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## Safe-to-Report Policies Across the Military:

### An Overview of Military Policies Regarding “Minor Collateral Misconduct” by Sexual Assault Victims<sup>1</sup>

The [Safe-to-Report Policy for Service Member Victims of Sexual Assault](#) is a military-wide policy that bars military personnel from taking disciplinary action against a victim of sexual assault for [minor misconduct](#) that was [collateral](#) to the assault. This policy, adopted in 2021, is designed to reduce one of the barriers to reporting faced by military-connected victims of sexual assault: fear of punishment for their own misconduct. Familiarity with this policy is essential for all service providers working with and on behalf of this survivor community.

#### USING THIS RESOURCE

This resource provides a general overview of the military-wide Safe-to-Report Policy through a question/answer format. Each military service and the National Guard Bureau are required to develop and implement their [own policies](#). These policies are also referenced throughout this resource. It is recommended that providers review the policy or policies relevant to the specific military-connected individuals that they are serving; links to these policies are included [below](#).

#### MORE RESOURCES FOR PRACTITIONERS SERVING MILITARY-CONNECTED VICTIMS

This resource is part of the Toolkit for Advocating for Military-Connected Victims (Toolkit), a key component of the [Advocating for Military-Connected Survivors Project](#).<sup>2</sup> The Toolkit contains a variety of resources to help practitioners provide survivor-centered, trauma-informed, and collaborative advocacy for military-connected victims, including: interactive videos, tip sheets, checklists, quizzes, flash cards, and survivor interviews. Register [here](#) to gain free access to these resources.

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<sup>1</sup> The National Crime Victim Law Institute (NCVLI) is grateful for the assistance provided by NCVLI Intern, Sergeant First Class (SFC) Freyja Eccles, in the creation of this resource. SFC Eccles has twenty-five years of military experience in the U.S. Army, the U.S. Army Reserves, and the Wyoming Army National Guard, including more than eight years as a victim advocate in the Army Sexual Harassment/Assault Response Prevention (SHARP) Program.

<sup>2</sup> The Advocating for Military-Connected Survivors Project is a partnership between the [National Crime Victim Law Institute \(NCVLI\)](#) and the [National Organization for Victim Advocacy \(NOVA\)](#) that is designed to provide specialized training and technical assistance for criminal justice and allied professionals who respond to military members (active duty, Reservist, National Guard, and veteran) and military family members, who have been the victim of sexual assault, domestic violence, dating violence and/or stalking.

## QUESTIONS/ANSWERS

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**What are the origins of Safe-to-Report Policies in the military?** In the FY 2021 National Defense Authorization Act (NDAA), Congress directed that the Secretary of Defense establish a policy for addressing minor collateral misconduct committed by victims of sexual assault<sup>3</sup> who are members of the military.<sup>4</sup> In response, the Under Secretary of Defense for Personnel Readiness issued a memorandum that outlined the military’s Safe-to-Report Policy and detailed standards for implementation.<sup>5</sup> In this memorandum, the Under Secretary directed each military department and the National Guard to issue and implement their [own Safe-to-Report Policies](#).<sup>6</sup>

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<sup>3</sup> For the purposes of DoD’s Safe-to-Report Policy, “sexual assault” refers to penetrative and nonpenetrative violations of Article 120 of the Uniform Code of Military Justice (UCMJ); acts of forcible sodomy occurring before January 1, 2019, under Article 125 of the UCMJ; and attempts and conspiracies to commit any of these offenses. Mem. from Under Sec’y of Defense to Sec’y of Military Departments, et al., subject: Safe-to-Report Policy for Service Member Victims of Sexual Assault (Oct. 25, 2021), [https://federalnewsnetwork.com/wp-content/uploads/2021/11/Safe-to-Report-Policy\\_Sec539A-NDAA-FY2021\\_signed-25OCT2021\\_UPR002559-21.pdf](https://federalnewsnetwork.com/wp-content/uploads/2021/11/Safe-to-Report-Policy_Sec539A-NDAA-FY2021_signed-25OCT2021_UPR002559-21.pdf) [hereinafter, “DoD Safe-to-Report Policy”]. Some military departments take a broader approach; for example, the Navy’s Safe-to-Report Policy added to the definition in DoD’s policy, including “any similar or comparable offense under federal, state, or local criminal law.” U.S. Dep’t of the Navy, Department of the Navy Safe-to-Report Policy 1 (June 29, 2022), <https://media.defense.gov/2022/Jun/30/2003028732/-1/-1/0/SAFE%20TO%20REPORT.PDF> [hereinafter, “Navy Safe-to-Report Policy”].

<sup>4</sup> Pub. L. 116-283, Div. A, Title V, § 539A, Jan. 1, 2021, 134 Stat. 3607.

<sup>5</sup> DoD Safe-to-Report Policy, *supra* note 3, at 1.

<sup>6</sup> *Id.*

**Who is covered by Safe-to-Report Policies?** The Department of Defense (DoD) Safe-to-Report Policy applies to *all members of the military*, including Reservists, Guardsmen, and cadets and midshipmen at the Military Service Academies.<sup>7</sup> This policy – and all of the service-specific policies – applies regardless of to whom the victim reports their sexual assault and regardless of whether the investigation and/or prosecution of the underlying sexual assault is handled by military or civilian authorities.<sup>8</sup>

**What is “collateral misconduct”?** “Collateral misconduct” refers to conduct potentially punishable under the Uniform Code of Military Justice (UCMJ) that took place close in time to or during the sexual assault and was connected to the incident of the assault. Such conduct is generally discovered as a result of a report or investigation of the sexual assault. If a commander<sup>9</sup> determines that collateral misconduct is “minor,” the protections of the Safe-to-Report Policy apply; if the commander determines the collateral misconduct is “non-minor,” the protections of the policy do not apply. A commander has considerable discretion in making this assessment, which depends upon the [balancing of multiple factors](#).

**Who determines if a sexual assault victim’s misconduct is “collateral” and/or “minor”?** Commanders<sup>10</sup> determine whether a sexual assault victim’s misconduct is collateral to a sexual assault and whether it is “minor” or “non-minor” for

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> In July 2023, President Biden signed Executive Order 14103, which amended the Manual for Courts Martial and its accompanying rules with respect to how the military handles the prosecution of certain crimes, including sexual assault. Exec. Order No. 14,103, 88 F.R. 50535 (July 28, 2023). These reforms included shifting responsibility for decisions regarding whether to prosecute sexual assaults from commanders to specialized, independent military prosecutors, known as special trial counsel. C. Todd Lobez, U.S. Dep’t of Defense, *Executive Order Changes How Military Handles Sexual Assaults* (Aug. 1, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3479106/executive-order-changes-how-military-handles-sexual-assaults/>. The Safe-to-Report Policies of DoD and most military services pre-date the Executive Order and do not directly address the role of special trial counsel in command decisions regarding whether a victim’s conduct was “collateral” and/or “minor.” The Coast Guard, which issued its Safe-to-Report policy after the Executive Order, does address special trial counsel’s involvement in these determinations. U.S. Coast Guard, ALCOAST 050/24, Coast Guard Safe-to-Report Policy (Feb. 1, 2024) [hereinafter, “Coast Guard Safe-to-Report Policy”], <https://content.govdelivery.com/accounts/USDHSCG/bulletins/38828d2>. Under the Coast Guard’s policy, commanders are responsible for determining whether a sexual assault victim’s collateral misconduct was “minor” or “non-minor,” “*unless* a special trial counsel has elected to exercise authority over the alleged collateral misconduct and has not deferred such misconduct to the command.” *Id.* (emphasis added). For assistance analyzing the role of special trial counsel with respect to the Safe-to-Report Policy of a specific military service, [contact NCVLI for technical assistance](#).

<sup>10</sup> See generally *supra* note 9.

the purposes of Safe-to-Report Policies.<sup>11</sup> Commanders have considerable discretion when making these determinations.<sup>12</sup>

**How does a commander determine if a sexual assault victim’s misconduct was “collateral” to the sexual assault?** Commanders make the assessment of whether the victim’s misconduct was [collateral](#) by analyzing whether it took place close in time, place, or circumstances associated with the incident of sexual assault.<sup>13</sup> Notably, conduct that takes place after the assault may still be “collateral” to the sexual assault.<sup>14</sup>

**How does a commander determine if a sexual assault victim’s misconduct is “minor” or “non-minor”?** Once a commander determines that a sexual assault victim’s misconduct was collateral, the commander analyzes whether the misconduct was “minor” or “non-minor” based on a consideration of multiple factors.<sup>15</sup> They make this determination in consultation with their assigned Staff Judge Advocate.<sup>16</sup> The factors considered include:

- ❑ **Criteria for “Minor Offenses.”** The Manual for Court-Martial<sup>17</sup> provides guidance regarding the types of offenses that might be considered “minor” for the purposes of the Safe-to-Report Policy.<sup>18</sup> It explains that nonjudicial punishment may be imposed for minor offenses and whether an offense is “minor” depends on multiple factors, including “the nature of the offense and the circumstances surrounding its commission; the offender’s age, rank, duty assignment, record and experience; and the maximum sentence imposable

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<sup>11</sup> DoD Safe-to-Report Policy, *supra* note 3, at 1–2.

<sup>12</sup> *Id.* at 2.

<sup>13</sup> The DoD Safe-to-Report Policy does not directly address this, but the policies of military branches do. See, e.g., U.S. Dep’t of Army, Dir. 2022-10, Safe-to-Report for Victims of Sexual Assault 2 (July 6, 2022), [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/ARN35839-ARMY\\_DIR\\_2022-10-000-WEB-1.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN35839-ARMY_DIR_2022-10-000-WEB-1.pdf) (defining “collateral misconduct” as “any victim misconduct that might be in time, place, or circumstance associated with the victim’s sexual assault incident”); Navy Safe-to-Report Policy, *supra* note 3, at 1 (stating that “[t]he term ‘collateral misconduct’ refers to victim misconduct that might be in time, place or circumstance associated with the victim’s sexual assault incident. Some reported sexual assaults involve circumstances where the victim may have engaged in some form of misconduct at or near the time of the sexual assault or at or near the time the victim reports the sexual assault to authorities.”).

<sup>14</sup> See Navy Safe-to-Report Policy, *supra* note 3, at 10 (recognizing that a victim’s conduct may be “collateral” to a sexual assault for the purposes of the Navy’s Safe-to-Report policy if engaged in at the time the victim reports the assault to law enforcement).

<sup>15</sup> DoD Safe-to-Report Policy, *supra* note 3, at 2–3.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> Dep’t of Defense, Manual for Court-Martial, Part V, § 1.e (2024 ed.), [https://jsc.defense.gov/Portals/99/2024%20MCM%20files/MCM%20\(2024%20ed\)%20\(2024\\_01\\_02\)%20\(adjusted%20bookmarks\).pdf?ver=WLVzJg--lbaFtAC5qOM1uA%3d%3d](https://jsc.defense.gov/Portals/99/2024%20MCM%20files/MCM%20(2024%20ed)%20(2024_01_02)%20(adjusted%20bookmarks).pdf?ver=WLVzJg--lbaFtAC5qOM1uA%3d%3d) [hereinafter, “Manual for Court-Martial”].

<sup>18</sup> DoD Safe-to-Report Policy, *supra* note 3, at 2.

for the offense if tried by general court martial.”<sup>19</sup> This can cover a wide-range of offenses, “from an incidental infraction during initial training to a significant dereliction.”<sup>20</sup> Commanders have considerable discretion in determining what is a “minor offense” for the purpose of imposing nonjudicial punishment.<sup>21</sup> As a result, although a “minor offense” is usually one for which the maximum sentence would not include a dishonorable discharge or confinement for more than a year, a victim’s 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.”<sup>22</sup>

❑ **Mitigating Circumstances.** Mitigating circumstances decrease the gravity of a victim’s collateral misconduct, its impact on “good order and discipline,” and concern that such conduct might be “service discrediting.”<sup>23</sup> Examples of mitigating circumstances include:

- the victim’s age and level of military experience;
- the perpetrator’s position of authority over the victim or being a higher grade than the victim;
- the perpetrator engaged in acts that “influenced” the victim to engage in sexual behavior (e.g., stalking, harassment, hazing, coercion);
- command’s knowledge of the collateral misconduct prior to the report of sexual assault and, if command lacked knowledge, the likelihood that the collateral misconduct would have been discovered, if the sexual assault had not been disclosed or reported; and
- the victim engaged in misconduct after the sexual assault 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”).<sup>24</sup>

❑ **Aggravating Circumstances.** Aggravating circumstances are circumstances that increase the gravity of a victim’s collateral misconduct or its impact on “good order and discipline.”<sup>25</sup> The presence of aggravating circumstances does not automatically make a victim’s collateral misconduct

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<sup>19</sup> Manual for Court-Martial, *supra* note 17, at Part V, § 1.e.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> DoD Safe-to-Report Policy, *supra* note 3, at 2–3.

<sup>23</sup> *Id.* at 2.

<sup>24</sup> *Id.* at 1–2.

<sup>25</sup> *Id.* at 2.

non-minor. Examples of aggravating circumstances include whether the misconduct intentionally or unintentionally:

- resulted in or imminently threatened to result in failure of a military mission or objective;
- threatened the health and safety of any person (excluding acts of self-harm or acts of self-defense against the perpetrator of an assault); and
- resulted in significant damage to government property or to personal property (except when such damage was the collateral result of an assault and/or an act of self-defense).<sup>26</sup>

**What are examples of “minor collateral misconduct”?** DoD and various of the military branches have identified certain acts of collateral misconduct that generally are to be treated as minor for the purposes of Safe-to-Report Policies, including:

- the victim was drinking underage at or near the time of the sexual assault;
- the victim was engaged in an “unprofessional relationship” with the accused at the time of the sexual assault, where an “unprofessional relationship” is one that violates a law, regulation, or policy; or
- the victim was in violation of lawful orders establishing curfews, off-limit locations, school standards, barracks/dormitory policies, or similar matters at the time of the assault.<sup>27</sup>

**What happens when a commander determines that a sexual assault victim’s collateral misconduct was “minor”?** If a commander determines that a sexual assault victim’s collateral misconduct was minor, disciplinary action is not to be taken against the victim for that conduct. They may still take certain non-disciplinary administrative actions, such as:

- referring the victim to substance abuse screening or treatment, if the collateral misconduct involved substance abuse;
- referring the victim to behavioral health or medical providers for a “fitness for duty determination”; or

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

- temporarily suspending the victim’s access to critical positions, such as positions in the personnel reliability program.<sup>28</sup>

**What happens when a commander determines that a sexual assault victim’s conduct was “non-minor”?** If a commander finds a sexual assault victim’s collateral misconduct to be non-minor, they retain discretion as to whether and when to discipline the victim.<sup>29</sup> Under DoD Instruction *Sexual Assault Prevention and Response (SAPR) Program Procedures*,<sup>30</sup> commanders with special court-martial convening authority have discretion to defer action against a victim of sexual assault for non-minor collateral misconduct until final disposition of the sexual assault case.<sup>31</sup> This DoD policy authorizes commanders to “tak[e] 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.”<sup>32</sup>

**Do Safe-to-Report Policies prevent military investigative organizations from investigating and documenting any collateral misconduct?** No. The policies do not preclude Military Criminal Investigative Organizations from continuing to investigate and document incidents of collateral misconduct that are revealed during investigative processes.<sup>33</sup>

#### **Where are branch-specific Safe-to-Report Policies located online?**

- **Army:** U.S. Dep’t of Army, Dir. 2022-10, Safe-to-Report for Victims of Sexual Assault (July 6, 2022), [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/ARN35839-ARMY\\_DIR\\_2022-10-000-WEB-1.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN35839-ARMY_DIR_2022-10-000-WEB-1.pdf).

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<sup>28</sup> *Id.* at 3.

<sup>29</sup> The Coast Guard’s Safe-to-Report Policy recognizes that commanders have such discretion regarding discipline, but “should a special trial counsel exercise authority over a victim’s alleged collateral misconduct, the commander is precluded from taking disciplinary action against the victim, unless the special trial counsel defers at a later point. In cases in which a special trial counsel is prosecuting a sexual assault offense, the authorized commander, through their Staff Judge Advocate, should consult with the special trial counsel prior to taking disciplinary action regarding the alleged collateral misconduct over which the special trial counsel has not exercised authority or has deferred.” Coast Guard Safe-to-Report Policy, *supra* note 9.

<sup>30</sup> Dep’t of Defense, Instruction 6495.02, vol. 1, encl. 5, § 9, *Sexual Assault Prevention and Response (SAPR) Program Procedures* (Mar. 28, 2013), [https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649502\\_vol01.PDF](https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649502_vol01.PDF).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> DoD Safe-to-Report Policy, *supra* note 3, at 1.

- ❑ **Navy/Marine Corps:** U.S. Dep't of the Navy, Department of the Navy Safe-to-Report Policy (June 29, 2022), <https://media.defense.gov/2022/Jun/30/2003028732/-1/-1/0/SAFE%20TO%20REPORT.PDF>.
- ❑ **Air Force/Space Force:** Mem. from Sec'y of the Air Force for Distribution C, *Department of the Airforce Safe-to-Report Policy for Service Member Victims of Sexual Assault* (Aug. 25, 2022), [https://www.sapr.mil/sites/default/files/public/docs/policy/Air\\_Force\\_Safe-to-Report\\_Policy.pdf](https://www.sapr.mil/sites/default/files/public/docs/policy/Air_Force_Safe-to-Report_Policy.pdf).
- ❑ **National Guard Bureau:** Nat'l Guard Bureau, NGB DM 1300.00, NGB-J1-SAPR, Mem. for Adjutants General and Commanding General for the District of Columbia (Apr. 28, 2022), [https://www.ngbpmc.ng.mil/Portals/27/Publications/NGB-DTM/NGBDTM%201300\\_02%20\\_20221019.pdf?ver=jxyqPCFRKVaDOT4ujGw5\\_A%3D%3D](https://www.ngbpmc.ng.mil/Portals/27/Publications/NGB-DTM/NGBDTM%201300_02%20_20221019.pdf?ver=jxyqPCFRKVaDOT4ujGw5_A%3D%3D).
- ❑ **Coast Guard:** U.S. Coast Guard, ALCOAST 050/24, Coast Guard Safe-to-Report Policy (Feb. 1, 2024), <https://content.govdelivery.com/accounts/USDHSCG/bulletins/38828d2>.

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