DEPARTMENT OF DEFENSE
OFFICE OF THE GENERAL COUNSEL
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October 16, 2014

The Honorable Elizabeth Holtzman
Chair
Judicial Proceedings Panel
One Liberty Center
875 N. Randolph Street, Suite 150
Arlington, VA 22203

Dear Madam Chair:

I am writing to clarify two points that arose at the Judicial Proceedings Panel's October 10, 2014 public meeting, one concerning alleged victims' current right to be heard through counsel at evidentiary hearings and the other concerning the change to the rules governing the procedures for admitting rape shield evidence at Article 32 pretrial hearings that the President adopted earlier this year.

First, it is already the law in the military justice system that an alleged victim or the holder of a psychotherapist-patient or victim advocate-victim privilege has the right to be heard through counsel during litigation over production or admissibility of evidence under Military Rules of Evidence 412, 513, or 514, respectively. In a July 18, 2013 decision, the Court of Appeals for the Armed Forces ruled: "A reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel." *LRM v. Kastenberg*, 72 M.J. 364, 370 (C.A.A.F. 2013). The proposed amendment to the *Manual for Courts-Martial* that was discussed during the public meeting, *see* Notice of Proposed Amendments to the Manual for Courts-Martial, United States (2012 ed.), 79 Fed. Reg. 59938, 59945-46 (2014) [hereinafter Proposed MCM Amendments], would codify this existing law.

Second, certain characterizations of the President's June 13, 2014 revision of the rules governing application of the military rape shield rule at Article 32 hearings were inaccurate. Before the recent revision, testimony concerning alleged victims' past sexual practices was frequently elicited at Article 32 hearings, even when such evidence would not be admissible at courts-martial. *See, e.g.*, Major Paul M. Schimpf, *Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military*, 185 MIL. L. REV. 149, 181 n.206 (2005). The 2014 change to Rule for Courts-Martial 405(i) was designed to ensure that procedures to protect victims and their privacy are followed at Article 32 investigations, not to allow the admission of any evidence that would have been inadmissible at an Article 32 investigation before the rule change. In fact, the rule change addressed only the means of *excluding* evidence from pretrial investigations. The change provided that in applying the Military Rules of Evidence regarding self-incrimination, rape shield, and privileges at a pretrial investigation, "the term 'military judge,' . . . shall mean the investigating officer, who shall assume the military judge's powers to exclude evidence from the pretrial investigation, and

who shall, in discharging this duty, follow the procedures set forth in the" relevant Military Rule of Evidence. Exec. Order No. 13,669, 79 Fed. Reg. 34,999, 35,001-02 (2014) (attached).

As was mentioned at the public meeting, the Department of Defense's Joint Service Committee on Military Justice recently proposed a *Manual for Courts-Martial* amendment to narrow the scope of rape shield evidence, psychotherapist-patient communications, and victim advocate-victim communications that can be admitted at preliminary hearings under Article 32 as amended by Section 1702 of the National Defense Authorization Act for Fiscal Year 2014. Proposed MCM Amendments, *supra*, 79 Fed. Reg. at 59,945-46. If adopted by the President, this proposed change would eliminate the admissibility of such evidence at preliminary hearings under the "constitutionally required" exception, which would be legally permissible because an accused does not have a Sixth Amendment right to confrontation or to present a defense at an Article 32 preliminary hearing. In the rape shield context, the proposed change would allow evidence to continue to be admitted, for example, where another sexual act by the alleged victim is relevant to show an alternative source of semen or injury, which may go directly to the issues of probable cause and appropriate disposition. *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, § 1702(a)(1), 127 Stat. 672, 954 (2013) (to be codified at 10 U.S.C. § 832(a)(2)) (stating that the purposes of the preliminary hearing are to: (1) determine "whether there is probable cause to believe an offense has been committed and the accused committed the offense"; (2) determine "whether the convening authority has court-martial jurisdiction over the offense and the accused"; (3) consider "the form of charges"; and (4) recommend "the disposition that should be made of the case"). Permitting the defense to attempt to offer relevant evidence falling within Military Rule of Evidence 412's first two exceptions is consistent with Article 32's statutory authority for the accused to "present additional evidence in defense and mitigation, relevant to the limited purposes of the hearing." *Id.* (to be codified at 10 U.S.C. § 832(d)(2)). But the proposed change would eliminate what in practice appears to be the most-used Military Rule of Evidence 412 exception and the exception whose application has proved the most controversial at Article 32 investigations: the exception for evidence the exclusion of which would violate the accused's constitutional rights. As explained above, the accused has no constitutional right to have evidence admitted at an Article 32 hearing.

Sincerely,

Paul S. Koffsky
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Personnel and Health Policy

Attachment:
As stated