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# Legislative Highlights and the History of Sexual Assault Issues in the Armed Forces Since 2012

CAPT Art Record  
JAGC, USN

Chair, Joint Service Committee on Military Justice

# *Joint Service Committee on Military Justice*





# Overview

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- Holistic reviews – 1968-9 – 1983-4 – 2013-6
  - Public concern – Media coverage
  - Congressional scrutiny - National Defense Authorization Acts
  - Piece meal changes
    - FY 12: 4 Military Justice & Legal Matters; 6 SAPR Matters
    - FY 13: 11 Military Justice & Legal Matters; 10 SAPR Matters
    - FY 14: 33 SAPR and Related Reforms; 3 Sense of Congress; 4 Military Justice Matters
    - FY 15: 17 Military Justice, Including Sexual Assault and Domestic Violence Prevention and Response
    - FY 16: 15 Military Justice, Including Sexual Assault and Domestic Violence Prevention and Response
    - FY 17: Includes several retaliation and SAPR-related substantive matters AND Military Justice Act 2016
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# The Dialog

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- 26,000 ‘rapes’ in the military
- Commanders sweep it under the rug
- Lack of accountability – offenders and commanders
- Must report to your boss, the commander
- Our allies did it
- Commanders are not legally trained or equipped to make these decisions
- Victims routinely suffer reprisal and retaliation



# Military Justice Reviews

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- Defense Task Force on Sexual Assaults in the Military Services
- Defense Legal Policy Board (DLPB)
- U.S. Commission on Civil Rights
- Joint Service Committee Sexual Assault Subcommittee
- Response Systems Panel (RSP)
  - Role of the Commander
  - Comparative Systems
  - Victim Services
- Judicial Proceedings Panel (JPP)
- Military Justice Review Group (MJRG)
- Collateral Misconduct Subcommittee (JSC-CM)
  - Studied whether to recommend automatic immunity for victim collateral misconduct in sexual assault cases.



# SAPR Reports

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- SAPR Report to the President of the United States
- DoD SAPRO Annual Report to Congress on Sexual Assault
- Military Service Academies Report
- RAND Survey
- Significant FOIAs



# Recent Focus

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- Reprisals and retaliation
- Comparisons with civilian prosecutions
- Military Justice Improvement Act (MJIA)
- Attention focused on victim declinations
- Special Victim Investigation and Prosecution (SVIP) Capability
- MCIO investigations of contact offenses
- Special Victims Counsel/Victims Legal Counsel
- Attention focused on restricted v. unrestricted reporting



# The Process

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- Authorities – statutory and regulatory
  - POTUS v. DoD
  - DoD v. Services (USMC – don't say Departmental!)
  - Judicial w/in Executive – “old role” of the JSC
- Strategies – proactive v. reactive v. results
  - Art 54e
  - SVC/VLC
  - Elevated Review of Referral Decisions
  - CVRA – policy v. executive order v. statutory
  - Character and military service of the accused
  - Art 60 – the two year exception
  - Art 32 – judge advocates as PHOs / active PHO / disclosure rule
  - Victims v. Sexual Assault Victims v. Accused



# 2014

## Prevention & Response

- §1711 – Prevention of entry into service of convicted sex offenders
- §1722 – Shortened RSP deadline
- §1725 – Min. requirements for SAPR personnel
- §1746 – Service Academy initial SAPR training
- §1731 – Additional RSP duties
- §1725 – SANE availability at MTFs
- §1741 – Report to Congress on need for specific UCMJ article regarding prohibited relationships with recruits and trainees
- §1733 – Review of SAPR training
- §1741 – Regs on inappropriate conduct with recruits and trainees (mandatory separation processing)
- §1726 – Added DOD SAPRO responsibilities
- §1735 – SecDef review of how sexual harassment is handled (EO vs. SAPRO?)
- §1734 – SecDef review of retention of, and access to, evidence and records relating to sexual assault
- §1721 – Verification of command climate surveys
- §1747 – Completion of SF 86 by sexual assault victims

## All phases of a court-martial

- §1701 – Add Crime Victims’ Rights Act to UCMJ
- §1704 – DC must go through TC to interview victim
- §1716 – Special Victims Counsel requirement
- §1701 – Crime Victims’ Rights Act implementing regulations
- §1703 – Eliminate SOL for sexual assault and sexual assault of a child
- §1707 – Repeal of consensual sodomy

## Reporting

- §1724 – NG & Reserve access to SARCs
- §1751 – Sense of Congress on command climate free of retaliation for allegations of sexual assault
- §1712 – Expedited transfer for USCG
- §1715 – IG investigation of retaliation claims in sexual assault and sexual harassment cases
- §1743 – SecDef policy on use of 8-day incident report for alleged sexual assaults
- §1714 – Expanded whistleblower protection (e.g., broadens unfavorable personnel actions and covered communications)
- §1713 – Guidance on transfer of an accused following an allegation of sexual assault
- §1709 – Service regulations to prohibit retaliation against members who report a criminal offense
- §1723 – 50 year retention of restricted reports
- §1709 – Report due on establishing a new punitive article for retaliation offenses

## Investigation

- §1732 – SecDef review of MCIO investigative practices
- §1742 – Immediate referral of sexual assault allegations to MCIO

## Pre-Trial

- §1752 – Sense of Congress on disposition of sex offenses via court-martial
- §1753 – Sense of Congress on discharge in lieu of court-martial
- §1708 – Elimination of “character and military service of accused” as a factor in disposition decision
- §1702 – Complete revision of Article 32 (now a probable cause “preliminary hearing”)
- §1744 – Review of decisions not to refer sexual assaults

## Trial

- §1705 – Mandatory GCM jurisdiction for penetration offenses
- §1705 – Mandatory dismissal for DD for penetration offense convictions

## Post-trial

- §1702 – Complete revision to commander’s authority to take post-trial action
- §1706 – Victim participation in clemency phase
- §1745 – Inclusion and command review of records of sex-related offenses

## Effective dates

- Immediate
- 25 Apr 14 (120 days)
- 24 Jun14 (180 days)
- June 2014
- 26 Dec 14 (1 year)

2014/15

Prevention & Response

§1711 – Prevention of entry into service of convicted sex offenders	§1722 – Shortened RSP deadline	§1725 – Min. requirements for SAPR personnel	§545 – Requires JPP to review & assess use of victims' mental health records
§1746 – Service Academy initial SAPR training	§1731 – Additional RSP duties	§1725 – SANE availability at MTFs	§1726 – Added DOD SAPRO responsibilities
§1741 – Regs on inappropriate conduct with recruits and trainees (mandatory separation processing)	§1741 – Report to Congress on need for specific UCMJ article regarding prohibited relationships with recruits and trainees	§1733 – Review of SAPR training	§546 – Provides that JPP will be succeeded by a 5-yr defense advisory committee
§1734 – SecDef review of retention of, and access to, evidence and records relating to sexual assault	§1721 – Verification of command climate surveys	§1735 – SecDef review of how sexual harassment is handled (EO vs. SAPRO?)	§531 - Prohibition on relationships between recruiters & a potential recruit "who is pursuing or has recently pursued becoming a member of the Armed Forces"
	§1747 – Completion of SF 86 by sexual assault victims	§531 - SVC/VLC prohibited from assisting w/ civil suits against US	§539 - Limits who may be a Sexual Assault Forensic Examiner & requires certification standards
		§547 – Requires Secretaries of Military Depts to establish a confidential BCMR/BCNR process for SA victims to challenge terms of their discharges	

All phases of a court-martial

§1701 – Add Crime Victims' Rights Act to UCMJ	§1704 – DC must go through VLC to interview victim	§1716 – Special Victims Counsel requirement	§540 – Moves the final day of a CAAF judge's term from 9/30 to 7/31	§537 – Adoption of Klemick standard for in camera reviews of MRE 513
§1701 – Crime Victims' Rights Act implementing regulations	§1703 – Eliminate SOL for sexual assault and sexual assault of a child	§1707 – Repeal of consensual sodomy	§531 - Crime victims' rights article limited to "an individual"	§533 - Expands access to SVC/VLC Reserve Component
§534 - Within 180 days, Military Rules of Evidence must be amended to provide that where the victim has the right to be heard, the victim may exercise that right through counsel, especially a SVC under section 1044e	§537 - R.C.M. 513 "Constitutionally required" exception stricken. Privilege must be expanded to cover other licensed mental health professionals	§534 - Service Secretaries must promulgate procedures to ensure that victims' counsel receive adequate notice of the scheduling of proceedings	§532 - Depos limited to circumstances where "it is in the interest of justice that the testimony of the prospective witness be taken and preserved for use at a preliminary hearing under section 832 of this title (Article 32) or a court-martial."	

Reporting

§1712 – Expedited transfer for USCG	§1724 – NG & Reserve access to SARCS	§1751 – Sense of Congress on command climate free of retaliation for allegations of sexual assault	§1714 – Expanded whistleblower protection (e.g., broadens unfavorable personnel actions and covered communications)
§1743 – SecDef policy on use of 8-day incident report for alleged sexual assaults	§1723 – 50 year retention of restricted reports	§1715 – IG investigation of retaliation claims in sexual assault and sexual harassment cases	§543 - Within a year, DoD must propose a plan to allow those who make restricted reports to have data about the offense and offender collected on a confidential basis to identify individuals who are suspected of perpetrating multiple sexual assaults. The plan must be executed within the next year.
§1713 – Guidance on transfer of an accused following an allegation of sexual assault	§1709 – Report due on establishing a new punitive article for retaliation offenses	§1709 – Service regulations to prohibit retaliation against members who report a criminal offense	
	§544 - Requires, within one year, a plan for a domestic violence database	§542 - Requires annual reports to include analysis of disposition of the most serious offense during a sexual assault that is the subject of an unrestricted report	

Investigation

§1732 – SecDef review of MCIO investigative practices	§1742 – Immediate referral of sexual assault allegations to MCIO
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Pre-Trial

§1752 – Sense of Congress on disposition of sex offenses via court-martial	§1753 – Sense of Congress on discharge in lieu of court-martial	§531 - Term "Legal Guardian" eliminated for judge-appointed designee to assert victim rights of minors	§534 - Victims must be consulted for preference as to exercise of military or civilian jurisdiction; CA must consider this preference
§1708 – Elimination of "character and military service of accused" as a factor in disposition decision	§1702 – Complete revision of Article 32 (now a probable cause "preliminary hearing") for all Article 32 hearings on or after 26 Dec 2015. Ability for Accused to waive Art 32 reinstated.	§1744 – Review of decisions not to refer sexual assaults, requires ISIC, or Secretary review, and Secretary review if requested by Service Chief Prosecutor	

Trial

§1705 – Mandatory GCM jurisdiction for penetration offenses	§1705 – Mandatory dismissal for DD for penetration offense convictions	§536 - Admissibility of good military character evidence limited to military-specific offenses	§535 - Victims can petition CCA for writ of mandamus if they believe military judge erred in MRE 412/513 ruling	§531 - CA authorized to take action on findings re: qualifying offenses
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Post-trial

§1702 – Complete revision to commander's authority to take post-trial action. Where a mandatory minimum punitive discharge was adjudged for a post 6/24/2014 offense, CA has old Article 60 powers where an accused is found guilty of offenses occurring before & after 6/24/2014	§1706 – Victim participation in clemency phase	§1745 – Inclusion and command review of records of sex-related offenses	§538 - Allows return of personal property seized as evidence upon conclusion of proceedings
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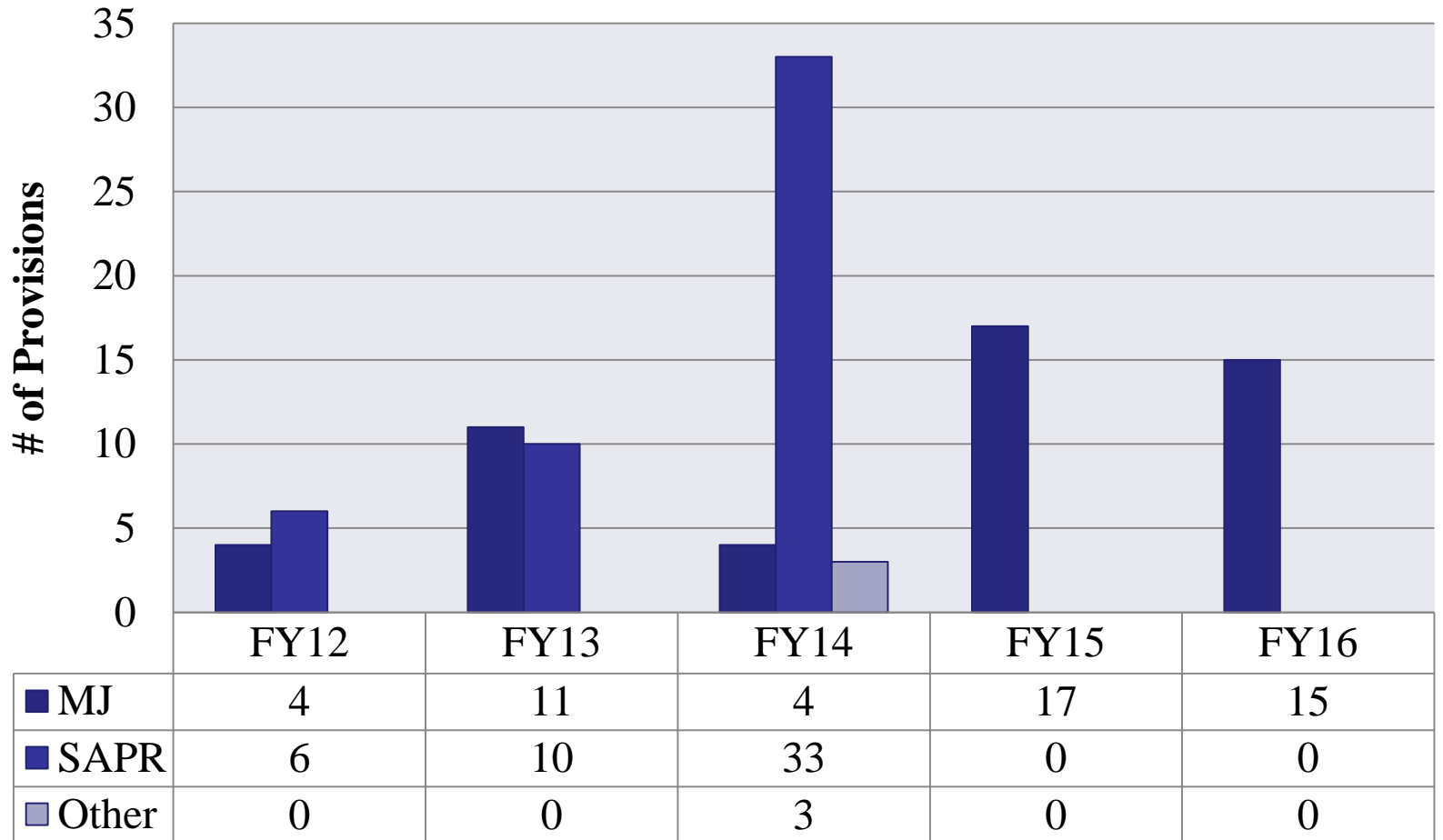
Effective dates

Immediate changes in FY14 NDAA	25 Apr 14 (120 days after FY14 NDAA)	24 Jun 14 (180 days after FY14 NDAA)	June 2014	26 Dec 14 (1 year after FY14 NDAA)	Immediate changes in FY15 NDAA	18 Apr 15 (120 days after FY15 NDAA)	16 Jun 15 (180 days after FY15 NDAA)	19 Dec 15 (1 year after FY15 NDAA)
FY14 & FY15 NDAA SAPR Legislative Changes				23 Feb 15	NLT 30 days before termination of JPP (31 Aug 17)			



# PIECE MEAL CHANGE

## NDAAs PROVISIONS BY FY





# FY14 NDAA

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The FY14 NDAA was the “most extensive UCMJ revision since the Military Justice Act of 1968.”

-MG(Ret) John D. Altenburg, USA

## Changes to the UCMJ

FY12 NDAA: 8 Articles  
FY13 NDAA: 4 Articles  
FY14 NDAA: 14 Articles  
FY15 NDAA: 10 Articles  
**Total: 36 Articles**



# FY14 NDAA

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- **Highlighted Issues/ Additions to the MCM:**
  - Extension and codification of Crime Victims' Rights
  - Elimination of 5 yr SOL for certain sex related offenses
  - DC interviews of victims via TC
  - Repeal of consensual sodomy
  - Reassignment of accused permitted for good order and discipline
  - COs must immediately report all reports of sex offenses to MCIO
  - Elevated Review of decisions not to refer charges to court-martial
  - SRB notations and CO reviews of sex offense convictions/NJPs
  - Prohibit retaliation for victims and witnesses who report a crime
  - Punitive policies on recruiter / recruits – mandatory processing
  - Restrictions on commander's post-trial Art 60 authority
  - Jurisdiction over certain sex offenses limited to GCM
  - Mandatory minimum of DD or Dismissal for certain sex offenses



# FY14 NDAA (cont)

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- Restrictions on commander's post-trial Art 60 authority
- Jurisdiction over certain sex offenses limited to GCM
- Mandatory minimum of DD or Dismissal for certain sex offenses
- Victim ability to participate in clemency phase of court-martial
- Removal of character and military service as factor COs should consider in disposition decision
- VLC to be provided for certain victims of sex related offenses
- New Article 32 preliminary hearing



# FY 15 NDAA

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- **Highlighted Issues:**

- Multiple Sections Related to Military Justice Corrected issues from FY 14 NDAA
  - Substantial changes to:
    - Article 60 (further modified)
    - Article 32 (modified/fixed)
      - Restored the ability of the accused to waive an Article 32 investigation.
      - Struck use of “trial counsel” and replaced it with “counsel for the government”
    - Article 56
      - Changes to Maximum Punishments for certain offenses
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# FY16 NDAA

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- **Highlighted Issues:**

- Timely notification to victims of sex-related offenses of the availability of assistance from Special Victims' Counsel.
  - Enhancement of confidentiality of restricted reporting of sexual assault in the military.
  - Modification of deadline for establishment of Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces.
  - Improved Department of Defense prevention and response to sexual assaults in which the victim is a male member of the Armed Forces.
  - Preventing retaliation against members of the Armed Forces who report or intervene on behalf of the victim of an alleged sex-related offence.
  - Retention of case notes in investigations of sex-related offenses involving members of the Army, Navy, Air Force, or Marine Corps.
  - Modification of Rule 304 of the Military Rules of Evidence relating to the corroboration of a confession or admission
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# FY17 NDAA

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- **Non-MJA16 Highlighted Issues:**

- Sec. 531. Improvements to whistleblower protection procedures.
  - Sec. 532. Modification of whistleblower protection authorities to restrict contrary findings of prohibited personnel action by the Secretary concerned.
  - Sec. 536. Comptroller General of the United States review of integrity of Department of Defense whistleblower program.
  - Sec. 541. United States Court of Appeals for the Armed Forces.
  - Sec. 542. Effective prosecution and defense in courts-martial and pilot programs on professional military justice development for judge advocates.
  - Sec. 543. Inclusion in annual reports on sexual assault prevention and response efforts of the Armed Forces of information on complaints of retaliation in connection with reports of sexual assault in the Armed Forces.
  - Sec. 544. Extension of the requirement for annual report regarding sexual assaults and coordination with release of Family Advocacy Program report.
  - Sec. 545. Metrics for evaluating the efforts of the Armed Forces to prevent and respond to retaliation in connection with reports of sexual assault in the Armed Forces.
  - Sec. 546. Training for Department of Defense personnel who investigate claims of retaliation.
  - Sec. 547. Notification to complainants of resolution of investigations into retaliation.
  - Sec. 548. Modification of definition of sexual harassment for purposes of investigations by commanding officers of complaints of harassment.
  - Sec. 549. Improved Department of Defense prevention of and response to hazing in the Armed Forces.
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# FY17 NDAA (MJA16)

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- Signed by the President December 23, 2016
- Authorizes military judge or magistrate to issue investigative subpoenas and warrants for electronic communications prior to referral
- Requires preliminary hearing officer in Article 32 hearing to analyze additional matters submitted by the parties and the victim, and to make disposition recommendation
- Requires non-binding disposition guidance be issued for commanders, convening authorities, staff judge advocates and judge advocates
- Includes judge advocate consultation before SPCM referral
- Criminalizes sexual activity between recruiters and prospective recruits and junior military members in a training environment
- Criminalizes retaliation against a victim
- Eliminates “bodily harm” element from sexual assault offenses and adds element of “without consent”
- Statutory authorization for PTAs
- (New?) sentencing scheme
- Post-trial simplification
- Enhanced rights of appeal and review
- Allows Government appeals of sentences on grounds that the sentence violates the law or is plainly unreasonable
- New data collection requirements
- Replacement of the Code Committee



# Current Status of Victim Rights

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- **Article 6b: Rights of a Victim of an Offense under the UCMJ**
  - FY16 NDAA, Sect 531: Amends Art. 6b rights. If a sexual assault victim believes that a PHO or court-martial ruling violates delineated rights (Art6 6b rights; MRE 412, MRE 513, MRE 514, MRE 615), the victim may petition the Court of Criminal Appeals for a writ of mandamus for remedy.
  - FY17 NDAA, Sec 5105: Amends Art. 6b to allow the legal guardians or representatives of a victim's estate, or any other person designated by the military judge to assume the rights of the victim.
  - FY17 NDAA, Sec 5105: Defense counsel must make any request to interview the victim via VLC or civilian counsel, and, if requested by victim, must allow either VLC, VA, or trial counsel presence at the interview.
  - FY16 NDAA Sec 528: Mandates DoD-wide plan to improve prevention/response to male victims
- **Services**
  - FY16 NDAA: Right to Victims Legal Counsel (VLC) extended to DoD civilian employees
  - FY16 NDAA Sec 534: Victims must be notified of their right to VLC prior to MCIO or trial counsel interviews of the victim, or requests for any statement from the victim.
- **Collateral Misconduct**
  - Sexual Assault Initial Disposition Authority (SA-IDA) holds disposition authority for victim collateral misconduct.
  - MILPERSMAN 1910-704: Names the first flag officer in a sexual assault victim's chain of command as the separating authority, if the victim is recommended for involuntary separation within one year of the final disposition of the sexual assault case.
- **CNO SAPR Initiatives**
  - CNO directed processes to allow victims of sexual assault to request an expedited discharge from service, and prevent victims of sexual assault from being co-located with their alleged offender. Implementing MILPERSMAN sections in review.
- **Retaliation**
  - FY16 NDAA: Prohibition of retaliation against those who report or intervene on behalf of a victim of sexual assault. Mandated DoD-wide retaliation prevention and response strategy.



# JSC Accomplishments Since 2012

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- EO 13643 – Signed 15 May 2013
    - Complete MRE reissue
      - FRE rewrite effective 1 Dec 11
      - MRE 1102
    - Max Punishments – Art 120, 120b, 120c
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# JSC Accomplishments Since 2012

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- EO 13669– Signed 13 June 2014
    - Implemented:
      - FY12 and FY14 NDAAAs
    - Changed:
      - R.C.M. 405, 1104, 1106, and 1306
      - Discussions for R.C.M. 306, 405, 703, 1103, 1104, 1105A, and 1106
      - Analysis of R.C.M. 1107
    - Major Provisions:
      - Authorized issuance of subpoena for electronically stored information
      - Provided ROTs to SA victims named in a specification
      - Provided victims the right to submit matters to the CA Action
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## JSC Accomplishments Since 2012

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- EO 13696– Signed 17 June 2015
    - Implemented new Art. 32
    - Enhanced victims’ rights
      - Notice, presence, confer, be heard
    - Limitations on depositions
    - Victim’s unsworn statement in sentencing
    - Art. 60 changes
    - Elimination of GMC
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# JSC Accomplishments Since 2012

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- EO 13730– Signed 20 May 2016
    - Changes to Part II, Part III, and Part IV
    - FY16 NDAA Sec. 544 (to modify R.C.M. 104)
  - Notable provisions
    - R.C.M. 104 – Ratings for SVC/VLC
    - R.C.M. 306 – Victim preference on jurisdiction
    - R.C.M. 705 – Victim consultation on PTAs
    - R.C.M. 907 – Failure to state an offense
    - R.C.M. 1103 – Preparation of verbatim transcript
    - R.C.M. 1107 – FY14 NDAA limits on CA actions
    - R.C.M. 1109 – Vacation hearing procedures
    - R.C.M. 1203 – Procedures for victim writs of mandamus
    - Mil.R.Evid. 304 – Admitting confessions or admissions
    - Mil.R.Evid. 311 – Exclusionary rule
    - Mil.R.Evid. 504 – Spousal privilege
    - Numerous Mil.R.Evids. – To conform with FRE amendments
    - Part IV, para. 4.e. Attempts – Mandatory punitive discharge for attempts of certain SA crimes
    - Part IV, para. 110.c. Communicating a Threat – Limits on criminalization of certain language
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## JSC Accomplishments Since 2012

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- EO 13740– Signed 16 Sep 2016
    - Sometimes called the “Residuum”
    - Implements portions of FY12, FY14, and FY15 NDAAs
      - R.C.M. 201, 307, 701, 703, 906, 907, 916, 917, 920, 1003, and 1004
      - Part IV Art. 79, 118, 119, 120, 120b, 120c, 125, and 134 and various discussions
      - Discussions for R.C.M. 307, 701, 809, 906, 907, 910, 916, 918, 1003
      - Analyses of R.C.M. 307, 906, 907, 916, 920, 1001, 1004, and Art. 79, 118, 120, 120b, 120c, 125, and 134
      - Analysis of Military Rules of Evidence
      - Part IV – Art. 120
      - Repeals consensual sodomy
      - Addresses defense counsel interview of victims
      - Indecent conduct
        - Prior “Indecent Acts with Another,” but no requirement for the presence of another person
      - Changes due to *U.S. v. Fosler*
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# QUESTIONS?

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