverse actions relating to their retaliatory misconduct; and the type of adverse actions the Service members received.<sup>100</sup> The Services were unable to provide data in response to this request.<sup>101</sup>

95 *Transcript of JPP Public Meeting* 340–41 (May 19, 2015) (testimony of Master Sergeant Michelle M. Johnson, U.S. Army).

96 U.S. Dep't of Def., Memorandum from Under Secretary of Defense for Personnel and Readiness on Data Call on Retaliation for the Fiscal Year 2014 Department of Defense Annual Report on Sexual Assault in the Military (Mar. 12, 2015), *available at* [http://jpp.whs.mil/Public/docs/03\\_Topic-Areas/06-Retaliation/20150410/11\\_SECDEF\\_Retaliation\\_Memos.pdf](http://jpp.whs.mil/Public/docs/03_Topic-Areas/06-Retaliation/20150410/11_SECDEF_Retaliation_Memos.pdf).

97 *Id.* The full list of requested data was as follows: 1) type of alleged retaliation; 2) narrative of the allegation; 3) type of alleged retaliation report; 4) relationship between alleged retaliator and victim; 5) whether the alleged retaliation was actionable; 6) whether the alleged retaliator was also the alleged perpetrator of the underlying sexual assault report; 7) gender of alleged retaliator(s); 8) gender of the victim; and 9) retaliation report outcome. The Services were directed to obtain the information from Service IG complaints, commander-directed inquiries, criminal complaints made to military criminal investigative organizations (MCIOS), military equal opportunity complaints, responses to Congressional inquiries, and any other Service-specific sources for reports of retaliation associated with sexual assault reporting. Additionally, the Services were directed to provide information on any instances of retaliation discussed at case management group meetings held in March 2015 involving victims, witnesses/bystanders, and first responders associated with unrestricted reports of sexual assault.

98 *Id.*

99 FY14 SAPRO REPORT, *supra* note 1, at 11.

100 JPP Requests for Information 81, 82 (May 6, 2015).

101 Services' Responses to JPP Requests for Information 81, 82 (May 6, 2015).



Some of the Services independently have begun to track retaliation data. The Air Force reported that starting in March 2015, the Air Force Sexual Assault Prevention and Response Office (AF SAPRO) began tracking reports made by victims who fall under the SAPR program.<sup>102</sup> The Army reported that it established a formal mechanism to track all allegations of retaliation through the monthly case management groups (CMGs), which the Army calls sexual assault review boards (SARBs).<sup>103</sup> The Marine Corps reported that it will use the Safety Screening Tool to monitor whether a victim is experiencing retaliation. If a victim experiences retaliation and opts to report it, he or she will be referred to the appropriate agency; the referral will be noted on the Services Provided Log and the status reported and tracked at the monthly CMG.<sup>104</sup>

In a public comment submitted to the JPP, Protect Our Defenders (POD) recommended that the Services begin systematically tracking reports of retaliation, including case outcomes. POD urged that this information be made available to the public in an anonymized form, much as is currently done in tracking sexual assault reports.<sup>105</sup>

It is important to track information about instances of retaliation related to sexual assault, and the lack of available data regarding cases of retaliation in DoD raises concerns. The problem of retaliation cannot be solved without a proper understanding of its nature, extent, and breadth. Having better data about retaliation is essential to developing any solution.

The JPP recommends that starting in the next fiscal year, Congress require DoD and the Services to begin tracking retaliation reports and disposition information, including administrative and punitive actions. Specifically, the JPP recommends that DoD and the Services collect the following information:

- (1) whether a victim claims professional or social retaliation;
- (2) narrative of the allegation, including the date of the retaliation;
- (3) recipient of each complaint, whether a supervisor or someone in the chain of command, an inspector general, a military investigator, the military police, or another individual or entity;
- (4) gender of the victim of retaliation;
- (5) gender of the retaliator(s);
- (6) relationship between the victim of retaliation, victim of sexual assault, and the retaliator(s);
- (7) relationship, if any, between the retaliator(s) and the alleged perpetrator of the underlying crime;
- (8) whether the alleged retaliation is actionable under the UCMJ;
- (9) outcome of the retaliation report; and

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102 Air Force's Response to JPP Request for Information 81 (May 6, 2015).

103 Army's Response to JPP Request for Information 81 (May 6, 2015).

104 Marine Corps' Response to JPP Request for Information 92(b) (Dec. 3, 2015).

105 Protect Our Defenders, Comment on Retaliation (submitted to JPP on Dec. 15, 2015) [hereinafter POD Comment], available at [http://jpp.whs.mil/Public/docs/06-Public\\_Comment/Statement\\_POD\\_Retaliation.pdf](http://jpp.whs.mil/Public/docs/06-Public_Comment/Statement_POD_Retaliation.pdf).

(10) whether the outcome of the retaliation report was shared with the victim of retaliation.<sup>106</sup>

Data on retaliation related to sexual assault reports should be published in the annual SAPRO report. The data will be helpful in answering a number of important questions about retaliation and shaping future policymaking on reporting, investigating, and resolving incidents of retaliation.

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<sup>106</sup> Other than the tenth criterion added to this list, the data collection proposed by the JPP largely mirrors that proposed by the Under Secretary of Defense for Personnel and Readiness in the March 2015 Memorandum on Data Call on Retaliation for the Fiscal Year 2014 Department of Defense Annual Report on Sexual Assault in the Military. *See supra* note 97.



## IV. Reporting Retaliation

### A. CHANNELS THROUGH WHICH VICTIMS CAN REPORT RETALIATION

Within the military, victims have multiple avenues through which to seek assistance and report retaliation: SARCs, VAs, SVCs, trial counsel, Victim and Witness Assistance Program (VWAP) personnel, legal assistance attorneys, commanders (including commanders outside the victim's chain of command), superior commissioned officers,<sup>107</sup> general or flag officers in certain circumstances,<sup>108</sup> IGs, and military criminal investigative organizations (MCIOs) (if the allegation is criminal in nature).<sup>109</sup> Victims can also report retaliation through hotlines maintained by DoD and the Services.<sup>110</sup>

Under DoD policy, SARCs or VAs assist the victim in completing DD Form 2910, "Victim Reporting Preference Statement," when he or she reports a sexual assault.<sup>111</sup> SARCS are responsible for entering information from the form into the Defense Sexual Assault Incident Database (DSAID) as an electronic record.<sup>112</sup> In completing DD Form 2910, the victim must initial the following statement: "I understand that if I experience coercion, retaliation, reprisal, or ostracism from my supervisors or peers, I can report it to the SARC, Special Victims Counsel, my commander, Victim Witness Assistance Program personnel or my Service Inspector General."<sup>113</sup> However, SARCS do not record any information about allegations of retaliation on the form itself.

The JPP requested information from the Services on the potential benefits and challenges of assigning SARCS the responsibility of collecting retaliation reports related to sexual assault allegations from all

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107 If a Service member believes that he or she was wronged by a commander and is refused redress by that commander, he or she may file an Article 138 complaint. Article 138 is a provision in the UCMJ that allows Service members to make a formal complaint to any superior commissioned officer, who then forwards the complaint to the officer exercising general court-martial jurisdiction over the commander (the GCMCA). If the GCMCA determines that the underlying allegation can be investigated through another channel, the GCMCA will refer the matter to the appropriate authority. In sexual assault retaliation cases, the GCMCA would likely forward an allegation of a criminal retaliatory act to the MCIO for investigation and an allegation of professional retaliation to the IG. The GCMCA notifies the complainant, in writing, of the action taken (including referrals to other investigating components) and the reasons for taking such action. *See* 10 U.S.C § 938 (UCMJ art. 138); *see also* Services' Responses to JPP Requests for Information 75(e), 79(e) (May 6, 2015).

108 A victim may report to a general or flag officer if the retaliation, reprisal, ostracism, or maltreatment involves the administrative separation of a victim within one year of the final disposition of the sexual assault case. A victim may request that the general or flag officer review the separation. A victim may also report to a general or flag officer if the victim believes that there has been an impact on his or her military career because he or she reported a sexual assault or sought mental health treatment for sexual assault. The victim may discuss the impact with the general or flag officer. *See* U.S. DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES encl. 4, ¶ 7(g)-(h) (July 7, 2015) [hereinafter DoDI 6495.02], *available at* <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>.

109 *Id.* at encl. 4, ¶ 7; *see also* Services' Responses to JPP Request for Information 69 (May 6, 2015); U.S. DEP'T OF DEF., DD FORM 2910, VICTIM REPORTING PREFERENCE STATEMENT (June 2014) [hereinafter DD FORM 2910], *available at* <http://www.dtic.mil/whs/directives/forms/eforms/dd2910.pdf>.

110 Services' Responses to JPP Requests for Information 68, 69 (May 6, 2015); *see also* DoD Safe Helpline, *available at* <https://safehelpline.org/>.

111 DoDI 6495.02 encl. 6, ¶ 1(h).

112 *Id.* at ¶ 4(u)(1)(a).

113 DD FORM 2910, Question 1(d)(6).

reporting channels, entering the information into DSAID, and tracking the progress of the investigation and final disposition of retaliation complaints.<sup>114</sup>

In its response, DoD SAPRO listed the following benefits of having SARCs assist with collecting retaliation data:

- DoD policy already requires SARCs to collect information from victims who wish to make a retaliation report related to a report of sexual assault. The matter is then discussed at the monthly CMG meeting.
- SARC involvement avoids the need to create a new position to handle these assignments where there is no policy or law in place allowing confidential and/or privileged communication, such as the protections specified in DoD Instruction 6495.01 and the victim advocate-victim privilege in Military Rules of Evidence (M.R.E.) 514.
- SARC involvement reduces the number of personnel to whom victims must explain their story.
- SARCs are certified in a standardized DoD process, have been screened and vetted, and have specialized training in supporting individuals who have been traumatized.<sup>115</sup>

DoD and the Services observed that assigning SARCs these additional responsibilities would also raise challenges. The Army noted that the Services would need to adopt standardized definitions for retaliation in order to provide SARCs a clear explanation of what constitutes retaliation for sexual assaults.<sup>116</sup> The Navy commented that not all victims elect to work with SARCs. In those instances, the SARC would have the added burden of having to collect information from other sources.<sup>117</sup> In some circumstances, such as when an IG investigates an allegation of reprisal against a victim of sexual assault, certain data may not be available to anyone—including SARCs—outside the investigation process.<sup>118</sup>

DoD SAPRO told the JPP that its forthcoming retaliation prevention and response strategy will establish a more formal data collection protocol that will make possible the tracking of cases beyond a particular installation. While DoD has not determined how the information will be collected, DoD SAPRO expects DSAID to play a role in data collection and tracking.<sup>119</sup> DoD SAPRO estimated that 24 months of development and testing will be required to modernize DSAID so that it can capture and report data about retaliation allegations, at a cost of about \$914,000.<sup>120</sup> In preparing its retaliation strategy, DoD is also identifying types of data that may be shared with SARCs without violating current law or interfering with the investigative process.<sup>121</sup>

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114 JPP Request for Information 94 (Dec. 3, 2015).

115 DoD SAPRO's Response to JPP Request for Information 94 (Dec. 3, 2015).

116 Army's Response to JPP Request for Information 94 (Dec. 3, 2015).

117 Navy's Response to JPP Request for Information 94 (Dec. 3, 2015).

118 DoD SAPRO's Response to JPP Request for Information 94 (Dec. 3, 2015).

119 DoD SAPRO's Response to JPP Request for Information 96 (Dec. 3, 2015).

120 DoD SAPRO's Response to JPP Request for Information 93 (Dec. 3, 2015).

121 DoD SAPRO's Response to JPP Request for Information 94 (Dec. 3, 2015).

The JPP recommends that the Services continue to provide multiple channels through which Service members may report instances of retaliation, thereby ensuring that they can make a report to someone in whom they feel comfortable confiding. However, the JPP believes that each installation should centralize its collection of reports and management of retaliation claims, just as the Services have done with sexual assault reports. In the JPP's view, installation SARCs—who, as discussed below, maintain contact and a supportive relationship with victims even after disposition of their sexual assault case—are best positioned to consolidate information from reports on retaliation and monitor each retaliation complaint throughout the investigative and judicial process until the complaint is resolved.

Tasking SARCs to collect reports of retaliation provides a single access point and maximizes insight into the number and nature of complaints, while minimizing the sharing of sensitive information. The JPP recommends that SARCs enter information regarding retaliation complaints into DSAID so that DoD and the Services can maintain an accurate and up-to-date database on all retaliation complaints and outcomes.

## B. INSTRUMENTS FOR REPORTING OCCURRENCES OF RETALIATION

The Services do not use a standardized form to record information about retaliation against victims of sexual assault.<sup>122</sup> The inspectors general for the Army, Air Force, Navy, and Marine Corps do have standardized complaint forms, but these not tailored to allegations of retaliation against victims of sexual assault.<sup>123</sup> In addition, the Services do not generally use standardized forms to record complaints of retaliation that are received through the various reporting channels other than the IGs.<sup>124</sup>

The Air Force was the only Service that provided the JPP with a form used by SARCs who receive complaints about retaliation. When victims have an open sexual assault case with the CMG and are willing to participate in the interview, Air Force SARCs complete a voluntary “Victim Experience Interview” form.<sup>125</sup> It includes questions about whether the victim had any negative professional or social experiences following his or her report of a sexual assault and whether the victim referred the matter to anyone.<sup>126</sup> Air Force SARCs are required to provide data from the form to AF SAPRO on a monthly basis.<sup>127</sup>

Some presenters, including SARCs from different Services, told the JPP that a standardized form and set procedures for retaliation complaints across all Services are needed so that the same data will be collected for each retaliation allegation.<sup>128</sup> However, in response to a JPP request for information

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122 Services' Responses to JPP Request for Information 92(a) (Dec. 3, 2015).

123 *Id.*

124 *Id.*

125 See U.S. Dep't of the Air Force, Memorandum on Change 1 to 27 February 15 Memorandum—Updated Procedures Regarding Reporting and Tracking Victim Retaliation in Sexual Assault Cases 7 (Mar. 17, 2015) [hereinafter AF Memo on Updated Procedures], available at [http://jpp.whs.mil/Public/docs/03\\_Topic-Areas/06-Retaliation/20150806/05\\_Memo\\_AFSAPR\\_Change1\\_Memo20150227\\_20150317.pdf](http://jpp.whs.mil/Public/docs/03_Topic-Areas/06-Retaliation/20150806/05_Memo_AFSAPR_Change1_Memo20150227_20150317.pdf).

126 See *id.* at 8–11. The Victim Experience Interview also includes questions about the relationship between the victim and the person with whom the victim had negative experiences, the gender of the person with whom the victim had negative experiences, and whether the person with whom the victim had negative experiences is the perpetrator of the underlying sexual assault.

127 *Id.* at 7.

128 *Transcript of JPP Public Meeting 235* (May 19, 2015) (testimony of Ms. Nancy Pike, SARC, U.S. Air Force); *id.* at 245

on developing uniform procedures for victims of sexual assault who wish to report retaliation, DoD agencies and the Services provided different opinions about whether and how to implement a standardized form.

The Navy commented that using a standardized form might delay the process of remedying the retaliation. In addition, the Navy noted that a standardized form could have a chilling effect on reporting, since some victims might not be comfortable with putting in writing a complaint against the command.<sup>129</sup>

DoD SAPRO and some of the Services expressed reservations about using an existing form—such as DD Form 2910—to record allegations of retaliation. They noted that DD Form 2910 is completed at the beginning of the process of reporting a sexual assault, while retaliation may occur after a report is made.<sup>130</sup>

However, other Services viewed DD Form 2910 as an appropriate place for a victim to report retaliation.<sup>131</sup> The Army noted that using it would enable the SARC to establish a link between a sexual assault and a retaliation case. In addition, the Army commented that using a single system would enable data queries to take place without any issue of incompatibility between systems.<sup>132</sup>

To facilitate the reporting and tracking of retaliation claims related to a sexual assault, the JPP recommends that DoD and the Services develop a standardized form to ensure that uniform information is collected from all Service members who complain of such retaliation. The form should be updated to reflect the status of the case throughout the investigative and judicial process for the retaliation complaint, until there is a final disposition of the retaliation complaint. Using a standardized retaliation form would enable DoD and the Services to monitor the status of each individual retaliation case, while also collecting the data necessary to properly assess the overall scope of retaliation in the military related to sexual assault.

The JPP recommends that the standardized retaliation form be maintained in DSAID and linked to DD Form 2910—the form that is used to initially report the sexual assault. Linking the retaliation form to DD Form 2910 would ensure that the retaliation allegation is analyzed and monitored in the context of the information about the underlying report of sexual assault.

The standardized form should provide retaliation victims with the option to file either an informal or a formal report, similar to Service members' options for filing equal opportunity complaints. An informal report would facilitate resolution of the complaint at the lowest level possible by offering the victim and the commander the opportunity to use a mediator.

The JPP notes two advantages of allowing both a formal and an informal process for reporting and investigating retaliation related to a sexual assault. First, additional reporting options may lead to an increase in reporting, since victims would be able to address retaliation without elevating their complaints to the level of a formal command, IG, or criminal investigation. Second, commands might

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(testimony of Ms. Marie A. Brodie, SARC, U.S. Marine Corps).

129 Navy's Response to JPP Request for Information 92(b) (Dec. 3, 2015).

130 DoD SAPRO's, Air Force IG's, and Marine Corps' Responses to JPP Request for Information 92(b) (Dec. 3, 2015).

131 Air Force Headquarters Sexual Assault Prevention and Response Office's and Army's Responses to JPP Request for Information 92(b) (Dec. 3, 2015).

132 Army's Response to JPP Request for Information 92(b) (Dec. 3, 2015).

be more willing to accommodate victims' concerns if they could do so through informal, rather than formal, investigations.

The JPP understands the importance of a commander's retaining the authority to initiate a separate investigation or refer the matter to the appropriate investigating agency if the commander discovers egregious misconduct associated with the retaliation complaint. Therefore, when a victim of retaliation files an informal report, the commander must inform the victim that the command will address the victim's concerns using the informal investigation process, but may also initiate a separate formal investigation if that is deemed necessary.





## V.

## Roles and Responsibilities of Personnel Who Respond to Retaliation Reports

Preventing or properly responding to instances of retaliation against sexual assault victims in the military may involve a number of individuals whose roles often overlap. The JPP received information and heard testimony about the roles in addressing retaliation of SARCs, VAs, SVCs, trial counsel, NCOs, and commanders.

### A. SEXUAL ASSAULT RESPONSE COORDINATORS AND VICTIM ADVOCATES

As discussed above, SARCs and VAs play a central role in informing victims of retaliation about available resources, providing victims with referrals for support and services, and assisting victims in making retaliation reports.<sup>133</sup> DoD Instruction 6495.02 on Sexual Assault Prevention and Response Program Procedures requires SARCs and VAs to inform victims of the channels available to report instances of retaliation, reprisal, ostracism, and maltreatment.<sup>134</sup>

The Air Force provided the JPP with a written policy that further details specific roles for Air Force SARCs and VAs in reporting and tracking retaliation.<sup>135</sup> During initial intake with the victim and once a month afterward, an Air Force SARC or VA is responsible for discussing the definition of retaliation and reprisal with the victim, asking the victim if he or she has experienced any form of retaliation, notifying the victim of different reporting options, and assisting in reporting the retaliation if the victim so chooses.<sup>136</sup> If the victim discusses a retaliation incident with the SARC or VA but elects not to make a report, the communication remains privileged and cannot be disclosed.<sup>137</sup> Air Force SARCs are responsible for tracking retaliation reports throughout the investigative process and making periodic updates to AF SAPRO.<sup>138</sup>

SARCs have a duty to coordinate and monitor the response efforts of different stakeholders in the command to aid sexual assault victims.<sup>139</sup> In order to fulfill their duties, all SARCs are required, under DoD policy, to have direct and unimpeded access to the installation commander and immediate commander of both the victim and the accused.<sup>140</sup>

SARCs' responsibilities include coordinating care for victims of retaliation, even after the adjudication of the underlying sexual assault offense. SARCs testified that the services they provide to victims of retaliation—including referrals to SVCs and assistance with expedited transfers—remain available after

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133 See *supra* Section IV.

134 DoDI 6495.02 encl. 4, ¶ 7.

135 AF Memo on Updated Procedures, *supra* note 125, at 1–4.

136 *Id.* at 1–2; see also Air Force's Response to JPP Request for Information 69 (May 6, 2015).

137 AF Memo on Updated Procedures, *supra* note 125, at 2.

138 *Id.* at 4; see also *Transcript of JPP Public Meeting 234–35* (May 19, 2015) (testimony of Ms. Nancy Pike, SARC, U.S. Air Force SARC).

139 See DoDI 6495.02, ¶ 4(g).

140 *Id.* at ¶ 4(h).

a case is adjudicated or closed.<sup>141</sup> An Army SARC told the JPP that she stays in contact with victims of retaliation, even after their cases are closed or they have obtained an expedited transfer.<sup>142</sup>

Victims' communications with SARCs and VAs are privileged under M.R.E. 514.<sup>143</sup> Therefore, victims who disclose retaliation to SARCs and VAs can request that their disclosures remain confidential. A Marine SARC told the JPP that often a Marine or sailor tells a VA that he or she is experiencing retaliation, but asks the VA not to share this information or act on it.<sup>144</sup>

The JPP heard testimony from both military and civilian SARCs.<sup>145</sup> A Navy SARC told the JPP that she believes she has certain advantages as a civilian: victims are more willing to speak to her about retaliation, and she is never viewed as a “troublemaker” by the command for reporting retaliation.<sup>146</sup> An Army SARC, in contrast, emphasized that the most important thing is having the “right person” in the position—either uniformed or civilian—who can be “professional and objective” and “get [victims] what they need.”<sup>147</sup>

## B. SPECIAL VICTIMS' COUNSEL

SVCs provide victims of retaliation with a broad range of legal assistance. SVCs maintain an ongoing relationship with victims of sexual assault. Therefore, when a victim of sexual assault experiences retaliation, SVCs may provide assistance soon after the retaliation occurs, during the investigative and adjudicative phases, or even after the sexual assault case is closed.<sup>148</sup>

In offering aid, SVCs may counsel the victim on options to address retaliation and provide assistance in filing complaints.<sup>149</sup> They can also advocate directly to the command to ensure the victim's rights have been safeguarded and to suggest an appropriate response to the retaliation allegation.<sup>150</sup>

In addition, SVCs can offer victims other legal services in connection with their retaliation concerns. If the victim requests an expedited transfer because of retaliation, the SVC can negotiate with a landlord to get a victim out of a lease, thereby minimizing the financial impact of transferring to a new duty station.<sup>151</sup> For a victim who does not transfer, SVCs can coordinate with the command and personnel

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141 *See Transcript of JPP Public Meeting 262* (May 19, 2015) (testimony of Sergeant First Class Bridgett Joseph, SARC, U.S. Army); *id.* at 265 (testimony of Mr. Magnus Graham, SARC Coordinator, U.S. Coast Guard).

142 *Transcript of JPP Public Meeting 262* (May 19, 2015) (testimony of Sergeant First Class Bridgett Joseph, SARC, U.S. Army).

143 MCM, *supra* note 10, MIL. R. EVID. 514; *see also* DoDI 6495.02 encl. 4, ¶ 1(b)(4).

144 *Transcript of JPP Public Meeting 243* (May 19, 2015) (testimony of Ms. Marie A. Brodie, SARC, U.S. Marine Corps).

145 *See generally Transcript of JPP Public Meeting 231–94* (May 19, 2015).

146 *Transcript of JPP Public Meeting 269–70* (May 19, 2015) (testimony of Ms. Kim Agnew, SARC, U.S. Navy).

147 *Transcript of JPP Public Meeting 271–73* (May 19, 2015) (testimony of Sergeant First Class Bridgett Joseph, U.S. Army SARC).

148 Services' Responses to JPP Requests for Information 71 (May 6, 2015); *see also* 10 U.S.C. § 1044(e).

149 Services' Responses to JPP Requests for Information 71 (May 6, 2015).

150 *Id.*

151 *Transcript of JPP Public Meeting 53–54* (May 19, 2015) (testimony of Ms. Meghan Rhoad, Researcher, Human Rights Watch, Women's Rights Division).

offices to obtain alternate working arrangements.<sup>152</sup> SVCs can also aid a victim with his or her application to the Board for Correction of Military Records (BCMR) to upgrade a general discharge to an honorable discharge.<sup>153</sup>

The JPP heard from several SVCs who explained that their services range from the simple to complicated, depending on the victim's unique and specific needs.<sup>154</sup> A Navy VLC commented that most retaliation allegations he has addressed have been dealt with directly through the chain of command and that most of his cases have been resolved by transferring the victim, at his or her request, to another unit or duty station.<sup>155</sup>

Other SVCs described some of their cases as more complex, requiring creative solutions to resolve the problem.<sup>156</sup> An Air Force SVC told the JPP about a complicated retaliation case in which his client sought an expedited transfer out of concerns about retaliation. However, the client did not believe that simply transferring to a new location would suffice, because his career field was so small that his colleagues in his new location would know of his situation. The client sought a transfer to another career specialty, but his request was denied because he was in a "critically manned" career field.<sup>157</sup> With the SVC's assistance, and with the support of the client's chain of command, an exception to policy was granted and the client's request approved. He transferred to another career field and ultimately chose to remain in the Service.<sup>158</sup>

SVCs can also help by communicating with commands about retaliation concerns within particular units.<sup>159</sup> For example, when one of the Army SVC's clients was subjected to demeaning comments and rumors, the SVC advised the command that unit personnel needed to be trained about an Army directive prohibiting retaliation. The command agreed and held a stand-down training day soon after.<sup>160</sup>

The SVCs testifying before the JPP agreed that in most cases, allegations of retaliation are most effectively addressed through the chain of command.<sup>161</sup> The SVCs told the JPP that they generally felt commands were responsive to their requests, that they usually could work well with their clients'

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152 *Transcript of JPP Public Meeting* 53–54 (May 19, 2015) (testimony of Ms. Meghan Rhoad, Researcher, Human Rights Watch, Women's Rights Division).

153 *Transcript of JPP Public Meeting* 53–54 (May 19, 2015) (testimony of Ms. Meghan Rhoad, Researcher, Human Rights Watch, Women's Rights Division).

154 *See generally Transcript of JPP Public Meeting* 229–314 (June 18, 2015).

155 *Transcript of JPP Public Meeting* 232–33 (June 18, 2015) (testimony of Lieutenant Commander James Toohey, Victims' Legal Counsel, U.S. Navy).

156 *Transcript of JPP Public Meeting* 246–48 (June 18, 2015) (testimony of Captain Micah Smith, Special Victims' Counsel, U.S. Air Force).

157 *See also infra* Section VII.A.

158 *Transcript of JPP Public Meeting* 246–48 (June 18, 2015) (testimony of Captain Micah Smith, Special Victims' Counsel, U.S. Air Force).

159 *See Services' Responses to JPP Request for Information* 71 (May 6, 2015).

160 *Transcript of JPP Public Meeting* 242–43 (June 18, 2015) (testimony of Captain George "Rob" Lavine III, Special Victims' Counsel, U.S. Army).

161 *See generally Transcript of JPP Public Meeting* 297–99 (June 18, 2015).

command leadership, and that rank did not affect their ability to address retaliation issues with higher-ranking officers.<sup>162</sup>

Reflecting on the influence and credibility of SVCs, a Human Rights Watch presenter emphasized the “clout” that SVCs are often able to exercise on behalf of their clients when dealing directly with the command: “[SVCs] were able to raise issues with commanders that victims themselves had found unable to bring[.] . . . [F]or example, if [a victim] had requested a change in housing, it might have been viewed as a frivolous request. When it came through their attorney, it was viewed as something that should be taken seriously.”<sup>163</sup>

### C. TRIAL COUNSEL

Trial counsel can also assist victims in identifying instances of retaliation and refer allegations for investigation to law enforcement, IGs, or the chain of command.<sup>164</sup> Trial counsel are responsible for ensuring that the victim is reasonably protected from the accused under Article 6b of the UCMJ, and for ensuring compliance with all notifications and procedures required by the Victim and Witness Assistance Program.<sup>165</sup> In addition, trial counsel inform victims that military protective orders and civilian restraining orders are available to them to prevent retaliation.<sup>166</sup>

Once investigations are complete, trial counsel evaluate the evidence to determine if the retaliatory conduct meets the elements of a charge under the UCMJ, a regulatory violation, or any other inappropriate noncriminal conduct.<sup>167</sup> Trial counsel then advise commanders on how to proceed concerning the allegations.<sup>168</sup>

### D. COMMANDERS

Commanders are responsible for safeguarding the safety and well-being of all members of their command, including victims of sexual assault. Commanders are also responsible for maintaining good order and discipline in their units and for appropriately disposing of all allegations of offenses under the UCMJ.<sup>169</sup>

Commanders testifying before the JPP described several approaches to fostering a command climate in which victims feel they can report sexual assault without fear of retaliation and report retaliation when it does occur.

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<sup>162</sup> See generally *Transcript of JPP Public Meeting* 295–96 (June 18, 2015).

<sup>163</sup> *Transcript of JPP Public Meeting* 56–57 (May 19, 2015) (testimony of Ms. Meghan Rhoad, Researcher, Human Rights Watch, Women’s Rights Division).

<sup>164</sup> Though the JPP did not hear testimony from any trial counsel, the Services provided information on the role of trial counsel in addressing retaliation. See *Services’ Responses to JPP Request for Information* 71 (May 6, 2015).

<sup>165</sup> *Services’ Responses to JPP Request for Information* 71 (May 6, 2015).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> 10 U.S.C. § 830(b) (UCMJ art. 30(b)).

Commanders emphasized the importance of educating personnel at all levels of the command about social and professional retaliation.<sup>170</sup> An Air Force commander described the experience of a sexual assault victim who recently was the subject of gossip and ostracized by her peers.<sup>171</sup> After speaking with the victim, the commander held a unit town hall meeting where he reiterated his policy on professionalism in the workplace. The commander and SARC also visited each section of the squadron to speak individually with unit members about retaliation. Afterward, the commander and the SARC followed up with the victim on multiple occasions, and the victim reported that the gossip and ostracism had ended.

Similarly, a Coast Guard commander testified that when he sensed that a few members of the senior enlisted leadership were taking sides following a sexual assault prosecution, he held an all-hands meeting with the officers and the chiefs to reiterate his command philosophy regarding respect and retaliation.<sup>172</sup> The commander reported that this intervention stopped the rumors, prevented retaliation, and ultimately enhanced trust between the command and the crew.<sup>173</sup>

Commanders also spoke of their responsibility for developing an appropriate plan of action to investigate allegations of retaliation within their command.<sup>174</sup> For example, an Air Force commander reported that after personally meeting with a victim who alleged a retaliatory personnel action, he opened a commander-directed investigation at her request. In order to ensure the independence of the investigation, he assigned a senior official outside of the victim's organization as the investigating officer.<sup>175</sup>

Finally, the commanders testified that when allegations of retaliation are substantiated, they are responsible for disposing of allegations through court-martial, non-judicial punishment, and administration action. However, they provided no specific examples of dispositions of such cases within their commands.

### E. NONCOMMISSIONED OFFICERS

Many initiatives by DoD and the Services focus on the essential role played by NCOs in preventing and responding to retaliation against sexual assault victims.<sup>176</sup> NCOs down to the lowest unit level need to be able to recognize retaliation when it occurs and closely monitor potential problems in command

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170 *See Transcript of JPP Public Meeting* 353 (May 19, 2015) (testimony of Captain Heidi Fleming, Commanding Officer, U.S. Navy).

171 *Transcript of JPP Public Meeting* 348–49 (May 19, 2015) (testimony of Brigadier General David Harris, Commander, U.S. Air Force).

172 *Transcript of JPP Public Meeting* 366–67 (May 19, 2015) (testimony of Captain Jeffrey Westling, Commander, U.S. Coast Guard).

173 *Transcript of JPP Public Meeting* 366–67 (May 19, 2015) (testimony of Captain Jeffrey Westling, Commander, U.S. Coast Guard).

174 *Transcript of JPP Public Meeting* 351 (May 19, 2015) (testimony of Brigadier General David Harris, Commander, U.S. Air Force).

175 *Transcript of JPP Public Meeting* 346–47 (May 19, 2015) (testimony of Brigadier General David Harris, Commander, U.S. Air Force).

176 *See, e.g.* U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (Dec. 3, 2014), *available at* [http://www.sapr.mil/public/docs/reports/FY14\\_POTUS/FY14\\_DoD\\_Report\\_to\\_POTUS\\_SecDef\\_Initiatives.pdf](http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_SecDef_Initiatives.pdf).

climate. Because NCOs frequently interact with the enlisted members of the command, they can help commanders stay abreast of issues affecting those members, such as retaliation.<sup>177</sup>

Highlighting this point, an Army master sergeant told the JPP that “[a] commander may not see . . . the 180 Soldiers in their command in a day [or] in a week . . . on an individual basis, but that squad leader sees them every single day from morning till bedtime.”<sup>178</sup> She testified that since NCOs act as the “daily connection with the Soldier,” retaliation “cannot be combatted . . . without buy-in from the non-commissioned officer.”<sup>179</sup>

NCOs also assist commanders by developing policies and training to prevent retaliation before it occurs. A Marine staff sergeant serving as a uniformed VA testified that she constantly trains Marines about the command philosophy on retaliation—stressing that the command has zero tolerance for retaliation or any type of re-victimization.<sup>180</sup>

Further commenting on the role of NCOs, the Army master sergeant noted that the Army had recently sent some of its junior squad leaders to Washington, DC, to help design training and policies on retaliation.<sup>181</sup> The Army’s initiative reflects an effort to move away from the traditional hierarchal, top-down approach to training and toward a more grassroots approach, encouraging young leaders to find solutions that will resonate with their soldiers when dealing with problems like retaliation.<sup>182</sup>

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177 See generally *Transcript of JPP Public Meeting 324–25* (May 19, 2015).

178 *Transcript of JPP Public Meeting 324* (May 19, 2015) (testimony of Master Sergeant Michelle M. Johnson, U.S. Army).

179 *Transcript of JPP Public Meeting 324* (May 19, 2015) (testimony of Master Sergeant Michelle M. Johnson, U.S. Army).

180 *Transcript of JPP Public Meeting 325* (May 19, 2015) (testimony of LeeAnn B. Nelson, Uniformed Victim Advocate, U.S. Marine Corps).

181 *Transcript of JPP Public Meeting 314–16* (May 19, 2015) (testimony of Master Sergeant Michelle M. Johnson, U.S. Army).

182 *Transcript of JPP Public Meeting 314–16* (May 19, 2015) (testimony of Master Sergeant Michelle M. Johnson, U.S. Army).

## VI. Investigating and Monitoring Retaliation

When a sexual assault victim reports retaliation, the allegation may be investigated by the MCIO, an IG, or the commander, depending on the type of retaliation.<sup>183</sup> DoD instructions require the MCIOs to investigate retaliation complaints of certain criminal violations, such as threats, assaults, or damage to property.<sup>184</sup> Usually, the IG investigates allegations of professional retaliation, and the command investigates allegations of social retaliation.<sup>185</sup> This section discusses these different types of investigations, along with the role of the case management groups, which monitor the status of retaliation cases at an installation or within an organization.

### A. INVESTIGATIONS BY MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS

DoD policy requires specially trained agents from the Services' MCIOs to receive all sexual assault reports and investigate all unrestricted sexual assault reports within their jurisdiction.<sup>186</sup> When these agents conduct an initial interview of a victim following a sexual assault report, they provide a DD Form 2701, which advises the victim to contact the investigator if he or she is threatened or harassed as a result of making the report.<sup>187</sup>

DoD policy does not specifically require MCIOs to investigate reports of retaliation related to a sexual assault.<sup>188</sup> Instead, DoD policy states that “when an MCIO initiates an adult sexual assault investigation, it will also initiate and conduct subsequent investigations relating to suspected threats against the sexual assault victim, to include minor physical assaults and damage to property.”<sup>189</sup> When an MCIO receives a retaliation complaint, the MCIO determines whether it will investigate the claim. If the complaint is found to involve less serious criminal activity, noncriminal activity, or activities

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183 See Services' Responses to JPP Requests for Information 74, 75 (May 6, 2015).

184 See Services' Responses to JPP Request for Information 75 (May 6, 2015).

185 See Services' Responses to JPP Requests for Information 71, 74, 75 (May 6, 2015).

186 DoD policy requires the primary MCIO investigator assigned to conduct an investigation of adult sexual assault to be properly trained in conducting such investigations; the policy lists the training criteria for those investigators. See U.S. DEP'T OF DEF., INSTR. 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE encl. 2, ¶ 6 (June 18, 2015) [hereinafter DoDI 5505.18], available at <http://www.dtic.mil/whs/directives/corres/pdf/550518p.pdf>. DoD policy also requires that all unrestricted reports of sexual assault (and attempts) against adults immediately be reported to the MCIO, regardless of the severity of the allegation, and that the MCIOs investigate the cases within their jurisdiction. *Id.* at ¶ 3c.

187 *Id.* at encl. 2, ¶ 2; see also U.S. DEP'T OF DEF., FORM 2701, INITIAL INFORMATION FOR VICTIMS AND WITNESSES OF CRIME (Aug. 2013), available at <http://www.dtic.mil/whs/directives/forms/eforms/dd2701.pdf>.

188 See DoDI 5505.18, ¶ 3(d)(1); see also Services' Responses to JPP Requests for Information 71, 74, 75 (May 6, 2015).

189 DoDI 5505.18, ¶ 3(d)(1); see also Services' Responses to JPP Requests for Information 75(b), 77 (May 6, 2015). DoDI 6495.02 also states that “[i]f the [retaliation] allegation is criminal in nature and the victim filed an Unrestricted Report [of sexual assault], the crime should be immediately reported to an MCIO, even if the crime is not something normally reported to an MCIO (e.g., victim's personal vehicle was defaced).” See DoDI 6495.02 encl. 4, ¶ 7. Incidents of retaliation committed by someone other than the alleged offender may result in the initiation of a separate law enforcement report. See Army's Response to JPP Request for Information 77 (May 6, 2015).



outside its authority, the MCIO may refer the matter to the IG, other law enforcement agencies, or the chain of command for further investigation and disposition.<sup>190</sup>

Upon receipt of a retaliation complaint, the MCIO agent must inform the victim's command, SARC, and SVC of the complaint as well as of the results of all ensuing investigative efforts.<sup>191</sup> The MCIO agent also must inform the victim when an investigation into the retaliation complaint is initiated and provide periodic status updates.<sup>192</sup> Service members who have concerns about how the MCIO is handling their case may contact their command, SVC, supervisory personnel at the local MCIO office, the MCIO headquarters, an IG, or members of Congress to complain.<sup>193</sup>

The Navy noted that “[c]riminal 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.”<sup>194</sup>

## B. INVESTIGATIONS BY DOD AND SERVICE INSPECTORS GENERAL

### 1. Procedures for IG Investigations

As noted above, the Military Whistleblower Protection Act of 1988, as amended by the FY14 NDAA, explicitly grants DoD IG and the Service IGs the authority to investigate unfavorable personnel actions taken against Service members as reprisal for communications regarding rape, sexual assault, sexual harassment, or other sexual misconduct.<sup>195</sup> Military members can file a professional retaliation complaint with any Service<sup>196</sup> or DoD IG office.<sup>197</sup>

When a Service IG receives any type of reprisal allegation, it is required to notify DoD IG within 10 working days, even if the Service IG does not believe the complaint meets the elements of a reprisal case.<sup>198</sup> DoD IG conducts an initial complaint analysis and determines whether there is a prima facie

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190 Air Force's and Navy's Responses to JPP Request for Information 75(b) (May 6, 2015).

191 Navy's Response to JPP Request for Information 77 (May 6, 2015).

192 Navy's and Marine Corps' Responses to JPP Request for Information 77 (May 6, 2015).

193 Services' Responses to JPP Request for Information 79(b) (May 6, 2015).

194 Navy's Response to JPP Request for Information 92(c) (Dec. 3, 2015).

195 FY14 NDAA, *supra* note 3, at § 1715; 10 U.S.C. § 1034.

196 Service IGs are available at all levels of the chain of command, including the headquarters level. *See* DoD's Response to JPP Request for Information 99 (Dec. 3, 2015). If an investigation is conducted by a Service IG, the Service IG must be outside the chain of command of both the alleged victim and the alleged retaliator, or at least one organization higher in the chain of command than the organization of both the alleged victim and the alleged retaliator. FY14 NDAA, *supra* note 3, at § 1714(a); 10 U.S.C. § 1034; DoDD 7050.06 encl. 2, ¶ 1(c).

197 DoD's Response to JPP Request for Information 99 (Dec. 3, 2015).

198 10 U.S.C § 1034; DoDD 7050.06 encl. 2, ¶ 3(c)(2); DoD IG's Response to JPP Request for Information 98 (Dec. 3, 2015). *Cf.* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, WHISTLEBLOWER PROTECTIONS: DOD NEEDS TO ENHANCE OVERSIGHT OF MILITARY WHISTLEBLOWER REPRISAL INVESTIGATIONS 27 (May 2015) [hereinafter 2015 GAO REPORT] (finding that not all complaints filed with the Services were reported to DoD IG); DoD IG's Response to JPP Request for Information 100 (Dec. 3, 2015) (noting that in light of the GAO's finding that not all complaints filed with the Services were reported to DoD IG, the original numbers of sexual assault related reprisal complaints provided to the JPP at the April 2015 JPP meeting were inaccurate); Marine Corps' Response to JPP Request for Information 98 (Dec. 3, 2015) (indicating that the Marine Corps

case for a MWPA claim.<sup>199</sup> For any type of reprisal allegation that meets the elements of a MWPA claim, DoD IG decides whether its Whistleblower Reprisal Investigation Section will conduct the investigation or the complaint will be returned to the Service IG for investigation.<sup>200</sup> When DoD IG delegates a reprisal investigation to a Service IG, DoD IG maintains oversight and approval authority.<sup>201</sup>

Under the implementing directive for the MWPA, results of an IG investigation must be reported within 180 days after a complaint is received.<sup>202</sup> For substantiated complaints, the investigating IG must make recommendations for an appropriate remedy. The investigating IG also must advise the (whistleblower) Service member that he or she may request a review by a BCMR.<sup>203</sup>

The Service Secretaries receive all completed IG investigation reports, including the recommendation for an appropriate remedy.<sup>204</sup> If the Service Secretary finds sufficient basis to conclude that retaliation has occurred, he or she must order that the record of the Service member be corrected and must take any appropriate disciplinary or corrective action against the individual who committed the retaliation.<sup>205</sup> If the Service Secretary determines that an order for remedial, disciplinary, or corrective action is not appropriate, then he or she must provide the Secretary of Defense and the Service member with a notice of the determination, give the reasons for not taking action, and, when appropriate, refer the report to the appropriate BCMR for further review.<sup>206</sup>

Service members can appeal the IG's findings and request that a higher IG office review their complaint.<sup>207</sup> However, if DoD IG conducts the investigation, the only recourse is to appeal to the Secretary of Defense.<sup>208</sup>

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Inspector General reports all "prima facie cases of Military Whistleblower Reprisal (MWR) to DoD IG," implying that some of the complaints may not be forwarded if they do not meet the initial complaint requirements).

199 DoD IG's Response to JPP Request for Information 99 (Dec. 3, 2015). Ms. Nilgun Tolek, the Director of DoD IG Whistleblower Reprisal Investigations, informed the JPP: "We determine if there's a prima facie allegation, which is to say there was a protected communication preceding some sort of threatened, withheld or taken personnel action and then if there is a plausible inference of knowledge and causation there we call that good to go for an investigation." *See Transcript of JPP Public Meeting* 309 (Apr. 10, 2015). If DoD IG determines that the allegation is for social retaliation, it refers the report back to the hotline coordinator or Service IG for investigation, but provides oversight of any investigative activity. *See Transcript of JPP Public Meeting* 306–07 (Apr. 10, 2015) (testimony of Mr. Patrick Gookin, Director, DoD IG Hotline).

200 DoD IG's Response to JPP Request for Information 99 (Dec. 3, 2015).

201 DoDD 7050.06 encl. 2, ¶ 1(d).

202 *Id.* at encl. 2, ¶ 1(e). If a Service IG cannot issue a report of the investigation within 180 days, the Service IG must notify DoD IG, the Under Secretary of Defense for Personnel and Readiness, the Secretary of the Military Department concerned, and the Service member of the reasons for the delay and an estimate of when the report will be issued. *See id.* at encl. 2 ¶ 3(f).

203 *Id.* at encl. 2, ¶¶ 1(e)(2), 1(i), 3(e)(2), 3(i).

204 *Id.* at encl. 2, ¶¶ 1(h), 3(h).

205 *Id.* at encl. 2, ¶ 4(b)-(c).

206 *Id.* at encl. 2, ¶ 4(d).

207 Army's and Air Force's Responses to JPP Request for Information 79(c) (May 6, 2015).

208 10 U.S.C. § 1034(h).

## 2. Shortcomings of IG Investigations

In 2012 and 2015, the Government Accountability Office (GAO) conducted reviews of DoD IG's management of whistleblower complaints. The 2012 review revealed that DoD IG was not meeting the 180-day requirement to complete military whistleblower reprisal investigations.<sup>209</sup> In its follow-up review, the GAO found that the average length of a DoD IG and Service IG investigation during fiscal years 2013 and 2014 was 526 days—almost three times the limit prescribed in DoD and Service regulations.<sup>210</sup> When the JPP asked DoD IG and the Services why cases were not processed within the required time, the reasons they gave included resourcing constraints, factual complexity of cases, inexperience of the teams conducting the investigations, and significant delays in the DoD IG oversight process.<sup>211</sup>

The 2015 GAO report also noted that DoD IG had inadequate oversight over the Service IGs, which did not always notify DoD IG of reprisal allegations.<sup>212</sup> From the written responses to the JPP requests for information, it appears that the Service IGs conducting an initial complaint analysis have not always informed DoD IG of reprisal allegations if those complaints did not meet the prima facie elements for a reprisal case.<sup>213</sup> Instead, believing that the complaints were not reprisal cases within the IG's jurisdiction, the Service IGs may have referred social retaliation complaints to the command or reports of criminal retaliation to the MCIOs.<sup>214</sup>

In addition, the 2015 GAO report concluded that DoD IG has not formalized its processes to review Service IG reprisal investigations and to help ensure the quality and independence of investigations.<sup>215</sup> Many Service IG case files reviewed by the GAO were missing required documentation, such as evidence of Service member interviews.<sup>216</sup>

Furthermore, it is unclear whether DoD IG intends to investigate all reprisal complaints related to sexual assault offenses or just continue to provide the requisite oversight. Ms. Nilgun Tolek, Director of DoD IG Whistleblower Investigations, testified that DoD IG will usually investigate sexual assault-related reprisal complaints.<sup>217</sup> In a written response, DoD IG reiterated that it already “handle[s]” all sexual assault-related reprisal allegations “about which it is made aware.”<sup>218</sup> However, there is no written policy establishing whether DoD IG retains investigative authority over sexual assault reprisal cases.

The JPP requested data from DoD IG and the Service IGs on the total number of reprisal complaints received by each IG, including (1) sexual assault complaints; (2) sexual harassment complaints;

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209 U.S. GOVERNMENT ACCOUNTABILITY OFFICE, WHISTLEBLOWER PROTECTION: ACTIONS NEEDED TO IMPROVE DOD'S MILITARY WHISTLEBLOWER REPRISAL PROTECTION 13 (Feb. 2012).

210 2015 GAO REPORT, *supra* note 198, at 15.

211 Services' Responses to JPP Request for Information 101(c) (Dec. 3, 2015).

212 2015 GAO REPORT, *supra* note 198, at 27.

213 See Marine Corps IG's Response to JPP Request for Information 98(a) (Dec. 3, 2015).

214 See Navy's Response to JPP Request for Information 98 (Dec. 3, 2015).

215 2015 GAO REPORT, *supra* note 198, at 31.

216 *Id.* at 41.

217 *Transcript of JPP Public Meeting* 311 (Apr. 10, 2015) (testimony of Ms. Nilgun Tolek, Director, DoD IG Whistleblower Investigations).

218 DoD IG's Response to JPP Request for Information 102(a) (Dec. 3, 2015).

(3) fraud, waste, and abuse complaints; and (4) other complaints.<sup>219</sup> The data the JPP received, summarized in the table below, indicate that both DoD IG and the Service IGs investigated sexual assault reprisal allegations in FY12, FY13, and FY14.<sup>220</sup> Thus, while DoD IG may be providing oversight, it has not been retaining complete investigative authority over all sexual assault reprisal allegations.

*Chart: Number of Sexual Assault Reprisal Complaints Filed with DoD and Service IGs Compared to the Total Number of Reprisal Complaints<sup>221</sup>*

FY	DoD IG	Army IG	Air Force IG	Navy IG	Marine Corps IG
2012	4 / 661	Unknown / 887	0 / 4	2 / 68	0 / 5
2013	6 / 565	1 / 704	2 / 7	1 / 39	0 / 7
2014	8 / 760	6 / 832	4 / 11	1 / 33	1 / 17
Total Reprisal Cases	18 / 1986	7 / 2423	6 / 22	4 / 140	1 / 29

NOTE: The first number indicates the number of sexual assault reprisal complaints; the second number indicates the total number of military reprisal complaints received in the fiscal year.

In December 2015, the JPP asked the IGs to also provide the disposition of the sexual assault reprisal allegations they received.<sup>222</sup> That information is summarized in the table below. As the table shows, only one of the sexual assault reprisal complaints received by an IG was substantiated from FY12 through FY14.<sup>223</sup>

219 JPP Request for Information 84 (May 6, 2015). The Coast Guard does not have an internal IG. The Coast Guard provided the following information: “The Coast Guard is unable to provide the requested data within the time period specified. Retaliation complaints may have been reported to [Department of Homeland Security] IG. [Coast Guard Investigative Service (CGIS)] may also receive complaints for retaliation. While CGIS recently acquired an electronic, online case database, Field Activity Tracking System (FACTS), IG cases are compiled together, and not by specific categories of IG complaints. CGIS is unaware of any specific complaint of sexual assault retaliation.” See Coast Guard’s Response to JPP Request for Information 100 (Dec. 3, 2015).

220 See Services’ Responses to JPP Request for Information 84 (May 6, 2015); Services’ Responses to JPP Requests for Information 100, 101, and 102(b) (Dec. 3, 2015).

221 The Army IG does not track sexual assault reprisals separately from other whistleblower complaints; it performed a manual search from FY13 to FY15. Therefore, FY12 data are unknown. In FY15, the Army IG received 9 sexual assault reprisal complaints; as of December 2015, 6 of the investigations were ongoing and 3 had been closed administratively. See Army’s Response to JPP Requests for Information 100, 101(a)-(b) (Dec. 3, 2015). The Army IG indicated that it has updated its database “to allow future tracking or reprisal complaints related to sexual assault.” See Army’s Response to JPP Request for Information 100 (Dec. 3, 2015).

222 JPP Request for Information 101(b) (Dec. 3, 2015); see also JPP Request for Information 84 (May 6, 2015).

223 See Services’ Responses to JPP Request for Information 101(b) (Dec. 3, 2015) (providing a complete synopsis of each retaliation complaint). Some of the Services also provided processing times in their responses. See Services’ Responses to JPP Request for Information 101(b) (Dec. 3, 2015).

Chart: Disposition of IG Sexual Assault Reprisal Cases for FY 2012–FY 2014<sup>224</sup>

Disposition for FY12–FY14	DoD IG	Army IG	Air Force IG	Navy IG	Marine Corps IG
Total complaints	18	7	6	4	1
Dismissed, Declined, Administrative closure, or No further investigation warranted	12	3	4	2	0
Still pending investigation	3	2	1	0	0
Not substantiated	3	2	1	1	1
Substantiated	0	0	0	1	0

NOTE: The data provided for DoD IG reflect the number of complaints filed directly with DoD IG. Although the Service IGs may have referred cases to DoD IG for investigation, those cases are not reflected in the data provided for DoD IG.

In FY15, DoD IG substantiated one reprisal case related to sexual misconduct.<sup>225</sup> This case involved an Air Force master sergeant working on a joint staff who reported that an Army lieutenant colonel made inappropriate sexual contact with a contract employee. The Army lieutenant colonel and a colonel gave the master sergeant a negative performance evaluation, which made him ineligible for promotion. DoD IG recommended that the Secretary of the Army take corrective action against both the lieutenant colonel and colonel, and that the Secretary of Air Force take appropriate action to remedy the master sergeant’s records to allow him to compete for promotion.<sup>226</sup>

### 3. Ways to Improve the IG Processing of Sexual Assault Reprisal Claims

As demonstrated above, DoD IG and the Service IGs have investigated very few cases of retaliation against sexual assault victims. Because they receive so few of these cases, IG investigators often lack the training and experience of the MCIO agents who investigate sexual assault-related cases.

224 The determination of *substantiated* or *not substantiated* is based on whether the allegations were supported by a preponderance of the evidence. See DEPARTMENT OF DEFENSE INSPECTOR GENERAL, GUIDE TO INVESTIGATING MILITARY WHISTLEBLOWER REPRISAL AND RESTRICTION COMPLAINTS 4-3 (June 29, 2015) [hereinafter DoD IG GUIDE], available at <http://www.dodig.mil/programs/whistleblower/pdfs/ioguide/GuideToInvestigatingMilitaryWhistleblowerReprisalAndRestrictionComplaints.pdf>. *Dismissed* means that the IG closed a case during the initial complaint analysis, for failure to make a prima facie allegation or for other threshold reasons such as timeliness. *Id.* at 2-3, 2-6. *Declined* is a term typically used when a complaint does not fall within the IG’s jurisdiction because it constitutes a crime, is duplicative of allegations that were already investigated by a Service IG, or does not allege an unfavorable personnel action under DoDD 7050.06. *Administrative closure* is a term used by the Army when Army IG refers a case to DoD IG for investigation and DoD IG determines that the case is not substantiated. *No further investigation warranted* is a term used in a variety of circumstances, including when the complainant no longer participates in the investigation and the evidence of the case indicates that the likely result would be a determination of not substantiated. See Services’ Responses to JPP Request for Information 101(b) (Dec. 3, 2015).

225 See U.S. Dep’t of Def., Office of the Inspector General, “DoD IG Monthly Update – October 2015,” available at [http://www.dodig.mil/eletter/eletter\\_view.cfm?id=6629](http://www.dodig.mil/eletter/eletter_view.cfm?id=6629).

226 *Id.*

The JPP asked the Services whether DoD IG should retain jurisdiction over all sexual assault–related reprisal complaints to improve the quality of investigations, and the Services provided conflicting answers.<sup>227</sup> In support of the proposal, the Army IG noted that “[d]irecting DoD IG to investigate all sexual assault victim reprisal complaints would lessen the burden on the Service IG offices.”<sup>228</sup> However, the Headquarters of the Department of the Army and the Army Office of the Judge Advocate General cautioned against implementing a requirement that DoD IG investigate all sexual assault reprisal claims, arguing that some cases may be better addressed by the MCIOs.<sup>229</sup> The Marine Corps stated that reserving investigative authority to DoD IG would not likely streamline the process “due to the amount of Service IG support DoD IG would require to complete the investigative process.”<sup>230</sup> The Navy and Air Force did not think giving DoD IG all investigative authority would have much impact, because of the “small number of reprisal cases emanating from . . . sexual assault” cases.<sup>231</sup>

The JPP also asked DoD IG and the Service IGs if it would be beneficial to have a specialized investigative or processing section within DoD IG to specifically handle sexual assault retaliation complaints.

DoD IG responded, “At this time the number of sexual assault reprisal complaints is too low to justify the creation of a specialized section. Should that change in the future, we are open to reevaluating.”<sup>232</sup> DoD IG also contended that no special training was required to investigate sexual assault reprisal cases, noting, “All of our investigators are trained to handle sensitive matters.”<sup>233</sup> In her testimony to the JPP in April 2015, Ms. Tolek stated that “there is no difference” between handling a sexual assault–related complaint and other reprisal complaints.<sup>234</sup> She considered reporting a sexual assault or other sexual misconduct “one of many . . . types of protected communications under th[e] [s]tatute.”<sup>235</sup>

Similarly, the Air Force IG responded:

There are no significant differences in the handling of a reprisal complaint based on the nature of the protected communication, in this case the report of a sexual assault. As long as the Investigating Officer can confirm that there was a Protected Communication made, then a reprisal investigation can be conducted. This should not require any specialized skillset.<sup>236</sup>

227 See Services’ Responses to JPP Request for Information 102 (Dec. 3, 2015).

228 Army’s Response to JPP Request for Information 102(a) (Dec. 3, 2015).

229 Headquarters of the Department of the Army / Army Office of the Judge Advocate General’s Response to JPP Request for Information 102(a) (Dec. 3, 2015).

230 Marine Corps IG’s Response to JPP Request for Information 102(a) (Dec. 3, 2015).

231 Air Force’s Response to JPP Request for Information 102(a) (Dec. 3, 2015); see also Navy’s Response to JPP Request for Information 102(a) (Dec. 3, 2015).

232 DoD IG’s Response to JPP Request for Information 102(c) (Dec. 3, 2015).

233 *Id.*

234 *Transcript of JPP Public Meeting 310* (Apr. 10, 2015) (testimony of Ms. Nilgun Tolek, Director, DoD IG Whistleblower Investigations).

235 *Transcript of JPP Public Meeting 310* (Apr. 10, 2015) (testimony of Ms. Nilgun Tolek, Director, DoD IG Whistleblower Investigations) (stating that in the past few years, DoD IG has begun to conduct the investigations for all sexual assault reprisal complaints).

236 Air Force IG’s Response to JPP Request for Information 102(c) (Dec. 3, 2015).



However, some SVCs told the JPP that they did not view the IG process, as currently set up, as effective for handling cases of professional retaliation against sexual assault victims.<sup>237</sup> Moreover, some victims told the JPP that they perceived the Service IGs as closely intertwined with the command structure rather than as independent entities.<sup>238</sup> One victim of retaliation testified that though she went to an IG three times, an investigation was initiated only after her senator also made an inquiry.<sup>239</sup> Another Air Force victim testified that the complaint of retaliation he made to his major command IG was provided to the individual he accused before it was submitted to the commander, and as a result the retaliation became worse.<sup>240</sup>

The JPP recognizes that it is important to maintain multiple avenues for reporting and investigating different types of retaliation allegations, and agrees that these should include an independent entity outside of the command structure. However, the current DoD and Service IG systems are limited by numerous problems, including extensive delays, inadequate oversight, and the IGs' lack of familiarity with cases specifically involving retaliation related to sexual assault.

Although the MWPA, as amended by the FY14 NDAA, outlines an important role for IGs in investigating sexual assault reprisal complaints, the Secretary of Defense must dedicate the resources, personnel, and training necessary to improve the deficiencies detailed in the GAO reports. The information received by the JPP indicates a lack of communication between DoD IG and the Service IGs regarding reporting requirements and investigative authority. Therefore, the JPP recommends that the Secretary of Defense establish a clear withholding policy requiring DoD IG to retain all investigative authority over sexual assault–related reprisal allegations. This would improve insight into and control over sexual assault reprisal complaints.

The JPP strongly disagrees with the view expressed by some presenters that handling sexual assault reprisal investigations is the same as handling other types of reprisal investigations. To date, the IG system has primarily addressed issues such as fraud, waste, abuse, and corruption. MCIO investigators and military prosecutors receive specialized training in trauma and counterintuitive behaviors in order to effectively interview victims and handle sexual assault cases. IG personnel who are responsible for investigating sexual assault reprisal complaints should receive similar training. Therefore, the JPP recommends that DoD IG designate investigators and supervisors within the Whistleblower Reprisal Investigation Section with specialized training in sexual assault trauma to handle sexual assault reprisal cases.

Though sexual assault reprisal investigations currently represent a small portion of the IG's workload, sexual assault reporting across the Services has increased significantly in recent years. This recent rise may presage a similar increase in the number of complaints about professional retaliation related to sexual assault. DoD must ensure that adequate resources and properly trained personnel are available to effectively and efficiently receive, process, and investigate these complaints.

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237 See, e.g., *Transcript of JPP Public Meeting 307* (June 18, 2015) (testimony of Captain Micah Smith, Special Victims' Counsel, U.S. Air Force); *id.* at 309–10 (testimony of Lieutenant Commander James Toohey, Victims' Legal Counsel, U.S. Navy).

238 See *Transcript of JPP Public Meeting 58* (May 19, 2015) (testimony of Ms. V.P.); *id.* at 59 (testimony of Ms. C.B.); see also *id.* at 63–65 (testimony of Ms. Sara Darehshori, Senior Counsel, Human Rights Watch, U.S. Program).

239 *Transcript of JPP Public Meeting 59* (May 19, 2015) (testimony of Ms. C.B.).

240 *Transcript of JPP Public Meeting 59–60* (May 19, 2015) (testimony of Master Sergeant T.S.).

### C. COMMAND INVESTIGATIONS

Allegations of social retaliation are generally investigated by the command. If an IG or MCIO receives a complaint of social retaliation, it will typically refer the complaint to the command for investigation and resolution.<sup>241</sup>

Any commander who receives a report of social retaliation can initiate an informal commander's inquiry or a more formal command investigation.<sup>242</sup> A commander can also forward the complaint to the next level in the chain of command if doing so is necessary to avoid the appearance of a lack of impartiality or objectivity.<sup>243</sup> If the command discovers that the allegations are criminal in nature, the commander can refer the matter to the MCIO; if the complaint involves professional retaliation, the commander can request that the IG conduct the investigation instead.<sup>244</sup>

The Air Force explained that in addition to ordering a command investigation,

a commander or supervisor must take appropriate action if it is reasonable to believe retaliation has occurred. At a minimum, the member suspected of engaging in retaliation will be ordered to cease from engaging in any further retaliation. . . . [T]he alleged victim . . . will be informed that the command is aware of the suspected act or acts of retaliation, and that the alleged offenders have been ordered to cease from engaging in any further retaliation. The individual retaliated against will be advised to report any further acts of retaliation.<sup>245</sup>

Each of the Services has instructions dictating specific procedures and standards for formal command investigations.<sup>246</sup> After being notified that a victim has made a complaint of retaliation, the commander may appoint an investigating officer to interview witnesses, seek other evidence, and draw conclusions and make recommendations concerning the allegations.<sup>247</sup> The investigating officer can receive advice from legal counsel assigned to assist in following the proper procedures, such as reading witnesses their rights, and in understanding the elements of UCMJ violations.<sup>248</sup>

241 See Services' Responses to JPP Requests for Information 71, 74, 75 (May 6, 2015).

242 See Services' Responses to JPP Request for Information 75(a) (May 6, 2015); see also MCM, *supra* note 10, Rule for Courts-Martial 303 (Preliminary inquiry into reported offenses).

243 Navy's Response to JPP Request for Information 74 (May 6, 2015); SECNAV INSTR. 5370.7D, *supra* note 5, at encl. 3, ¶ 6.

244 See Services' Responses to JPP Requests for Information 74, 75 (May 6, 2015).

245 Air Force Response to JPP Request for Information 69 (May 6, 2015); AF GUIDANCE MEMO TO AFI 36-2909, *supra* note 5, at ¶ 14.

246 See U.S. DEP'T OF THE ARMY, ARMY REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (Oct. 2, 2006) [hereinafter AR 15-6], available at [http://armypubs.army.mil/epubs/pdf/r15\\_6.pdf](http://armypubs.army.mil/epubs/pdf/r15_6.pdf); U.S. COAST GUARD, COMDTINST M5830.1A, ADMINISTRATIVE INVESTIGATIONS MANUAL (Sept. 2007) [hereinafter COMDTINST M5830.1A], available at <http://www.uscga-district-7.org/PDF/legal/Administrative%20Investigations%20Manual%20COMDTINST%205830.1A.pdf>; DEP'T OF THE AIR FORCE, COMMANDER-DIRECTED INVESTIGATION (CDI) GUIDE (Apr. 26, 2010) [hereinafter AF CDI GUIDE], available at <http://www.af.mil/Portals/1/documents/ig/cdi-guide.pdf>; DEP'T OF THE NAVY, JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL (June 26, 2012) [hereinafter JAGMAN], available at <http://www.jag.navy.mil/library/instructions/JAGMAN2012.pdf>.

247 Army's Response to JPP Request for Information 75(a) (May 6, 2015); Marine Corps' Response to JPP Request for Information 74 (May 6, 2015).

248 See Marine Corps' Response to JPP Request for Information 74 (May 6, 2015); see also AR 15-6, *supra* note 246, at ¶ 3.1; COMDTINST M5830.1A, *supra* note 246, at ¶ 3.A.1; AF CDI GUIDE, *supra* note 246, at ¶ 5.4; JAGMAN, *supra* note 246, at ¶ 0203.a.



The Services' instructions all establish that for command investigations, the burden of proof is a preponderance of the evidence standard.<sup>249</sup> In other words, the investigating officer's conclusions concerning the allegations must be supported by "a greater weight of evidence than supports a contrary conclusion."<sup>250</sup> The commander can adopt or reject the investigating officer's findings and recommendations in whole or in part.<sup>251</sup> The commander then determines the appropriate disposition of the allegations and briefs the individual who filed the complaint on that outcome.<sup>252</sup>

Service members who wish to challenge the findings and conclusions of a command investigation may request advice from their SVCs on which appeals process is appropriate to their particular concerns.<sup>253</sup> In addition, the Service member always has the option to raise his or her concerns about the investigation and its conclusion to a commander at a higher level in the chain of command.<sup>254</sup>

The JPP recognizes that military commanders and leaders are often best positioned to respond to certain types of retaliation complaints, particularly those involving issues of social retaliation. Many victims told the JPP that their primary desire was for the retaliatory action to be stopped, and command investigation and response can effectively and efficiently resolve issues of noncriminal or social retaliation. However, commanders and leaders must understand the challenges and sensitivities associated with investigating such allegations. Accordingly, the JPP recommends that the Services ensure that personnel assigned by commanders to investigate retaliation complaints are properly trained on sexual assault trauma and issues regarding retaliation relating to sexual assault.

#### D. INSTALLATION CASE MANAGEMENT GROUPS' MONITORING OF RETALIATION RELATED TO SEXUAL ASSAULT REPORTS

Given the overlapping roles of those involved in receiving and investigating retaliation reports, DoD requires that the Services' CMGs—which already monitor the status of sexual assault cases at monthly meetings—oversee retaliation complaints, facilitate updates on these cases, and coordinate responses to victims.<sup>255</sup> The CMGs are chaired by the installation commander or deputy installation commander

249 Services' Responses to JPP Request for Information 76 (May 6, 2015); COMDTINST M5830.1A, *supra* note 246, at ¶ 4.E.8.

250 Army's Response to JPP Request for Information 76 (May 6, 2015).

251 See AR 15-6, *supra* note 246, at ¶ 2.3; COMDTINST M5830.1A, *supra* note 246, at ¶ 1.D.10.c; AF CDI GUIDE, *supra* note 246, at ¶ 6.1.5; JAGMAN, *supra* note 246, at ¶ 0209.f.

252 See AR 15-6, *supra* note 246, at ¶ 2.3; COMDTINST M5830.1A, *supra* note 246, at ¶ 7.I.1.b; AF CDI GUIDE, *supra* note 246, at ¶¶ 6.1.10, 7.1; JAGMAN, *supra* note 246, at ¶ 0209.

253 Navy's and Marine Corps' Responses to JPP Request for Information 79(a) (May 6, 2015).

254 Coast Guard's Response to JPP Request for Information 79(a) (May 6, 2015).

255 See DoDI 6495.02 encl. 9, ¶ 2(i). The Coast Guard does not fall within the DoD requirement and uses SAPR Crisis Intervention Teams (CITs) instead of CMGs. The Coast Guard SAPR CITs are similar to civilian Sexual Assault Response Teams (SARTs) which involve the responders involved in sexual assault cases but do not have the high level command oversight of the CMGs or the requirement to review retaliation. According to the Coast Guard, "These SAPR CITs stand up within 24 hours for every unrestricted report of sexual assault and provide primary coordination for sexual assault incident response by promoting safety and communication across stakeholders. Each CIT consists of the responding SARC, the assigned Coast Guard Investigative Service (CGIS) agent, a judge advocate from the servicing legal office, a uniformed physician, as well as senior representatives from the victim and alleged offender's command(s). Anyone of these representatives who becomes aware of a retaliation complaint could make it known to the rest of the team in furtherance of the goals of the CIT." See Coast Guard's Response to JPP Request for Information 95(a) (Dec. 3, 2015); see also U.S. COAST GUARD, ALCOAST 320/14, SAPR CRISIS INTERVENTION TEAMS (SAPR CIT) (July 2014), available at [https://www.uscg.mil/announcements/ALCOAST/320-14\\_ALCOAST.txt](https://www.uscg.mil/announcements/ALCOAST/320-14_ALCOAST.txt).

and co-chaired by the installation SARC.<sup>256</sup> The other members are those involved in and working on specific sexual assault cases, including SARCs; VAs; SVCs; MCIO and DoD law enforcement representatives; victims' health care, mental health, and counseling services providers; chaplains; the command legal representatives or staff judge advocates; and victims' commanders.<sup>257</sup>

In December 2014, the Secretary of Defense announced that the CMG chairs have the additional responsibility to “regularly assess, and refer for appropriate corrective action, all reports from a victim, witness, or first responder of retaliation, ostracism, maltreatment, or reprisal in conjunction with a report of sexual assault.”<sup>258</sup> An update to DoD Instruction 6495.02 in July 2015 established that the CMG chair must ask the CMG members at each monthly meeting if the victim, victim's family members, witnesses, bystanders who intervened, SARCs, VAs, responders, or any other party to the incident have experienced any incidents of retaliation, reprisal, ostracism, or maltreatment.<sup>259</sup> Anyone with a communication privilege with the victim, such as the SARC, SVC, VA, or chaplain, must have permission from the victim to disclose the victim's retaliation concerns.<sup>260</sup>

Once a report of retaliation is raised at a CMG meeting, most of the Services require the retaliation victim's commander to provide the CMG chair a plan to address the issue.<sup>261</sup> Army policy requires the lieutenant colonel (O-5) or higher-level commander to forward to the chair of the sexual assault review board a written plan that immediately addresses the issue.<sup>262</sup> In the Air Force, when a retaliation report is made to the commander, the victim's commander must address the report in his or her plan.<sup>263</sup> The Marine Corps indicated that the final recommendations by its retaliation working group will standardize a format for the commander's plan.<sup>264</sup>

If a retaliation case is referred to the MCIO, the sexual assault case agent provides a monthly update on the retaliation investigation to the CMG.<sup>265</sup> However, IG representatives do not attend the CMG meetings, and cases reported to or investigated by the IGs are not currently briefed at the monthly CMG meetings.<sup>266</sup> The Army noted that Service regulations could be changed to require that an IG representative attend the meeting or provide the SARC with updates to the CMG.<sup>267</sup> Some of the other

256 DoDI 6495.02 encl. 9, ¶ 1(b)–(c).

257 *Id.* at encl. 9, ¶ 1(d).

258 U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (Dec. 3, 2014), *available at* [http://www.sapr.mil/public/docs/reports/FY14\\_POTUS/FY14\\_DoD\\_Report\\_to\\_POTUS\\_SecDef\\_Initiatives.pdf](http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_SecDef_Initiatives.pdf); *see also* Marine Corps' Response to JPP Request for Information 71 (May 6, 2015).

259 DoDI 6495.02 encl. 9, ¶ 2(i).

260 Services' Responses to JPP Request for Information 95(b) (Dec. 3, 2015).

261 Services' Responses to JPP Request for Information 71 (May 6, 2015); Services' Responses to JPP Request for Information 97 (Dec. 3, 2015).

262 DEP'T OF THE ARMY, ARMY DIR. 2015-16, COMMAND ENGAGEMENT TO PREVENT RETALIATION ¶ 4 (Mar. 4, 2015), *available at* [http://www.apd.army.mil/pdffiles/ad2015\\_16.pdf](http://www.apd.army.mil/pdffiles/ad2015_16.pdf); *see also* Army's Response to JPP Request for Information 97 (Dec. 3, 2015) (providing sample Army reprisal plan).

263 Air Force's Response to JPP Request for Information 71 (May 6, 2015). If the victim's commander is a subject in the retaliation report, Air Force policy requires the CMG chair to address the issue. *See* AF Memo on Updated Procedures, *supra* note 125, at ¶ 4.4.2.2.

264 Marine Corps' Response to JPP Request for Information 97 (Dec. 3, 2015).

265 Services' Responses to JPP Request for Information 95(c) (Dec. 3, 2015).

266 Services' Responses to JPP Request for Information 95(d) (Dec. 3, 2015).

267 Army's Response to JPP Request for Information 95(d) (Dec. 3, 2015).

Services observed that the independence and integrity of the IG system limit what information the IG may provide the CMG about investigations.<sup>268</sup>

DoD policy requires retaliation allegations to remain on the CMG’s agenda for status updates until the victim’s case is closed or the allegation has been appropriately addressed.<sup>269</sup> However, there is no standardized procedure for the CMG chairs or the Services to track open retaliation cases, and formal tracking is not required.<sup>270</sup> The Air Force and Marine Corps use the CMG meeting minutes to ensure that retaliation issues remain on the CMG’s agenda.<sup>271</sup> The Army assigns the installation SARC the responsibility of maintaining the CMG documentation.<sup>272</sup> The Navy did not specify how the CMG tracks retaliation cases, but noted that information is maintained by the SARC, VA, VLC, or the victim’s commanding officer.<sup>273</sup>

Presenters told the JPP that CMGs are generally an effective forum for understanding the problem of retaliation and successfully resolving retaliation allegations. In the view of the Deputy Director of AF SAPRO, the CMG ensures “review and accountability”—two key components to achieving success in addressing retaliation—and also can inform future data collection efforts.<sup>274</sup> An Air Force NCO highlighted the benefits of moving from the previous “reactive” and “passive-aggressive” approach to addressing retaliation to the CMGs’ “proactive” approach: “The new [Air Force] guidance describes procedures put in place through the [CMGs] to not just document, but to actively seek out instances of retaliation before they happen. This proactive approach . . . will prevent many instances of retaliation and the snowball effect that’s created by the supervisors and commanders when the issue of retaliation happens.”<sup>275</sup>

But the Services also highlighted certain limitations to the CMGs that result from the various privileges of the personnel involved, including the SARC, VA, and SVC.<sup>276</sup> The Navy pointed out that the CMG “is a victim-driven system in which the Chair of the CMG primarily receives retaliation related information based upon the request of the victim.”<sup>277</sup> The Army explained, however, that victims who report retaliation generally “want something done about it, and will authorize their SVC/VA to discuss the issue with the [CMG].”<sup>278</sup> SVCs and VAs can ask the client how much information they

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268 Air Force’s and Marine Corps’ Response to JPP Request for Information 95(d) (Dec. 3, 2015).

269 DoDI 6495.02 encl. 9, ¶ 2(i).

270 Army’s and Navy’s Responses to JPP Request for Information 96 (Dec. 3, 2015).

271 Air Force’s and Marine Corps’ Responses to JPP Request for Information 96 (Dec. 3, 2015). These responses did not specify who prepares the minutes or meeting agendas.

272 Army’s Response to JPP Request for Information 96 (Dec. 3, 2015).

273 Navy’s Response to JPP Request for Information 96 (Dec. 3, 2015).

274 *Transcript of JPP Public Meeting 265* (Apr. 10, 2015) (testimony of Mr. Jay Aanrud, Deputy Director, HQ, U.S. Air Force SAPR).

275 *Transcript of JPP Public Meeting 301* (May 19, 2015) (testimony of Chief Master Sergeant Craig Neri, U.S. Air Force, Command Chief, 45th Space Wing).

276 See Navy’s, DoD SAPRO’s, and Army’s Responses to JPP Request for Information 95(b) (Dec. 3, 2015).

277 See Navy’s Response to JPP Request for Information 95(b) (Dec. 3, 2015); see also DoD SAPRO’s Response to JPP Request for Information 95(b) (Dec. 3, 2015) (stating that “[u]nfortunately, the full scope of retaliation in sexual assault cases may never be known by the Chair of the CMG, as Department policy allows for victim choice in how they engage the response system”).

278 Army’s Response to JPP Request for Information 95(b) (Dec. 3, 2015).

would like shared at the CMG and “may be able to speak in hypotheticals to avoid releasing any client confidences or privileged information.”<sup>279</sup>

The JPP strongly supports the DoD initiative that requires the CMGs to review claims of retaliation related to the sexual assault cases discussed at their monthly meetings. In light of the recommendations given earlier in this report to improve processes, the Panel has three observations regarding the CMGs. First, across the Services, the details of how retaliation reports are handled and managed are not clear. Second, the absence of IGs from the CMGs may create gaps in information about professional retaliation complaints that could hamper the CMGs’ review of retaliation in sexual assault cases. Third, the CMGs’ monitoring function is limited by the willingness of victims to report retaliation.

On its face, the role of the CMG in the process seems straightforward: a report of retaliation related to a sexual assault is received through one of the various reporting channels, the commander or MCIO initiates an investigation, the CMG monitors the investigation, and the commander, with the assistance of the staff judge advocate, determines the appropriate disposition of the retaliation case. But the details regarding the roles and requirements of the CMG participants remain unclear. Specifically, some of the Services could not articulate who has responsibility for maintaining the information collected about retaliation at the CMGs and ensuring that it appears on the meeting agenda each month.

To improve the CMG’s ability to track retaliation complaints, DoD and the Services should require that SARC have the primary responsibility to maintain information about retaliation allegations discussed at the CMG meetings and ensure that the minutes properly reflect the CMG’s review. The SARC should note the status of each retaliation case after the CMG meeting. If no progress has been made and the CMG Chair fails to ensure that appropriate action is taken, the SARC can raise concerns through the SARC reporting channels at the Service or DoD level. The SARC should also have the responsibility of ensuring that the retaliation case appears on the CMG agenda for the following month.

In addition, to ensure that the CMGs can monitor cases of professional retaliation, a representative from DoD IG or the Service IG should attend the CMG or provide monthly investigation status updates to the installation-level SARC, who should be responsible for monitoring and tracking retaliation complaints. Currently, the CMGs address only social retaliation or criminal retribution. Regular participation by or status updates from the IG will improve the ability of the CMGs to monitor all forms of retaliation and will promote the timely investigation and resolution of retaliation reports.

Lastly, the JPP was encouraged by testimony from commanders and leaders indicating that the monthly CMGs provide a helpful forum for monitoring and responding to retaliation. However, some members of the CMGs are bound by client privilege, and information discussed at the CMGs may be limited by what a victim is willing to disclose. As more victims report sexual assault offenses, the JPP is hopeful that they will also perceive the CMGs as a helpful resource and permit discussion in the CMG of any retaliation they experience.

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<sup>279</sup> *Id.*



## VII. Resolving Retaliation Complaints

Resolving a complaint about retaliation requires commanders and their organizations to approach the problem from multiple directions. First, the command must work to end the retaliation and ensure that the victim's concerns are adequately addressed. Second, the command must provide the victim with an avenue for redress if he or she was subject to an improper personnel action. Third, the command must hold accountable the individual or group who engaged in retaliatory actions or behavior.

### A. RESPONDING TO THE VICTIM

#### 1. Expedited Transfers

Several victims told the JPP that their primary goal was simply to stop the retaliation they experienced after filing a report of sexual assault.<sup>280</sup> Victims of sexual assault often request expedited transfers, which allow Service members to move to another unit or a different installation.<sup>281</sup> Such transfers are sought not only to gain distance from the perpetrator but also to escape retaliation from peers or the command. According to DoD Instruction 6495.02 on Sexual Assault Prevention and Response Program Procedures, the expedited transfer policy is intended to “address situations where victims feel safe, but uncomfortable,” and “assist in the victim’s recovery by moving the victim to a new location, where no one knows of the sexual assault.”<sup>282</sup>

A SARC, VA, or commander must inform a Service member who files an unrestricted report of sexual assault of the option to request a temporary or permanent expedited transfer.<sup>283</sup> If a commander receives a request for expedited transfer and determines, after being advised by the supporting judge advocate and reviewing any available evidence, that the Service member’s report of sexual assault is credible, the commander must approve the request.<sup>284</sup> In most circumstances, the Service member is to be transferred within 30 days of the request’s approval.<sup>285</sup> A Service member whose request is disapproved can ask for a general or flag officer in the chain of command to review the decision.<sup>286</sup>

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280 See, e.g., *Transcript of JPP Public Meeting* 39 (May 19, 2015) (testimony of Master Sergeant T.S.); *id.* at 182 (testimony of Ms. A.N.); see also *id.* at 289–90 (testimony of Ms. Nancy Pike, SARC, U.S. Air Force).

281 *Transcript of JPP Public Meeting* 61 (Apr. 10, 2015) (testimony of Major General Jeffrey Snow, Director, DoD SAPRO); see also *Transcript of JPP Public Meeting* 196 (May 19, 2015) (testimony of Ms. A.H.); DoDI 6495.02, ¶ 4(o).

282 DoDI 6495.02 encl. 5, ¶ 6(a).

283 *Id.* at encl. 5, ¶ 6(b).

284 *Id.* at encl. 5, ¶ 6(b)(1).

285 *Id.* at encl. 5, ¶ 6(b)(4).

286 *Id.* at encl. 5, ¶ 6(b)(1).

Presenters testified that expedited transfers have been employed across the Services and often have proven to be an effective tool for ending retaliation.<sup>287</sup> When necessary, victims of retaliation obtained expedited transfers even after their underlying sexual assault cases were closed.<sup>288</sup>

However, some victims pointed to limitations in the expedited transfer process. Given the increase in the use of social media, a change in physical location may fail to provide victims a fresh start.<sup>289</sup> Likewise, expedited transfers may not be effective in those branches that are very small or have a close-knit community.<sup>290</sup> One victim explained that he could not use the expedited transfer process because his career field was too small and specialized; he also feared that a transfer would only exacerbate the retaliation he was experiencing.<sup>291</sup> He was eventually able to enter a new career field within his Service, but the process took more than a year.<sup>292</sup>

Presenters further commented about the need to minimize unintended consequences that may result from an expedited transfer, such as disruption to the Service member's job, family life, and social support structure.<sup>293</sup> An Army master sergeant testified that "the key is making sure there is the handoff between the losing command's unit victim advocate or command[er] to the next one."<sup>294</sup> A Navy command master chief told the JPP that he assigns a victim advocate during check-in to every Service member who transfers to ensure that he or she immediately has a support structure in place at the new command.<sup>295</sup>

The JPP recognizes the important role of the expedited transfer program in stopping retaliation. Therefore, the JPP recommends two modifications to increase the program's reach. First, the program should be expanded to include job retraining for Service members who belong to small specialty branches and thus would not benefit from a transfer to a new command or installation. Second, the program should also be made available, on a case-by-case basis, to witnesses or bystanders who intervene after a sexual assault and subsequently experience retaliation.

## 2. Improving Communication and Transparency

In addition to seeking an end to the retaliation they are experiencing, many victims indicated that they want to be kept informed about decisions that affect them, including the disciplinary actions taken against their retaliators.<sup>296</sup> While the results of courts-martial and non-judicial punishments

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287 *Transcript of JPP Public Meeting* 288 (Apr. 10, 2015) (testimony of Mr. Jay Aanrud, Deputy Director, HQ, U.S. Air Force SAPR).

288 *Transcript of JPP Public Meeting* 262, 266 (May 19, 2015) (testimony of Sergeant First Class Bridgett Joseph, SARC, U.S. Army and Ms. Nancy Pike, SARC, U.S. Air Force).

289 *See Transcript of JPP Public Meeting* 277 (June 18, 2015) (statement of JPP Member Victor Stone).

290 *See Transcript of JPP Public Meeting* 246–47 (June 28, 2015) (testimony of Captain Micah Smith, Special Victims' Counsel, U.S. Air Force).

291 *Transcript of JPP Public Meeting* 187–88 (May 19, 2015) (testimony of Staff Sergeant N.L.); *see supra* Section V.B.

292 *Transcript of JPP Public Meeting* 188–89 (May 19, 2015) (testimony of Staff Sergeant N.L.).

293 *See, e.g., Transcript of JPP Public Meeting* 333 (May 19, 2015) (testimony of Command Master Chief Kevin Goodrich, U.S. Navy); *id.* at 336 (testimony of Command Master Chief Jason D. Griffin, U.S. Coast Guard).

294 *Transcript of JPP Public Meeting* 337–38 (May 19, 2015) (testimony of Master Sergeant Michelle M. Johnson, U.S. Army).

295 *Transcript of JPP Public Meeting* 333 (May 19, 2015) (testimony of Command Master Chief Kevin Goodrich, U.S. Navy).

296 *See, e.g., Transcript of JPP Public Meeting* 45 (May 19, 2015) (testimony of Petty Officer Third Class D.M.); *id.* at 94–96



are releasable to a victim, victims do not always receive complete information about administrative disciplinary actions.<sup>297</sup>

When the command takes an adverse administrative action against an accused, that information is filed in the accused's personnel record. Commanders receive legal advice from their supporting staff judge advocate about what information is releasable to the victim under the Privacy Act.<sup>298</sup> But Privacy Act guidance is often vague, and interpretations vary widely regarding what information can be released to victims. In many circumstances, acting out of an abundance of caution, commanders do not release information to the victim about the administrative action taken against the offender.<sup>299</sup>

One victim, a former Air Force enlisted member, testified that she never could learn what administrative action was taken against her retaliator, despite the efforts of her SVC.<sup>300</sup> Her supervisors cited the Privacy Act when they declined to release the information.<sup>301</sup> The victim emphasized that transparency must be improved, so that victims can know what happens to their perpetrators.<sup>302</sup>

Improving communication and transparency can improve a victim's morale and increase trust in his or her leadership. A Navy SARC testified that command leadership should "thoroughly communicate with sexual assault victims" regarding what to expect after making a report, noting that "open communication could alleviate a lot of uncertainty and misunderstandings" associated with the command's response to a report of sexual assault or retaliation.<sup>303</sup>

The JPP recommends that DoD establish clear guidelines to specify what information can be released to a victim of retaliation. At a minimum, the victim should be notified whether his or her complaint was substantiated, was unsubstantiated, or was dismissed because the investigating authority determined that the allegations did not rise to the level that warranted an investigation. DoD policy should also clarify what information regarding the disciplinary action taken against the alleged offender is permissible under the Privacy Act to release to the victim of retaliation. DoD should address the various factors that might influence the command's decision to release disciplinary information, including the offender's right to privacy and the victim's right to information, as well the seriousness of the offense and the rank of the offender. The JPP believes that greater transparency about disciplinary actions would signal to members of the command that retaliation will not be tolerated and would increase confidence that action will be taken in response to retaliation allegations.

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(testimony of Ms. C.B.); *id.* at 156–57 (testimony of Major K.V.); *id.* at 99 (testimony of Ms. V.P.).

297 Air Force's Response to JPP Request for Information 78 (May 6, 2015).

298 *Id.*

299 *See id.*

300 *Transcript of JPP Public Meeting 94–96* (May 19, 2015) (testimony of Ms. C.B.).

301 *Transcript of JPP Public Meeting 94–96* (May 19, 2015) (testimony of Ms. C.B.).

302 *Transcript of JPP Public Meeting 94–96* (May 19, 2015) (testimony of Ms. C.B.).

303 *Transcript of JPP Public Meeting 257* (May 19, 2015) (testimony of Ms. Kim Agnew, SARC, U.S. Navy).



## B. REMEDIES FOR VICTIMS

### 1. *Flag Officer Reviews of Involuntary Separations*

Seeking to reduce the potential for improper or retaliatory involuntary discharges,<sup>304</sup> Congress directed the Secretary of Defense to develop a policy requiring a general or flag officer to review, upon request, the circumstances of any proposed involuntary separation of a Service member who made an unrestricted report of sexual assault within the preceding year.<sup>305</sup> DoD incorporated this FY13 NDAA provision into its instruction on sexual assault prevention and response procedures, but did not establish requirements to track compliance with the policy.<sup>306</sup>

Service members seeking a review of their involuntary separation must submit a written request, before the action is finalized, to the first general or flag officer in the separation authority's chain of command.<sup>307</sup> A Service member who submits a timely request will not be separated until the general or flag officer conducting the review concurs with the grounds for the involuntary separation. A Service member making a request after the final separation action is complete must apply to the appropriate Service discharge review board or BCMR for consideration.<sup>308</sup>

In April 2015, leadership from DoD SAPRO told the JPP they were not aware of any tracking or other mechanism to monitor compliance with the NDAA requirement that a general or flag officer review proposed involuntary separations of Service members who made unrestricted reports of sexual assault within the preceding year.<sup>309</sup> The JPP recommends that DoD institute such mechanisms and track the following three elements:

- (1) the number of Service members who reported a sexual assault in the previous 12 months and were involuntarily separated;

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304 In response to the JPP's May 2015 data call, the Services were unable to provide information about the total number of sexual assault victims who filed an unrestricted report and were subsequently involuntarily discharged in FY12–FY14. Most of the Services do not track these data. The Navy began tracking the involuntary separation of enlisted sexual assault victims in FY13; the Navy also began tracking the involuntary separation of officer sexual assault victims in FY14. See Services' Responses to JPP Request for Information 83 (May 6, 2015).

305 National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239 [hereinafter FY13 NDAA], § 578, 126 Stat. 1632 (2013).

306 See DoDI 6495.02, ¶ 4(p); see also *Transcript of JPP Public Meeting 76–77* (Apr. 10, 2015) (testimony of Dr. Nathan Galbreath, Senior Executive Advisor, DoD SAPRO). In a written submission to the JPP, Protect Our Defenders recommended that additional safeguards be put in place to ensure that sexual assault victims are not inappropriately subject to involuntary discharges. Specifically, POD expressed concern that when sexual assault victims are diagnosed with PTSD, they may be “wrongfully separated for another mental health condition (e.g. personality disorder, adjustment disorder) or minor misconduct stemming from PTSD.” POD suggested that when a victim has conflicting diagnoses and an involuntary administrative discharge is pending, “the victim should be allowed to go through a Medical Evaluation Board (MEB) to determine the nature of their medical conditions.” For military members facing both an administrative discharge and a medical discharge, POD recommended that the medical board review should have priority over the administrative discharge. See POD Comment, *supra* note 105.

307 DoDI 6495.02, ¶ 4(p).

308 *Id.*

309 *Transcript of JPP Public Meeting 76–77* (Apr. 10, 2015) (testimony of Dr. Nathan Galbreath, Senior Executive Advisor, DoD SAPRO).

- (2) the number of Service members who requested a review of the separation and, if such a request was made, whether a general or flag officer reviewed the circumstances of the involuntary separation; and
- (3) the results of the general or flag officer reviews, including whether separations are found to have been made with a retaliatory intent.

The JPP believes that such tracking will help ensure compliance with the NDAA requirement, which safeguards against the retaliatory involuntary separation of Service members.

## 2. *Record Corrections for Service Members*

Service members who believe that their personnel records contain “an error or injustice” may request relief from their Service’s BCMR, which is a board of equity.<sup>310</sup> Victims of sexual assault may apply to BCMRs to request relief from personnel actions resulting from social or professional retaliation.<sup>311</sup>

In considering an application for relief, the BCMR reviews documents submitted by the Service member along with personnel files, medical records, and advisory opinions from medical experts, if applicable.<sup>312</sup> It also reviews IG reports, when available.<sup>313</sup> Although the BCMR is not ordinarily an investigative body, it may receive oral argument, examine and cross-examine witnesses, take depositions, and conduct evidentiary hearings when adjudicating reprisal cases.<sup>314</sup> In addition, the BCMR may ask that the IG gather further evidence for its consideration.<sup>315</sup>

In Section 547 of the FY15 NDAA, Congress sought to enhance the process by which victims of sexual assault seek record corrections.<sup>316</sup> Section 547 requires the Service Secretaries to establish a confidential process through the BCMRs for victims of sexual assault to challenge the terms or characterization of their discharge or separation from the Service on the grounds that the characterization was adversely affected by the Service member being a victim of a sexual assault.<sup>317</sup> BCMRs must take into account the psychological and physical impact of the sexual assault, and must determine what bearing such an experience may have had on the circumstances surrounding the victim’s discharge or separation.<sup>318</sup>

In addition, under the FY16 NDAA, effective as of November 25, 2015, the Service Secretaries now have limited authority to initiate applications for correction of military records. Section 521 permits

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310 10 U.S.C. § 1552.

311 The MWPA does not provide for a civil remedy if a Service member receives an unfavorable personnel action as a reprisal for making a report of sexual assault or other protected communication. *See* 10 U.S.C. § 1034.

312 Army’s and Air Force’s Responses to JPP Request for Information 80(a) (May 6, 2015).

313 *Id.* BCMRs prioritize cases that have been substantiated by the IG. *See* Army’s and Air Force’s Responses to JPP Request for Information 80(d) (May 6, 2015).

314 10 U.S.C. § 1034(g)(2); *see also* Air Force’s Response to JPP Request for Information 80(a) (May 6, 2015).

315 10 U.S.C. § 1034(g)(2). The Air Force BCMR noted that it has requested the IG to gather further evidence three times in the past four years. *See* Air Force’s Response to JPP Request for Information 80(a) (May 6, 2015).

316 National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 [hereinafter FY15 NDAA], § 547, 128 Stat. 3292 (2014).

317 The Air Force noted that a confidential process previously existed for all applicants, so there have not been any significant changes as a result of the NDAA provision. *See* Air Force’s Response to JPP Request for Information 80(b) (May 6, 2015).

318 FY15 NDAA, *supra* note 316, at § 547; *see also* Services’ Responses to JPP Request for Information 80(b) (May 6, 2015).

the Service Secretaries to file a request for correction of a military record if the request is made on behalf of a group of Service members or former Service members who were similarly harmed by the same error or injustice.<sup>319</sup> This may prove to be a useful provision for similarly situated victims of sexual assault seeking record corrections after experiencing retaliation.

Efforts are also under way to speed up the process for record corrections. Representatives from the BCMRs described an expedited system for processing MWPA complaints. These complaints can be processed in six months, rather than the usual ten months.<sup>320</sup> The Army explained that its BCMR generally maintains a copy of the substantiated IG investigation report on hand, so that the documents will be immediately available if a Service member requests relief.<sup>321</sup>

Despite the improved procedures, BCMR representatives told the JPP that they had received very few applications for relief from victims of sexual assault.<sup>322</sup> These victims rarely frame their requests for relief in terms of retaliation.<sup>323</sup> Instead, the Air Force noted that of the victims of sexual assault who applied to the BCMRs for record corrections, most claimed to have been discharged because of their inability to cope with the rigors of the military as a result of the trauma suffered from the assault. Generally, these applicants requested that the BCMR consider a medical discharge or medical retirement in lieu of an administrative discharge.<sup>324</sup> As in other cases involving requests for retirement or discharge for physical disability, the BCMR “must determine if the evidence provided by the applicant is sufficient to conclude that the applicant should have been found unfit for continued service at the date of their separation, and, thus, entitled to disability benefits.”<sup>325</sup>

## C. HOLDING OFFENDERS ACCOUNTABLE

### 1. *Mechanisms to Punish Those Who Engage in Retaliation*

Commanders have numerous tools to take action against members of their command who engage in retaliation. Administrative actions against the accused include corrective measures such as counseling, admonitions, reprimands, or withholding of privileges.<sup>326</sup> For more serious violations, commanders may impose non-judicial punishment under Article 15 of the UCMJ. Such punishments include

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319 National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92 [hereinafter FY16 NDAA], § 521 (2015).

320 See Air Force’s Response to JPP Request for Information 80(a) (May 6, 2015); see also 10 U.S.C. § 1557.

321 See Army’s Response to JPP Request for Information 80(d) (May 6, 2015).

322 See generally *Transcript of JPP Public Meeting* 353–54 (Apr. 10, 2015) (testimony of Mr. John K. Vallario, Deputy Executive Director, Air Force BCMR; testimony of Mr. Douglas Huff, Legal Advisor, Army Review Boards Agency; testimony of Mr. Jon Ruskin, Board for Correction of Naval Records Counsel; and testimony of Ms. Julia Andrews, Chair, Coast Guard BCMR).

323 As of May 2015, the Air Force reported that the Air Force BCMR had not received any applications from a Service member claiming that the personnel action received was a reprisal for reporting a sexual assault. See Air Force’s Response to JPP Request for Information 81(c) (May 6, 2015). Similarly, the Coast Guard reported that the Coast Guard BCMR had not received a sexual assault whistleblower case in several years. See Coast Guard’s Response to JPP Request for Information 81(a) (May 6, 2015).

324 Air Force’s Response to JPP Request for Information 80(c) (May 6, 2015).

325 *Id.*

326 See MCM, *supra* note 10, Rule for Courts-Martial 306(c)(2).

reduction in pay grade, confinement, forfeiture of pay, restrictions to certain specified areas and limits, and suspension from duty.<sup>327</sup> Commanders may also prefer charges for prosecution under the UCMJ.

## 2. *Lack of Data on Punishing Retaliation*

The extent to which commanders employ their numerous tools to discipline Service members who engage in retaliation is unknown. Historically, the Services have not tracked information on the disposition of retaliation offenses, and none of the Services could tell the JPP the number of their members who received an adverse action relating to their retaliatory misconduct.<sup>328</sup>

Anecdotal evidence suggests that Service members accused of retaliation often go unpunished. Some victims told the JPP that their retaliators were not held accountable for their actions.<sup>329</sup> A Human Rights Watch researcher added that “the lack of accountability for retaliation was definitely something that we heard time and time again from survivors, even if their cases were substantiated and [they] experienced severe retaliation[.]”<sup>330</sup>

## 3. *Retaliation as an Article 92 Violation*

The FY14 NDAA required the Secretary of Defense to prescribe regulations prohibiting retaliation against an alleged victim or other member of the Armed Forces who reports a criminal offense.<sup>331</sup> As discussed previously, all the Services recently prescribed regulations that prohibit ostracism, maltreatment, and professional retaliation.<sup>332</sup> If a Service member engages in conduct that violates one of these regulations, he or she may be prosecuted under Article 92 of the UCMJ for failure to obey an order or regulation.<sup>333</sup>

As the regulations are currently drafted, the Services include narrow intent requirements in their definitions of ostracism and maltreatment. Most of the Services define ostracism as “the exclusion, from social acceptance, privilege or friendship *with the intent to discourage reporting of a criminal offense or otherwise discourage the due administration of justice.*”<sup>334</sup> Maltreatment as a form of retaliation is defined by most of the Services as

treatment by peers or other persons that, when viewed objectively under all the circumstances, is abusive or otherwise unnecessary for any lawful purpose, *that is done with the intent to discourage reporting of a criminal offense or otherwise discourage the*

327 See 10 U.S.C. § 815 (UCMJ art. 15).

328 Services’ Responses to JPP Request for Information 82 (May 6, 2015).

329 See, e.g., *Transcript of JPP Public Meeting 229* (May 19, 2015) (testimony of Lance Corporal J.J.).

330 See *Transcript of JPP Public Meeting 18* (May 19, 2015) (testimony Ms. Sara Darehshori, Senior Counsel, Human Rights Watch, U.S. Program); see also HRW EMBATTLED, *supra* note 37, at 100–05 (May 2015).

331 FY14 NDAA, *supra* note 3, at § 1709.

332 See *supra* Section II.D and Appendix A.

333 See 10 U.S.C. § 892 (UCMJ art. 92).

334 AF GUIDANCE MEMO TO AFI 36-2909, *supra* note 5, at ¶ 11.2 (emphasis added); see also SECNAV INSTR. 5370.7D, *supra* note 5, at encl. 1, ¶ 15(a)(2); ALCOAST 208/14, *supra* note 5, at ¶ 3(b). The Army’s definition of ostracism differs from the other Services’ definitions of ostracism. See ARMY DIR. 2014-20, *supra* note 5, at ¶ 4(a)(2).

*due administration of justice*, and that results in physical or mental harm or suffering, or reasonably could have caused, physical or mental harm or suffering.<sup>335</sup>

A 2014 report prepared by DoD noted that the Services included the intent requirement in the definitions of ostracism so that the regulations can survive constitutional scrutiny (as not violating the First Amendment’s right to freedom of association).<sup>336</sup> However, the report did not comment on the parallel intent requirement in the definitions of maltreatment, and no such element appears in Article 93 of the UCMJ, which prohibits maltreatment of a person who was subject to the orders of the accused.<sup>337</sup> Under the Service regulations, ostracism and maltreatment cover only a subset of retaliatory behaviors about which the JPP heard testimony<sup>338</sup>—for example, the regulations would not address retaliatory acts when there is not sufficient proof of the retaliator’s intent.

The JPP recognizes the First Amendment concerns raised by punishing ostracism and agrees that the narrow intent element is necessary for the restriction on ostracism to survive constitutional scrutiny. However, the JPP believes that portions of the Service regulations on maltreatment, including the narrow intent element, are problematic.

The Services’ current definitions of maltreatment include elements that are not required under other provisions prohibiting similar misconduct, such as Article 93, UCMJ—which criminalizes maltreatment of a person who is subject to the orders of the accused—and the Service regulations prohibiting hazing. Specifically, the maltreatment definitions include (1) a narrow intent element requiring that the act was committed “to discourage reporting of a criminal offense or otherwise discourage the due administration of justice,” (2) unspecific language requiring that the behavior was abusive “or otherwise unnecessary for any lawful purpose,” and (3) a requirement that the retaliatory act resulted “in physical or mental harm or suffering, or reasonably could have caused, physical or mental harm or suffering.”<sup>339</sup>

The JPP recommends that the Services revise their definitions of maltreatment. The following definition would address the JPP’s concerns:

Maltreatment, which is a form of retaliation, is treatment by peers or by other persons that, when viewed objectively under all the circumstances, is abusive, cruel, humiliating, oppressive,

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335 AF GUIDANCE MEMO TO AFI 36-2909, *supra* note 5, at ¶ 11.3 (emphasis added); *see also* SECNAV INSTR. 5370.7D, *supra* note 5, at encl. 1, ¶ 15(a)(3); ALCOAST 208/14, *supra* note 5, at ¶ 3(c). The Army’s definition of maltreatment differs from the other Services’ definitions of maltreatment. *See* ARMY DIR. 2014-20, *supra* note 5, at ¶ 4(a)(3).

336 U.S. DEP’T OF DEF., REPORT ON PROHIBITING RETALIATION AGAINST AN ALLEGED VICTIM OR OTHER MEMBER OF THE ARMED FORCES WHO REPORTS A CRIMINAL OFFENSE [hereinafter DoD REPORT ON PROHIBITING RETALIATION] at 8 (June 2014), available at [http://jpp.whs.mil/Public/docs/03\\_Topic-Areas/06-Retaliation/20150410/02\\_DoDReport\\_Response\\_FY14Section1709\\_201406.pdf](http://jpp.whs.mil/Public/docs/03_Topic-Areas/06-Retaliation/20150410/02_DoDReport_Response_FY14Section1709_201406.pdf).

337 *See id.*; *see also* 10 U.S.C. § 893 (UCMJ art. 93). Article 93 states: “Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.” The elements under Article 93 are (1) that a certain person was subject to the orders of the accused and (2) that the accused was cruel toward, or oppressed, or maltreated that person. The explanation under Article 93 states, in part: “‘Any person subject to his orders’ means not only those persons under the direct or immediate command of the accused but extends to all persons, subject to the code or not, who by reason of some duty are required to obey the lawful orders of the accused, regardless whether the accused is in the direct chain of command over the person.”

338 *See Transcript of JPP Public Meeting* 93 (May 19, 2015) (testimony of Ms. Sara Darehshori, Senior Counsel, Human Rights Watch, U.S. Program).

339 AF GUIDANCE MEMO TO AFI 36-2909, *supra* note 5, at ¶ 11.3; *see also* SECNAV INSTR. 5370.7D, *supra* note 5, at encl. 1, ¶ 15(a)(3); ALCOAST 208/14, *supra* note 5, at ¶ 3(c); *see also* Appendix A.

demeaning, or harmful to an individual and is done to discourage the individual from reporting a criminal offense or because the individual reported a criminal offense. Maltreatment under this instruction does not require that the individual was subject to the orders of the accused as is required for maltreatment under Article 93, UCMJ.

The JPP believes that the behaviors that should be prohibited as maltreatment should be similar to those prohibited under the Service regulations on hazing: behaviors that are cruel, abusive, humiliating, oppressive, demeaning, or harmful. The JPP also believes that the latter portion of the intent element in the existing regulations—the “intent to . . . discourage the due administration of justice”—can be broadened to state “because the Service member reported a criminal offense.” This proposed definition of maltreatment would appropriately cover a broader range of abusive, retaliatory acts that may occur both before and after a report of sexual assault is made.

#### 4. *A Separate Punitive Article Prohibiting Retaliation*

The 2012 version of the UCMJ does not include a distinct article that specifically prohibits retaliation against a Service member who reports a criminal offense. The FY14 NDAA required the Secretary of Defense to prepare a report on whether the UCMJ should be amended to add a new punitive article prohibiting retaliation.<sup>340</sup> In its June 2014 report, DoD recommended against doing so.<sup>341</sup> Noting the potential First Amendment problems with criminalizing retaliation—particularly ostracism—the report commented that should a court find the anti-retaliation language unconstitutional, an enforceable retaliation offense could be more quickly restored in regulations changed by the Services than in a statute amended by Congress.<sup>342</sup>

The report also explained that some forms of retaliation may be criminally punished under Article 93 of the UCMJ, which prohibits cruelty to or maltreatment of a person who was subject to the orders of the accused; Article 133, which prohibits conduct unbecoming an officer and a gentleman; and Article 134, which prohibits conduct that is prejudicial to good order and discipline or of a nature to bring discredit to the Armed Forces.<sup>343</sup> Retaliation that rises to the level of a separate criminal offense, such as stalking, threatening a victim, or assaulting a victim, may be prosecuted under the appropriate punitive article.<sup>344</sup>

On December 28, 2015, DoD published a report by the Military Justice Review Group (MJRG) recommending legislative changes to the UCMJ: among its proposals is to add professional retaliation as a new enumerated offense. The new article would punish as a court-martial may direct any Service member “who, with the intent to retaliate against any person for reporting or planning to report a criminal offense, or with the intent to discourage any person from reporting a criminal offense—(1) wrongfully takes or threatens to take an adverse personnel action against any person; or (2) wrongfully withholds or threatens to withhold a favorable personnel action with respect to any person.”<sup>345</sup> The

340 FY14 NDAA, *supra* note 3, at § 1709(c).

341 DoD REPORT ON PROHIBITING RETALIATION, *supra* note 336, at 1, 7–8.

342 *Id.*

343 10 U.S.C. §§ 892, 893, 933, 934 (UCMJ art. 92, 93, 133, 134); *see also* DoD REPORT ON PROHIBITING RETALIATION, *supra* note 336, at 6–7.

344 *See, e.g.*, 10 U.S.C. § 920a (UCMJ art. 120a) (Stalking); 10 U.S.C. § 928 (UCMJ art. 128) (Assault); MCM, *supra* note 10, pt. IV, ¶ 110 (Threat, communicating).

345 MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS 981 (Dec. 22, 2015), *available at* <http://www.dod.gov/dodgc/mjrg.html>.

MJRG believes that “[t]his new offense would provide added protection for witnesses, victims, and persons who report or plan to report a criminal offense to law enforcement or military authority.”<sup>346</sup>

According to the MJRG’s analysis, this proposed new offense would not preempt Service regulations that specify additional types of retaliatory conduct that may be punishable under Article 92 (Failure to obey order or regulation), nor would it preempt other forms of retaliatory conduct from being prosecuted under Articles 93 (Cruelty and maltreatment), 109 (Destruction of property), 128 (Assault), 131b (Obstructing justice), 130 (Stalking), or 134 (General article).<sup>347</sup>

Due to the timing of the MJRG report, the JPP was unable to fully analyze the MJRG’s recommendation to add professional retaliation to the UCMJ as an enumerated offense.

The JPP believes that commanders currently have adequate tools at their disposal to punish members of their command who engage in social retaliation. Social retaliation can be punished as a violation of Article 92 of the UCMJ, as well as a violation of other enumerated articles that may address any underlying misconduct that is part of the retaliatory actions. Therefore, the JPP recommends that Congress not add a separate offense to the UCMJ to prohibit social retaliation.

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<sup>346</sup> *Id.*

<sup>347</sup> *Id.*



## VIII. Preventing Future Retaliation

In addition to seeking to effectively resolve retaliation complaints, the Services rely mainly on Service-wide and localized training to prevent retaliation. Many presenters to the JPP testified that training Service members at all levels of the command is the key to preventing retaliation.<sup>348</sup>

### A. DOD AND THE SERVICES' INITIATIVES FOCUSED ON TRAINING

Retaliation training is not uniform across the Services: each has developed different methods and designated different organizations as responsible.<sup>349</sup> Nevertheless, presenters to the JPP were generally unified in emphasizing the importance of developing targeted training for direct or first-line supervisors. In December 2014, DoD directed the Chiefs of the Military Services to augment training for first-line supervisors on sexual assault prevention and response, including training on how to recognize the signs of retaliation.<sup>350</sup>

Together with periodic training on retaliation, many of the Services use less formal communications strategies to educate Service members about retaliation.<sup>351</sup> These strategies range from small group discussions and face-to-face engagements about retaliation to broad social media outreach and media campaigns.<sup>352</sup>

#### 1. U.S. Army

In the Army, the Sexual Harassment/Assault Response and Prevention (SHARP) Directorate, SHARP Academy, Training and Doctrine Command, Inspector General, and the Judge Advocate General's Legal Center and School all share responsibility for training Service members about retaliation.<sup>353</sup> All soldiers are required to receive annual SHARP operational training, which includes material on retaliation and takes place both online and in a classroom.<sup>354</sup> SHARP certification courses are also used to train SARCs and VAs on how to report and respond to retaliation allegations.<sup>355</sup>

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348 See, e.g., *Transcript of JPP Public Meeting 379* (May 19, 2015) (testimony of Colonel Brian Foley, Garrison Commander, U.S. Army); *id.* at 328 (Command Master Chief Kevin Goodrich, U.S. Navy).

349 Services' Responses to JPP Request for Information 67 (May 6, 2015).

350 U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (Dec. 3, 2014), available at [http://www.sapr.mil/public/docs/reports/FY14\\_POTUS/FY14\\_DoD\\_Report\\_to\\_POTUS\\_SecDef\\_Initiatives.pdf](http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_SecDef_Initiatives.pdf).

351 *Transcript of JPP Public Meeting 247* (Apr. 10, 2015) (testimony of Colonel Scott S. Jensen, Branch Head, USMC, HQ, Marine Corps SAPR); *id.* at 256 (testimony of Rear Admiral Richard P. Snyder, U.S. Navy, Director, Twenty-First Century Sailor Office); see also Services' Responses to JPP Request for Information 67 (May 6, 2015).

352 *Transcript of JPP Public Meeting 247* (Apr. 10, 2015) (testimony of Colonel Scott S. Jensen, Branch Head, USMC, HQ, Marine Corps SAPR); *id.* at 256 (testimony of Rear Admiral Richard P. Snyder, U.S. Navy, Director, Twenty-First Century Sailor Office).

353 Army's Response to JPP Request for Information 67 (May 6, 2015).

354 U.S. Dep't of Army, Sexual Harassment/Assault Response & Prevention, "Prevention & Training," available at [http://www.sexualassault.army.mil/Template-preventionAndTran.cfm?page=prevention\\_overview.cfm](http://www.sexualassault.army.mil/Template-preventionAndTran.cfm?page=prevention_overview.cfm).

355 Army's Response to JPP Request for Information 67 (May 6, 2015).



The Army has also launched the “Not in My Squad” campaign, an initiative specifically geared toward junior noncommissioned officers.<sup>356</sup> This campaign was developed to address the critical role of first-line leaders in promoting “a climate of dignity and respect founded on good order and discipline.”<sup>357</sup>

In addition, the Army produces videos containing testimonials from sexual assault victims who had experienced social retaliation. These videos are used to facilitate small group discussions about retaliation and the harm it causes.<sup>358</sup>

## 2. U.S. Air Force

AF SAPRO is the lead organization within the Air Force in training leaders and Service members about retaliation against victims of sexual assault. AF SAPRO incorporates information about retaliation in the annual SAPR training provided to all airmen. Topics addressed by the training include how to provide support to victims of sexual assault and how to report retaliation allegations. Furthermore, AF SAPRO educates leaders on the neurobiology of trauma and trains commanders to proactively address retaliation.<sup>359</sup> The Air Force has also developed training on retaliation for first-line supervisors and senior enlisted leaders.<sup>360</sup>

In addition to annual SAPR training, all airmen participate in SAPR small group discussions throughout the year, including a mandatory session that focuses on empathy and how to appropriately respond to a victim of sexual assault.<sup>361</sup>

## 3. U.S. Navy

The Navy has incorporated retaliation training into a holistic training program overseen by the Twenty-First Century Sailor Office.<sup>362</sup> This office was established in 2013 to streamline initiatives aimed at maximizing sailor and Marine readiness and resiliency.<sup>363</sup> Among its many responsibilities—which include promoting awareness about drug and alcohol abuse, preventing hazing, and responding to sexual harassment—the Twenty-First Century Sailor Office ensures that appropriate training is provided to leaders and Service members about retaliation against victims of sexual assault.<sup>364</sup> The Navy’s SAPR Office and Naval Justice School also provide training on retaliation.<sup>365</sup>

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356 *Transcript of JPP Public Meeting 240–41* (Apr. 10, 2015) (testimony of Ms. Monique Ferrell, U.S. Army, Director, SHARP).

357 *Transcript of JPP Public Meeting 240* (Apr. 10, 2015) (testimony of Ms. Monique Ferrell, U.S. Army, Director, SHARP).

358 Army’s Response to JPP Request for Information 67 (May 6, 2015).

359 Air Force’s Response to JPP Request for Information 67 (May 6, 2015).

360 *Id.*

361 *Id.*

362 Navy’s Response to JPP Request for Information 67 (May 6, 2015).

363 U.S. DEP’T OF THE NAVY, SECNAV INSTR. 5300.40, DEPARTMENT OF THE NAVY 21ST CENTURY SAILOR AND MARINE INITIATIVE (June 27, 2013), *available at* <http://www.21stcentury.navy.mil/Documents/SECNAVINST%205300.40.pdf>.

364 Navy’s Response to JPP Request for Information 67 (May 6, 2015).

365 *Id.*

In addition, the Navy is enhancing first-line supervisor training on how to recognize, respond to, and prevent retaliation.<sup>366</sup> The Navy is developing new training courses on sexual assault response and prevention for senior enlisted leaders. These courses will include sections that discuss retaliation, reprisal, ostracism, and maltreatment and the appropriate response by peers to a victim and an alleged offender when a sexual assault is reported.<sup>367</sup>

Like the Army, the Navy also produces short videos on various topics relating to sexual assault response and prevention. Some of these videos address the need to prevent gossip and rumors and ensure that victims receive appropriate care. The videos include testimonials from victims of social retaliation.<sup>368</sup>

#### 4. *U.S. Marine Corps*

In the Marine Corps, the Inspector General has the primary responsibility for reprisal training, and the Marine Corps SAPR Program provides additional training on retaliation. Marines are required every two years to complete online training on whistleblower protections. The Marine Corps also incorporates retaliation as part of its annual equal opportunity training, which includes an explanation of how to make a complaint.<sup>369</sup>

The Marine Corps also emphasizes the importance of training first-line supervisors in preventing and responding to retaliation. A branch head for the Marine Corps SAPR Headquarters commented that “our small unit leaders are ultimately the center of gravity.”<sup>370</sup>

Like the other Services, the Marine Corps uses social media and other far-reaching campaigns to disseminate training and education material to as wide an audience as possible.<sup>371</sup> Illustrating this point, the Branch Head for the Marine Corps SAPR Headquarters noted that a single social media announcement about retaliation posted by the Marine Corps was able to reach more than 400,000 people.<sup>372</sup>

#### 5. *U.S. Coast Guard*

In the Coast Guard, the SAPR Program is responsible for developing training materials for mandatory annual training and special event training, such as Sexual Assault Awareness Month. Retaliation is one

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366 *Transcript of JPP Public Meeting 256* (Apr. 10, 2015) (testimony of Rear Admiral Richard P. Snyder, U.S. Navy, Director, Twenty-First Century Sailor Office).

367 Navy’s Response to JPP Request for Information 67 (May 6, 2015).

368 *Id.*

369 Marine Corps’ Response to JPP Request for Information 67 (May 6, 2015).

370 *Transcript of JPP Public Meeting 245* (Apr. 10, 2015) (testimony of Colonel Scott S. Jensen, Branch Head, USMC, HQ, Marine Corps SAPR).

371 *Transcript of JPP Public Meeting 247* (Apr. 10, 2015) (testimony of Colonel Scott S. Jensen, Branch Head, USMC, HQ, Marine Corps SAPR).

372 *Transcript of JPP Public Meeting 247* (Apr. 10, 2015) (testimony of Colonel Scott S. Jensen, Branch Head, USMC, HQ, Marine Corps SAPR).

of the topics covered.<sup>373</sup> SARCs receive training on retaliation during their initial training, as well as during their ongoing advanced training.<sup>374</sup>

## B. TRAINING SATURATION

While acknowledging the importance of the Services' training efforts, some presenters expressed concern about the harm that ineffective and overly repetitive sexual assault training might do. A Navy command master chief warned the JPP of "unintended consequences of training saturation and duplication," which include skepticism about the relevance of the material and low unit morale.<sup>375</sup> He observed that "sometimes the aggravation with the training is actually transferred" and "can result in a little bit of retaliation as well."<sup>376</sup> A Coast Guard command master chief was similarly worried about training saturation, particularly online trainings that do not resonate with Service members and require only that they blindly "click through the buttons."<sup>377</sup>

The JPP recognizes the importance of regular training and education in addressing the root causes of retaliation and preventing its future occurrence. To reduce the number of Service members who ignore or disregard training, the JPP recommends that the Services continue to develop innovative approaches to conveying information on retaliation, such as the video testimonials from victims who can describe its effects firsthand.

The JPP further recommends that the Services develop targeted training that can be ordered by a commander or other supervisor who needs to address problems of retaliation within the command. Such targeted training should be used to foster a command climate in which Service members understand the harm done by retaliation to victims, to unit morale and cohesion, and to mission readiness. The JPP also recommends that the Services develop commander training that educates leaders about the full range of options available for addressing retaliation, particularly when retaliatory acts are not prosecutable under the UCMJ.

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373 Coast Guard's Response to JPP Request for Information 67 (May 6, 2015).

374 *Id.*

375 *Transcript of JPP Public Meeting* 305 (May 19, 2015) (testimony of Command Master Chief Kevin Goodrich, U.S. Navy).

376 *Transcript of JPP Public Meeting* 305 (May 19, 2015) (testimony of Command Master Chief Kevin Goodrich, U.S. Navy).

377 *Transcript of JPP Public Meeting* 309 (May 19, 2015) (testimony of Command Master Chief Jason D. Griffin, U.S. Coast Guard).

# IX.

## Proposed and Pending Legislation Addressing Retaliation

Congress has recently considered several bills on the issue of sexual assault in the military, two of which address retaliation.

### A. S. 1130, THE LEGAL JUSTICE FOR SERVICEMEMBERS ACT

Senators Barbara Boxer, Ron Wyden, and Edward J. Markey and Congresswoman Jackie Speier introduced the Legal Justice for Service Members Act in Congress on April 29, 2015.<sup>378</sup> In the accompanying press release, the sponsors noted that “[a]lthough the [MWPA] has been updated periodically over the years, changes have not kept pace with protections afforded to civilian whistleblowers.”<sup>379</sup> Accordingly, certain provisions of the bill seek to align the rights of military whistleblowers, including sexual assault victims, with the rights of their civilian counterparts. The JPP focused on one key provision of the bill.<sup>380</sup>

The bill proposes modifying the burden of proof in military whistleblower cases to mirror the burden of proof in civilian whistleblower cases.<sup>381</sup> Currently, under DoD IG’s guidance for military whistleblower cases, all four elements—a protected communication; knowledge of the protected communication on the part of the responsible management official; a personnel action taken, threatened, or withheld; and a causal connection between the protected communication and the personnel action—must be established by a preponderance of the evidence.<sup>382</sup> Thus, in keeping with the fourth element, if the evidence establishes that a negative personnel action would have been taken, threatened, or withheld even absent the protected communication, the IG will not substantiate the case.<sup>383</sup>

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378 Press Release from Sen. Barbara Boxer, “Boxer, Wyden, Markey, Speier Introduce Legislation to Strengthen Protections for Military Whistleblowers” (Apr. 29, 2015) [hereinafter Military Whistleblower Press Release], *available at* <http://www.boxer.senate.gov/press/release/boxer-wyden-markey-speier-introduce-legislation-to-strengthen-protections-for-military-whistleblowers/>; *see also* S. 1130, 114th Cong., Legal Justice for Servicemembers Act of 2015 (2015). Senator Boxer authored the original MWPA in 1988.

379 Military Whistleblower Press Release, *supra* note 378.

380 In addition to the provision considered by the JPP, the bill would also: (1) grant the investigating IG the authority to temporarily suspend adverse personnel actions against a whistleblower while the investigation is under way if the IG determines that the personnel action would result in immediate hardship to the Service member; (2) allow Service members to decline investigation of their retaliation claim by a Service IG in favor of a higher-level review by DoD IG; (3) require DoD IG to develop standardized training and investigation procedures for the Service IGs; (4) require the investigating IG to provide disciplinary recommendations in its report to a BCMR; (5) direct the BCMRs to conduct evidentiary hearings on significant cases presenting factual discrepancies that cannot be resolved without witness testimony; (6) instruct BCMRs to obtain relevant medical or personnel records if Service members make reasonable efforts but are still unable to obtain the records; (7) require that, to the extent practicable, administrative judges serve as presiding officers of the BCMRs; and (8) establish BCMR board membership as a full-time position with a five-year term limit. *See* Military Whistleblower Press Release, *supra* note 378; *see also* S. 1130, 114th Cong., Legal Justice for Servicemembers Act of 2015 (2015).

381 Military Whistleblower Press Release, *supra* note 378; *see also* S. 1130, 114th Cong., Legal Justice for Servicemembers Act of 2015 (2015).

382 DoD IG GUIDE, *supra* note 224, at 1-1, 1-6.

383 *Id.* at 1-1, 1-6.

Under the Whistleblower Protection Act (WPA), which covers civilian employees of DoD, the complainant must prove by a preponderance of the evidence that the disclosure was a “contributing factor” in the adverse personnel action.<sup>384</sup> The burden then shifts to the agency to demonstrate by clear and convincing evidence that it would have taken the same personnel action absent the disclosure.<sup>385</sup> This is a different standard from that used in military whistleblower cases.

Protect Our Defenders and Human Rights Watch both support revisions to the MWPA that are similar to this provision in the Legal Justice for Servicemembers Act.<sup>386</sup> In a statement submitted to the JPP, POD recommended that the MWPA be strengthened, particularly by aligning the burden of proof to be consistent with federal civilian practices.<sup>387</sup>

The JPP considered the burdens of proof proposed by the Legal Justice for Service Members Act. The JPP recommends that the Secretary of Defense revise the policies in the DoD IG investigator guide for Service members filing complaints under the MWPA so that the elements and burdens of proof are aligned with those in the Whistleblower Protection Act for DoD civilians. Under a revised standard, if a military whistleblower shows by a preponderance of evidence that the disclosure is a “contributing factor” in an adverse personnel action, the burden of proof would shift to the responsible management official to demonstrate by clear and convincing evidence that he or she would have taken the same personnel action absent the disclosure.

Since the MWPA does not address the burdens of proof for military whistleblowers, legislative action would not be required to change DoD policy regarding the elements and burdens of proof for military whistleblowers. Instead, the Secretary can ensure that the same standard applies for both Service members and civilians within DoD.

## B. SECTION 539 OF THE FY 2016 NATIONAL DEFENSE AUTHORIZATION ACT (REQUIREMENT FOR A RETALIATION PREVENTION STRATEGY)

Under Section 539 of the FY16 NDAA, effective as of November 25, 2015, the Secretary of Defense is required to establish a comprehensive strategy to prevent retaliation against Service members who report sexual assault or intervene on behalf of victims of sexual assault.<sup>388</sup> The retaliation strategy is expected to be released in the second quarter of fiscal year 2016.<sup>389</sup>

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384 5 U.S.C. § 1221(e); *see also* 5 C.F.R. § 1209.7.

385 5 U.S.C. § 1221(e).

386 HRW EMBATTLED, *supra* note 37, at 96; POD Comment, *supra* note 105.

387 POD Comment, *supra* note 105.

388 FY16 NDAA, *supra* note 319, at § 539. In May 2015, the Secretary of Defense directed the Acting Under Secretary of Defense for Personnel and Readiness, in collaboration with the Secretaries of the Military Departments and the Department of Defense Inspector General, to establish a comprehensive strategy to prevent retaliation against Service members who report or intervene on behalf of the victim in instances of sexual assault and other crimes. The plans for the strategy were to be reported to the Secretary of Defense by September 1, 2015. As of the date of this report, no information has been made publicly available regarding the retaliation strategy required under the Secretary of Defense’s directive. *See* U.S. Dep’t of Def., Memorandum from the Secretary of Defense on Initiatives to Address Sexual Assault Prevention and Response and Retaliation Associated with Reporting Crime (May 1, 2015), *available at* [http://sapr.mil/public/docs/reports/FY14\\_Annual/FY14\\_Annual\\_Report\\_SecDef\\_Memo\\_Initiatives.pdf](http://sapr.mil/public/docs/reports/FY14_Annual/FY14_Annual_Report_SecDef_Memo_Initiatives.pdf).

389 U.S. DEP’T OF DEF., SAPRO, DACOWITS DoD SAPRO RETALIATION OVERVIEW 11 (Dec. 9, 2015), *available at* <http://dacowits.defense.gov/Portals/48/Documents/Reports/2015/Documents/DoD%20SAPRO%20Retaliation%20Overview.pdf>.

As required by the NDAA, the retaliation strategy must include, at a minimum, three elements: first, bystander intervention programs emphasizing the importance of guarding against retaliation; second, DoD and Service policies and requirements to ensure protection from retaliation for victims of sexual assault and for Service members who intervene on their behalf; and third, additional training for commanders on methods and procedures to combat attitudes and beliefs that result in retaliation.<sup>390</sup>

In addition to the NDAA requirements, the JPP recommends that DoD establish enhanced policies for reporting, monitoring, and tracking retaliation in its strategy addressing retaliation against sexual assault victims. The strategy should specify (1) processes for reporting and investigating retaliation, (2) responsibility for the collection and monitoring of reports, and (3) mechanisms for tracking retaliation complaints and outcomes. The JPP believes that such policies will improve the processes for responding to and addressing retaliation.

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<sup>390</sup> FY16 NDAA, *supra* note 319, at § 539.



# APPENDIX A: Service Regulations on Retaliation

	Army	Air Force	Navy / Marine Corps	Coast Guard
Service Regulations Prohibiting Retaliation	<p>Army Directive 2014-20</p> <p><u>Prohibition of Retaliation Against Soldiers for Reporting a Criminal Offense</u> (19 June 2014)</p> <p>2. No Soldier may retaliate against a victim, an alleged victim or another member of the Armed Forces based on that individual's report of a criminal offense.</p> <p>3. This directive implements [Section 1709 of the FY14 NDAA] effective immediately. The provisions of this directive are punitive, and violations may be punished under Article 92, Uniform Code of Military Justice (UCMJ).</p>	<p>AFI 36-2909_ AFGM2014-01</p> <p><u>Air Force Guidance Memorandum to AFI 36-2909, Professional and Unprofessional Relationships</u> (19 June 2015)</p> <p>Preamble. Military members, including Reserve members on active duty or inactive duty for training and ANG members in Federal service, who violate the specific prohibitions contained in paragraph 11 of this instruction can be prosecuted under either Article 92 or Article 134 of the Uniform code of Military Justice (UCMJ), or both, as well as any other applicable Article of the UCMJ, as appropriate.</p> <p>11. Prohibition on Retaliation. Military members shall not retaliate against an alleged victim or other military member who reports a criminal offense.</p>	<p>ALNAV 030/14</p> <p><u>Retaliation Against Members of the Armed Forces Reporting a Criminal Offense</u> (April 2014)</p> <p>RMKS/1.</p> <p>Retaliation against alleged victims or other members of the Armed Forces who report a criminal offense is prohibited. This prohibition constitutes a lawful general order, is punitive, and is applicable to all Department of the Navy (DON) personnel without further implementation. A violation by a person subject to the Uniform Code of Military Justice (UCMJ) (Chapter 47 of Title 10, United States Code) is punishable as a violation of Article 92 of the UCMJ. A violation by civilian personnel may be punishable under regulations governing disciplinary actions.</p>	<p>ALCOAST 208/14</p> <p><u>Military Whistleblower Protection</u> (May 2014)</p> <p>2. In accordance with [Section 1709 of the FY14 NDAA], Coast Guard personnel shall not retaliate against an alleged victim or other member of the Armed Forces who reports a criminal offense. This prohibition constitutes a lawful general order, is punitive, and is applicable to all Coast Guard personnel without further implementation. A violation by a person subject to the Uniform Code of Military Justice (UCMJ) is punishable as a violation of Article 92, UCMJ.</p>



	Army	Air Force
<p><b>Definitions of Retaliation</b></p>	<p><b>Army Directive 2014-20</b>  <u>Prohibition of Retaliation Against Soldiers for Reporting a Criminal Offense</u>                      4a. Subject to more specific guidance from the Department of Defense, for the purposes of this directive, “retaliation” is defined as:                      (1) taking or threatening to take an adverse or unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, with respect to a victim or other member of the Armed Forces because the individual reported a criminal offense or was believed to have reported a criminal offense; or                      (2) ostracism, which is defined as excluding from social acceptance, privilege or friendship a victim or other member of the Armed Forces because: (a) the individual reported a criminal offense; (b) the individual was believed to have reported a criminal offense; or (c) the ostracism was motivated by the intent to discourage reporting of a criminal offense or otherwise to discourage the due administration of justice; or                      (3) acts of cruelty, oppression or maltreatment (as these terms are described in paragraph 17c(2) of [MCM Part IV]), committed against a victim, an alleged victim or another member of the Armed Forces by peers or other persons, because the individual reported a criminal offense or was believed to have reported a criminal offense.</p>	<p><b>AFI 36-2909_AFGM2014-01</b>  <u>Air Force Guidance Memorandum to AFI 36-2909, Professional and Unprofessional Relationships</u>                      11.1. Retaliation. Retaliation is 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.                      11.2. Ostracism. Ostracism, which is a form of retaliation under this instruction, is the exclusion, from social acceptance, privilege or friendship with the intent to discourage reporting of a criminal offense or otherwise discourage the due administration of justice.                      11.3. Maltreatment. Maltreatment, which is a form of retaliation under this instruction, is treatment by peers or by other persons, that, when viewed objectively under all the circumstances, is abusive or otherwise unnecessary for any lawful purpose, that is done with the intent to discourage reporting of a criminal offense or otherwise discourage the due administration of justice, and that results in physical or mental harm or suffering, or reasonably could have caused, physical or mental harm or suffering. Maltreatment under this instruction is prohibited by the National Defense Authorization Act of Fiscal Year 2014, Section 1709(b), and does not require a senior-subordinate relationship as is required for maltreatment under Article 93, UCMJ.</p>

Navy / Marine Corps	Coast Guard
<p><b>SECNAVINST 5370.7D, Encl. 1</b>  <u>Military Whistleblower Protection</u>                      15. a. Per [Section 1709 of the FY14 NDAA], retaliation against a service member is one of the following actions when taken because that member reported, either formally or informally, a criminal offense:</p> <p>(1) Taking or threatening to take an unfavorable or adverse personnel action, or withholding or threatening to withhold a favorable personnel action;</p> <p>(2) Ostracism, which is the exclusion from social acceptance, privilege, or friendship with intent to discourage reporting of a criminal offense or otherwise discourage the due administration of justice; or</p> <p>(3) Maltreatment, which is treatment by peers or by other persons, that, when viewed objectively under all the circumstances, is abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose, that is done with intent to discourage reporting of a criminal offense or otherwise discourage the due administration of justice, and that results in physical or mental harm or suffering, or reasonably could have caused, physical or mental harm or suffering. Maltreatment under this instruction does not require a senior-subordinate relationship as is required for maltreatment under Article 93, UCMJ.</p>	<p><b>ALCOAST 208/14</b>  <u>Military Whistleblower Protection</u>                      3. For the purpose of this order, retaliation against a military member is one of the following actions taken because that member, either formally or informally, reported a criminal offense:</p> <p>A. Taking or threatening to take an unfavorable or adverse personnel action, or withholding or threatening to withhold a favorable personnel action,</p> <p>B. Ostracism, which is the exclusion from social acceptance, privilege, or friendship with the intent to discourage that individual from reporting a criminal offense or otherwise discourage the due administration of justice, or</p> <p>C. Maltreatment, which is treatment by peers or by other persons, that, when viewed objectively under all the circumstances, is abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose that is done with the intent to discourage reporting of a criminal offense or otherwise discourage the due administration of justice and that results in physical or mental harm or suffering, or reasonably could have caused physical or mental harm or suffering. Maltreatment does not require a senior-subordinate relationship as is required for maltreatment under Article 93, UCMJ.</p>



# APPENDIX B: Judicial Proceedings Panel Authorizing Statutes

## NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013

### SECTION 576. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

#### (a) INDEPENDENT REVIEWS AND ASSESSMENTS REQUIRED.—

(2) JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012 AMENDMENTS.—The Secretary of Defense shall establish a panel to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault 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 (Public Law 112–81; 125 Stat. 1404) for the purpose of developing recommendations for improvements to such proceedings.

#### (b) ESTABLISHMENT OF INDEPENDENT REVIEW PANELS.

##### (1) COMPOSITION.

(B) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall be appointed by the Secretary of Defense and consist of five members, two of whom must have also served on the panel established under subsection (a)(1).

(2) QUALIFICATIONS.—The members of each panel shall be selected from among private United States citizens who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in State and Federal criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Forces, and offenses relating to rape, sexual assault, and other adult sexual assault crimes.

(3) CHAIR.—The chair of each panel shall be appointed by the Secretary of Defense from among the members of the panel.

(4) PERIOD OF APPOINTMENT; VACANCIES.—Members shall be appointed for the life of the panel. Any vacancy in a panel shall be filled in the same manner as the original appointment.

##### (5) DEADLINE FOR APPOINTMENTS.—

(B) JUDICIAL PROCEEDINGS PANEL.—All original appointments to the panel required by subsection (a)(2) shall be made before the termination date of the panel established under subsection (a)(1), but no later than 30 days before the termination date.

(6) MEETINGS.—A panel shall meet at the call of the chair.

(7) FIRST MEETING.—The chair shall call the first meeting of a panel not later than 60 days after the date of the appointment of all the members of the panel.

(c) REPORTS AND DURATION.—

(2) JUDICIAL PROCEEDINGS PANEL.—

(A) FIRST REPORT.—The panel established under subsection (a)(2) shall submit a first report, including any proposals for legislative or administrative changes the panel considers appropriate, to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives not later than 180 days after the first meeting of the panel.

(B) SUBSEQUENT REPORTS.—The panel established under subsection (a)(2) shall submit subsequent reports during fiscal years 2014 through 2017.

(C) TERMINATION.—The panel established under subsection (a)(2) shall terminate on September 30, 2017.

(d) DUTIES OF PANELS.—

(2) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall perform the following duties:

(A) Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice that were enacted by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112– 81; 125 Stat. 1404).

(B) Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases.

(C) Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts.

(D) Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report required by subsection (c)(2) and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available.

(E) Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), and any instances in which prior sexual conduct was determined to be inadmissible.

- (F) Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case.
  - (G) Building on the data compiled as a result of paragraph (1)(D), assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases.
  - (H) Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by section 573 of this Act.
  - (I) Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the Uniform Code of Military Justice in certain sexual assault cases.
  - (J) Consider such other matters and materials as the panel considers appropriate for purposes of the reports.
- (3) UTILIZATION OF OTHER STUDIES.—In conducting reviews and assessments and preparing reports, a panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies.
- (e) AUTHORITY OF PANELS.—
- (1) HEARINGS.—A panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the panel considers appropriate to carry out its duties under this section.
  - (2) INFORMATION FROM FEDERAL AGENCIES.—Upon request by the chair of a panel, a department or agency of the Federal Government shall provide information that the panel considers necessary to carry out its duties under this section.
- (f) PERSONNEL MATTERS.—
- (1) PAY OF MEMBERS.—Members of a panel shall serve without pay by reason of their work on the panel.
  - (2) TRAVEL EXPENSES.—The members of a panel shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance or services for the panel.
  - (3) STAFFING AND RESOURCES.—The Secretary of Defense shall provide staffing and resources to support the panels, except that the Secretary may not assign primary responsibility for such staffing and resources to the Sexual Assault Prevention and Response Office.

## NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

### SEC. 1731. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

#### (b) ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.—

- (1) ADDITIONAL ASSESSMENTS SPECIFIED.—The independent panel established by the Secretary of Defense under subsection (a)(2) of section 576 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the “judicial proceedings panel”, shall conduct the following:
- (A) An assessment of the likely consequences of amending the definition of rape and sexual assault under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), to expressly cover a situation in which a person subject to chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), commits a sexual act upon another person by abusing one’s position in the chain of command of the other person to gain access to or coerce the other person.
  - (B) An assessment of the implementation and effect of section 1044e of title 10, United States Code, as added by section 1716, and make such recommendations for modification of such section 1044e as the judicial proceedings panel considers appropriate.
  - (C) An assessment of the implementation and effect of the mandatory minimum sentences established by section 856(b) of title 10, United States Code (article 56(b) of the Uniform Code of Military Justice), as added by section 1705, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).
  - (D) An assessment of the adequacy of the provision of compensation and restitution for victims of offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), and develop recommendations on expanding such compensation and restitution, including consideration of the options as follows:
    - (i) Providing the forfeited wages of incarcerated members of the Armed Forces to victims of offenses as compensation.
    - (ii) Including bodily harm among the injuries meriting compensation for redress under section 939 of title 10, United States Code (article 139 of the Uniform Code of Military Justice).
    - (iii) Requiring restitution by members of the Armed Forces to victims of their offenses upon the direction of a court-martial.
- (2) SUBMISSION OF RESULTS.—The judicial proceedings panel shall include the results of the assessments required by paragraph (1) in one of the reports required by subsection (c)(2)(B) of section 576 of the National Defense Authorization Act for Fiscal Year 2013.

## NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015

### SEC. 545. ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.

- (a) **ADDITIONAL DUTIES IMPOSED.**—The independent panel established by the Secretary of Defense under section 576(a)(2) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the “judicial proceedings panel”, shall perform the following additional duties:
- (1) Conduct a review and assessment regarding the impact of the use of any mental health records of the victim of an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), by the accused during the preliminary hearing conducted under section 832 of such title (article 32 of the Uniform Code of Military Justice), and during court-martial proceedings, as compared to the use of similar records in civilian criminal legal proceedings.
  - (2) Conduct a review and assessment regarding the establishment of a privilege under the Military Rules of Evidence against the disclosure of communications between—
    - (A) users of and personnel staffing the Department of Defense Safe Helpline; and
    - (B) users of and personnel staffing of the 26 Department of Defense Safe Help Room.
- (b) **SUBMISSION OF RESULTS.**—The judicial proceedings panel shall include the results of the reviews and assessments conducted under subsection (a) in one of the reports required by section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1760).

### SEC. 546. DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

- (f) **DUE DATE FOR ANNUAL REPORT OF JUDICIAL PROCEEDINGS PANEL** – Section 576(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239; 126 Stat. 1760) is amended by inserting “annually” thereafter” after “reports”.





## APPENDIX C: Judicial Proceedings Panel Members

### HONORABLE ELIZABETH HOLTZMAN – JPP CHAIR

Ms. Holtzman is counsel with the law firm Herrick, Feinstein LLP. Ms. Holtzman served for eight years as a U.S. representative (D-NY, 1973–81). While in office, she authored the Rape Privacy Act. She then served for eight years as District Attorney of Kings County, New York (Brooklyn), the fourth-largest DA's office in the country, where she helped change rape laws, improve standards and methods for prosecution, and develop programs to train police and medical personnel. In 1989 Ms. Holtzman became the only woman ever elected Comptroller of New York City. Ms. Holtzman graduated from Radcliffe College, *magna cum laude*, and received her law degree from Harvard Law School.

### HONORABLE BARBARA S. JONES, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (RETIRED)

Judge Jones is a partner at the law firm Zuckerman Spaeder LLP. She served as a judge in the U.S. District Court for the Southern District of New York for sixteen years, and heard a wide range of cases relating to accounting and securities fraud, antitrust, fraud and corruption involving city contracts and federal loan programs, labor racketeering, and terrorism. Before being nominated to the bench in 1995, Judge Jones was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County (Manhattan). In that role she supervised community affairs, public information, and oversaw the work of the Homicide Investigation Unit. In addition to her judicial service, she spent more than two decades as a prosecutor. Judge Jones was a special attorney of the United States Department of Justice (DOJ) Organized Crime & Racketeering, Criminal Division, and the Manhattan Strike Force Against Organized Crime and Racketeering. Previously, Judge Jones served as an Assistant U.S. Attorney, as chief of the General Crimes Unit, and as chief of the Organized Crime Unit in the Southern District of New York.

### MR. VICTOR STONE

Victor Stone represents crime victims at the Maryland Crime Victims Resource Center, Inc. Previously, Mr. Stone served as Special Counsel at the United States Department of Justice. He spent forty years with the Department of Justice in numerous positions, including as Chief Counsel, FBI Foreign Terrorist Task Force, and as Assistant U.S. Attorney in Oregon and the District of Columbia. He has experience working on victim and prisoners' rights, serving on committees that resulted in the enactment of the Crime Victims' Rights Act and updates to the ABA Standards for Prisoner Rights. After graduating from Harvard Law School, he clerked on the United States Court of Appeals for the Ninth Circuit.

### **PROFESSOR THOMAS W. TAYLOR**

Tom Taylor teaches graduate courses at Duke University's Sanford School of Public Policy. Previously, he served as a decorated and distinguished Army officer, civil servant, and member of the Senior Executive Service. During a twenty-seven-year career in the Pentagon, he advised seven secretaries and seven Chiefs of Staff of the Army, and as the senior leader of the Army legal community he worked on a wide variety of operational, personnel, and intelligence issues. He graduated with high honors from Guilford College, Greensboro, N.C., and with honors from the University of North Carolina at Chapel Hill law school, where he was a Morehead Fellow, a member of the law review, and a member of the Order of the Coif.

### **VICE ADMIRAL PATRICIA A. TRACEY, U.S. NAVY (RETIRED)**

Pat Tracey is the Vice President of Homeland Security and Defense for HP Enterprise Services, U.S. Public Sector, developing dynamic strategies and providing support to various government agencies, including the U.S. Department of Homeland Security, U.S. Department of Justice, U.S. Department of State, and U.S. Department of Defense. In 2006, after thirty-four years in the U.S. Navy, she retired as the first female vice admiral. As Chief of the Navy's \$5 billion global education and training enterprise, she led a successful revolution in training technology to improve the quality, access, and effectiveness of Navy training while lowering its cost. Admiral Tracey graduated from the College of New Rochelle and the Naval Postgraduate School, with distinction, and completed a fellowship with the Chief of Naval Operations' Strategic Studies Group.

# APPENDIX D: Staff Members and Designated Federal Officials

## JUDICIAL PROCEEDINGS PANEL STAFF

Colonel Kyle Green,  
U.S. Air Force, Staff Director

Lieutenant Colonel Kelly McGovern,  
U.S. Army, Deputy Staff Director

Mr. Dale Trexler, Chief of Staff

Mr. Roger Capretta, Supervising Paralegal  
(June 2014 - July 2015)

Ms. Julie Carson, Attorney and Legislative  
Analyst

Ms. Janice Chayt, Investigator

Ms. Alice Falk, Editor

Ms. Nalini Gupta, Attorney

Lieutenant Colonel Glen Hines,  
U.S. Marine Corps, Attorney

Mr. Kirtland Marsh, Attorney

Ms. Laurel Prucha Moran, Graphic Designer

Mr. Douglas Nelson, Attorney  
(June 2014 - October 2015)

Mr. Matt Osborn, Attorney  
(August 2014 - October 2015)

Ms. Meghan Peters, Attorney

Ms. Terri Saunders, Attorney

Ms. Meghan Tokash, Attorney  
(December 2014 - October 2015)

Ms. Stayce Rozell, Senior Paralegal

Ms. Tiffany Williams, Supervising Paralegal

Ms. Sharon Zahn, Senior Paralegal

## DESIGNATED FEDERAL OFFICIALS

Ms. Maria Fried, Designated Federal Official

Mr. William Sprance,  
Alternate Designated Federal Official

Major Jacqueline M. Stingl,  
Alternate Designated Federal Official

Mr. Dwight Sullivan,  
Alternate Designated Federal Official



# APPENDIX E: Judicial Proceedings Panel Public Meetings Addressing Retaliation

JPP PUBLIC MEETINGS	PRESENTERS AND DELIBERATIONS on Retaliation
<p>April 10, 2015</p> <p>Public Meeting of the JPP at the U.S. District Court for the District of Columbia, Washington, D.C</p>	<ul style="list-style-type: none"> <li>• Major General Jeffrey Snow, Director, DoD SAPRO</li> <li>• Dr. Nathan Galbreath, Senior Executive Advisor, DoD SAPRO</li> <li>• Dr. Lilia M. Cortina, Professor, University of Michigan</li> <li>• Dr. Vicki Magley, Professor, University of Connecticut</li> <li>• Mr. Michael F. Noone, Professor, Columbus Law School, Catholic University</li> <li>• Dr. Patricia J. Harned, Chief Executive Officer, Ethics &amp; Compliance Initiative</li> <li>• Dr. Matthew F. Soulier, University of California, Davis</li> <li>• Dr. Veronique N. Valliere, Valliere &amp; Counseling Associates, Inc.</li> <li>• Ms. Monique Ferrell, Director, U.S. Army SHARP</li> <li>• Rear Admiral Richard P. Snyder, Director, Twenty-First Century Sailor Office</li> <li>• Colonel Scott S. Jensen, Branch Head, USMC, HQ, Marine Corps SAPR</li> <li>• Mr. Jay Aanrud, Deputy Director, HQ, U.S. Air Force SAPR</li> <li>• Mr. Patrick Gookin, Director, DoD IG Hotline &amp; Whistleblower Protection Ombudsman</li> <li>• Ms. Nilgun Tolek, Director, DoD IG Whistleblower Reprisal Investigations</li> <li>• Mr. John K. Vallario, Deputy Executive Director, Air Force BCMR</li> <li>• Mr. Douglas Huff, Legal Advisor, Army Review Boards Agency</li> <li>• Mr. Jon Ruskin, Board for Correction of Naval Records Counsel</li> <li>• Ms. Julia Andrews, Chair, Coast Guard BCMR</li> </ul>

JPP PUBLIC MEETINGS	PRESENTERS AND DELIBERATIONS on Retaliation
<p>May 19, 2015</p> <p>Public Meeting of the JPP at the U.S. District Court for the District of Columbia, Washington, D.C.</p>	<ul style="list-style-type: none"> <li>• Ms. Sara Darehshori, Senior Counsel, Human Rights Watch, U.S. Program</li> <li>• Ms. Meghan Rhoad, Researcher, Human Rights Watch, Women’s Rights Division</li> <li>• Ms. V.P., Retired U.S. Army Captain</li> <li>• Master Sergeant T.S., U.S. Air Force</li> <li>• Petty Officer Third Class D.M., U.S. Coast Guard</li> <li>• Ms. C.B., Former U.S. Air Force Enlisted Member</li> <li>• 1st Lieutenant C.B., U.S. Army</li> <li>• Ms. J.S., Retired U.S. Air Force Technical Sergeant</li> <li>• Ms. Susan L. Burke, Victim Counsel, Law Offices of Susan L. Burke</li> <li>• Major K.V., U.S. Air Force</li> <li>• Staff Sergeant E.A., U.S. Army</li> <li>• Petty Officer First Class S.F., U.S. Coast Guard</li> <li>• Ms. A.N., Former U.S. Navy Petty Officer Second Class</li> <li>• Staff Sergeant N.L., U.S. Air Force</li> <li>• Ms. A.H., Spouse of U.S. Air Force Staff Sergeant</li> <li>• Lance Corporal J.J., U.S. Marine Corps</li> <li>• Ms. Nancy Pike, U.S. Air Force SARC, Seymour-Johnson Air Force Base, North Carolina</li> <li>• Mr. Michael Starkey, U.S. Air Force SAPR Victim Advocate, Davis-Monthan Air Force Base, Arizona</li> <li>• Mr. Magnus Graham, U.S. Coast Guard SARC Coordinator, Portsmouth, Virginia</li> <li>• Ms. Marie A. Brodie, U.S. Marine Corps SARC, Marine Corps Base Camp Lejeune, North Carolina</li> <li>• Sergeant First Class Bridgett Joseph, U.S. Army SARC, Schofield Barracks, Hawaii</li> <li>• Ms. Kim Agnew, U.S. Navy SARC, Naval Support Activity, Bethesda, Maryland</li> <li>• Command Chief Master Sergeant Craig A. Neri, U.S. Air Force, 45th Space Wing, Patrick Air Force Base, Florida</li> <li>• Command Master Chief Kevin Goodrich, U.S. Navy, Naval Air Station Hampton Roads, Virginia</li> <li>• Command Master Chief Jason D. Griffin, U.S. Coast Guard, 7th District</li> <li>• Master Sergeant Michelle M. Johnson, U.S. Army, Pentagon, Virginia</li> <li>• Staff Sergeant LeeAnn B. Nelson, U.S. Marine Corps Uniformed Victim Advocate, Marine Corps Base Quantico, Virginia</li> <li>• Brigadier General David Harris, U.S. Air Force, Commander, 96th Test Wing, Eglin Air Force Base, Florida</li> </ul> <p style="text-align: right;"><i>(Continued)</i></p>

JPP PUBLIC MEETINGS	PRESENTERS AND DELIBERATIONS on Retaliation
<p><i>(Continued)</i></p> <p>May 19, 2015</p> <p>Public Meeting of the JPP at the U.S. District Court for the District of Columbia, Washington, D.C.</p>	<ul style="list-style-type: none"> <li>• Captain Heidi Fleming, U.S. Navy, Commanding Officer, Naval Air Station Patuxent River, Maryland</li> <li>• Captain Jeffrey C. Westling, U.S. Coast Guard, Commander, U.S. Coast Guard Base Kodiak, Alaska</li> <li>• Colonel Allen Broughton, U.S. Marine Corps, Chief of Staff, Marine Corps Installations National Capital Region/Marine Corps Base Quantico, Virginia</li> <li>• Colonel Brian Foley, U.S. Army, Garrison Commander, Fort Meade, Maryland</li> </ul>
<p>June 18, 2015</p> <p>Public Meeting of the JPP at the The George Washington University Law School, Washington, D.C.</p>	<ul style="list-style-type: none"> <li>• Lieutenant Commander James Toohey, U.S. Navy, Victims' Legal Counsel</li> <li>• Lieutenant Commander Kismet Wunder, U.S. Coast Guard, Special Victims' Counsel</li> <li>• Captain George "Rob" Lavine III, U.S. Army, Special Victims' Counsel</li> <li>• Captain Micah Smith, U.S. Air Force, Special Victims' Counsel</li> <li>• Major Chantell Higgins, U.S. Marine Corps, Victims' Legal Counsel</li> </ul>
<p>August 6, 2015</p> <p>Public Meeting of the JPP at the The George Washington University Law School, Washington, D.C.</p>	<ul style="list-style-type: none"> <li>• Panel deliberations (no speakers)</li> </ul>
<p>September 18, 2015</p> <p>Public Meeting of the JPP at the Holiday Inn Ballston at Arlington, VA</p>	<ul style="list-style-type: none"> <li>• Panel deliberations (no speakers)</li> </ul>



JPP PUBLIC MEETINGS	PRESENTERS AND DELIBERATIONS on Retaliation
<p>October 9, 2015</p> <p>Public Meeting of the JPP at the Holiday Inn Ballston at Arlington, VA</p>	<ul style="list-style-type: none"> <li>• Panel deliberations (no speakers)</li> </ul>
<p>November 6, 2015</p> <p>Public Meeting of the JPP at the Holiday Inn Ballston at Arlington, VA</p>	<ul style="list-style-type: none"> <li>• Panel deliberations (no speakers)</li> </ul>
<p>December 11, 2015</p> <p>Public Meeting of the JPP at the Holiday Inn Ballston at Arlington, VA</p>	<ul style="list-style-type: none"> <li>• Panel deliberations (no speakers)</li> </ul>
<p>January 15, 2016</p> <p>Public Meeting of the JPP at the Holiday Inn Ballston at Arlington, VA</p>	<ul style="list-style-type: none"> <li>• Panel deliberations &amp; review of draft report (no speakers)</li> </ul>
<p>January 22, 2016</p> <p>Public Meeting of the JPP at the Holiday Inn Ballston at Arlington, VA</p>	<ul style="list-style-type: none"> <li>• Panel deliberations &amp; report approval (no speakers)</li> </ul>

# APPENDIX F: Acronyms and Abbreviations

AF SAPRO	Air Force Sexual Assault Prevention and Response Office	NDAAs	National Defense Authorization Act
BCMR	Board for Correction of Military Records	POD	Protect Our Defenders
CDR	commander	POTUS	President of the United States
CMG	case management group	PTSD	post-traumatic stress disorder
DD Form	Department of Defense Form	RMWS	RAND Military Workplace Study
DoD	Department of Defense	SAPR	Sexual Assault Prevention and Response
DSAID	Defense Sexual Assault Incident Database	SAPRO	Sexual Assault Prevention and Response Office
FY	fiscal year	SARB	sexual assault review board
GAO	Government Accountability Office	SARC	sexual assault response coordinator
IG	inspector general	SHARP	Sexual Harassment/Assault Response and Prevention
JPP	Judicial Proceedings Panel	SVC	special victims' counsel
MCIO	military criminal investigative organization	UCMJ	Uniform Code of Military Justice
MJRG	Military Justice Review Group	USD(P&R)	Under Secretary of Defense for Personnel and Readiness
M.R.E.	Military Rules of Evidence	VA	victim advocate
MWPA	Military Whistleblower Protection Act	VLC	victims' legal counsel
NCO	noncommissioned officer	VWAP	Victim Witness Assistance Program
		WPA	Whistleblower Protection Act



# APPENDIX G: Sources Consulted

## 1. U.S. CONSTITUTION

## 2. LEGISLATIVE SOURCES

### a. Enacted Statutes

5 C.F.R. § 1209.7 (Burden and degree of proof)

5 U.S.C. § 1221 (Individual right of action in certain reprisal cases)

5 U.S.C. App. 2 (Federal Advisory Committee Act)

10 U.S.C. §§ 801-946 (Uniform Code of Military Justice)

10 U.S.C. § 1034 (Protected communications; prohibition of retaliatory personnel actions)

10 U.S.C. § 1044e (Special Victims' Counsel for victims of sex-related offenses)

10 U.S.C. § 1552 (Correction of military records: claims incident thereto)

National Defense Authorization Act for Fiscal Year 1989, Pub. L. No. 100-456, 102 Stat. 1918 (1988)

National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013)

National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013)

National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014)

National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92 (2015)

### b. Proposed Statutes

S. 1130, 114th Cong., Legal Justice for Servicemembers Act of 2015 (2015)

## 3. RULES AND REGULATIONS

### a. Executive Orders

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012), *available at* [http://www.loc.gov/rr/frd/Military\\_Law/pdf/MCM-2012.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf)

### b. Department of Defense

DoD DIRECTIVE 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM (Jan. 23, 2012) (Change 2, Jan. 20, 2015), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf>

DoD DIRECTIVE 7050.06, MILITARY WHISTLEBLOWER PROTECTION (Apr. 17, 2015), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/705006p.pdf>

DoD INSTRUCTION 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE (Jan. 25, 2013) (Change 2, June 18, 2015), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/550518p.pdf>

DoD INSTRUCTION 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES (Mar. 28, 2013) (Change 2, July 7, 2015), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>

**c. Services**

U.S. COAST GUARD COMMANDANT, ALCOAST 208/14, MILITARY WHISTLEBLOWER PROTECTION (May 2014), *available at* [http://jpp.whs.mil/Public/docs/07-RFI/Set\\_3/Responses/RFI\\_Attachment\\_Q88\\_USCG.pdf](http://jpp.whs.mil/Public/docs/07-RFI/Set_3/Responses/RFI_Attachment_Q88_USCG.pdf)

U.S. COAST GUARD COMMANDANT, ALCOAST 320/14, SAPR CRISIS INTERVENTION TEAMS (SAPR CIT) (July 2014), *available at* [https://www.uscg.mil/announcements/ALCOAST/320-14\\_ALCOAST.txt](https://www.uscg.mil/announcements/ALCOAST/320-14_ALCOAST.txt)

U.S. COAST GUARD COMMANDANT, INSTRUCTION M5830.1A, ADMINISTRATIVE INVESTIGATIONS MANUAL (Sept. 2007), *available at* [http://www.uscg.mil/directives/cim/5000-5999/CIM\\_5830\\_1A.pdf](http://www.uscg.mil/directives/cim/5000-5999/CIM_5830_1A.pdf)

U.S. DEP'T OF THE AIR FORCE, COMMANDER-DIRECTED INVESTIGATION (CDI) GUIDE (Apr. 26, 2010), *available at* <http://www.af.mil/Portals/1/documents/ig/cdi-guide.pdf>

U.S. DEP'T OF ARMY, ARMY REGULATION 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (Oct. 2, 2006), *available at* [http://armypubs.army.mil/epubs/pdf/r15\\_6.pdf](http://armypubs.army.mil/epubs/pdf/r15_6.pdf)

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U.S. DEP'T OF ARMY, DIRECTIVE 2015-16, COMMAND ENGAGEMENT TO PREVENT RETALIATION (Mar. 4, 2015), *available at* [http://www.apd.army.mil/pdf/ad2015\\_16.pdf](http://www.apd.army.mil/pdf/ad2015_16.pdf)

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U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTRUCTION 5300.40, DEPARTMENT OF THE NAVY 21ST CENTURY SAILOR AND MARINE INITIATIVE (June 27, 2013), *available at* <http://www.21stcentury.navy.mil/Documents/SECNAVINST%205300.40.pdf>

U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTRUCTION 5370.7D, MILITARY WHISTLEBLOWER PROTECTION ACT (Dec. 4, 2014), *available at* <http://doni.daps.dla.mil/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-300%20Manpower%20Personnel%20Support/5370.7D.pdf>

#### 4. MEETINGS AND HEARINGS

Transcript of JPP Public Meeting (Apr. 10, 2015)

Transcript of JPP Public Meeting (May 19, 2015)

Transcript of JPP Public Meeting (June 18, 2015)

Transcript of JPP Public Meeting (Aug. 6, 2015)

Transcript of JPP Public Meeting (Sept. 18, 2015)

Transcript of JPP Public Meeting (Oct. 9, 2015)

Transcript of JPP Public Meeting (Nov. 6, 2015)  
 Transcript of JPP Public Meeting (Dec. 11, 2015)  
 Transcript of JPP Public Meeting (Jan. 15, 2016)  
 Transcript of JPP Public Meeting (Jan. 22, 2016)

## 5. MILITARY POLICY AND GUIDANCE

### a. Department of Defense

Memorandum from the Secretary of Defense on Initiatives to Address Sexual Assault Prevention and Response and Retaliation Associated with Reporting Crime (May 1, 2015), *available at* [http://sapr.mil/public/docs/reports/FY14\\_Annual/FY14\\_Annual\\_Report\\_SecDef\\_Memo\\_Initiatives.pdf](http://sapr.mil/public/docs/reports/FY14_Annual/FY14_Annual_Report_SecDef_Memo_Initiatives.pdf)

Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (Dec. 3, 2014), *available at* [http://www.sapr.mil/public/docs/reports/FY14\\_POTUS/FY14\\_DoD\\_Report\\_to\\_POTUS\\_SecDef\\_Initiatives.pdf](http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_SecDef_Initiatives.pdf)

Memorandum from the Under Secretary of Defense for Personnel and Readiness on Data Call on Retaliation for the Fiscal Year 2014 Department of Defense Annual Report on Sexual Assault in the Military (Mar. 12, 2015), *available at* [http://jpp.whs.mil/Public/docs/03\\_Topic-Areas/06-Retaliation/20150410/11\\_SECDEF\\_Retaliation\\_Memos.pdf](http://jpp.whs.mil/Public/docs/03_Topic-Areas/06-Retaliation/20150410/11_SECDEF_Retaliation_Memos.pdf)

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JUDICIAL PROCEEDINGS PANEL:  
REPORT ON RETALIATION RELATED TO SEXUAL ASSAULT OFFENSES

*February 2016*