



PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
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MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHIEF OF THE NATIONAL GUARD BUREAU
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER AND
RESERVE AFFAIRS

SUBJECT: Safe-to-Report Policy for Service Member Victims of Sexual Assault

As required by section 539A of the William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021, the Safe-to-Report Policy prescribes the handling of alleged minor collateral misconduct involving a Service member who is the victim¹ of an alleged sexual assault², and is applicable to all members of the Military Departments (including Reservists and cadets and midshipmen at the Military Service Academies). This policy applies regardless of to whom the victim makes the allegation of sexual assault, and regardless of whether the investigation and/or prosecution is handled by military or civilian authorities. This policy does not preclude Military Criminal Investigative Organizations from continuing to investigate and document in final reports incidents of alleged collateral misconduct revealed during associated investigative processes, but it may impact the commander's action or response to such misconduct.

Each Secretary of a Military Department and the Chief of the National Guard Bureau (CNGB), shall issue a Safe-to-Report Policy including the standards set out in this memorandum. The Safe-to-Report Policy will detail processes and procedures for the identification of and treatment of alleged "minor" and "non-minor" collateral misconduct by victims of sexual assault.

**DETERMINATION OF WHETHER THE COLLATERAL MISCONDUCT IS DEEMED
"MINOR" OR "NON-MINOR"**

The threshold issue for the applicability of the Safe-to-Report Policy is determining whether the alleged collateral misconduct in question is "minor" or "non-minor." Commanders must assess the alleged collateral misconduct against aggravating and mitigating circumstances. If the alleged collateral misconduct is non-minor, then the Safe-to-Report Policy does NOT apply and the victim could be subject to disciplinary action. However, if the alleged collateral misconduct is deemed minor, then the Safe-to-Report Policy does apply and the victim shall not be disciplined.

¹ Use of the term "victim(s)" refers to individuals who disclose or report a sexual assault allegation. It is not intended to presume the guilt or innocence of an alleged offender.

² For purposes of this Safe-to-Report Policy, sexual assault is defined as: alleged penetrative and non-penetrative violations of the applicable version of Article 120, Uniform Code of Military Justice; alleged violations of Article 125 for acts of forcible sodomy of a victim age 16 y/o or older occurring before January 1, 2019; and alleged attempts and conspiracies to commit any of these offenses.

For purposes of determining whether an offense is “minor” under the Safe-to-Report Policy, the criteria providing guidance on the implementation of Article 15 of the Uniform Code of Military Justice (UCMJ) in paragraph 1.e of Part V of the Manual for Courts-Martial (MCM) generally apply. Commanders have considerable discretion in deciding whether an offense is a minor offense. The guidance related to nonjudicial punishment can be used to cover a wide variety of offenses, ranging from an incidental infraction during initial training to a significant dereliction. Therefore, alleged minor collateral misconduct may in some instances include UCMJ offenses that may be punishable by more than one year of confinement if tried by general court-martial. The following are examples of collateral misconduct that generally should be treated as minor for purposes of the Safe-to-Report Policy:

- (a) The victim was drinking underage at the time of the assault;
- (b) The victim was engaged in an unprofessional relationship with the accused at the time of the sexual assault. An “unprofessional relationship” is a relationship that violated law, regulation, or policy in place at the time of the sexual assault;
- (c) The victim was in violation of lawful orders establishing curfews, off-limit locations, school standards, barracks/dormitory/berthing policies, or similar matters at the time of the alleged sexual assault.

Aggravating Circumstances. The Secretaries of the Military Departments and CNGB shall identify within their respective Safe-to-Report policies the aggravating circumstances that increase the gravity of alleged collateral misconduct or its impact on good order and discipline. Commanders shall take into account these factors in determining whether the alleged collateral misconduct is minor. Aggravating circumstances include, but are not limited to, whether the alleged misconduct intentionally or unintentionally:

- (a) Resulted or imminently threatened to result in failure of a specified military mission or objective;
- (b) Threatened the health and safety of any person, not including acts of self-harm or acts of self-defense against the alleged perpetrator(s) of an assault; or
- (c) Resulted in significant damage to government property, or to the personal property of others, except when such damage was the collateral result of an assault and/or resulted from an act of self-defense.

The existence of aggravating circumstances does not automatically result in making the alleged collateral misconduct non-minor. The command retains the discretion whether, or not, to take disciplinary action against a victim for alleged collateral misconduct where aggravating circumstances render the misconduct more serious.

Mitigating Circumstances. The Secretaries of the Military Departments and CNGB shall identify within their respective Safe-to-Report policies the mitigating circumstances that decrease the gravity of alleged collateral misconduct, its impact on good order and discipline, and concern that it may be service discrediting. Commanders shall take into account these factors in determining whether the alleged collateral misconduct is minor. Mitigating circumstances include, but are not limited to:

- (a) The victim’s age and military experience level.

- (b) Whether the suspect is in a position of authority over the victim or a higher grade than the victim.
- (c) Whether the suspect engaged in actions to stalk, harass, haze, coerce and/or otherwise influence the victim to engage in sexual behavior.
- (d) Whether the alleged collateral misconduct was known to command prior to the report of sexual assault, and if not known, the likelihood that the alleged collateral misconduct would have otherwise been discovered, but for the victim disclosing or reporting the sexual assault.
- (e) The victim engaging in misconduct after the sexual assault, which may be related to symptoms of exposure to trauma; e.g., the victim engaged in underage drinking as a coping mechanism to alleviate sexual assault trauma symptoms.

DETERMINATION THAT THE COLLATERAL MISCONDUCT IS NON-MINOR

If the victim's alleged collateral misconduct is determined to be non-minor, the commander still retains discretion on whether to discipline³ and when to discipline. In accordance with Enclosure 5, section 8, of DoD Instruction 6495.02, Volume 1, "Sexual Assault Prevention and Response (SAPR) Program Procedures," commanders in the grade of O-6 and above who possess special court-martial convening authority shall have discretion to defer action on alleged non-minor collateral misconduct by the sexual assault victims (and commanders shall not be penalized for such a deferral decision), until final disposition of the sexual assault case. Under this policy, commanders may take into account the trauma to the victim and respond appropriately so as to encourage reporting of sexual assault and continued victim cooperation, while also bearing in mind any potential speedy trial and statute of limitations concerns. Commanders may wait to take action, if any, on the alleged collateral misconduct, until after final disposition of the sexual assault case. If a commander believes that it would be appropriate to document alleged non-minor collateral misconduct in the interest of rehabilitation, he or she should consider actions that minimize or eliminate impacts on the victim's career.

DETERMINATION THAT THE COLLATERAL MISCONDUCT IS MINOR – Triggering of Safe-to-Report Policy Protections

Commanders retain discretion to make the final determination of whether the alleged collateral misconduct is minor or not, based on their analysis of aggravating and mitigating factors. Commanders shall consult with their servicing Staff Judge Advocate in reaching these determinations.

Once the final determination is made that the alleged collateral misconduct is minor, the individual shall not be disciplined for the alleged minor collateral misconduct pursuant to this Safe-to-Report Policy. However, this policy does not preclude the commander from fulfilling certain administrative requirements, for example: referral to substance abuse screening if the minor collateral misconduct involves any kind of substance abuse, referral to behavioral health

³ In this context, the term "discipline" includes an officially documented command action that has been initiated against the victim in response to alleged collateral misconduct, including: letters of reprimand (or Service equivalent) or written records of individual counseling in official personnel files; imposition of nonjudicial punishment; preferral of charges; initiation of involuntary administrative separation proceedings; or administrative demotion. This also includes discipline under cadet/midshipman regulations at the Military Service Academies.

or medical providers for a fitness for duty determination, or temporarily suspending access to critical positions such as positions in the personnel reliability program (PRP). It may be appropriate to temporarily decertify the victim from PRP status or other critical positions until appropriate evaluations can be conducted.

TRACKING USE OF SAFE-TO-REPORT POLICY

Section 539A of the NDAA for FY 2021 requires the Secretary of Defense to develop and implement a process to track incidents of minor collateral misconduct that are subject to the Safe-to-Report Policy. Accordingly, the Secretaries of Military Departments (covering their respective Military Department's Active Component, Military Service Academy cadets or midshipmen, and Reservists) and the CNGB, shall provide requested data to the DoD Sexual Assault Prevention and Response Office (SAPRO) for tracking purposes, to include why the collateral misconduct was deemed non-minor, or why the collateral misconduct was considered minor and subject to the Safe-to-Report Policy.

CHANGE IN THE ROLE OF COMMANDERS IN MILITARY JUSTICE

In the event that a statute or Executive Branch action fundamentally alters the role of commanders in the referral of court-martial cases, the DoD Office of General Counsel (OGC) is requested to refer this Safe-to-Report Policy to the Joint Service Committee on Military Justice (JSC) for any recommended revisions to ensure alignment with the MCM, UCMJ, other laws, and DoD policy. Following any such review by the JSC, the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) will determine whether to revise this policy.

My point of contact for the Safe-to-Report Policy is the Director, DoD SAPRO. The Secretaries of the Military Departments and CNGB are requested to provide their respective Safe-to-Report policies to SAPRO within 180 days. Once the USD(P&R) and the DoD OGC have reviewed and approved all the Safe-to-Report policies from the Military Departments and NGB, then this memorandum will be cancelled.

The Safe-to-Report Policy will allow us to build on the support we strive to provide to victims of sexual assault, while ensuring due process for the accused and good order and discipline for the Force. Thank you for your continued efforts in combating sexual assault.



Gilbert R. Cisneros, Jr.

cc:

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Chiefs of the Military Services
Superintendents, Military Service Academies
Deputy Assistant Secretary of Defense for Military Personnel Policy
Director, Office of Legal Policy
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