



September 26, 2012

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

Dear Mr. President,

We understand in speaking today with Lt. Col. Christopher Kennebeck, Executive Secretary, Joint Service Committee on Military Justice, Office of the Judge Advocate General, Criminal Law Division, that an amendment to 412 – Military Rules of Evidence has been submitted to you.

The proposed Executive Order as submitted would effectively eliminate the Rape Shield Rule in the military. Please do not allow this to happen.

This is a terrible proposal, which would severely undermine our military justice system with regard to sexual assaults. A system already flawed with regard to providing justice to service men and women who are raped, sexually assaulted or harassed. If victims get wind of this change and learn their entire sexual histories could be displayed without concern for their privacy, it will have a dramatic chilling effect on victims willing to report their assaults throughout the services. And according to DOD's own reports less than 13.5% of victims currently report the crime for fear of retaliation. Furthermore, 80% of those few who do report would not do so again, if given the chance.

The relevant change is in MRE 412(c)(3). The existing version of MRE 412(c)(3) requires the military judge to weigh the probative value of an alleged victim's sexual behavior against the danger of unfair prejudice to the alleged victim's privacy. And as it stands now current practice, MRE412 is not sufficient. The proposed MRE 412(c)(3) deletes any consideration of the alleged victim's privacy.

Removing language about the victim's privacy interest substantially changes the meaning of the Rule. As proposed, the "unfair prejudice" balancing test would then only apply to the government's case, which is a burden that rarely outweighs an accused's interest in presenting a defense. As it stands now, MRE 412 is already broadly construed in favor of the accused. Removing the privacy interest for the victim would eviscerate its protections and seriously hamper the successful prosecution of offenders.

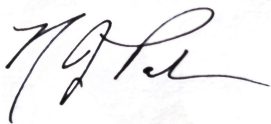
This change goes completely against the commitments made by you and Secretary Panetta in April of 2012. Victims of rape and sexual assault need more - not less - protection.

The rationale for this change is that the military wants the language in the Rule to be consistent with two August 2011 decisions made by the court of United States Court of Appeals for the Armed Forces (CAAF). CAAF wrongly decided these two cases, and the President (through the military JAGs) should not change the Rule but should challenge these CAAF decisions on appeal.

It should be noted that the recent CAAF decisions, which designated MRE 412 as unnecessary, cited MRE 403 as providing sufficient protections. However, that opinion creates a fundamental burden shift. Under MRE 412, the proponent of the evidence (defense) bears the burden of proving admissibility; whereas under MRE 403 the party moving to exclude the evidence (government) bears the burden to keep it out. This burden shifting is counterproductive to effectively prosecuting perpetrators of sexual assault. Instead of generally excluding a victim's sexual history, with limited exceptions under MRE 412 – CAAF's interpretation makes that sexual history entirely admissible, unless the government can successfully keep it out.

We ask that you let the existing language remain so that the two CAAF cases striking down any consideration of a victim's privacy may be challenged. Consideration of the victim's privacy in the Rule must remain. In order to encourage the reporting of sexual assault throughout the ranks, victims must believe the system will attempt to protect them in the process. Destroying protections of privacy will instead tell our troops that reporting a sexual assault will cause undue embarrassment, hardship, and emotional trauma. This is not the message that should be sent. Please reject the proposed changes to MRE 412 and help fight sexual assault in the military.

Sincerely,

A handwritten signature in black ink, appearing to read 'N. Parrish', written over a light blue circular stamp.

Nancy Parrish,
President, Protect Our Defenders Foundation

cc: Leon Panetta, Secretary of Defense