

THE JUDGE ADVOCATE GENERAL'S SCHOOL  
JOINT MILITARY JUDGES' ANNUAL TRAINING 14-A

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Training Materials – Slide Decks

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# Benchbook Update

- Changes Since Last We Met (I think)
  - Added Note regarding judicial notice instruction. 12-01.
  - Added colloquy with accused regarding mental responsibility/competency issues. 12-02.
  - Moved post-trial and appellate rights advice in JA/GP (And cleaned up some of the jargon in the boilerplate). 12-03.
  - Deleted notes concerning death penalty as authorized punishment of 120 and 120b offenses. 12-04.
  - Fixed error in Note 1 of Article 92 regarding lawfulness of the order for other order – need not come from any particular rank but must be one the accused had a duty to obey. 12-05.

# Benchbook Update

- Added a new Preface to Article 120 offenses. 12-06.
- Added a justification defense instruction. 13-1.
- Amended Article 107 to define what is an official statement in light of *Spicer* and *Capel*. 13-4.
- Added notes to the reconsideration instruction for situations where the members incorrectly complete the findings or sentence worksheet (*U.S. v. Garner*, 71 MJ 430). 13-5.

# Benchbook Update

- Adjusted instructions on consensual sodomy to reflect law after *Castellano*. (See future changes reflecting FY 14 NDAA) 13-06.
- Incorporated 2013 MCM Amendments by Executive Order of 15 May 2013. 13-07.
- Amended Article 120 instructions to include element and instruction on consent as an element when government alleges same physical act as actus reus and bodily harm. (See future changes). 13-08.

# Benchbook Update

- Cleaned up several typing, usage and administrative errors. 13-10.
- Added inquiry of Special Victims Counsel (SVC) regarding qualification and oath. 13-11.
- Updated reference change for DODI on sex offender registration. 13-12.
- Deleted reference in child porn instruction to reflect law after *U.S. v. Wagner*. 13-13.
- Made numbering of all Articles consistent with MCM. 13-14.

# Benchbook Update

- Changes Headed Your Way
  - New 2012 Article 120 instructions concerning consent and MOF. 13-09.
  - Application of all changes resulting from FY14 NDAA – (no more consensual sodomy, etc.).
  - Web Based Version?????

# ***Headquarters U.S. Air Force***

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## ***Joint Service Committee Update***



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**Lt Col Mike Lewis  
AFLOA/JAJM  
JSC Chair**



- Response Systems Panel Update
- UCMJ Review Panel Update
- Joint Service Committee Update
  - Quick review of implemented changes
  - Life of an EO
  - The three current EOs
  - Timelines
- Prominent FY14 NDAA provisions – not in EOs
- MRE Manual



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# Response Systems Panel Authority

FY13 NDAA

**SEC. 576. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM  
CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS  
OF SEXUAL ASSAULT CASES.**

(a) INDEPENDENT REVIEWS AND ASSESSMENTS REQUIRED.—

(1) RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES.—

The Secretary of Defense shall establish a panel to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.



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# ***Response Systems Panel Members and Committees***

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## ■ Full Panel Composition

- Hon Barbara Jones (SecDef)
- Hon Elizabeth Holtzman (SecDef)
- VADM (Ret) James Houck (SecDef)
- BG (Ret) Colleen McGuire (SecDef)
- BG (Ret) Malinda Dunn (SASC)
- COL (Ret) Holly Cook (HASC)
- Prof Elizabeth Hillman (HASC)
- Mr. Harvey Bryant (SASC)
- Ms. Mai Fernandez (SecDef)

## ■ 3 Subcommittees

- Role of the Commander
- Victim Services
- Comparative Systems

**RSP Website**

**<http://responsesystemspanel.whs.mil/>**



# *Response Systems Panel*

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- Adult Sexual Assault
- Lots of documents posted on their website as submitted by the services
- 5 Public Hearings To Date (DC, Austin TX)
- 2 site visits
  - Dec 13 - Ft Hood/Joint Base Lackland
  - 4-7 Feb 14 - Naval Base Kitsap-Bremerton and Joint Base Lewis/McChord
- 29 Jan 14 – Role of the Commander initial assessment published
- Follow-on judicial proceedings panel - independent review and assessment of judicial proceedings involving adult sexual assault and related offenses



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# *RSP Timeline*

3 Jan 13 -  
Formed by  
FY13 NDAA,  
§576

7 Jun 13 -  
Appointed by  
SecDef,  
HASC &  
SASC

27 Jun 13 -  
First Meeting

26 Dec 13 -  
Curtailed by  
14 NDAA  
from 18 Mos  
to 12 Mos

27 Jun 14 -  
Report of  
RSP

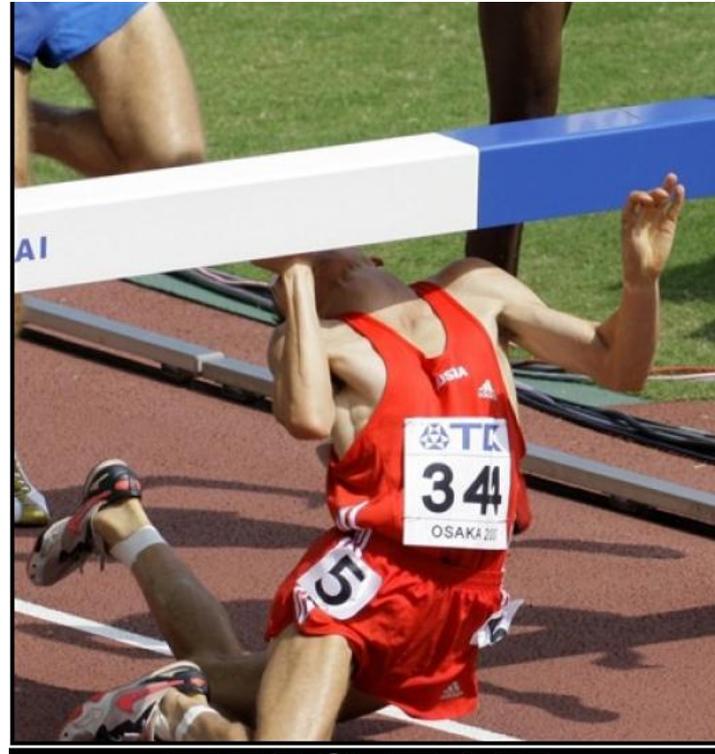
27 Dec 14  
Follow-on  
Judicial  
Proceedings  
Panel Report



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# *Supporting Two Independent Reviews*

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# *UCMJ Review Panel*

- Four teams:
  - Punitive Articles
  - Structure
  - RCM/MRE
  - Sentencing and Special Projects
- Cover to cover review of the MCM
- Compiling master list of issues that should be considered for change
- Suggestions: Lt Col Chuck Wiedie, USAF,  
[charles.e.wiedie.mil@mail.mil](mailto:charles.e.wiedie.mil@mail.mil)

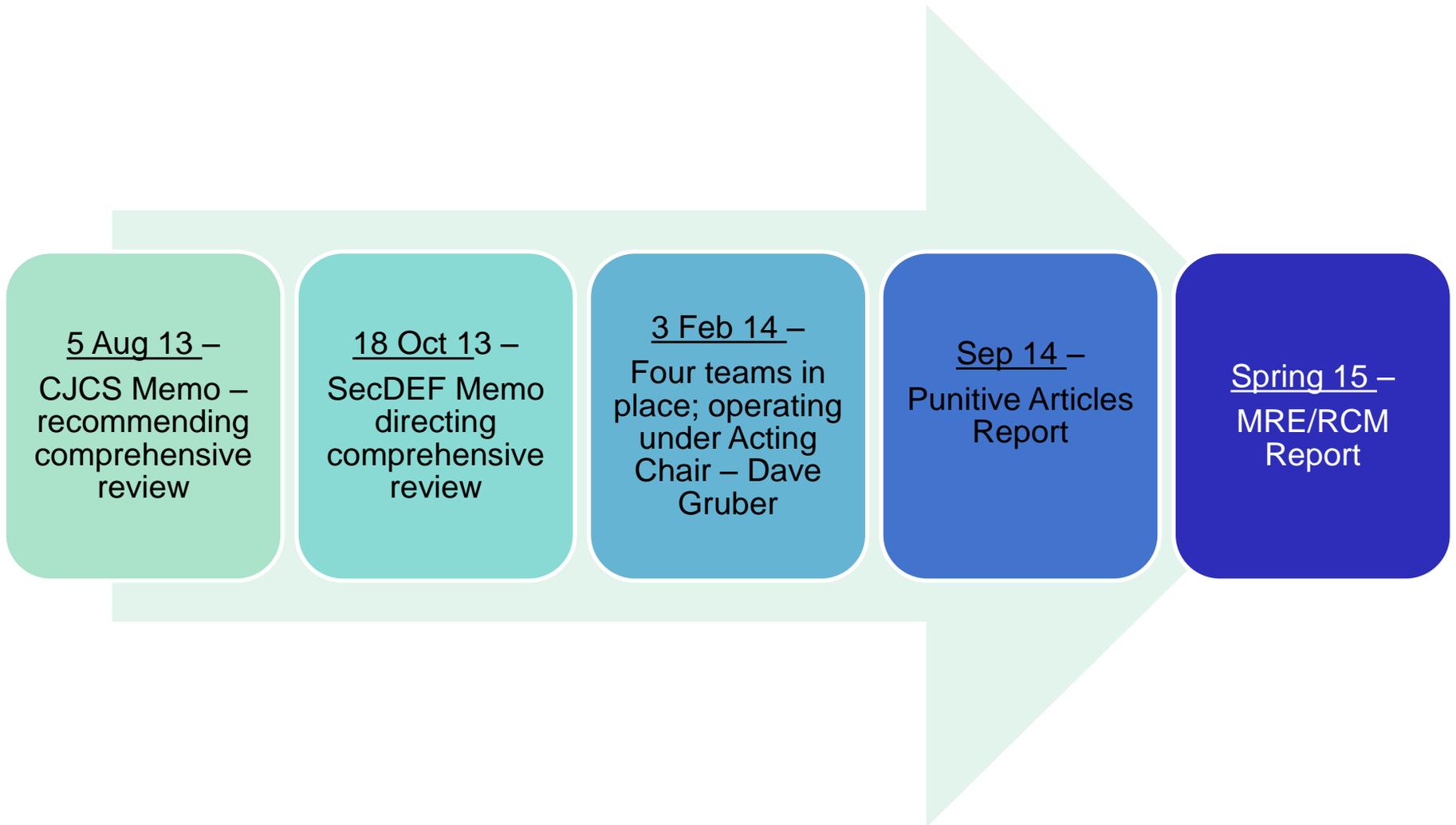
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# *UCMJ Review Timeline*





# Joint Service Committee

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## ■ Voting Group

- AF - Lt Col Mike Lewis (Chair - Jan 15)
- Army – COL Mike Mulligan
- Navy – CAPT Robert Crow
- Marine Corps: LtCol Derek Brostek
- Coast Guard – CDR Vasilios Tasikas

## ■ Working Group

- AF - Maj Dan Mamber (Exec Secretary)
- Army – LTC John Kiel; LTC Deb Pike
- Navy – LCDR Stuart Kirkby
- Marine Corps – Capt Jason Brown
- Coast Guard – LCDR Amanda Lee

Non-Voting Members: Dwight Sullivan (DoD/OGC); Capt Lindsay Rodman (OCJCS/LC); Mr. Clark Price (CAAF)

Marine Corps – Takes over JSC Chair in Jan 15

**JSC Website**

**[http://www.dod.mil/dodgc/jsc\\_business.html](http://www.dod.mil/dodgc/jsc_business.html)**



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# ***Where have we been***

## ***EO 13638***

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- **EO 13638 – Signed 15 May 2013**
  - **Complete MRE reissue**
    - **FRE rewrite effective 1 Dec 11**
    - **MRE 1102**
  - **Max Punishments – Art 120, 120b, 120c**



# EO 13638

## *Max Punishments*

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- Max Punishments – 15 May 13
  - Rape (& child) – **life w/o parole**
  - Sexual assault (& child) – 30 yrs
  - Agg sexual contact & Sexual abuse of child inv contact – 20 yrs
  - Sexual abuse of a child not inv contact – 15 yrs
  - Forcible pandering – 12 yrs
  - Abusive sexual contact & Broadcast/distribute indecent visual recording – 7 yrs
  - Indecent visual recording – 5 yrs
  - Indecent viewing & Indecent exposure – 1 yr



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# EO 13638

## *MRE changes*

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- MRE 312(f) – Body Views and Intrusions
  - *US v. Stevenson*, 66 M.J. 15 – Evidence of contraband seized during a medical examination is only admissible if the search did not exceed necessary for medical purpose.
- MRE 412 – Victim’s Sexual Behavior or Predisposition
  - No Change BUT...
  - *US v. Gaddis*, 70 M.J. 248 & *US v. Ellerbrock*, 70 M.J. 314



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**EO 13638**

# ***MREs - Classified Information***

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- **MRE 505 – Classified Information**
  - Incorporates MCRE & CIPA
  - (h)(1)(C) – Adds head of agency designee as authorized to sign assertion of privilege (replaces current (c)) (506 also)
  - (j)(1)(E) – Requires MJ to provide written explanation of ruling
  - (j)(5) – Requires TC to disclose to ACC any info used to rebut CI



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**EO 13638**

# ***MREs - Remote Live Testimony***

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- MRE 611(d)(3) – Remote Live Testimony for Children
  - *MD v. Craig*, 497 US 836 (1990) – set rules for remote live testimony
  - Never reflected in MCM
  - MRE 611(d) added to MCM in 1999
    - Child unable to testify b/c of fear
    - Substantial likelihood, established by expert testimony, that child would suffer emotional trauma from testifying
    - Child suffers from mental or other infirmity
    - Conduct by accused or DC cause the child to be unable to continue testifying
  - *US v. Pack*, 65 M.J. 381 (2007) – Only use remote live testimony for a child when:
    - Necessary to protect the child
    - The child would be traumatized by the presence of the accused
    - Emotional distress suffered by the child is more than *de minimis*

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# *Great...so when am I getting Part IV for the 2012 Article 120*

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# *Life of an EO*

- Approval by Voting Group (VG)
- Post in Fed Reg for Public Comment
  - Encouraged but not required *DoDD 5500.17, E2.4.2*
- Final JSC review & vote
- Forward to DoD/OGC
- Forward to OMB – Circulate for interagency review
  - Commissions, DoJ, SASC, HASC
  - White House Staff
- Signed by POTUS



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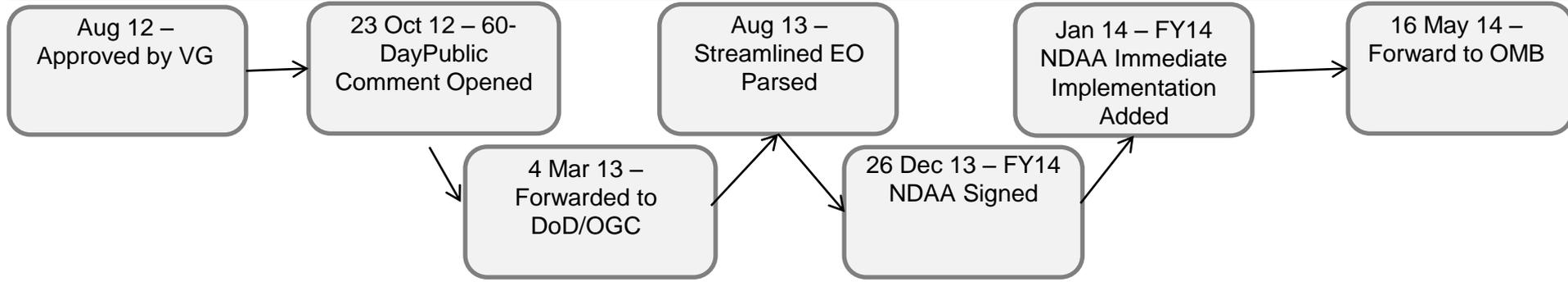
# *Three EOs*

- August 2012 EO
  - Streamlined EO – excerpt ~ 30 pages
  - Residuum of Aug 2012 EO
- 2014 EO

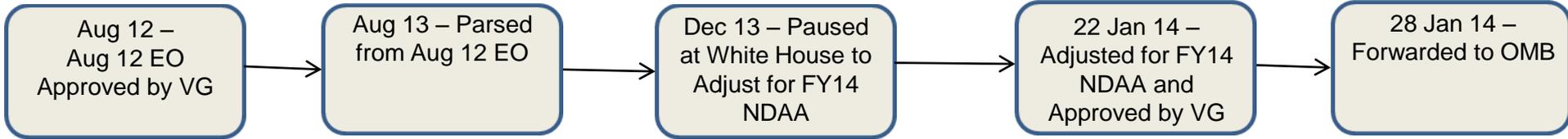


# JSC EO Timeline

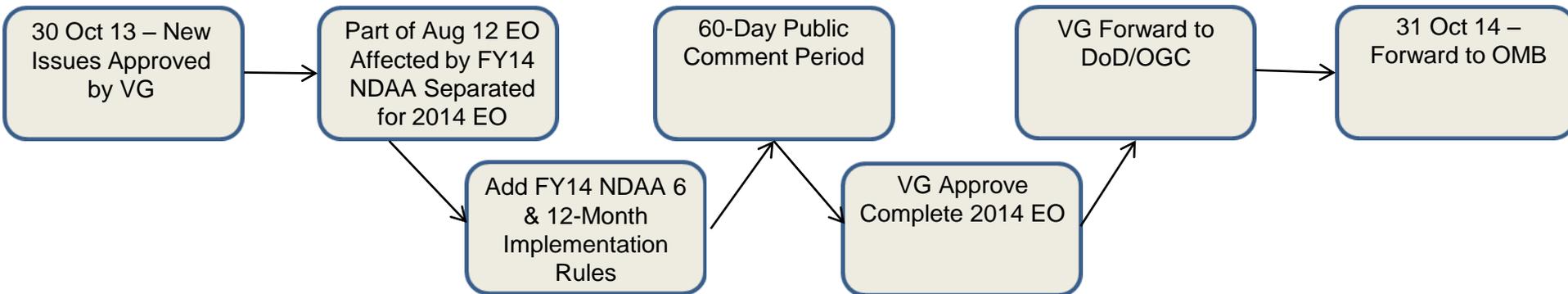
## AUG 12 EO



## Streamlined EO



## 2014 EO





# *Streamlined EO Preview*

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- Streamlined EO Preview
  - Delete Character of Acc from Discussion factors in RCM 306(b)
  - Art. 32 IO may issue subpoena duces tecum
  - Art. 32 IO use MJ process under MRE 412
  - SA victims entitled to ROT
  - Victims may submit matters to CA at clemency



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# *Streamlined EO Delete Character of Service*

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- Amends RCM 306(b) discussion – eliminates wording “the character and military service of the accused”
- Required by Section 1708 of FY14 NDAA
- No change to RCM 306 – lowest appropriate level of disposition
- Still balancing nature of offenses, mitigation/ extenuation, views of victim, subordinate commander recommendations, etc



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# *Streamlined EO Subpoena Duces Tecum*

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- Art 47 – Refusal to Appear or Testify
  - (a)(1) – “Any person not subject to this chapter who...has been duly issued a subpoena duces tecum for an investigation pursuant to [Art. 32]...”
  - RCM 405 & 703 amended to implement Art 47



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# *Streamlined EO MRE 412 Evidence at Art. 32*

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- Consideration of MRE 412 Evidence at 32 Hearing
  - RCM 405(i) revised to expressly allow IO to make admissibility determinations under MRE 412
  - Discussion – Include 412 evidence in Art 32 report if considered by IO



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# *Streamlined EO ROT to SA Victim*

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- Art 54 – Record of Trial
  - (e) Requires Gov't to notify & provide free copy of ROT to any SA victim who testified at trial
  - RCM 1103 & 1104 – Procedure for implementing the rule



# *Streamlined EO Victim Statement at Clemency*

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- Victim Statement at Clemency
- RCM 1105A – Matters Submitted by a Crime Victim
  - *Written* statement to CA after sentence is adjudged
  - Not just sexual assault
  - 30 days after sentence is announced (3 for SCM)
- RCM 1106
  - SJAR is mandatory when victim submits statement
  - Victim statement must be attached to SJAR
- RCM 1107 – CA must consider statement submitted by victim



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# *Really...no Part IV for Article 120?*



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# August 2012 EO Preview

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- Aug 12 EO
  - Art 120, Pt IV
  - Mistake of Fact as to Consent
  - Repeal of Consensual Sodomy
  - Art 134
    - Animal Abuse, Indecent Conduct
    - Prostitution & Pandering, Assault w Intent to Commit Sexual Assault (et al)
    - DC Interview of Sex Related Offense Victims (Art 46)
  - DD & GCM for Certain Sex Related Offense Victims (Art 56)
  - Broader Contempt Powers (Art 48)
  - *Fosler* (Art. 134 Terminal Element), *Jones* (LIOs),  
*Campbell* (Multiplicity v. Unreasonable Multiplication of Charges)
  - New Appendix 12A – LIOs list

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# ***August 2012 EO Art 120 Part IV***

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- New elements
- Model Specs
- LIOs
- Explanation
- No changes from JSC draft (so far)



# August 2012 EO

## *Mistake of Fact as to Consent*

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- Consent as an Element
- c.(4) Lack of consent is not an element unless expressly stated (b.(1)(e)(ii)- administer drug/intoxicant)
  - RCM 916(b)(4) ~~DELETED~~ Mistake of fact as to consent
  - RCM 916(j)(1) – Mistake of fact generally still listed as a defense
    - (2) – Reasonable mistake of fact as to age for child may lead to reasonable mistake as to consent defense
    - (3) ~~DELETED~~ Sexual offenses



## ■ Art 125

- *Lawrence v. Texas*, 123 S.Ct. 2472,
- *US v. Markham*, 60 M.J. 198
- PETA – pushback on repealing bestiality

<http://www.youtube.com/watch?v=B-ptFbHEhBk>

## ■ Art 134

- Animal Abuse
  - Replace Abusing a public animal, includes sexual acts
- Indecent Conduct
  - Old Indecent acts w/ another, but no requirement for “another”
  - Catch-all



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# *August 2012 EO*

- Art 134
  - Pandering and Prostitution – “sexual act” for money added
  - *US v. Fosler*, 70 M.J. 225 – Gov’t must allege terminal element either expressly or by necessary implication
  - RCM 307 (proposed) must allege terminal element



- *US v. Campbell*, 71 M.J. 19
  - Multiplicity – Constitutional protection against double jeopardy
  - Unreasonable Multiplication of Charges – Military protection against overreaching in exercise of prosecutorial discretion
  - “Multiplicity of offenses for sentencing purposes”
  - RCM 307, 906, 907, 1003 (proposed) amended to comport with *Campbell*

No Such Thing



## ■ Art 48 – Contempts

- RCM 201 – Expands MJ’s contempt power to willfully disobeying the CM; Increases maximum fine to \$1000.00
- RCM 809 Discussion



## ■ Art 79

- b. Explanation – implements *US v. Jones*, 68 M.J. 465 – A charge is not an LIO of a charged greater offense unless the LIO is “necessarily included”
- (d) “See paragraph 3 of this part and Appendix 12A”
- Appendix 12A (proposed) – Replaces subparagraph d. in Pt. IV, Paras. 1-113



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***This does not look promising...***



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# ***2014 EO Preview***

- Conspiracy to violate LOW (Art 81)
- Knowingly receiving, buying, concealing stolen property (Art 134)
- Typos & Clarifications
- NDAA provisions - by 24 Jun 14
  - Limit CA's authority to grant clemency (Art 60)
- NDAA provisions - by 26 Dec 14
  - MCVRA
  - Reform Art 32 Hearing



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2014 EO

# *Law of War Conspiracy*

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- 2006 amendment to Art. 81 added (b):
  - Conspiracy to violate LOW
  - Results in death
  - Death penalty available
- Part IV amendment
- Law of War undefined in Art. 81



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# 2014 EO *Receive, Buy, Conceal*

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- Art. 134, para 106 – Stolen property; knowingly receiving, buying, concealing
  - (c)(3) – Adding “buying or concealing” as “wrongful” if it is without justification or excuse.



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2014 EO

# CA Authority @ Clemency

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- Restrict CA authority to affect findings and sentence at clemency for *qualifying offenses*:
  - Findings –
    - Max confinement <2 yrs
    - Adjudged sentence = <6 mos confinement & no punitive discharge
    - Never for rape or SA (120), 120b, 125, other offenses specified by SecDef
  - Sentence – Adjudged sentence = <6 mos confinement & no punitive discharge
    - Exceptions – “substantial assistance” in investigation/prosecution of another accused
      - PTA (but for mandatory minimum, only to reduce DD to BCD)
- CA required to include written justification of any changes in ROT
- Offenses before/after implementation date will give CA some discretion

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- Incorporates CVRA-like 8 rights into UCMJ as Article 6b
- Effective immediately *but* implementation guidance and enforcement mechanism not due until 26 Dec 14
- Applies to ALL victims of crime
- Which of the rights are “new”?
  - The right to be reasonably heard at public pretrial confinement, sentencing, and clemency/parole proceedings
  - The right to proceedings free from unreasonable delay
- SecDef will establish an enforcement mechanism
  - Authority in each service designated to receive and investigate complaints
  - Availability of disciplinary sanctions for “willful or wanton” failure to comply with requirements related to victims’ rights



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# 2014 EO MCVRA cont.

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- Legal guardian for victims < 18, incompetent, incapacitated, or deceased
  - Military Judge *shall* designate a legal guardian
  - Representatives of estate, a family member, or other suitable person
- Preliminary Discussions
  - Role of Victim's counsel or legal assistance attorney (for civilian victims)
  - Child Pornography cases...DoJ process w/NCMEC
  - Working this before referral...as right to be heard exists at Article 32 under Art 6b
  - Comparisons to civilian practice for appointing guardianship



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# 2014 EO Art 32 Hearing

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- Preliminary Hearing Scope: probable cause, jurisdiction, form of charges, recommendation as to disposition
- Recorded (not transcribed), shall be made available to victim on request
- Victim (mil or civ) cannot be compelled to testify...shall be declared unavailable
- DC presentation of evidence/cross – limited...relevant to purpose of hearing
- Hearing officer: JAG, senior to GR/DC whenever practicable
- Future issues:
  - Depositions
  - How new “scope” really changes depth of hearings



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# ***MRE Manual***

- Available in .pdf form
- Adds discussion section to MRE 101, 301, 312, 314, 315, 317, 505

*Discussion was added to these Rules in 2013. The Discussion itself does not have the force of law, even though it may describe legal requirements derived from other sources. It is in the nature of treatise, and may be used as secondary authority. If a matter is included in a rule, it is intended that the matter be binding, unless it is clearly expressed as precatory. The Discussion will be revised from time to time as warranted by changes in applicable law.*



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# Questions?



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**2014 WILLIAM S. FULTON, JR.  
APPELLATE MILITARY JUDGES' TRAINING**

**Agenda**

- 0730** Registration/Breakfast Reception
- 0810** **OPENING REMARKS**  
Colonel Mark L. Allred  
Chief Judge, U.S. Air Force Court of Criminal Appeals
- 0815** **JUDGING JUDGES: LESSONS LEARNED ALONG THE WAY**  
Honorable James E. Baker, Chief Judge, U.S. Court of Appeals for the Armed Forces
- 0910** *Break*
- 0920** **U.S. SUPREME COURT REVIEW AND OUTLOOK**  
Colonel Gregory Maggs, USAR; Professor of Law & Co-Director of the National Security Law LL.M. Program, The George Washington University School of Law
- 1020** *Break*
- 1030** **INTERNATIONAL HUMAN RIGHTS AND THE UCMJ**  
Professor Jeffrey K. Walker, Asst. Dean for Transnational Programs,  
St. John's University School of Law
- 1130** *Lunch*
- 1150** **PROFESSIONAL RESPONSIBILITY** (optional)  
Lieutenant Colonel Crystal D. Haynes, U.S. Air Force
- 1300** **DNA DEMONSTRATION**  
Ms. Rachel Neagle, Virginia Department of Forensic Science
- 1350** *Break*
- 1400** **CONFRONTATION CLAUSE AND DNA**  
Professor Stephen A. Saltzburg  
The George Washington University School of Law
- 1500** *Break*
- 1520** **SVC PANEL**  
Colonel James McKee, USA, Program Manager, Special Victim Counsel Program  
Colonel Carol K. Joyce, USMC, OIC, Victims' Legal Counsel Organization  
Commander Ted Fowles, USCG, Director, Office of Special Victims' Counsel  
Lieutenant Colonel Andrea deCamara, USAF, Chief, Special Victims' Counsel Division
- 1620** **CLOSING REMARKS & AAR**  
Colonel Mark L. Allred