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RIGHTS
WATCH

BOOTED

Lack of Recourse for Wrongfully Discharged US Military Rape Survivors



Booted

**Lack of Recourse for Wrongfully Discharged US
Military Rape Survivors**

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Glossary

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

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

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

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

Ranks

AIR FORCE

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

ARMY

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

COAST GUARD

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

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

MARINE CORPS

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

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

NAVY

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

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

Summary

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

—A1C Juliet Simmons, November 2012

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Bad Discharges

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

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

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

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

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

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

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

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

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

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

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

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

Mental Health or Misconduct Discharges

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

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

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

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

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

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

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

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

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

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

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

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

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

Need for Protections

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

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

As one Navy survivor said,

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

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

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

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

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

Unfair Process, Little Recourse

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

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

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

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

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

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

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

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

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

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

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

¹⁷ 10 USC sec. 1557.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Key Recommendations

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

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

Methodology

This report is based primarily on more than 270 in-person and telephone interviews conducted between October 2013 and February 2016, as well as documents provided to Human Rights Watch in response to public record requests.

Interviews were conducted with 163 sexual assault survivors from all branches of the US Armed Forces, including the Coast Guard and National Guard. We reviewed written accounts from an additional 52 survivors. We also reviewed supporting documentation provided by some of the survivors interviewed.

Twenty-two of the survivors interviewed were male, though this does not reflect the demographics of sexual assault victims in the US military. Because the population of service members is disproportionately male, there are more male victims of unwanted sexual contact than female, though men report at much lower rates.²⁹

We also considered written accounts by more than 50 survivors. Victims interviewed for this report span a wide range of years—going back to the Vietnam War era in the 1960s. Their experiences of retaliation after sexual assault and characterization of their discharge may differ from the current state of affairs since the military has undertaken extensive reforms in the past three years. However, their stories are important to understanding the unfairness of the harm service members experience as a result of their discharges—harm that continues to the present.

The issues documented in this report arose repeatedly in our interviews with survivors across the military services. However, we did not attempt to conduct a representative sampling of military sexual assault survivors. Moreover, this is not a randomized study and this report's findings cannot be generalized to the military population as a whole. Given the sensitive nature of the topic and confidentiality concerns expressed by many interviewees, many survivors' names and other identifying details have been withheld.

²⁹ See Sexual Assault Prevention and Response Office, "DOD Sexual Assault Prevention and Response Fact Sheet," April 2015, http://sapr.mil/public/docs/saapm/2015/SAPR_Fact_Sheet_201504.pdf (accessed April 8, 2015). DOD estimates 8,500 women and 10,500 men experienced unwanted sexual contact in 2014.

Survivors and other interviewees who requested confidentiality have been randomly assigned pseudonyms in this report.

This report covers the impact of “bad discharges” on military personnel who were separated from the military after reporting a sexual assault. In order to minimize further trauma, Human Rights Watch did not focus our interviews or investigations on the underlying assault.

The discharges described in this report occurred from as long ago as 1966 to as recently as 2015. The military has undertaken a number of reforms in its handling of sexual assaults, particularly since 2008. The experiences of survivors in recent years is, for the most part, improved and we would hope that some of the more extreme incidents described in this report would not happen today. What has not improved, however, is the military’s responsiveness to survivors who may be suffering from the repercussions of previous policies, especially through wrongful discharges. Moreover, as described in the Human Rights Watch report *Embattled: Retaliation against Sexual Assault Survivors in the US Military*, problems with retaliation against survivors persist.³⁰

Thus while certain types of discharges from the military described in this report, such as those due to personality disorder or homosexual conduct, are used less frequently than before, or banned completely, we included some description of these types of discharges for the context they provide.

Survivors were located using several methods: Human Rights Watch launched a Facebook page in October 2013 describing the project and providing a point of contact for those willing to be interviewed. A number of survivors we interviewed posted information about our research on private military sexual trauma support pages or referred other survivors to us. In addition, nongovernmental groups who support survivors, including Protect Our Defenders (POD), Service Women’s Action Network (SWAN), and the Military Rape Crisis Center, referred victims to us and/or, with the survivor’s consent, provided their written accounts of their experiences. We also reviewed audio interviews done by StoryCorps as a part of its Veterans Listening Project and in-depth statements included in the “Fort Hood

³⁰ Human Rights Watch, *Embattled: Retaliation against Sexual Assault Survivors in the US Military*, May 18, 2015, <https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military>.

Report,” a joint project by Iraq Veterans Against the War, Civilian-Soldier Alliance and Under the Hood Café and Outreach Center, and the International Human Rights Clinic at Harvard Law School. On October 10, 2014, Human Rights Watch placed a print ad in *Stars and Stripes* newspaper.³¹ A similar online ad ran on *Military Times* websites intermittently between October 6 and October 19, 2014. Special Victim Counsel and Victims’ Legal Counsel also referred clients to us.

In addition to interviews with survivors, Human Rights Watch conducted over 100 interviews with: experts in military law, current and former uniformed and civilian victim advocates, experts in military response to sexual trauma, military law practitioners, members of nongovernmental organizations that work with or advocate on behalf of service members, service members who are not victims, parents of veterans, Special Victim Counsel and Victims’ Legal Counsel, members of the Department of Defense Inspector General’s office, Sexual Assault Prevention and Response Coordinators, Sexual Harassment and Assault Response Program personnel, judge advocates, rape crisis center personnel from four rape crisis centers located near military bases, trauma counselors, Vet Center staff, a former Army Review Boards staff member, a former Board for Correction of Naval Records staff member, and five members of the Sexual Assault Prevention and Response Office at the Department of Defense (SAPRO). We also visited five Vet Centers across the country. Human Rights Watch repeatedly attempted to meet with current staff of the BCMRs but they canceled the meetings and would not reschedule.

Most interviews were conducted individually and in private. Group interviews were conducted with Navy Victims’ Legal Counsel and Air Force Special Victim Counsel (including their Sexual Assault Prevention and Response (SAPR) policy advisor), members of the Department of Defense Inspector General’s office whistleblower reprisal unit, SAPRO, staff from two rape crisis centers, one group of seven women veterans in New York City, and one legal services organization. One survivor had her lawyer on the line for a telephone interview; another survivor, who was interviewed multiple times, had a

³¹ The ad read: “A major human rights organization would like to speak confidentially with active US service members or recent veterans (2008 on) who experienced reprisals after reporting a sexual assault or harassment while serving, or witnesses to such reprisals. We are also interested in speaking with service members who felt supported after reporting an assault or felt any retaliation was handled well. Information provided will contribute to an independent investigation of sexual assault survivors, and shape recommendations for improvements. Contact us at [tel. no.] or www.hrw.org/keywords/sexual-assault-us-military.”

counselor with her for one of her interviews. No incentive or remuneration was offered to interviewees.

In addition to interviews, we submitted document requests under the US Freedom of Information Act (FOIA) to the Offices of the Inspector General for the Department of Defense, Navy, Marine Corps, Coast Guard, Air Force, and Army; Boards for Correction of Military Records for the Army, Air Force, and Coast Guard and the Board for Correction of Naval Records; the Office of the Secretary of Defense and Joint Staff; the Army National Guard; the Air National Guard; and the Departments of the Air Force, Army, Navy, Marine Corps, and Coast Guard.³²

At time of writing, Human Rights Watch received responses from all the Boards for Correction of Military Records and Inspectors General. Though the Army, Navy, and Air Force provided a limited number of documents and data, neither the services nor the Defense Department provided substantive responses to most of our requests by the time of publication.

As part of our research, we also reviewed extensive publicly available information about military sexual assault including, but not limited to, reports and transcripts of the Response Systems Panel and the Judicial Proceedings Panel, the responses provided by the branches to the Panel's requests for information and testimony before the Panels, academic articles, Government Accountability Office reports, publications by experts on psychological disorders and administrative law, congressional testimony by military officers, experts, and victims, complaints from lawsuits, military sexual assault training materials, Department of Defense Instructions, documents provided to Vietnam Veterans of America by the Department of Defense as a result of their lawsuit regarding personality disorder discharges, and nongovernmental and Task Force reports on sexual assault in the military.

In addition, on behalf of Human Rights Watch, several law firms coded all cases in the Defense Department Boards for Correction reading room that contained the search terms "personality disorder" and "adjustment disorder." The search (conducted on August 9,

³² A request was sent to the Office of the Secretary of Defense and Joint Staff on July 24, 2014. Our last communication with them was on March 4, 2015, at which time they indicated a narrowed request was being processed but the response would not be provided within the statutory time period. Requests were submitted to the branches on September 25, 2014.

2013) resulted in 3,615 cases, of which 2,002 were coded and analyzed for this report. The remaining 1,613 cases were duplicates, Discharge Review Board cases, or cases that were reviewed and found to have had no relation to either personality disorder or adjustment disorder. The Coast Guard was not included in our analysis as they have too few cases that meet our criteria (the Coast Guard BCMR considered only two PD cases between 2009 and 2013). The Coast Guard was also not included in the 2008 Government Accountability Office report examining personality disorder discharges.

On March 22, 2016, Human Rights Watch provided Secretary of Defense Ashton B. Carter with a summary of the findings of this report and requested his response. The Defense Department response is attached to this report as an appendix.

A note on terminology:

Many survivors' groups, support service organizations, and others working on sexual violence strongly prefer the term "survivor" to "victim." "Survivor" implies greater empowerment, agency, and resilience, and many individuals do not want to be labeled solely as "victims." This is often important to their healing process and sense of identity. That said, some individuals feel "victim" better conveys their experience of having been the target of violent crime. In recognition of these differing views, this report uses both terms.

Throughout the report, we reference survivors' most senior rank while in service, though they may have left service by the time of our interview or prior to publication of this report.

We use the term "Post-Traumatic Stress Disorder" (or PTSD) in this report because it is the medical diagnosis used by the military and Department of Veterans Affairs, though we recognize some prefer to reference it as "Post-Traumatic Stress" or "sexual assault trauma" in order to destigmatize what many believe is an appropriate response to trauma.

Three survivors interviewed for this report are transgender. To minimize confusion, they are referenced as the gender they publicly identified as at the time of their assault.

Other military terminology and abbreviations are set out in the glossary. Common abbreviations will be spelled out in the first use of each chapter.

I. Background

Discharged from the Military after Reporting a Sexual Assault

Military personnel who report a sexual assault frequently find that their military career is the biggest casualty.

Our interviews suggest that all too often superior officers choose to expeditiously discharge sexual assault victims rather than support their recovery and help them keep their position. Very few sexual assault survivors we spoke to managed to stay in service. Expressing a view repeated by others, one victims' lawyer said, "A lot of clients are out [of the military]" after reporting sexual assault.³³ Navy VLCs told Human Rights Watch that helping sexual assault survivors with discharges was a regular part of their practice.³⁴ A psychiatrist who has appeared as an expert witness in more than 40 courts-martial told a Defense Department Panel, "I am yet to meet a victim of sexual assault who reports that she is looking forward to her future military career."³⁵

Though some survivors manage to stay in service until the end of their enlistment period, and others are medically discharged due to trauma or injuries sustained during their attacks or prefer to leave service, many victims report facing an involuntary discharge from service—an administrative separation—after reporting an assault.³⁶

An administrative discharge or separation is an early termination of service based upon a service member's conduct. It is involuntary if the separation is initiated by command. A

³³ Human Rights Watch telephone interviews with Marine Corps VLC #2, January 6, 2015, and Marine Corps VLC #1, January 5, 2015.

³⁴ Human Rights Watch group interviews with Navy VLCs, Jacksonville, December 10, 2014. Though some victims' lawyers in different branches told Human Rights Watch they were able to assist service members with discharges on an ad hoc basis, others said this was outside of the scope of their responsibilities.

³⁵ Dr. Matthew F. Soulier, The Ninth Public Meeting of the Judicial Proceedings Panel, April 10, 2015, http://jpp.whs.mil/Public/docs/05-Transcripts/20150410_Transcript_Final.pdf, transcript p. 192.

³⁶ See, among others, My Duty to Speak, "Coast Guardsman raped, ignored," July 12, 2012, <http://mydutytospeak.com/2012/07/21/coast-guardsmember-raped-ignored/> (after reporting an assault, the case was not investigated and the victim is fighting an administrative discharge a few months later); My Duty to Speak, "Coast Guard continues to discharge rape survivors, promote rapists," April 30, 2012, <http://mydutytospeak.com/2012/04/30/coast-guard-continues-to-discharge-rape-survivors-promote-rapists/> (after reporting a rape, the victim was told not to speak about it if she wanted to stay in the Coast Guard but was nonetheless given an administrative discharge and won't be eligible for benefits).

lawyer who works with service members facing involuntary discharge described it as a “retrauma.”³⁷

How one leaves service, the characterization of discharge received, and the narrative reason for ending service that appears on discharge papers, have an enormous impact on a veteran’s ability to access benefits and reintegrate into society.

In the military, discharges (whether voluntary or not) are classified in one of the following categories:³⁸

- Honorable (the quality of the member’s service generally meets standards of acceptable conduct);
- General Under Honorable Conditions (significant negative aspects of the member’s conduct outweigh positive aspects of conduct);
- General Under Other Than Honorable Conditions (based on a pattern of misconduct that constitutes a significant departure from conduct expected from service members or one or more acts of misconduct);
- Bad Conduct (adjudged by a general or special court-martial);
- Dishonorable (a person has been adjudged by a general court-martial).

The vast majority of those who leave service (over 85 percent) are honorably discharged.³⁹ Veterans with anything less than an honorable discharge are considered to have “bad paper.”

Bad paper impacts health care, disability benefits, education, and other forms of support that may be crucial for recovery and reintegration into the civilian world. Veterans with bad paper may face adverse consequences from employers and may not qualify for a range of

³⁷ Human Rights Watch telephone interview with military law practitioner, National Lawyers Guild, May 8, 2014.

³⁸ The only discharges that are uncharacterized are “Entry Level Separations,” which are given to those who have fewer than 180 days of military service or have a void enlistment (i.e. the recruit was under 17 years old, a deserter from another service, or if the enlistment was not voluntary due to lack of capacity). Department of Defense, “Instruction 1332.14, Enlisted Administrative Separations,” January 27, 2014, <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>.

³⁹ Swords to Plowshares and NVLSP, “Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper,” Veterans Legal Clinic, Legal Services Center of Harvard Law School, March 2016, <https://www.swords-to-plowshares.org/sites/default/files/Underserved.pdf> (accessed April 6, 2016).

assistance offered to veterans by states or employers or even service organizations (such as the American Legion or Veterans of Foreign Wars) that help veterans. Generous education benefits offered after 9/11 to encourage service members to enlist only apply if the service member is honorably discharged. Only those with Honorable or General Under Honorable Conditions discharges are eligible for immigration benefits connected to service. Bad paper is also linked with other devastating harm: veterans with bad paper are twice as likely to commit suicide and far more likely to end up homeless or in prison.⁴⁰

Honorably discharged veterans may also be saddled with problematic discharge papers. Many service members Human Rights Watch interviewed indicated they were administratively discharged on grounds of “Personality Disorder” (PD) after reporting their assault and that this discharge, unbeknown to them at the time, had far-reaching negative consequences, even though their discharge was often classified as honorable and would not normally be considered “bad paper.”

While these types of discharges have declined in recent years, the negative repercussions continue to haunt service members due to the military’s lack of willingness to offer meaningful redress.

Between FY 2001 and FY 2010, over 31,000 veterans were discharged on grounds of personality disorder. A disproportionate number of those discharged were women.

Between FY 2001 and FY 2010, over 31,000 veterans were discharged on grounds of personality disorder. A disproportionate number of those discharged were women.⁴¹

A 2008 Government Accountability Office (GAO) report found that proper procedures were

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

⁴¹ Vietnam Veterans of America, “Casting Troops Aside: The United States Military’s Illegal Personality Disorder Discharge Problem,” March 2012, <http://www.vva.org/PPD-Documents/WhitePaper.pdf>.

not followed in many of these cases and that potentially thousands of people were misdiagnosed and wrongfully administratively discharged.⁴²

In at least some cases, the service member may have had Post-Traumatic Stress Disorder and been eligible for medical retirement, which is honorable, does not carry any stigma, and has greater access to benefits.⁴³ Moreover, the medical retirement process (the Integrated Disability Evaluation System (IDES)) provides greater protections for service members, as they have multiple opportunities to appeal or rebut medical evaluations or determinations regarding fitness for duty.⁴⁴

Following the GAO report, the criteria for discharging a service member on the grounds of “Personality Disorder” were made more stringent, particularly for those who served in combat. **Although use of this type of discharge has declined dramatically since 2009, military sexual assault victims are still given this and other questionable mental health diagnoses.**⁴⁵

We include older cases in our analysis too because thousands of people are still living with the stigma and negative consequences of being wrongly labeled with mental health problems. Moreover, misdiagnosis means veterans may not be entitled to severance or disability benefits. An unexpected early administrative discharge, even if fully honorable, can affect ability to access education and health benefits, the VA’s home loan guarantee, and may require repayment of enlistment bonuses because the enlistment period is incomplete. Thus many people discharged for PD continue to suffer the ill consequences of their discharge.

⁴² Government Accountability Office, “Defense Health Care: Additional Efforts Needed to Ensure Compliance with Personality Disorder Separation Requirements,” GAO-09-31, October 2008, <http://www.gao.gov/assets/290/283014.pdf>; see also US House of Representatives, Committee on Veterans’ Affairs, “Status of Efforts to Address Lack of Compliance with Personality Disorder Separation Requirements,” Statement of Debra Draper, GAO-10-1013T, September 15, 2010, <http://www.gao.gov/assets/130/125240.pdf>.

⁴³ For example, families of veterans who are medically retired receive DOD health care, they may receive higher disability pay, they have full access to 9/11 GI Bill education benefits, receive severance, and do not have to repay any enlistment or re-enlistment bonuses. See e.g., 38 USC secs. 3311, 3313.

⁴⁴ US Department of Defense, Office of Warrior Care Policy, Integrated Disability Evaluation System (IDES) Brochure, http://warriorcare.dodlive.mil/files/2011/10/IDES_Trifold_Brochure.pdf.

⁴⁵ Emails from staff at Protect Our Defenders to Human Rights Watch, March 1, 2016, on file at Human Rights Watch, indicating they still regularly see cases of service members fighting against personality disorder diagnoses and discharges.

Though public exposure of the problems with PD discharges (particularly as used against combat veterans who may have had PTSD) has led to reform, nothing has been done to correct the discharge papers of the thousands of people who may have received wrongful PD discharges. Instead, the Defense Department has instructed those who think they have received erroneous discharges to seek to have them changed through their respective services' administrative bodies—the Discharge Review Boards and the Boards for Correction of Military Records.⁴⁶

Survivors with less than honorable discharges face even greater challenges accessing benefits. Many service member survivors of sexual assault received the double label of PD and General Under Honorable Conditions discharges.

Sexual assault survivors who engaged in misconduct either at the time of the offense (such as underage drinking) or after the assault due to trauma (such as taking an unauthorized leave (AWOL) to flee their perpetrators) may be saddled with an Other Than Honorable discharge, which may make them ineligible for any veterans benefits at all. Under current discharge review mechanisms, little can be done to improve their discharge status after they have left service.

As with PD cases, the only mechanisms available to upgrade discharge characterization—the Discharge Review Boards and the Boards for Correction of Military Records (BCMRs)—offer victims virtually no opportunity to be heard and little probability of success. This will be discussed in detail below.

Commanders are allowed to involuntarily discharge service members to maintain the readiness and discipline of their unit. Because this is seen as necessary to ensure the readiness of the forces, commanders have a great deal of discretion in deciding who should be separated, the basis of the separation, and the characterization of the discharge.

⁴⁶ In order “to keep Congress from mandating establishment of a dedicated review board” to look at PD cases, a Department of Defense report requested their services to instruct the Discharge Review Boards and Boards for Correction of Military Records to expedite review of PD discharges for those who had deployed in the Gulf War on Terror (an estimated 3,400 (or 11 percent) of the 31,000 PD discharges). It is unclear whether that happened as it does not appear many PD cases have come forward. Talking Paper on FY08 NDAA Report on Administrative Separations Based on Personality Disorder, 11-L-0109 VVA (AF) 945, April 2008, http://www.vva.org/PPD-Documents/11_L_0109VVA_AF_938_946.pdf.

Administrative separations can be justified on many grounds including pregnancy, parenthood, hardship, failing a drug or alcohol rehab program, misconduct, or, until 2011, homosexuality. The procedures for each branch are slightly different, but in general the commanding officer makes a recommendation for separation that is reviewed and approved by a separating authority higher in the chain of command.

When the service member is being discharged for misconduct (or a pattern of misconduct), there may be a requirement that the commander counsel the service member and attempt rehabilitation before recommending a discharge. The service member must be notified in writing of the recommendation for discharge and informed of their rights.⁴⁷

Service members often have little voice in this process. Procedural safeguards do exist for service members being administratively separated: they can submit statements on their own behalf, consult with legal counsel prior to separation, and obtain copies of their separation packet.⁴⁸ Service members with more than six years of service or those with an Other Than Honorable characterization of service may request a hearing before an administrative board. The Defense Department now allows enlisted service members who make an unrestricted report of sexual assault and face involuntary separation afterwards to request high-level review of the grounds for their separation.⁴⁹

In practice, these safeguards are rarely utilized or effective.⁵⁰ The GAO found that in the over 300 PD cases it reviewed in 2008, only 11 percent of service members submitted statements on their own behalf, all of whom were separated. Only 32 percent of files indicated the service member asked to speak with an attorney; not one eligible service member had an administrative hearing.⁵¹

⁴⁷ Department of Defense, "Instruction 1332.14, Enlisted Administrative Separations," January 27, 2014, <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>.

⁴⁸ However, they may be given only two working days to act on the notice. Ibid.

⁴⁹ Department of Defense, "Instruction 1332.14, Enlisted Administrative Separations," Enclosure 5, part 11, January 27, 2014 ("An enlisted Service member who made an unrestricted report of sexual assault and who is recommended for involuntary separation from the Military Services within 1 year of final disposition of his or her sexual assault case may request a general or flag officer (G/FO) review of the circumstances of and grounds for the involuntary separation"). DOD testified it has not collected information on this. Dr. Nathan Galbreath, The Ninth Public Meeting of the Judicial Proceedings Panel, April 10, 2015, http://jpp.whs.mil/Public/docs/05-Transcripts/20150410_Transcript_Final.pdf, transcript pp. 75-76.

⁵⁰ Human Rights Watch has been unable to obtain information on how often the above provision has been used. DOD has indicated they do not collect this information.

⁵¹ US House of Representatives, Committee on Veterans' Affairs, Personality Disorder Discharges: Impact on Veterans' Benefits, Responses to Post-Hearing Questions for the Record Submitted by the Honorable Bob Filner from Debra Draper,

Service members generally may acquiesce to a PD or bad discharge for a number of reasons. They are often very young and very junior enlisted personnel. The vast majority of PD discharges (80 percent) are enlisted service members with fewer than four years of service; 49 percent were discharged within one year.⁵²

For those who suffered trauma because of a sexual assault, many may not be in any condition to make such an important decision. They may have already experienced significant retaliation or had their credibility questioned. Some may be so eager to leave service (and often proximity to their perpetrators) that they are willing to take an adverse discharge if it means getting home sooner.


DD Form 214

Service members receive a certificate of release at the end of their service, the Department of Defense Form 214 (DD-214), that verifies their service and summarizes their career, including awards, records of service or training, and characterization of service. The form is used to obtain benefits from the Department of Veterans Affairs and other organizations that help veterans. It is also often requested by employers to verify military service, particularly if they are granting a preference to veterans. The form may be used to determine eligibility for interment in a VA cemetery or military honors at the time of death.

In addition to summarizing a service member's career, the form contains a code indicating whether a person is eligible for re-enlistment and contains a space for a narrative reason for separation. The re-enlistment code (from RE 1 through RE 4, with three and four not being eligible for re-enlistment) not only impacts the service member's ability to re-enlist in the military, but also determines eligibility for civil service jobs and security clearance. The narrative reason for separation can also impact employment opportunities. Having "Personality Disorder," "Unacceptable Conduct," or "Misconduct" appear on a DD-214 can be a significant barrier to resuming life as a civilian.

Director, Health Care U.S. Government Accountability Office, September 15, 2010, <http://archives.veterans.house.gov/Media/File/111/9-15-10/GAOQFRs.htm>.

⁵² US House of Representatives, Committee on Veterans' Affairs, Personality Disorder Discharges: Impact on Veterans' Benefits, September 15, 2010, 11-L-0109 VVA (OUSD P&R) 309, insert p. 73; "Active Duty/Reserve/Guard Separations Under Personality Disorders & Adjustment Disorders By Other Demographics, As of: FY 2000-JUL 2010," 11-L-0109 VVA (OUSD P&R) 255-272, http://www.vva.org/PPD-Documents/11_L_0109VVA_OUSDP_R_73_309.pdf.

SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)		
23. TYPE OF SEPARATION DISCHARGE	24. CHARACTER OF SERVICE (Include upgrades) HONORABLE	
25. SEPARATION AUTHORITY AR 635-200, PARA 5-13	26. SEPARATION CODE JFX	27. REENTRY CODE 3
28. NARRATIVE REASON FOR SEPARATION PERSONALITY DISORDER		
29. DATES OF TIME LOST DURING THIS PERIOD (YYYYMMDD) NONE		30. MEMBER REQUESTS COPY 4 (Initials) 

DD FORM 214-AUTOMATED, FEB 2000

PREVIOUS EDITION IS OBSOLETE.
GENERATED BY TRANSPROC

SERVICE-2

DD-214 (discharge papers) for a soldier with an honorable discharge for Personality Disorder. The form must be shown to prove veteran status.

Many are so traumatized that when their superior officer raises the possibility of a discharge they do not pay attention to the characterization of service and would “take anything just to get out.”⁵³ All too often they fail to appreciate the consequences of a bad discharge or have the mistaken belief that it would not be difficult to upgrade later.

Denial of Benefits

Characterization of discharge has an enormous impact on a veteran’s eligibility to receive benefits. Service members might believe, or even be told, that having an honorable discharge means they are entitled to all veterans’ benefits. However, an involuntary discharge, even if labeled as honorable (which is common for PD discharges), may mean a victim is ineligible for services to which they might otherwise be entitled. As an Army form states, “An involuntary honorable Discharge ... will disqualify you from reenlistment for some period of time and may disqualify you from receiving transitional benefits (e.g., commissary, housing, health benefits) and the Montgomery GI Bill [education benefits].”⁵⁴

Nearly half of all PD discharges (49 percent) between 2002 and 2007 occurred within the service members first year of service.⁵⁵ Leaving before 24 months, or before the end of the agreed-upon term for enlistment if it is fewer than 24 months, even if the departure from the military is involuntary, makes service members ineligible for VA benefits (with the exception of care specifically relating to trauma from military sexual assault or

⁵³ Human Rights Watch telephone interview with SN Nicole Collins, October 23, 2014.

⁵⁴ DA Form 4856, July 2014, <http://wizardnet.us/armydocs/Counselings/MISC%20Examples/Family%20Care%20Plan%20Invalid-%20Counseling%202014.pdf>.

⁵⁵ US House of Representatives, Committee on Veterans’ Affairs, Personality Disorder Discharges: Impact on Veterans’ Benefits, testimony of Dr. Jack W. Smith, Deputy Assistant Secretary of Defense for Clinical and Program Policy, US Department of Defense, September 15, 2010.

harassment) unless they are discharged for a disability or can show they have a service-connected disability.⁵⁶

Until the veteran can prove they meet this requirement, which may take years, they have no access to any of these services. Personality disorder itself is, by definition, not considered service-connected. Advocates who work with veterans raise concerns that veterans who seek help at a VA hospital are told they are not eligible for services, but not told that they could become eligible if they file a compensation claim for disabilities.⁵⁷ Thus many do not know that they may be able to get health care despite having fewer than two years of service.

Service members with less than fully honorable discharges face additional challenges. As military forms warn departing service members, “In addition you could face difficulty in obtaining civilian employment as employers have a low regard for General and Under Other Than Honorable Conditions discharges.”⁵⁸

Those with General Under Honorable Conditions discharges are not eligible for education benefits, which are extremely important for reintegration. Some state benefits may also be denied to those who have less than fully honorable discharges. General Under Honorable Conditions discharges also do not afford service members the same administrative protections as other discharges. Unlike an Other Than Honorable discharge, General Under Honorable Conditions discharges can be made without referral to a Board of Inquiry. Though a service member may submit a statement or documents in support of a rebuttal for a General Under Honorable Conditions discharge, there is no right to a hearing.

⁵⁶ 38 CFR sec. 3.12a(1). Former service members can access health care for problems related to trauma from sexual assault or harassment while in service even if they are not otherwise eligible for health care. 38 USC sec. 1720D. However, one veteran who had an Other Than Honorable discharge was told by her VA that she was limited to 12 mental health sessions and was not allowed to participate in other activities for military sexual trauma (MST) survivors such as group therapy or yoga unless she got her discharge upgraded by the Navy DRB. She said, “A lot of people think the VA is welcoming to MST survivors but that is not the case unless you have an honorable discharge or high disability rating.” Human Rights Watch telephone interview with Stacey Thompson, February 17, 2016.

⁵⁷ Email from attorney at Swords to Plowshares to Human Rights Watch, December 11, 2015; Swords to Plowshares and NVLSP, “Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper,” Veterans Legal Clinic, Legal Services Center of Harvard Law School, March 2016, <https://www.swords-to-plowshares.org/sites/default/files/Underserved.pdf> (accessed April 6, 2016).

⁵⁸ DA Form 4856, July 2014, <http://wizardnet.us/armydocs/Counselings/MISC%20Examples/Family%20Care%20Plan%20Invalid-%20Counseling%202014.pdf>; Developmental Counseling Form, name withheld, May 18, 2009, on file at Human Rights Watch (“If a General Under Honorable Conditions, Other than Honorable, or Uncharacteristic Discharge is given, you may face difficulty obtaining civilian employment as employers have a low regard for less than Honorable Discharges.”).

DEVELOPMENTAL COUNSELING FORM For use of this form, see ATP 6-22.1; the proponent agency is TRADOC.		
DATA REQUIRED BY THE PRIVACY ACT OF 1974		
AUTHORITY:	5 USC 301, Departmental Regulations; 10 USC 3013, Secretary of the Army.	
PRINCIPAL PURPOSE:	To assist leaders in conducting and recording counseling data pertaining to subordinates.	
ROUTINE USES:	The DoD Blanket Routine Uses set forth at the beginning of the Army's compilation of systems or records notices also apply to this system.	
DISCLOSURE:	Disclosure is voluntary.	
PART I - ADMINISTRATIVE DATA		
Name (Last, First, MI)	Rank/Grade	Date of Counseling
Organization	Name and Title of Counselor	
PART II - BACKGROUND INFORMATION		
Purpose of Counseling: (Leader states the reason for the counseling, e.g. Performance/Professional or Event-Oriented counseling, and includes the leader's facts and observations prior to the counseling.) Event Oriented Counseling - Violation of Article 86 - FAILURE TO REPORT Violation of Article 92 - FAILURE TO OBEY AN ORDER OR REGULATION		
PART III - SUMMARY OF COUNSELING		
Complete this section during or immediately subsequent to counseling.		
Key Points of Discussion: On _____ you were not accounted for during _____ held at _____. You did not show up until _____ and did not notify anyone that you were going to be late. This is a violation of Article 86, Failure to Report. You were previously briefed that you need to be present at least 10 minutes prior to formation. This is a violation of Article 92: Failure to Obey an Order or Regulation. This behavior will not be tolerated. If this disregard for standards continues, you will be recommended for UCMJ action. I am counseling you for the conduct noted above. If this conduct continues, action may be initiated to separate you from the Army under AR 635-200, Chapters 5, 9, 13, or 14. If you are involuntarily separated, you could receive an Honorable discharge, a General, under honorable conditions, discharge, or an Under Other Than Honorable conditions discharge. An Honorable discharge may be awarded under any provision. A General discharge may be awarded for separation under Chapter 14.		
<p style="background-color: yellow;">If you receive an Honorable discharge, you will be qualified for most benefits resulting from military service. An involuntary Honorable discharge, however, will disqualify you from reenlisting for some period of time and may disqualify you from receiving transitional benefits (e.g., commissary, housing, health benefits) and the G.I. Bill. If you receive a General discharge, you will be disqualified from reenlisting in the service for some period of time and you will be ineligible for some benefits including the 9/11 G.I. Bill. If you receive an Under Other Than Honorable conditions discharge, you will be ineligible for reenlistment and for most benefits including payment for accrued leave, transportation of dependents and household goods to home, transitional benefits and 9/11 G. I. Bill. You may also face difficulty in obtaining civilian employment, as employers have a low regard for the General and Under Other Than Honorable conditions discharges. Although there are agencies to which you may apply to have the character of your discharge changed, it is unlikely that any such applications will be successful.</p>		
OTHER INSTRUCTIONS		
This form will be destroyed upon: reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement. For separation requirements and notification of loss of benefits/consequences see local directives and AR 635-200.		

The Worst Administrative Discharge: “Other Than Honorable”

The worst discharge characterization commanders can use to administratively separate a service member from the military is Under Other Than Honorable Conditions. An Other Than Honorable discharge is given when misconduct “constitutes a significant departure from the conduct expected of Soldiers in the Army.”⁵⁹

An Other Than Honorable discharge makes veterans ineligible for many benefits, including, in most cases, access to health care and VA compensation.⁶⁰ In addition, Other Than Honorable discharges are ineligible for payment for accrued leave, unemployment benefits after separation, federal veteran hiring preference, wearing a military uniform, burial rights, commissary access, relocation assistance, military family housing, and educational assistance, and will generally be unable to get jobs requiring a security clearance.⁶¹

Veterans with misconduct discharges are also often excluded from a range of important services from the state or from aid organizations including homeless shelters, tuition benefits, or programs offering employers incentives to hire veterans.⁶² Moreover, many organizations that provide assistance to veterans do not provide services to people with DD-214s that “are less than stellar.”⁶³ Some veterans’ service groups, such as the American Legion and Veterans of Foreign Wars, are only open to those who were honorably discharged.

Veterans with Other Than Honorable discharges may be eligible for VA benefits if the VA reviews their service individually and determines they left with a discharge “under conditions other than dishonorable.” However, in practice **the vast majority of bad**

⁵⁹ US Department of the Army, AR 635-200, Active Duty Enlisted Administrative Separations, June 6, 2005, para. 3-7, http://www.apd.army.mil/pdffiles/r635_200.pdf. Dishonorable or Bad Conduct discharges require a court martial and are not administrative separations.

⁶⁰ 38 USC sec. 5303(a); 38 CFR sec. 3.12(d). A veteran can appeal an Other Than Honorable discharge to the VA in an attempt to get benefits but it is difficult to succeed.

⁶¹ See Benefits at Separation Chart, <http://asktop.net/wp/wp-content/uploads/2013/03/Benefits-at-Separation-Chart.pdf>.

⁶² For example, a hire-a-vet credit of \$5,000 to \$15,000 is offered in New York to employers who hire unemployed veterans with honorable or general under honorable discharges for at least 35 hours a week for a year. New York State Division of Veterans’ Affairs, “Hire-A-Vet Credit,” undated, <http://veterans.ny.gov/content/hire-vet-credit>. Tuition benefits are also offered to veterans discharged under honorable conditions. New York State Division of Veterans’ Affairs, “Veterans Tuition Awards,” undated, <http://veterans.ny.gov/content/veterans-tuition-awards>.

⁶³ Human Rights Watch interview with staff member at Swords to Plowshares, San Francisco, April 24, 2014.

discharges (89 percent since 2001) are never reviewed by the Department of Veterans Affairs. Only 4 percent of misconduct discharges are granted VA eligibility.⁶⁴

Bad Administrative Discharge vs. Medical Discharge

For service members—whether sexual assault survivors or those who had PTSD and might otherwise be qualified for medical retirement—the sacrifice in taking a bad administrative discharge instead of fighting for a medical discharge may be enormous.

Veterans who are medically retired have no stigma attached to their papers and can receive military disability pay and access to health care for the entire family. They are also fully eligible for post-9/11 GI Bill education benefits and are not required to repay any part of their re-enlistment bonus. Moreover, the medical retirement process (IDES) provides far more procedural protections for service members.

Integrated Disability Evaluation System

If a physician finds a service member has a condition that may permanently interfere with their ability to serve on active duty, the physician may refer them to a Medical Evaluation Board. The Medical Evaluation Board is comprised of at least two doctors who evaluate whether or not the service member's medical condition allows them to continue to serve in their position. The Medical Evaluation Board's findings are referred to a Physical Evaluation Board that formally determines if the service member is fit to stay in service and whether they are eligible for disability compensation. Throughout the process, VA Military Service Coordinators and Physical Evaluation Board Liaison Officers "help guide and counsel service members to ensure they are aware of their options and required decisions." Service members may request a hearing if they disagree with the Physical Evaluation Board's findings and have multiple opportunities to rebut or appeal decisions by the Boards.⁶⁵

⁶⁴ Swords to Plowshares, "Serve All Who Served: Fixes to the DVA's Eligibility Criteria for Servicemembers Discharged for Misconduct," on file at Human Rights Watch. The memo indicates that VA hospital staff routinely turn away people who should be eligible for adjudication of their cases without initiating a request as required by VHA regulations. Additionally, depending on the VA Regional Office, veterans with bad paper who apply for eligibility can be denied at a rate as high as 100%. Swords to Plowshares and NVLSP, "Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper," Veterans Legal Clinic, Legal Services Center of Harvard Law School, March 2016, <https://www.swords-to-plowshares.org/sites/default/files/Underserved.pdf> (accessed April 6, 2016).

⁶⁵ US Department of Defense, Office of Warrior Care Policy, Integrated Disability Evaluation System (IDES) Brochure, http://warriorcare.dodlive.mil/files/2011/10/IDES_Trifold_Brochure.pdf.

The differences in benefits for those with Honorable and Other Than Honorable discharges is illustrated below:

US Veterans Benefits

HONORABLE DISCHARGE

VA Health Benefits Employment Preference
Civil Service Preference Vocational Rehabilitation
Job Counseling and Employment Assistance
Payment for Accrued Leave Disability Compensation
Non-Service Connected Disability
Uniformed Services Employment and Reemployment Rights Act Protections
Unemployment Insurance for Ex-Service Members
Civil Service Retirement Credit VA Pension
Pension for Supportive Services for Veteran Families
Naturalization Benefits Caretaker Benefits
Dependents Education Assistance Home Loans
Dependency and Indemnity Compensation
GI Bill: Montgomery and Post-9/11*
Aid and Attendance Homeless Shelter Services
Transitional Benefits & Services
Wearing of Military Uniform Burial Benefits
Membership in Major Veterans Service Organizations
Property Tax Exemptions** State Veterans' Homes**
Honorary High School Diploma**
Veterans Designation on Driver's License or ID Card**
Pre-Separation Counseling
Counseling Following Service in Combat Theater
Treatment for Conditions Related to Military Sexual Trauma

OTHER THAN HONORABLE DISCHARGE

Pre-Separation Counseling
Counseling Following Service in Combat Theater
Treatment for Conditions Related to Military Sexual Trauma

* GI Bill (education) benefits are not available to veterans with General Under Honorable Conditions discharges.

** Many states only extend this benefit to those discharged under honorable conditions.

II. Personality Disorder Discharges

I defy any of you not to have mental consequences if you were raped and harassed repeatedly and even set on fire, while management looked the other way and just laughed.

—Testimony of Amy Quinn before the Judicial Proceedings Panel on Sexual Assault in the Military, May 19, 2015

Personality Disorders

Commanders can justify early separation on grounds of an “other designated physical or mental condition” that does not amount to a disability (such as sleepwalking or chronic seasickness or airsickness). This category also includes mental health conditions “sufficiently severe that the Soldier’s ability to effectively perform military duties is significantly impaired.”⁶⁶ Until 2009, this provision was frequently used to discharge people on the grounds of “Personality Disorder.”

According to the American Psychological Association’s *Diagnostic and Statistical Manual of Mental Disorders*, personality disorders (PDs) are characterized by deeply ingrained maladaptive patterns of behavior.⁶⁷ A personality disorder typically appears by the time one reaches adolescence and causes long-term difficulties in personal relationships or in functioning in society.⁶⁸

Because having a PD renders one ineligible for military service, the military screens applicants for PD before their enlistment. Prior to entering service, all applicants undergo a multistep medical screening process. Medical prescreening forms ask if the applicant has ever sought mental health help. In addition, during the physical medical examination the applicant is asked a series of questions about mental health as part of their medical

⁶⁶ US Department of the Army, “AR 635-200, Active Duty Enlisted Administrative Separations,” June 6, 2005, para. 5-17, http://www.apd.army.mil/pdffiles/r635_200.pdf.

⁶⁷ American Psychiatric Association, ed., (*Diagnostic and Statistical Manual of Mental Disorders (Fifth Edition)*) (Arlington: American Psychiatric Publishing, 2013), pp. 646–649.

⁶⁸ *Ibid.*

history. As a result, 1,018 potential recruits were rejected for personality disorders in FY 2009 and 1,161 applicants were rejected for PD in FY 2010.⁶⁹

If PD is diagnosed after service has begun and a doctor determines it renders the service member unfit for duty, a service member with fewer than eight years of service may be discharged without benefits because PD is considered a pre-existing condition, even if it is diagnosed during the course of service. This is because veterans are only eligible for disability benefits for disabilities incurred or aggravated during military service.

A Difficult Diagnosis

The process of an administrative discharge on mental health grounds is initiated when a commander orders a service member to undergo a mental health examination.

Accurately diagnosing PD is difficult. The American Psychiatric Association's (APA) manual requires clinicians to establish that the traits indicating personality disorder were evident by early adulthood; are stable over time and in different situations; and are different from other mood or anxiety disorders such as Post-Traumatic Stress Disorder (PTSD). In order to do this properly, they recommend clinicians evaluate the stability of personality traits by conducting more than one interview with the patient spaced out over time.⁷⁰

Proper PD diagnosis is particularly difficult following trauma, including sexual assault. Some symptoms of a personality disorder—irritability, feelings of detachment or estrangement from others, and aggressiveness—are similar to symptoms of PTSD. Approximately 30 percent of sexual assault survivors experience PTSD.⁷¹

⁶⁹ US House of Representatives, Committee on Veterans' Affairs, Personality Disorder Discharges: Impact on Veterans' Benefits, Statement of Mr. Lernes J. Hebert, Acting Director, Officer and Enlisted Personnel Management, Office of the Deputy Under Secretary of Defense, VVA 11-L-0109 VVA (OUSD P&R) 301-303, September 15, 2010. An additional 9,698 potential recruits were rejected for various other mental health conditions in 2009 and 8,248 were rejected for other mental health conditions in 2010.

⁷⁰ American Psychiatric Association, ed., *Diagnostic and Statistical Manual of Mental Disorders (Fourth Edition)* (Arlington: American Psychiatric Publishing, 1994).

⁷¹ National Violence Against Women Prevention Research Center, "The Mental Health Impact of Rape," 2000, <https://mainweb-v.musc.edu/vawprevention/research/mentalimpact.shtml> (accessed October 7, 2015). Some estimate the number to be as high as 50 percent. Mark Creamer, Philip Burgess, and Alexander McFarlane, "Post-traumatic stress disorder: Findings from the Australian National Survey of Mental Health and Well-being," *Psychological Medicine*, vol. 31 (2001), pp. 1237–1247.

The significant difference between PD and PTSD is that PTSD arises following a traumatic event whereas PD is a longstanding condition with symptoms appearing in early adolescence. According to the APA, in order to distinguish between the two, it is necessary to get an in-depth personal and medical history from the service member that is ideally corroborated by family and friends.⁷²

The VA also advises clinicians to consult with family or others with knowledge of the individual prior to service when considering a PD diagnosis because PD, PTSD, and Traumatic Brain Injury share common symptoms.⁷³ The *Diagnostic and Statistical Manual of Mental Disorders* also suggests that if personality changes appear after a person has been exposed to extreme stress, “a diagnosis of Post-Traumatic Stress Disorder should be considered.”⁷⁴ One expert said it is “a rule of thumb amongst psychiatrists” not to diagnose someone with PD in the middle of a traumatic experience.⁷⁵ Unlike PD, service members diagnosed with PTSD as a result of a traumatic event incurred while in service are eligible for service-connected disability compensation.

Interviews with survivors, as well as information gathered by the Government Accountability Office, indicate that **the type of in-depth exam required for proper diagnosis often did not occur for service member survivors of sexual assault before PD discharges were made.**

Many sexual assault survivors were slapped with a PD label after minimal interaction with a doctor. For example, Leila Kennedy told Human Rights Watch that after she reported her rape by a senior non-commissioned officer in 1999, her commander restricted her to her barracks and she was not allowed to be around men without a female escort. When she complained that she was being punished, her commander ordered her to counseling. After

⁷² Government Accountability Office, “Defense Health Care: Additional Efforts Needed to Ensure Compliance with Personality Disorder Separation Requirements,” GAO-09-31, October 2008, pp. 9-10.

⁷³ US House of Representatives, Committee on Veterans’ Affairs, Personality Disorder Discharges: Impact on Veterans’ Benefits, Prepared Statement of Antonette Zeiss, Ph.D., Acting Deputy Chief Patient Care Services Officer for Mental Health, Office of Patient Care Services, Veterans Health Administration, September 15, 2010.

⁷⁴ American Psychiatric Association, ed., *Diagnostic and Statistical Manual of Mental Disorders (Fourth Edition)*, p. 632; see also US House of Representatives, Committee on Veterans’ Affairs, Post Traumatic Stress Disorder and Personality Disorders: Challenges for the U.S. Department of Veterans Affairs, Statement of Tracie Shea, Ph.D., Psychologist, Post Traumatic Stress Disorder Clinic, Veterans Affairs Medical Center, Providence, RI, July 25, 2007, <http://www.va.gov/OCA/testimony/hvac/070725TS.asp>.

⁷⁵ David S. Martin, “Rape victims say military labels them ‘crazy,’” CNN, April 14, 2012, citing Dr. Liza Gold, clinical professor of psychiatry at Georgetown University School of Medicine.

a five-minute consultation she was diagnosed with Personality Disorder and her out-processing began. She was able to appeal with assistance from civilian doctors who argued that a PD diagnosis could not be made in five minutes.⁷⁶

Richard Wheeler, who was gang-raped and sodomized with a broomstick in 1980, was forced out of the military fewer than two weeks after his assault. He was involuntarily discharged by his commander for personality disorder by a doctor whom he said met with him for 20 to 30 minutes.⁷⁷

A week after being declared fit for service by a civilian psychiatrist in 2007, a military doctor diagnosed MAJ Tess Hayes with personality disorder after one session because she “kept talking about her case.”⁷⁸ The doctor recommended she be involuntarily discharged from the National Guard for PD after 23 years of service.⁷⁹

Seaman Ariana Perez said after one less-than-30-minute consultation with a Navy psychiatrist in Japan, he told her she was going back to the United States. She said, “Oh, I am getting a new job?” and he told her, “No, you are getting discharged for Personality Disorder.” When she asked what that was, he said her “personality doesn’t suit the needs of the Navy.”⁸⁰

An Army Board for Correction of Military Records case also describes a victim who was given a PD diagnosis the same day her commander requested an evaluation. Within three weeks she was discharged after almost eight years of honorable service. At the time of her discharge she was being treated for PTSD due to rape and sexual harassment.⁸¹

⁷⁶ Human Rights Watch telephone interview with Leila Kennedy, March 5, 2014. See also Protect Our Defenders, “Katie’s story,” undated, <http://www.protectourdefenders.com/survivor-story/katies-story/> (after reporting a rape, Katie was given an honorable discharge but was told she “had a pre-existing medical condition, called a Personality Disorder”).

⁷⁷ Human Rights Watch interview with Richard Wheeler, New York, January 13, 2014; see also David S. Martin, “Rape victims say military labels them ‘crazy,’” CNN, referencing PD diagnoses made after 30 minutes.

⁷⁸ Human Rights Watch telephone interview with MAJ Tess Hayes, July 1, 2015.

⁷⁹ Ibid.

⁸⁰ Human Rights Watch interview with SA Ariana Perez, New York, NY January 27, 2016.

⁸¹ Army Board for Correction of Military Records, Docket No. AC95-11136. In another Army BCMR case, the victim said she was diagnosed with a “deep rooted personality disorder” in 15 minutes. Army Board for Correction of Military Records, Docket No. AR20110012424, decided on January 5, 2012. Many others have expressed concern about misdiagnosis. One Air Force veteran 2LT wrote that though she suffered panic attacks and distress following the rape, “My DD-214 does not reflect the true reasons why I was discharged from the military. I do not have a character disorder or personality disorder. I have worked for 27 years as a psychiatric nurse in Los Angeles since discharge from the military. I know a personality disorder when I see one.” Written testimony from 2LT Peggy Wade, May 13, 2014, on file at Human Rights Watch.

PD vs. PTSD Discharge

Data show use of PD as a ground for discharge escalated significantly in all branches (except the Navy, which had already been using it extensively) between 2002 and 2007.⁸² More than half of the survivors we interviewed who left service between 2000 and 2008 told us they had been diagnosed with PD.

An experienced Air Force Sexual Assault Response Coordinator (SARC) said, “I would swear mental health gets paid for denying PTSD claims” after witnessing cases in which the military diagnosed survivors with personality disorder but civilian doctors diagnosed the patient with PTSD.⁸³ An Airman who was diagnosed with PTSD after his assault in 2011 said, “When I asked for a medboard (medical retirement) they started doing Personality Disorder tests.”⁸⁴

PD does not have greater prevalence among females. However, between 2000 and 2010, the services discharged women for PD at rates nearly double what would be expected given the proportion of women in service.

Though we were unable through public records requests to obtain data on the number of sexual assault survivors who received PD discharges, available military data does show that female service members were disproportionately discharged for PD. Research in the general population shows **PD does not have greater prevalence among females.⁸⁵ However, between 2000 and 2010, the services discharged women for PD at rates nearly double what would be expected given the proportion of women in service.** Women accounted for between 25 and 31 percent of PD/AD separations despite constituting only 15 percent of all active duty forces.⁸⁶

⁸² Vietnam Veterans of America, “Casting Troops Aside: The United States Military’s Illegal Personality Disorder Discharge Problem,” March 2012, <http://www.vva.org/PPD-Documents/WhitePaper.pdf>, p. 10.

⁸³ Human Rights Watch interview with Air Force SARC, October 10, 2014.

⁸⁴ Human Rights Watch telephone interview with A1C Chris King, December 4, 2014.

⁸⁵ Randy A. Sansone, MD, and Lori A. Sansone, MD, “Gender Patterns in Borderline Personality Disorder,” *Innovations in Clinical Neuroscience*, vol. 8 (2011), pp. 16-20. Research shows no differences in prevalence by gender in Borderline Personality Disorder.

⁸⁶ In 2013, data provided by the Navy indicates 44 percent of its PD discharges were female. Charts provided by the Navy to Human Rights Watch in response to a FOIA request, on file at Human Rights Watch.

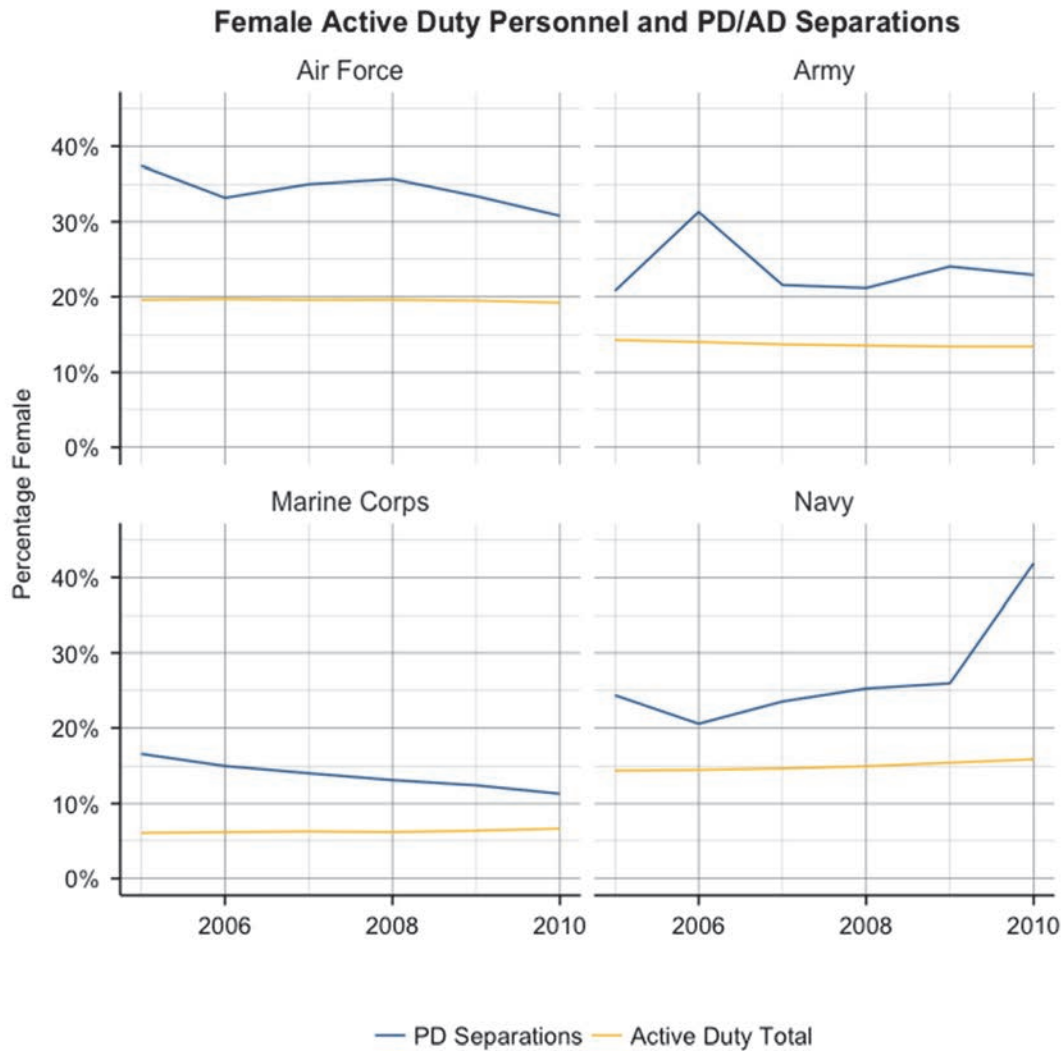


Chart made by Human Rights Watch using data provided in response to FOIA request. © 2016 Human Rights Watch

Though the overall number of PD discharges has dropped, service members still report being diagnosed with PD after reporting a sexual assault.⁸⁷

Prior to reforms, there were misplaced incentives operating on commanders and medical staff to prefer a PD diagnosis to PTSD. Commanders preferred PD because, in contrast to PTSD, it was a diagnosis that allowed for quick dismissals and the deployment of a healthy

⁸⁷ Email from Protect Our Defenders to Human Rights Watch, March 1, 2016.

replacement. In contrast, PTSD is considered service-connected and requires a medical board's assessment, a process that can take two years. During that time, the commander cannot get a healthy replacement for the soldier being considered for medical retirement. Similarly, doctors may face pressure to minimize service members' diagnoses to discharge troubled service members quickly and minimize benefits.

An Army psychologist was captured on tape saying, "Not only myself, but all the clinicians up here are being pressured to not diagnose PTSD." He and a recently retired Army psychiatrist indicated that their commanders encouraged them to diagnose service members with other disorders that would reduce their benefits.⁸⁸

SPC Haynes told us how hard it is to overcome a commander's request for a mental health discharge. After she reported being raped and sodomized in 2006, her commander ordered her to undergo a mental health evaluation to see whether she was fit for service. A judge advocate was able to help her fight the discharge but a month later she was again referred to mental health. This time the therapist said she was fit to serve. However, her commander referred her to mental health a third time. The doctor said, "This is the third time I have seen your 5-17 (other designated physical or mental health condition) paperwork. Clearly they want you out." This time the JAG was told to stay out of it and she was chaptered out of the service for "5-17." In 2010, the ABCMR denied her request to change her records.⁸⁹

An Army Surgeon General review of Army PD discharges in 2007 found no soldier had been improperly dismissed with PD. However, reviewers did not interview soldiers, doctors, or soldiers' families in making their findings.⁹⁰ In 2010, the Army again asserted that no service member had been inappropriately discharged and the DOD asserted that pre-2008 discharges were not characterized by widespread and systematic error, but they have not released information about how the review was conducted.

⁸⁸ Michael de Yoanna and Mark Benjamin, "I Am Under a Lot of Pressure Not to Diagnose PTSD," *Salon*, April 8, 2009, <http://www.salon.com/2009/04/08/tape/>.

⁸⁹ Human Rights Watch telephone interview with Ellen Haynes, March 18, 2014.

⁹⁰ US House of Representatives, Committee on Veterans' Affairs, Personality Disorder Discharges: Impact on Veterans' Benefits, Responses to Army Questions for the Record from Major General Farrissee, September 15, 2010, <https://www.gpo.gov/fdsys/pkg/CHRG-111hrg61755/html/CHRG-111hrg61755.htm>.

PFC Patricia Watson joined the Marines after the 9/11 attacks. After reporting her rape, she says her superiors branded her a “troublemaker” and a “liar.” They singled her out for non-judicial punishment for adultery (because her assailant was married) and fraternization. The nurse she went to for STD tests lectured her about drinking and unprotected sex. Her assailant spread rumors about her. When she later rejected the advances of a sergeant she was singled out for abuse in formation. For example when she had pink eye, in front of the formation, one corporal said loudly to another, “Do you want to know how you get pink eye? You let a guy jizz in your eye.”

Her superiors started looking for things she had done wrong and yelled at her all the time. Soon everyone thought she was a “shitbag” soldier and she began feeling suicidal. At night, she was harassed in her room. On the way to a new shop building, a lance corporal started masturbating in the car and told her to “show me your tits.” After she refused to get in the car with him again, he tampered with her vehicle, putting her life at risk. When she got pregnant later with her husband, she was accused of doing so to get out of her duties and the harassment got worse. She was made to scrub floors repeatedly with a toothbrush. After confiding to a midwife that she was having difficulty and was depressed, she was referred to a therapist on base. When she told him about the rape, he said, “They are most likely to try to administratively discharge you.” A few months later, while on maternity leave, she got notice she was being discharged. Only after all the out-processing was complete did she see she had been discharged on grounds of personality disorder. Watson said, “I didn’t know what it meant but didn’t like it and knew I didn’t have it ... For a long time I thought something was wrong with me. I thought it must be true. I never thought people would lie.”⁹¹ She had no notice she had been diagnosed with PD and no counseling. She later tried to get her discharge upgraded, but was rejected. She has had a hard time getting a job and believes it relates to her discharge papers. Though she was diagnosed with PTSD, the PD label made it hard for her to get benefits or counseling linked to PTSD.⁹²

Reforms

After the GAO reported in October 2008 that the branches’ compliance rates for requirements in discharging based on PD varied greatly (from 40 to 98 percent) depending on the installation, the military was required to report to Congress on compliance with DOD requirements for PD separations.

⁹¹ Human Rights Watch telephone interview with PFC Patricia Watson, October 29, 2013.

⁹² Ibid.

Additional safeguards were put in place to protect service members, including a requirement that service members be counseled in writing that personality disorder does not qualify as a disability and that evidence be provided to indicate that the service member is unable to function effectively because of a personality disorder. DOD also added new requirements to ensure that enlisted service members who have served in imminent danger areas have further safeguards against being wrongly diagnosed with PD.⁹³

Specifically, as of August 28, 2008, PD diagnoses for those who have served in dangerous areas must be corroborated by a psychiatrist or higher-ranking mental health professional, the diagnosis must be endorsed by the Surgeon General of the respective branch, and it must address whether or not PTSD or other mental health conditions are present.⁹⁴ In 2011, these additional procedural requirements were expanded to encompass all other non-disability mental health conditions used as a basis of administrative discharge.

Though the requirements for corroboration, surgeon general endorsement, and addressing PTSD would not apply to sexual assault victims who did not serve in combat zones, a provision was enacted that allows service members who make an unrestricted report of sexual assault and face involuntary discharge within a year of their report to request high-level review of the grounds for separation.⁹⁵

After these stricter safeguards were put in place, the number of PD discharges dropped dramatically across the board. For example, the Army had 1,078 PD discharges in 2007 but only 17 in 2010; the Navy went from 854 PD discharges in 2008 to 237 in 2010.⁹⁶

⁹³ Government Accountability Office, "Defense Health Care: Better Tracking and Oversight Needed of Servicemember Separations for Non-Disability Mental Conditions," GAO-15-266, Table 1, February 13, 2015, <http://www.gao.gov/assets/670/668519.pdf>. An imminent pay danger area is defined by DOD as an area in which enlisted service members were in imminent danger of being exposed to hostile fire or explosion of hostile mines and in which, during the period they were on duty in that area, other members of the uniformed services were subject to hostile fire or explosion of hostile mines. Serving in an area in conflict is also an imminent danger zone.

⁹⁴ Government Accountability Office, "Defense Health Care: Better Tracking and Oversight Needed of Servicemember Separations for Non-Disability Mental Conditions," GAO-15-266, Table 1, February 13, 2015, <http://www.gao.gov/assets/670/668519.pdf>.

⁹⁵ Department of Defense, "Instruction 1332.14, Enlisted Administrative Separations," Enclosure 5, part 11, January 27, 2014, <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>.

⁹⁶ Vietnam Veterans of America, "Casting Troops Aside: The United States Military's Illegal Personality Disorder Discharge Problem," p. 8; Charts provided by the Navy to Human Rights Watch in response to a FOIA request, on file at Human Rights Watch.

Nonetheless, advocates still report seeing victims administratively separated for PD when a medical separation for PTSD may be more appropriate, and they have expressed concern that abuse of non-disability mental health discharges are also continuing in other forms. For example, the number of discharges given for another non-disability mental health condition, adjustment disorder (discussed further below), rose significantly after 2007.⁹⁷

Moreover, in February 2015 the GAO raised concerns that the military services are not effectively monitoring compliance with DOD requirements for other non-disability mental health separations and, as a result, military services may not be affording service members the protections intended by the revised policies.⁹⁸

Harm Caused by a Personality Disorder Discharge

An erroneous mental health discharge has been described as the “ultimate retaliation.”⁹⁹ Apart from loss of benefits, being labeled as having personality disorder is deeply stigmatizing and can have devastating consequences.

By wrongfully applying this label to some sexual assault survivors in the course of discharging them, and subsequently failing to respond to requests to correct the records, the military has unnecessarily subjected survivors to a range of life-altering repercussions.

In addition to repercussions already mentioned, in criminal proceedings for the underlying assault, a PD diagnosis may cast doubt on the reliability of the victim and make prosecutions more difficult. As one veteran told us, “After I was given that [PD diagnosis], everything else I did had less credibility.”¹⁰⁰ One Army victim with a PD discharge says she

⁹⁷ Vietnam Veterans of America, “Casting Troops Aside: The United States Military’s Illegal Personality Disorder Discharge Problem,” March 2012, <http://www.vva.org/PPD-Documents/WhitePaper.pdf>. For example, the report notes that the number of Airmen discharged for adjustment disorder rose from 102 in 2007 to 748 in 2009.

⁹⁸ Government Accountability Office, “Defense Health Care: Better Tracking and Oversight Needed of Servicemember Separations for Non-Disability Mental Conditions,” GAO-15-266, February 13, 2015, <http://www.gao.gov/assets/670/668519.pdf>.

⁹⁹ Human Rights Watch telephone interview with former Naval advisor, December 18, 2013.

¹⁰⁰ Human Rights Watch telephone interview with SGT Laura Ross, June 2, 2014. Similarly, after A1C Joseph White was diagnosed with Personality Disorder in 2013 following his sexual assault report (a diagnosis disputed by his civilian therapist), he said his SAPRO director at the Air Force base was no longer helpful. Human Rights Watch telephone interview with A1C Joseph White, November 4, 2014.

was told she could not testify against her accused rapists during their court-martial because of her “mental health condition.”¹⁰¹

The lack of credibility may impact access to health care. Physical illnesses may be ignored as something fabricated or imagined by a person with a mental health condition. Service members told Human Rights Watch that they had a hard time getting VA benefits due to a perceived lack of credibility when PD appears on their papers. A veteran reported her benefits were denied for PTSD because she had been diagnosed with PD.¹⁰² Others said that they believed the VA downgraded or delayed their benefits as a result of having PD on their papers.

SA Tia Christopher was in advanced language training when she was raped by a fellow seaman. She initially opted not to report her rape in March 2001 after a friend warned her, “If you want a career and don’t want to be labeled a troublemaker, just deal with it.” However, her assailant was stalking her and eventually it became too difficult to cope. When Christopher spoke to her commanding officer, he told her she “asked for it” and asked her if she “thought it was funny” since she was the third report that week. Witnesses to the crime who came forward to corroborate her account got in trouble for underage drinking, despite having been told they would not be punished. Over the remaining six months of her career she was isolated, humiliated by her command (for example, a senior petty officer asked her to “lift up [her] shirt and show [her] big titties”), and ordered not to talk about the case. She described what happened after the assault as so much worse than the rape itself. That summer, Christopher attempted suicide and her command decided to process her out of service. While she was awaiting her final out-processing, she was made to clean the men’s bathroom with other seamen who were in trouble, including one who was a suspect in a sexual assault. She was also forced to remain in the room in which she was raped despite requests to change rooms. Although she had no history of mental health problems prior to service, Christopher received an honorable discharge with a narrative reason of personality disorder. Her command told her she was not a veteran and would not receive benefits. It took a long time before she sought care for her PTSD.¹⁰³

¹⁰¹ Human Rights Watch telephone interview with Diana Gonzalez, December 16, 2013.

¹⁰² Human Rights Watch telephone interview with PFC Patricia Watson, October 29, 2013.

¹⁰³ Human Rights Watch interview with Tia Christopher, New York, February 21, 2014.

Moreover, depending on the year, between 25 and 46 percent of PD/Adjustment Disorder (AD) discharges were characterized as something other than honorable, which greatly impacts benefits as discussed above.¹⁰⁴

Although PD diagnoses are harder to come by now and overall military handling of sexual assault has improved since many of these discharges occurred, the various ways in which a PD label on discharge papers continues to harm survivors are described in more detail below. It is important to understand the magnitude of these harms because they continue unaddressed as long as the military fails to provide meaningful opportunity to review wrongful PD discharges (and other discharges), discussed in more detail in Chapter V.

Shame

Survivors of sexual assault often described the personal devastation and shame they felt at being labeled as having a personality disorder. Service members feel they have been labeled “damaged goods” and their “identity and self-worth as once proud warriors destroyed.”¹⁰⁵ Some choose to hide the fact that they were in service rather than have to show their DD-214.¹⁰⁶

The following are some of the emotional harms described to Human Rights Watch by survivors with PD discharges:

- Cathleen Perkins joined the Army in 1989 to escape a difficult home life and also to make her family proud. She thought by joining the Army she could make a difference. After two years of service during which she was often ill with a stomach ailment, was repeatedly assaulted, and treated like a “whore” by her peers (“We used to have prostitutes, now we have you”), her supervisor gave her notice of discharge. When she got her papers, she learned her separation was on the basis of “Personality Disorder.” The diagnosis was made after a 10-minute discussion

¹⁰⁴ “Active Duty/Reserve/Guard Separations Under Personality Disorders & Adjustment Disorders By Other Demographics, As of: FY 2000-JUL 2010,” 11-L-0109 VVA (OUSD P&R) 255-272, http://www.vva.org/PPD-Documents/11_L_0109VVA_OUSDP_R_73_309.pdf.

¹⁰⁵ US House of Representatives, Committee on Veterans’ Affairs, Personality Disorder Discharges: Impact on Veterans’ Benefits, Statement of Amy Fairweather, Policy Director, Swords to Plowshares, September 15, 2010, <https://www.gpo.gov/fdsys/pkg/CHRG-111hrg61755/html/CHRG-111hrg61755.htm>.

¹⁰⁶ Human Rights Watch telephone interview with Megan Stone, May 30, 2014. Stone was raped by a superior on a Navy destroyer while she was at sea. After reporting the attack she was diagnosed with a personality disorder and discharged.

with a psychiatrist. When she was being processed out, in Delaware, she was denied a ribbon and told, “We save the ribbons for the real heroes, soldiers.” Corporal Perkins was devastated and felt like she “was a piece of trash to them.... It was bad enough to be booted out, but the lack of dignity made it much worse.”¹⁰⁷ Over the past 25 years, she has felt intense shame and stigma from the diagnosis. Her family says, “See, it’s not just me that thinks you’re fucked up,” and still uses it as an excuse to abuse her. She said it “latches on to your heart and crushes you—destroys you.” She will not claim a veteran’s preference for jobs because she does not want to show her discharge papers saying she has a personality disorder. Corporal Perkins applied to correct her records in 1992 “just for her sense of self” and because she wanted to be treated fairly. She was denied.¹⁰⁸

- Third Class Petty Officer Carroll reported sexual harassment by her supervisor to her lieutenant in 1992. The next day she was ordered to get a mental health evaluation. When she objected, she was told she would get a dishonorable discharge for making a false allegation of sexual harassment if she did not go. Six months later when she reported for duty she was told to go to the divisional support person to sign discharge papers. She had no idea she had been diagnosed with personality disorder and has not been diagnosed with it since. Though she was able to get an honorable discharge, she described the DD-214 narrative that labeled her as having PD as a “stain” and “the greatest sting, biggest embarrassment” and dreads trying to explain it to potential employers.¹⁰⁹ She once defaced her form to hide it from a potential employer. She has been diagnosed with PTSD.¹¹⁰
- Amy Quinn, who was raped three times in the Navy and set on fire by her peers, also received a PD discharge in January 2005. She said the greatest impact of “being stuck with the false personality disorder diagnosis” has been psychological—she says, “It took me ten years to get myself together after the personal torture I experienced on that ship.” She has always thought, “What was

¹⁰⁷ Human Rights Watch telephone interview with CPL Cathleen Perkins, November 6, 2013.

¹⁰⁸ Ibid.

¹⁰⁹ Human Rights Watch telephone interview with PO3 Miranda Carroll, January 22, 2015.

¹¹⁰ Email to Human Rights Watch from PO3 Miranda Carroll, February 13, 2016.

wrong with me?” and is disappointed that her Navy career, which she hoped to last a lifetime, ended prematurely.¹¹¹

- An Army veteran, Eva Washington, said, “It is bad enough to go through military sexual trauma, but to be discredited and labeled is difficult to overcome and causes so much damage. PD is another level of betrayal because it is so stigmatizing.... People think there is something wrong with me and don’t realize it was a label just stuck on people.” She has found that even within the military sexual trauma community, there is shame attached to the PD diagnosis.¹¹²
- Brian Lewis, a Navy veteran, says he carries his discharge “as an official and permanent symbol of shame, on top of the trauma of the physical attack, the retaliation and its aftermath.”¹¹³
- PFC Burns says that after 13 years, she still cries when she sees her discharge papers because she finds it so shameful.¹¹⁴
- Seaman Perez said she was devastated by her personality disorder discharge when it happened in 1994 and still feels shame to this day because it made her feel she “was not good enough for the Navy.”¹¹⁵
- Shirley Lawson was assaulted a week before graduating from Lackland Air Force in 1979. She decided not to report because she thought she would be leaving soon and worried she would not be believed. However, when she moved on to Tech School, she could not put the assault behind her. She felt like she was still treated like a “mattress” and was continually harassed. When later she got pregnant with her husband, she was sent in for a psychological evaluation that resulted in an administrative separation in 1981 for “apathy, defective personality, unsuitable.” She says she was fit when she started, and now she is humiliated whenever she has to show her DD-214 for veterans’ benefits, jobs, even veterans’ discounts.¹¹⁶

¹¹¹ Human Rights Watch telephone interview with Amy Quinn, September 16, 2015; also written testimony on file at Human Rights Watch.

¹¹² Human Rights Watch telephone interview with PFC Eva Washington, October 21, 2013.

¹¹³ Testimony of Brian Lewis before the Senate Armed Services Committee, March 13, 2013, <http://www.protectourdefenders.com/testimony-by-brian-k-lewis-before-the-senate-armed-services-committee-march-13-2013/>.

¹¹⁴ Human Rights Watch telephone interview with PFC Elizabeth Burns, November 25, 2013.

¹¹⁵ Human Rights Watch interview with SA Ariana Perez, New York, January 27, 2016.

¹¹⁶ Human Rights Watch telephone interview with Shirley Lawson, January 23, 2014.

Eva Washington said she was a top student who left for boot camp two days after graduating from high school in 2000. She enlisted both because she wanted to serve her country and because her family could not pay for college. Because of her test scores, she was selected to do intelligence work. After excelling in boot camp and training, she was encouraged to have a military career. Her superiors said they would nominate her for West Point and her future seemed assured. Her plans were cut short, however, after her date to the Marine Corps ball raped her, beating her badly so her battle buddy (assigned partner) reported the assault to her chain of command. She was taken to a hospital where she was interviewed by civilian and military authorities. Her assailant was questioned but no prosecution was pursued. When she returned from emergency leave, she “got the message loud and clear. I needed to keep quiet, deal with it and move on.”

In the ensuing months, she went from star soldier to target for retaliation. She received multiple disciplinary notices (article 15s) for behavior ranging from “failure to soldierize” (for having a pale pink, not peach, manicure, or for having boxers over her military underwear, or for wearing lip gloss) to failure to obey direct orders (for wearing an extra item of clothing). Before reporting the rape, the same lip gloss and nail polish were not a problem. At night, a drill sergeant would repeatedly come into her room while she was sleeping and stand over her bed in order to intimidate her. He made comments about her breasts and used excessive hazing techniques in order to punish her. Private Washington told her father about the harassment. He called their congressman who then called her supervisor who called her into his office. She was ordered to tell the congressman, in front of her superiors, that nothing was wrong.

After that, Washington was singled out for even more abuse. It was clear to her they wanted her out of service. West Point was taken off the table. She was confronted in the bathroom and threatened by friends of her assailant who warned her not to talk about what happened. She was taken out of her room in the middle of the night repeatedly for extra physical training, she believes in retaliation for speaking out. She was raped two more times, which she did not report because she feared more retaliation. The culture was such that they could “smoke the hell out of you any time and have you do push-ups and sit-ups until you throw up. If you complained, it got worse.” Also, she said, “Once you are singled out people stay away from you to avoid also being subjected to additional hazing.” Eventually she agreed to marry someone she barely knew in order to change housing in a desperate effort to avoid hazing at night, though they



Eva Washington after finishing boot camp in 2000. She was raped repeatedly while in training for Army Intelligence and given a Personality Disorder discharge without having a medical diagnosis.

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still did not allow her to leave the barracks. She said the military made it clear she “was property of the US military.” She said, “My enemy wore the same uniform as me.”¹¹⁷



Eva Washington after finishing boot camp in 2000. She was raped repeatedly while in training for Army Intelligence and given a Personality Disorder discharge without having a medical diagnosis.

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One Friday about six months after the second rape, she was taken to a storage room and told she would be given an honorable discharge. Her drill sergeant ordered her to sign some papers and put her on a flight out that afternoon. She had no idea what was on the papers but was told she had no choice since she could not be reclassified, as she had requested, to avoid her assailant. They cut up her ID and gave her a plane ticket (the cost of which they then took out of her pay). She did not look at the paperwork until a long time later. Only then did she realize she had been given a “Personality Disorder” as a narrative on her discharge papers and would not be allowed to reenlist. She still did not know what it meant and had no history of mental health problems.

She found out what it meant after she was thrown out of Reserve Officers Training Corps (ROTC) in a university near her home. Despite a 4.15 grade point average and a clean bill of health from the military, several months into the ROTC program she was pulled aside by its leader and told she had a black mark on her record and could not participate any longer. Both civilian and VA doctors have confirmed she had PTSD and never had PD. However, she is afraid to go to the Boards to change her record because of the “amount it would rip apart my life. I don’t want to do it until I know I have support from Congress.” Since her discharge she has been homeless at times and has had difficulty in getting a job because of

the PD label on her paperwork. Once government employers see her paperwork, she loses job interviews.¹¹⁸

Medical Care

Service members discharged with PD, which is considered a pre-existing condition, may not believe they are eligible for VA care so they often do not even try to get it, which may

¹¹⁷ Human Rights Watch telephone interview with PFC Eva Washington, October 21, 2013.

¹¹⁸ Human Rights Watch telephone interview with PFC Eva Washington, October 21, 2013.

carry long-term costs. Some survivors are even told by their command that they are not veterans and will not receive health care.¹¹⁹ As a veterans' service organization testified,

Veterans come to Swords to Plowshares in financial and psychological crisis, many believe that they are not eligible for VA care and benefits because personality disorders, as a pre-existing condition is not service connectable. Even with the help of our legal and social services staff, this status causes significant delays in care, causing unnecessary exacerbation of their symptoms ... [T]he cost in suffering, poverty, and the shame inflicted on warriors is immeasurable.¹²⁰

Even for those who do seek help at the VA, being mislabeled with PD may have insidious consequences. Survivors told Human Rights Watch that they were denied medical care because doctors said their injuries were “all in their head.”¹²¹ Moreover, it may impact available treatment. A counselor who works with veterans told Human Rights Watch that she has found other “old school” counselors refuse to allow those with personality disorder in their records into group therapy sessions because “they will go after each other.”¹²² While those properly diagnosed with PD may require special consideration in their medical care, the military's failure to properly diagnose PD has ongoing ramifications for veterans in the VA system.

¹¹⁹ Human Rights Watch interview with Tia Christopher, New York, February 21, 2014.

¹²⁰ US House of Representatives, Committee on Veterans' Affairs, Personality Disorder Discharges: Impact on Veterans' Benefits, Statement of Amy Fairweather, Policy Director, Swords to Plowshares, September 15, 2010, <https://www.gpo.gov/fdsys/pkg/CHRG-111hrg61755/html/CHRG-111hrg61755.htm>. Service members with General discharges also told HRW that they did not believe they were eligible for VA care because they did not have fully honorable discharges. E.g. Human Rights Watch telephone interview with Gayle Dunn, November 26, 2013.

¹²¹ Survivors who have mental health diagnoses in their files, even if not on their discharge papers, report similar problems with medical care. A retired Army 1st sergeant told Human Rights Watch that it took nearly a year for VA doctors to treat her serious vision problems because doctors attributed her dizziness and balance issues to trauma from sexual assault rather than a physical ailment resulting from a head injury sustained on another occasion. Human Rights Watch telephone interview with Irene Lowe, January 6, 2016.

¹²² Human Rights Watch telephone interview with PO3 Miranda Carroll (who is now a counselor working with veterans), January 22, 2015.

Brian Lewis was the top junior ROTC class in his battalion when he joined the Navy out of high school in 1997. Three years later he was raped at knifepoint by a senior non-commissioned officer. He reported it to the chain of command but he was told not to report it to Naval Criminal Investigative Service (NCIS) because the assailant was “mission critical”—he held an important position. Over the course of the following year, Brian suffered from severe PTSD and was put on limited duty and began the process for medical retirement. While he was preparing to go, he saw in his paperwork that he had been given a PD diagnosis in addition to PTSD. After he complained about his treatment through several channels, his doctor changed his diagnosis from PTSD to personality disorder, claiming that he “manifested immediate danger.” Despite having gone through extensive psychological testing previously for work on a submarine and showing no sign of PD, within a few weeks he was out of service with a General Under Honorable Conditions discharge for “Personality Disorder.” He described his discharge as “soul crushing.”¹²³ Although the VA also diagnosed him with PTSD as a result of his rape shortly after his discharge, the Board for Corrections refused to change his discharge classification. He told Human Rights Watch he carries his discharge “as an official and permanent symbol of shame, on top of the trauma of the physical attack, the retaliation and its aftermath.”¹²⁴ Before entering college, he had to discuss his diagnosis with the disability services people at school. He also had to submit his discharge papers to financial aid and again explain what happened. Now a law student, he worries about how it will impact his bar admission and employment opportunities. Because he was not medically retired, his partner lost health and education benefits.¹²⁵

Below are some experiences survivors described to Human Rights Watch in which they felt their discharge papers impacted their care:

- Cathleen Perkins had trouble getting her Crohn’s disease diagnosed because doctors did not believe her complaints after seeing PD on her record. She suffered in great pain for years before her complaints were taken seriously.¹²⁶
- A lance corporal in the Marines who was depressed after two sexual assaults was diagnosed with “histrionic personality disorder.” When she later had a bad reaction to dye during a medical test, the doctor insinuated she was lying, which

¹²³ Human Rights Watch telephone interview with Brian Lewis, November 22, 2013.

¹²⁴ Testimony of Brian Lewis before the Senate Armed Services Committee, March 13, 2013, <http://www.protectourdefenders.com/testimony-by-brian-k-lewis-before-the-senate-armed-services-committee-march-13-2013/>.

¹²⁵ Human Rights Watch telephone interview with Brian Lewis, November 22, 2013.

¹²⁶ Human Rights Watch telephone interview with Cathleen Perkins, November 6, 2013.

her mother believes stemmed from the PD diagnosis. The dye caused kidney failure.¹²⁷ She was later diagnosed with PTSD and Traumatic Brain Injury resulting from her assault.

- An Air Force veteran, Josie Weber, said when she was treated for cancer she was put on “danger watch” because of her personality disorder diagnosis.¹²⁸
- It took Audrey Dixon seven years of appeals for her to get benefits from the VA, which she attributes to the PD diagnosis. In the meantime, she paid for counseling herself. Doctors diagnosed her with PTSD and depression, which she thinks may have been avoided if she had gotten help immediately.
- Though PFC Patricia Watson was diagnosed with both PTSD and PD, she says the PD label made it hard for her to get benefits or counseling linked to PTSD.¹²⁹
- Sergeant Ross, a survivor of military sexual assault, said of her discharge papers, “When I read ‘personality disorder,’ I collapsed in tears.” She felt PD made her even less credible when she tried to get benefits from the Army. “It was hard to be treated that way by an organization I put my heart into.... Not recognizing it is the worst thing they do to victims.”¹³⁰
- Ruth Moore was raped in the Navy twice in 1987. Unable to get help, her life spiraled downward after contracting an STD due to the assaults. She attempted suicide and was discharged from service with a personality disorder. “Outprocessing” advised her to waive all claims to the VA as she would get health care through her active duty spouse. Over the next six years she struggled with relationships and had a hard time holding jobs because she did not trust male supervisors. Increasingly she showed symptoms of PTSD, but she was repeatedly denied help from the VA where administrators told her they could not help her because personality disorder is a pre-existing condition.¹³¹ Eventually, Moore met a Military Sexual Trauma Coordinator who listened to her at another VA hospital. Her psychiatrist and counselor determined Moore did not have a personality disorder.

¹²⁷ Human Rights Watch interview with Judith Fowler, San Jose, April 23, 2015.

¹²⁸ Human Rights Watch telephone interview with Josie Weber, April 10, 2014.

¹²⁹ Human Rights Watch telephone interview with PFC Patricia Watson, October 29, 2013.

¹³⁰ Human Rights Watch telephone interview with SGT Laura Ross, June 2, 2014.

¹³¹ Human Rights Watch telephone interview with Ruth Moore, October 22, 2014.

With their help, and that of a senator, she was ultimately able to get adequate benefits—23 years after leaving service. She says, “If I had been treated promptly and received benefits in a timely manner, back at the time of my discharge, my life would have been much different. I would not have had to endure homelessness and increased symptomology to the point where I was suicidal ... and I firmly believe that I would have been able to develop better coping and social skills.”¹³²



Ruth Moore as a Navy Seaman in 1987. After being raped twice in service she was given a Personality Disorder discharge and had to fight for 23 years to get benefits. © 2016 Private

¹³² US House of Representatives, Committee on Veterans' Affairs, *Invisible Wounds: Examining the Disability Compensation Process for Victims of Military Sexual Trauma*, Testimony of Ms. Ruth Moore, July 18, 2012, <https://veterans.house.gov/witness-testimony/ms-ruth-moore>.

Nina Carr joined the Air Force in 1981 to escape poverty and get an education. In 1983, she had top secret clearance and was assigned to communications. She loved her work. When her boss took an inappropriate interest in her, she complained to a chaplain and to a senior officer who told her to “go along with it” because “that is how it works.” After that, Carr told Human Rights Watch, she was reprimanded and lost a promotion twice. Her supervisor scheduled her for a 12-hour overnight shift alone in a vault with him. That night he raped her. After the assault she went to a local clinic for a rape kit and medical attention. They called her supervisor and he told them she was psychotic. She was taken in a straitjacket to Lackland air base where she was held in a hospital for 115 days without her belongings and without notifying her family while they made an effort to dishonorably discharge her. After her mother reached out to Congress, Carr was given an honorable discharge with a “Personality Disorder” narrative—which was factually inconsistent, since with “top secret clearance” she could not have had a pre-existing mental health issue. Later when she had severe endometriosis (a condition in which tissue grows outside the uterus) and needed medical care, she was initially ignored by the VA because of her “mental health issues.”

When the surgery went badly and she tried to raise her concerns, she said she was told by the surgeon, “You just have mental health issues. Get over it.” As a result she had to have multiple surgeries and now has chronic debilitating health problems and is fully physically disabled. Although she is frustrated with being unfairly discredited by her discharge papers, she has not sought to revise them because she is “tired and doesn’t want another battle” on top of her struggles with the VA.¹³³

Jobs

Because an administrative discharge for a pre-existing condition may leave people without retirement pay and ineligible for benefits, returning to civilian employment is all the more important. However, many employers ask to see a veteran’s discharge papers before hiring them and that can be the end of the road for many who have bad papers.

For some positions—particularly in security or law enforcement, but also for civil service positions—a PD label may be disqualifying. Jobs that require security clearance may also be unavailable to those with mental health discharges. Even for jobs that are not restricted, the stigma of a mental health label may make employers reluctant to take a chance on an applicant. Survivors report that even after having a positive interview, job offers would fall through once employers saw the DD-214. Some survivors said they simply

¹³³ Human Rights Watch telephone interview with Nina Carr, November 25, 2013.

stopped applying for jobs as a veteran because they were embarrassed about their papers.¹³⁴

Roseanne Henderson was assaulted in 2007 by her Navy recruiter at age 18 and then harassed when she was at sea. After complaining, she was told by command, “If we send you back on a ship this will happen again.... You’d be better off serving your country as a Navy wife.” During her discharge process, her supervisor promised her a medal and said she would have no problem finding work, which was important as she was poor and did not have family. When she got her DD-214, she saw the discharge was honorable but the narrative said PD. She said, “Now I can’t even get a security job.”¹³⁵ She was told she had personality disorder because she was emotionally unstable after her rape. Roseanne said, “It’s like if someone said because your car was broken into, we are going to take away your future. Except it was my body.”¹³⁶ Roseanne also got only half of her GI Bill benefits. She attempted to change her discharge narrative at the BCNR but, despite submitting medical documents indicating she never had PD, was denied.¹³⁷

Several other survivors told Human Rights Watch that they had difficulty finding employment as a result of having PD on their discharge papers:

- As a result of PD, Ruth Moore is ineligible to hold any state or government position. Civil service jobs are also out of reach.¹³⁸
- Eva Washington said she believes her inability to get a job stems from the PD label on her paperwork. Once government employers see her paperwork, she loses job interviews. She has to explain her discharge—and her rape—when she applies for jobs.¹³⁹
- Diana Gonzalez, who deployed as part of an all-male unit that took part in Desert Shield in the Persian Gulf in 1990, was given a PD discharge after struggling with PTSD following a gang rape by other soldiers in her barracks. When she looked for jobs, she had to give prospective employers her DD-214 so they could get credit for

¹³⁴ Human Rights Watch telephone interview with PFC Hillary Stevens, October 3, 2013; Human Rights Watch interview with SA Ariana Perez, New York, January 27, 2016; Human Rights Watch telephone interview with William Minnix, February 12, 2015.

¹³⁵ Human Rights Watch telephone interview with Roseanne Henderson, December 5, 2014.

¹³⁶ Ibid.

¹³⁷ Human Rights Watch telephone interview with Roseanne Henderson, December 5, 2014.

¹³⁸ Human Rights Watch telephone interview with Ruth Moore, October 22, 2014.

¹³⁹ Human Rights Watch telephone interview with PFC Eva Washington, October 21, 2013.

hiring a veteran. However, she found employers would not call her back once they saw her papers.¹⁴⁰

- Samantha Drake said she was subject to nearly constant harassment and bullying after her roommates reported—against her wishes—that she had been sexually assaulted at a party off base. At the time, she was in Power School in training for the Navy’s nuclear program. She said that in class, her peers would make an effort to get instructors to talk about rats and make rat noises in reference to her because they believed she made up the assault to get out of trouble for drinking at a party. The strain of the harassment eventually got to her and during her next level of training she faked a suicide attempt in order to get out of service. She was processed out quickly and only saw it was on the basis of PD when she was signing her discharge papers but she did not know what it meant. Later it affected her return to civilian life. She described positive job interviews that would not result in an offer after the employer looked into her background. She too was diagnosed with PTSD and has never had a PD diagnosis. She said the PD discharge “ruined my life.”¹⁴¹
- Private First Class Burns was raped and sodomized by a fellow Marine while at work in 2000 shortly after entering service. She said he threatened to ruin her career if she reported so she did not. However, after being raped a second time at gunpoint by a member of the military police, she confided in an officer she trusted. Almost immediately, she was sent to a Naval hospital to meet with a psychiatric intern. After three meetings she was given a diagnosis of personality disorder and PTSD and was quickly processed out. She only learned of the PD when she was leaving. At that point she also learned her discharge was “General Under Honorable Conditions” though she had been told it would be honorable.¹⁴² She told Human Rights Watch she has found it hard to get a job ever since. For one job, she was not able to get security clearance to carry a weapon.¹⁴³

¹⁴⁰ Human Rights Watch telephone interview with Diana Gonzalez, December 16, 2013; email from Diana Gonzalez to [name withheld], October 27, 2013, on file at Human Rights Watch.

¹⁴¹ Human Rights Watch telephone interview with MM3 Samantha Drake, November 7, 2013.

¹⁴² Human Rights Watch telephone interview with PFC Elizabeth Burns, October 30, 2013.

¹⁴³ Human Rights Watch telephone interview with PFC Elizabeth Burns, November 25, 2013.

Amy Quinn told Human Rights Watch she joined the Navy in 2002 as soon as she finished high school. She decided to enlist out of a sense of duty following the 9/11 attacks. In boot camp she was one of the top four in her class and received the “shipmate” award for the person who most exemplified the ideal shipmate. She said her trouble started after she rejected the advances of her master chief. After that, others told her he was looking for her to make a mistake so he could kick her out of “his” Navy. She was raped but did not report for fear of what would happen since she was already labeled a troublemaker. Later, on deployment, due to sedatives she had been given to help her cope with the news that her brother had been shot, she fell asleep on a chair during a meeting.

Her shipmates sprayed her body with aircraft cleaner and set her on fire with a lighter. She survived without serious injury due to her fire-retardant gear, but the perpetrators were only given an oral reprimand and she was told she was overreacting. Her supervisor switched her to a different unit but she was put on a night shift with a first class petty officer who groped her breast and said in his country her “clit would be cut off.” Her complaints about harassment went nowhere. She requested an audience with superiors on November 26, 2004, and listed her grievances for the record and asked for a transfer. Instead, she was ordered to work the night shift with the subject of her complaints. She refused and was punished as a result. She said for five days she had to stand at attention in front of the maintenance shop six to eight hours a day with breaks only to eat or use the bathroom.

A sympathetic senior enlisted person told her to speak to the chaplain. She did. The next day she was told to pack her things. She was sent to the Temporary Processing Unit in Norfolk. At first they did not have her papers, but when they found them and saw she had made complaints, she was told she was not welcome there. She was discharged a few days later. Initially the characterization was General but she fought for an Honorable Discharge, though the narrative reason was “Personality Disorder.” Her command told her they were doing her a favor and that it was the only way to get what she wanted—to be away from the ship. Her command also assured her that the discharge would not have any ramifications. Later, potential employers rejected her for jobs in security and law enforcement because even though her discharge was honorable, they could not hire someone whose papers said “Personality Disorder.”¹⁴⁴

Audrey Dixon joined the Navy in 1999 when she had just turned 18 years old. She loved the Navy and enthusiastically volunteered for everything from the Special Olympics to funeral duty and as a result received multiple awards. She was studying to be a sonar technician and “living life up” when a sailor came

¹⁴⁴ Human Rights Watch telephone interview with Amy Quinn, September 16, 2015; also written testimony submitted to the Judicial Proceedings Panel on file at Human Rights Watch.

into her room and attempted to rape her. She managed to escape and reported it to her command. It turned out he was suspected to be a serial offender. Four days after the investigation began he appeared in the barracks room and chased her when she fled. In the following weeks, she was no longer able to sleep in her room. She felt withdrawn and no longer volunteered for extra duties. Instead of sending her to mental health for counseling, she was told to go to the chaplain.

Ultimately she took strong Motrin in an attempted suicide that she described as a cry for help. Not long after, she was given a “General Under Honorable Conditions” discharge with a PD narrative in October 2001. At the time she was given her papers, she saw “General Under Honorable Conditions” and thought it was okay. She said she didn’t understand the implications of getting the “Personality Disorder” narrative. When she tried to get a job working on submarine manufacturing, she found that she could not get sufficient security clearance because of the personality disorder label and therefore couldn’t work on certain projects. She also had to pay back part of her enlistment bonus. It took seven years of appeals for her to get benefits from the VA, which she attributes to the personality disorder diagnosis. In the meantime, she paid for counseling out of her own pocket. Doctors have diagnosed her with PTSD and depression, which she thinks may have been avoided if she had gotten help immediately. She said, “I wanted to stay in the military. I just wanted help. I had all these dreams.”¹⁴⁵

Diana Gonzalez joined the Army in 1988. She said that after reporting being drugged and assaulted by other soldiers, she was initially threatened with charges of adultery because she was married. Ultimately her perpetrators were punished, but in the process her battalion commander made it clear he would end her career for “pulling down his reputation.” She was harassed and abused by her peers who said “she got what she deserved.” After Iraq invaded Kuwait in 1990, Gonzalez was sent to Saudi Arabia. There she continued to suffer from harassment and also began to have health problems, including PTSD from the assault as well as physical injuries from hauling sandbags in Saudi Arabia. Eventually her commander viewed her as a problem and wanted her out of service. She was discharged honorably at the end of 1991. However, when she got her discharge papers she saw the narrative reason was “borderline personality disorder” and that she was prohibited from re-entering service. She said when she saw it she thought, “I’m not crazy. What are they talking about?” She did not realize what the DD-214 meant until she had a hard time finding work later. She told Human Rights Watch she has “struggled for two decades with this ‘diagnosis.’” Later she was diagnosed with PTSD, not PD. At the time of her discharge, she was told her discharge was “not appealable” and so she has not tried to change it.¹⁴⁶

¹⁴⁵ Human Rights Watch telephone interview with Audrey Dixon, November 14, 2013.

¹⁴⁶ Human Rights Watch telephone interview with Diana Gonzalez, December 16, 2013.

Enlistment Bonus

An administrative discharge for personality disorder may require the service member to repay part of their enlistment bonus. Five out of the six separation codes for personality disorder require the service member to repay any unearned portion of their bonus.¹⁴⁷ Service members told us of their surprise when they received a letter telling them they owed the military money not long after being forced out of service against their will.¹⁴⁸ For many, repaying the bonus is a significant financial hardship. One rape survivor from the Navy was given 30 days' notice to repay a nearly \$5,000 enlistment bonus. By the time she got the letter due to a change in address, she only had a week to gather the funds.¹⁴⁹

Other Consequences

Survivors reported other unanticipated negative consequences that resulted from their PD diagnoses and discharges, ranging from losing custody of their children to being thrown out of school. Service members also report daily humiliations such as having to show and explain their DD-214 form to get a veterans' license plate or a discounted gym membership.¹⁵⁰

Sergeant Colleen Bushnell had a promising military career until she reported a sexual assault after seven years of service in 2004. She said she had risen through the ranks quickly and, in recognition of her high performance, she was selected to be an instructor in her specialty for the Department of Defense. After the person she accused committed suicide, her Air Force unit made it clear Bushnell was persona non-grata. She said her performance reviews went from stellar to poor. She was ostracized, blamed for the death, and harassed. Ultimately, she became depressed and attempted suicide and was given a PD discharge despite having no prior history of a mental health condition and having excelled in school prior to joining the Air Force. Bushnell successfully fought the PD discharge but the diagnosis remained in her paperwork and ultimately had serious repercussions. She lost custody of and all physical access to her two children because she did not have the funds to prove to the court that she was misdiagnosed, and her ex-husband successfully used it against her in custody proceedings to show she was unfit. She can now only communicate with her children by mail. ¹⁵¹

¹⁴⁷ US Department of the Army, Separation Program Designator Code Table, http://veteransinfo.tripod.com/spd_code_final.pdf (accessed January 7, 2016), p.8.

¹⁴⁸ Human Rights Watch telephone interview with Audrey Dixon, November 14, 2013; Human Rights Watch telephone interview with 1LT Lucy Gray, October 3, 2013.

¹⁴⁹ Human Rights Watch telephone interview with IS2 Lauren Morris, October 31, 2014.

¹⁵⁰ Human Rights Watch telephone interview with PFC Hillary Stevens, October 3, 2013.

¹⁵¹ Human Rights Watch telephone interview with SGT Colleen Bushnell, November 14, 2013.

Hillary Stevens joined the military in 2004 at age 18. She loved her specialty and said, “I was going to be a lifer, make a career out of it.” She said that changed in September 2005 when she was brutally raped off base by a veteran. She was a virgin at the time and was devastated. She had to report the assault to her superiors since she missed morning formation because she was still being treated in a hospital emergency room. Had she not reported, she would have risked being found Absent Without Leave (AWOL). Following her report, she was harassed by her chain of command. She said about reporting: “It’s like being assaulted again.” She told Human Rights Watch that her supervisor told her if she followed through on criminal charges, she would be dishonorably discharged. Her superiors told her she had a “vivid imagination.” In despair, she attempted suicide. After treatment for a suicide attempt, Stevens returned to her unit and was informed she would be discharged. She thought it was a medical discharge and that she would be eligible for benefits. Later she learned that though the discharge was honorable, she was not getting benefits and had been discharged on grounds that she had a “Personality Disorder.” She said she had no idea what it meant and had never met the doctor who signed the paper saying she had a borderline personality disorder. She only recalled meeting with a military psychologist for 30 minutes during which time he avoided discussion about the assault and told her she was not adapting to military life due to her self-harming behavior. When informed of the discharge, Stevens asked to see a lawyer but was told if she was unwilling to accept her diagnosis, she would be dishonorably discharged. Within one month of her assault, Stevens was discharged from the Army.¹⁵²

After her discharge, Stevens had a serious accident and broke her leg. While in a wheelchair, she slipped and injured her spine and also lost bowel and bladder control. When she sought help at the VA Hospital in Indiana, she was told it was “in her head” because they had seen her papers indicating she had personality disorder. She also believes the papers adversely impacted her benefits’ claim because they thought she was exaggerating her disabilities. Later, a counselor diagnosed her with PTSD.¹⁵³

The “Personality Disorder” label had other negative consequences. Stevens had to turn in her discharge papers for everything from veterans’ license plates to job applications to getting a discount at the gym. She stopped applying for jobs as a veteran because she was embarrassed about her papers. After enrolling in college she said she was unexpectedly called into the Dean’s office. The dean had her DD-214 papers in front of her and told her she was a “disgrace to the university” and expelled her from the school.¹⁵⁴ Veterans are required to submit DD-214s to schools to verify their veteran status. Stevens said that her papers came to the Dean’s attention after she requested extra time to take tests due to Traumatic Brain Injury.¹⁵⁵

¹⁵² Human Rights Watch telephone interview with PFC Hillary Stevens, October 3, 2013.

¹⁵³ Human Rights Watch telephone interview with PFC Hillary Stevens, October 3, 2013.

¹⁵⁴ Human Rights Watch telephone interview with PFC Hillary Stevens, October 3, 2013.

¹⁵⁵ Email from PFC Hillary Stevens to Human Rights Watch, February 18, 2016.

Stevens first learned of the Board for Correction of Military Record's existence in 2013. It was then she attempted to have her DD-214 changed. Her initial effort to have her discharge changed at the Army BCMR was denied in July 2013 in a decision that misstated the record.¹⁵⁶ With help from pro bono lawyers, she appealed the decision and in March 2015 the narrative reason for her discharge was changed to "Secretarial Authority."¹⁵⁷

¹⁵⁶ Board for Correction of Military Records, Docket No. AR20120019264, decided on July 23, 2013. Her application was denied in part because the Board said the VA had also diagnosed her with PD, but in fact the VA had simply accepted the faulty Army diagnosis. It also said she had attempted suicide before joining the service, which was mentioned in the VA notes, but the applicant contends her suicidal thoughts began after the assault. The Board claimed not to have received materials she had sent.

¹⁵⁷ Human Rights Watch telephone interview with PFC Hillary Stevens, October 3, 2013. "Secretarial Authority" is a more neutral reason for a discharge and may be used for separations due to funding cutbacks, for example.

III. Adjustment Disorder and Other Mental Health Discharges

Adjustment Disorder Discharges

As discussed above, because DOD requires service members to be physically and psychologically suitable for military service, a commander can involuntarily separate a service member if they have any mental health condition that interferes with their ability to function.

If the mental health condition was not incurred or aggravated while in service (or is not considered a disability), it is considered a non-disability mental health condition and the service member is ineligible for disability benefits unless they can prove it is connected to service.¹⁵⁸

While PD discharges have declined in recent years, advocates and counsel have expressed concern that abuse of non-disability mental health discharges are continuing under another name—primarily “Adjustment Disorder.”¹⁵⁹ Fear of being separated in this way is such that survivors told Human Rights Watch they were afraid to seek mental health services because they thought if they did they would get a mental health discharge.¹⁶⁰

According to the National Institutes of Health, Adjustment Disorder (AD) is a group of symptoms (such as stress, feeling sad or hopeless, and physical symptoms) that can occur after a stressful life event.¹⁶¹ The symptoms must develop within three months of the onset of the stressor and resolve within six months of the termination of the stressor. As with PD, for a service member to be separated for AD, AD must interfere with the performance of their duties. AD was not considered a disability entitling a veteran to benefits until 2013.

¹⁵⁸ Government Accountability Office, “Defense Health Care: Better Tracking and Oversight Needed of Servicemember Separations for Non-Disability Mental Conditions,” GAO-15-266, February 13 2015, <http://www.gao.gov/products/GAO-15-266> (accessed January 8, 2016), p. 1.

¹⁵⁹ A former Air Force SVC told Human Rights Watch her clients were afraid to seek mental health help because they thought the doctor would initiate a discharge based on AD. Human Rights Watch telephone interview with Air Force SVC #1, June 19, 2014.

¹⁶⁰ Human Rights Watch telephone interview with SN Nicole Collins, October 23, 2014.

¹⁶¹ US National Library of Medicine, Medline Plus, “Adjustment Disorder,” <https://www.nlm.nih.gov/medlineplus/ency/article/000932.htm> (accessed January 8, 2016).

Symptoms of AD are very similar to those of PTSD.¹⁶² However, AD is an easier and less costly diagnosis as it does not entitle veterans to benefits. A 2008 email from a VA doctor inadvertently disclosed to a journalist, for example, says:

Given that we are having more and more compensation seeking veterans, I'd like to suggest that you refrain from giving a diagnosis of PTSD straight out. Consider a diagnosis of Adjustment Disorder, R/O PTSD. Additionally, we really don't or have time to do the extensive testing that should be done to determine PTSD.¹⁶³

According to a study done for the Vietnam Veterans of America by the Veterans Legal Services Clinic at Yale Law School, the number of AD discharges in some military branches has dramatically increased. For example, Air Force AD discharges increased from 102 in 2007 to 668 in 2010, the most recent year for which data are available; Coast Guard AD discharges went from 57 in 2009 to 109 in 2010.¹⁶⁴

Those discharged with AD include rape victims. Survivors told Human Rights Watch they were diagnosed with adjustment disorder and recommended for administrative discharge after complaining about sexual assault.¹⁶⁵

In one case, a Navy lieutenant commander who had received several awards for service and had 17 years in service was recommended for an AD discharge after being sexually assaulted. A service member testified before the Senate Armed Services Committee that she was raped while on deployment in Iraq. When she attempted to report, she was threatened with adultery charges because the perpetrator was married. When she followed up upon returning to the US in May 2012, she said, “[I] tried to pursue it then, I told my

¹⁶² US Department of Veterans Affairs, National Center for PTSD, “Symptoms of PTSD,” http://www.ptsd.va.gov/public/PTSD-overview/basics/symptoms_of_ptsd.asp (accessed January 8, 2016).

¹⁶³ Memo from Norma Perez, former coordinator of PTSD at the VA hospital in Temple, Texas, March 20, 2008, www.joshuakors.com/perezmemo (accessed January 8, 2016).

¹⁶⁴ Vietnam Veterans of America, “Casting Troops Aside: The United States Military’s Illegal Personality Disorder Discharge Problem,” March 2012, <http://www.vva.org/PPD-Documents/WhitePaper.pdf>, p. 14.

¹⁶⁵ Human Rights Watch telephone interviews with PO3 Sasha Lewis, November 17, 2014, and LCDR Nancy Wilson, November 17, 2014.

squad leader at the time ... and the next thing ya know I get told they are chaptering me out on adjustment disorder.”¹⁶⁶

A lawyer who represents service members told Human Rights Watch that she had two rape victims referred to her in 2015 who are currently fighting AD discharges.¹⁶⁷ One client was diagnosed with AD after a short command-directed evaluation with a doctor. The lawyer said the stress of possible discharge itself added to the symptoms making an AD diagnosis almost a “self-fulfilling prophecy.”¹⁶⁸

Other Mental Health Discharges

Other mental health conditions may also be being used improperly to administratively separate survivors.

A January 2014 DOD policy lists eight separation requirements for non-disability mental health condition discharges: written notice; formal counseling concerning deficiencies and an opportunity to overcome those deficiencies; evidence that the service member is unable to function effectively because of the non-disability mental health condition; diagnosis by an authorized mental health provider; and the service member must be notified that their condition does not qualify as a disability. For those who serve in imminent danger areas, the diagnosis must also be corroborated by a peer, be endorsed by the surgeon general, and include an assessment of whether the service member has PTSD or another mental health condition.

A February 2015 GAO report raised concerns that the military services are not effectively monitoring compliance with DOD requirements for non-disability mental health separations and as a result military services may not be affording service members the protections intended by the revised policies.¹⁶⁹

¹⁶⁶ Senate Armed Services Committee Hearing, Statement from Nancy Parrish, President, Protect Our Defenders, June 4, 2013, http://protectourdefenders.com/downloads/POD-Two_Stories.pdf.

¹⁶⁷ Email to Human Rights Watch from director of a law school, September 15, 2015, on file at Human Rights Watch.

¹⁶⁸ Human Rights Watch telephone interview with director of a law school, September 17, 2015. After challenging the discharge, the survivor was reassigned to another unit but her transfer papers indicated she was involved in an NCIS investigation without making it clear she was the victim, causing her difficulties.

¹⁶⁹ Government Accountability Office, “Defense Health Care: Better Tracking and Oversight Needed of Servicemember Separations for Non-Disability Mental Conditions,” GAO-15-266, February 13 2015, <http://www.gao.gov/products/GAO-15-266> (accessed January 8, 2016).

The GAO found it is difficult to track compliance because DOD and three of the services do not use codes to specify the reason a service member is separated for a “condition, not a disability” making it impossible to know whether service members are separated for a physical or mental condition. Moreover, the Defense Department does not monitor the discharges to determine if their requirements for non-disability mental health separations are being followed.¹⁷⁰ The GAO also found DOD’s review of the service’s compliance reports with PD discharge standards inadequate because the reports were inconsistent and incomplete and moreover indicated three services were still non-compliant with some of the requirements when DOD decided to end the monitoring in 2012.¹⁷¹

Service members report other hasty non-disability mental health discharges. For example, a Navy seaman wrote that in 2010, “I was drugged and raped. I couldn’t take it anymore and when I tried to report it, I was instead sent to a mental hospital and discharged for having ‘depressed mood.’”¹⁷²

Corporal Warnock also sought help after a sexual assault while deployed in Kandahar in November 2008. She was sent to a psychiatric ward and a month later administratively discharged for “other designated physical or mental conditions” for her anxiety and depression. She believes she would have been able to recover if she had been treated better by the military. “That hurt equal or more than the assault, people I was willing to die for didn’t take me seriously.”¹⁷³

Without better tracking and oversight it will be difficult to determine whether mental health discharges are being improperly used.

But even ensuring compliance with DOD requirements may not be enough to protect the careers of service members who report sexual assaults. Other broad reasons, such as “failure to adapt,” are sometimes used by commanders to discharge service members and it is not clear if these categories afford any meaningful protection for those who believe their discharge is unfair.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² POD statement from Navy E3 Alana Gibson, February 21, 2013, on file at Human Rights Watch.

¹⁷³ Human Rights Watch telephone interview with CPL Andrea Warnock, March 14, 2014.

Seaman Bertzikis was assaulted in the Coast Guard on May 30, 2006. She was based at a small station in Vermont and decided to report because she did not feel safe living across the hall from her perpetrator. When she told her chief he said, “For your own protection, we don’t have a holding facility so we are going to lock you in a closet while we investigate.” She was in a closet for “what felt like forever.”¹⁷⁴ Her chief then told her and her perpetrator to “work it out” because they were “supposed to all get along.”¹⁷⁵ Eventually, Coast Guard Investigative Services (CGIS) launched an investigation and Bertzikis was transferred to Boston. There she was assigned to sit in a cubicle with nothing to do. When CGIS closed the case, they threatened her with false reporting charges. Her peers were told not to talk to her or they would be accused of rape. A group of the assailant’s friends cornered her on base, accusing her of being a snitch, and tried to rip her uniform off. A passerby stopped them but Seaman Bertzikis was told not to report or she would be labeled a troublemaker who complains about everything. Meanwhile papers were initiated for her to be medically discharged, but instead her commander administratively discharged her for “failing to adapt to military life,” a description that has meant she has to explain the circumstances of her discharge and assault repeatedly when using her papers to get veterans’ benefits. She was 24 years old and had wanted to stay in the service that she loved.¹⁷⁶

In 2014, DOD instituted a policy affording rape victims the right to have their discharge reviewed if they believe it was unfair and in retaliation for reporting a rape. DOD has not collected information on whether that policy has been implemented, so it is difficult to know to what extent service members have been willing to challenge their separations.¹⁷⁷

A young enlisted seaman in the Coast Guard reported in 2013 that her office was “porno central”:

Every computer’s screensaver and desktop photo showed porn. I reported it. I was told that if I wanted butterflies and unicorns that I should have been a preschool teacher. I was told that this is the Coast Guard.... Shortly

¹⁷⁴ Human Rights Watch interview with SN Panayiota Bertzikis, New York, March 4, 2014.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Department of Defense, “Instruction 1332.14, Enlisted Administrative Separations,” Enclosure 5, part 11, January 27, 2014, (“An enlisted Service member who made an unrestricted report of sexual assault and who is recommended for involuntary separation from the Military Services within one year of final disposition of his or her sexual assault case may request a general or flag officer (G/FO) review of the circumstances of and grounds for the involuntary separation”). DOD testified it has not collected information on this. Dr. Nathan Galbreath, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, D.C., April 10, 2015, transcript p. 80 (unofficial transcript on file with Human Rights Watch).

after things went downhill. I was viewed as a troublemaker.... I am always reminded that I might be kicked out for failure to adopt [sic] to military life. I have completed all of my qualifications. I have not had any disciplinary problems. Because I have a problem that others view porn and because I do not laugh at rape “jokes” I am the one that is allegedly not able to stay in the Coast Guard.... It scares me though that I might be out of a career because others are breaking Coast Guard policies.¹⁷⁸

¹⁷⁸ My Duty to Speak, “Active Duty Coast Guardsman: ‘Women are not treated equally in the Coast Guard,’” posted February 20, 2013, <http://mydutytopeak.com/2013/02/20/active-duty-coast-guardsman-women-are-not-treated-equally-in-the-coast-guard/> (accessed January 8, 2016).

IV. Misconduct Discharges

As discussed above, an Other Than Honorable discharge is the worst characterization of an administrative separation and makes veterans ineligible for many benefits, including, in most cases, access to health care and VA compensation.¹⁷⁹ It is also deeply stigmatizing. The repercussions of bad paper may be extensive and impact not only the veteran but also their families and communities. Veterans outside VA care are 30 percent more likely to commit suicide than those in VA care.¹⁸⁰ Overall, veterans with less than honorable discharges commit suicide twice as often as veterans with Honorable or General Under Honorable Conditions discharges. They also face discrimination when seeking employment.

“Bad paper” (a less than honorable discharge) may result from minor disciplinary infractions (such as being late to formation a couple of times), a pattern of misconduct (which requires at least two instances of misconduct during an enlistment period), commission of a serious offense (which could range from drug use to refusing to obey an order), or a civilian conviction.

Sexual assault survivors are susceptible to misconduct discharges for a number of reasons. In the course of reporting a sexual assault, the victim may reveal conduct that is prohibited under the Uniform Code of Military Justice (such as adultery or fraternization), which may lead to a discharge for misconduct. Prior to changes to “Don’t Ask Don’t Tell,” male service members in particular risked being thrown out of service for homosexual conduct after reporting rape by a male, even though the conduct was non-consensual. No guideline or regulation exists prohibiting commanders from discharging service members for misconduct that came to their attention in the course of reporting a more serious offense. On the contrary, officers are discouraged from overlooking misconduct in the interests of maintaining order and discipline.

¹⁷⁹ 38 USC sec. 5303(a).

¹⁸⁰ Swords to Plowshares and NVLSP, “Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper,” Veterans Legal Clinic, Legal Services Center of Harvard Law School, March 2016, <https://www.swords-to-plowshares.org/sites/default/files/Underserved.pdf> (accessed April 6, 2016), p. 21.

Second, superiors may view sexual assault survivors as troublemakers and no longer want them in their units. Commanders who are looking can easily find reasons to discipline service members who are out of favor. Many service members reported being singled out for discipline for minor infractions following a sexual assault report in an effort, they believe, to create a record justifying a misconduct discharge.

Third, survivors may engage in misconduct following the assault as a result of the trauma. The prevalence of PTSD among sexual assault survivors is high—approximately 30 percent of sexual assault survivors experience PTSD.¹⁸¹ Over 70 percent of the 156 survivors Human Rights Watch interviewed said they had experienced PTSD at some point. PTSD symptoms, such as an exaggerated startle response, an inability to control reflexive behavior, irritability, or attraction to high-risk behavior, may lead to misconduct or difficulty in performing at work.¹⁸² In fact, interference with social and occupational functioning is a primary measure of the severity of PTSD.¹⁸³ PTSD is associated with substance abuse, which can result in discharge. Drugs used to treat PTSD may induce fatigue and also interfere with job performance. Yet command may not see the disciplinary infractions as symptoms of a mental health condition or may not view it as related to in-service trauma. The victim may also not yet have been diagnosed with PTSD.

Survivors discharged for misconduct or substance abuse without ever being diagnosed with PTSD may never get the care they need because they are ineligible for veterans' services. Survivors may behave in ways that are inconsistent with military requirements for other reasons as well—several survivors of sexual assault told Human Rights Watch that they left their bases without authorization (Absent Without Leave—AWOL) because they feared further attacks by their perpetrators. As a result they have had to live with an Other Than Honorable discharge and often went for years without assistance for their trauma.

The problem is not limited to sexual assault survivors. Combat veterans in particular are susceptible to PTSD. One study found that Marines with PTSD from combat were 11 times more likely to receive misconduct discharges than those without a psychiatric diagnosis

¹⁸¹ National Violence Against Women Prevention Research Center, "The Mental Health Impact of Rape," 2000, <https://mainweb-v.musc.edu/vawprevention/research/mentalimpact.shtml> (accessed October 7, 2015).

¹⁸² Diane Swick et al., "Impaired Response Inhibition in Veterans with Post-Traumatic Stress Disorder and Mild Traumatic Brain Injury," *Journal of the International Neuropsychological Society*, 18 (2012): pp. 917-926.

¹⁸³ 38 CFR 4.130: Schedule of Ratings—Mental Disorders.

and eight times as likely to receive a substance abuse discharge.¹⁸⁴ **Between FY 2000 and 2013, more than 125,000 service members received Other Than Honorable Discharges.** A Pulitzer Prize-winning 2013 *Colorado Springs Gazette* investigation found a surge in misconduct discharges at posts with the most combat troops.¹⁸⁵

Though PD discharges have been the subject of reform, military discharge policy for misconduct still does not take into account behavior that may have resulted from mental health conditions.

Between FY 2000 and 2013, more than 125,000 service members received Other Than Honorable Discharges.

Discharged after Collateral Charges

As discussed in Human Rights Watch’s previous report, *Embattled*, a broad range of activities are punishable in the military that are not considered criminal in the civilian environment. Adultery, fraternization (an officer is prohibited from socializing with an enlisted member), underage drinking, and “conduct unbecoming an officer” (a broad array of improper behavior), are all punishable crimes under the Uniform Code of Military Justice (UCMJ).

In the course of reporting an assault, a victim may face bringing their own misconduct to the attention of superiors that would otherwise have been unknown. Consequences of reporting even minor misconduct can be devastating. Victims may themselves face criminal charges or receive administrative reprimands. Either could ultimately end their career and result in a misconduct discharge.¹⁸⁶ As a Coast Guard SVC testified:

The biggest challenge I have dealt with is working with clients with collateral misconduct issues. In the current personnel environment, the Coast Guard is very unforgiving when it comes to misconduct.... I have had

¹⁸⁴ Robyn M. Highfill-McRoy et al., “Psychiatric diagnoses and punishment for misconduct: the effects of PTSD in combat-deployed Marines,” *BMC Psychiatry* 10 (2010), accessed March 1, 2016, doi:10.1186/1471-244X-10-88.

¹⁸⁵ Dave Philipps, “Other Than Honorable: More Army misconduct discharges,” *Colorado Springs Gazette*, May 19, 2013, <http://www.washingtonexaminer.com/other-than-honorable-more-army-misconduct-discharges/article/2529954> (accessed January 8, 2016).

¹⁸⁶ Human Rights Watch group interview with Air Force SVCs, December 4, 2014; Human Rights Watch telephone interview with Air Force SVC #1, June 19, 2014.

victims who have been faced with a very difficult decision of seeking justice for what has happened to them or preserving their careers.¹⁸⁷

An Air Force SVC told us that “force shaping” pressures (the need to reduce the size of particular units or branches of the military) means disciplinary actions have more significance—“If you have an LOR [a formal letter of reprimand in your record] you can’t survive it.”¹⁸⁸

Current guidelines allow a delay for punishment, but not immunity, for collateral misconduct. Commanders have “discretion to defer action on alleged collateral misconduct by the sexual assault victims ... until final disposition of the sexual assault case.”¹⁸⁹ Commanders are also advised to “take into account the trauma to the victim and respond appropriately so as to encourage reporting of sexual assault and the continued cooperation of the victim.”¹⁹⁰ However, the deferment of punishment does not alleviate victims’ concerns that their careers will be over if they implicate themselves in misconduct.

Accounts of Sexual Assault Survivors with Bad Discharges Due to Collateral Misconduct

Human Rights Watch interviewed several service members who were threatened with court-martial for collateral misconduct, or were otherwise discharged with an Other Than Honorable status, due to alleged misconduct arising in conjunction with their sexual assaults, including the following:¹⁹¹

¹⁸⁷ Testimony of Coast Guard LCDR Kismet Wunder, The Fourth Public Meeting of the Judicial Proceedings Panel, Arlington, VA, November 14, 2014, http://jpp.whs.mil/Public/docs/05-Transcripts/20141114_Transcript_Final.pdf (accessed April 29, 2015), p. 176.

¹⁸⁸ Human Rights Watch interview with Air Force SVC #1, November 24, 2014.

¹⁸⁹ Department of Defense, “Instruction 6495.02: Sexual Assault Prevention and Response (SAPR) Program Procedures,” Enclosure 5, para. 8, March 28, 2013, <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf> (accessed April 24, 2015).

¹⁹⁰ Army Command Policy, Army Regulation 600-20, http://www.apd.army.mil/pdffiles/r600_20.pdf (accessed April 24, 2015), para. 8-50(24); Department of Defense, “Instruction 6495.02: Sexual Assault Prevention and Response (SAPR) Program Procedures,” Enclosure 5, para. 8, March 28, 2013, <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf> (accessed April 24, 2015).

¹⁹¹ Another survivor told Human Rights Watch she became the subject of a criminal investigation after she decided to stop participating in judicial proceedings because it was too stressful. Human Rights Watch telephone interview with 1LT April Brown, April 7, 2015; Human Rights Watch telephone interview with PO2 Gabrielle Bouvier, October 15, 2014 (her chief said she would be “brought up on adultery charges because her perpetrator was married”). Heather Santos was investigated for perjury after reporting her assault in Navy reserves. Correspondence from Heather Santos, on file at Human Rights Watch; My Duty to Speak, “Coast Guardswoman Raped, Beaten May 2012,” June 21, 2012, <http://mydutytospeak.com/2012/06/21/coast-guardswoman-raped-beaten-may-2012/> (accessed April 28, 2015) (“I was threatened with a Captain Mast if I chose to go forward with reporting the rape”); email communication from [name withheld]

- SPC Cindy Bates was violently raped four times one night in 2004 while deployed in Kuwait. Despite having physical evidence of injuries, she was accused of false reporting. Within three weeks she was being out-processed in Germany for misconduct due to the alleged false report. Her rape kit was thrown away. She was able to have her discharge upgraded to General Under Honorable Conditions from Other Than Honorable because the unit commander who discharged her did not get the proper approval for a misconduct discharge.¹⁹² However, the experience was devastating. She tried to kill herself three times with pills and knives. She wrote of her experience: “I don’t want anyone to pay like I have.”¹⁹³
- Leah Wells was sexually assaulted four times while in the Navy in 2004 and 2005. Initially she did not report because she feared retaliation. After the fourth assault, she was so distressed her work began to suffer, so her supervisors started asking questions. When she disclosed the abuse, she was taken to a female superior who yelled at Wells for losing her composure (military bearing) and not properly addressing an officer by rank while describing her assaults. Afterwards, she was sent to a locked compartment and put on suicide watch, despite not having said anything about harming herself. Two days later, she was referred to Captain’s Mast on charges of sexual misconduct because all sexual contact was prohibited on the ship. She was found guilty on two counts, both relating to rapes she had disclosed during the proceedings. As punishment, she was put on restriction, demoted to E-1 (the lowest rank), given extra duty (with her perpetrator), and lost half a month’s pay. She was kicked off the ship and within three weeks discharged under General Under Honorable Conditions for “misconduct.” When she saw the DD-214 she initially refused to sign because she had done nothing wrong, but her superior told her she had no choice and that if she disagreed she could appeal to a Discharge Review Board later. Because of her discharge, she has been rejected from

to Protect Our Defenders, January 13, 2013 (“I was told if I say another word to ANYONE about it that I was going to be charged with Adultery and get an Article 15”). Cathy Hoffman told Human Rights Watch she was investigated for making a false statement after reporting being raped by a fellow Marine in Okinawa in 1993. Before the investigation was complete, she found a confession from her perpetrator. Armed with the confession and help from her Senator, she was able to obtain a medical discharge before she was separated for misconduct. Human Rights Watch telephone interview with Cathy Hoffman, November 2, 2013. SVCs also indicated that their clients sometimes faced punishment for collateral misconduct. Human Rights Watch group interview with Air Force SVCs, Washington, D.C., December 4, 2014; Human Rights Watch telephone interview with Marine Corps VLC #1, January 5, 2015.

¹⁹² OSA Form 172 (Revised), May 22, 1998, on file at Human Rights Watch, p. 5.

¹⁹³ Letter from Cindy Bates to [name withheld], October 29, 2013, on file at Human Rights Watch.

government jobs. She was overwhelmed and said she did not feel strong enough to try to change her discharge papers until recently.¹⁹⁴

- Katelyn Butler was charged with misconduct after reporting a sexual assault while deployed in Iraq. Though cleared of charges, her career was over and “pattern of misconduct” appeared on her discharge papers as the reason for separating because she had been subject to a misconduct board hearing. As a result she lost federal retirement (due to a stipulation about misconduct) and says she was ineligible for most jobs that interested her.¹⁹⁵ While she was awaiting her hearing, she was forced to stay in her room and to be accompanied so as to “protect her” from further assaults. However, the person assigned to escort her raped her, constituting her second sexual assault in the military, saying, “I picked you because I knew command wouldn’t believe you.”¹⁹⁶

Lance Corporal Stacey Thompson, 19, was drugged and raped in 1999. After going to a nightclub she began to feel ill. A sergeant said he would help her home since she was barely conscious. Instead he took her to a different barracks and raped her. After her assault she sought medical treatment and was prescribed Tylenol with codeine to help with pain from her injuries. Not long after, she was told by investigators she would be charged with seven counts of possession of a controlled substance based, she believes, on her prescription and statements of people who saw her the night she was raped. She was given the choice of an Other Than Honorable discharge or a court-martial with charges that could result in life imprisonment. After contemplating suicide, she opted for the discharge. She said she never had legal advice to explain the consequences of her discharge and believed, “You really just had to sign.... My worst day was not the day I was raped, it was the retaliation. I considered suicide because of the retaliation, not the rape.” Because she left service in just under two years, she “lost the ability to call myself a veteran.” She was unable to get jobs because of the Other Than Honorable characterization. She said she “stopped trying” after she was told the third time she was not eligible for a position.¹⁹⁷ In December 2015 she was able to get her discharge changed to honorable by the Navy Discharge Review Board after submitting a 120-page package (which included letters of support from three current senators), but she found the process re-traumatizing and “horrible” and said “no one should have to go through that.”¹⁹⁸

¹⁹⁴ Human Rights Watch interview with Leah Wells, July 28, 2015.

¹⁹⁵ Human Rights Watch telephone interview with Katelyn Butler, September 29, 2014. One employer told her she was ineligible because of the pattern of misconduct narrative. For other jobs she has found that if they ask for her DD-214, she cannot get past it.

¹⁹⁶ Human Rights Watch telephone interview with Katelyn Butler, September 29, 2014.

¹⁹⁷ Human Rights Watch interview with LCpl Stacey Thompson, August 1, 2014.

¹⁹⁸ Human Rights Watch telephone interview with LCpl Stacey Thompson, February 17, 2016.

For male victims, prior to 2011, reporting a sexual assault was fraught with additional peril: they risked being prosecuted or separated for homosexual conduct. Several male survivors told Human Rights Watch that they were discharged with bad paper after reporting sexual assault:

- Jack Williams grew up in a military family and signed up for the Air Force as soon as he could at age 18. While in basic training in Lackland in 1966, the assistant drill instructor ordered him into his office at night where he choked him until he was unconscious and sexually assaulted him. The assistant drill sergeant continued to brutalize and threaten him. After the third assault, Jack tried to hang himself and was found unconscious in the bathroom. While he was in the hospital getting treatment for kidney damage, the base commander and his captains told him he would be discharged. When Williams refused to sign the papers, the officers told him he would be court-martialed for homosexual conduct. They said, “Even if we walked in and the sergeant was hilt high in you, you couldn’t prove you didn’t entice him, that you didn’t ask for it.” They told him he would “go to Leavenworth [military prison] and then get a bad conduct discharge after serving four years.” Williams said that at 18, “I did not know anything, but I knew a bad conduct discharge was worse than a scarlet letter.”¹⁹⁹ He gave up his dreams of following his father and uncle into service. When he later tried to get counseling at the VA, he said he was told, “You are trying to pull the same BS you did in the service.” For 50 years he has suffered from severe emotional and physical injuries he believes resulted from his assault.²⁰⁰
- A Navy Seaman Apprentice said that after reporting that his shipmate sexually assaulted him in 1983, he found out he was getting discharged because he was “not fit for Naval service” despite having no recent or serious disciplinary infractions. At the time, he had seven months left in his enlistment and he was certain he would receive an honorable discharge. Instead he was given an Other Than Honorable discharge. He says, “As I look back on the incident I have at times cursed myself for speaking up and reporting what happened but ... I thought I was doing the right thing.... I cannot even begin to express how this entire ordeal has

¹⁹⁹ Human Rights Watch interview with Jack Williams, February 20, 2014.

²⁰⁰ Human Rights Watch interview with Jack Williams, February 20, 2014.

affected my life; it won't go away and I still struggle with self-esteem and trust and the entire myriad of symptoms victims of sexual assault suffer.... The Navy discarded me like a piece of scrap iron or less; truthfully, this ordeal continues to haunt me ... I am a broken man."²⁰¹

From Victim to Target

Army Lieutenant Gray says after reporting sexual harassment by a senior officer while deployed in Iraq in 2009, her superiors were initially supportive. They relieved the commander of his position after she filed a report and turned over inappropriate emails.²⁰² Three months later, however, the focus changed and she became the subject of the investigation rather than her harasser. She was told, "This is someone's career on the line."²⁰³ Her character was attacked and her friends were questioned about whether she "partied." A witness to the harassment told Human Rights Watch, "She had a case but they turned it around to make it seem like she was a bad person."²⁰⁴ The officer said they had a consensual relationship and that she lied to investigators. Lieutenant Gray feared further investigation into her personal life would result in a possible discharge due to the Don't Ask Don't Tell policy and so accepted a formal reprimand for falsehoods that "served to minimize [her] own participation in an inappropriate relationship."²⁰⁵ She was threatened with a charge of making false official statements if she testified against her harasser, yet she was reprimanded for not appearing at his hearing. Not long after, she was discharged for conduct unbecoming an officer.



LT Lucy Gray at Basic Officer Leader Course II in January 2008.
© 2008 Private

²⁰¹ POD statement by Seaman Apprentice Ken Nelson, October 16, 2012, on file at Human Rights Watch.

²⁰² Human Rights Watch telephone interview with 1LT Lucy Gray, October 3, 2013.

²⁰³ Department of the Army, Memorandum for Record, Subject: 14 September 2009 Interview with MAJ [name withheld], September 23, 2009, on file at Human Rights Watch.

²⁰⁴ Human Rights Watch telephone interview with Linda Brooks, January 27, 2014.

²⁰⁵ Department of the Army, Memorandum for Lucy Gray, Subject: Memorandum of Reprimand, October 9, 2009, on file at Human Rights Watch.

Lieutenant Gray was third generation military in her family and was the top cadet coming out of officer basic training. She had planned to have a career in the military. Her evaluations said she had “unlimited potential and will be an excellent staff officer” and described her as “outstanding,” recommending she be promoted ahead of her peers as “her direct efforts have made a lasting impact on our Battalion’s readiness for its upcoming deployment in support of the Global War on Terrorism.”²⁰⁶ She earned the status of “top lieutenant” in the General Support Aviation Battalion.²⁰⁷ Instead of realizing her potential, after three years she was terminated with a General Under Honorable Conditions discharge. As a result it was harder for her to get officer transition services as she is given lower priority than those with an honorable discharge. She has to constantly explain her discharge papers saying “unacceptable conduct,” all of which have limited her job options. She cannot apply for several government positions. Later the Army sent her a memo informing her she owed the military \$4,000 for her education.²⁰⁸

When she went to the Discharge Review Board to try to upgrade her discharge, a Board member repeatedly interrupted Gray and yelled at her for waiting three days before reporting the first time her assailant made inappropriate remarks to her. Her lawyer, who was not allowed to speak on her behalf, found the proceedings at the DRB “appalling” and said “it was like a whole new assault” on her client, who was reduced to tears after the hearing.²⁰⁹ Although regulations require support for applicants with PTSD, no one was there. It was apparent the DRB had not fully read the file. When the decision came, denying her request (despite telling Lieutenant Gray and her lawyer they believed the harassment did occur), it incorrectly said no witness was called and that she had not submitted material on her post-discharge activity.²¹⁰ The decision made no mention of Gray’s inability to defend herself against accusations of a consensual relationship because of “Don’t Ask, Don’t Tell.”

Discharges after a Pattern of Misconduct

The US military disciplinary system provides a spectrum of administrative disciplinary options for commanders to ensure good order and discipline. These options, in order of

²⁰⁶ Service School Academic Evaluation Report, June 13, 2008, on file at Human Rights Watch; Officer Evaluation Report for 1LT Lucy Gray, March 4, 2009, on file at Human Rights Watch.

²⁰⁷ Officer Evaluation Report for 1LT Lucy Gray, March 4, 2009, on file at Human Rights Watch; Memorandum for Record, Character Reference for 1LT Lucy Gray, Major [name withheld], June 17, 2010.

²⁰⁸ Human Rights Watch telephone interview with 1LT Lucy Gray, October 3, 2013.

²⁰⁹ Human Rights Watch telephone interview with Jo Ann Merica and 1LT Lucy Gray, November 11, 2013.

²¹⁰ Army DRB Case Report and Directive, AR20120008701 (indicating the board determination was based on the applicant’s record and testimony and consideration of the analyst’s recommendation and rationale. It was not clear in the hearing or the decision whether any of the material submitted by 1LT Gray was considered by the Board).

increasing severity and formality, include oral counseling, formal letters of counseling,²¹¹ letters of reprimand (LOR) or General Officer Memorandum of Reprimand (GOMOR), and non-judicial punishments (also known as Article 15s, or Captain’s Mast, depending on the branch).

These forms of discipline may be used to justify an administrative discharge. If a service member has two incidents of misconduct during an enlistment period, they can be administratively discharged for a pattern of misconduct. The misconduct can be minor or more serious and the incidents do not need to be of the same nature.

For many service members who spoke with Human Rights Watch, these disciplinary actions became a routine part of life after they reported sexual assault or harassment. In some cases, they asserted that the allegations of misbehavior made against them had no basis in fact. In others, behavior that had previously been tolerated or failings that were routinely overlooked suddenly drew swift condemnation.

In this way, commanders may begin building a record that can end a sexual assault survivor’s career. As one senior master sergeant said, “There was never any support for females who reported. You took it or suffered. If you did report it, you were scrutinized or chastised in everything you did. You didn’t deploy because you were a problem.”²¹²

Several survivors reported to Human Rights Watch an over attentiveness to minor issues (nitpicking over nothing) following a report of sexual harassment or assault leading to an administrative discharge:

- After reporting a sexual assault in 2014, Airman Garcia started accumulating paper for things such as having dirty dishes in the sink (despite having previously reported a clogged drain) and for being late (despite being on crutches and even though others who showed up late were not reprimanded). When she disputed the Letter of Reprimand for the dishes, she was told by her supervisor that she was “playing the victim.” Her first sergeant told her, “With all your paperwork, you are

²¹¹ Letters of counseling in the Marine Corps are also known as a “6105,” referring to a paragraph in the Marine Corps Separations Manual that lists counseling required prior to administrative separation; in the Coast Guard, a “negative page seven” or “CG-3307” also refers to administrative remarks put into a permanent record that may later be used to justify a discharge.

²¹² Email from SMSgt Margaret Kelly to Human Rights Watch, November 12, 2014.

going to be a civilian soon.” She found out that there has been a move to administratively separate her.²¹³

- After reporting a rape, Lieutenant Chen’s supervisors investigated her for conduct unbecoming an officer and “everything they could think of.” In the meantime, they also held up her evaluation, which meant she could not be considered for promotion at the appropriate time. As a result, she was slated for discharge and involuntarily removed from service.²¹⁴
- Whitney Patterson was raped when she was tasked with taking her command sergeant major to the airport in 2006. She initially did not report the assault, but when he continued harassing her she decided she had to say something. After reporting, her life was a “living hell.... If I coughed, I received a negative counseling. In one day, I received six negative counselings. My security clearance and NCOER was denied processing.” After 19 years and six months of service she was being processed out of the military involuntarily. She was able to hire a lawyer and fight her out-processing in order to make it to retirement.²¹⁵ However, she said, “I did not receive a retirement award, ceremony, NCOER, or have a security clearance. In other words, the way I [en]visioned leaving the military with the honors I deserved for being a great Soldier/NCO were taken away for reporting a predator. You can say I was being harassed and assaulted over and over again by the leaders who were suppose[d] to be trained to defend and protect me.”²¹⁶
- Seaman Bailey was raped at gunpoint while she was injured and serving in the Navy in 2011. She was medically evacuated to San Diego from Guam after a suicide attempt. While there, she was assigned temporary duty in an area (weather) outside of her specialty (aviation electronics). Her superior officer resented her many medical appointments and started cancelling them. When she went to see the doctors, she was charged with malingering. Her medical discharge

“I feel I wish I had screamed and he had shot me. Nothing is worth this.”

²¹³ Human Rights Watch interview with Airman Grace Garcia, March 12, 2015.

²¹⁴ Statement of SHARP Manager [name withheld], December 13, 2012; correspondence from 1LT Chen to Department of the Army, October 4, 2013, on file at Human Rights Watch.

²¹⁵ Written testimony from Whitney Patterson, June 8, 2013, on file at Human Rights Watch.

²¹⁶ Ibid.

process was stopped and instead she was given a General Under Honorable Conditions discharge “for serious offense misconduct” in December 2013. She says every time she seeks help, she has to show her papers and has to live with that every day. She even wishes she had been given a personality disorder diagnosis instead and ultimately says of her rapist: “I feel I wish I had screamed and he had shot me. Nothing is worth this.”²¹⁷ Her effort to change the discharge failed.

Misconduct Discharges for Survivors with PTSD

A strong correlation exists between PTSD, substance abuse, and persistent misconduct.²¹⁸ Some offenses—such as alcohol or drug use, angry outbursts, or showing up late for formation—may be symptoms of PTSD. Yet these offenses may be grounds for a separation that leaves the soldier without lifelong benefits or care.

In a Pulitzer Prize-winning series of articles in 2013, the *Colorado Springs Gazette* investigated use of misconduct discharges against combat veterans with PTSD stemming from combat-related experiences. The same scrutiny has not been applied to sexual assault victims though prevalence of PTSD among sexual assault victims is high.

We recognize that trauma resulting from sexual assault may negatively impact a survivor’s performance or lead to misconduct that the military is justified in addressing. The military also has particular battle-readiness needs and fitness for duty requirements that may make it less adaptable to meeting victims’ needs than most other institutions.

However, processes do exist to discharge service members with medical needs who are unfit for service and more care needs to be taken to ensure service members are not unfairly discharged and saddled with “bad paper” as a result of mental health conditions

²¹⁷ Human Rights Watch interview with SN Monica Bailey, November 13, 2013.

²¹⁸ National Center for PTSD and US Department of Veterans Affairs, “Iraq War Clinician Guide,” June 2004, http://www.ptsd.va.gov/professional/manuals/manual-pdf/iwcg/iraq_clinician_guide_v2.pdf (accessed February 18, 2016), p. 24; Major Tiffany M. Chapman, “Leave No Soldier Behind: Ensuring Access to Health Care for PTSD-Afflicted Veterans,” *Military Law Review*, vol. 204 (2010), pp. 1-50; Jim McGuire and Sean Clark, “PTSD and the Law: An Update,” *PTSD Research Quarterly*, vol. 22 (2011), pp. 2-3.

brought on by trauma incurred during service, whether from combat or from sexual assault—or both.

Shelby Willis told Human Rights Watch she loved the Air Force after joining in 1989 at age 17. She made close friends and felt it gave her a more adult perspective on how “others matter and deserve freedom.” In 1990, after she was assigned to a new base, she noticed her stand-in supervisor started paying her extra attention both on and off base in a way that made her uncomfortable. At first she laughed it off, but later it escalated and he followed her off base and tried to kiss her. When she rejected him, he started saying her performance was bad and giving her write-ups, but still suggested they hang out together. When she threatened to tell he said, “They’re never going to believe you. You haven’t proven yourself.”

She said that when she complained to her new supervisor about inappropriate touching, the supervisor told her his predecessor supervisor was “a gentleman” and threatened her with false reporting. Both she and her previous supervisor were given reprimands. Meanwhile, her work was sabotaged after hours and her supervisor started writing her up for infractions. Willis said, “The more they [supervisors] did nothing, the more confident he was that I was new and seen as a troublemaker and he had been around and people would believe him.” She said that when she was up on a tall ladder in a warehouse a few months later, he gave her a box and told her to put it on a high shelf. While her arms were full, he pulled her down from the ladder onto the concrete floor, fracturing her tailbone. He told her she “was a loudmouth bitch” and had caused him a lot of trouble. He pulled her hair, spit on her face, and hit her before raping her. She bit on his penis until he bled, and she threw up, allowing her to get away. She went straight to her captain’s office but even with the physical evidence of the blood and vomit, the captain did not believe her. Instead, the supervisor gave Willis extra duty cleaning the men’s bathroom, which was isolated, making her fearful. She still had to work with the perpetrator for the next few months.

She started getting letters of reprimand for infractions like not saluting. Her request to transfer was denied because it would “take a year to discipline” her first. When she was finally moved across base, word had travelled, and she was called a “tease” and a “nigger lover.” In August 1990 she was given a General Under Honorable Conditions discharge for a “pattern of misconduct.” She said they were “looking for a reason to get rid” of her, though she had “hopes for a career.” She said if she had received a medical discharge, “I would have been able to get therapy and would be much farther along than I am now. My entire life would be different.”²¹⁹

²¹⁹ Human Rights Watch telephone interview with Shelby Willis, February 11, 2015.

Survivors and their families told Human Rights Watch of a number of situations in which the military mishandled a rape victim's PTSD symptoms, sometimes resulting in tragic consequences:

- Lauren Morris struggled with anxiety and PTSD after her rape in the Navy in 2010. Her commander ordered her to go to a drug and alcohol counseling program. There she did not receive treatment for PTSD but was instead made to discuss the reason for her drinking in a co-ed counseling group. After she yelled at a member of the group who made a rape “joke” and who happened to have a higher rank, she got in trouble. She was dismissed from the program 24 hours prior to its completion, after the program counselors told her she was being considered a “treatment failure” because she needed treatment for the assault and that alcohol was not the main issue. As a result of not finishing alcohol treatment, however, she was automatically designated for administrative separation.²²⁰
- An Army combat veteran, Staff Sergeant Turner was chaptered out of service and lost benefits she desperately needed as a single mother after being involved in a bar fight, despite the fact that aggression is a symptom of PTSD and at the time of the incident she was being treated for PTSD following harassment and stalking by her first sergeant.²²¹
- In the immediate aftermath of Airman First Class King's sexual assault in 2011, he had PTSD and his work suffered. He was late to work because he was unable to sleep at night, experienced anxiety attacks in his office, and had angry outbursts. As a result, his supervisor regularly disciplined him and told him he would be kicked out if he did not change his ways. He felt he had to disclose his sexual assault to his supervisor in order to defend himself (he had previously reported confidentially) and explain his symptoms, though ultimately his performance evaluation still suffered, making him non-competitive for promotion and he is now leaving service.²²²

²²⁰ Email from IS2 Lauren Morris to Nancy Parrish, CEO, Protect Our Defenders, August 13, 2012, on file at Human Rights Watch.

²²¹ POD written statement by Cynthia Turner, February 16, 2014, on file at Human Rights Watch.

²²² Human Rights Watch telephone interview with A1C Chris King, December 4, 2014.

- Coast Guard Seaman Recruit Walter was sexually assaulted and sodomized by a petty officer in 2001. Although her assailant was convicted and sent to the brig, she was ostracized by her classmates and teachers, given poor work assignments meant for those in trouble, and was singled out for punishment for infractions. To cope with the stress, Walter began drinking. She was ordered to attend alcohol rehab (including an Alcoholics Anonymous meeting with her assailant) or be discharged from the military. After rehab, she was nevertheless forced out of the Navy. She had to pay back her bonus, lost her college fund and GI benefits, and she cannot receive any veteran benefit or land board grant because of her Other Than Honorable discharge. She said, “I have a hard time being patriotic to a country that could not stand up for me when I needed it most. I will never let my children serve in the military for fear that the same would happen to them.”²²³

Carri Goodwin joined the Marines in 2007 when she was 18 years old. In the short time she was in service, her recruiter assaulted her and a higher-ranking service member beat and sodomized her after ordering her to report to him after work. After reporting her assaults, she still had to work with her assailant. Her journal indicated her peers “all took the assailant’s side” and said, “Don’t talk to her. She will say you raped her.” Her assailant taunted her with emails saying he gave her AIDS. She was not allowed to go on leave because they feared she would go AWOL.

After reporting, her superiors kept finding things she did wrong and she was regularly put on restriction. She coped with her isolation by drinking alcohol. She was also on prescription medication for her PTSD. She was suicidal at times and had difficulties when she was sent to alcohol rehabilitation programs. Her superiors disciplined her for drinking while underage, missing formation, leaving her appointed place of duty, reporting while under the influence of alcohol, breaking restriction, and failure to obey an order. As a result, she was discharged Under Other Than Honorable Conditions for misconduct.²²⁴ Five days after getting home in 2009, at age 20, she was found dead in a car after mixing alcohol and Zoloft, a drug for treatment of depression, PTSD, and other mental health conditions.²²⁵ Because of her misconduct discharge, her father cannot bury her remains in a military cemetery and is unable to honor her by framing her discharge papers. His eight-year effort to

²²³ POD written statement by SR Evelyn Walter, February 7, 2012, on file at Human Rights Watch.

²²⁴ Naval Discharge Review Board, Docket No. MD14-00335, decided on March 20, 2014.

²²⁵ Human Rights Watch interview with Carri Goodwin’s father, Gary Noling, November 4, 2013.

upgrade her discharge because of the rapes and PTSD has failed.²²⁶ Only if her papers are fixed and she gets a proper burial does her father believe he can bring closure to her ordeal.²²⁷



Gary Noling holding a photo of his daughter Carri Goodwin, a rape victim who died of acute alcohol intoxication less than a week after receiving an Other Than Honorable discharge from the Marines. Because of her discharge, her father has been unable to secure a military burial for her remains. © 2013 Francois Pesant

Absent Without Leave (AWOL)

Human Rights Watch spoke with a number of sexual assault survivors who fled their duty bases without authorization (or deserted if they left for over 30 days) to avoid repeated attacks and as a result were threatened with a prison sentence if they did not agree to an Other Than Honorable discharge.

²²⁶ Department of Navy, Discharge Review Board, Letter to Gary Noling, dated April 10, 2014, on file at Human Rights Watch.

²²⁷ Human Rights Watch telephone interview with Gary Noling, December 15, 2014.

Under the Manual for Courts-Martial, after 30 days' absence, service members could face a maximum penalty of dishonorable discharge, forfeiture of all pay and allowances, and confinement for up to five years (or even the death penalty in times of war).²²⁸ If the service member is absent for more than 180 days, Congress requires the Department of Veterans Affairs to exclude them from benefits unless "compelling circumstances" justify the absence.²²⁹

Another veteran who had an Other Than Honorable discharge after being AWOL told Human Rights Watch he was physically removed from a VA hospital when he went there seeking help.²³⁰

Survivors report suffering from PTSD, homelessness, alcohol abuse, and a lifetime of destroyed relationships. Of those we interviewed, the few who have tried to have their discharges changed at the Board for Correction of Military Records failed.

Below are accounts survivors told Human Rights Watch of Other Than Honorable or Dishonorable discharges received for being AWOL:

- William Minnix joined the Air Force in 1973 at age 17 so that he could "be proud and serve his country." While he was at Tech School he was repeatedly raped by higher-ranked service members. When he could not take it anymore, he fled the base. After a month he decided to turn himself in to avoid upsetting his parents. When he went back to base he attempted to report the rapes. The assaults were not investigated, but Airman First Class Minnix was stripped of his rank and, after a short unofficial hearing, given an Other Than Honorable discharge for going AWOL. He felt his "life and career was taken away from me." His sisters disowned him and he began to believe he was a bad person because he was never able to fulfill his dream of an Air Force career. The shame haunted him for years. For 40 years he felt like a criminal, and only after attempting suicide was he able to get the help he needed.²³¹ Minnix denies he was in service rather than show his DD-214. His effort to upgrade to a General Under Honorable Conditions discharge failed.

²²⁸ Manual for Courts-Martial, United States, 2012 edition, https://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf (accessed January 7, 2016).

²²⁹ 38 USC 5303(a).

²³⁰ Human Rights Watch telephone interview with Rick Tringale, January 16, 2014.

²³¹ Letter from William Minnix, To Whom It May Concern Re: Military Justice Act, June 2, 2014, on file at Human Rights Watch.

- Tom O'Brien was gang raped by three male soldiers while he was on his second tour of duty in 1982. The soldiers threatened to kill him if he reported. Afterwards, he coped by drinking heavily and was so drunk he failed to report to base. As a result, he was court-martialed for being AWOL and received a Bad Conduct discharge. In the following years, he continued to drink heavily and was repeatedly arrested. Efforts to get benefits from the VA for PTSD failed. The VA decision said that because the sexual trauma/stressor causing PTSD occurred during the period of service determined to be dishonorable, his benefits were denied.²³²
- Rick Tringale told Human Rights Watch he was brutally gang raped in February 1986 during basic training. He got medical attention but did not admit to doctors what really caused his injuries. To the rest of his unit, he acted as if nothing happened. Over the next several months, he managed to channel his trauma into work though he started taking enormous risks, acted on suicidal impulses, and eventually went AWOL in September of that year. A few months later, he was arrested. During questioning, he disclosed he had been raped. Tringale said his interviewer turned off the tape recorder and said, in effect, "If you want to go with this story, I have to put you in the brig with a rapist and murderer who will rape and kill you by the time you get permission to go to the latrine." He was talked into accepting an Other Than Honorable discharge in lieu of facing criminal charges and going to the brig. He was told (erroneously) that after a year the discharge would be automatically upgraded to General Under Honorable Conditions.²³³ In the years following his discharge, he struggled with PTSD and was homeless and living in his car. His attempts to get mental health assistance from the VA were unsuccessful because his Other Than Honorable discharge made him ineligible for care.²³⁴
- A Marine wrote that after his roommate and his two friends raped him while he was asleep, he fled his base in fear the next day "always hiding, always afraid that I would go to jail for desertion. [A] few years went by and I was picked up and

²³² Letter from Department of Veterans Affairs to Tom O'Brien, VA File Number 28 [number withheld], October 16, 2013, on file at Human Rights Watch.

²³³ Human Rights Watch telephone interview with Rick Tringale, January 16, 2014.

²³⁴ Human Rights Watch telephone interview with Rick Tringale, January 16, 2014.

reprocessed out with a less than honorable discharge. Yes, it has certainly caused a lot of problems in my life.”²³⁵

Heath Phillips was a 126-pound, 17-year-old when he enlisted in the Navy in 1988. All he ever wanted was to have a military career. On his 17th birthday he joined the first branch that would accept him. Initially boot camp went well and he was treated like a favored kid brother. However, when Phillips reported to his first ship he found he was a day early because of a holiday weekend. Phillips told Human Rights Watch that some shipmates invited him to spend the weekend with them. After drinking with them, he blacked out and woke up to find himself being sexually assaulted by three men. They threatened to kill him if he reported them, but he did.



Heath Phillips as a 17-year-old Navy Seaman in 1988. He was later given an Other Than Honorable discharge after fleeing his ship to avoid his rapists, and struggled for over 20 years to get medical benefits. © 2016 Private

A few days later Phillips was attacked again in the middle of the night. He reported again and was told he was a liar and that that didn't happen in the ship and that he was a "sissy." Soon the attacks became a regular occurrence.²³⁶ He eventually attempted suicide and went AWOL but he reported the assaults to his congressman while he was in hiding. While he was AWOL he met a counselor who diagnosed him with PTSD from sexual assaults. When he was returned to his ship he was considered a rat and singled out for more abuse—his room was destroyed, shipmates urinated or defecated on his property, and he began being attacked at night. Eventually he was assaulted by three shipmates, one of whom jammed the handle of a toilet bowl brush inside his anus. He blacked out several times. He said that when he sought medical help—beaten up, bloody, and swollen—the infirmary told him he probably was developing hemorrhoids and should take a day off. He had no place else to turn for medical attention. His command continued to consider him a liar.

As the ship was about to leave for the Mediterranean, he decided to run because he feared being trapped on the ship for months with his assailants with no way to escape. He turned himself in and was sent to the brig where his lawyer gave him the choice of six months' confinement or

an Other Than Honorable discharge in lieu of court-martial. Phillips said:

²³⁵ POD written testimony by PFC Newman, June 24, 2013, on file at Human Rights Watch.

²³⁶ Human Rights Watch telephone interview with SR Heath Phillips, October 30, 2013.

At this point in my life after being subjected to countless sexual assaults, beatings, threats, humiliation, in constant fear, a total basket case, I would have signed a deal with the devil himself to escape the torture I kept getting while on board the ship.²³⁷

Following his discharge, Phillips drank heavily, had difficulties holding jobs and maintaining relationships, and engaged in self-destructive behavior. Because of his discharge, the VA would not help him. His marriage ended. Only after 20 years did he learn about Military Sexual Trauma counseling at the VA.



Heath Phillips was given an Other Than Honorable discharge in 1993 after fleeing his ship to avoid repeated sexual assaults. He has been unable to have his discharge overturned and as a result struggled to get health care and benefits for over 20 years. © 2013 Francois Pesant

Heath's efforts to upgrade his discharge because of his assaults were rejected because he had consulted with a lawyer at the time of his discharge. The Boards denied his request for an upgrade twice, despite evidence of assault and PTSD while he was in service.²³⁸

²³⁷ Narrative provided by SR Heath Phillips, on file at Human Rights Watch.

²³⁸ Human Rights Watch telephone interview with SR Heath Phillips, May 28, 2014.

V. Lack of Legal Protections

There is no day in court for soldiers.

—Tom Devine, legal director, Government Accountability Project, Washington, D.C., October 2014

When confronted with questions about thousands of possibly unfair discharges, the US Defense Department has repeatedly stated it “encourages all former Service members who believe that their discharges were incorrectly characterized or processed to request adjudication through their respective Military Department’s Discharge Review Board.”²³⁹

While it is true that these Boards provide an avenue to former service members to correct their records, as the Defense Department well knows they offer little to no hope of success and, particularly for the Boards for Correction of Military Records, virtually no opportunity to be heard. One practitioner described the Boards as “broken, ridiculous, and awful,” language repeated by other lawyers who have handled such cases.²⁴⁰

The Boards for Correction offer virtually no hearing to applicants. The nearly absolute lack of hearings underscores the importance of meaningful review of records by Board members. Unfortunately, the BCMRs’ review of service members’ applications for record changes appears woefully inadequate. Most cases are not reviewed by the Boards at all. Army and Navy Board members do not receive case files in advance of a session. Dozens of cases are decided within a few hours. Little to no effort is made to consider previous decisions for consistency. Judicial oversight is virtually non-existent.

²³⁹ Office of the Under Secretary of Defense Personnel and Readiness, “Report to Congress on Administrative Separations Based on Personality Disorder, Fiscal Years 2002 thru 2007,” http://www.vva.org/PPD-Documents/Pentagon_2008-Report.pdf, p. 10; David S. Martin, “Rape victims say military labels them ‘crazy,’” CNN, April 14, 2012, <http://www.cnn.com/2012/04/14/health/military-sexual-assaults-personality-disorder/>; Letters to Senators Bond and Brownback from William Carr, Deputy Under Secretary of Defense, November 27, 2009, on file at Human Rights Watch. On April 2, 2012, the Department of the Army sent a letter to veterans whose records indicated they deployed and received a PD discharge after September 11, 2001 encouraging them to seek a change in their records if they were subsequently diagnosed with PTSD or Traumatic Brain Injury and believe it influenced their discharge. Sample letter provided by Army in response to records request, on file at Human Rights Watch.

²⁴⁰ Human Rights Watch telephone interview with head of a veterans’ law clinic, September 17, 2015; Human Rights Watch interview with NVLSP lawyers, December 9, 2015 (the NVLSP lawyers also called the Boards “broken”).

The Boards

Protections for service members who are sexually assaulted are limited under existing US law. By longstanding Supreme Court precedent, service members are prohibited from suing the military for injuries or harm that “arise out of or are in the course of activity incident to service.”²⁴¹ This includes violations of their constitutional rights.²⁴²

A lawyer said of a prospective client who had been raped while in service and wanted to pursue a tort claim against the military: “It broke my heart to tell this lady, ‘I’m sorry. There’s not a damn thing you can do about it.’”²⁴³

One rationale for barring members of the armed forces from bringing suit is the existence of alternative compensation systems—namely, veterans’ benefits.²⁴⁴ Yet, as discussed above, for some victims reporting their sexual assault and being subsequently discharged in a less than honorable status meant being denied access to benefits.

For service members who believe they were wrongfully discharged or dispute the characterization of service, their only recourse is with their service’s Discharge Review Board (DRB) or Board for Correction of Military Records (BCMR).

The Discharge Review Boards have authority to upgrade discharges (unless the discharge stems from a general court-martial) and to change the narrative reason for a discharge. DRBs have limited ability to change re-enlistment codes,²⁴⁵ recommend medical retirement or medical discharge, reinstate people in service, or make other changes to the records of service members. They have primary jurisdiction for 15 years after the service member’s

²⁴¹ *Feres v. United States*, 340 US 135 (1950).

²⁴² *Chappell v. Wallace*, 462 US 296 (1983). Federal appeals courts have also barred uniformed personnel from bringing discrimination suits under Title VII of the Civil Rights Act, the primary mechanism for holding employers accountable for inappropriate sexual conduct.

²⁴³ Human Rights Watch interview with Raymond J. Toney, San Francisco, April 22, 2014.

²⁴⁴ *Madsen v. US*, ex rel. US Army Corps of Engineers, 841 F. 2d 1011, 1013 (10th Cir. 1987).

²⁴⁵ As of February 6, 2015, the Naval DRB is authorized to change an applicant’s re-enlistment code if the discharge characterization or narrative reason is changed and that change also warrants a change in the re-enlistment code. See Assistant Secretary of the Navy, Council of Review Boards, Naval Discharge Review Board, <http://www.secnav.navy.mil/mra/CORB/pages/ndrb/default.aspx> (accessed February 10, 2016). If the Army DRB changes a reason for separation and it requires a different re-entry code, it may also make that change. Army Review Boards Agency, The Army Board for Correction of Military Records, <http://arba.army.pentagon.mil/abcmr-faq.cfm> (accessed February 10, 2016).

discharge date, so those seeking to change their characterization of service (from Other Than Honorable to Honorable, for example) or narrative reason for discharge (to remove personality disorder or misconduct) must go to the Discharge Review Boards first if they have been out of service for fewer than 15 years. DRBs are comprised of five members with the senior line officer acting as the presiding officer.²⁴⁶ Decisions by the DRBs can be appealed to the BCMR.

The Boards for Correction of Military Records are the ultimate administrative authority responsible for correcting errors and removing injustices in military records. In addition to reviewing DRB cases, they have the ability to remove disciplinary actions, grant disability retirement benefits, show that medals should have been awarded, remove problems that prevent a service member from receiving VA benefits, reinstate a veteran to military service, and generally correct military records as “necessary to correct an error or remove an injustice.”²⁴⁷

Thus service members with PD discharges who believe they should have been medically separated must go to the BCMRs for referral to a medical evaluation board. BCMRs are also the exclusive remedy for veterans discharged more than 15 years ago.²⁴⁸ Board members are typically civilians in the branches who have agreed to serve on Boards as a collateral duty subject to their availability. Three panel members sitting in an executive session (usually for a half day) make determinations on applications.²⁴⁹

Administrative Dead End

The BCMRs provide little prospect of relief for those with bad discharges. Military law practitioners interviewed by Human Rights Watch expressed extreme frustration with the

²⁴⁶ 32 CFR sec. 865.107.

²⁴⁷ 10 USC sec. 1552.

²⁴⁸ Technically, applicants must file an application within three years after an alleged error or injustice was discovered or reasonably should have been discovered. However, the Boards may waive the time limits when it is in the interest of justice. 10 U.S.C. 1552 (b). They have typically been liberal in applying this standard.

²⁴⁹ Response from Department of the Navy Board for Correction of Military Records to Human Rights Watch FOIA request, December 17, 2013, on file at Human Rights Watch; Secretary of the Navy, “Instruction 5420.193: Board for Correction of Naval Records,” November 19, 1997, <https://doni.daps.dla.mil/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-400%20Organization%20and%20Functional%20Support%20Services/5420.193.pdf>; Response from Department of the Army to Human Rights Watch FOIA request, December 30, 2013, on file at Human Rights Watch; Memorandum for SAF/AAll (FOIA) from SAF/MRBC re: Freedom of Information Act Request—Case #2014-01025-F, December 5, 2014, on file at Human Rights Watch.

Boards. Some refuse to take clients' cases to the Boards because they consider it a "waste of time."²⁵⁰ **Another military law expert described the BCMRs as "a virtual graveyard."**²⁵¹ He estimated 3 to 6 percent of the hundreds of upgrade cases he has seen succeeded.²⁵² Even military documents acknowledge that efforts to upgrade discharges are all but certain to fail. One warns service members, "Although agencies exist to which you may apply to upgrade a less than Honorable Discharge, it is unlikely that such application will be successful."²⁵³

Various data analyses bear this out. **Data provided by the Navy in response to a public records request show that between January 2009 and December 2012 the BCNR granted upgrades to just 1 percent of the 4,189 Other Than Honorable discharges it reviewed.**²⁵⁴ General Discharge upgrade requests had a 4 percent success rate.²⁵⁵ A Yale

"Although agencies exist to which you may apply to upgrade a less than Honorable Discharge, it is unlikely that such application will be successful."

law clinic review of publicly available records for the Army BCMR found that between 1998 and 2013, 4.6 percent of the 371 Vietnam veterans with Other Than Honorable discharges who applied for an upgrade succeeded.²⁵⁶ Human Rights Watch's analysis of DOD BCMR cases available in the BCMR reading rooms as of

August 2013 involving sexual assault victims found that only 5.6 percent were granted the full relief sought. A journalist also reviewed 389 Army BCMR cases from 2001-2012 in which veterans were seeking medical discharge or a change in reason for discharge and found that 5 percent of requests were granted and in only 2 percent of cases was a medical

²⁵⁰ Human Rights Watch telephone interview with military law practitioner, November 12, 2014.

²⁵¹ Human Rights Watch interview with military law advisor at a major veterans' service organization, Washington, D.C., May 27, 2014.

²⁵² Ibid.

²⁵³ Developmental Counseling Form, [name withheld], April 10, 2009, on file at Human Rights Watch; Developmental Counseling Form, [name withheld], May 18, 2009, on file at Human Rights Watch.

²⁵⁴ Response from Department of the Navy Board for Correction of Military Records to Human Rights Watch FOIA request, December 17, 2013, on file at Human Rights Watch. The overall rate of relief (full and partial) for the BCNR is seven percent. See testimony of Jon Ruskin, Counsel, BCNR, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, D.C., April 10, 2015, http://jpp.whs.mil/Public/docs/05-Transcripts/20150410_Transcript_Final.pdf, transcript p. 341.

²⁵⁵ Response to FOIA request from Department of the Navy Board for Correction of Military Records, December 17, 2013, on file at Human Rights Watch. Statistics provided by the Navy to Human Rights Watch in response to a public document request show that for calendar years 2009 through 2012, the BCNR denied 92 to 96 percent of "DRS [Discharge/Retirement/Separation]" cases brought before the boards.

²⁵⁶ Sundiata Sidibe and Francisco Unger, "Unfinished Business: Correcting 'Bad Paper' for Veterans with PTSD," Veterans Legal Services Clinic, Jerome N. Frank Legal Services Organization at Yale Law School, <https://www.law.yale.edu/system/files/documents/pdf/unfinishedbusiness.pdf>, p. 3.

evaluation ordered. Only one PD case was sent for a medical evaluation that could result in a medical retirement.²⁵⁷ Newer cases show a similar pattern.

The DRBs do not offer much more hope for the applicants. An analysis of discharge upgrade cases since 2013 done by the Urban Justice Center found fewer than 10 percent of upgrade cases before the Department of Defense DRBs succeeded in getting relief.²⁵⁸ In some cases examined by Human Rights Watch, even when an upgrade is granted, the narrative reason for separation (for example, personality disorder) may not be changed, thereby leaving the stigma in place.

In order to get an upgrade, applicants must overcome the Board's deference to command and presumption that the discharge was correct. As the Navy DRB points out on its website, "the Department of the Navy, in issuing a discharge will always presume it was correct in that action" and so the burden is on the applicant to provide "clear and substantial evidence" of error.²⁵⁹ This is a high burden to overcome.

The prospects for success have improved in only one area recently. On September 3, 2014, Secretary of Defense Chuck Hagel issued a memorandum directing the BCMRs to grant "liberal consideration" to veterans seeking to upgrade Other Than Honorable discharges who showed symptoms of PTSD (not PD) during service that might have mitigated the misconduct underlying the discharge classification.²⁶⁰ On February 24, 2016, the Acting Under Secretary of Defense for Personnel and Readiness provided supplemental guidance to the Boards requiring waiver of time limits for consideration of cases related to PTSD or Traumatic Brain Injury, and requiring de novo review, upon request, for cases considered without benefit of the September 2014 memorandum.

²⁵⁷ Alyssa Figueroa, "A Losing Battle: How the Army denies veterans justice without anyone knowing," *Fusion*, <http://interactive.fusion.net/a-losing-battle/index.html>. The 389 cases break down as follows: PD discharge (231); discharge for a condition not a disability (131); and misconduct stemming from PTSD and/or TBI (27).

²⁵⁸ Nicholas Cawley and David Inkeles, "Relief Granted: Characterization Upgrades and Changes in Narrative Reason from the U.S. Department of Defense Discharge Review Boards in 2013," Urban Justice Center, Veteran Advocacy Project, on file at Human Rights Watch.

²⁵⁹ Assistant Secretary of the Navy, Council of Review Boards, Preparing For A Personal Appearance Hearing At Washington Navy Yard, D.C., September 9, 2005, <http://www.secnav.navy.mil/mra/CORB/Pages/NDRB/hphd.aspx>.

²⁶⁰ Memorandum for Secretaries of the Military Departments from Chuck Hagel, Defense Secretary, Subject: Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder, September 3, 2014, on file at Human Rights Watch.

An assessment of implementation of this change done by the Yale Veterans' Legal Services Clinic found that the overall grant rate for PTSD-based discharges for the Army BCMR increased substantially from 3.7 percent in 2013 to 45 percent in the period after the memo was released.²⁶¹ The bulk of the cases (97 percent) were upgraded from Other Than Honorable to General Under Honorable Conditions. The number of cases submitted to the Boards following the memorandum also increased from an average of 39 cases a year between 1998 and 2013 to approximately five times that number for the year following the release of the memo. However, the clinic found that due to limited outreach, the overall numbers are still low compared to the potentially tens of thousands of eligible veterans.²⁶²

While this is a positive development for a subset of veterans who may have been discharged for PTSD-related misconduct, the guidance does not make any recommendation for consideration of medical retirement and it specifically is “not applicable to cases involving pre-existing conditions which are determined not to have been incurred or aggravated while in military service.”²⁶³

The memo instructs the Boards to give “special consideration” to VA determinations documenting PTSD or PTSD-related conditions connected to military service.²⁶⁴ However, many with bad discharges do not have access to VA services, which is often their primary reason for seeking the upgrade. Therefore they may not benefit from the memo at all.

Moreover, no clear guidance has been given with respect to handling of claims in relation to sexual assault. None of the BCMRs indicated they had any guideline for handling of sexual assault cases in response to our document requests as of late 2013 and early 2014.

In the 2015 National Defense Authorization Act (NDAA), Congress directed the services to instruct the BCMRs “to give due consideration to the psychological and physical aspects of the individual’s experience in connection with the sex-related offense; and to determine

²⁶¹ The other services did not submit documentation of PTSD-based upgrade decisions made following the Hagel memo.

²⁶² Sundiata Sidibe and Francisco Unger, “Unfinished Business: Correcting ‘Bad Paper’ for Veterans with PTSD,” Veterans Legal Services Clinic, Jerome N. Frank Legal Services Organization at Yale Law School, <https://www.law.yale.edu/system/files/documents/pdf/unfinishedbusiness.pdf>.

²⁶³ Memorandum for Secretaries of the Military Departments from Chuck Hagel, Defense Secretary, Subject: Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder, September 3, 2014, on file at Human Rights Watch.

²⁶⁴ *Ibid.*

what bearing such experience may have had on the circumstances surrounding the individual's discharge or separation from the Armed Forces."²⁶⁵ Congress also directed the Boards to establish a confidential review process allowing victims of sex-related offenses to challenge their discharge "on the grounds that the terms or characterization were adversely affected by the individual being the victim of such an offense."²⁶⁶

Human Rights Watch has been able to find only one response to this provision of the NDAA: an August 6 directive from the Secretary of the Army that repeats the language in the statute. In response to questions by the DOD Judicial Proceedings Panel on whether a separate procedure has been established as required by Congress, the Air Force indicated its proceedings are already confidential so it does not make any special exception for sexual assault cases.

The Navy and Coast Guard said they no longer post sexual assault cases in the reading room; the Army does so only with the victim's consent.²⁶⁷ The decision not to publish sexual assault cases, which seems to be the primary result of the congressional directive, may have the unintended consequence of making it more difficult for other victims to find precedent on which to rely. All decisions posted in reading rooms are redacted before publication, so applicants are never identified.

It is difficult to determine whether these provisions of the NDAA have benefitted survivors at all. Both the Air Force and Navy submitted information to the Judicial Proceedings Panel indicating the burden remains on the applicant to prove there was a sexual assault before they give "due consideration" to the effect on the applicant.²⁶⁸

²⁶⁵ National Defense Authorization Act for Fiscal Year 2015, Public Law 113-291, December 2014, sec. 547.

²⁶⁶ National Defense Authorization Act for Fiscal Year 2015, Public Law 113-291, December 2014, sec. 547.

²⁶⁷ Eighth Public Meeting of the Judicial Proceedings Panel on Sexual Assault in the Military, Judicial Proceedings Panel Request for Information Set #3, Question 80(e), May 13, 2015, http://jpp.whs.mil/Public/docs/07-RFI/Set_3/Responses/Q80_Responses_20150513.pdf.

²⁶⁸ Eighth Public Meeting of the Judicial Proceedings Panel on Sexual Assault in the Military, Judicial Proceedings Panel Request for Information Set #3, Question 80, March 13, 2015, http://jpp.whs.mil/Public/docs/07-RFI/Set_3/Responses/Q80_Responses_20150513.pdf. The Navy's response to question 80(b) was, "If the Board for Correction for Naval Records (BCNR) determines the information provided by an applicant alleging sexual assault is credible, the BCNR will consider that evidence;" the Air Force's response to question 80(f) was, "the AFBCMR will appropriately consider evidence provided by an applicant in determining if the applicant was a victim of a sexual assault and whether or not the effects of the assault had a bearing on the misconduct that precipitated the discharge."

Thus, a burden remains on the applicant to prove a sexual assault, which may be insurmountable, particularly if the victim did not report to authorities. A former Board for Correction of Naval Records staff member said he believed it would be unlikely for Board members to accept an uncorroborated claim of sexual assault.²⁶⁹

A lawyer who works with veterans on upgrades also found DRBs deny claims if there is no proof of sexual assault other than the veteran's statements. Though there are some instances where they will accept a veteran's statements as true, it is rarely sufficient to overcome the "presumption of government regularity."²⁷⁰

The vast majority of survivors do not officially report a sexual assault (in some years, the estimated reporting rate is less than 10 percent; even with recent improvements only an estimated one in four service members report).²⁷¹ Cases before the BCMRs may involve assaults from decades ago where proof will be difficult to come by. Yet no instruction exists to grant a presumption in the applicant's favor. In recognition of this problem and "[t]o ensure all available evidence supporting these claims is considered," the Department of Veterans Affairs relaxed its evidentiary standard for disability claims related to military sexual trauma in 2002:

Because military service records may lack corroborating evidence that a stressful event occurred, VA regulations make clear that evidence from non-military sources may be used to corroborate the Veteran's account of the MST [military sexual trauma]. Further, when direct evidence of an MST is not available, VA may request a medical opinion to consider a Veteran's account and any 'markers' to corroborate the occurrence of the MST event as related to current PTSD symptoms.²⁷²

²⁶⁹ Human Rights Watch telephone interview with former Board staff member, February 4, 2016.

²⁷⁰ Human Rights Watch telephone interview with military law practitioner, February 17, 2016.

²⁷¹ See, for example, Department of Defense, "Annual Report on Sexual Assault in the Military, Fiscal Year 2012," May 3, 2013, http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-volume_one.pdf (accessed April 24, 2015); US Department of Defense, Department of Defense Press Briefing on Sexual Assault in the Military in the Pentagon Press Briefing Room, May 1, 2015, <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/607047> (accessed March 18, 2016); Patricia Kime, "Incidents of rape in military much higher than previously reported," *Military Times*, December 5, 2014, <http://www.militarytimes.com/story/military/pentagon/2014/12/04/pentagon-rand-sexual-assault-reports/19883155/> (accessed March 18, 2016).

²⁷² US Department of Veterans Affairs, "Fact Sheet: Disability Compensation for Conditions Related to Military Sexual Trauma (MST)," April 2015, www.benefits.va.gov/BENEFITS/factsheets/serviceconnected/MST.pdf. "However, VA knows that events involving sexual trauma are not always officially reported. Therefore, for PTSD claims related to MST VA has relaxed the

The BCMRs and DRBs should adopt the same standards as the VA in cases of MST.

Underutilization of Boards

Though thousands of service members may have been wrongfully discharged, very few apply for a discharge upgrade or a change in narrative reason for separation. Our 2013 search of the DOD BCMR reading rooms from October 1998 found only 444 cases of sexual assault victims who applied to the BCMR for a record change out of potentially tens of thousands of victims.²⁷³ A representative from the Government Accountability Office testified that fewer than 1 percent of the 371 PD cases her office reviewed went to a Discharge Review Board to challenge the reason for separation.²⁷⁴

There are several reasons why service members do not go to Boards. Many veterans are simply unaware they exist. Veterans told Human Rights Watch that they learned of the Boards' existence only 13 or 15 years after leaving service, sometimes stumbling upon information about them by chance.²⁷⁵ As a former Army DRB member said, "Who knows about the BCMRs anyway? The average soldier doesn't know about it."²⁷⁶

evidentiary requirements and looks for 'markers' (i.e., signs, events, or circumstances) that provide some indication that the traumatic event happened. These include, but are not limited to: Records from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, or physicians; Pregnancy tests or tests for sexually transmitted diseases; Statements from family members, roommates, fellow Servicemembers, clergy members, or counselors; Requests for transfer to another military duty assignment; Deterioration in work performance; Substance abuse; Episodes of depression, panic attacks, or anxiety without an identifiable cause; Unexplained economic or social behavioral changes; Relationship issues, such as divorce; Sexual dysfunction."

²⁷³ That actual number could be greater because Board decisions do not always include reference to sexual assault even when that is the basis of the request for relief. See Poor Quality Decisions below.

²⁷⁴ US House of Representatives, Committee on Veterans' Affairs, Personality Disorder Discharges: Impact on Veterans' Benefits, Responses to Post-Hearing Questions for the Record Submitted by the Honorable Bob Filner from Debra Draper, Director, Health Care U.S. Government Accountability Office, September 15, 2010, <http://archives.veterans.house.gov/Media/File/111/9-15-10/GAOQFRs.htm>. Three of 371 cases went to a DRB and one was successful.

²⁷⁵ Human Rights Watch telephone interviews with PFC Elizabeth Burns, November 25, 2013, and Shauna Rice, July 27, 2015.

²⁷⁶ Human Rights Watch telephone interview with Howard Cooley, former lawyer with the Army Review Board Agency, November 4, 2015.

At a DOD panel, representatives from the BCMRs testified that they mainly rely on their websites and word of mouth to educate service members about the BCMR process.²⁷⁷ The Army also provides training for military legal staff on BCMR processes.²⁷⁸

Those who know about the Boards may know their odds of success are low. Some Army counseling forms state, “While you can apply to the Discharge Review Board or Army Board for Correction of Military Records to upgrade the character of your service, it is unlikely that you will be successful,” or, “It is very difficult to upgrade a less than honorable discharge.” Personal experience may confirm those warnings: a survivor with a PD discharge told Human Rights Watch, “I thought about going to the Boards but don’t know of anyone who has been successful [even though] I work with a lot of [veterans] in my job.”²⁷⁹

Several survivors told us they were reluctant to reopen the trauma of their sexual assault for military boards that are likely to side with the military. For example, despite the terrible impact a PD discharge has had on her life, Eva Washington said she is afraid to go to the Boards to try to change her record because of the “amount it would rip apart my life.”²⁸⁰ A male victim with an Other Than Honorable discharge who has been desperate for health care told Human Rights Watch, “I can’t do the forms. I get stuck in my head reliving events and get traumatized again.”²⁸¹

Some survivors were exhausted by the VA claims process and could not face another administrative ordeal. An Air Force veteran with a “defective personality” discharge said of her decision not to try to get the BCMR to change her record: “I never petitioned to get it changed. It was just too much for me after my C and P [Compensation and Pension exam by the Department of Veterans Affairs].”²⁸² One victim with an Other Than Honorable discharge who did go to the DRB to change her record said, “I can’t put into words how

²⁷⁷ See testimony of Julia Andrews, Chair, Coast Guard BCMR, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, D.C., April 10, 2015, http://jpp.whs.mil/Public/docs/05-Transcripts/20150410_Transcript_Final.pdf, transcript pp. 345-346; testimony of John Vallario, Deputy Executive Director, Air Force BCMR, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, D.C., April 10, 2015, transcript p. 326; testimony of Douglas Huff, Legal Advisor, Army BCMR, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, D.C., April 10, 2015, transcript p. 339.

²⁷⁸ See testimony of Douglas Huff, Legal Advisor, Army BCMR, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, D.C., April 10, 2015, transcript p. 339.

²⁷⁹ Human Rights Watch telephone interview with PO3 Miranda Carroll, January 22, 2015.

²⁸⁰ Human Rights Watch telephone interview with PFC Eva Washington, October 21, 2013.

²⁸¹ Human Rights Watch telephone interview with Rick Tringale, January 16, 2014.

²⁸² Human Rights Watch telephone interview with Shirley Lawson, January 23, 2014.

hard it was.” She became suicidal again for the first time in years while awaiting the decision, an experience her therapist described as retraumatizing though she ultimately succeeded in changing her discharge.²⁸³

A lawyer who has worked full time with veterans for five years explains that rape victims are unlikely to submit to the process because they fear not being believed. Rape victims often do not have a record of their assault (even if they reported).²⁸⁴ The risk of devastation is real. An Army sergeant whose case was rejected by the Boards because she reported her assault confidentially said having the Board “stand behind a report saying that they didn’t believe you were raped ... was victimizing, it was unnecessary, it was degrading.... I don’t trust this process at all.”²⁸⁵

In addition, the Board applications are complicated, and the vast majority proceed without legal assistance.²⁸⁶ Many veterans do not have the means to hire a lawyer, and applicants are not entitled to recover fees associated with the cost of changing an error or injustice in their records.²⁸⁷

A former BCNR staff member estimated that between 1 and 5 percent of discharge cases he saw in his 25 years were represented by counsel.²⁸⁸ Without a lawyer, forms may not be completed correctly and cases may not be coherently presented, which may result in a case being closed. BCMR staff members may administratively close a case if it is missing forms or information, lacks a signature or social security number, is unclear about relief sought, submits the wrong forms, or if no military records are available.²⁸⁹

²⁸³ Human Rights Watch telephone interview with Stacey Thompson, February 17, 2016.

²⁸⁴ Human Rights Watch telephone interview with lawyer at Swords to Plowshares, January 15, 2014.

²⁸⁵ Human Rights Watch telephone interview with SGT Laura Ross, June 2, 2014.

²⁸⁶ Human Rights Watch interview with military law advisor at a major veterans’ service organization, Washington, D.C., May 27, 2014. He estimated 20 percent of cases have legal assistance.

²⁸⁷ See 32 CFR 581.3 (h)(3) (“The Army may not pay attorney’s fees or other expenses incurred by or on behalf of an applicant in connection with an application for correction of military records”); 32 CFR 723.11(a) (“No expenses of any nature whatsoever voluntarily incurred by the applicant, counsel, witnesses, or by any other person in the applicant’s behalf, will be paid by the Government”); Testimony of Douglas Huff, Legal Advisor, Army BCMR, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, D.C., April 10, 2015, http://jpp.whs.mil/Public/docs/05-Transcripts/20150410_Transcript_Final.pdf, transcript p. 334 (“Most applicants are not represented by counsel”).

²⁸⁸ Human Rights Watch telephone interview with former Board staff member, February 4, 2016.

²⁸⁹ Response by Army BCMR to Human Rights Watch FOIA request, “Life Cycle of an ABCMR case,” on file at Human Rights Watch.

According to the Air Force, 19 percent of its cases in 2014 were administratively closed or closed because they were “nonviable.”²⁹⁰ Avoiding rejection of an application by seeking help from the Boards’ staff may be difficult. When Human Rights Watch attempted to reach the Boards to request an interview, two of the BCNR telephone numbers we could find were out of service and the third had a full voicemail. The Army BCMR telephone number refers callers to the website only. We were unable to find a phone number online for the Air Force BCMR.²⁹¹

There are additional complications even when a veteran does obtain legal assistance. Records necessary to present a case are difficult to obtain. A coordinator of pro bono (free) services for veterans said in many cases, it can take up to a year to obtain records. By that time, the pro bono lawyers who have volunteered to assist may no longer have room in their schedules or have left their firms.²⁹² Although Boards themselves are supposed to obtain military records for applicants, they may not do so.²⁹³ Moreover, as discussed above, sexual assault victims may have difficulty demonstrating they were raped. Many (especially male victims) do not report. Those who have reported, particularly if it was several years ago, say they have had difficulty locating reports of the assault, which handicaps them significantly before the Boards.²⁹⁴

Even for the rare case that makes it to the Boards and is successful, the victory may not always be satisfying. One veteran who had her PD narrative changed to “Secretarial Authority” said, “They ruined my career and my life ... I got no apology. I got nothing.”²⁹⁵

²⁹⁰ Testimony of John Vallario, Deputy Executive Director, Air Force BCMR, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, D.C., April 10, 2015, http://jpp.whs.mil/Public/docs/05-Transcripts/20150410_Transcript_Final.pdf, transcript p. 329.

²⁹¹ Human Rights Watch tried to make these calls on January 25, 2016.

²⁹² Human Rights Watch telephone interview with Rob Cuthbert, Urban Justice Center, January 4, 2016.

²⁹³ Human Rights Watch telephone interview with former Board staff member, February 4, 2016, indicating that as a matter of course the BCNR obtained records for applicants during his tenure, but plaintiffs in a recent class action suit filed against the Army indicate they may be asking applicants to get their own records, in contravention of their own policy. *National Veterans Legal Services Program, et al v. The United States Department of Defense et al*, Case 1:14-cv-01915, Complaint, US District Court of Columbia, filed November 14, 2014, on file at Human Rights Watch.

²⁹⁴ Only 2 percent of those who did not report their assaults were granted full relief from the Boards as compared to 9.2 percent of those who reported. Data extracted from BCMR database, see Methodology section.

²⁹⁵ Human Rights Watch telephone interview with Kimberly Benton, January 13, 2015.

Lack of Due Process

Sexual assault survivors who seek a record change through the service Boards face various hurdles that severely limit their due process rights.²⁹⁶ Under US law, when a property or liberty interest is at stake, due process requires notice and an opportunity to be heard before an impartial tribunal.²⁹⁷ Liberty interests may be implicated “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing”²⁹⁸ as long as it is accompanied by loss of a tangible benefit, such as employment opportunities.²⁹⁹ Denial of government benefits is considered a property interest entitling a claimant to a hearing.³⁰⁰

Although the property and reputational stakes may be high for service members or veterans seeking to correct a discharge, their due process rights are markedly curtailed. Courts have found that service members do not have a property interest in military service since they serve “at the pleasure of the President.”³⁰¹ As discussed below, service members have no right to a hearing before the BCMRs and may have to travel long distances to Washington, D.C. to exercise their right to an in-person hearing before a DRB;³⁰² Board members spend little, and perhaps no, time reviewing material submitted by applicants; inadequate access to prior Board decisions hampers applicants’ ability to research their claims and apply precedent; Boards themselves do not have uniform practices across the services or precedent to benefit from (apart from what an applicant might call to their attention)—which increases the chances of arbitrary decision making; and federal judicial oversight of Board decisions is minimal.

²⁹⁶ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S 171, entered into force March 23, 1976, art. 14, para. 1.

²⁹⁷ US Const. Amendments V, XIV; *Grannis v. Ordean*, 234 US 385, 394 (1914) (“The fundamental requisite of due process of law is the opportunity to be heard. And it is to this end, of course, that summons or equivalent notice is employed.”).

²⁹⁸ *Wisconsin v. Constantineau*, 400 US 433, 437 (1971).

²⁹⁹ *Paul v. Davis*, 424 US 693 (1976).

³⁰⁰ *Mathews v. Eldridge*, 424 US 319, 96 S.Ct. 893 (1976); *Oteze Fowlkes v. Adamec*, 432 F.3d 90, 108, 108 Soc. Sec. Rep. Serv. 241 (2d Cir. 2005). Thus, social security claimants are constitutionally entitled to a hearing to challenge the denial of their applications and to a complete record of the hearing. *Betancourt v. Astrue*, 824 F.Supp.2d 211, 215 (D. Mass 2011). Social Security hearings, which are presided over by an administrative law judge, are considered important enough that courts closely scrutinize claimants’ waivers of their right to a hearing and reject uninformed waivers. See e.g. *Hall v. Schweiker*, 660 F.2d 116 (5th Cir. 1981).

³⁰¹ *Sims v. E L*, 505 F.2d 857, 860 (1974).

³⁰² Applicants are entitled by statute to a hearing before DRBs. However, only the Air Force DRB has a traveling Board. Applicants must come to Washington, D.C. if they want to appear in person before an Army or Navy DRB. The Army does arrange for teleconference hearings from regional centers.

Twenty years ago, Congress expressed concern about “the perception among service members that the boards [BCMRs] have become lethargic and unresponsive, and have abdicated their independence to the uniformed service staffs.”³⁰³ As a result the 1996 National Defense Authorization Act directed the Defense Department to prepare a comprehensive review of the Boards’ make-up and procedures with an eye towards standardizing procedures to improve their effectiveness and responsiveness.³⁰⁴

The DOD report described a number of concerns, many of which persist today. In 2006, Congress enacted legislation setting clearance targets for the BCMRs.³⁰⁵ The Boards are now required to clear 90 percent of their applications within 10 months. All cases must be cleared within 18 months unless they receive a waiver from a military department Secretary. Given the enormous caseloads of the Boards (which can exceed 20,000 per year for the Army and are regularly over 13,000 for the Navy), creating strict deadlines without a corresponding allocation of additional resources likely only exacerbates the problems of over-reliance on staff and the inability of applicants to have a thorough consideration of their cases. It also creates incentives to quickly dispose of cases administratively if forms are not filed correctly. One veteran told Human Rights Watch she was warned repeatedly to “be careful because they are looking for mistakes in the file so they can just say no.”³⁰⁶ All of these issues are discussed further below.

Virtually No Opportunity to be Heard

There is no right to a hearing before the BCMRs and service members have virtually no opportunity to appear before the Boards. The BCMRs retain sole discretion to grant hearing requests. This rarely happens. For minor record corrections, such as changing a date or other simple administrative errors, this may not be an issue. But the standard also applies to matters such as discharge upgrades where a great deal is at stake.

In response to Human Rights Watch’s public information requests, **the Army BCMR provided information indicating that one hearing had been held between 2009 and**

³⁰³ United States Senate, Committee on Armed Services, National Defense Authorization Act for Fiscal Year 1996 Report, Senate Report 104-112, July 1995, <https://www.gpo.gov/fdsys/pkg/CRPT-104srpt112/html/CRPT-104srpt112.htm>.

³⁰⁴ National Defense Authorization Act for Fiscal Year 1996, Public Law 104-106, February 10, 1996, sec. 554(a): Review of System for Correction of Military Records.

³⁰⁵ 10 USC sec. 1557.

³⁰⁶ Human Rights Watch telephone interview with Stacey Thompson, February 17, 2016.

2013, though a three-member panel decides approximately 9,000 cases per year.³⁰⁷ The Navy BCMR held no hearing during that time period though it closed 24,127 cases in that period.³⁰⁸ The Air Force had one personal appearance hearing between July 2006 and July 2013, though the Board decided over 2,000 cases per year.³⁰⁹ The Coast Guard had no personal appearance hearing between 2009 and 2013.³¹⁰

The actual frequency of hearings may be far lower. According to one report, the Coast Guard has not had a hearing in 10 years; the Navy has not held a hearing in 20 years.³¹¹

Human Rights Watch was unable to determine through an examination of cases in the reading room or public records requests the number of applicants who requested a BCMR hearing, but according to the 1996 DOD report, at that time the services estimated that between 10 (Navy) and 50 (Army) percent of applicants requested formal hearings.³¹²

Applicants have good reason to request a personal appearance. A former staff member for the Board for Correction of Naval Records described the importance of a personal appearance before the DRB as “huge” and possibly “the difference between getting an upgrade or not.”³¹³ The figures bear that out: those who appear before the DRBs are much more likely to prevail in their cases. An overview of discharge upgrade cases before the

³⁰⁷ Response from Department of the Army to Human Rights Watch FOIA request, December 30, 2013, on file at Human Rights Watch. In an April 2015 Judicial Proceedings Panel, a representative of the Army BCMR testified that there would be another hearing that year. See testimony of Douglas Huff, Legal Advisor, Army BCMR, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, D.C., April 10, 2015, http://jpp.whs.mil/Public/docs/05-Transcripts/20150410_Transcript_Final.pdf, transcript p. 334.

³⁰⁸ Response from Department of the Navy Board for Correction of Military Records to Human Rights Watch FOIA request, December 17, 2013, on file at Human Rights Watch.

³⁰⁹ Memorandum for SAF/AAll (FOIA) from SAF/MRBC re: Freedom of Information Act Request—Case #2014-01025-F, December 5, 2014, on file at Human Rights Watch. The Board received 4,985 cases in FY 2011 and decided 2,277; in FY 2012 it received 5,940 cases and decided 2,897; in FY 2013 it received 5,235 cases and decided 2,704. The rest were administratively closed, corrected, or deemed non-viable. Testimony before the Judicial Proceedings Panel indicated that the Air Force BCMR had one hearing in 2014. See testimony of John Vallario, Deputy Executive Director, Air Force BCMR, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, D.C., April 10, 2015, transcript p. 324.

³¹⁰ Letter from Department of Homeland Security in response to Human Rights Watch public records request, 2014-HQFO-00301, February 21, 2014, on file at Human Rights Watch.

³¹¹ Eugene R. Fidell, “The Boards for Correction of Military and Naval Records: An Administrative Law Perspective,” *Administrative Law Review*, vol. 65 (2013), pp. 101, 109.

³¹² Department of Defense, Report, National Defense Authorization Act for FY 1996, Section 554: Review of System for Correction of Military Records, 1996, http://www.dod.mil/pubs/foi/Reading_Room/Acquisition_Budget_and_Financial_Matters/861.pdf. At the time, the Army granted an average of five hearings a year; the Air Force less than one; and the Navy granted one to two requests per year. In 1995, the caseload for the Army was 10,867; Navy 9,300; and Air Force 4,169.

³¹³ Human Rights Watch telephone interview with former Board staff member, February 4, 2016.

DRBs in the 1980s shows that the percentage of discharge cases approved by Boards doubled or tripled or more if the applicant made a personal appearance. For example, in 1988, 7.5 percent of Air Force cases in which there was no personal appearance were approved compared to 23 percent of cases approved in which the applicant appeared.³¹⁴ A former Army DRB member recalled participating in cases in which the DRBs voted to deny relief after reviewing the written record, but changed their mind after hearing the applicant in a personal appearance.³¹⁵

While the DRBs have traditionally provided applicants with the right to a hearing, that window has diminished. The Navy and Army no longer have a traveling DRB, though Army hearings may be held via teleconference from regional bases. Apparently for cost reasons, the Navy DRB stopped having hearings across the country at least 20 years ago.³¹⁶

If an Army or Navy applicant wants to appear personally and present evidence, they (or their lawyer) must travel to Arlington, Virginia or the Washington, D.C. Navy Yard. For those who live far away, the costs associated with a personal appearance may be prohibitive. A Navy veteran said she did not request a DRB hearing because she could not afford flights and lodging.³¹⁷ As a coordinator of pro bono services for veterans said, “If you are low income or homeless, it is very difficult to afford the costs associated with a hearing.”³¹⁸

For those seeking medical retirement or other corrections to their records that can only be made by a BCMR or whose discharge occurred more than 15 years ago (such as a change to re-enlistment code), there is no right—and virtually no opportunity—to have a hearing.

Administrative Staff

Congress created the Boards to provide independent civilian review of errors or injustices in military records. However, a significant proportion of cases are closed by staff members

³¹⁴ Michael Ettlinger and David F. Addlestone, *Military Discharge Upgrading and Introduction to Veterans Administration Law: 1990 Supplement with Cumulative Index and Case List* (Washington, D.C.: National Veterans Legal Services Project, 1990), Appendix 1c: Discharge Review Boards, http://ctveteranslegal.org/wp-content/uploads/2012/12/MilitaryDischargeUpgrading_lr.pdf.

³¹⁵ Human Rights Watch telephone interview with Howard Cooley, November 4, 2015.

³¹⁶ Human Rights Watch telephone interview with former Board staff member, February 4, 2016.

³¹⁷ Human Rights Watch telephone interview with Stacey Thompson, February 17, 2016.

³¹⁸ Human Rights Watch telephone interview with Rob Cuthbert, Urban Justice Center, January 4, 2016.

without ever being submitted to the Boards for consideration despite the requirement that the civilian Board, not staff members, adjudicate claims.

Staff members are allowed to return applications in limited circumstances. For example, Army regulations allow its BCMR staff to return an application without action only if the applicant fails to complete and sign the application; all other administrative remedies have not been exhausted; the BCMR does not have jurisdiction to grant the requested relief; or if no new evidence was submitted with a request for reconsideration.³¹⁹

Navy documents show it accepted for further consideration fewer than half of all applications submitted for correction between 2009 and 2012.³²⁰ In 2014, 43 percent of Air Force cases were referred by staff to the BCMR.³²¹

Not all of these failures to consider cases raise concerns. Some cases may not end up being referred to the Boards because the service granted the relief requested before the Boards considered the applications. The Air Force BCMR testified that 39 percent of its closed cases in FY 2014 were closed for this reason.³²² Other cases may be legitimately administratively closed because they are missing documentation or for technical reasons (such as lacking a signature) or request relief the Board does not offer.³²³

However, lawyers for veterans are concerned that the staff members are also closing cases based on insufficient evidence without presenting the cases to the Boards.³²⁴ A class action lawsuit against the Army BCMR describes cases in which applicants' discharge upgrades were denied by staff members without Board review because the applications did not "contain any documentation to support [their] request[s]." No explanation was provided as to why the supporting materials provided by the applicants were

³¹⁹ Staff members may close a case if it is missing forms or information, lacks a signature or social security number, is unclear in the reason for the error, submits the wrong forms, or if no military records are available. Response by Army BCMR to Human Rights Watch FOIA request, "Life Cycle of an ABCMR case," on file at Human Rights Watch.

³²⁰ Response from Department of the Navy Board for Correction of Military Records to Human Rights Watch FOIA request, December 17, 2013, on file at Human Rights Watch.

³²¹ See testimony of John Vallario, Deputy Executive Director, Air Force BCMR, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, D.C., April 10, 2015, transcript p. 329.

³²² Ibid.

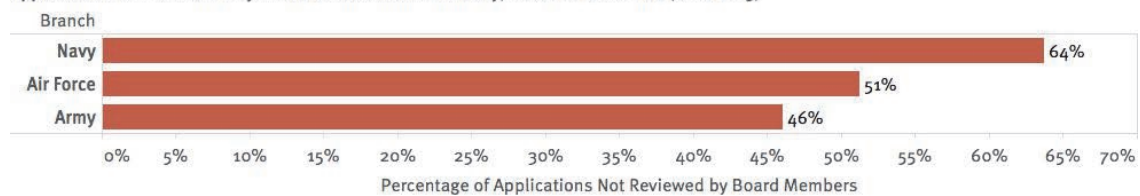
³²³ 32 CFR sec. 581.3(e)(1).

³²⁴ Human Rights Watch telephone interview with NVLSP lawyers, December 9, 2015.

insufficient.³²⁵ The Army BCMR denial letters also said applicants “must provide all Army medical treatment records” to substantiate their requests, despite stated policy indicating the Boards themselves will request military records.³²⁶

In sum, the reasons for administrative closures are not entirely clear. What is clear is that the application process is sufficiently opaque that a significant portion of applicants are unable to access it easily and may never receive the civilian review of their claims to which they are entitled.

Applications Denied Review by Board of Correction of Military/Naval Records Staff (2011-2013)



Source: Responses to Freedom of Information Act requests from Army BCMR, Navy BCNR, Air Force BCMR on file at Human Rights Watch. Navy only includes 2011 and 2012.

Inadequate Time Spent Reviewing Cases

Even the cases that do reach the Boards may not receive full and fair review by panel members. Applicants seeking discharge upgrades or medical discharges may include extensive documentation. Veterans have provided Human Rights Watch with copies of their applications that include not only their military records but also criminal investigative files, extensive medical records, briefs, statements, letters from family, friends, and professionals, and detailed expert reports on trauma totaling hundreds of pages.³²⁷ Lawyers for veterans say their cases often include “personal statements, affidavits, briefs, and hundreds of documents.”³²⁸

³²⁵ *National Veterans Legal Services Program, et al v. The United States Department of Defense et al*, Case 1:14-cv-01915, Complaint, US District Court of Columbia, filed November 14, 2014.

³²⁶ Army Board for Correction of Military Records, “Applicant’s Guide to Applying to the Army Board for Correction of Military Records (ABCMR),” December 2014 (“You do not need to obtain a copy of your military records from the NPRC to apply to the ABCMR. The ABCMR will obtain your records from the NPRC when your DD Form 149 is received.”).

³²⁷ See e.g. files of PFC Hillary Stevens, Brian Whittaker, and SR Heath Phillips, on file at Human Rights Watch.

³²⁸ Human Rights Watch interview with NVLSP lawyers, December 9, 2015.

Yet, based on information provided by the Boards in response to public information requests, Board members often spend only a few minutes deciding a case and often reach a decision without actually reading the submitted material, instead relying on a summary prepared by staff.

Cursory review is particularly problematic for service members who may be incapacitated and unable to put together a thorough application.³²⁹

In response to public records requests, the Army and Navy BCMRs indicated that Board members do not review cases in advance of their sessions. The BCNR said, “The first time they [Board members] see a case is on the day it is presented to them.”³³⁰ Similarly, the information sheet provided to Army BCMR members informs them that when they arrive in the Board conference room, “There are usually about 90 cases divided into three stacks by potential decision—Grant, Partial Grant, and Deny.”³³¹

The Boards often decide 80 cases in a half day. In effect, according to attorneys specializing in military law, they act as “yes men, yes women” to the analysts who prepare the draft decisions rather than independent reviewers.

The files “range in sizes from 5-10 pages up to a wrapped bundle with several folders of 30-40 pages each.”³³² Although the case file is available to Board members, the Army BCMR says “[t]here is no requirement as to what the Board member must view” and they view “as much of the case files as they need to make an informed and judicious decision.”³³³ Each

³²⁹ Human Rights Watch telephone interview with Rob Cuthbert, Urban Justice Center, January 27, 2016.

³³⁰ Response from Department of the Navy Board for Correction of Naval Records to Human Rights Watch FOIA request, December 17, 2013, on file at Human Rights Watch. In “unusually complex” cases information will be provided in advance to three board members selected on the basis of their availability and expertise and a special meeting will be held. The Navy in an earlier FOIA estimates that this happens four to eight times a year. Response from Department of the Navy Board for Correction of Naval Records to Raymond J. Toney FOIA request, June 18, 2009, on file at Human Rights Watch. (The response also stated, “Generally the board members do not prepare in any way for the applications that they will be called upon to decide.... Simply put they [Board members] do not see or have any knowledge of the cases they will decide before they meet.”)

³³¹ Subject: Army Board for the Correction of Military Records (ABCMR) Board Member Information and Helpful Hints, DAIM-ODP 28 OCT 2013, on file at Human Rights Watch.

³³² Subject: Army Board for the Correction of Military Records (ABCMR) Board Member Information and Helpful Hints, DAIM-ODP 28 OCT 2013, on file at Human Rights Watch.

³³³ Response from Department of the Army Board for Correction of Military Records to Raymond J. Toney FOIA request, May 19, 2009, on file at Human Rights Watch.

Army case comes with a “draft decisional document” prepared by an analyst that expedites decision making. **The Boards often decide 80 cases in a half day.³³⁴ In effect, according to attorneys specializing in military law, they act as “yes men, yes women” to the analysts who prepare the draft decisions rather than independent reviewers.³³⁵**

While the Army BCMR has the heaviest case load, the other Boards do not spend a great deal of time on deliberations either. The Navy BCNR meets Monday to Thursday from about 9 a.m. to lunch time.³³⁶ While they did not provide data indicating the average number of applications decided each day in response to our record request, in 2009 they decided an average of 407 cases per month or approximately 34 cases per three-hour session.³³⁷ Staff members brief Board members orally on each case before providing the application and supporting documents to Board members.

A former staff member said most of the time the Board votes on the written summary and oral presentation prepared by the staff member and there is no need for the underlying documents.³³⁸ **After the Board votes, the BCNR staff prepare a decision that is not generally provided to Board members before it is sent out.³³⁹ This means BCNR Board members neither draft nor review their decisions and generally do not even see the documents provided by the applicants.**

³³⁴ Ibid., stating, “Board sessions are conducted two times a week with an average of 80 cases decided by each Board,” and, “Boards usually sit twice a week on Tuesday and Thursday from 8:00 am until they are finished with the cases on the docket, typically about 1:00 pm.”

³³⁵ Human Rights Watch telephone interview with NVLSP lawyers, December 9, 2015.

³³⁶ Response from Department of the Navy Board for Correction of Naval Records to Human Rights Watch FOIA request, December 17, 2013, on file at Human Rights Watch.

³³⁷ Response from Department of the Navy Board for Correction of Naval Records to Raymond J. Toney FOIA request, June 18, 2009, on file at Human Rights Watch. At that time, Boards met three days a week.

³³⁸ Human Rights Watch telephone interview with former Board staff member, February 4, 2016.

³³⁹ Response from BCNR to Human Rights Watch FOIA request, December 17, 2013.

The Air Force Boards meet two to three times a week for two to three hours a session. The deputy executive director of the Air Force BCMR indicated that typically 30 cases are decided in a session.³⁴⁰ However, the Air Force does provide Board members with a draft “record of proceedings” and information a week prior to a Board session.³⁴¹ The information is presented in “an analyzed and distilled fashion” so it is unclear whether the Board members receive access to the entire file.³⁴²

After the Board votes, the BCNR staff prepare a decision that is not generally provided to Board members before it is sent out. This means BCNR Board members neither draft nor review their decisions and generally do not even see the documents provided by the applicants.

While there may be cases in which the correction is minor or administrative and does not require deliberation, the time in which cases are decided does not allow for a full consideration of evidence in the more complex cases.

Based on the data, it is estimated that Army and Navy Board members spend an average of three minutes and 45 seconds and six minutes and 45 seconds per case.³⁴³ For the Air Force, deliberations average five to six minutes. The Coast Guard, with its smaller case load, considers five to ten cases per three-hour session.³⁴⁴

Given what is at stake and the often considerable information to be reviewed, this would appear to be woefully inadequate. **While there may be cases in**

which the correction is minor or administrative and does not require deliberation, the

³⁴⁰ See testimony of John Vallario, Deputy Executive Director, Air Force BCMR, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, D.C., April 10, 2015, http://jpp.whs.mil/Public/docs/05-Transcripts/20150410_Transcript_Final.pdf, transcript p. 324.

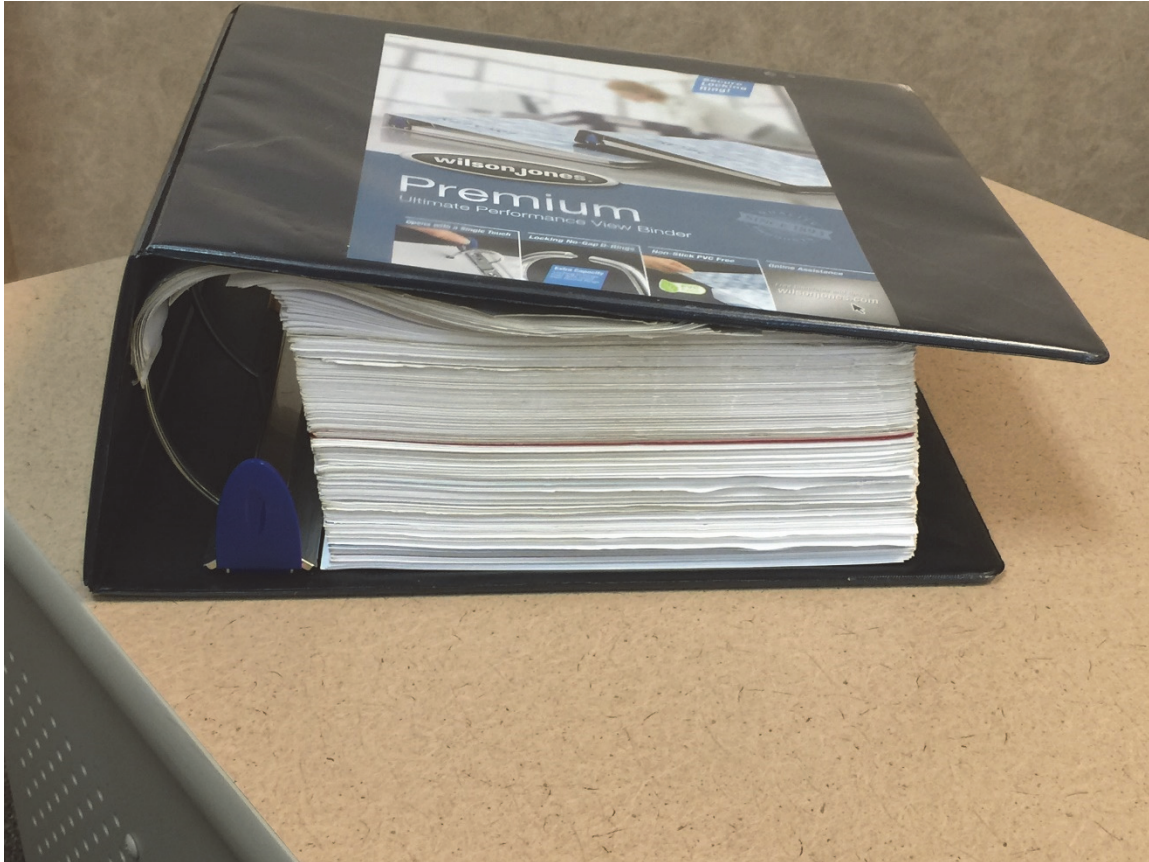
³⁴¹ Memorandum for SAF/AAIL (FOIA) from SAF/MRBC re: Freedom of Information Act Request—Case #2014-01025-F, December 5, 2014, on file at Human Rights Watch. The Coast Guard, which has a much smaller case load, also provides case materials and a draft decision to Board members three to four days in advance of a session. Response from Department of Homeland Security to Human Rights Watch FOIA request, February 21, 2014, on file at Human Rights Watch.

³⁴² See testimony of John Vallario, Deputy Executive Director, Air Force BCMR, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, D.C., April 10, 2015, transcript p. 316.

³⁴³ See Alyssa Figueroa, “A Losing Battle: How the Army denies veterans justice without anyone knowing,” *Fusion*, <http://interactive.fusion.net/a-losing-battle/index.html>; US Commission on Civil Rights, Briefing: Sexual Assault in the Military, Testimony of Rachel Natelson, Legal Director, Service Women’s Action Network, January 11, 2013, <http://www.eusccr.com/Transcript%20of%20briefing%20on%20Military%20Sexual%20Assault-FINAL.pdf>, p. 16.

³⁴⁴ See testimony of Julia Andrews, Chief, Coast Guard BCMR, The Ninth Public Meeting of the Judicial Proceedings Panel, Washington, D.C., April 10, 2015, transcript p. 346.

time in which cases are decided does not allow for a full consideration of evidence in the more complex cases. Between 2009 and 2012, over 40 percent of the Navy Review Board's cases were discharge reviews.³⁴⁵



A sexual assault survivor's application for a discharge upgrade with the Board for Correction for Naval Records
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Moreover, the practice of relying on summaries and draft decisions prepared by staff members is problematic. A 1996 DOD report on the Boards stated that the consequence of this practice is:

[P]anel members generally have little time to delve into the details of cases. Thus, their exercise of independent judgment can be significantly influenced by the summarized information and advice provided by the staff. It is not unusual, therefore, that panel members rarely disagree with the

³⁴⁵ Response from BCNR to Human Rights Watch FOIA request, December 17, 2013.

examiner's proposed decision. This procedure raises an appearance that panel members merely act as a 'rubber stamp' for the examiner.³⁴⁶

Although DOD recommended that this practice (and that of not having panel members review decisional documents after Board action for review) be re-examined, after 20 years the practice remains in place. Over-reliance on Board staff jeopardizes the role of the Board as an independent "honest broker."³⁴⁷ As Congress once said, "If these boards become extensions of the military staffs, they will have lost their sole reason for existence."³⁴⁸

Poor Access to Prior Cases

Although Boards have a great deal of discretion in making their determinations, it is not completely unfettered. In order to avoid arbitrariness, Boards should treat similar cases consistently, or explain as warranted why they are not doing so.

A federal district court requiring remand of an Army BCMR decision rejected the Board's contention that it is not bound by precedent because it is a board of equity, stating, "[i]t is axiomatic that '[a]n agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.'"³⁴⁹ The court also stated that "the need to consider relevant precedent becomes especially acute when a plaintiff has pointed to a specific prior decision as very similar to his own situation."³⁵⁰

Nonetheless, the Boards make little effort to consider prior rulings when deciding cases. Moreover, because of the way prior decisions are made available in online reading rooms, it is very difficult for applicants, their lawyers, or even Board staff members to find other cases on which they can base arguments. Digests of prior decisions are not compiled or maintained by the BCMRs.

³⁴⁶ Department of Defense, Report, National Defense Authorization Act for FY 1996, Section 554: Review of System for Correction of Military Records, 1996, http://www.dod.mil/pubs/foi/Reading_Room/Acquisition_Budget_and_Financial_Matters/861.pdf.

³⁴⁷ United States Senate, Committee on Armed Services, National Defense Authorization Act for Fiscal Year 1996 Report, Senate Report 104-112, sec. 555, July 1995, <https://www.gpo.gov/fdsys/pkg/CRPT-104srpt112/html/CRPT-104srpt112.htm>.

³⁴⁸ *Ibid.*

³⁴⁹ *Wilhelmus v. Geren*, 796 F.Supp.2d 157 (D.D.C. 2011).

³⁵⁰ *Ibid.*

In response to public information requests about use of precedent, the Air Force BCMR said it refers to prior decisions only “if a case is cited as precedent by an applicant and/or counsel.”³⁵¹ Neither the Navy nor the Air Force BCMRs have any “system for classifying or indexing an application according to the factual or legal issues presented for its consideration.”³⁵² Although the Army claimed “attorney client privilege” and did not respond to our request, in response to an earlier records request it said it “makes its decisions on the individual merits of each case.”³⁵³ A former Board staff member told Human Rights Watch that applicants rarely cite cases in part because it is “awfully hard” to find old cases, as the existence of reading rooms is “not widely known” and they are “not particularly user friendly.” Moreover, he himself saved cases he had worked on in the event he needed to reference a prior decision, but that helped only slightly.³⁵⁴ The Boards, like applicants, search the online reading rooms if they want to review past decisions.³⁵⁵ Only the Coast Guard indicated that staff members and Board members often considered prior cases when adjudicating applications.³⁵⁶

The reliance on reading rooms to find relevant cases is problematic because the reading rooms as they currently exist are virtually unusable. Military law practitioners describe the reading rooms as “egregious” and “dysfunctional” and say searching it is a “massive burden on everyone.”³⁵⁷

³⁵¹ Memorandum for SAF/AAll (FOIA) from SAF/MRBC re: Freedom of Information Act Request—Case #2014-01025-F, December 5, 2014, on file at Human Rights Watch. In a previous response to a public document request the Navy also stated, “Past decisions of the Board are not precedential in nature and are thus not binding upon the Board when reviewing of [sic] current applications. Nevertheless if an applicant makes an argument based on a prior decision the Board will certainly consider it during deliberations.” Response from Department of the Navy Board for Correction of Naval Records to Raymond J. Toney FOIA request, June 18, 2009, on file at Human Rights Watch.

³⁵² Memorandum for SAF/AAll (FOIA) from SAF/MRBC re: Freedom of Information Act Request—Case #2014-01025-F, December 5, 2014, on file at Human Rights Watch; response from BCNR to Human Rights Watch FOIA request, December 17, 2013, on file at Human Rights Watch.

³⁵³ Response from Department of the Army to Human Rights Watch FOIA request, December 30, 2013, on file at Human Rights Watch; response from Army Review Boards Agency to Raymond J. Toney FOIA request, July 30, 2009, on file at Human Rights Watch.

³⁵⁴ Human Rights Watch telephone interview with former Board staff member, February 4, 2016.

³⁵⁵ Memorandum for SAF/AAll (FOIA) from SAF/MRBC re: Freedom of Information Act Request—Case #2014-01025-F, December 5, 2014, on file at Human Rights Watch; response from BCNR to Human Rights Watch FOIA request, December 17, 2013, on file at Human Rights Watch; response from Army Review Boards Agency to Raymond J. Toney FOIA request, July 30, 2009, on file at Human Rights Watch.

³⁵⁶ Letter from Department of Homeland Security in response to Human Rights Watch public records request, 2014-HQFO-00301, February 21, 2014, on file at Human Rights Watch.

³⁵⁷ Human Rights Watch telephone interviews with Coco Culhane, November 23, 2015, Rob Cuthbert, January 4, 2016, and NVLSP lawyers, December 9, 2015.

Federal regulations require the BCMRs and DRBs to make all their decisions publicly available.³⁵⁸ Moreover, decisions are required to be indexed “in a useable and concise form so as to enable the public to identify those cases similar in issue together with the circumstances under and/or reasons for which the Board and/or Secretary have granted or denied relief.”³⁵⁹ In this way, applicants and their lawyers should be able to search for cases to determine applicable standards and present their arguments accordingly.

However, in reality, the reading rooms are very basic, consisting of a list of case numbers. Except for the Coast Guard, which has a bare-bones indexing system, none of the services indexes their cases at all. Thus, as a pro bono coordinator said, “If you need an upgrade case, it is not indexed so you can’t find it.”³⁶⁰ If lawyers find the reading rooms unworkable, then it must be even more challenging for the vast majority of applicants who are left to their own devices.

The search mechanism that exists is also rudimentary. Cases are posted in different formats (pdf, rtf, doc, txt), which makes searching and printing even more difficult and time consuming. Not all cases are posted. As discussed above, the Coast Guard and Navy no longer post decisions relating to sexual assault claims. Reading rooms have also been shut down for months at a time.³⁶¹ Given the potential importance of being able to

³⁵⁸ See e.g. 32 CFR sec. 865.7(e); 32 CFR 865.118(e); 32 CFR 723.11(b); 32 CFR 581.3(h)(i)(2). These regulations were the culmination of a settlement agreement in the case of *Urban Law Institute of Antioch College, Inc. v. Secretary of Defense*, Case No. 76-0530 (D.D.C., filed March 31, 1976). The agreement requires the BCMRs and DRBs to publish their decisions, give reasons for the decisions, enumerate the facts on which the decisions were based, and make the decisions publicly available with indices.

³⁵⁹ 32 CFR 723.11; see also 32 CFR 581.3(i)(2)(i) (“The index will be in a usable and concise form so as to indicate the topic considered and the reasons for the decision.”); 32 CFR sec. 865.118 (“The documents shall be indexed in usable and concise form so as to enable the public and those who represent applicants before the DRB to isolate from all these decisions that are indexed those cases that may be similar to an applicant’s case and that indicate the circumstances under and/or reasons for which the DRB or the Secretary of the Air Force granted or denied relief.”)

³⁶⁰ Human Rights Watch telephone interview with Rob Cuthbert, Urban Justice Center, January 4, 2016.

³⁶¹ Between April and September 2013, the Air Force reading room was shut down due to software problems, a problem that also impacted the Coast Guard’s reading room. [Coast Guard] Board for Correction of Military Records, *Facts To Go*, April 23, 2013 (“Significant Upcoming Issues: Determining how best to re-establish FOIA reading room to avoid release of personal information due to Air Force Software problem”); General Law Division’s Bi-Weekly Report, September 16-30, 2013 (“Significant Accomplishments: ... BCMR FOIA reading room restored”), on file at Human Rights Watch. In 2009, Air Force technicians unknowingly blocked Coast Guard decisions from appearing on the website for a period of time. [Coast Guard] BCMR Quarterly Report for the Third Quarter of FY 2009, July 17, 2009, on file at Human Rights Watch. The link to the Air Force DRB reading room was shut down for several months during the summer of 2015, Human Rights Watch telephone interview with Rob Cuthbert, Urban Justice Center, January 4, 2016. Human Rights Watch was unable to open the Air Force BCMR Reading Room on January 12, 2016.

reference prior decisions in making a claim, the difficulty in finding relevant cases is a serious handicap.

NAME	DATE	File Size
20070000004.txt	05-28-2008	5 Kb
20070000005.txt	05-28-2008	8 Kb
20070000009C071108.doc	10-15-2008	99 Kb
20070000024.txt	05-28-2008	7 Kb
20070000040.txt	05-27-2008	9 Kb
20070000041.txt	05-28-2008	10 Kb
20070000043.txt	05-28-2008	9 Kb
20070000045C071029.doc	10-15-2008	100 Kb
20070000046.txt	05-28-2008	16 Kb
20070000048C071108.doc	10-15-2008	105 Kb
20070000053C071029.doc	10-15-2008	113 Kb
20070000056.txt	05-27-2008	7 Kb
20070000069.txt	05-27-2008	10 Kb
20070000077.txt	05-28-2008	6 Kb
20070000079.txt	05-28-2008	8 Kb
20070000096.txt	05-27-2008	5 Kb
20070000099.txt	05-28-2008	4 Kb
20070000100.txt	05-27-2008	5 Kb
20070000101.txt	05-27-2008	5 Kb
20070000105C071029.doc	10-15-2008	99 Kb
20070000108.txt	05-27-2008	7 Kb
20070000115C071029.doc	10-15-2008	93 Kb
20070000113C071029.doc	10-15-2008	103 Kb
20070000124C071029.doc	10-15-2008	97 Kb
20070000128C071029.doc	10-15-2008	101 Kb
20070000131.txt	05-28-2008	7 Kb
20070000134C071029.doc	10-15-2008	102 Kb
20070000140.txt	05-28-2008	10 Kb
20070000145.txt	05-27-2008	4 Kb
20070000151.txt	05-28-2008	8 Kb
20070000155C071108.doc	10-15-2008	115 Kb
20070000159C071029.doc	10-15-2008	102 Kb
20070000162.txt	05-27-2008	9 Kb
20070000168.txt	05-28-2008	6 Kb
20070000170.txt	05-27-2008	7 Kb
20070000171.txt	05-28-2008	22 Kb
20070000173.txt	05-27-2008	7 Kb
20070000174.txt	05-27-2008	8 Kb
20070000179C071108.doc	10-15-2008	97 Kb
20070000181.txt	05-28-2008	10 Kb
20070000185.txt	05-28-2008	6 Kb
20070000188C071108.doc	10-15-2008	106 Kb
20070000190C071108.doc	10-15-2008	101 Kb
20070000211C071108.doc	10-15-2008	114 Kb

Screen shot of the Army Board for Correction of Military Records (BCMR) reading room © 2016 Human Rights Watch

Poor-Quality Decisions

Given the lack of reliance on precedent, it is not surprising that military law practitioners say there is little consistency in decisions.³⁶² Lawyers who spoke to Human Rights Watch have gone so far as to describe some decisions as “crazy”³⁶³ and one described a decision that seemed to indicate the Board “does not understand their own regulations” as they misstated the process for a mental health discharge.³⁶⁴

For informal adjudication, Boards are required to render decisions that set forth a “brief statement of the grounds for denial” sufficient to enable courts to understand the basis for

³⁶² Human Rights Watch telephone interview with lawyer at Swords to Plowshares, January 15, 2014.

³⁶³ Human Rights Watch interview with NVLSP lawyers, Washington, D.C., May 27, 2014.

³⁶⁴ Human Rights Watch telephone interview with NVLSP lawyers, December 9, 2015.

the decision and determine whether it complies with the usual standards for judicial review.³⁶⁵

Although many cases from the reading rooms seemed to summarize the evidence presented by the applicant and address the arguments presented, it is difficult to determine if the applicants' arguments were fully considered without reading the underlying material.

In cases in which Human Rights Watch was able to review both the Board decision and the materials presented to the panel for consideration, we found Naval Board decisions that did not address the substantive claims made by the applicants but instead appeared to be form letters.

For example, Heath Phillips, who at age 18 was given an Other Than Honorable discharge after fleeing his ship to escape repeated sexual assaults by peers, attempted twice to get the BCNR to upgrade his discharge in order to enable him to get the health care assistance he needed from the VA. His lawyer submitted evidence showing that Phillips was diagnosed with PTSD from sexual trauma at the time he was AWOL. He also submitted military records establishing that Phillips had been subject to sexual harassment while in service. Although Phillips had agreed to an Other Than Honorable discharge in lieu of a court-martial after consulting with a judge advocate, his lawyer pointed out that “the decision making ability of a frightened 17 year-old suffering from PTSD, and facing the immediate prospect of going back into the company of shipmates whom had tormented him, must be called into question.”³⁶⁶ The BCNR denied his 2010 upgrade request in a two-page formulaic letter that made no reference to military sexual trauma and simply said Phillips had been AWOL, consulted with an attorney, and received the “benefit of [his] bargain” when the request for a discharge in lieu of a court-martial was granted.³⁶⁷

In 2012, with the assistance of an attorney, Phillips applied for reconsideration. The Board again denied his application in a two-page letter that was very similar to the first decision.

³⁶⁵ 5 USC secs. 555(e), 706(2)(A).

³⁶⁶ Service member's Brief submitted to the Board for Correction of Naval Records, SN:113640286, November 9, 2012, on file at Human Rights Watch.

³⁶⁷ Board for Correction of Naval Records, Docket No. 7189-10, decided on December 3, 2010.

Neither the sexual assault nor the diagnosis of PTSD was referenced in the decision and it is unclear if they were considered at all.³⁶⁸

Similarly, when Brian Lewis sought to have his PD narrative changed, the Board decision, which is less than a page and contains mostly boilerplate language, references neither the PD nor the sexual assault that was the basis for the request. It simply discounted the VA diagnosis of PTSD because fitness and disability determinations made by the armed forces are fixed at the date of separation (though a PTSD diagnosis had, in Brian's case, been made prior to separation).³⁶⁹

The mixed quality of decisions and the potential uneven application of standards make it all the more important that cases be subject to judicial review.

Minimal Judicial Oversight

Board decisions are subject to minimal external oversight. Although Board decisions are reviewable in federal court, very few cases are brought to court and relief is rarely granted.

While lawyers who spoke to Human Rights Watch described Board decisions as arbitrary and in some cases plainly erroneous, few bring cases to court. Lawyers say by the time their client gets the BCMR decision, they are frustrated and do not want to go to court.³⁷⁰ Moreover, the expense of hiring a lawyer to bring a complaint (which some estimate at a minimum to be between \$5,000 and \$15,000 over and above anything paid to have representation before the Boards) is a significant barrier to challenging decisions for many veterans.³⁷¹ The cost is particularly hard to justify because the chance of success is extremely low.

³⁶⁸ Board for Correction of Naval Records, Docket No. 12147-12, decided on May 15, 2013. Unlike the earlier decision, the 2013 letter did note that it had access to the Discharge Review Board decision denying Phillips' claim and that the earlier decision referenced "homosexual harassment."

³⁶⁹ Board for Correction of Naval Records, Docket No. 03641-04, decided on August 6, 2004. The failure to address the substantive arguments in Phillips' and Lewis' cases also illustrate the shortcomings of our search of the Board's databases. Neither case appeared in our search of the boards' libraries because they did not contain reference to sexual assault or PD despite the fact that they were the bases of the claims for relief.

³⁷⁰ Human Rights Watch interview with NVLSP lawyers, Washington, D.C., May 27, 2014.

³⁷¹ See Alyssa Figueroa, "A Losing Battle: How the Army denies veterans justice without anyone knowing," *Fusion*, <http://interactive.fusion.net/a-losing-battle/index.html>.

Federal courts generally grant broad deference to agency action, only overturning a decision if it is “arbitrary, capricious, an abuse of discretion,” or otherwise contrary to law.³⁷² However, for BCMRs, the courts use an “unusually deferential application” of this standard. Courts are reluctant to second-guess military decisions about “how best to allocate military personnel in order to serve the security needs of the Nation,” describing the task as “inherently unsuitable to the judicial branch.”³⁷³

Because the Secretary is not legally required to correct even an undisputed error or injustice in a personnel record, the reviewing court’s authority to upset a determination by the secretary is substantially restricted.³⁷⁴ The standard is so high that the Court of Appeals for the District of Columbia Circuit said, “Perhaps only the most egregious decisions may be prevented under such a deferential standard of review,” and further indicated of judicial review, “[I]t is not for us but for Congress to say whether the game is worth the candle.”³⁷⁵

Many have concluded it is not worth it. Very few challenge Board decisions in court. According to the Air Force BCMR, between 2009 and 2013, an average of nine applicants per year—or fewer than 0.5 percent of cases decided by the Air Force BCMR—sought judicial review. Of the 46 cases that received judicial review between 2009 and 2013, no decisions were vacated, reversed, or modified. Eight cases were remanded and only two of those remands resulted in relief for the applicant. The remaining cases were denied after remand.³⁷⁶ The figures are similar for the Army. Between 2008 and 2013, out of tens of thousands of decisions, only 56 cases were remanded by federal courts resulting in partial relief for six applicants and granting of relief to five others.³⁷⁷

³⁷² 5 USC sec. 706(2)(A).

³⁷³ *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1511 (1989).

³⁷⁴ *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1514 (1989). The Secretary is authorized to act “when he considers it necessary to correct an error or remove an injustice.”

³⁷⁵ *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1515 (1989).

³⁷⁶ Memorandum for SAF/AAll (FOIA) from SAF/MRBC re: Freedom of Information Act Request—Case #2014-01025-F, December 5, 2014, on file at Human Rights Watch. The Board received 4,985 cases in FY 2011 and decided 2,277; in FY 2012 it received 5,940 cases and decided 2,897; in FY 2013 it received 5,235 cases and decided 2,704. The rest were administratively closed, corrected, or deemed non-viable.

³⁷⁷ Response from Department of the Army to Human Rights Watch FOIA request, December 30, 2013, on file at Human Rights Watch. One case was still with an analyst and another said “no application received.”

In short, judicial oversight of BCMR cases is so negligible as to be nearly non-existent, providing little incentive for Boards to make credible decisions that can withstand scrutiny.

VI. Human Rights Obligations

The US government has an obligation under international human rights law to protect the rights of sexual assault survivors in the military, including those who have been wrongfully discharged from the services. As a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United States committed to ensure that those who report torture or other cruel, inhuman or degrading treatment or punishment “are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”³⁷⁸

In 2014, the United Nations Committee against Torture, the expert body charged with monitoring compliance with the convention, reminded the US government of its obligation to ensure those protections for complainants reporting military sexual assault.³⁷⁹

In addition, international law affords victims the right to an effective remedy for violations of their rights, including sexual assault.³⁸⁰ Recognizing the ways that retaliation can interfere with victims’ access to a remedy under human rights law, international best practices on the treatment of victims obligate governments to “[take] measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.”³⁸¹

³⁷⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, art. 13.

³⁷⁹ UN Committee against Torture, Concluding observations on the combined third to fifth periodic reports of the United States of America, U.N. Doc. CAT/C/USA/CO/3-5 (2014), para. 30.

³⁸⁰ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (“Reparations Principles”), adopted December 16, 2005, G.A. res. 60/147, U.N. Doc. A/RES/60/147 (2005).

³⁸¹ United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, November 29, 1985, G.A. res. 40/34, U.N. Doc. A/RES/40/34 (1985), para. 6(d). The Declaration was adopted as part of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, August 26-September 6, 1985 and it details international consensus on best practices in relation to victims of crime.

Protecting victims from retaliation requires providing them with a meaningful opportunity for redress for harm that has come to them as a result of seeking justice for sexual assault. This includes the right to a fair hearing for any loss of property or liberty.

As a party to the International Covenant on Civil and Political Rights (ICCPR), the US is obligated to ensure that “[i]n the determination ... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”³⁸²

The Human Rights Committee, which interprets and oversees compliance with the ICCPR, has noted that fair and public hearing requirements are “based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights.”³⁸³ Thus, in addition to applying to criminal and civil judicial proceedings, the right to a fair and impartial hearing applies to “equivalent notions in the area of administrative law” such as termination of civil servants and determination of the pension rights of soldiers.³⁸⁴

The ICCPR also contains the right to equality before the law. The Human Rights Committee has said, “The right to equality before courts and tribunals also ensures equality of arms.”³⁸⁵ The principle of “equality of arms” is inherent in the concept of a fair hearing and applies to civil as well as to criminal cases.³⁸⁶ A fair balance between the parties requires that each party be afforded a reasonable opportunity to present their case.

The responsibility to ensure equality of arms and fairness of hearings lies with the US government to ensure that service members and veterans have the same rights as others.

³⁸² International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S 171, entered into force March 23, 1976, art. 14, para. 1.

³⁸³ UN Human Rights Committee, General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32 (2007), para. 16.

³⁸⁴ *Ibid.* citing Communication No. 441/1990, *Casanovas v. France*, para. 5.2; Communication No. 112/1981, *Y.L. v. Canada*, para. 9.3.

³⁸⁵ UN Human Rights Committee, General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32 (2007), para. 13.

³⁸⁶ *Ibid.*

Recommendations

To the Secretary of Defense

To Improve Transparency about the Boards

- Conduct effective outreach to inform service members and veterans about administrative remedies available to correct records.
- Publish clear guidelines by which applications are evaluated and place these guidelines in DD Forms 149 and 293.
- Adopt measures to ensure all Board decisions (including cases involving sexual assault) are indexed, summarized, and published in a database that is uniformly searchable by keywords, unlike the current reading rooms.
- Develop methods to identify the number of service members separated for non-disability mental health conditions and oversight mechanisms to monitor separations for non-disability mental health conditions to ensure they comply with Defense Department regulations, as per the Government Accountability Office recommendations.
- Require that services provide sexual assault victims with legal consultation (either their victim's counsel or defense counsel) prior to an administrative discharge and require that waiving that consultation be done in the presence of defense or victims' counsel.

To Improve Board Practices

- Develop a working group with representatives from each service's Board, civilian lawyers, and veterans' organizations to study standards for granting relief, determine best practices and procedures, and make recommendations for uniform standards and procedures to be included in revised Defense Department instructions. Reforms should include at a minimum:
 - Eliminating the one-year time limit for reconsideration

- Requiring entire case files to be provided to Board members in advance of dates on which they are sitting
- Ending the staff practice of providing decisional documents containing recommendations for proposed decisions to Board members prior to case review
- Developing materials to make the process more understandable to applicants, and include these procedural descriptions in DD Forms 149 and 293
- Notifying applicants that they can include testimony in their applications
- Providing standard and more extensive training to Board Members
- Provide for audio or video conference hearings by the Boards for Correction and Discharge Review Boards.
- Adopt measures to ensure Boards are obtaining medical and military records on behalf of applicants as required by regulation.
- Amend regulations and instructions to require the Boards to consider trauma or mental illness a mitigating factor in requests for discharge upgrades, changes to narrative reasons for discharges, or re-enlistment codes.
- Require the Boards to refer victims who assert mental health claims but do not have access to VA care to the Department of Veterans Affairs for a medical evaluation by VA professionals who are trained in the area of the mental health condition raised.
- Require expedited production of records to veterans who intend to file claims before the Discharge Review Boards or the Boards for Correction of Military Records (60 days) if such an application will request an upgrade, medical retirement, or change in re-enlistment code.
- Adopt measures to ensure those involved with decisions about discharge categorization (supervisors and judge advocates including SVCs) are trained on the consequences of different discharge characterizations on benefits.
- Require Boards to notify applicants of deficiencies in their applications and inform them of what additional evidence is required to substantiate a claim.

To Redress Harm to Sexual Assault Survivors

- Instruct Boards for Correction to change “Personality Disorder” narrative reason for discharges to “Completion of Service” for applicants with a personality disorder discharge who experienced trauma and have not be diagnosed with a personality disorder since leaving service.
- Expand the September 2014 and February 2016 guidance on considering upgrade requests by veterans claiming PTSD to clarify that special consideration of PTSD claims should be extended to all sexual assault survivors.
- Require liberal consideration of expert opinions from sexual assault specialists for Boards for Correction cases in which the applicant is seeking relief with respect to adverse action relating to a sexual assault.
- Create evidentiary standards for proving to the Boards that a sexual assault occurred that include a broad range of “markers” showing a traumatic event occurred to substantiate a claim, in line with the standards adopted by the US Department of Veterans Affairs.

To the US Congress

Include in the National Defense Authorization Act measures that

Strengthen the Administrative Review Process

- Provide applicants the right to a hearing before the Boards for Correction of Military Records if the applicant has otherwise not had a hearing.
- Require the Boards for Correction and Discharge Review Boards to allow video or audio hearings.
- Reinstate traveling Discharge Review Boards for the Navy and Army to allow meaningful access to veterans who seek a personal appearance.
- Require adequate training for new Board members to include training on Post-Traumatic Stress Disorder.
- Allow veterans who succeed in their claims before the Boards to recover reasonable legal fees to increase access to legal services, as is done for Equal Employment Opportunity cases.

- When sexual assault is raised as an issue in a complaint before the Boards for Correction or Discharge Review Boards, require an advisory opinion on trauma arising from sexual assault.
- Direct the Secretary of Defense to create a working group, including Board representatives, military lawyers and veterans' groups, to study best practices and recommend standardized procedures for service Boards.
- Establish full time, permanent Board members assigned for a fixed number of years, to review all cases where there is an application for an upgrade, medical retirement, or change of re-enlistment code.

Improve Transparency and Oversight of Boards

- Enforce the requirement that Boards publish, summarize, and index all decisions (including cases involving sexual assault) so that they are searchable and accessible.
- Require mandatory publicly available annual reports by each service Board on performance to improve transparency and uniformity.
- Require judicial review of military board decisions to be consistent with that required by the Administrative Procedure Act for those of any other federal agency without the additional "unusual deference" reserved for the military.

Increase Protection against Improper Discharges of Traumatized Service Members

- Expand statutory protections for PTSD or other mental health conditions (e.g. depression) stemming from a traumatic event that occurred in service to include mental health experts and expedited decision making for all Board cases involving trauma, including trauma resulting from sexual assault, and provide personnel dedicated to reviewing these trauma-related cases.
- Extend protections for non-disability mental health discharges that exist for combat veterans to those who have experience other forms of trauma, including sexual assault.
- Require the services to suspend administrative separation procedures and refer cases for potential medical evaluation through the medical retirement process

(Integrated Disability Evaluation System) when a service member has a diagnosis of a medical condition related to sexual harassment or sexual assault (such as PTSD or depression).

Provide Redress to Wrongfully Discharged Service Members

- Codify a presumption for veterans with documented PTSD that the PTSD contributed materially to discharge classification.
- Codify evidentiary standards to allow a broad range of “markers” for proving to the Boards that a sexual assault or traumatic event occurred to substantiate a claim, in line with the standards adopted by the US Department of Veterans Affairs.
- Create a specialized panel to expeditiously review cases in which veterans claim to have been wrongfully discharged following a report of sexual assault. The panel should include members with expertise on military sexual trauma.

To the Department of Veterans Affairs

- Issue instructions to medical staff to be cautious about relying on personality disorder diagnoses by services to ensure that medical care is not compromised.
- Conduct outreach to inform service members and veterans about administrative remedies available to correct records.
- Conduct extensive outreach to notify both VA staff and veterans with Other Than Honorable discharges that those with such discharges may be entitled to a positive Character of Discharge by the Department of Veterans Affairs.
- Adopt regulations authorizing tentative eligibility for health care for service members pending adjudication of Character of Discharge.
- Authorize eligibility for support services other than health care, including housing services, for former service members receiving health care related to military sexual trauma.

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PERSONNEL AND
READINESS

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Ms. Sara Darehshori
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Dear Ms. Darehshori:

Thank you for your recent letter to Secretary Carter regarding the discharges of Servicemembers asserting that they were victims of sexual assault. Since Department of Defense (DoD) policy for the Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) is under my purview, I have been asked to respond.

As you know, a number of Veterans have asked the Boards to upgrade their other than honorable conditions discharges based on conduct which may be attributable to Post-Traumatic Stress Disorder (PTSD). In response to these and other related concerns, and after a comprehensive and coordinated effort within DoD and in consultation with the Department of Veterans Affairs, then-Secretary Hagel issued broad guidance addressing the medical requirements, mitigating factors, and review protocols applicable to the petitions of Veterans asserting PTSD or related conditions. Recently, in February 2016, the Acting Under Secretary of Defense for Personnel and Readiness provided supplemental guidance to the Boards regarding waiver of the time limits for consideration of requests related to PTSD or related mental health conditions, and required, upon request, de novo review for any petitions that were previously considered prior to the implementation of the September 2014 guidelines. Additionally, as of December 2014, Congress amended the governing statutes for the Boards to require a psychologist or psychiatrist on DRB cases, and a medical opinion from a psychologist or psychiatrist in BCMR/NR cases asserting mental health issues. All of these changes in the last 18 months provide liberal consideration to every Veteran, including sexual assault victims, who asserts PTSD or mental health issues as a basis for relief at these Boards.

The Department regularly reviews its procedures and will continue to do so, always placing emphasis on serving Service members, Veterans, and their families with justice, equity, and compassion.

These effort reflects our shared commitment to those who served our great Nation during times of war. Thank you for your continued support of our current and former Service members, and we look forward to reviewing your report.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul E. Kantwill".

Paul E. Kantwill
Director, Office of Legal Policy



BOOTED

Lack of Recourse for Wrongfully Discharged US Military Rape Survivors

Over the years thousands of service members who reported sexual assaults or harassment in the US military found their careers cut short involuntarily. Those suffering from trauma were unfairly discharged for a “personality disorder” or a pre-existing mental health condition that makes them ineligible for benefits. Others were given “Other Than Honorable” discharges for misconduct that shut them out of the Veterans Affairs system and a broad range of educational and financial assistance. Recently, the US defense department has introduced reforms to improve protection for service members who are sexually assaulted. However, these changes have not redressed existing wrongs.

Booted: Lack of Recourse for Wrongfully Discharged US Military Rape Survivors draws on interviews with 163 sexual assault survivors from all branches of the US military from the Vietnam War era to the present. The report shows that the consequences for veterans and their families of having “bad paper” (any less than honorable discharge) or being labeled with a personality disorder are far-reaching, impacting employment, child custody, health care, disability payments, and even burial rights—virtually all aspects of life.

Despite the high stakes, veterans can do little to fix an unjust discharge. Service members are prohibited from suing the military for service-related harm. Administrative structures meant to correct injustices, the Boards for Correction of Military Records, are overwhelmed. Well over 90 percent of those applying to the Boards to change their discharge are rejected with almost no opportunity to be heard or for meaningful review. Judicial oversight of the Boards is virtually non-existent.

Human Rights Watch calls on Congress and the defense secretary to take measures to correct wrongful discharges of sexual assault survivors and strengthen administrative mechanisms to ensure all veterans receive an opportunity to be heard and meaningful, independent review of any injustices in their records.

(above) Gary Noling holding a photo of his daughter Carri Goodwin, a rape victim who died of acute alcohol intoxication less than a week after receiving an Other Than Honorable discharge from the Marines. Because of her discharge, her father has been unable to secure a military burial for her remains.

(front cover) Gary Noling holding dogtags belonging to his daughter, Carri Goodwin, a rape victim who died of acute alcohol intoxication less than a week after receiving an Other Than Honorable discharge from the Marines. Because of her discharge, her father has been unable to secure a military burial for her remains.

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