



July 28, 2014

### Summary Concerns Re: MRE 412 Executive Order

President Obama signed [Executive Order](#) (EO) 13669 on June 13, proposed and drafted by DoD, which includes an amendment to Rules for Court Martial 405(i) that explicitly allows the consideration of a victim's prior sexual history at Article 32; evidence protected by Military Rule of Evidence 412 (MRE 412), the military's version of the "rape shield rule." This change subverts the intention behind MRE 412 protections, is contrary to the intent of Congress, is inconsistent with established procedure in sexual assault cases, and exemplifies the DoD's failure to seriously address defects in the military justice system.

DoD argues that:

1. The President's new Executive Order, by explicitly applying MRE 412 to the Article 32 hearing and allowing the admission of evidence on prior sexual history and inclinations, enhances privacy protections for information regarding a victims' sexual history.
2. These changes do not alter the standards of admissibility for MRE 412 evidence at pre-trial hearings.
3. These changes bolster the protections provided by Art 32 reform passed by Congress in FY14 NDAA, which narrowed the scope of Article 32 to determining probable cause and allows victims to opt out of testifying.

To the contrary, these arguments are not valid and the President's action, led by the Pentagon, undermines the military's rape shield protection and inappropriately intrudes into the most intimate aspects of victims' lives.

Prior to the President signing the June 13<sup>th</sup> EO, the Rules for Courts-Martial 405(i) ("RCM 405(i)") prohibited admission of evidence of a victim's prior sexual behavior during Article 32 hearings. Nevertheless, many investigating officers interpreted the rule as permitting their consideration of such evidence, even though MRE 412 specifically reserved this power only to military judges during a court-martial. Victims' advocates and attorneys had been fighting to eliminate the inappropriate *de facto* admission of such evidence during the Article 32 preliminary hearing process. **Unfortunately, the new Presidential EO validates and codifies this erroneous historical disregard for MRE 412 protections barring introduction of such evidence at Article 32 hearings.**

In addition to undermining the rape shield rule itself, the EO undercuts the reforms passed by Congress in the National Defense Authorization Act for Fiscal Year 2014 ("NDAA 2014"), which converted Article 32 hearings from an investigative tool into a probable cause hearing. Congress designed this change to more closely align Article 32 hearings with civilian probable cause hearings, where, as a practical matter, the use of a victims' prior sexual history at a preliminary hearing is almost unheard of. In Grand Jury proceedings—the civilian probable

cause hearing most often used after a rape or sexual assault investigation—the accused does not have a right to be present, much less to confront or cross-examine witnesses or present evidence. Even in the less common instance of a Federal 5.1 hearing, used in cases of an arrest, the context of the hearing—demonstrating probable cause for charging the suspect—ensures that a victims’ prior sexual history would almost never be applicable.

Unfortunately, the EO disregards this fact and expands the rights of the accused, thereby erasing vital victim protections. Under the EO, the accused will now be allowed to call witnesses to testify about their sexual interaction with the victim, and, because the accused is allowed to introduce hearsay evidence at Article 32, they are allowed to introduce alleged statements made by a victim to a witness to assail the victims’ character.

While proponents of the EO point to the fact that it requires MRE 412 evidence be sealed, this is of limited value. The EO expressly allows the convening authority (CA) to review the entire record from the Article 32 hearing, including MRE 412 evidence that has been ruled inadmissible by the IO. **Therefore the CA (a person in the accused’s chain of command) will be permitted to consider inadmissible evidence before deciding whether to refer a case to court martial.** Despite Congress’s recent legislation narrowing the scope of the Article 32 hearing process, the EO now incentivizes the accused to drum up as much potential MRE 412 evidence as possible, knowing that even if it is irrelevant or inadmissible it will still be available for review by the CA.

A victim’s prior sexual behavior is irrelevant to the determination of whether there is probable cause to believe the accused committed sexual assault. Attorneys for the accused seek to introduce such prejudicial evidence to humiliate, intimidate, and dishearten victims so they will refuse to further participate in the military justice process. Instead of abandoning the rule and codifying the mistaken practice of allowing the introduction of MRE 412 evidence without the approval of a military judge at an Article 32 hearing, the EO should have mandated that RCM 405(i)—the rule prohibiting consideration of MRE 412 evidence by anyone but a judge at courts martial--be followed as it was clearly written. This would have constituted a significant improvement in victim protection. As written, the EO undermines existing victim protections.