

# BULLET BACKGROUND PAPER

## ON

### FY14 NDAA PROVISIONS

#### **SUBTITLE A – REFORM OF UNIFORM CODE OF MILITARY JUSTICE**

##### **Sec. 1701 – Extension of crime victims’ rights to victims of offenses under the Uniform Code of Military Justice.**

*BLUF: Incorporates all 8 CVRA rights into UCMJ. However, rather than an enforcement mechanism through a military court, the provision requires SecDef to establish an enforcement mechanism, including designation of an authority in each service to receive and investigate complaints and the availability of disciplinary sanctions for “willful or wanton” failure to comply with requirements relating to such rights. 1 year provided for implementation.*

- Adds the following rights of the victim as Art. 6b, UCMJ:
  1. The right to be reasonably protected from the accused.
  2. The right to reasonable, accurate, and timely notice of any of the following:
    - a. A public hearing concerning the continuation of confinement prior to trial of the accused.
    - b. A preliminary hearing under Article 32.
    - c. A court-martial relating to the offense.
    - d. A public proceeding of the service clemency and parole board relating to the offense.
    - e. The release or escape of the accused, unless such notice may endanger the safety of any person.
  3. The right not to be excluded from any public hearing or proceeding unless the military judge or investigating officer determines after receiving clear and convincing evidence that testimony by the victim would be materially altered.
  4. The right to be reasonably heard at any of the following:
    - a. A public hearing concerning the continuation of confinement prior to trial of the accused.
    - b. A sentencing hearing relating to the offense.
    - c. A public proceeding of the service clemency and parole board relating to the offense.
  5. The reasonable right to confer with the government in any of the proceedings under paragraph 2.
  6. The right to receive restitution as provided in law.
  7. The right to proceedings free from unreasonable delay.
  8. The right to be treated with fairness and with respect for the dignity and privacy of the victim.
- Enforcement mechanism:
  - SecDef shall prescribe mechanisms for ensuring victims are notified of and accorded their rights, and enforcement of such rights, including designation of an authority in each service to receive and investigate complaints and disciplinary sanctions for “willful or wanton” failure to comply with requirements relating to such rights.

## **SEC. 1702 – Revision of Article 32 and Article 60, Uniform Code of Military Justice.**

*BLUF: This section limits an Art. 32 Investigation to a preliminary hearing and limits a convening authority's ability to alter finding and sentence at clemency.*

- Art. 32
  - Preliminary hearing with 4 purposes:
    1. Probable cause determination;
    2. Jurisdiction determination;
    3. Consider form of charges; and
    4. Recommend disposition of case.
  - Hearing officer must be JA “whenever practicable.”
  - Hearing officer must not be outranked by either counsel “whenever practicable.”
  - Accused has right to cross-examine witnesses and present additional evidence within the scope of the stated purpose of the hearing.
  - Victim may not be compelled to testify and shall be declared unavailable at Art. 32 hearing if declines to participate.
  - Presentation of evidence (including cross-examination of witnesses) shall be limited to matters relevant to limited purpose of the hearing.
  - Hearings shall be recorded and the recording shall be made available to the victim upon request.
  - Hearing officers may investigate uncharged misconduct.
- Art. 60
  - Findings:
    - CA may only affect findings for “qualifying offenses”
    - If CA does act to affect findings, CA must include a written explanation of the action in the record of trial.
    - “Qualifying offenses” for findings
      1. Maximum sentence of confinement does not exceed 2 years;
      2. Adjudged sentence does not include dismissal or punitive discharge, or confinement for more than 6 months;
      3. May never be for any of the following offenses:
        - a. Rape or Sexual Assault under Art. 120;
        - b. Any offense under Art. 120b;
        - c. Any offense under Art. 125; or
        - d. Other offenses specified by SecDef
  - Sentence:
    - CA may disapprove, commute, or suspend adjudged sentences that are less than six months and do not include a punitive discharge.
    - CA may *not* disapprove, commute, or suspend adjudged sentences that are more than six months or include a punitive discharge, unless:
      1. Upon recommendation from trial counsel, in recognition of “substantial assistance” by the accused in the investigation or prosecution of another person, including for offenses with mandatory minimum sentences.
      2. In order to honor a PTA. However, the CA may not commute a mandatory minimum sentence except to reduce a mandatory dishonorable discharge to a BCD.
    - If CA disapproves, commutes, or suspends a sentence, in whole or in part, a written explanation of the reasons for such action is required.

**Sec. 1703 – Elimination of five-year statute of limitations on trial by court-martial for additional offenses involving sex-related crimes.**

*BLUF: This section amends Art. 43 to remove the statute of limitations for sexual assault (Art 120(b)) and sexual assault of a child (120b(b)).*

**Sec. 1704 – Defense counsel interview of victim of an alleged sex-related offense in presence of trial counsel, counsel for the victim, or a Sexual Assault Victim Advocate.**

*BLUF: This section amends Art 46 to require defense counsel to make requests to interview sexual assault victims through trial counsel; and at the request of victim, requires that either trial counsel, victim’s counsel, or victim advocate be present during the defense interview.*

- *This requirement is to be enforced for any victim of a violation of Arts. 120, 120a, 120b, 120c, 125, or attempts thereof.*

**Sec. 1705 – Discharge or dismissal for certain sex-related offenses and trial of such offenses by general courts-martial.**

*BLUF: For anyone convicted of rape or sexual assault (under Art. 120), rape or sexual assault of a child (under Art. 120b), forcible sodomy (under Art. 125), or attempts thereof (under Art. 80) the adjudged punishment must include a dismissal or dishonorable discharge.*

**Sec. 1706 – Participation by victim in clemency phase of courts-martial process.**

*BLUF: AF has already implemented through AFI 51-201. Streamlined EO includes new RCM 1105A for DoD implementation. Provision will change current AF practice, which is to require the victim impact statement to be submitted within 10 days of notice provided by the legal office, prior to the victim receiving the ROT. Current AF practice is to serve the victim impact statement on the accused and ADC at the same time as the ROT as an attachment to the SJAR. This change will result in delays to post-trial processing.*

- *In any case in which findings and sentence have been adjudged for an offense that involved a victim, the victim shall be provided an opportunity to submit matters for consideration by the convening authority.*
- *Victim shall submit matters within 10 days of the later of receipt of the ROT and SJAR.*
- *The convening authority shall not consider any submitted matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded at trial.*

**Sec. 1707 – Repeal of the offense of consensual sodomy under the Uniform Code of Military Justice.**

*BLUF: This section decriminalizes consensual sodomy. Of note, one proposed JSC EO proposes to change Art. 134, Abusing a Public Animal, to Animal Abuse. This change would incorporate bestiality into animal abuse. With forcible sodomy already covered by the new definition of rape under Art. 120, this would clear the way for repealing Art. 125 entirely.*

**Sec. 1708 – Modification of Manual for Courts-Martial to eliminate factor relating to character and military service of the accused in rule on initial disposition of offenses.**

*BLUF: “[T]he character and military service of the accused” in the discussion following RCM 306(b), shall be deleted.*

**Sec. 1709 – Prohibition of retaliation against members of the Armed Forces for reporting a criminal offense.**

*BLUF: The Services are directed to prescribe regulations prohibiting retaliation against any victim or other member of the armed forces who reports a criminal offense. The regulation shall state that any such retaliation is punishable under Art. 92.*

**SUBTITLE B – OTHER AMENDMENTS TO TITLE 10, UNITED STATES CODE**

**Sec. 1711 – Prohibition on service in the Armed Forces by individuals who have been convicted of certain sexual offenses.**

*BLUF: No change anticipated to current AF practice.*

- Prohibition on commissioning or enlisting a person who has been convicted under federal or state law of rape, sexual assault, forcible sodomy, incest, or attempts to commit these offenses.

**Sec. 1712 – Issuance of regulations applicable to the Coast Guard regarding consideration of request for permanent change of station or unit transfer by victim of sexual assault.**

*BLUF: Extends mandate to make expedited transfer for victims available to the Coast Guard.*

**Sec. 1713 – Temporary administrative reassignment or removal of a member of the Armed Forces on active duty who is accused of committing a sexual assault or related offense.**

*BLUF: SecDef directed that the services implement policy allowing admin reassignment or transfer of alleged offenders of sexual assault by 1 Jan 14. An AFGM to AFI 36-2110, Assignments, and re-write of AFI 36-6001, Sexual Assault Prevention and Response Program, are pending. Under the draft policy, the victim will be able to provide input once he or she requests an expedited transfer whether he or she would prefer for the alleged offender to move instead. If the Vice Commander elects to transfer the alleged offender, the alleged offender will then have an opportunity to submit location preferences following the same procedures that apply to victims, focusing on transferring the alleged offender to an assignment where he or she will have access to support and services while under investigation. This provision will require expansion of transfer of alleged offenders to include those under investigation for 120b offenses.*

- SecDef may provide guidance for commanders regarding their authority to reassign members alleged to have committed offenses under Arts. 120, 120a, 120b, 120c, 125, and attempts thereof.

**Sec. 1714 – Expansion and enhancement of authorities relating to protected communications of members of the Armed Forces and prohibited retaliatory actions.**

*BLUF: Changes provisions of 10 U.S.C. § 1034 – Protected communications; prohibition of retaliatory personnel actions. Expands the categories of prohibited personnel actions to include a significant change in a member's duties. Expands the class of covered communications to include when a member is perceived as making or preparing a communication to one of the covered personnel or agencies, including those made in a court-martial. Increases the time period a member has to make an allegation from when they learned of the personnel action from 60 days to 1 year. Requires the service Secretary to determine that a prohibited personnel action has occurred, order action necessary to correct the member's record, and take appropriate disciplinary action. Requires BCMR to hold hearing when a member submits an application under this provision (currently*

*optional). Changes threshold from TJAG making legal assistance available to members before BCMR under this section from cases that are “unusually complex” to whether the member would “benefit” from legal assistance.*

- No person may take or threaten to take an unfavorable personnel action as a reprisal against a member of the Armed Forces for making or preparing or being perceived as making or preparing a communication to a Member of Congress, an IG, a member of a DoD inspection, investigation, or law enforcement organization, any person in the chain of command, or a court-martial.
- Unfavorable personnel actions expanded to include making or threatening to make a significant change in the duties or responsibilities of a member not commensurate with the member’s grade.
- Protected communications include those made to a person the member reasonably believed the be covered, even if the communication revealed information that had previously been disclosed, regardless of the member’s motive for making the communication, regardless of whether the communication was in writing or not, regardless of whether the communication was made while the member was on or off duty.
- Expands the time a member has from the time they become aware of the personnel action to make an allegation from 60 days to 1 year.
- IG conducting the investigation must be outside the chain of command of the member submitting the allegation and individual alleged to have taken the retaliatory action and one organization higher in the chain of command than the organization of the member submitting the allegation and the individual alleged to have taken the retaliatory action.
- Action in case of violations.
  - The service Secretary shall determine whether there is sufficient basis to conclude whether a prohibited personnel action has occurred.
  - If the Secretary determines that a prohibited personnel action has occurred, the Secretary shall order action necessary to correct the record of the member and take appropriate disciplinary action against the individual who committed the prohibited personnel action.
  - If the Secretary determines that an order for corrective or disciplinary action is not appropriate, he or she shall provide to SecDef and the member a notice of the determination and the reasons for not taking action and when appropriate refer the report to the BCMR for further review.
- Requires the BCMR to hold a hearing when a member submits an application under this provision (vice currently the BCMR has the *option* of holding a hearing).
  - Member who filed application may be provided with legal assistance if TJAG determines the member would benefit from such legal assistance.

**Sec. 1715 – Inspector General investigation of allegations of retaliatory personnel actions taken in response to making protected communications regarding sexual assault.**

*BLUF: Expands investigations IG must investigate to include retaliatory actions made against members whose communications were made to personnel or agencies under 10 U.S.C. §1034 with regard to rape, sexual assault, or other sexual misconduct under Arts. 120, 120a, 120b, and 120c.*

- IG investigation required for allegations of retaliatory personnel actions in violation of laws or regulations prohibiting rape, sexual assault, or other sexual misconduct in violation of Arts. 120, 120a, 120b, and 120c, sexual harassment or unlawful discrimination.

**Sec. 1716 – Designation and availability of Special Victims’ Counsel for victims of sex-related offenses.**

*BLUF: Will require expansion of SVC Program to cover victims of Arts. 120a, 120b, and 120c offenses. Eligibility remains tied to 10 U.S.C. §1044 eligibility for legal assistance. An AMJAMS query yielded 75 cases under investigation in FY13 involving an Art. 120a, 120b, or 120c offense. New substantive areas for AF SVCs include advising victims on civil litigation against parties other than DoD and potentially assisting with applications for veterans benefits. 180 days provided for implementation.*

- Adds new 10 U.S.C. §1044e. Special Victims’ Counsel for victims of sex-related offenses.
- Types of legal assistance authorized:
  - Legal consultation regarding collateral misconduct and victim’s right to seek ADC.
  - Legal consultation regarding VWAP.
  - Legal consultation regarding responsibilities and support provided by SARC and VA, including MRE 514.
  - Legal consultation regarding potential for civil litigation against parties other than DoD.
  - Legal consultation regarding the military justice system.
  - Accompanying the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the offense.
  - Legal consultation regarding eligibility and requirements for services available for medical and mental health services.
  - Legal consultation and assistance in personal civil legal matters, any proceedings of the military justice process in which a victim can participate as a witness or other party, in MPOs and CPOs, in understanding and obtaining any military and veteran benefits, such as transitional compensation.
  - Other legal assistance as SecDef authorizes.
- Nature of relationship between SVC and victim is atty-client.
- Qualifications:
  - Legal assistance attorney under 10 U.S.C. § 1044(d)(2)
  - Certified as competent to be SVC by TJAG.
- Availability of SVC:
  - Individual is eligible for legal assistance under 10 U.S.C. § 1044.
  - Must be offered option of SVC upon report to SARC, VA, MCIO, VWAP, TC, or healthcare personnel.
  - Victims who make either an unrestricted or restricted report are eligible.
  - Covers victims who allege offenses under Arts. 120, 120a, 120b, 120c, 125, and attempts thereof under Art. 80.
- In-depth and advanced training for all military and civilian attorneys providing legal assistance under section 1044 or 1044e to support victims of sex-related offenses.

**SUBTITLE C – AMENDMENTS TO OTHER LAWS**

**Sec. 1721 – Tracking of compliance of commanding officers in conducting organizational climate assessments for purposes of preventing and responding to sexual assaults.**

*BLUF: Requires SecDef to direct the Secretary to verify and track the compliance of commanders in conducting organizational climate assessments, which are required within 120 days of the commander assuming command and annually thereafter under the FY13 NDAA.*

**Sec. 1722 – Advancement of submittal deadline for report of independent panel on assessment of military response systems to sexual assault.**

*BLUF: Advances the deadline the RSP has to submit its report from 18 months to 12 months. SecDef requested the 12 month deadline earlier this year, which will result in the report being published in Summer 2014.*

**Sec. 1723 – Retention of certain forms in connection with Restricted Reports and Unrestricted Reports on sexual assault involving members of the Armed Forces.**

*BLUF: Under the FY13 NDAA a member who filed a Restricted Report had to request that the DD Form 2910 and DD Form 2911 be retained for 50 years. This provision will mandate 50 year retention of these forms regardless of whether the victim requests retention or not. Under current DoD policy, the DD Form 2910 is automatically retained for 50 years in Unrestricted Reports and the DD Form 2910 and 2911 is automatically maintained for 5 years in Restricted Reports.*

- SecDef shall ensure that all copies of DD Form 2910, Victim Reporting Preference Statement, and DD Form 2911, DoD Sexual Assault Forensic Examination Report, for Restricted and Unrestricted Reports are retained for 50 years.

**Sec. 1724 – Timely access to Sexual Assault Response Coordinators by members of the National Guard and Reserves.**

*BLUF: Requires “timely access” to a SARC by a member of the National Guard or Reserves who is the victim of a sexual assault during the performance of duties or the victim of a sexual assault committed by a member of the National Guard or Reserves.*

**Sec. 1725 – Qualifications and selection of Department of Defense sexual assault prevention and response personnel and required availability of Sexual Assault Nurse Examiners.**

*BLUF: Expands SecDef requirement to establish minimum standards to include the positions of SAPR Program Manager and SANE as well as VAs who serve only on a part-time basis. Requires the assignment of a SANE to all MTFs with 24 hr/day emergency departments and for a SANE to be available to a patient of all other MTFs. An issue for interpretation is whether “available” for MTFs without 24 hr/day emergency departments can include through MOUs with civilian hospitals.*

- SecDef shall establish minimum standards for qualifications necessary to be a SAPR Program Manager, SARC, VA, or SANE, whether assigned to such duty on a full-time or part-time basis.
- Secretary shall require the assignment of a full time SANE to each MTF in which an emergency department operates 24 hrs/day.
  - For all other MTFs, the Secretary shall require that a SANE be made available to a patient of the facility.
- SecDef shall prepare a report on that adequacy of the training, qualifications, and experience of personnel assigned to a position that includes sexual assault prevention and response.

**Sec. 1726 – Additional responsibilities of Sexual Assault Prevention and Response Office for Department of Defense sexual assault prevention and response program.**

*BLUF: Additional duties for DoD SAPRO.*

- DoD SAPRO shall develop metrics to measure the effectiveness of, and compliance with, training and awareness objectives of the services on sexual assault prevention and response and collect and maintain such data.

- DoD SAPRO shall act as a liaison between DoD and federal and state agencies on programs and efforts related to sexual assault prevention and response.
- Oversee development of strategic program guidance and joint planning objectives for resources in support of the SAPR program, and make recommendations on modifications to policy, law, and regulations needed to ensure the continuing availability of such resources.

## **SUBTITLE D – STUDIES, REVIEWS, POLICIES, AND REPORTS**

**Sec. 1731 – Independent reviews and assessments of Uniform Code of Military Justice and judicial proceedings of sexual assault cases.**

**Sec. 1732 – Review and policy regarding Department of Defense investigative practices in response to allegations of Uniform Code of Military Justice violations.**

**Sec. 1733 – Review of training and education provided members of the Armed Forces on sexual assault prevention and response.**

**Sec. 1734 – Report on implementation of Department of Defense policy on the retention of and access to evidence and records relating to sexual assaults involving members of the Armed Forces.**

**Sec. 1735 – Review of the Office of Diversity Management and Equal Opportunity role in sexual harassment cases.**

## **SUBTITLE E – OTHER MATTERS**

**Sec. 1741 – Enhanced protections for prospective members and new members of the Armed Forces during entry-level processing and training.**

*BLUF: The Services are required to prescribe regulations defining and prohibiting inappropriate conduct by anyone exercising authority over a person in entry-level processing or training, with the recruit or trainee.*

- The violator shall be subject to mandatory processing for administrative separation when the member is not otherwise punitively discharged.
- SecDef is required to submit a report to the SASC & HASC on whether a new punitive article is needed.

**Sec. 1742 – Commanding officer action on reports on sexual offenses involving members of the Armed Forces.**

*BLUF: Upon receipt of a report of a “sex-related offense” against a commander’s troop, the commander must immediately forward the report to the servicing MCIO.*

**Sec. 1743 – Eight-day incident reporting requirement in response to unrestricted report of sexual assault in which the victim is a member of the Armed Forces.**

*BLUF: AF already implements most of the requirement through OPREP reporting. Will require adding to the OPREP whether the alleged offender has been administratively reassigned, transferred, or ordered to pretrial confinement, and the post-incident actions taken. 180 days provided for implementation.*

- SecDef shall establish a policy requiring submission of a written incident report within 8 days of the filing of an Unrestricted Report in which a member of the Armed Forces is the victim.



- Report of incident must include:
  - Time/date/location of incident.
  - Type of offense alleged.
  - Service affiliation, assigned unit, and location of victim.
  - Service affiliation, assigned unit, and location of alleged offender, including information regarding whether the alleged offender has been temporarily transferred or removed from an assigned billet or ordered to pretrial confinement or otherwise restricted, if applicable.
  - Post-incident actions taken in connection with the incident, including referral of victim to SARC, notification of incident to MCIO, receipt and processing status of request for expedited transfer if applicable, and issuance of any MPOs in connection with incident.

**Sec. 1744 – Review of decisions not to refer charges of certain sex-related offenses for trial by court-martial.**

*BLUF: Requires the Secretary to review all cases under Arts. 120(a), 120(b), 125, and attempts thereof where the SJA recommends referral and the convening authority declines to refer any charges. Requires review by the next superior commander authorized to exercise general court-martial convening authority when both the SJA recommends not referring charges and the convening authority does not refer charges. The AF currently partially implements the second requirement through the SecAF GCMCA Review policy.*

- Service Secretary required to review all cases under Arts. 120(a), 120(b), 125, and attempts thereof where the SJA recommends the charges be referred to a court-martial and the convening authority decides not to refer any charges to a court-martial.
- If the SJA recommends *not* referring charges under Arts. 120(a), 120(b), 125, and attempts thereof to trial and the convening authority decides not to refer any charges to a court-martial, the convening authority shall forward the case file to the next superior commander authorized to exercise general court-martial convening authority.
- The case file forwarded for review under these provisions must include:
  1. All charges and specifications preferred.
  2. All reports of investigation, including from the MCIO and Art. 32 IO.
  3. A certification that the victim was notified of the opportunity to express views on the victim’s preferred disposition of the offense for consideration by the convening authority.
  4. All victim statements provided to the MCIO, the victim’s chain of command, and the convening authority expressing the victim’s view on disposition of the case.
  5. The SJA’s advice prepared pursuant to Art. 34.
  6. A written statement explaining the reasons for the convening authority’s decision not to refer charges.
  7. A certification that the victim was informed of the convening authority’s decision to forward the case for review under these provisions.
- The victim must be notified of the results of the review conducted.
- SecDef shall require the Secretary to develop a system to ensure that a victim of Arts. 120(a), 120(b), 125, and attempts thereof is given the opportunity to state, either at the time of making an Unrestricted Report or during the investigation, whether or not the victim believes that the offense alleged is an offense subject to the requirements of this section.

**Sec. 1745 – Inclusion and command review of information on sex-related offenses in personnel service records of members of the Armed Forces.**

*BLUF: Requires notation in a member's records if the member is convicted by court-martial or received nonjudicial punishment or administrative action for sex-related offenses. Note that "sex-related offenses" is not defined in the provision and has different definitions throughout the NDAA.*

**Sec. 1746 – Prevention of sexual assault at military service academies.**

*BLUF: Students at the Service Academies must be provided training on the problem that sexual assault presents, resources available to victims, and consequences for commission of a sexual offense within 14 days of arriving at the school and annually thereafter.*

**Sec. 1747 – Required notification whenever members of the Armed Forces are completing Standard Form 86 of the Questionnaire for National Security Positions.**

*BLUF: Whenever a member is required to complete SF 86, the member shall be instructed to answer "no" to question 21 with respect to consultation with a healthcare professional if the member is a victim of a sexual assault and the consultation occurred with respect to an emotional or mental health condition strictly in relation to the sexual assault.*

**SUBTITLE F – SENSE OF CONGRESS PROVISIONS**

**Sec. 1751 – Sense of Congress on commanding officer responsibility for command climate free of retaliation.**

**Sec. 1752 – Sense of Congress on disposition of charges involving certain sexual misconduct offenses under the Uniform Code of Military Justice through courts-martial.**

**Sec. 1753 – Sense of Congress on the discharge in lieu of court-martial of members of the Armed Forces who commit sex-related offenses.**