Protect Our Defenders
Strengthen our Military. Prosecute Rape. Support Survivors.

September 25, 2013

President Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President,

We have learned that the Joint Services Committee is proposing an Executive Order that would change Rules for Courts-Martial (RCM) 405(i). The proposed order would expressly apply Military Rules of Evidence (MRE) 412 and require the Investigative Officer (IO) to follow the same standards a military judge would use during a court-martial, when ruling on the admissibility of MRE 412 evidence during an Article 32 proceeding.

MRE 412 is designed to protect a victim of sexual assault from further victimization in court. However, the way in which it is being applied is inconsistent and often inappropriate, even abusive, particularly during Article 32 preliminary hearings. The proposed changes would make the process more consistent, but in a manner that would harm victims and would further hinder the process of finding justice.

Currently MRE 412, as applied at trial, provides that a military judge must determine whether the evidence regarding the victim's sexual history and sexual orientation is admissible during the court-martial. Historically many believed MRE 412 protections did not apply at Article 32 preliminary hearings, which led to dramatically different procedures and outcomes during the pre-trial phase. To address this inconsistency, RCM 405 was changed to directly apply MRE 412 during the Art 32 process, but the revised language has led to new confusion.

Many JAGs interpret the change to RCM 405 to mean that the privacy protections established under MRE 412 strictly apply at the Article 32, thus preventing the discussion or consideration of any protected information. However, others believe that RCM 405 only establishes that the MRE 412 process, including the need to determine admissibility, applies at preliminary hearings, as at trial, and therefore requires a separate closed-hearing to determine admissibility.

Currently, Article 32 Investigating Officers (IOs), who are not military judges, are extremely inconsistent regarding how they interpret their role in the Article 32 hearing process. Many follow the broader interpretation of RCM 405 and allow MRE 412 evidence to be admitted, and other IOs hold a closed hearing on admissibility and let in MRE 412 evidence they deem admissible—hence the Naval Academy fiasco. Other IOs will not allow any MRE 412 evidence to be discussed during Article 32 hearings.

The effect of the current proposed change to RCM 405 would be that MRE 412 evidence could clearly be admitted at Article 32 hearings. Even if the IO ultimately did not rule any MRE 412 evidence admissible, the victim would still have to undergo a MRE 412 hearing as part of the Article 32 process, only to go through it again before trial. Furthermore, the Convening Authority (CA) would be able to see the sealed evidence from the closed MRE 412 hearing.

For example, it appears that, before overturning Captain Herrera's sexual assault conviction, General Susan Helms reviewed the MRE 412 hearing record—including evidence that had been excluded from trial by the military judge. Under the changes to MRE 412, as proposed, the closed hearing could be used to harass and smear the victim, bringing out irrelevant evidence, which while not admitted in the Article 32, would still be presented to the Convening Authority. This serves no purpose other than to prejudice the CA against the victim, and deter the victim from further participation in the prosecution of their attacker.

The Article 32 proceedings were originally created to function as a probable cause hearing, but have essentially become an opportunity for the defense to try the case twice. Article 32 hearings are not supposed to be trials or even mini-trials, but for sexual assault cases they often end up that way. Even worse, the IO is not allowed to rule on objections, so defense attorneys are able to take unbridled control of the questioning process and intimidate and abuse witnesses.

There is no civilian equivalent to this process. Federal Grand Jury proceedings do not allow participation by the defense. They are limited to a presentation of evidence by the prosecution so the Jury can make a determination as to whether there is sufficient evidence for a finding of probable cause, indictment of the accused, and whether to proceed forward to trial.

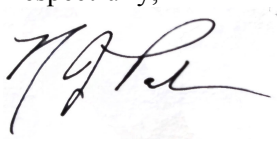
The issues of defense participation and the role of the IO in admitting evidence are critical and much broader than just MRE 412. The proper solution is not to increase the discretion of the IO during Article 32 proceedings, but to limit Article 32 proceedings to a presentation of evidence by the prosecution to the IO—or, even better, to a jury—who then determines whether a finding of probable cause is justified.

Instead of expanding the IO's power at Article 32 hearings, we recommend MRE 412 be amended to explicitly state that MRE 412 *protections* apply at the Article 32, and that 412 evidence is not relevant or admissible at the Article 32 hearing. There is no evidence that must be constitutionally admitted at an Article 32 hearing.

After all of the recent attention on this issue, it is troubling that military leaders seem to be doubling down on bad policy.

The question for you, Mr. President, is whether victims of sexual assaults in the military justice system should endure a process more hostile and unfair than victims of assaults experience in the civilian justice system.

Respectfully,



Nancy Parrish,
President
Protect Our Defenders
nancy@protectourdefenders.com
(202) 733-5196