

**REDEFINING THE NARRATIVE: WHY CHANGES TO  
MILITARY RULE OF EVIDENCE 513 REQUIRE  
COURTS TO TREAT THE PSYCHOTHERAPIST-PATIENT  
PRIVILEGE AS NEARLY ABSOLUTE**

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I. Introduction

In the 2015 National Defense Authorization Act (NDAA), Congress directed the President to significantly expand the protection offered to psychotherapist-patient communications in Military Rule of Evidence (MRE) 513.<sup>1</sup> The President implemented Congress's recommendation in Executive Order (EO) 13696, effective June 2015.<sup>2</sup> Since its inception, MRE 513 has provided the following privilege:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in

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<sup>1</sup> See Carl Levin & Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014); *infra* app. D (containing full text of § 537).

<sup>2</sup> See Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,819–20 (June 22, 2015) (amending Military Rule of Evidence (MRE) 513); see *infra* app. E (containing relevant portion of the 2015 executive order (EO)).

a case arising under the Uniform Code of Military Justice [(UCMJ)], if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.<sup>3</sup>

The pre-June 2015 privilege contained eight enumerated exceptions, including a “constitutionally required” exception which allowed courts to breach the privilege “when admission or disclosure of a communication is constitutionally required.”<sup>4</sup> When one of the parties disputed a potential breach of the privilege, upon request, the military judge conducted a hearing.<sup>5</sup> If, after the hearing, the military judge determined that the court must review the evidence before ruling on production or admissibility, the military judge conducted an *in camera* review.<sup>6</sup>

Before June 2015, military judges frequently relied on the constitutional exception to review otherwise privileged mental health treatment records of victims in sexual assault cases—even when defense counsel could not articulate a reasonable basis for asserting that the records or communications could contain any constitutionally-expected information.<sup>7</sup> Commonly, military judges reviewed the records *in camera*

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<sup>3</sup> JOINT SERV. COMM. ON MILITARY JUSTICE, PART III—MILITARY RULES OF EVIDENCE UPDATED AS OF JUNE 2016, MIL. R. EVID. 513 (2016), <http://jsc.defense.gov/Portals/99/Documents/MREsUpdatedJune2016.pdf?ver=2016-07-05-111944-123> [hereinafter JSC, UPDATED MREs]; *see infra* app. F (showing current version of MRE 513); *see also* Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,116 (Oct. 12, 1999) (promulgating MRE 513); *infra* app. B (containing relevant portion of the 1999 EO).

<sup>4</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 513(d)(8) (2014) [hereinafter MCM]; *see* app. C (containing 2013 MRE 513); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 513(d)(8) (2012) [hereinafter 2012 MCM] (containing 2012 MRE 513); Exec. Order No. 13,140, 64 Fed. Reg. at 55,117 (containing 1999 MRE 513).

<sup>5</sup> *See* MCM, *supra* note 4, MIL. R. EVID. 513(e).

<sup>6</sup> *Id.* MIL. R. EVID. 513(e)(4).

<sup>7</sup> *See Judicial Proceedings Panel on Military Sexual Assault*, Department Of Defense Transcript of Public Meeting, at 264 (Oct. 10, 2014) (testimony of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders) (“In the military, the constitutionally required exception to [MRE 513] has been utilized by judges to justify automatic in camera review of all mental health records, often leading to the disclosure of large chunks of a victim’s therapy records.”); *Embattled: Retaliation against Sexual Assault Survivors in the US Military*, HUMAN RIGHTS WATCH, May 18, 2015, [https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military#\\_ftn95](https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military#_ftn95) (“Attorneys told us that military judges commonly review private mental health records in chambers looking for relevant evidence, which some described as a ‘fishing expedition.’” (citation omitted)).

on the basis that the records *could* contain impeachment material.<sup>8</sup> Based on their review, military judges released to the parties—at times liberally—otherwise privileged communications or records that the judge determined relevant under typical discovery rules.<sup>9</sup> Treating MRE 513 as a rule of relevance rather than limiting a release to information that was allegedly constitutionally required, or that supported the defense’s alleged theory, was particularly troublesome in sexual assault cases. In these cases, deeply personal treatment communications were handed over to the very individual that allegedly victimized the witness.

Because the pre-2015 MRE 513 was vague<sup>10</sup> and military courts were accustomed to open discovery, it was understandable that when MRE 513 could allow it, judges chose the more cautious route of reviewing and disclosing an alleged victims’ mental health records. Regardless of the judge’s reason for requiring the victim witness to disclose otherwise privileged communications and records, producing this information could be traumatic for alleged sexual assault victims and did not account for the purpose of the privilege or the victims’ rights.<sup>11</sup> The result of the privilege’s misapplication was re-victimization of sexual assault victims.

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<sup>8</sup> See *United States v. Burgh*, No. 38207, 2014 CCA LEXIS 824, at \*19-21 (A.F. Ct. Crim. App. Apr. 16, 2014), *review denied*, 2014 CAAF LEXIS 1031, at \*1 (C.A.A.F. Oct. 28, 2014) (finding trial judge properly reviewed victim’s mental health records based on defense assertion that they could contain *Brady* or *Giglio* material and that the court properly released portions of the records even though they contained no reference to the possible *Brady* or *Giglio* material asserted); *United States v. Hohenstein*, No. 37965, 2014 CCA LEXIS 179, at \*17 (A.F. Ct. Crim. App. July 1, 2013), *aff’d in part, rev’d in part, dismissed in part*, 2014 CAAF LEXIS 910 (C.A.A.F. Sept. 5, 2014) (finding trial court conducted *in camera* review based on defense assertion that victim made statements to therapists that could be used for impeachment as constitutionally required under MRE 513).

<sup>9</sup> See *United States v. Palmer*, No. 38184, 2013 CCA LEXIS 1116, at \*13 (A.F. Ct. Crim. App. Nov. 25, 2013), *review denied*, 2014 CAAF LEXIS 947, at \*1 (C.A.A.F. June 30, 2014) (noting, without more explanation, that the court granted defense’s motion to compel production of the victim’s mental health records and the defense received a copy of the records); *United States v. Mora*, No. 201200335, 2013 CCA LEXIS 265, at \*3-4 (N-M Ct. Crim. App. Mar. 28, 2013) (noting, without more explanation, that the court granted defense’s motion to compel production of the victim’s mental health records); *see also supra* notes 7-8.

<sup>10</sup> See MCM, *supra* note 4, MIL. R. EVID. 513.

<sup>11</sup> See Carolyn Peddy Courville, *Rationales for the Confidentiality of Psychotherapist-Patient Communications: Testimonial Privilege and the Constitution*, 35 Hous. L. Rev. 187 (1998) (discussing victims’ privacy rights); Major David L. Hayden, *Should There Be a Psychotherapist Privilege in Military Courts-Martial?*, 123 Mil. L. Rev. 31, 42, 56-59 (1989) (discussing the development of a constitutional right of privacy and its application to the psychotherapist-patient relationship).

It further discouraged victims from continuing to cooperate in prosecutions.<sup>12</sup> Arguably, such a result is a miscarriage of justice. The application of the privilege, therefore, had to change.

The President, Congress, and the Department of Defense (DoD) have become more attuned to victims' rights.<sup>13</sup> The President has noted that sexual assault threatens our national security,<sup>14</sup> and the DoD Annual Report on Sexual Assault in the Military cited the revisions to the psychotherapist-patient privilege in its way forward in fiscal year 2015 "to incorporate best practices and reforms that improve its ability to address this crime."<sup>15</sup> The military has also recognized the value of servicemembers seeking mental health treatment and endeavored to abolish stigmas associated with such treatment.<sup>16</sup> Responding to a clear

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<sup>12</sup> See *Testimony on Sexual Assaults in the Military: Hearing Before the Subcomm. on Personnel of the S. Comm. on Armed Services*, 113th Cong. 89 (2013) [hereinafter *Sexual Assault Hearing*] (statement of Major General Gary S. Patton, U.S. Army, Director, Sexual Assault Prevention and Response Office) ("[V]ictims won't come forward unless we can demonstrate we will treat them the dignity and respect everyone deserves. . . . We gain their trust by creating a climate where a victim's report is taken seriously, their privacy is protected, and they are provided the resources and attention to manage their care and treatment."); Brief of U.S. Air Force Special Victims' Counsel Division as Amicus Curiae Supporting Petitioner at 16 n.10, *DB v. Lippert*, No. 20150769, 2016 WL 381436 (A. Ct. Crim. App. Feb. 1, 2016) ("Successful prosecution of [sexual offenses] frequently depends on victim cooperation. Prosecutors may reasonably conclude that if victims know disclosure of their confidential psychotherapy records without observance of legal protections is a significant risk, they will be less willing to step forward." (citing *People v. Superior Court*, 182 P.3d 600, 612 n.13 (Cal. 2008))).

<sup>13</sup> See, e.g., 10 U.S.C. § 806b (2014) (declaring, among other things, that crime victims have "[t]he right to be treated with fairness and with respect for the dignity and privacy of the victim."); 10 U.S.C. § 1044e (2014) (establishing Special Victims' Counsel (SVC) program).

<sup>14</sup> Bryant Jordan, *Obama: Sexual Assault Threatens National Security*, MILITARY.COM (May 17, 2013), <http://www.military.com/daily-news/2013/05/17/obama-sexual-assault-threatens-national-security.html>; Tom Vanden Brook & David M. Jackson, *Obama says Sexual Assault Crisis Hurts National Security*, USA TODAY (May 16, 2013, 6:41 pm) <http://www.usatoday.com/story/news/politics/2013/05/16/obama-hagel-military-sexual-assaults/2165763/>.

<sup>15</sup> U.S. DEP'T OF DEFENSE, SEXUAL ASSAULT PREVENTION AND RESPONSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2014, at 52 [hereinafter DOD SAPR REPORT].

<sup>16</sup> JOIE D. ACOSTA, ET AL., RAND CORP., MENTAL HEALTH STIGMA IN THE MILITARY 67-75 (2014). After over a decade of recurring deployments, the military has come to value and depend on psychotherapy in a time where suicide rates of servicemembers are still a real and preventable problem. See *The Incidence of Suicides of United States Servicemembers and Initiative Within the Department of Defense to Prevent Military Suicides: Hearing Before the Subcomm. on Personnel of the Comm. on Armed Services*, 111th Cong. 8-12 (2009) (statement of General Peter Chiarelli, Vice Chief of Staff, U.S. Army).

need to prevent unnecessary re-victimization by baselessly breaching the privilege, the President updated MRE 513 to ensure victim witnesses receive their protections intended by Congress. These protections arguably amount to providing victim witnesses a level of due process. Now, MRE 513 more clearly reflects the privilege's main purposes as it pertains to alleged victims—encouraging them to report the crime and seek effective treatment for their trauma.

The primary changes implemented by the 2015 EO are the following: (1) expanding the definition of psychotherapist; (2) deleting the “constitutionally required” exception in MRE 513(d)(8); (3) enhancing procedural protections during the required motions hearing prior to the court ordering production or admission of records or communications; (4) inserting the following specific requirements that a judge must find by a preponderance of the evidence before conducting an *in camera* review of evidence:

- (A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;
- (B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;
- (C) that the information sought is not merely cumulative of other information available; and
- (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources[;]<sup>17</sup> and
- (5) requiring any production or disclosure to only include information that meets the determined exception and purpose for which they are sought.<sup>18</sup>

The President, Congress, and the DoD are moving the military toward the unqualified federal privilege articulated in *Jaffee v. Redmond*.<sup>19</sup> At the same time, because the military justice system requires more specificity and efficiency than the civilian justice system,<sup>20</sup> Congress, the President,

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<sup>17</sup> Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,820 (June 22, 2015); JSC, UPDATED MREs, *supra* note 3, MIL. R. EVID. 513(e)(3)(A)-(D).

<sup>18</sup> Exec. Order No. 13,696, 80 Fed. Reg. at 35,819-20; JSC, UPDATED MREs, *supra* note 3, MIL. R. EVID. 513(e)(4).

<sup>19</sup> See *Jaffee v. Redmond*, 518 U.S. 1 (1996).

<sup>20</sup> See 2012 MCM, *supra* note 4, MIL. R. EVID. 501 analysis, at A22-38-39.

and the DoD articulated the required exceptions for military necessity and safety to ensure all parties' rights are appropriately balanced.<sup>21</sup> After meeting the above-articulated factors by a preponderance of the evidence, the current MRE 513 exceptions allow piercing the privilege in the following circumstances:

- (1) when the patient is dead;
- (2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;
- (3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;
- (4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;
- (5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;
- (6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission; [and]
- (7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice.<sup>22</sup>

The changes to MRE 513 show that the President and Congress have determined that a patient's right to privacy in their mental health records prevails over an accused having access to all potentially relevant information in a case. By deliberately deleting the constitutional exception

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<sup>21</sup> See *id.* MIL. R. EVID. 513(d) analysis, at A22-38-39.

<sup>22</sup> JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(d)(1)-(7).

in MRE 513(d)(8) and enumerating the required analysis for courts to review and disclose records that fall under the seven remaining exceptions, the President and Congress have revealed their judgment that the exceptions reflect the full extent of the constitutional requirements. Now, the psychotherapist-patient privilege can only be pierced under limited, defined exceptions, similar to the absolute and nearly absolute clergy, spousal, and attorney-client privileges.<sup>23</sup> The rule no longer allows a fishing expedition through privileged information.

Instead of acknowledging that MRE 513 is now nearly absolute, practitioners have attempted to create their own exceptions, rather than look to the enumerated exceptions or other non-privileged sources.<sup>24</sup> In one recent case, defense counsel alleged that deleting the constitutionally required exception to MRE 513 had no impact on the application of the privilege.<sup>25</sup> The defense made no attempt to conform to the new MRE 513<sup>26</sup> and asserted the same baseless arguments to pierce the privilege that were successful under the pre-2015 MRE 513.<sup>27</sup> Practitioners have also published articles that seemingly take for granted MRE 513's revisions and the narrowing of the constitutionally required exception.<sup>28</sup> This view,

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<sup>23</sup> *Id.*; see discussion *infra* Part IV.A.

<sup>24</sup> See *infra* note 28.

<sup>25</sup> *DB v. Lippert*, No. 20150769, 2016 WL 381436, at \*6 (A. Ct. Crim. App. Feb. 1, 2015) (“The defense motion first argued that the recent amendment to Mil. R. Evid. 513(d)(8) (removing the ‘constitutionally required’ exception to the privilege) was without effect.”).

<sup>26</sup> See *id.* (“[T]he [defense] motion [for mental health records] also argued that the procedural requirements under Mil. R. Evid. 513 are invalid when the defense is seeking constitutionally required material.”).

<sup>27</sup> See *id.* (“The [defense] motion [for mental health records] did not identify, other than broad generalizations of possible impeachment evidence, what information they believed the records contained . . . . Nor did the motion identify with any specificity what constitutional issues were at play.”).

<sup>28</sup> See Major Michael Zimmerman, *Rudderless: 15 Years and Still Little Direction on the Boundaries of Military Rule of Evidence 513*, 223 MIL. L. REV. 312, 341-42 (2015) (advocating that trial judges pierce the MRE 513 privilege and conduct an *in camera* review when “the moving party can make the reasonable-likelihood showing” that “the requested intrusion is relevant and material, . . . the balancing test is satisfied, and . . . piercing the privilege is necessary”); Major Cormac M. Smith, *Applying the New Military Rule of Evidence 513: How Adopting Wisconsin’s Interpretation of the Psychotherapist Privilege Protects Victims and Improves Military Justice*, ARMY LAW., at 14-15, Nov. 2015 (recommending that if military judges determine that there is a “reasonable likelihood” that privileged mental health records contain three categories of evidence that patients must either choose to waive their privilege and allow the court to conduct an *in camera* review or have their testimony suppressed).

however, is not surprising given the military's strong resistance to treating the psychotherapist-patient privilege as a real privilege.<sup>29</sup>

By making a blanket assertion that the Constitution must prevail, arguments against interpreting MRE 513 as a nearly absolute privilege reach the wrong conclusion regarding what is actually constitutionally required. These arguments fail to account for the fact that the President has spelled out how the rule should be interpreted, which is supported by Congress and the exceptional societal interest recognized by the Supreme Court in *Jaffee*.<sup>30</sup> Courts cannot engage in a balancing test of constitutional rights because the Supreme Court, Congress, and the President have already performed that test, and the importance of the privilege has prevailed over the unlikely possibility of discovering probative information in all but a few enumerated exceptions.<sup>31</sup> By updating MRE 513, the President and Congress agreed that MRE 513 protects all interests involved, including the constitutional rights of the accused, victims' due process and privacy rights, and society's interest in protecting psychotherapist-patient communications while still discovering the truth. Military courts, therefore, have a clearly defined privilege in MRE 513 and cannot continue interpreting MRE 513 as having undefined exceptions.

To assist in understanding how to interpret and apply MRE 513, Part I of this article explains the recent updates to MRE 513. To show that the current version of MRE 513 is a nearly absolute privilege, Part II examines the purpose and history of the federal and military psychotherapist-patient privileges, the continuing trend of expanding the military psychotherapist-patient privilege, and the motivations for expanding the privilege. Through legislative history and Supreme Court and military case law, Part III discusses the constitutional interests involved in a nearly absolute psychotherapist-patient privilege and argues that the President—at the directive of Congress—appropriately balanced all interests in promulgating the current version of MRE 513. Part IV reviews other military privileges and concludes that the psychotherapist-patient privilege should be treated like other absolute and nearly absolute privileges, in particular the clergy privilege. Part V discusses how to correctly interpret and implement the *in camera* review procedure spelled out in MRE 513. Part VI concludes with a review of why the

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<sup>29</sup> See discussion *infra* Part II.B.

<sup>30</sup> See *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996).

<sup>31</sup> See *id.* at 10-11, 17-18.



psychotherapist-patient privilege must be interpreted as nearly absolute despite the potential limitation on acquiring all probative evidence.

## II. Background

Although the Supreme Court has been reluctant to recognize testimonial privileges, it has recognized that public interest in protecting certain sensitive information is more important than the need to have access to all possible information.<sup>32</sup> For example, the psychotherapist-patient privilege, the spousal privilege, the attorney-client privilege, and the communications to clergy privilege are based on the need for trust and confidence in the exclusive nature of the relationship.<sup>33</sup> The psychotherapist-patient privilege is the most recently recognized of the aforementioned privileges by the military,<sup>34</sup> but it is no less essential.

By examining the legislative history and development of the psychotherapist-patient privilege in both the federal and military justice systems, this section demonstrates how highly the President, Congress, and Supreme Court value the psychotherapist-patient privilege. The discussion below follows the federal psychotherapist-patient privilege from its early recognition by the Supreme Court, through Congress's discussions of codifying federal privileges and subsequent delegation to the Supreme Court to define privileges, to the psychotherapist-patient privilege's ultimate recognition by the Supreme Court.<sup>35</sup> This section also discusses how the military and civilian justice systems differ, the military's resistance to recognize the psychotherapist-patient privilege until after the President promulgated MRE 513, and the changes to MRE 513 since its implementation.<sup>36</sup> Finally, this section concludes with an examination of the motivations behind the changes to the psychotherapist-patient privilege, specifically the important impact of recognition of victim's rights by society, Congress, and the President.<sup>37</sup>

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<sup>32</sup> See *id.* at 9; *Trammel v. United States*, 445 U.S. 40, 50-51 (1980); *United States v. Nixon*, 418 U.S. 683, 710 (1974).

<sup>33</sup> See *Jaffee*, 518 U.S. at 10. *But see* 2012 MCM, *supra* note 4, MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45 ("In keeping with American military law since its inception, there is still no physician-patient privilege for members of the Armed Forces.").

<sup>34</sup> President Carter promulgated the military rules of evidence in 1980 and recognized the spousal privilege, the attorney-client privilege, and the communications to clergy privilege. Exec. Order. No. 12,198, 45 Fed. Reg. 16,932 (1980).

<sup>35</sup> See *infra* Part II.A.

<sup>36</sup> See *infra* Part II.B.

<sup>37</sup> See *infra* Part II.C.

### A. Federal Psychotherapist-Patient Privilege

The federal psychotherapist-patient privilege began as a compromise between the Supreme Court and Congress and evolved into the nearly absolute privilege recognized today. The Supreme Court has long recognized nine non-constitutional privileges: required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer.<sup>38</sup> In 1972, all the aforementioned privileges were submitted by the Supreme Court to Congress for inclusion in the Federal Rules of Evidence (FRE).<sup>39</sup> In its submission, the Supreme Court included only three exceptions to the psychotherapist-patient privilege<sup>40</sup> and noted that many state-created psychotherapist-patient privileges contained so many exceptions that they left “little if any basis for the privilege.”<sup>41</sup> The House could not agree on how to best articulate the privilege rules and therefore eliminated all of the Court’s specific rules in favor of one general rule.<sup>42</sup> Congress thus charged the courts to define privileges “on a case-by-cases basis” through “the application of the principles of the common law as interpreted by the courts of the United States in the light of reason and experience.”<sup>43</sup>

#### 1. *Supreme Court Recognition of Psychotherapist-Patient Privilege*

In 1996, the Supreme Court responded to its Congressionally-mandated mission and recognized the federal psychotherapist-patient

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<sup>38</sup> See FED. R. EVID. 501 advisory committee’s note to 1974 enactment; see also Stacy E. Flippin, *Military Rule of Evidence (MRE) 513: A Shield to Protect Communications of Victims and Witnesses to Psychotherapists*, ARMY LAWYER, Sept. 2003, at 2-6 (discussing in detail the development of the federal and military psychotherapist-patient privilege).

<sup>39</sup> See FED. R. EVID. 501 advisory committee’s note to 1974 enactment.

<sup>40</sup> Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 241 (1972) (including exceptions to the federal psychotherapist-patient privilege for proceedings for hospitalizations for mental illness, examinations ordered by a judge, and mental and emotional conditions that are elements of the claim or defense).

<sup>41</sup> *Id.* at 241-42 advisory committee’s note to Rule 504; see app. A (containing proposed FRE 504).

<sup>42</sup> S. REP. NO. 93-1277 (1974), as reprinted in 1974 U.S.C.C.A.N. 7051, 7053 (noting that “it was clear that no agreement was likely to be possible as to the content of specific privilege rules”); see also FED. R. EVID. 501 advisory committee’s note to 1974 enactment (“Many of these rules contained controversial modifications or restrictions upon common law privileges.”).

<sup>43</sup> FED. R. EVID. 501 advisory committee’s note to 1974 enactment.

privilege for the first time in *Jaffee v. Redmond*.<sup>44</sup> In *Jaffee*, the administrator of the estate of a man whom a police officer shot and killed sued the officer and the town alleging excessive force.<sup>45</sup> At trial, the testimony of witnesses conflicted with the police officer's version of events.<sup>46</sup> During discovery, the estate sought the statements the officer made to a licensed social worker in the course of psychotherapy, as well as the notes taken during their sessions.<sup>47</sup> The Court determined that the statements and records were protected from compelled disclosure, observing the "mental health of our citizenry . . . is a public good of transcendent importance."<sup>48</sup>

In so deciding, the Court noted the privilege is similar to the attorney-client and marital privileges in that it is "rooted in the imperative need for confidence and trust."<sup>49</sup> The Court determined that the privilege is vital because it facilitates treatment for individuals with mental or emotional problems.<sup>50</sup> If rejected, confidential communications between psychotherapists and patients "would surely be chilled," especially when future litigation is contemplated.<sup>51</sup> On the other hand, the Court noted that "the likely evidentiary benefit that would result from the denial of the privilege is modest."<sup>52</sup> Furthermore, the Court noted that if the psychotherapist-patient privilege did not exist, individuals would not speak to their therapists when litigation could follow, and then the evidence would never be created.<sup>53</sup>

## 2. Supreme Court Scope of Psychotherapist-Patient Privilege

The psychotherapist-patient privilege equally applies in criminal and civil cases. In *Swidler & Berlin v. United States*, the Supreme Court noted that "there is no case authority for the proposition that the [attorney-client] privilege applies differently in criminal and civil cases."<sup>54</sup> Additionally,

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<sup>44</sup> See *Jaffee v. Redmond*, 518 U.S. 1 (1996).

<sup>45</sup> *Id.* at 4.

<sup>46</sup> *Id.* at 5.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 15-18.

<sup>49</sup> *Id.* at 10.

<sup>50</sup> *Id.* at 11.

<sup>51</sup> *Id.* at 11-12.

<sup>52</sup> *Id.* at 11.

<sup>53</sup> *Id.* at 12 ("This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged.")

<sup>54</sup> *Swidler & Berlin v. United States*, 524 U.S. 399, 408-09 (1998).

the *Jaffee* Court seemed to acknowledge the psychotherapist-patient privilege's application to criminal cases.<sup>55</sup> The Court cited the criminal case of *Trammel v. United States* in finding that "both reason and experience" indicated that "a privilege protecting confidential communications between a psychotherapist and her patient 'promotes sufficiently important interests to outweigh the need for probative evidence.'" <sup>56</sup> The *Jaffee* Court again cited *Trammel* and noted, "Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" <sup>57</sup>

Justice Scalia's dissent in *Jaffee* also acknowledged the privilege's application to criminal cases.<sup>58</sup> Scalia expressed his disapproval of the majority's determination by contrasting excluding evidence under the privilege with excluding evidence under *Miranda v. Arizona*.<sup>59</sup> He lamented that when excluding "reliable and probative evidence" under *Miranda*, "the victim of the injustice is always the impersonal State or the faceless 'public at large.' For the rule proposed here, the victim is more likely to be some individual who is prevented from proving a valid claim—or (worse still) prevented from establishing a valid defense."<sup>60</sup> Although *Jaffee* is a civil case, it illustrates the proper application of the psychotherapist-patient privilege in criminal cases.

## B. Military Psychotherapist-Patient Privilege

The military justice system functions somewhat differently than civilian justice systems, to include the authority and application of privilege.<sup>61</sup> The Constitution gives Congress the authority to enact laws

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<sup>55</sup> See *Jaffee*, 518 U.S. at 9-10.

<sup>56</sup> *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

<sup>57</sup> *Id.* at 9 (quoting *Trammel*, 445 U.S. at 50).

<sup>58</sup> See *id.* at 19 (Scalia, J., dissenting).

<sup>59</sup> *Id.* (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

<sup>60</sup> *Id.* at 19-20. Scalia's dissent reveals his interpretation that the majority intended the psychotherapist-patient privilege be nearly absolute. *Id.*

<sup>61</sup> See *United States v. McElhaney*, 54 M.J. 120, 124 (C.A.A.F. 2000) ("Although there are many similarities between civilian criminal proceedings and our own, and although we frequently look to civilian statutes for guidance, the military and civilian justice systems are separate as a matter of law."); see also 1 DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 3-16 (9th ed.) (Matthew Bender & Co., Inc. 2015) (2003) (explaining the military criminal justice system).

regulating “land and naval [f]orces.”<sup>62</sup> Via Article 36(a) of the UCMJ, Congress delegated authority to the President to issue rules governing military “[p]retrial, trial, and post-trial procedures,” which include MREs.<sup>63</sup> The Supreme Court has upheld the constitutionality of this delegation.<sup>64</sup> The MREs, therefore, have been issued through executive orders. However, at least recently, Congress has instructed the President and the Secretary of Defense through legislation to make changes to the MREs, and the President has complied through executive order.<sup>65</sup> The MREs, therefore, have strong statutory authority.<sup>66</sup>

Unlike Congress’s general adoption of privilege in the FREs via Rule 501, the MREs are very specific. According to the Joint Services Committee (JSC), a general rule would be “impracticable within the armed forces. . . . [T]he military criminal legal system is characterized by its dependence upon large numbers of laymen, temporary courts, and inherent geoliental and personnel instability due to the worldwide deployment of military personnel. Consequently, military law requires far more stability than civilian law.”<sup>67</sup> The President and Congress, therefore, deliberately preempted the military from having to determine privilege application on a case-by-case basis.<sup>68</sup>

Despite this requirement for specificity, the military “recognizes privileges ‘generally recognized in the trial of criminal cases in the United

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<sup>62</sup> U.S. CONST. art. 1, § 8, cl. 14.

<sup>63</sup> See 10 U.S.C. § 836(a) (2006) (“Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . .”).

<sup>64</sup> *Loving v. United States*, 517 U.S. 748, 772 (1996) (“The President’s duties as Commander in Chief, however, require him to take responsible and continuing action to superintend military, including the courts-martial. The delegated duty, then, is interlinked with duties already assigned to the President by express terms of the Constitution . . .”).

<sup>65</sup> See, e.g., Carl Levin & Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

<sup>66</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said . . . to personify the federal sovereignty.”).

<sup>67</sup> 2012 MCM, *supra* note 4, MIL. R. EVID. 501 analysis, at A22-38.

<sup>68</sup> See *id.*

States district courts pursuant to Rule 501 of the Federal Rules of Evidence.”<sup>69</sup> However, a caveat exists to the military’s ability to recognize common law privilege: “the application of such principles in trials by court-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this Manual.”<sup>70</sup> Military courts have consistently eschewed federal court precedent and used this caveat to resist recognizing any new privileges or to interpret privileges differently than a literal reading of the MRE.<sup>71</sup>

### *1. Military Recognition of Psychotherapist-Patient Privilege*

Consequently, after *Jaffee*, the military continued to reject the psychotherapist-patient privilege citing MRE 501(d), where President Carter specifically barred a doctor-patient privilege.<sup>72</sup> The Court determined that the definition of “physician” necessarily included psychiatrists and psychotherapists; therefore, the President had precluded the psychotherapist-patient privilege.<sup>73</sup> This view prevailed until 1999, when President Clinton exercised his delegated authority by establishing and implementing MRE 513.<sup>74</sup>

Soon after President Clinton promulgated MRE 513, the U.S. Court of Appeals for the Armed Forces (CAAF) discussed *Jaffee* and the newly adopted MRE 513 in *United States v. Rodriguez*.<sup>75</sup> The CAAF interpreted *Jaffee* as articulating an absolute federal psychotherapist-patient privilege and acknowledged that the Supreme Court rejected the balancing test

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<sup>69</sup> *Id.* MIL. R. EVID. 501 analysis, at A22-38-39 (citation omitted).

<sup>70</sup> *Id.* MIL. R. EVID. 501 analysis, at A22-39 (citation omitted).

<sup>71</sup> *See, e.g.,* *United States v. Rodriguez*, 54 M.J. 156, 160 (C.A.A.F. 2000) (refusing to recognize psychotherapist-patient privilege); *United States v. Custis*, 65 M.J. 366, 368 (C.A.A.F. 2007) (refusing to recognize a crime-fraud exception to the spousal privilege); *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003) (refusing to broaden spousal privilege exception to include the definition of child to include a “de facto child” or “a child who is under the care or custody of one of the spouses”).

<sup>72</sup> Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980) (“Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.”).

<sup>73</sup> *See* *United States v. Rodriguez*, 54 M.J. 156, 160 (C.A.A.F. 2000) (citations omitted) (“A psychotherapist-patient privilege would be contrary to and inconsistent with Mil.R.Evid. 501(d).”).

<sup>74</sup> *See* Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,120 (Oct. 12, 1999) (“Military Rule of Evidence 513 shall only apply to communications made after 1 November 1999.”).

<sup>75</sup> *See Rodriguez*, 54 M.J. at 156.

applied by the lower court.<sup>76</sup> The CAAF also noted that when promulgating MRE 513, the President did not rely on MRE 501(a)(4) to incorporate district court common law or “literally incorporate *Jaffee*.”<sup>77</sup> Instead, MRE 513 took “a more limited approach,” and the President set forth “in detail” the military privilege and its various exceptions.<sup>78</sup> Notably, MRE 513 included the possible exception cited in *Jaffee* among its eight enumerated exceptions.<sup>79</sup>

Practitioners used the last of the enumerated exceptions, “when admission or disclosure of a communication is constitutionally required,”<sup>80</sup> to eviscerate the privilege.<sup>81</sup> Military courts gutted the privilege despite the JSC’s observation that MRE 513 is necessary “based on the social benefit of confidential counseling recognized by *Jaffee*, and similar to the clergy-penitent privilege.”<sup>82</sup> The JSC further noted that the exceptions to the privilege ensure “commanders . . . have access to all information that is necessary for the safety and security of military personnel, operations, installations, and equipment.”<sup>83</sup> The analysis of MRE 513 does not highlight a concern for the constitutional rights of the accused.<sup>84</sup> Instead, the JSC indicates that the primary concern of the rule

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<sup>76</sup> See *id.* at 159. The Court of Appeals for the Armed Forces (CAAF) also cites the possible exception noted in *Jaffee*. See *id.* (citing *Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996)).

<sup>77</sup> *Rodriguez*, 54 M.J. at 160; see also 2012 MCM, *supra* note 4, MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45 (“Rule 513 was based in part on proposed Fed. R. Evid. 504 (not adopted) and state rules of evidence.”).

<sup>78</sup> *Rodriguez*, 54 M.J. at 160.

<sup>79</sup> Compare Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,117 (Oct. 12, 1999) (listing the 1999 MRE 513 exceptions, including (d)(4) and (d)(6)) with *Jaffee*, 518 U.S. at 18 n.19 (“[W]e do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.”). The exceptions are also included in the current version of MRE 513. See JSC, UPDATED MREs, *supra* note 3, MIL. R. EVID. 513 (d)(4) and (d)(6).

<sup>80</sup> Exec. Order No. 13,140, 64 Fed. Reg. at 55,117.

<sup>81</sup> See *supra* notes 7-9 and accompanying text.

<sup>82</sup> 2012 MCM, *supra* note 4, MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45.

<sup>83</sup> *Id.* (“The exceptions to the rule have been developed to address the specialized society of the military and separate concerns that must be met to ensure military readiness and national security.”). Health and welfare reasons allow commanders to view Soldiers’ psychotherapist information separate and apart from the courts-martial process. *Id.* (“There is no intent to apply Rule 513 in any proceeding other than those authorized under the [Uniform Code of Military Justice (UCMJ)].”).

<sup>84</sup> Compare 2012 MCM, *supra* note 4, MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45 with 2012 MCM, *supra* note 4, MIL. R. EVID. 507(c) analysis, at A22-44.

is treatment, and the reason for the limitations on the privilege is military readiness.<sup>85</sup>

## 2. *Development of Military Psychotherapist-Patient Privilege*

Reinforcing the importance of protecting mental health consultations from disclosure at courts-martial, Presidents have continuously expanded patient protections under the military psychotherapist-patient privilege. President Obama narrowed the exceptions of the 1999 MRE 513 in 2012 by removing the spousal abuse exception to the privilege.<sup>86</sup> In 2013, the JSC altered the language in MRE 513(e)(3) from “military judge[s] shall”<sup>87</sup> to “military judge[s] may examine the evidence or a proffer thereof *in camera*.”<sup>88</sup> The purpose of the change was to give judges more discretion, but the change did not have any apparent impact on the application of the vague *in camera* procedure.<sup>89</sup> Fortunately, the 2015 NDAA and EO 13696 defined the *in camera* prerequisites and procedure and significantly expanded the overall scope of the privilege.<sup>90</sup> Importantly, in addition to removing the constitutionally required exception, the 2015 MRE 513 requires specific findings by a preponderance of evidence to overcome the privilege.<sup>91</sup> These changes reveal executive and legislative intent to protect victim-witness rights and treat information protected by MRE 513 as truly privileged.

Congress further recognized victims’ rights by amending Article 6(b) of the UCMJ in the 2015 NDAA.<sup>92</sup> The provision enumerated that a crime victim may petition the Court of Criminal Appeals for a writ of mandamus

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<sup>85</sup> See 2012 MCM, *supra* note 4, MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45.

<sup>86</sup> “Executive Order 13593 removed communications about spouse abuse as an exception to the privilege by deleting the words ‘spouse abuse’ and ‘the person of the other spouse or’ from Rule 513(d)(2) . . . .” *Id.* MIL. R. EVID. 513 analysis to 2012 amendment, at A22-45-46.

<sup>87</sup> *Id.* MIL. R. EVID. 513(e)(3) (emphasis added).

<sup>88</sup> MCM, *supra* note 4, MIL. R. EVID. 513(e)(3) (emphasis added).

<sup>89</sup> See *id.* MIL. R. EVID. 513 analysis to 2013 amendment, at A22-51 (“[T]he committee changed the language to further expand the military judge’s authority and discretion to conduct *in camera* reviews.”).

<sup>90</sup> Carl Levin & Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014) [hereinafter 2015 NDAA]; Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,819-20 (June 22, 2015).

<sup>91</sup> 2015 NDAA § 537.

<sup>92</sup> 2015 NDAA § 535. The section is entitled “Enforcement of Crime Victims’ Rights Related to Protections Afforded by Certain Military Rules.” *Id.*



to require the court-martial to comply with MRE 412 and 513 if the victim “believes that a court-martial ruling violates the victim’s rights” under those rules.<sup>93</sup> Congress, through these changes, is emphasizing a crime victims’ due process rights.

### C. Impetus for Change

The Manual for Courts-Martial (MCM) revisions reflect internal and external pressure in the military justice system to recognize victims’ rights. Internally, *LRM v. Kastenberg*<sup>94</sup> revealed why MRE 513 needed to evolve through the perceived inability by the trial court and the Air Force Court of Criminal Appeals (AFCCA) to provide victims sufficient rights.<sup>95</sup> Externally, the media and Congress subjected the military justice system to intense scrutiny and criticism.<sup>96</sup> In addition to highlighting the significance of crime victims’ rights, arguably the MCM revisions also were a response to the reluctance of military judges to recognize the psychotherapist-patient privilege as a real privilege. All these issues motivated changing MRE 513.

#### 1. *LRM v. Kastenberg*

The JSC cited *Kastenberg* as an impetus for changing MRE 513.<sup>97</sup> In *Kastenberg*, an Article 120, UCMJ case, Airman First Class (A1C) LRM’s special victims’ counsel (SVC) filed a formal notice of appearance advising the court that he would be “asserting A1C LRM’s enumerated rights as a victim of crime under federal law and Mil. R. Evid. 412, 513, and 514.”<sup>98</sup> To enable adequate representation of his client, the SVC requested the trial judge “direct the parties to provide him with copies of

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<sup>93</sup> *Id.* For an example, see *DB v. Lippert*, No. 20150769, 2016 WL 381436, at \*6 (A. Ct. Crim. App. Feb. 1, 2015).

<sup>94</sup> *LRM v. Kastenberg*, No. 2013-05, 2013 WL 1874790 (A.F. Ct. Crim. App. Apr. 2, 2013), *rev’d*, 72 M.J. 364 (C.A.A.F. 2013).

<sup>95</sup> *See id.* at \*1 (A.F. Ct. Crim. App. Apr. 2, 2013).

<sup>96</sup> *See infra* note 110.

<sup>97</sup> *See* Manual for Courts-Martial; Publication of Supplementary Materials, 80 FED. REG. 39,077, 39,088 (2015) (amending the MCM 2015 analysis of MRE 513(e)(2) to include reference to *Kastenberg* and the 2015 NDAA).

<sup>98</sup> *Kastenberg*, 2013 WL 1874790, at \*1. MRE 412 precludes admission of irrelevant evidence of past sexual behavior of alleged victims in sexual offense case. JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 412. MRE 514 creates a victim advocate-victim privilege. JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 514.

motions filed under those Military Rules of Evidence.”<sup>99</sup> The SVC argued LRM was entitled to the motions “so she can understand the arguments being made regarding her privacy interests and thereby receive a ‘meaningful opportunity’ to respond and be heard.”<sup>100</sup> The SVC also requested authorization to argue issues arising under MREs 412, 513, and 514 at the motions hearings, should it be necessary.<sup>101</sup> The military judge denied the SVC’s requests, finding the alleged victim had no standing.<sup>102</sup> The appellate SVC for LRM filed a Petition for a Writ of Mandamus and Petition for Stay of Proceedings at the AFCCA.<sup>103</sup> The AFCCA determined that it did not have jurisdiction to rule on a sexual assault victim’s complaint about a military judge’s ruling in an ongoing court-martial proceeding.<sup>104</sup>

The Air Force Judge Advocate General certified three issues for review by the CAAF.<sup>105</sup> The CAAF determined that the lower court erred by denying the victim the opportunity to be heard through counsel, thereby denying her due process under the MREs, the Crime Victims’ Rights Act, and the Constitution.<sup>106</sup> The CAAF also determined that the appellate court erred by determining it lacked jurisdiction to hear the victim’s Petition for a Writ of Mandamus.<sup>107</sup> The CAAF further found that LRM had standing<sup>108</sup> and remanded the case to the trial judge “for action not inconsistent with [the CAAF’s] opinion.”<sup>109</sup> The MCM’s revisions, therefore, also reflect the CAAF’s increased understanding of sexual assault victims and the emphasis on protecting victims’ rights in criminal prosecutions.

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<sup>99</sup> *Kastenberg*, 2013 WL 1874790, at \*1 (“When a military judge is detailed to a case, SVC will enter an appearance, notifying the judge of their representation of a witness in the case and requesting that the judge direct that the SVC be provided with information copies of motions filed where the victim has an interest (e.g., Mil. R. Evid. 412, 513, and 514 motions).” (quoting SVC Rule 4.5)).

<sup>100</sup> *Id.* at \*2 (citation omitted).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at \*3. Specifically, the trial judge found that “LRM had no standing (1) to move the court, through her SVC or otherwise, for copies of any documents related to Mil. R. Evid. 412 and 513; (2) to be heard ‘through counsel of her choosing’ in any hearing before the court-martial; or (3) to seek any exclusionary remedy.” *Id.* (citation omitted).

<sup>103</sup> *Id.* The SVC named the trial judge, Lieutenant Colonel Kastenberg, as the respondent. *Id.*

<sup>104</sup> *Id.* at \*4-7.

<sup>105</sup> See *LRM v. Kastenberg*, 72 M.J. 364, 366 (C.A.A.F. 2013).

<sup>106</sup> *Id.* at 369-71.

<sup>107</sup> *Id.* at 367-68.

<sup>108</sup> *Id.* at 368-69.

<sup>109</sup> *Id.* at 372.

## 2. Victims' Rights

The changes to MRE 513 likely reflect a response to Congressional pressure to recognize victims' rights, as well as increased scrutiny from the media. The DoD, in particular, has been vocally criticized in the media and by Congress for its alleged mistreatment of sexual assault victims by the military.<sup>110</sup> In an attempt to encourage victims to come forward with rape or abuse allegations, the President and Congress made victims' rights a priority.<sup>111</sup> According to Department of Justice and DoD statistics, sexual assault is an extremely underreported crime.<sup>112</sup> Victim-focused legislation highlighted and reinforced the need to redefine the narrative for victims wanting to pursue justice and prevent future crime.

The President, Congress, and the DoD made numerous changes to the MCM, creating and enhancing programs to better assist victims through the entire legal and treatment process.<sup>113</sup> The changes attempt to minimize

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<sup>110</sup> See, e.g., *Sexual Assault Hearing*, *supra* note 12, at 2-4 (statement of Sen. Kirsten E. Gillibrand, Chairman, Subcomm. on Personnel); Leo Shane III, *Military Sexual Assault Reform Plan Fails Again*, MILITARY TIMES (June 18, 2015), <http://www.militarytimes.com/story/military/crime/2015/06/16/ndaa-gillibrand-sex-assault/28814451/>; Jacqueline Klimas, *Gillibrand Again Pushes for Reforming Military Justice System*, WASH. TIMES (Dec. 2, 2014), <http://www.washingtontimes.com/news/2014/dec/2/kirsten-gillibrand-again-pushes-reforming-military/>.

<sup>111</sup> See, e.g., Crime Victim's Rights Act, 18 U.S.C. § 3771 (2004); *Sexual Assault Hearing*, *supra* note 12.

<sup>112</sup> MICHAEL PLANTY ET. AL, U.S. DEP'T OF JUSTICE, NCJ 240655, SPECIAL REPORT: FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010 6-7 (Mar. 2013), [www.bjs.gov/content/pub/pdf/fvsv9410.pdf](http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf) (finding from 2005-2010, sixty-four percent of rapes and sexual assaults victimizing females were not reported to the police); LYNN LANGTON ET. AL, U.S. DEP'T OF JUSTICE, NCJ 238536, SPECIAL REPORT: VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010 4 (Aug. 2012), [www.bjs.gov/content/pub/pdf/vnvp0610.pdf](http://www.bjs.gov/content/pub/pdf/vnvp0610.pdf) (finding from 2006-2010, sixty-five percent of rapes and sexual assaults were not reported to the police); DOD SAPR REPORT, *supra* note 15, at 6 n.8 (noting that sexual assault is an underreported crime). RAND estimated that approximately seventy-six percent of servicemembers did not report unwanted sexual contact in fiscal year 2014. DOD SAPR REPORT, *supra* note 15, app. A, at 12 (containing provisional statistical data on sexual assault).

<sup>113</sup> See, e.g., Carl Levin & Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 543, 128 Stat. 3292, 3373 (2014) (requiring the Secretary of Defense (SECDEF) to submit a plan for limited use of certain information on sexual assaults in restricted reports by military criminal investigate organizations); *id.* § 533 (requiring SVCs for victims of sex-related offenses); *id.* § 534 (requiring SECDEF to establish a process to ensure victims of certain sexual offenses are consulted concerning jurisdiction of the victim's case and that they have notice of any proceeding so they can participate); *id.* § 535 (expanding crime victims' rights under 10

the re-victimization of witnesses in sexual assault and domestic abuses cases as they endure the military justice process.<sup>114</sup> The military's goal is to eliminate sexual assault; to assist in achieving that goal, victims must have enough trust in the system to come forward.<sup>115</sup> By most standards, with the addition of special victim prosecutors and special victim counsel, the military is moving in the right direction. From fiscal year 2012 to fiscal year 2014, the estimated number of sexual assaults in the military decreased and the number of reports increased.<sup>116</sup> As protections for victims have increased, so have the number of sexual abuse prosecutions in the military.<sup>117</sup>

The victim-based impetus for change to MRE 513 is apparent not only through the 2015 NDAA, the subsequent EO, and *Kastenber*, but also through statements of DoD officials.<sup>118</sup> Military justice practitioners, therefore, must include victims' rights in the calculus when trying to correctly apply MRE 513. To assist in understanding the psychotherapist-

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U.S.C. § 806b); *id.* § 537 (expanding privilege under MRE 513); *id.* § 538 (modifying DOD policy on retention of evidence in a sexual assault case to permit return of personal property upon completion of related proceedings); *id.* § 541 (adding the role of a Chief Prosecutor in each of the Services to review Convening Authority's non-referral decision in certain sexual assault cases); *see also Sexual Assault Hearing, supra* note 12 (discussing the numerous changes to the military justice system since 2005).

<sup>114</sup> *See Sexual Assault Hearing, supra* note 12, at 61 (statement of Lieutenant General (LTG) Dana K. Chipman, The Judge Advocate General (TJAG), U.S. Army); *see also* 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, 150 (2005) ("[T]he criminal process, rather than the offender, often inflicts a large portion of the trauma the victim experiences."); Tera Jckowski Peterson, *Distrust and Discovery: The Impending Debacle in Discovery of Rape Victims' Counseling Records in Utah*, 2001 UTAH L. REV. 695 (2001) (discussing the re-victimization of rape victims during criminal prosecutions and the evolution of victims' rights).

<sup>115</sup> *See Sexual Assault Hearing, supra* note 12, at 52 (statement of LTG Dana K. Chipman, TJAG, U.S. Army); DOD SAPR REPORT, *supra* note 15, at 41.

<sup>116</sup> DOD SAPR REPORT, *supra* note 15, at 41 ("While the estimated prevalence of [sexual assault] is down from FY 2012 to FY 2014, the overall reporting of sexual assault in the same period increased substantially.").

<sup>117</sup> *Sexual Assault Hearing, supra* note 12, at 60 (statement of LTG Dana K. Chipman, TJAG, U.S. Army) ("Since the inception of the SVP program in 2009, the number of courts-martial for sexual assault and domestic violence has steadily increased.").

<sup>118</sup> *See, e.g., Judicial Proceedings Panel on Military Sexual Assault*, Department Of Defense Transcript of Public Meeting (Oct. 10, 2014) (testimony of Mr. William Barto, Army Highly Qualified Expert, Attorney Advisor, and Colonel John Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division, Military Justice & Community Development), [http://jpp.whs.mil/public/docs/05-Transcripts/20141010\\_Transcript\\_Final.pdf](http://jpp.whs.mil/public/docs/05-Transcripts/20141010_Transcript_Final.pdf); *Sexual Assault Hearing, supra* note 12, at 61-65 (statement of Hon. Robert S. Taylor, Acting General Counsel of the Department of Defense).

patient privilege, this article will next discuss relevant military and civilian case law to explain why MRE 513 should be interpreted as a nearly absolute privilege and the significance of such an interpretation.

### III. How the Constitutional Exception Applies to Privilege

Current case law does not provide definitive guidance on piercing a privilege on constitutional grounds, including government searches that involve privileged evidence when a party merely alleges its existence. In general, an accused must have access to evidence that is “relevant, material, and favorable to the defense.”<sup>119</sup> There is, however, “no general right to discovery . . . in a criminal case.”<sup>120</sup> Privilege is an exception asserted to prevent inspecting and disclosing evidence that might otherwise be discoverable.<sup>121</sup> To implicate a constitutional right, an accused must show that by failing to produce certain evidence, the government denied the accused the opportunity to present his or her case.<sup>122</sup>

Although the Supreme Court and military courts have held that the Constitution will prevail over contrary legislation,<sup>123</sup> dismissively asserting that the Constitution *always* prevails over evidentiary rules is meaningless without a deeper exploration of the limits of all constitutional safeguards when compared to privileges. Both civilian and military courts recognize that privileges are constitutional, even when the privilege obscures relevant information.<sup>124</sup> To allay the concerns of individuals like Justice Scalia, who believe that a nearly absolute psychotherapist-patient privilege will lead to “occasional injustice,”<sup>125</sup> the following section argues that MRE 513 is constitutional when interpreted as written.

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<sup>119</sup> *United States v. Williams*, 37 M.J. 352, 359 (C.A.A.F. 1993); *see also* *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (“[T]he Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984))).

<sup>120</sup> *United States v. Lucas*, 5 M.J. 167, 170 (C.M.A. 1978) (citing *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)).

<sup>121</sup> *See Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996).

<sup>122</sup> *See Lucas*, 5 M.J. at 170.

<sup>123</sup> *See United States v. Gaddis*, 70 M.J. 248, 253 (C.A.A.F. 2011) (“Congress may not legislatively supersede our decisions interpreting and applying the Constitution.” (citing *Dickerson v. United States*, 530 U.S. 428, 437 (2000))).

<sup>124</sup> *See Jaffee*, 518 U.S. at 9-10; *Trammel v. United States*, 445 U.S. 40, 50-51 (1980); *United States v. Nixon*, 418 U.S. 683, 709-710 (1974).

<sup>125</sup> *Jaffee*, 518 U.S. at 18 (Scalia, J. dissenting).

Part III.A discusses limitations that the executive and legislative branches have placed on an accused's ability to discover and use evidence in both civilian and military court systems. It also explores the judiciary's reasoning for upholding those restrictions and argues that the psychotherapist-patient privilege is a justifiable restriction on discovery and use of potentially relevant information. Part III.B addresses how the Supreme Court (like the President) has balanced accused, victim, and societal interests and recognized the importance of the psychotherapist-patient privilege as an exception to the discovery and production of relevant evidence. To determine when privilege can prevail over Fifth and Sixth Amendment challenges, Part III.C examines Supreme Court decisions involving privilege and discusses the difference between a qualified and absolute privilege. Based on the drafter's intent, the specificity of the privilege, and the societal import in protecting the privileged information, the section concludes that the psychotherapist-patient privilege is nearly absolute and, as written, can prevail over due process, confrontation, and compulsory process arguments. Part III.D emphasizes that privilege rules are distinct from military discovery rules. To conclude, Section III.E discusses the President's authority and his national security and military readiness objectives in the military justice system. Since the President deliberately changed MRE 513, revealing his intent that it be nearly absolute, the Supreme Court and the CAAF should defer to him (particularly in light of Congressional support).

#### A. Evidentiary Rules Do Not Necessarily Yield to Defendant's Alleged Rights

Importantly, the Supreme Court has acknowledged that limitations may be placed on potential constitutional rights.<sup>126</sup> Other legitimate interests may prevail over information the accused can discover<sup>127</sup> and use<sup>128</sup> at trial. The Supreme Court has accepted the loss of potential

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<sup>126</sup> See cases cited *infra* notes 127-28.

<sup>127</sup> See *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) ("A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [government's] files."); *cf. Nixon*, 418 U.S. at 701 ("Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial.");

<sup>128</sup> See, e.g., *United States v. Scheffer*, 523 U.S. 303, 308 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions."); *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) ("Of course, the right to present relevant testimony is not without limitation."); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) ("Of course, the right to confront and to cross-examine is not absolute and may, in

evidence in numerous ways, including: “the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place.”<sup>129</sup> The Court has also determined that particular types of information are not useful.<sup>130</sup> Although the *Jaffee* Court relied on the need for complete privacy and trust as justification for the psychotherapist-patient privilege,<sup>131</sup> the Court could have determined that any information produced in psychotherapy sessions was not the type of information that makes for reliable testimony.<sup>132</sup>

In *United States v. Scheffer*, for example, the accused wanted to admit the opinion of the polygraph examiner that there was no deception indicated when the accused denied committing the charged offense.<sup>133</sup> Military Rule of Evidence 707 (a per se rule against the admission of polygraph evidence in court-martial proceedings) prevented the accused from admitting the evidence, as the President determined the evidence was unreliable.<sup>134</sup> The Court found that the exculpatory polygraph merely would have been used to bolster testimony of the accused.<sup>135</sup> Therefore, MRE 707 did not “implicate any significant interest of the accused.”<sup>136</sup> In determining the constitutionality of a complete ban on polygraph evidence, the Court found:

The approach taken by the President in adopting Rule 707 . . . is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence. . . .

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appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.”).

<sup>129</sup> *Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1998); *see also Jaffee*, 518 U.S. at 12 (“Without a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being.”).

<sup>130</sup> *Scheffer*, 523 U.S. at 309 (“Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules.”).

<sup>131</sup> *See Jaffee*, 518 U.S. at 10.

<sup>132</sup> This is particularly true given the nature of psychotherapy where the victim and therapist are likely exploring “doubts, insecurity, and self blame” as part of treatment, not because the victim was actually lying. Schimpf, *supra* note 114, at 186 (citing Anna Y. Joo, *Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor*, 32 HARV. J. ON LEGIS. 255, 264 (1995)).

<sup>133</sup> *Scheffer*, 523 U.S. at 306.

<sup>134</sup> *See id.* at 306-307.

<sup>135</sup> *Id.* at 317.

<sup>136</sup> *Id.* at 316-17. *But see* *Chambers v. Mississippi*, 410 U.S. 284 (1973) (finding a due process violation where a state’s rules of evidence arbitrarily limited cross-examination, impeachment, and excluded relevant exculpatory evidence).

Individual jurisdictions . . . may reasonably reach differing conclusions as to whether polygraph evidence should be admitted. We cannot say, then, that presented with such widespread uncertainty, the President acted arbitrarily or disproportionately in promulgating a per se rule excluding all polygraph evidence.<sup>137</sup>

The Supreme Court thus determined that MRE 707 did not violate the Fifth or Sixth Amendment rights of the accused.<sup>138</sup>

Similarly, the nearly absolute privilege contained in MRE 513 does not violate the Fifth or Sixth Amendment rights of the accused. First, the accused's interests in MRE 513 evidence are unlikely to be particularly weighty.<sup>139</sup> An accused can pursue evidence using the procedure enumerated in the rule; however, if the accused has a valid basis for the request, the information likely exists in an unprivileged format, so breaching the privilege would not be necessary. Second, the purpose of the mental health information is therapy, so any privileged information will likely have little to no relevance in a criminal proceeding. This advances the legitimate interest, enumerated in *Scheffer*, of barring unreliable evidence.<sup>140</sup>

Third, like the prohibition against polygraph evidence in *Scheffer*, the clearly enumerated exceptions in MRE 513 prevent military courts from reaching inconsistent conclusions that can occur when individual courts are left to create their own exceptions.<sup>141</sup> Also, the clarity of MRE 513 avoids delays and mini-trials that result from: (1) determining whether the government must attempt to obtain the privileged information; (2) actually trying to obtain the information; (3) litigating whether the judge should conduct an *in camera* review; (4) litigating whether information should be disclosed to defense; (5) litigating whether the information can be used at trial; and (6) waiting for any writs that may be filed based on the court's

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<sup>137</sup> *Scheffer*, 523 U.S. at 312; see also *United States v. Rodriguez*, 54 M.J. 156, 158 (C.A.A.F. 2000) ("The President may promulgate rules of evidence for the military, which 'do not abridge an accused's right to present a defense . . . [W]e have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused.'" (quoting *Scheffer*, 523 U.S. at 308)).

<sup>138</sup> *Scheffer*, 523 U.S. at 317.

<sup>139</sup> See *id.* at 316-17.

<sup>140</sup> See *id.* at 312.

<sup>141</sup> See, e.g., cases cited *supra* notes 8-9; *infra* note 155.



determinations during the process.<sup>142</sup> The privilege in MRE 513 is also a rational and proportional means of advancing the public interest in protecting mental health information.<sup>143</sup>

Finally, the Supreme Court recognized the importance of protecting the psychotherapist-patient privilege by finding a federal privilege; this decision necessarily implies the privilege is non-arbitrary under the standard set out in *Scheffer*.<sup>144</sup> Furthermore, unlike MRE 707, MRE 513 is not a complete ban on a specific type of evidence; it is a tailored privilege with enumerated exceptions.<sup>145</sup> The Supreme Court, the President, and Congress have found that excluding potential evidence is acceptable when interests are properly balanced; therefore, the near-absolute privilege provided in MRE 513 should similarly withstand constitutional scrutiny.

#### B. Accused, Victim, and Societal Interests Have Been Balanced

In establishing federal privileges, as empowered by Congress, the Supreme Court ensures that the privilege “serve[s] public ends.”<sup>146</sup> Similar to the President’s determination in establishing MRE 513, the Supreme Court weighed the interests involved in the federal psychotherapist-patient privilege and determined that exceptional circumstances warrant protecting the privileged information.<sup>147</sup> Because of the Court’s fear that the exceptions could swallow the privilege, the Supreme Court established an absolute (though relatively undefined) federal psychotherapist-patient privilege in *Jaffee*.<sup>148</sup> The Court did note at least one possible exception to the absolute privilege (to prevent harm

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<sup>142</sup> In the portions of his opinion that were not supported by the majority, Justice Thomas also cited “[p]reserving the court members’ core function of making credibility determinations in criminal trials” and avoiding collateral litigation as legitimate interests in creating rules of evidence that limit an accused’s ability to present a defense. *Scheffer*, 523 U.S. at 313-14.

<sup>143</sup> *See id.* at 312.

<sup>144</sup> *See id.*

<sup>145</sup> Compare MCM, *supra* note 4, MIL. R. EVID. 707 (prohibiting admission of any reference to a polygraph examination) with JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(d) (enumerating seven exceptions to the psychotherapist-patient privilege).

<sup>146</sup> *See Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

<sup>147</sup> *Id.* at 9.

<sup>148</sup> *Id.* at 15; *see supra* Part II.A.

to the patient or others),<sup>149</sup> but emphasized a patient's need for assurances of their privacy.<sup>150</sup> According to the Court, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."<sup>151</sup> The Supreme Court, therefore, specifically prohibited lower courts from conducting balancing tests between evidentiary needs and privacy interests.<sup>152</sup>

Although the psychotherapist-patient privilege articulated in *Jaffee* is broad and seemingly absolute, privileges must be narrowly construed because they exclude relevant evidence.<sup>153</sup> Pursuant to this narrow construction, some circuit courts have recognized exceptions to the psychotherapist-patient privilege.<sup>154</sup> State and federal court interpretation of the privilege, however, is varied and inconsistent and, thus, not particularly useful.<sup>155</sup> Also, the President has clearly articulated MRE 513 (including its exceptions), and military courts have refused to recognize

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<sup>149</sup> *Jaffee*, 518 U.S. at 18 n.19 ("Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.").

<sup>150</sup> *Id.* at 17-18.

<sup>151</sup> *Id.* at 18 (citing *Upjohn*, 449 U.S. at 393 (1981)). The Court also noted that "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Id.* at 17.

<sup>152</sup> *Id.* The Court similarly notes "the rejected use of a balancing test in defining the contours of the privilege" with regard to the attorney-client privilege, noting that "[b]alancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application." *Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1998); *see also United States v. Custis*, 65 M.J. 366, 368 (C.A.A.F. 2007) (noting that the trial court erroneously conducted a balancing test in determining whether to release privileged marital communications).

<sup>153</sup> *Trammel v. United States*, 445 U.S. 40, 50-51 (1980).

<sup>154</sup> *See Diane M. Allen, Psychotherapist-patient Privilege Under Federal Common Law*, 72 A.L.R. FED. 395 (2015) (discussing the development of the federal psychotherapist-patient privilege and federal cases addressing the scope of the privilege).

<sup>155</sup> *See Smith, supra* note 28, at 13, n.114 (describing the variety of state law precedent in treatment of state psychotherapist privileges); Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 OR. L. REV. 1, 17-23 (2007) (examining numerous state and federal approaches to whether the privilege or accused rights prevail); Jennifer L. Hebert, *Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants*, 83 TEX. L. REV. 1453, 1466-69 (2005) (comparing state case law on whether a criminal defendant has the right to compel production of exculpatory information protected by an absolute privilege); Flippin, *supra* note 38, at 10 (reviewing federal case law's inconsistent treatment of psychotherapy privilege).

additional privileges or exceptions to privileges unless the President promulgates or amends a rule.<sup>156</sup>

Although a zealous advocate may have difficulty comprehending not having access to potentially useful information, the Supreme Court's privilege determinations make sense given the unlikelihood of locating any material information that a party could not otherwise discover from a non-privileged source.<sup>157</sup> Beyond the Court's determination of the superior public interest involved, since privileges often preclude the search for potentially relevant information rather than access to known information, the privilege concept is easier to understand.

Furthermore, if a party were able to articulate a strong enough basis to search privileged communications, he or she likely has another source for the information, thus rendering piercing the privilege cumulative and unnecessary. Also, the seven remaining exceptions account for any evidence that may be constitutionally required. In the unlikely event that a victim witness recanted to his or her therapist and is going to commit perjury, there is a crime-fraud exception to MRE 513. Finally, if the victim witness has an emotional issue or a propensity to lie or exaggerate the truth, coworkers, family, and friends will be able to testify regarding the victim's character for truthfulness.

### C. Privilege Can Prevail over Fifth and Sixth Amendment Challenges

In determining whether to recognize and how to scope a privilege, Congress told courts to use their "reason and experience."<sup>158</sup> The Supreme Court has recognized limitations to privileges based on the importance of the privacy interests involved in *Davis v. Alaska*,<sup>159</sup> *Pennsylvania v.*

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<sup>156</sup> See *infra* Part III.E.3.

<sup>157</sup> See *Jaffee*, 518 U.S. at 11 (stating "the likely evidentiary benefit that would result from the denial of the privilege is modest").

<sup>158</sup> FED. R. EVID. 501 advisory committee's note to 1974 enactment; Diane Marie Amann and Edward J. Imwinkelried, *The Supreme Court's Decision to Recognize a Psychotherapist Privilege in Jaffee v. Redmond*, 116 S. Ct. 1923 (1996): *The Meaning of "Experience" and the Role of "Reason" Under the Federal Rule of Evidence 501*, 65 U. CIN. L. REV. 1019, 1042 (1997).

<sup>159</sup> See *Davis v. Alaska*, 415 U.S. 308, 320 (1974) (finding that, under the specific circumstances of the case, the defendant's right to confrontation overcame the state's policy interest in maintaining the confidentiality of a key witness's juvenile records).

*Ritchie*,<sup>160</sup> and *United States v. Nixon*.<sup>161</sup> *Davis* and *Ritchie* involved state privilege statutes, not federal privileges recognized pursuant to FRE 501 authority.<sup>162</sup> *Nixon* involved the unique circumstance of a President asserting a generalized executive privilege.<sup>163</sup> All cases are pre-*Jaffee*, and none provide definitive guidance on how the Fifth and Sixth (and Fourteenth) Amendment rights of the accused are balanced against a nearly absolute military privilege based on an important societal benefit recognized by the Supreme Court. These cases, however, are instructive on when the Court will pierce a privilege and when a privilege will prevail over a constitutional challenge.

### 1. *The Supreme Court May Pierce a Qualified Privilege*

The Supreme Court has been willing to pierce what it determines are qualified state privileges. When evaluating state privileges, the Supreme Court has looked to the drafter's language and legislative intent to determine the extent of the state's interest in preserving privacy interests.<sup>164</sup> In *Pennsylvania v. Ritchie*, the Supreme Court reviewed the state's privilege prohibiting the release of a victim's Children and Youth Services (CYS) file, a state agency "charged with investigating cases of suspected mistreatment and neglect."<sup>165</sup> The defendant subpoenaed "the [CYS] file related to the immediate [child abuse] charges," as well as records and a possible medical report from a previous CYS investigation resulting from "a separate [abuse] report by an unidentified source."<sup>166</sup> When CYS asserted its privilege over the records and refused to comply with the subpoena, *Ritchie* requested the trial court sanction CYS, arguing that "the file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence."<sup>167</sup>

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<sup>160</sup> See *Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 (1987) (finding the defendant was entitled to have the state investigative file, which was covered by a qualified state privilege, reviewed by the trial court for material information).

<sup>161</sup> See *United States v. Nixon*, 418 U.S. 683, 713 (1974) (finding that the Fifth and Sixth Amendment require a President's "generalized assertion of privilege . . . yield to the demonstrated, specific need for evidence in a pending criminal trial").

<sup>162</sup> See *Davis*, 415 U.S. at 320; *Ritchie*, 480 U.S. at 57-58.

<sup>163</sup> See *Nixon*, 418 U.S. at 713.

<sup>164</sup> See *Ritchie*, 480 U.S. at 57-58.

<sup>165</sup> See *id.* at 42-43.

<sup>166</sup> *Id.* at 43-44.

<sup>167</sup> *Id.* at 44.

The CYS privilege included an exception that allowed disclosure to a “court of competent jurisdiction pursuant to a court order.”<sup>168</sup> The Court found that the state’s CYS privilege statute was qualified because it “contemplated some use of CYS records in judicial proceedings.”<sup>169</sup> Since the privilege was qualified, the Court determined that the state legislators intended the privilege be pierced under the circumstances.<sup>170</sup> The Court remanded the case to the trial court to conduct an *in camera* review and determine if the records contained information that was material to the defense, as alleged by the accused.<sup>171</sup>

Signifying the importance of the drafter’s intent, the Court (in dicta) differentiated the qualified CYS privilege from the state’s absolute privilege for communications between sexual assault counselors and victims.<sup>172</sup> Arguably, the pre-2015 MRE 513, like the CYS privilege, was qualified. By deliberately removing the constitutional exception, the President signaled and effected his intent that the privilege be absolute aside from the enumerated exceptions.

## 2. *Due Process Could Prevail Over Qualified or Generalized Privilege*

Although a qualified privilege protects information, certain constitutional rights, such as due process, can prevail over a qualified or generalized privilege. The Fifth Amendment guarantees that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>173</sup> In *Nixon*, thus, the Supreme Court determined that due process required that “[t]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.”<sup>174</sup> The Court refused to quash a subpoena requiring then-President Nixon to produce tape recordings and related documents in a criminal prosecution of Nixon officials.<sup>175</sup> The Court determined that the prosecution made “a

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<sup>168</sup> *Id.* at 43-44 (citation omitted).

<sup>169</sup> *Id.* at 57 (emphasis omitted).

<sup>170</sup> *See id.* at 57-58.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 57 (“This is not a case where a state statute grants [Children and Youth Services] the absolute authority to its files from all eyes. . . . [Compare the] unqualified statutory privilege for communications between sexual assault counselors and victims.”).

<sup>173</sup> U.S. CONST. amend. V.

<sup>174</sup> *United States v. Nixon*, 418 U.S. 683, 713 (1974).

<sup>175</sup> *Id.*

sufficient preliminary showing that each of the subpoenaed tapes contain[ed] evidence admissible with respect to the offenses charged in the indictment.”<sup>176</sup>

Nixon asserted an absolute privilege over the information based on the “need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties” and “the independence of the Executive Branch within its own sphere.”<sup>177</sup> According to the Court, Nixon’s “broad, undifferentiated claim of public interest in the confidentiality of such conversations” could not “sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”<sup>178</sup>

The *Nixon* Court required a demonstrated, specific need for evidence before breaching the asserted privilege. Military Rule of Evidence 513 also requires a specific basis before breaching the privilege. Unlike President’s Nixon’s broad assertion of executive privilege based on a generalized assertion of public interest, however, MRE 513 clearly defines the psychotherapist-patient privilege, its exceptions, and its implementation. The President, Congress, and the Supreme Court have all agreed that the privilege is important based on the strong public interest in a guarantee of privacy to enable a psychotherapist-patient relationship. The decision in *Nixon*, therefore, is only instructive in differentiating its generalized asserted interests with those clearly articulated in MRE 513 and other nearly absolute privileges.

In *Ritchie*, discussed above, the Court also addressed due process. In evaluating the defense’s request to review state-privileged CYS records, the Court looked to the public interest in protecting the information.<sup>179</sup> In analyzing the public interest, the Court looked to the drafter’s intent in the relevant state statute.<sup>180</sup> Since the state legislature enumerated an exception to the privilege for use in judicial proceedings and there was no “apparent state policy to the contrary,” the court relied on the exception to pierce the privilege.<sup>181</sup> The *Ritchie* Court thus determined that due process required an *in camera* review of the state-privileged information when a

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<sup>176</sup> *Id.* at 700.

<sup>177</sup> *Id.* at 705-06.

<sup>178</sup> *Id.* at 706.

<sup>179</sup> *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987).

<sup>180</sup> *Id.* at 57-58.

<sup>181</sup> *Id.* at 58.

party's request is based on an exception in the state statute.<sup>182</sup> Though the Court explicitly expressed "no opinion" on whether due process would have prevailed over the state privilege if it were absolute,<sup>183</sup> the fact that the Court classified and discussed the different privileges is instructive.

The enumerated court order exception to the CYS privilege is even broader than the previous constitutionally required exception of MRE 513. As discussed above, by deleting the constitutionally required exception, the President indicated the importance of consistency among courts and the importance of the public interest. The rule is now nearly absolute because it is all encompassing but still contains seven enumerated exceptions that balance the interests involved, including the constitutional rights of the accused. For example, if an accused has a specific factual basis that evidence of child sexual abuse by another exists only in psychotherapy records, the defendant could look to one of the enumerated exceptions to overcome the privilege.<sup>184</sup> According to MRE 513(d)(2), there is no privilege "when the communication is evidence of child abuse or of neglect."<sup>185</sup> Also, MRE 513(d)(3)<sup>186</sup> and (d)(6)<sup>187</sup> require disclosure of child abuse.<sup>188</sup> Additionally, if the alleged victim witness is going to testify falsely, there is no privilege "if the communication clearly contemplated the future commission of a fraud or crime."<sup>189</sup>

In addition to MRE 513 being nearly absolute and the *Ritchie* privilege being qualified, the public interest in protecting mental health records and communications is stronger than protecting state investigative files. Requiring a higher standard to breach MRE 513, therefore, makes sense. Moreover, although there was no evidence that the prosecution viewed the files, they were state files in the state's possession.<sup>190</sup> The Court does not

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 57 n.14.

<sup>184</sup> See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(e)(3).

<sup>185</sup> *Id.* MIL. R. EVID. 513(d)(2).

<sup>186</sup> There is no privilege "when federal law, state law, or service regulation imposes a duty to report information contained in a communication." *Id.* MIL. R. EVID. 513(d)(3).

<sup>187</sup> There is no privilege "when necessary to ensure the safety and security of . . . military dependents." *Id.* MIL. R. EVID. 513(d)(6).

<sup>188</sup> Mental health professionals may also have state ethical obligations that require them to disclose child exploitation.

<sup>189</sup> JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(d)(5).

<sup>190</sup> *Pennsylvania v. Ritchie*, 480 U.S. 39, 44 n.4 (1987). The Court of Military Appeals, citing Supreme Court precedent, determined that besides the need to disclose exculpatory evidence, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded. *United States v. Lucas*, 5 M.J. 167, 170 (C.M.A. 1978)

emphasize these factors, so whether or to what extent they affected the analysis is unknown. Since mental health records are located with civilian as well as military providers, the potentially disparate application of due process on a testimonial privilege is worth considering.<sup>191</sup>

### 3. Sixth Amendment Right to Cross-Examination Could Prevail Over a Non-Weighty State Privilege

Like the Fifth Amendment, the Sixth Amendment could also prevail over a state privilege. The Confrontation Clause provides the accused the right to face the person testifying against him or her and the right to cross-examine witnesses.<sup>192</sup> Restricting an attorney's ability to conduct cross-examination violates the Confrontation Clause "when '[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.'" <sup>193</sup> *Davis v. Alaska* is an example of the Supreme Court weighing privacy interests against confrontation rights.<sup>194</sup>

In *Davis*, the Court examined an Alaska statute created to preserve the State's privacy interest in juvenile adjudications of delinquency.<sup>195</sup> A key witness in a robbery case was on probation from a juvenile court for burglary.<sup>196</sup> On cross-examination, the defense attorney asked the witness if he had ever been similarly questioned by law enforcement, and he denied it.<sup>197</sup> Despite the "questionably truthful" nature of the response, the trial judge stopped the defense counsel from continuing the line of

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(quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)). *Brady* is not a discovery right, so if the government has not obtained the evidence, the defense has not been denied equal access. *Id.* at 170-71 ("The fair trial considerations enunciated in *Brady* . . . were motivated by concern on the part of the Supreme Court with the suppression by the Government of evidence favorable to the defense, rather than a right to discovery for an accused in a criminal case." (italics added) (citations omitted)).

<sup>191</sup> Interestingly, if the privilege were qualified, it could potentially matter if therapy occurred at a military versus a civilian facility. This seemingly would produce the unintended consequence of requiring sexual assault victims to seek psychological treatment at non-military facilities.

<sup>192</sup> U.S. CONST. amend. VI.

<sup>193</sup> *United States v. Jasper*, 72 M.J. 276 (C.A.A.F. 2013) (alteration in original) (citation omitted).

<sup>194</sup> See *Davis v. Alaska*, 415 U.S. 308 (1974).

<sup>195</sup> *Id.* at 309.

<sup>196</sup> *Id.* at 310-11.

<sup>197</sup> *Id.* at 313.



questioning and asking the witness about being on probation for a juvenile offense.<sup>198</sup>

The State argued that releasing a juvenile's record of delinquency would "cause impairment of rehabilitative goals of the juvenile correctional procedures."<sup>199</sup> The Supreme Court, however, determined that the accused's Sixth Amendment confrontation right in this case was paramount to the state's interest in protecting a witness from embarrassment.<sup>200</sup> The defense, therefore, should have been able to cross-examine the witness for bias "because of [his] vulnerable status as a probationer."<sup>201</sup>

In *Davis*, the accused's right to confrontation prevailed over the state privilege. *Davis* and the state juvenile record privilege, however, are distinct from *Jaffee*, the federal psychotherapist-patient privilege, and MRE 513. The privacy interest in juvenile records, unlike the psychotherapist-patient privilege, is not particularly significant, nor is it a federally recognized privilege. *Davis* also only involved the trial right of cross-examination with information known by both parties and not discovery rights.<sup>202</sup> The interests in *Davis*, therefore, are quite different from those of a person talking to a counselor before or after a traumatic event to help them heal.

#### 4. Sixth Amendment Confrontation Rights May Not Apply in Pretrial Discovery

The Confrontation Clause might not apply to privileged information unless the prosecution were to introduce counseling records at trial or put the therapist on the stand. According to four justices in *Ritchie*, the confrontation right articulated in *Davis* did not create "a constitutionally

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<sup>198</sup> *Id.* at 313-14.

<sup>199</sup> *Id.* at 319 ("This exposure, it is argued, might encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgression.").

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 318-19. The concurrence "emphasize[d] that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions." *Id.* at 321 (Stewart, J., concurring).

<sup>202</sup> *Id.* at 311.

compelled rule of pretrial discovery.”<sup>203</sup> In remanding the opinion to the trial court, the Supreme Court noted that “the Confrontation Clause only guarantees ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish.’”<sup>204</sup> This is consistent with both Supreme Court and military precedent.<sup>205</sup> The Court, however, has not provided clear guidance as to when and to what extent the Confrontation Clause applies in the context of privileges. Nonetheless, as discussed, any information necessary for a fair trial that an accused could glean from a victim’s mental health records could be acquired from a different source or through one of the enumerated exceptions.<sup>206</sup>

##### *5. Sixth Amendment Right to Compulsory Process Is Potentially Implicated By Privilege*

The Sixth Amendment right to compulsory process is potentially implicated by privileges.<sup>207</sup> Again, this right does not include the power to require pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.<sup>208</sup> In *Ritchie*, the Court determined that Sixth Amendment compulsory process “provides no greater protections” in areas controlling a defendant’s right to require the government to produce exculpatory evidence than protections afforded by

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<sup>203</sup> *Pennsylvania v. Ritchie*, 480 U.S. 39, 52-53 (1987) (plurality opinion) (“The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.”).

<sup>204</sup> *Id.* at 54 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)).

<sup>205</sup> *See, e.g., id.* at 54 n.10 (listing cases); *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989) (noting that the Sixth Amendment confrontation right is not without limits).

<sup>206</sup> It is also noteworthy that there is no constitutional right of confrontation during presentencing. *DB v. Lippert*, *DB v. Lippert*, No. 20150769, 2016 WL 381436, at \*7 (A. Ct. Crim. App. Feb. 1, 2015) (noting that “it is only logical to conclude that the Sixth Amendment right of confrontation does not apply to the presentencing portion of a non-capital court-martial” (quoting *United States v. McDonald*, 55 M.J. 173, 177 (C.A.A.F. 2001)); *see also id.* (“While the rules of evidence provide for cross-examination of sentencing witnesses, *see* Mil. R. Evid. 611(b) and 1101(a), these are regulatory confrontation rights rather than a constitutional right of confrontation that could form the basis for piercing a privileged communication.”) (emphasis in original)).

<sup>207</sup> U.S. CONST. amend. VI.

<sup>208</sup> *See Ritchie*, 480 U.S. at 59 (acknowledging strong public interest in protecting psychotherapist records but indicating state legislative intent determines whether or not the privilege yields in criminal prosecutions if the information is material).

due process.<sup>209</sup> The Court, therefore, did not address the issue,<sup>210</sup> but it did note that they “never squarely held that the Compulsory Process Clause guarantees the right to discover the identity of witnesses, or to require the government to produce exculpatory evidence.”<sup>211</sup> At the same time, the *Ritchie* Court noted that *Nixon* suggested that compulsory process “may require the production of evidence.”<sup>212</sup>

As discussed above, *Nixon* was a unique case decided on Fifth and Sixth Amendment grounds.<sup>213</sup> The *Nixon* Court stated that “[t]o ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed by either the prosecution or by the defense.”<sup>214</sup> However, the *Nixon* Court then distinguished *Nixon*’s claimed privilege from those “designed to protect weighty and legitimate competing interests,” such as the attorney-client and priest-penitent privileges.<sup>215</sup> So, while *Nixon* may have implicated compulsory process, it only did so when a broad, general executive privilege was weighed against “a sufficient preliminary showing [of] . . . evidence admissible with respect to the offense charged in the indictment.”<sup>216</sup> The privilege in *Nixon* is thus different than the weighty and legitimate interests involved in well-defined psychotherapist-patient privilege.

Even if the accused requested compulsory process, in most if not all cases, he or she would not be able to meet the burden to establish the

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<sup>209</sup> *Id.* at 56 (emphasis omitted). The Court did note, however, that they “never squarely held that the Compulsory Process Clause guarantees the right to discover the identity of witnesses, or to require the government to produce exculpatory evidence.” *Id.* (emphasis omitted). At the same time, the Court notes that *United States v. Nixon* suggests that compulsory process may require the production of evidence. *Id.*

<sup>210</sup> The Court also chose not to address testimonial privileges in *Washington v. Texas*, an otherwise significant compulsory process case. 388 U.S. 14, 23 n.21 (1967) (“Nothing in this opinion should be construed as disapproving testimonial privileges, . . . which are based on entirely different considerations from those underlying the common-law disqualifications for interest.”).

<sup>211</sup> *Ritchie*, 480 U.S. at 56 (emphasis omitted).

<sup>212</sup> *Id.* (citing *United States v. Nixon*, 418 U.S. 683, 709, 711 (1974)).

<sup>213</sup> See *supra* note 161 and accompanying text.

<sup>214</sup> *Nixon*, 418 U.S. at 709.

<sup>215</sup> *Id.* The Court noted that President Nixon “does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.” *Id.* at 710.

<sup>216</sup> *Id.* at 700; see also *id.* at 712-13.

materiality of witnesses or evidence.<sup>217</sup> As discussed above, neither the government nor the defense typically has access to privileged information, so neither could articulate its significance. If the accused had sufficient information to meet the standard required to compel discovery, the information would likely be cumulative. Finally, an accused has access to evidence through the enumerated exceptions if he or she meets the MRE 513 requirements.

### 6. *Implications of Military Due Process*

Servicemembers' due process rights differ from those of civilians.<sup>218</sup> The Supreme Court has noted that "in determining what process is due [to defendants in military proceedings], courts 'must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces.'"<sup>219</sup> Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline."<sup>220</sup> The standard, therefore, when the Court examines a due process challenge to an aspect of the military justice system is "whether the factors militating in favor of [the servicemember's alleged due process right] are so extraordinarily weighty as to overcome the balance struck by Congress."<sup>221</sup> The Supreme Court has already determined that the societal interests involved in protecting the psychotherapist-patient relationship are significant. Courts, therefore, should defer to the President and Congress and accord military defendants the rights articulated in MRE 513.

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<sup>217</sup> See, e.g., *United States v. Lucas*, 5 M.J. 167, 171-72 (C.M.A. 1978) (finding no violation of Sixth Amendment right to compulsory process where defense did not articulate why requested witnesses were material).

<sup>218</sup> See *Weiss v. United States*, 510 U.S. 163 (1994).

<sup>219</sup> *Id.* at 177 (quoting *Middendorf v. Henry*, 425 U.S. 25 (1976)).

<sup>220</sup> *Id.* (quoting *Chappell v. Wallace*, 462 U.S. 296 (1983)).

<sup>221</sup> *Id.* at 177-78 (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)). This deferential treatment also applies to the President's promulgation of military rules of evidence. See *Loving v. United States*, 517 U.S. 748, 772 (1996).

#### D. Military Discovery

Military rules of discovery should not be confused with the rules governing privilege.<sup>222</sup> Military Rule of Evidence 701 clearly spells out that privileges overcome an absolute right to discovery.<sup>223</sup> The discussion following RCM 701(a)(2) directs the reader to “specific rules concerning certain mental examinations of the accused or third party patients” and cites RCM 513.<sup>224</sup> The reciprocal discovery portion of RCM 701 similarly specifies that “the defense, on request of trial counsel, shall (except as provided in . . . Mil. R. Evid. 513) permit the trial counsel to inspect any results or reports of physical or mental examinations.”<sup>225</sup> Also, RCM 701(f) reiterates that “[n]othing in this rule shall be construed to require the disclosure of information protected . . . by the Military Rules of Evidence.”<sup>226</sup> The analysis following RCM 701 states, “[t]he rule is intended to promote full discovery to the maximum extent possible consistent with legitimate needs for nondisclosure (see e.g., Mil. R. Evid. 301; Section V).”<sup>227</sup> Privileged information is excluded from standard discovery, and MRE 513 articulates the requirements that practitioners must follow.<sup>228</sup>

#### E. Presidential Intent

As discussed, the President has the authority to promulgate rules of evidence in the military criminal justice system.<sup>229</sup> The goal of military privileges is to give practitioners clear guidance, as well as to contemplate military readiness and national security.<sup>230</sup> The President, therefore, has

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<sup>222</sup> See *DB v. Lippert*, No. 20150769, 2016 WL 381436, at \*11 (A. Ct. Crim. App. Feb. 1, 2015) (“It is axiomatic that if a privileged communication is disclosed whenever it would be subject to the rules governing discovery then there is no privilege at all.”).

<sup>223</sup> See 2012 MCM, *supra* note 4, R.C.M. 701(a)(2) discussion.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* R.C.M. 701(b)(4). The rule was amended in 2002 “to take into consideration the protections afforded by the new psychotherapist-patient privilege under Mil. R. Evid. 513.” *Id.* R.C.M. 701 analysis to 2002 amendment, at A21-34-35.

<sup>226</sup> *Id.* R.C.M. 701(f). “This subsection is based on privileges and protections in other rules (see, e.g., Mil. R. Evid. 301 and Section V).” *Id.* R.C.M. 701 analysis to 1986 amendment, at A21-35.

<sup>227</sup> *Id.* R.C.M. 701 analysis to introduction, at A21-33.

<sup>228</sup> See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513.

<sup>229</sup> See *supra* note 63.

<sup>230</sup> See 2012 MCM, *supra* note 4, 501 analysis, at A22-38; *id.* at MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45.

established military privileges with different goals in mind than civilian federal analogues. Because of this, courts should defer to the President (and Congress) and interpret MRE 513 as written.

*1. The Supreme Court Defers to the President and Congress in Military Matters*

The Supreme Court gives the President and Congress great deference when addressing matters pertaining to the military.<sup>231</sup> According to the Court, “Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military . . . . [W]e have adhered to this principle of deference in a variety of contexts where . . . the constitutional rights of servicemen were implicated.”<sup>232</sup> The Supreme Court recognized that the separation of powers did not preclude Congress from delegating the constitutional authority to make rules governing the military to the President.<sup>233</sup> It is apropos that the Commander-in-Chief makes rules for his military.<sup>234</sup> As discussed in Part II.B., because of Congress’s involvement in changing MRE 513, the President should receive even more deference in his role as rule maker.<sup>235</sup>

*2. The CAAF Defers to the President in Interpreting MREs*

The CAAF recognized the need to narrowly construe privileges, stating “the authority to add exceptions to the codified privileges within the military justice system lies not with this Court or the Courts of Criminal Appeal, but with the policymaking branches of government.”<sup>236</sup>

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<sup>231</sup> See *Loving v. United States*, 517 U.S. 748, 777-78 (1996) (Thomas, J., concurring) (“This heightened deference extends not only to congressional action but also to executive action by the President, who by virtue of his constitutional role as Commander in Chief . . . possesses shared authority over military discipline.”).

<sup>232</sup> *Weiss v. United States*, 510 U.S. 163, 177 (1994) (alteration in original) (quoting *Solorio v. United States*, 483 U.S. 435, 447-48 (1987)).

<sup>233</sup> *Loving*, 517 U.S. at 772 (“The President’s duties as Commander in Chief, however, require him to take responsible and continuing action to superintend military, including the courts-martial. The delegated duty, then, is interlinked with duties already assigned to the President by express terms of the Constitution . . .”).

<sup>234</sup> See U.S. CONST. art. II, § 2, cl. 1.

<sup>235</sup> See discussion *supra* Part II.B.

<sup>236</sup> *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007); see *United States v. McCollum*, 58 M.J. 323, 342 (C.A.A.F. 2003) (finding whether an exception should apply

This finding accounts for the fact that the President articulates, in detail, military rules to simplify the process for our system.<sup>237</sup> As discussed in Part II.B., the CAAF has thus refused to read exceptions into privileges, noting that adding an exception to a codified privilege is “inconsistent with” the rule which already reflects the policy judgments of the President.<sup>238</sup> The CAAF followed similar reasoning in *Rodriguez* when determining the court could not create a privilege.<sup>239</sup>

### 3. MRE 513 Plainly Expresses Presidential and Congressional Intent

Courts use principles of statutory construction in understanding and applying the military rules of evidence.<sup>240</sup> According to the CAAF, “when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”<sup>241</sup> Congress and the President plainly articulated the psychotherapist-patient privilege and its enumerated exceptions.<sup>242</sup> Clearly, recognizing a nearly absolute psychotherapist-patient privilege is not absurd, as the Supreme Court did so in *Jaffee*.<sup>243</sup> The JSC analysis of MRE 513 cites “the social benefit of confidential counseling recognized by *Jaffee*” as the reason for adopting the rule.<sup>244</sup>

The military privilege is even narrower than the federal privilege. In articulating the exceptions, the President accounted for the possible exception the Supreme Court articulated in *Jaffee*—if someone was going to harm him or herself or others—which also ensures the safety of military

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to a privilege in a courts-martial “is a legal policy question best addressed by the political and policy-making elements of the government.”)

<sup>237</sup> See 2012 MCM, *supra* note 4, MIL. R. EVID. 501 analysis, at A22-38 (“Commanders, convening authorities, non-lawyer investigating officers, summary court-martial officers, or law enforcement personnel need specific guidance as to what material is privileged and what is not.”).

<sup>238</sup> *Custis*, 65 M.J. at 370; see discussion *supra* Part II.B.

<sup>239</sup> See *supra* Part II.B.1.

<sup>240</sup> *United States v. Matthews*, 68 M.J. 29 (C.A.A.F. 2009); *Custis*, 65 M.J. at 370.

<sup>241</sup> *Custis*, 65 M.J. at 370 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citations and internal quotations omitted)).

<sup>242</sup> See Carl Levin & Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014); Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,819-20 (June 22, 2015).

<sup>243</sup> See *Jaffee v. Redmond*, 518 U.S. 1 (1996).

<sup>244</sup> 2012 MCM, *supra* note 4, MIL. R. EVID 513 analysis to 1999 amendment, at A22-45.

personnel.<sup>245</sup> The exception is covered by MREs 513(d)(4)<sup>246</sup> and (d)(6).<sup>247</sup> Even so, the loss of potentially probative evidence may occur when applying a privilege. The rule and its exceptions, however, account for military necessity and all interests involved, including the accused's right to a fair trial.<sup>248</sup>

#### 4. MRE 513 Addresses the President's Significant Public Policy Concerns

The CAAF has pointed to public policy concerns when interpreting exceptions to other privileges.<sup>249</sup> Significant public policy concerns, such as encouraging reporting by and treatment of sexual assault victims, require a psychotherapist-patient privilege. As discussed above, the President, Congress, and the DOD are focused on eliminating sexual assault from the military.<sup>250</sup>

The psychotherapist-patient privilege may be even more important in the military than in the civilian world to reinforce command support for the previously stigmatized act of seeking mental health counseling.<sup>251</sup> Also, it may be even more difficult for servicemember victims when they are assaulted by a fellow servicemember than for those in civilian society, as members of the military often have little separation between their work, personal, and social lives.<sup>252</sup> Having well-adjusted servicemembers that feel comfortable and confident enough in the sanctity of their relationship with their mental health professional is beneficial for servicemembers and,

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<sup>245</sup> See *supra* note 79.

<sup>246</sup> There is no privilege "when . . . a patient's mental or emotional condition makes the patient a danger to any person, including the patient." JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(d)(4).

<sup>247</sup> MRE 513(d)(6) says that there is no privilege "when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission." *Id.* MIL. R. EVID. 513(d)(6).

<sup>248</sup> 2012 MCM, *supra* note 4, MIL. R. EVID 513(d) analysis to 1999 amendment, at A22-45 ("These exception are intended to emphasize that military commanders are to have access to all information that is necessary for the safety and security of military personnel, operations, installations, and equipment.").

<sup>249</sup> For example, in interpreting an exception to the spousal privilege, the CAAF pointed to the "explicit public policy concerns prompting the military's adoption of [the privilege exception]." *United States v. McCollum*, 58 M.J. 323, 344 (C.A.A.F. 2003) (Crawford, C.J., concurring in the result).

<sup>250</sup> See *supra* Part II.C.2.

<sup>251</sup> See *supra* note 16 and accompanying text.

<sup>252</sup> See Schimpf, *supra* note 114, at 179-80.



thus, national security. Finally, MRE 513 also increases the efficiency of the military justice process by not having multiple mini-trials that delay justice and ensuring the fact finder only reviews relevant, probative, and not unduly prejudicial evidence during a criminal trial.

*5. Eliminating the “Constitutionally Required” Language Reveals Presidential Intent*

The June 2015 changes to MRE 513 ensure that courts understand that privilege is stronger than locating, acquiring, and producing potential evidence in all but limited and specifically enumerated instances.<sup>253</sup> The significance of our executive and legislative branches agreeing on this issue should not be ignored.<sup>254</sup> Arguably, the previous MRE 513 was a qualified privilege, and the deliberate deletion of the constitutionally required language indicated a significant change in the implementation of the rule. According to the CAAF, “[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”<sup>255</sup>

Removing the constitutionally required language, particularly when viewed alongside other Congressional and Presidential actions, reveals their determination that the psychotherapist-patient privilege should be nearly absolute. The deletion of the exception coincided with the President’s declared mission to improve the military’s response to sexual assault, which included discussions regarding the potential abuse of MRE 513(d)(8).<sup>256</sup> The constitutionally required exception that was included in the previous MRE 513, unlike the other enumerated exceptions, did not account for military necessity, societal interests, and fair treatment of victims. Instead, the exception seemed to try to balance the hesitance of the military to recognize a psychotherapist-patient privilege against the Supreme Court’s recognition of the privilege.

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<sup>253</sup> See Carl Levin & Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014); Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,819-20 (June 22, 2015).

<sup>254</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring).

<sup>255</sup> *United States v. Matthews*, 68 M.J. 29, 37 (C.A.A.F. 2009) (quoting *Stone v. Immigration & Naturalization Serv.*, 514 U.S. 386, 397 (1995)).

<sup>256</sup> See *supra* note 7 and accompanying text.

Similar to the federal psychotherapist-patient privilege established in *Jaffee*, Congress and the President have determined that the military benefits when the psychotherapist-patient privilege prevails over giving defense access to all possibly relevant information. Military practitioners now need to abide by that determination. As discussed, privileges exist to protect information, some of which would be otherwise discoverable. Since attorneys have become accustomed to discovering mental health records as if they were any other item with some extra procedural requirements, the transition will be difficult. Judicially created exceptions would likely cause parties to fall back into the practice of not treating MRE 513 as a privilege. The deletion of the constitutionally required exception obliges military practitioners to overcome their reservations in the interest of justice for all parties.

Justice does not prevail when a witness is persecuted until he or she is no longer willing to cooperate because of a defense counsel's interest in marginally-relevant or confusing treatment notes. If the military is serious about eliminating sexual assault, then military courts need to comply with MRE 513 as it is written. The possible worst-case scenario is that the parties never discover exculpatory information or a damaging piece of impeachment evidence. However, this could happen in any case (even when no privilege is involved). The justice system assumes risk when declaring privileges, but society has determined that some risks are worthwhile. That said, it seems extremely unlikely that wrongful convictions could result from properly applying a privilege, particularly where MRE 513 enumerates exceptions, such as the crime-fraud exception, to overcome the privilege.

#### IV. Comparison of the Psychotherapist-Patient Privilege to Other Military Privileges

The JSC observed that MRE 513 is necessary “based on the social benefit of confidential counseling recognized by *Jaffee*, and similar to the clergy-penitent privilege.”<sup>257</sup> Clearly, the psychotherapist-patient privilege has not been treated similarly to the clergy privilege, which begs the question: Are rules of evidence applied differently in sexual assault cases?<sup>258</sup> Are members of the military (and society at large) so mired in the prejudices surrounding sexual assault cases and psychotherapy that

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<sup>257</sup> 2012 MCM, *supra* note 4, MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45.

<sup>258</sup> See Hebert, *supra* note 155.

despite all of the statutory progress relating to both, change cannot occur? Practitioners need to consider why this privilege is treated differently than the federally recognized privileges to which it is most similar (the clergy, spousal, and attorney-client privileges). The below, therefore, compares the psychotherapist-patient privilege to other military privileges to assist in consistent and proper interpretation and application of the privilege.

#### A. Absolute or Nearly Absolute Privileges

As discussed above, there are no intended exceptions to absolute privileges.<sup>259</sup> Nearly absolute privileges are those in which the drafters have clearly defined the enumerated exceptions within the four corners of the rule.<sup>260</sup> The below discusses the absolute clergy privilege and the nearly absolute spousal and attorney-client privileges and concludes that psychotherapist-patient privilege is similar to and should be treated like the absolute or nearly absolute privileges.

##### 1. *Communications to Clergy Privilege*

The President recognized the absolute nature of the communications to clergy privilege in drafting the rule; the privilege includes no exceptions.<sup>261</sup> Military courts have also recognized the absoluteness of the privilege through case law.<sup>262</sup> The CAAF has determined the privilege applies despite the fact that breaching the privilege could prevent ongoing and future crimes.<sup>263</sup> The CAAF noted that “[a]lthough the clergy

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<sup>259</sup> See *supra* Part III.C.1.

<sup>260</sup> See *supra* Part III.C.1.

<sup>261</sup> See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 503. The Army also has a regulation that further defines the privilege for clergy. See U.S. DEP’T OF ARMY, REG. 165-1, Army Chaplain Corps Activities, para. 16-2 (23 June 2015).

<sup>262</sup> See *United States v. Moreno*, 20 M.J. 623 (A.C.M.R. 1985) (establishing a three-part test to apply MRE 503 and reversing accused’s conviction based on violation of privilege).

<sup>263</sup> *United States v. Shelton*, 64 M.J. 32 (C.A.A.F. 2006) (finding privilege applied to accused’s confession, to not only reverend, but to his wife in reverend’s presence and at reverend’s encouragement, that he was molesting his four-year-old stepdaughter); *United States v. Benner*, 57 M.J. 210 (C.A.A.F. 2002) (finding accused’s confession to CID involuntary after chaplain violated privilege and revealed to CID that accused was molesting his stepdaughter); *United States v. Isham*, 48 M.J. 608 (N-M Ct. Crim. App. 1998) (dismissing with prejudice accused’s conviction based on privileged communications to chaplain revealing his specific plans to kill his fellow Marines and himself).

privilege, like all privileges must be strictly construed, it is legal error when the privilege is misconstrued.”<sup>264</sup>

Military case law seems to acknowledge the absolute nature of this privilege even when the parties know that privilege is preventing the admission of potentially exculpatory evidence.<sup>265</sup> Although there is no case law directly on point, *United States v. Jasper* indicates that if the victim’s guardian had not waived the privilege covering the victim’s communications with the clergyman, exculpatory information would not have been admissible.<sup>266</sup>

In *Jasper*, the seventeen-year-old victim witness told her pastor that she had made up some (but not all) of her allegations of sexual abuse against the accused to get attention.<sup>267</sup> The pastor requested and received permission to discuss the victim’s communications with the trial counsel, and the trial counsel disclosed the statements to the defense counsel.<sup>268</sup> At a motions hearing, the military judge determined that the privilege had not been waived and denied the defense motion to produce the pastor because “any testimony that [he] would have would be inadmissible.”<sup>269</sup> The ACCA agreed finding that the victim did not voluntarily consent “to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege.”<sup>270</sup>

The CAAF noted that the parties agreed that the clergy privilege applied to the victim’s communications and determined that the “sole question before [the Court], then, is whether the privilege was waived under MRE 510(a).”<sup>271</sup> The CAAF found that the victim waived the privilege,<sup>272</sup> but the case implies that without waiver by the privilege holder, the material evidence would have been privileged.<sup>273</sup>

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<sup>264</sup> *Shelton*, 64 M.J. at 37 (footnote omitted).

<sup>265</sup> See *United States v. Jasper*, 72 M.J. 276 (C.A.A.F. 2013).

<sup>266</sup> *Id.* at 281.

<sup>267</sup> *Id.* at 278-79.

<sup>268</sup> *Id.* at 279.

<sup>269</sup> *Id.* (quoting trial court).

<sup>270</sup> *United States v. Jasper*, No. 20100112, 2012 WL 2887224, at \*2 (A. Ct. Crim. App. July 13, 2012) (quoting MRE 510(a)), *rev’d* 72 M.J. 276 (C.A.A.F. 2013).

<sup>271</sup> *Jasper*, 72 M.J. at 280.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 281 (“[W]here, as here, a privilege holder voluntarily consents to the disclosure of privileged statements to trial counsel without express limitation, we think it would be

The psychotherapist-patient privilege is similar to the communications to clergy privilege. Both relationships are based on trust and focus on wellbeing, and breaching the privileges would eviscerate the purpose and societal benefits resulting from the relationships. The Supreme Court's reasoning in recognizing the privileges is substantially similar.<sup>274</sup> Like the patient of a mental health professional, if a congregant has to worry about the possibility of future disclosure, they may not discuss what is necessary to repent. Also, both clergy and mental health professionals have ethical obligations requiring them (in most circumstances) to maintain the privacy of the patients' communications.<sup>275</sup> Furthermore, both clergy and psychotherapists may be servicemembers or military employees, or they may be civilians, so creating a penetrable privilege could unduly complicate discovery. Finally, similar to the psychotherapist-patient privilege, the military was reluctant to recognize the communications to clergy privilege, but eventually realized its importance.<sup>276</sup>

Importantly, however, the psychotherapist-patient privilege has enumerated exceptions to help ensure exculpatory evidence is disclosed to defense counsel. In *Jasper*, without the waiver, the parties may not have known of the existence of the exculpatory evidence. The psychotherapist-patient privilege, however, contains a crime-fraud exception which arguably allows piercing the privilege under these circumstances to

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inappropriate to allow a claim of privilege to prevent Appellant from using those statements at trial. Cf. R.C.M. 701(a)(6); *Brady v. Maryland* . . .”).

<sup>274</sup> Compare *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (“Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure . . . . [T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment) with *Trammel v. United States*, 445 U.S. 40, 51 (1980) (“The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.”).

<sup>275</sup> “Under the current MRE 513, these civilian victims often have their records turned over contrary to state law protecting their confidentiality.” Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, and Mr. Ryan Guilds, Counsel, Arnold & Porter LLP, to Judicial Proceedings Panel, MRE 513 Analysis and Proposal For Reform 6 (Oct. 24, 2014) (on file with author); see also *United States v. Harding*, 63 M.J. 65-66 (C.A.A.F. 2006) (finding government's interlocutory appeal of trial judge's decision abating proceedings when social worker refused to comply with warrant of attachment and produce sexual assault victim's counseling records because of privilege was not authorized).

<sup>276</sup> See Lieutenant Shane D. Cooper, *Chaplains Caught in the Middle: The Military's "Absolute" Penitent-Clergy Privilege Meets State "Mandatory" Child Abuse Reporting Laws*, 49 NAVAL L. REV. 128, 133-34 (2002).

prevent a potential miscarriage of justice.<sup>277</sup> Therefore, the exculpatory evidence discussed above in *Jasper* would likely be revealed even if applying a nearly absolute interpretation to MRE 513.

## 2. Spousal and Attorney-Client Privileges

The psychotherapist-patient privilege is also similar to the spousal and attorney-client privileges (though to a lesser degree than the clergy privilege). According to the Supreme Court, the spousal privilege protects the important public interest of “marital harmony.”<sup>278</sup> The spousal privilege, like the psychotherapist-patient privilege, has a number of exceptions and no constitutional exception.<sup>279</sup> As discussed, the CAAF has strictly interpreted the enumerated exceptions.<sup>280</sup> The CAAF would not recognize a crime-fraud exception to the privilege,<sup>281</sup> nor would the CAAF expand the definition of “child.”<sup>282</sup> In response, the President broadened the exceptions to the spousal privileges based on his policy determination that protecting child victims was more important than the spousal privilege in some instances.<sup>283</sup> Unlike the psychotherapist-patient privilege, where the exceptions are narrowed and the privilege broadened to protect victims, the exceptions to the spousal privilege are broad and the privilege is narrow to protect victims.

The attorney-client privilege is the oldest privilege<sup>284</sup> and “rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.”<sup>285</sup> The attorney-client privilege, like the psychotherapist-patient privilege, has specifically enumerated exceptions and no

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<sup>277</sup> See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(d)(5).

<sup>278</sup> *Trammel v. United States*, 445 U.S. 40, 53 (1980).

<sup>279</sup> See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 504(c).

<sup>280</sup> See *United States v. Custis*, 65 M.J. 366, 368 (C.A.A.F. 2007); *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003).

<sup>281</sup> *Custis*, 65 M.J. at 368.

<sup>282</sup> *McCollum*, 58 M.J. at 340.

<sup>283</sup> See 2012 MCM, *supra* note 4, MIL. R. EVID. 504 analysis of 2012 amendment, at A22-41 (creating an exception to the privilege via executive Order 13,593 “when both parties have been substantial participants in illegal activity”); *id.* MIL. R. EVID. 504 analysis of 2007 amendment, at A22-41 (modifying exception to include “a ‘de facto’ child or a child who is under the physical custody of one of the spouses but lacks a formal legal parent-child relationship with at least one of the spouses”).

<sup>284</sup> *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

<sup>285</sup> *Trammel v. United States*, 445 U.S. 40, 51 (1980).

constitutional exception.<sup>286</sup> In both cases, clients are seeking professional assistance to deal with an issue that they cannot solve themselves. Like the psychotherapist-patient privilege, the professional relationship of the attorney and client would likely not exist and the communications not made without the privilege.<sup>287</sup>

### *3. Practitioners Should Treat the Psychotherapist-Patient, Clergy, Spousal, and Attorney-Client Privileges Similarly*

The clergy, spousal, attorney-client, and psychotherapist-patient privileges are all absolute or nearly absolute. Given the similar goals in the relationships of the parties in the privileges, it is nonsensical that the psychotherapist-patient privilege is frequently breached and the others are not—particularly since the MRE 513 specifically conveys the limited circumstances under which trial judges can breach the privilege.<sup>288</sup> This phenomena is particularly odd given the military’s emphasis on changing the previously negative associations surrounding seeing a mental health professional.<sup>289</sup> Nonetheless, despite the numerous undeniable similarities, the privileges are treated differently, producing the likely unintended consequence of directing victims to a clergy member or spouse for counseling instead of a psychotherapist.

## B. Qualified Privileges

As discussed above, qualified privileges are those in which the drafters create a broad exception for discovering and using the otherwise privileged information in court.<sup>290</sup> The below differentiates the psychotherapist-patient privilege from the qualified identity of informant and victim advocate-victim privileges.

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<sup>286</sup> See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 502(d).

<sup>287</sup> See *supra* Part II.A.

<sup>288</sup> See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513; see also *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996) (declining to allow trial courts to conduct balancing test to determine admissibility of psychotherapy evidence by evaluating “the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure”).

<sup>289</sup> See *supra* note 16 and accompanying text.

<sup>290</sup> See *supra* Part III.C.1.

### 1. *Identity of Informant Privilege*

The relationship between an informant and the individual to whom the informant provides information is not on par with the relationships discussed in Part IV.A. Also, unlike the psychotherapist-patient privilege, there are obvious constitutional concerns with the identity of informant privilege that cannot be specifically addressed in enumerated exceptions. The identity of informant privilege thus has several necessary open-ended exceptions that are left to the courts to determine.<sup>291</sup> These exceptions account for the numerous Fifth and Sixth Amendment concerns inherent in not knowing the identity of a potential accuser, such as information that “is necessary to the accused’s defense on the issue of guilt or innocence”<sup>292</sup> and information necessary to decide a motion to suppress evidence.<sup>293</sup> The President, therefore, specifically left military courts broad discretion to pierce the privilege.<sup>294</sup>

### 2. *Victim Advocate-Victim Privilege*

Similar to the informant privilege and the pre-2015 version of MRE 513, the privilege between a victim advocate and victim allows for an exception “where the accused could show harm of constitutional magnitude if such communication was not disclosed.”<sup>295</sup> The victim

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<sup>291</sup> See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 507(d).

<sup>292</sup> *Id.* MIL. R. EVID. 507(d)(2). In its analysis of the rule, the Joint Services Committee specifically notes that the exception “recognizes that in certain circumstances the accused may have a due process right under the Fifth Amendment, as well as a similar right under the [UCMJ], to call the informant as a witness.” 2012 MCM, *supra* note 4, MIL. R. EVID. 507(c)(2) analysis, at A22-44 (“The subdivision intentionally does not specify what circumstances would require calling the informant and leaves resolution of the issue to each individual case.”).

<sup>293</sup> JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 507(d)(3) (“[T]he military judge must, upon motion of the accused, determine whether disclosure of the identity of the informant is required by the United States Constitution as applied to members of the Armed Forces.”); see 2012 MCM, *supra* note 4, MIL. R. EVID. 507(c)(3) analysis, at A22-44 (“In view of the highly unsettled nature of the issue, the Rule does not specify whether or when such disclosure is mandated and leaves the determination to the military judge in light of prevailing law utilized in the trial of criminal cases in the Federal district courts.”).

<sup>294</sup> See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 507(d). Also, if a military judge determines an exception applies, the privilege allows the command to make the ultimate determination regarding whether to disclose the informant’s identity or withdraw charges so any concern for protecting the safety of the individual is alleviated. *Id.* MIL. R. EVID. 507(e)(3).

<sup>295</sup> 2012 MCM, *supra* note 4, MIL. R. EVID. 514(d) analysis to 2012 amendment, at A22-46 (noting “this relatively high standard of release is not intended to invite a fishing



advocate-victim privilege was established to prevent the re-victimization that occurred when defense attorneys called a victim witness's victim advocate as a witness in a criminal prosecution.<sup>296</sup> Like MRE 513, MRE 514 may become a nearly absolute privilege in the future. However, the relationship between a victim advocate and a victim is quite different than that of a psychotherapist and a patient. A victim advocate provides a victim of sexual assault or domestic abuse with support and assistance with future planning.<sup>297</sup> Because of that close tie to the military justice process, it makes sense that their relationship is less sacrosanct than that of a mental health professional and his or her patient.<sup>298</sup>

### 3. *Practitioners Should Treat the Informant and Victim-Advocate Privileges Differently Than the Psychotherapist-Patient Privilege*

Contrast the qualified identity of informant and victim advocate-victim privileges with the nearly absolute psychotherapist-patient privilege. It does make sense to treat the privileges similarly. Significantly, both MRE 507 and MRE 514 explicitly allow courts to breach them for constitutional reasons. As discussed, the President deleted a similar enumerated constitutional exception from MRE 513, indicating his intent to move the privilege into the same category as the clergy, attorney-client, and spousal privileges.

#### C. MRE 412 is Not a Privilege

Military Rule of Evidence 412 is a rule of relevance to exclude evidence of an alleged victim's other sexual behavior or sexual predisposition.<sup>299</sup> It is not a privilege but is worth mentioning because of the danger that practitioners may conflate the analyses. That MRE 513 is

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expedition for possible statements made by the victim, nor is it intended to be an exception that effectively renders the privilege meaningless").

<sup>296</sup> See *id.* at MIL. R. EVID. 514 analysis to 2012 amendment, at A22-46. According to a 2009 report by the Defense Task Force on Sexual Assault in the Military Services, "victims [also] did not believe they could communicate confidentially with medical and psychological support services provided by DoD." *Id.*

<sup>297</sup> See, e.g., U.S. DEP'T OF ARMY REG. 600-20, ARMY COMMAND POLICY ch. 8 (6 Nov. 2014) (explaining the victim advocates will explain reporting options, resources available, and assistance throughout medical, investigative, and judicial process). Unit victim advocates are specifically prohibited from counseling a victim. *Id.* at para. 8-5 (s)(6).

<sup>298</sup> But see Schimpf, *supra* note 114.

<sup>299</sup> JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 412(a).

often used by defense counsel to invade the privacy of sexual assault victims does not remove MRE 513 from Section V, “Privileges” and place it into Section IV, “Relevancy and its Limits” (where MRE 412 is located).<sup>300</sup>

Military Rule of Evidence 412 was created to recognize that a sexual assault victim’s past sexual behavior is often not relevant or has “minimal probative value with great potential for distraction.”<sup>301</sup> The rule contains an exception for “evidence the exclusion of which would violate the constitutional rights of the accused.”<sup>302</sup> The JSC’s analysis of MRE 412 is instructive on how the relevancy constitutional exception should be interpreted.<sup>303</sup> According to the JSC, MRE 412 recognizes “the fundamental right of the defense under the Fifth Amendment . . . to present relevant defense evidence by admitting evidence that is ‘constitutionally required to be admitted.’ Further, it is the Committee’s intent that the Rule not be interpreted as a rule of absolute privilege.”<sup>304</sup>

Clearly, MRE 513 is not the same type of evidentiary rule as MRE 412, as demonstrated by its text and the drafter’s analysis. Instead, as stated above, the JSC notes that the psychotherapist-patient privilege is “similar to the clergy-penitent privilege.”<sup>305</sup> Comparison to other military rules of privilege and evidence buttress what is apparent by the President and Congress’s actions—that courts should only breach the psychotherapist-patient privilege for the seven enumerated reasons. Notably, MRE 513 and its analysis lack any statement that the list of exceptions is non-exhaustive.<sup>306</sup> Supreme Court and military case law support this nearly absolute interpretation because of the importance of the privacy interest. Trial judges, therefore, should infrequently have to conduct an *in camera* review, but when they do, the requirements are explicitly stated.<sup>307</sup>

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<sup>300</sup> See 2012 MCM, *supra* note 4, pt. III, sec. IV, V.

<sup>301</sup> Although not binding, the analysis of the military rules “presents the intent of the drafting committee.” *Id.* MIL. R. EVID. 412 analysis, at A22-36.

<sup>302</sup> JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 412(b)(1)(C); *accord* MCM, *supra* note 4, MIL. R. EVID. 513(d)(8) (enumerating an exception “when admission or disclosure of a communication is constitutionally required”).

<sup>303</sup> 2012 MCM, *supra* note 4, app. 22, sec. I, at A22-1.

<sup>304</sup> *Id.* MIL. R. EVID. 412 analysis, at A22-36; *see also* United States v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011).

<sup>305</sup> 2012 MCM, *supra* note 4, MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45.

<sup>306</sup> See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513; 2012 MCM, *supra* note 4, MIL. R. EVID. 513 analysis, at A22-45-46.

<sup>307</sup> See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(e).

## V. *In Camera* Review

Courts are only allowed to breach the privilege if they make a finding by a “preponderance of the evidence” that there is a “reasonable likelihood” that an *in camera* review of the information will reveal non-cumulative evidence that meets an enumerated exception.<sup>308</sup> Some practitioners have asserted that the *in camera* review procedure reinforces that a low threshold exists for piercing the privilege.<sup>309</sup> However, all potential evidence is subject to an *in camera* review.<sup>310</sup> Thus, having a particularized *in camera* procedure in the rule indicates additional care and consideration for the protected information beyond the standard procedure.<sup>311</sup>

*United States v. Klemick*, which served as a basis for the *in camera* review procedures codified in MRE 513, supports this idea by laying out specific threshold requirements to review information privileged under MRE 513 rather than simply citing the relevant Rule for Courts-Martial.<sup>312</sup> Those requirements were incorporated and expanded by the President in the latest revisions to MRE 513.<sup>313</sup> Arguably, the requirements set by the President highlight the high standard of care due to the exceedingly sensitive information and the fact that the information is likely going to be unknown to all parties before judicial review.

### A. *United States v. Klemick*

As mentioned above, before the current MRE 513, when a party raised the possibility that an exception to a privilege applied, some courts looked to *United States v. Klemick* to determine if they should conduct an *in camera* review.<sup>314</sup> *Klemick* involved a government request to breach the

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<sup>308</sup> *Id.* MIL. R. EVID. 513(e)(3).

<sup>309</sup> See Smith, *supra* note 28, at 13 (observing that some could interpret the *in camera* review mechanism as making the privilege qualified); Schimpf, *supra* note 114, at 173 (asserting that MRE 513’s *in camera* review provision makes it “a second-tier privilege”).

<sup>310</sup> See 2012 MCM, *supra* note 4, R.C.M. 703(f)(4)(C); *United States v. Zolin*, 491 U.S. 554, 568-69 (1989); *United States v. Romano*, 46 M.J. 269, 275 (C.A.A.F. 1997).

<sup>311</sup> Numerous privileges have particularized *in camera* rules. See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 505; *id.* MIL. R. EVID. 506; *id.* MIL. R. EVID. 507; *id.* MIL. R. EVID. 513; *id.* MIL. R. EVID. 514.

<sup>312</sup> See 2012 MCM, *supra* note 4, R.C.M. 703(f)(4)(C).

<sup>313</sup> See *United States v. Klemick*, 65 M.J. 576 (N-M. Ct. Crim. App. 2006).

<sup>314</sup> See *Klemick*, 65 M.J. at 576. The CAAF cited *Klemick* in *L.R.M. v. Kastenber*, 72 M.J. 364 (C.A.A.F. 2013).

psychotherapist-patient privilege of an accused's spouse using the child abuse exception.<sup>315</sup> Before requesting the privileged records, the government unsuccessfully attempted to interview the accused's spouse.<sup>316</sup> The trial judge released the records that fell under the child abuse exception, as well as records that related to the witness's potential bias.<sup>317</sup>

The appellant contended that the judge erred in reviewing and ultimately releasing a portion of his wife's records to the government pursuant to this exception because the government failed to make the required "threshold showing."<sup>318</sup> Since there was a dispute as to whether the requested records contained admissible information pursuant to the exception, the Court looked to MRE 513(e).<sup>319</sup> As discussed, MRE 513 was silent as to whether there was any threshold requirement.<sup>320</sup> The Navy-Marine Corps Court of Criminal Appeals (NMCCA), therefore, looked to similar state psychotherapist-patient privilege rules.<sup>321</sup> The court established the following three-part standard:

(1) [D]id the moving party set forth a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to Mil. R. Evid. 513; (2) is the information sought merely cumulative of other information available; and (3) did the moving party make reasonable efforts to obtain the same or substantially similar information through non-privileged sources?<sup>322</sup>

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<sup>315</sup> JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(d)(2) (There is no privilege under this rule "when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse.").

<sup>316</sup> *Klemick*, 65 M.J. at 579.

<sup>317</sup> *Id.* at 578-79.

<sup>318</sup> *Id.* at 579.

<sup>319</sup> *Id.*

<sup>320</sup> Compare MCM, *supra* note 4, MIL. R. EVID. 513(e) (containing no guidance on when to conduct an MRE 513 *in camera* review beyond when production or admission of material is "in dispute") with JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(e)(3) (containing a four-pronged requirement that a proponent must meet by the preponderance of the evidence for an MRE 513 *in camera* review).

<sup>321</sup> See *Klemick*, 65 M.J. at 579 ("using a standard similar to that of the Wisconsin Supreme Court in [*Wisconsin v. Green*], 646 N.W.2d 298 (Wis. 2002)]").

<sup>322</sup> *Id.* at 580.

The court stated that the standard was “not high, because we know that the moving party will often be unable to determine the specific information contained in a psychotherapist’s records.”<sup>323</sup> The NMCCA found that the otherwise privileged records “could reasonably be expected” to contain the information alleged pursuant to the child abuse exception, that the information was not cumulative, and that the government could not get the information elsewhere because the spouse would not speak to the government.<sup>324</sup> The trial court then ordered and conducted the *in camera* review.<sup>325</sup>

The standard laid out in *Klemick* in 2006 was apparently used in establishing the current MRE 513(e).<sup>326</sup> In the EO, the President used the three factors articulated in *Klemick* and added the standard (which was implicit in *Klemick*) “that the requested information meets one of the enumerated exceptions under subsection (d) of this rule.”<sup>327</sup> The 2015 amendment to the rule also required that “the military judge must find by a preponderance of the evidence that the moving party showed [all four factors].”<sup>328</sup> Arguably, this preponderance of the evidence requirement increases the threshold showing from *Klemick* or at least solidifies a middle ground threshold that accounts for the fact that the neither party will likely have seen the alleged evidence and the important privacy interests at stake. If *Klemick* were decided under the 2015 MRE 513, thus, the government may not have met the “reasonable likelihood” standard “by a preponderance of the evidence.”<sup>329</sup>

The NMCCA did not make a finding on whether the apparently unrequested information regarding the victim’s bias should have been disclosed.<sup>330</sup> The current rule requires that the military judge only disclose “the specific records or communications, or portions of such records or communications that meet the requirements for one of the enumerated exceptions to the privilege . . . and are included in the stated purpose for

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<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 581.

<sup>326</sup> See JUDICIAL PROCEEDINGS PANEL, INITIAL REPORT 117 (Feb. 2015).

<sup>327</sup> Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,820 (June 22, 2015); JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(e)(3)(D).

<sup>328</sup> Exec. Order No. 13,696, 80 Fed. Reg. at 35,819; JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(e)(3).

<sup>329</sup> Exec. Order No. 13,696, 80 Fed. Reg. at 35,819-20; JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(e)(3)(A), (e)(3).

<sup>330</sup> See *Klemick*, 65 M.J. at 789-79.

which the records or communications are sought.”<sup>331</sup> When conducting *in camera* reviews, therefore, the military judge must maintain a type of fiction and not disclose potentially relevant evidence that does not fall under an exception and does not meet the stated purpose for the request.

In addition, the NMCCA mentioned that the government requested a deposition of the witness because of her apparent unavailability but does not discuss the outcome of that request.<sup>332</sup> Since the ability to conduct a deposition may have still been available and the ability to cross the witness at trial was still available, the government may not have actually met the standard required for the military judge to review the information *in camera*.<sup>333</sup> Breaching the privilege should be a rare occurrence and will most likely result from accidental waivers or child exploitation exceptions, and practitioners need to ensure that they are strictly applying the required standard.

#### B. Military Judges Should Apply the *In Camera* Review Procedure as Written

Litigation regarding the new MRE 513 is inevitable, but the privilege seems to effectively enumerate the standard to review privileged psychotherapist information based on Supreme Court case law, military necessity, and balancing the involved interests. Military justice practitioners, nonetheless, have attempted to define and redefine the types of accused interests that should necessitate *in camera* reviews.<sup>334</sup> The categories, however, are overbroad, redundant to the enumerated exceptions, do not usefully define the interests at stake, and defy executive and legislative intent. Rules of evidence are presumed constitutional,<sup>335</sup>

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<sup>331</sup> JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(e)(4).

<sup>332</sup> *Klemick*, 65 M.J. at 578 n.2.

<sup>333</sup> See JSC, UPDATED MRES, *supra* note 3, MIL. R. EVID. 513(e)(3)(C)-(D) (requiring “that the information sought is not merely cumulative of other information available” and “that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources”).

<sup>334</sup> See Smith, *supra* note 28, at 14 (enumerating the first three Fishman categories); Fishman, *supra* note 155, at 41 (including the following categories, “Recantation or Other Contradictory Conduct[;] . . . Evidence of Behavioral, Mental, or Emotional Difficulties[;] . . . Complainant’s ability to Perceive, Remember, and Relate Events . . . [and] Other Situations Involving Rape and Child Abuse Complaints.”).

<sup>335</sup> See *DB v. Lippert*, No. 20150769, 2016 WL 381436, at \*9 (A. Ct. Crim. App. Feb. 1, 2015) (“The presumption is that a rule of evidence is constitutional unless lack of

and as discussed, a nearly absolute psychotherapist-patient privilege is not inconsistent with the Constitution.

In addition, reading non-enumerated exceptions into MRE 513 is not allowed by either Supreme Court precedent or the MREs. It would require the judges to conduct constitutional interest balancing to pierce the privilege. Enumerated exceptions cover the examples that practitioners give of when they believe the psychotherapist-patient privilege should be pierced. For example, “if the accused demonstrates that a victim is unable to distinguish fantasy from reality,”<sup>336</sup> there must be other evidence available to support the argument. Otherwise, there likely would not be enough evidence to satisfy the standard in MRE 513(e)(3). This evidence could be obtained from, for example, medical records, testimony of individuals who have interacted with the witness, or cross-examination. If necessary, the defense could even use its expert to testify about the victim and the characteristics displayed on the stand during cross in relation to a diagnosis. Finally, if this is truly a concern, in rare cases, perhaps an RCM 706 procedure should be instituted for victims.<sup>337</sup>

One article posits that military courts can balance all interests involved in MRE 513 if military judges require a victim to waive his or her privilege upon a determination that a defendant’s constitutional rights indicate an *in camera* review is necessary.<sup>338</sup> While this puts some power in the hands of the victim,<sup>339</sup> the procedure is not enumerated under MRE 513.<sup>340</sup> The current iteration of the privilege does not require a victim to waive his or her privilege before the judge can conduct an *in camera* review. This may actually put a victim in a worse position, because once the privilege is waived, the judge is not obliged to follow the procedures outlined in MRE 513(e). Also, suppressing victim-witness testimony or abating proceedings does little to enhance victim rights and is counter to society’s interest in justice. Reducing sexual assault prosecutions runs counter to

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constitutionality is clearly and unmistakably shown.” (quoting *United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F. 2000)).

<sup>336</sup> Smith, *supra* note 28, at 13.

<sup>337</sup> See 2012 MCM, *supra* note 4, R.C.M. 706.

<sup>338</sup> Smith, *supra* note 28, at 14-15.

<sup>339</sup> See *id.*

<sup>340</sup> Cf. JSC, UPDATED MREs, *supra* note 3, MIL. R. EVID. 507(e)(3) (enumerating procedure if the government does not want to reveal the identity of an informant after a military judge determines it is required).

leadership's goal of eliminating sexual assault.<sup>341</sup> To implement the proposal, the President would have to issue a new executive order.

## VI. Conclusion

Over the years, the Supreme Court has rejected numerous other privileges<sup>342</sup> but determined that not only is the psychotherapist-patient privilege necessary, it is nearly absolute.<sup>343</sup> Similarly, the MREs only recognize a limited number of privileges.<sup>344</sup> The Supreme Court does not prohibit a nearly absolute interpretation of the privilege; to the contrary, case law supports an absolute psychotherapist-patient privilege.<sup>345</sup> Relevant Supreme Court case law also supports deference to a privilege's drafter<sup>346</sup> and great deference to the President in matters involving the military.<sup>347</sup> Both the President and Congress support the current version of MRE 513,<sup>348</sup> as do national policy goals.<sup>349</sup> The exceptions have been spelled out to account for not only military readiness and national security, but also the rights of the accused, the witness, and society.

Given the necessary deference to Congress and the President,<sup>350</sup> military courts must interpret MRE 513 as nearly absolute. An MRE is presumed valid "unless lack of constitutionality is clearly and unmistakably shown."<sup>351</sup> Furthermore, the results of a nearly absolute interpretation are not arbitrary or absurd, and the interests protected by the

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<sup>341</sup> See DOD SAPR REPORT, *supra* note 15.

<sup>342</sup> *Jaffee v. Redmond*, 518 U.S. 1, 19 (1996) (Scalia, J., dissenting) (listing some rejected privileges as privileges prohibiting disclosure of "academic peer review materials" and "legislative acts by member of state legislature" (citations and internal quotation marks omitted)).

<sup>343</sup> *Jaffee*, 518 U.S. at 13.

<sup>344</sup> See 2012 MCM, *supra* note 4, sec. V; see also *id.* MIL. R. EVID. 513 analysis to 1999 amendment, at A22-45 (rejecting a physician-patient privilege).

<sup>345</sup> See *Jaffee*, 518 U.S. at 13.

<sup>346</sup> See *United States v. Scheffer*, 523 U.S. 303, 308 (1998); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Davis v. Alaska*, 415 U.S. 308, 320 (1974).

<sup>347</sup> See *Loving v. United States*, 517 U.S. 748, 772 (1996).

<sup>348</sup> See Carl Levin & Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014); Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,819-20 (June 22, 2015).

<sup>349</sup> See, e.g., DOD SAPR REPORT, *supra* note 15.

<sup>350</sup> See *United States v. Custis*, 65 M.J. 366, 369 (C.A.A.F. 2007).

<sup>351</sup> *DB v. Lippert*, No. 20150769, 2016 WL 381436 (A. Ct. Crim. App. Feb. 1, 2015) (quoting *United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F. 2000)).



privilege are weighty.<sup>352</sup> The privilege balances multiple interests and ensures the introduction of reliable evidence while avoiding excessive litigation on collateral matters. A clearly defined privilege will increase the reliability and efficiency of the military justice system.

There is no reason to treat the psychotherapist-patient privilege differently than similar privileges.<sup>353</sup> The drafter's analysis and the recent changes in the rule indicate that the psychotherapist-patient privilege should be treated like the clergy privilege and the other nearly absolute privileges and only pierced under the thoughtfully defined exceptions enumerated in the privilege. Nonetheless, military justice practitioners seem to forget that as a privilege, MRE 513 purposefully precludes access to potentially relevant evidence based on an exceptional societal interest.<sup>354</sup> Perhaps the mistreatment of the psychotherapist-patient privilege is purposeful, perhaps it is due to inherent biases against sexual assault victims and psychotherapy, or perhaps it is due to the military's previously used relevancy analysis for psychotherapy evidence. Regardless, the need to rely on the psychotherapist-patient privilege is particularly important in a time when the military is trying to eliminate sexual assault by, among other things, encouraging victims to report the crime.

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<sup>352</sup> See *United States v. Scheffer*, 523 U.S. 303, 309 (1998); *Custis*, 65 M.J. at 370.

<sup>353</sup> See discussion *supra* Part IV.

<sup>354</sup> See *United States v. Trammel*, 445 U.S. 40, 50 (1980) ("Testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'" (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950) (one set of internal quotation marks omitted))).

Appendix A. Proposed FRE 504<sup>1</sup>**Rule 504. PSYCHOTHERAPIST–PATIENT PRIVILEGE****(a) Definitions.**

(1) A “patient” is a person who consults or is examined or interviewed by a psychotherapist.

(2) A “psychotherapist” is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is “confidential” if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

**(b) General rule of privilege.** A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

**(c) Who may claim the privilege.** The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

**(d) Exceptions.**

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<sup>1</sup> Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 240-41 (July 1, 1973).

(1) *Proceedings for hospitalization.* There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) *Examination by order of judge.* If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) *Condition an element of claim or defense.* There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

Appendix B. Exec. Order 13140 (1999 MRE 513)<sup>356</sup>

## Rule 513. Psychotherapist-patient privilege

(a) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) Definitions. As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

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<sup>356</sup> Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,116-18 (Oct. 12, 1999) (promulgating MRE 513).

(c) Who may claim the privilege. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf.

The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is constitutionally required.

(e) Procedure to determine admissibility of patient records or communications.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise.”

Appendix C. 2013 MRE 513<sup>357</sup>

## Rule 513. Psychotherapist-patient privilege

(a) *General Rule.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions.* As used in this rule:

(1) "Patient" means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) "Psychotherapist" means a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any State, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) "Assistant to a psychotherapist" means a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" means testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

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<sup>357</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 513 (Supp. 2014).



- (d) *Exceptions.* There is no privilege under this rule:
- (1) when the patient is dead;
  - (2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;
  - (3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;
  - (4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;
  - (5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;
  - (6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;
  - (7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or
  - (8) when admission or disclosure of a communication is constitutionally required.
- (e) *Procedure to Determine Admissibility of Patient Records or Communications.*
- (1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party must:
    - (A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and
    - (B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subdivision (e)(2).
  - (2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a

hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings may not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members.

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1103A and must remain under seal unless the military judge or an appellate court orders otherwise.

Appendix D. 2015 NDAA § 537<sup>358</sup>

## SEC. 537. MODIFICATION OF RULE 513 OF THE MILITARY RULES OF EVIDENCE, RELATING TO THE PRIVILEGE AGAINST DISCLOSURE OF COMMUNICATIONS BETWEEN PSYCHOTHERAPISTS AND PATIENTS.

Not later than 180 days after the date of the enactment of this Act, Rule 513 of the Military Rules of Evidence shall be modified as follows:

- (1) To include communications with other licensed mental health professionals within the communications covered by the privilege.
- (2) To strike the current exception to the privilege contained in subparagraph (d)(8) of Rule 513.
- (3) To require a party seeking production or admission of records or communications protected by the privilege—
  - (A) to show a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;
  - (B) to demonstrate by a preponderance of the evidence that the requested information meets one of the enumerated exceptions to the privilege;
  - (C) to show that the information sought is not merely cumulative of other information available; and
  - (D) to show that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.
- (4) To authorize the military judge to conduct a review in camera of records or communications only when—
  - (A) the moving party has met its burden as established pursuant to paragraph (3); and
  - (B) an examination of the information is necessary to rule on the production or admissibility of protected records or communications.
- (5) To require that any production or disclosure permitted by the military judge be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the

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<sup>358</sup> Carl Levin & Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014).

privilege and are included in the stated purpose for which the such records or communications are sought.

Appendix E. Exec. Order 13696 (2015 MRE 513)<sup>359</sup>

(c) Mil. R. Evid. 513(b)(2) is amended to read as follows:

"(2) "Psychotherapist" means a psychiatrist, clinical psychologist, clinical social worker, or other mental health professional who is licensed in any State, territory, possession, the District of Columbia, or Puerto Rico to perform professional services as such, or who holds credentials to provide such services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials."

(d) Mil. R. Evid. 513(d)(8) is deleted.

(e) Mil. R. Evid. 513(e)(2) is amended to read as follows:

"(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before, a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members."

(f) Mil. R. Evid. 513(e)(3) is amended to read as follows:

"(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party showed:

(A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources."

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<sup>359</sup> Exec. Order No. 13,696, 80 Fed. Reg. 35,783, 35,819-20 (June 22, 2015).

(g) A new Mil. R. Evid. 513(e)(4) is inserted immediately after Mil. R. Evid. 513(e)(3) and reads as follows:

"(4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subsection (d) of this Rule and are included in the stated purpose for which the records or communications are sought under subsection (e)(1)(A) of this Rule."

(h) Mil. R. Evid. 513(e)(4) is renumbered as Mil. R. Evid. 513(e)(5).

(i) Mil. R. Evid. 513(e)(5) is renumbered as Mil. R. Evid. 513(e)(6).

Appendix F. Current MRE 513<sup>360</sup>

## Rule 513. Psychotherapist—patient privilege

(a) *General Rule.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions.* As used in this rule:

(1) "Patient" means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) "Psychotherapist" means a psychiatrist, clinical psychologist, clinical social worker, or other mental health professional who is licensed in any State, territory, possession, the District of Columbia, or Puerto Rico to perform professional services as such, or who holds credentials to provide such services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) "Assistant to a psychotherapist" means a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" means testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant,

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<sup>360</sup> JOINT SERV. COMM. ON MILITARY JUSTICE, PART III—MILITARY RULES OF EVIDENCE UPDATED AS OF JUNE 2016, MIL. R. EVID. 513 (2016), <http://jsc.defense.gov/Portals/99/Documents/MREsUpdatedJune2016.pdf?ver=2016-07-05-111944-123>.

guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(e) *Procedure to Determine Admissibility of Patient Records or Communications.*

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party must:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subdivision (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call



witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial comprised of a military judge and members, the military judge must conduct the hearing outside the presence of the members.

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party showed:

(A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

(4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subsection (d) of this Rule and are included in the stated purpose for which the records or communications are sought under subsection (e)(1)(A) of this Rule.

(5) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(6) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1103A and must remain under seal unless the military judge or an appellate court orders otherwise.