

I would like to thank the panel and your staff for the opportunity to appear here today.

My name is Ryan Guilds and I am a civilian attorney in the Washington, DC office of Arnold & Porter. Arnold & Porter's long history of pro bono representation extends to the provision of legal services for survivors of crime, including military sexual assault survivors. Our representation in this area extends to virtually every branch of the armed services and touches every aspect of the military criminal justice system.

In my view, the military justice system has made some incremental improvements in respecting sexual assault survivors' rights to dignity and privacy. But much more needs to be done. It remains the case that military sexual assault survivors do not enjoy the same level of privacy protections afforded their civilian counterparts. The reasons for these differences are neither constitutionally justified nor linked to a unique military objective.

Take first the application of military rule of evidence 412. The language of the military's rape shield law does not materially differ from analogous provisions in our federal and state systems. Nevertheless, there are significant differences in how the military investigates and prosecutes sexual assault cases and applies MRE 412 that makes military sexual assault survivors far more likely to have to be asked about the most intimate and personal details of their lives.

It begins with how the military investigates sexual assaults. It is common practice for military criminal investigators to press sexual assault survivors about their sexual history information as part of the initial workup of the case and to sign a comprehensive release of medical records. This is not a typical investigative tactic in the civilian setting. Nor should it be.

Under the current rules, the questioning of survivors about their prior sexual history means that this information may be considered in the Article 32 proceeding. Military defense counsel's ability to use this information to smear the victim has no parallel in the civilian system. Civilian sexual assault victims do not testify at preliminary hearings, they are rarely interviewed by defense counsel, and they are not forced to endure an Article 32 process that allows the Convening Authority unfettered access to potential 412 evidence, regardless of its admissibility at trial.

Making matters worse, the current system does not provide victim's legal counsel with clearly defined right to intercede in Article 32 and court-martial proceedings where the victim's rights are at stake. Recent military case law makes clear that sexual assault survivors have a right to be heard under 412. To be effective, however, that right must extend not just to interaction with trial counsel or the making of arguments in advance of a hearing, but also to the proceedings themselves.

The military justice system's closed docketing system and practice of preventing victim legal counsel from having access to case materials and motions also seriously undermines their ability to protect their clients' 412 rights. While some trial counsel provide these materials, many others do not. There is no similar restrictions in the civilian courts and no legitimate military objective served by limiting victim lawyers' access to the materials they need to do their job.

This unequal access to information only reinforces the view in the mind of the survivor that they are not a respected part of the process.

Turning now to MRE 513, it is my sincere view that MRE 513 by its language and application is the single greatest threat to the privacy and dignity of military sexual assault survivors in this country.

MRE 513 is described as a privilege. But in fact, as interpreted and applied by military judges, it is nothing of the sort. Military judges routinely pierce that privilege by conducting en camera reviews based on the scantest evidence. What should be a near absolute privilege has devolved into a fishing expedition followed by a mere relevancy determination.

The result for victims is catastrophic. Military VLCs rightly warn survivors that if they decide to file an unrestricted report it is likely their most private medical and counseling records will be disclosed. All too often victims are simply unwilling to accept that risk, and choose not to come forward. Alternatively, victims refuse to get the services they need out of fear that their most personal and intimate emotions will be turned over to the very person who caused them in the first place.

Defense counsel and military judges erroneously focus on the constitutionally required exception set forth in MRE 513 as the basis for piercing the survivor's doctor patient privilege. But no court has ever held that the constitution mandates the routine disclosure of a victim's medical and therapy records. In fact, such records are rarely sought in civilian proceedings precisely because of the stringent rules in place to restrict their disclosure. To make matters worse, military crime victims do not have an ability to timely appeal the disclosure of their records. The result is that crime victims are in the untenable position of either accepting that their private thoughts and records will be disclosed or refusing to proceed with criminal charges. It is a result that must be changed if the military is to make meaningful progress in its efforts to support and respect sexual assault victims.

I thank you again for the opportunity to appear before you and welcome any questions you may have.