

Fact Sheet: I am Vanessa Guillén Act of 2020

Section 1: Short Title – “I am Vanessa Guillén Act of 2020”

Section 2: Modification of Authority to Determine to Proceed to Trial by Court-Martial on Charges Involving Sex-Related Offenses

Under current law, charging decisions for offenses under the Uniform Code of Military Justice (UCMJ) are made by commanding officers, who must review the results of a criminal investigation and then decide whether to convene a court-martial to prosecute those charges. In the case of a sex-related offense, such as sexual assault, the commander with court-martial convening authority must be at a rank of O-6 (a captain in the Navy or a colonel in the Army, Air Force, or Marines) or higher. Commanders are primarily responsible for the military readiness of their units—they carry concern for the welfare of the individuals under their command, but that concern also includes the suspect. Commanders may also be concerned with the professional reputation of their units and the impacts a public court-martial may have on that reputation. Leaving prosecution decisions to the commander creates a conflict of interest and may discourage survivors from reporting an assault, especially in cases where a toxic command environment contributed to a climate where sexual violence is tolerated.

This section would require each military department to establish an Office of the Chief Prosecutor. Charging decisions for sex-related offenses, including sexual harassment and sexual assault, would be transferred from the commander to the service’s chief prosecutor. If the chief prosecutor determines not to convene a court-martial, the commander would continue to have discretion over a range of administrative sanctions, including punitive discharges and rank reduction. The military services would be required to implement this new process 2 years after enactment.

Section 3: Punitive Article on Sexual Harassment and Related Investigation Matters

Under current law, sexual harassment may be charged under four separate UCMJ articles:

- Article 92 (prohibiting violation of lawful general orders),
- Article 93 (prohibiting maltreatment of a subordinate),
- Article 133 (misconduct by commissioned officers, cadets, and midshipmen), and
- Article 134 (general disorder).

While sexual harassment is typically addressed through administrative sanctions, such as a formal reprimand, assignment of additional duties, reduction in rank, or a punitive discharge, in some cases the seriousness of the conduct justifies criminal charges. The Department of Defense (DoD) has recommended establishing a standalone UCMJ article for sexual harassment to send a clear message to the force that such behavior is unacceptable and may result in severe consequences. In addition, a standalone offense would enable the services to more effectively track UCMJ actions related to sexual harassment. Subsection (a) of this section would establish a standalone sexual harassment offense within the UCMJ, incorporating the updated definition of sexual harassment from the BE HEARD in the Workplace Act (H.R.2148).

This section also reforms the procedure for investigating sexual harassment. Under current policy, the military uses command investigations for sexual harassment allegations against military servicemembers. The investigation is typically conducted by another servicemember in the unit who has little or no training or experience in investigating sexual harassment. Because sexual harassment is most common in a command environment that tolerates that behavior, internal command investigators are particularly problematic. Abysmal reporting rates help demonstrate that many servicemembers do not trust their commands to address their harassment. To improve the quality of investigations and increase trust in the system, subsection (b) of this section would require the military services to establish a process to conduct independent investigations of sexual harassment allegations against military service members using trained investigators within 2 years of enactment of this act. The services could use DoD civilian or military investigators, as long as the investigators are not within the chain of command of the complainant. The new, independent investigation process would be required to meet the same timelines as under current policy: initiating an investigation within 72 hours of the complaint and completing the investigation within 14 days of the date that the investigation commences, with a final report due within 20 days of the date that the investigation commences. Not later than 9 months after enactment, each service secretary would be required to report to Congress on preparation to implement this new independent investigation process.

Section 4: Confidential Reporting of Sexual Harassment – included in the House-passed NDAA (H.R.6395) by voice vote.

Under current policy, military service members may make three types of sexual harassment reports:

- A formal report, which results in an investigation and report;
- An informal report, in which a Sexual Harassment/Assault Response and Prevention (SHARP) official, commander, or other official attempts to resolve the complaint without a formal investigation; and
- An anonymous report.

In the first two options, the identity of the complainant is known to the commander and potentially other officials. In an anonymous report, the identity of the complainant is not known by anyone other than the complainant. Anonymous reports may result in investigations and/or action, though potential actions may be limited by the inability to contact the complainant to obtain more information. There is no option for reporting sexual harassment analogous to restricted reports of sexual assault, in which a complaint is filed; the complainant's identity is known to SHARP officials but kept confidential from all others, including the commander; the complainant is given the option to participate in the military's Catch a Serial Offender program, which allows the complainant to be notified if other servicemembers allege a sexual assault by the same person; and the complainant can convert to an unrestricted report at any time.

This section would establish a confidential reporting option for sexual harassment that would allow a victim to file a sexual harassment complaint with a SHARP official that would be confidential (that is, not disclosed to the commander or anyone else), participate in the military's Catch a Serial Offender program, be notified if the harasser is accused by another service member of sexual harassment or sexual assault, and have the option to convert to a formal complaint at any time.

Section 5: Authorization of Claims by Members of the Armed Forces Against the United States that Arise from Sex-Related Offense

Under current law, a civilian who is sexually assaulted or sexually harassed by a military servicemember or DoD employee has the ability to file a claim for monetary damages against DoD, but a servicemember who is sexually assaulted or harassed by another servicemember or DoD employee has no such recourse. As part of the enacted FY 2020 NDAA, Congress created an administrative claims process to address a similar disparity for injuries caused by medical malpractice. Under that new provision, codified at 10 USC § 2733a, military servicemembers who are harmed due to medical error at a military medical treatment facility may file claims for damages through an administrative process established and operated by DoD. This section would establish a similar administrative claims process for military servicemembers who experience personal injury or death due to a sex-related offense committed by a member of the armed forces or a DoD employee, or the negligent failure to prevent or investigate such an offense.

Section 6: Reports on Sexual Harassment/Assault Response Programs of the Armed Forces

This section would require DoD and the Government Accountability Office to conduct separate reviews of the military's sexual harassment and assault response programs. Within 180 days of enactment, DoD would be required to evaluate alternative structures for SHARP, including using civilians, contractors, and servicemembers within a dedicated military occupational specialty, as well as any other structure which the Secretary of Defense considers appropriate. Within 1 year of enactment, GAO would be required to assess the impacts and efficacy of the SHARP programs of the military departments and make such recommendations as the comptroller general considers appropriate to improve these programs.

Section 7: GAO Study of Members Absent Without Leave or on Unauthorized Absence – included in the House-passed NDAA (H.R.6395) by voice vote

This section would require GAO to study procedures used by the military departments to respond to missing servicemembers and make recommendations to improve these procedures. The GAO review would be required to cover the military services' guidelines for distinguishing between common cases and cases that might involve foul play in which the servicemember may be in danger, the guidelines for cooperation between the military and other law enforcement agencies, the use of social and traditional media in conjunction with such cases, military resources available for such cases and any shortfalls in such resources, how the procedures used vary by those used by other law enforcement, and best practices for responding to and investigating such cases.