Applying the New Military Rule of Evidence 513: How Adopting Wisconsin's Interpretation of the Psychotherapist Privilege Protects Victims and Improves Military Justice

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Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.[1]

I. Introduction

You are a special victim counsel (SVC) representing sexual assault survivors.[2] You zealously represent their interests, explain to them the nuances of the military justice process, and counsel them on a wide range of issues. Despite being competent in navigating court-martial procedures, when a client shows emotional suffering resulting from sexual assault trauma, you recommend they seek professional psychiatric help. After all, a clinical psychiatrist is far better prepared than an attorney to provide such treatment.

It seemed obvious that referring the client to counseling was in her best interest. However, a military judge orders production of the counseling records for an in camera review, leaving the client feeling exposed and betrayed. You advised the client to seek treatment to combat emotional suffering from the sexual assault; all counseling you provide is privileged and the court would not order production of statements covered by the lawyer-client privilege.[3] Now the client wants an explanation why—against her wishes—the judge, and potentially government and defense counsel, will review the client's treatment discussions with a psychiatrist. Why should the client's privacy suffer further because she sought treatment through the best available means? Would a better interpretation of the psychotherapist privilege encourage victims to seek treatment while still protecting the accused's right to a fair trial?

From inception, the military psychotherapist privilege, Military Rule of Evidence (MRE) 513, insufficiently safeguarded privileged communications. As discussed in Part II, when the Supreme Court established a federal psychotherapist privilege through common law, it ruled that psychiatric treatment improves public mental health and requires an environment of "confidence and trust" to be effective.[4] Accordingly, the Court declined to make the privilege "contingent upon a trial judge's . . . evaluation."[5] In contrast, the subsequent military psychotherapist privilege permitted in camera review if a judge deemed it necessary to rule on production motions.[6] The military judiciary routinely reviewed privileged communication,[7] degrading the privilege's effectiveness.

Congress and the President recently strengthened MRE 513's protections through the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act (NDAA) for Fiscal Year 2015.[8] The changes, analyzed in Part III, include removal of a frequently used "constitutionally required" exception to the privilege and establish more stringent limitations on in camera reviews.[9] Yet a statute or executive order cannot supersede the Constitution,[10] and Part III(A) discusses how courts differ on when the Constitution requires privilege exceptions.[11] Amidst this uncertainty, the military judiciary should select

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[1] Jaffee v. Redmond, 518 U.S. 1, 10 (1996).

[2] The term "survivor" is commonly used within the Department of Defense to describe victims of a sexual offense. *See*, e.g., U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FOR FISCAL YEAR 2014 at 5 (2014).

[3] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 502 (2012) [hereinafter MCM] (lawyer-client privilege containing no provision for judicial in camera review of protected communication).

[4] *Jaffee*, 518 U.S. at 10.

[5] *Id.* at 17.

[6] MCM, *supra* note 3, MIL. R. EVID. 513(e)(3).

[7] *See infra* notes 40–43.

[8] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 3369 (2014) [hereinafter 2015 NDAA].

[9] *Id*.

[10] *See Ex parte* Siebold, 100 U.S. 371, 376 (1879) ("An unconstitutional law is void, and is as no law.").

[11] *Compare* United States v. Shrader, 716 F. Supp. 2d 464, 472–73 (S.D. W. Va. 2010) (finding a defendant's constitutional rights did not require an in camera review of psychotherapist records) *with* Bassine v. Hill, 450 F. Supp. 2d 1182, 1185–86 (D. Or. 2006) (determining that the due process and confrontation clauses mandated in camera review of privileged mental health records).

the best of several interpretations of the new MRE 513, discussed in Part III(B), to meaningfully strengthen the psychotherapist privilege.

The military judiciary should adopt Wisconsin's judicial interpretation of the psychotherapist privilege and, when necessary, bar a patient's testimony unless the patient waives the privilege for an in camera review. Part III(C) explains that judges should only use this process under exceptional circumstances, such as when there is evidence of a patient's "[r]ecantation or [o]ther [c]ontradictory [c]onduct . . . [b]ehavioral, [m]ental, or [e]motional [d]ifficulties . . . [or] [a]bility to [p]erceive, [r]emember, and [r]elate [e]vents."[12] This interpretation recognizes that an accused's rights might require a court to review privileged records in camera yet still preserves the trust necessary for a successful psychotherapist-patient relationship. The justification for a more protective psychotherapist privilege comes not only from the 2015 NDAA and persuasive case law, but also from the source of the federal privilege—the Supreme Court's decision in *Jaffee v. Redmond*.[13]

II. The Origins of MRE 513

Analysis of MRE 513 must begin with the federal psychotherapist privilege creation. Military privileges are generally established in MREs set forth by executive order.[14] In contrast, federal rule of evidence privileges are not statutorily enumerated but created through common law.[15] A framework of federal courts recognizing privileges case-by-case inevitably leads to circuit splits regarding privilege recognition, requiring resolution from the Supreme Court.[16]

A. The Federal Psychotherapist Privilege

In 1996, the Supreme Court recognized a federal psychotherapist privilege in *Jaffee v. Redmond*.[17] The bulk of the Court's reasoning relied not on precedent of the privilege's recognition in federal and state jurisdictions but on the underlying policy justification for establishing a psychotherapist privilege.[18] The Court rarely recognizes new privileges which "are in derogation of the search for truth."[19] While acknowledging that the psychotherapist privilege impeded truth-seeking, the Court determined that the privilege "promotes sufficiently important interests to outweigh the need for probative evidence . . . ."[20] The psychotherapist privilege serves the public good by rectifying citizens' mental suffering.[21] Additionally, the therapy's effectiveness depends upon a trusting environment.[22]

Psychotherapy treatment "depends upon an atmosphere of confidence and trust in which the patient is willing to make frank and complete disclosures of facts, emotions, memories and fears."[23] The Court compared the psychotherapist privilege to attorney and spousal privileges[24] and determined that the "mere possibility of disclosure" impeded the communication necessary for successful treatment.[25] Accordingly, the Court refused to make the privilege subject to trial judges' weighing the patient's interest with the evidentiary interest, stating such a balancing test "would eviscerate the effectiveness of the privilege."[26]

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[12] Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 OR. L. REV 1, 41–45 (2007). Fishman categorizes these as the areas where courts give "serious consideration" to discovery requests for rape and child sexual assault victim mental health records. *Id.* at 41.

[13] Jaffee v. Redmond, 518 U.S. 1 (1996).

[14] UCMJ art. 36(a) (2012). In addition to privileges established in Military Rule of Evidence (MREs) or the Manual for Courts-Martial (MCM), military courts recognize privileges established in the U.S. Constitution as applied to servicemembers, federal statute as applied to courts-martial, and privileges established through federal criminal case law if not inconsistent with the Uniform Code of Military Justice (UCMJ), MREs, or the MCM. MCM, *supra* note 3, MIL. R. EVID. 501(a).

[15] FED. R. EVID. 501. By relying on common law privileges, Congress rejected a proposal from the Supreme Court and the Judicial Conference of the United States recommending adoption of nine testimonial privileges. Jaffee v. Redmond, 518 U.S. 1, 8 n.7 (1996). The recommended privileges included a psychotherapist-patient privilege. *Id.*

[16] *Jaffee*, 518 U.S. at 7.

[17] *Id.* at 9–10. In doing so, the Court resolved a conflict among the federal circuits, some of which recognized the privilege and some of which did not. *Id.* at 7. The Court noted that every state and the District of Columbia recognized some form of a psychotherapist privilege, yet it extended the privilege beyond psychotherapists to include licensed social workers conducting psychotherapy as well. *Id.* at 12, 15.

[18] *Id.* at 10–11.

[19] United States v. Nixon, 418 U.S. 683, 710 (1974).

[20] *Jaffee*, 518 U.S. at 9–10 (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)). The Court determined that recognizing the privilege would result in small evidentiary loss, reasoning that patients would divulge less in an unprivileged setting. *Id.* at 11–12.

[21] *Id.* at 11.

[22] *Id.* at 10. *See also* JAMES F. ALEXANDER ET AL., HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE 181 (Allen E. Bergin & Sol L. Garfield eds., 4th ed. 1994) ("It should come as no surprise that helping people deal with depression, inadequacy, anxiety, and inner conflicts, as well as helping them form viable relationships and meaningful directions for their lives, can be greatly facilitated in a therapeutic relationship that is characterized by trust, warmth, acceptance, and human wisdom.").

[23] *Jaffee*, 518 U.S. at 10. The Court contrasted psychotherapists with physicians, who could successfully treat a patient based solely on a physical examination and objective information from the patient. *Id. See also* LEWIS R. WOLBERG, THE TECHNIQUE OF PSYCHOTHERAPY 630 (4th ed. 1988) (encouraging therapists to assuage patient fears by explaining that what the patient divulges, and their therapy records, are "completely confidential and will, under no circumstances, be divulged").

[24] *Jaffee*, 518 U.S. at 10.

[25] *Id.*

[26] *Id.* at 17.

Unfortunately, MRE 513, crafted in the wake of *Jaffee*, incorporated such a balancing test.[27]

B. The Pre-2015 Military Psychotherapist Privilege

President Clinton signed into law the military psychotherapist privilege as MRE 513 in 1999.[28] The rule was created to "clarif[y] military law in light of [*Jaffee*]" and to follow federal evidentiary rules "when practicable."[29]

Military Rule of Evidence 513 was purportedly "based on the social benefit of confidential counseling recognized by *Jaffee*,"[30] yet it included the judicial balancing test *Jaffee* found destructive to the privilege.[31] The rule contained eight enumerated exceptions to the privilege,[32] including "when admission or disclosure of a communication is constitutionally required."[33] Disputes over production or admission of mental health records require military judges to conduct a hearing on the proponent's motion.[34] If necessary to rule on the motion, the military judge "may" review the records in camera.[35] Although the rule's analysis describes the psychotherapist privilege as "similar to the clergy-penitent privilege,"[36] the clergy privilege is truly absolute, containing no exception, no process for production, and no process for in camera review.[37] Military Rule of Evidence 513's weaknesses did not lie dormant; the military judiciary frequently used the rule's in camera balancing test.[38]

Military case law demonstrates that an in camera review of a victim's mental health records is almost certain once defense requests the records.[39] In some cases, after an in camera review, the court provides parties with portions of the mental health record for use during the merits portion of the trial.[40] Sometimes the court conducts an in camera

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[27] MCM, *supra* note 3, MIL. R. EVID. 513(e)(3).

[28] Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999).

[29] MCM, *supra* note 3, MIL. R. EVID. 513 analysis, at A22–45. Courts-martial may recognize privileges created through federal criminal case law if not inconsistent with the UCMJ, MREs, or MCM. *Id.*, MIL. R. EVID. 501(a)(5). However, the United States Court of Appeals for the Armed Forces (CAAF) determined that the President occupied the field with MRE 501(d), which limits privilege claims for communication to physicians, thus preventing recognition of a common law military psychotherapist privilege. United States v. Rodriguez, 54 M.J. 156, 160 (C.A.A.F. 2000). The Court of Appeals for the Armed Forces ruled on *Rodriguez* after President Clinton signed MRE 513 into law; however, the case considered whether a military psychotherapist privilege existed in any form during the post-*Jaffee*, pre-MRE 513 time period, and concluded that it did not. *Id.* at 161.

[30] MCM, *supra* note 3, MIL. R. EVID. 513 analysis, at A22–45.

[31] *Compare Jaffee*, 518 U.S. at 17 (determining a balancing component would "eviscerate the effectiveness of the privilege") *with* MCM, *supra* note 3, MIL. R. EVID. 513(e)(3) (establishing that military judges "shall" conduct in camera reviews of purportedly privileged communication when necessary to rule on production motions). *See also Rodriguez*, 54 M.J. at 161 (contrasting the "full civilian" and "limited military" psychotherapist privileges).

[32] MCM, *supra* note 3, MIL. R. EVID. 513(d). Some exceptions, such as those to ensure the security of classified information, are justified by "separate concerns . . . to ensure military readiness and national security." *Id.*, MIL. R. EVID. 513 analysis, at A22–45. The exceptions are,

> (1) [W]hen 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 [Rule for Court-Martial] 706 or Mil. R. Evid. 302 . . . ; or (8) when admission or disclosure of a communication is constitutionally required.

MCM, supra note 3, at MIL. R. EVID. 513(d).

[33] MCM, *supra* note 3, at MIL. R. EVID. 513(d)(8).

[34] *Id.* at MIL. R. EVID. 513(e)(2).

[35] 2013 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,643, 78 Fed Reg. 29, 559 (May 15, 2013), MIL. R. EVID. 513(e)(3) [hereinafter 2013 Amendments to the MCM]. The rule's initial language encouraged in camera reviews even more by stating that the military judge "shall" review the communications in camera "if such examination is necessary" for the ruling. MCM, *supra* note 3, MIL. R. EVID. 513(e)(3). Military Rule of Evidence 513 analysis from the 2013 Amendments to the MCM states that the change was designed for stylistic reasons and to "expand the military judge's authority and discretion to conduct in camera reviews." 2013 Amendments to the MCM, MIL. R. EVID. 513 analysis, at A22–51 (2013).

[36] MCM, *supra* note 3, MIL. R. EVID. 513 analysis, at A22–45.

[37] MCM, *supra* note 3, MIL. R. EVID. 503.

[38] *See infra* notes 40–43.

[39] *See id*. A notable exception to the trend of universal in camera review is the Navy-Marine Corps Court of Criminal Appeals' decision in *United States v. Klemick*. United States v. Klemick, 65 M.J. 576 (N-M. Ct. Crim. App. 2006). The court looked to state appellate courts for persuasive authority in establishing an evidentiary threshold for in camera reviews and applied Wisconsin's standard. *Id.* at 579–80 (citing State v. Green, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298). However, *Klemick* is distinguishable as involving the accused's spouse's psychotherapist records under the child abuse exception. *Id.* at 578. Even purporting to use the Wisconsin standard, the court found an in camera review and release of records appropriate. *Id.* at 581.

[40] *See* United States v. Mora, No. 201200335, 2012 WL 7807212 (N-M. Ct. Crim. App. Mar. 28, 2013) (finding in favor of defense's motion to compel discovery of victim's mental health records); United States v. Piette, No. 38101, 2014 CCA LEXIS 568 (A.F. Ct. Crim. App. Aug. 6, 2014) (ordering production of victim's counseling records for defense and government after an in camera review); United States v. Cano, No. 20010086, 2004 CCA LEXIS 331 (A. Ct. Crim. App. Feb. 4, 2004) (approving a military judge's rejection of a privilege claim for an eleven-year-old child's post-sexual assault counseling records); United States v. Burgh, No. 38207, 2014 CCA LEXIS 824 (A.F. Ct. Crim. App. Apr. 16, 2014) (ordering release of

review but only releases portions of the records for use during sentencing.[41] At other times, the court orders an in camera review but does not release the mental health records.[42] In camera reviews of mental health records are so ubiquitous that the government even sometimes requests them or fails to object to them on behalf of victims,[43] and judges order production for in camera review prior to the mandatory hearing.[44]

United States v. Cano shows the expansiveness of military courts' use of in camera reviews and the low hurdle for production.[45] In *Cano*, the U.S. Army Court of Criminal Appeals described a military judge's order to produce "everything . . . even remotely potentially helpful to the defense" from counseling records as a "fair trial standard."[46] Despite such a generous standard, the court ruled that the judge erred by producing too *few* of the counseling records.[47] It urged military judges to review such privileged materials "with an eye and mind-set of a defense counsel at the beginning of case preparation" in order to determine which portions to produce.[48] Whatever adjective suits communication protected by such a low production standard, it is not 'privileged.'

United States v. Harding[49] highlights the lengths to which some military judges will go to thwart a patient's intent and a therapist's effort to maintain the privilege. In that case, the prosecution issued a subpoena for the mental health records of a reported sexual assault victim.[50] The prosecution issued the subpoena in response to a discovery request even without an MRE 513(e) hearing, apparently choosing to not object to defense's request for the records or claim the privilege on the victim's behalf.[51] A civilian social worker declined to produce the sexual assault victim's counseling records because of the privileged nature of the records.[52] Despite a subsequent hearing on the matter, a reissue of the subpoena by the military judge, and a warrant of attachment authorizing U.S. Marshals to seize the records, the social worker persisted in refusing to produce the mental health records.[53] The military judge decided an in camera review was necessary to rule on the production request.[54] Determining there was no adequate substitute for the review, and lacking the records or means to obtain them, the judge abated proceedings on the underlying rape charge.[55] Although the alleged victim in this case maintained her privilege and proceedings were abated, most victims are unlikely to benefit from psychotherapists willing to violate subpoenas or U.S. Marshals unwilling to execute a warrant of attachment. Their privilege, then, is less secure.

The military psychotherapist privilege's poor track record of protecting patient privacy was a direct result of the rule's poor structure. Military Rule of Evidence 513 contained a "constitutionally required" exception to the privilege, with no guidance for the limits of that exception.[56]

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seventy-nine pages of a victim's mental health records to defense, though none contained communication forming the basis of their request).

[41] *See* United States v. Williams, No. 35066, 2004 CCA LEXIS 169 (A.F. Ct. Crim. App. July 28, 2004) (ordering production of communications involving impact of the offense after the military judge's review of the mental health records); United States v. Palmer, No. 38184, 2013 CCA LEXIS 1116 (A.F. Ct. Crim. App. Nov. 25, 2013) (allowing defense to use portions of the records to impeach the victim concerning impact of the rape); United States v. Hudgins, No. 38305, 2014 CCA LEXIS 227 (A.F. Ct. Crim. App. Apr. 3, 2014) (declining to produce mental health records for the merits portion of the trial, but provided portions to defense during sentencing after an expert testified about the victim's post-traumatic symptoms).

[42] *See* United States v. Nast, No. S31687, 2010 CCA LEXIS 190 (A.F. Ct. Crim. App. June 28, 2010) (denying defense's motion to order production of mental health records after an in camera review); United States v. Verdejo-Ruiz, No. 37957, 2014 CCA LEXIS 607 (A.F. Ct. Crim. App. Aug. 14, 2014) (denying production of victims mental health records for defense); United States v. Walker, No. 38237, 2014 CCA LEXIS 306 (A.F. Ct. Crim. App. May 15, 2014) (granting defense's motion to review every victims' mental health records, although the government failed to locate them prior to trial); United States v. Phillips, No. 36412, 2008 CCA LEXIS 113 (A.F. Ct. Crim. App. Mar. 19, 2008) (denying release of material information from victim's mental health records due to defense's failure to meet their burden).

[43] *See* United States v. Nixon, No. 37622, 2012 CCA LEXIS 438 (A.F. Ct. Crim. App. Nov. 14, 2012) (releasing portions of four victims mental health records to trial and defense counsel after conducting an in camera review of the records at prosecution's request); United States v. Wallace, No. 201100300, 2012 CCA LEXIS 109 (N-M. Ct. Crim. App. Mar. 30, 2012) (requesting in camera review of a sexual assault victim's mental health records went unopposed by the government).

[44] *See* CC v. Lippert, No. 20140779, slip op. at 2 (A. Ct. Crim. App. Oct. 16, 2014) (instructing a military judge to "comply with Military Rule of Evidence 513(e)(2)" after the judge ordered production of a reported victim's mental health records for an in camera review without conducting the required hearing).

[45] *Cano*, 2004 CCA LEXIS 331.

[46] *Id.* at *9.

[47] *Id.*

[48] *Id.*

[49] United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006).

[50] *Id.* at 65.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 66. Even though the U.S. Court of Appeals for the Tenth Circuit authorized the Marshalls to execute the warrant of attachment, they did not execute it. *Id.*

[54] *Id.*

[55] *Id.*

[56] MCM, *supra* note 3, MIL. R. EVID. 513(d)(8). Some observers consider this similar to MRE 412's constitutional exception. *See* Major Stacy Flippin, *Military Rule of Evidence (MRE) 513: A Shield to Protect Communications of Victims and Witnesses to Psychotherapists*, ARMY LAW., Sept. 2003, at 1, 11 (encouraging practitioners to use MRE 412's constitutionally required exception as a guideline for MRE 513's exception). However, the analysis is fundamentally different. Section IV MREs involve "Relevancy and its Limits" rather than the "Privileges" of Section V MREs. *Compare* MCM, *supra* note 3, pt. III Section IV ("Relevancy and its Limits") *with Id.* pt. III Section V ("Privileges"). As such, the MRE 412 cases determine when the Constitution guarantees an

The military judge "may" examine the privileged communications "if such examination is necessary."[57] This essentially compelled a prudent military judge wishing to protect the record to at least review the privileged communication in camera once a party requested production.[58] A patient and her therapist had no recourse to prevent judicial review of their communication unless they were willing to violate a subpoena.[59] Military Rule of Evidence 513 established the type of balancing test[60] *Jaffee* rejected as destructive to the privilege's purpose.[61] By the Supreme Court's standard, the pre-2015 MRE 513 was an "uncertain privilege . . . little better than no privilege at all."[62]

III. 2015 NDAA Changes to MRE 513

As a result of MRE 513's inadequate protections, Congress strengthened and broadened the privilege's protections by mandating changes to the rule through the 2015 NDAA.[63] First, the changes extend the privilege to include communication with "other licensed mental health professionals."[64] Second, the changes remove the "constitutionally required" privilege exception.[65] Third, production or disclosure of privileged communication ordered by military judges must be "narrowly tailored to only the specific records or communications . . . that meet the requirements for one of the enumerated exceptions to the privilege and are included in the stated purpose for which . . . such records or communications are sought."[66] Finally, the changes mandate an evidentiary burden for a party seeking an in camera review or admission of mental health records; the party must also prove the evidence falls under an enumerated exception.[67]

The Joint Service Committee drafted the new MRE 513 to incorporate these required changes; the rule now requires a military judge, prior to conducting an in camera review, to

> [F]ind by a preponderance of the evidence that the moving party: (A) showed 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 [MRE 513(d)]; (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.[68]

Solely based on its text, the new MRE 513 creates an essentially absolute privilege for victims' mental health records. The rule no longer contains a "constitutionally required" exception,[69] and it strictly limits review, production, and disclosure to only the enumerated exceptions.[70] None of the seven remaining exceptions plausibly apply to victims' mental health records, absent uncommon circumstances.[71] Therefore, facially, the new privilege creates an impenetrable wall to defense counsel seeking review of mental health records for impeachment evidence or inconsistent statements.

This does not settle whether there are additional, non-textual exceptions to the privilege. The "constitutionally required" exception was arguably superfluous to begin with,[72] rendering its removal meaningless. Even if the 2015 NDAA or MRE 513 purport to prevent disclosure or introduction of constitutionally required communication, they cannot do so.[73] Regardless of Congressional intent, the judiciary is independently charged with determining what evidence is constitutionally required for a fair trial.[74]

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accused the ability to present *known* evidence at trial. *See* United States v. Ellenbrock, 70 M.J. 314, 318–19 (C.A.A.F. 2011) (finding that MRE 412's constitutionally required exception affords an accused the opportunity for cross-examination of a witness's motive to lie using evidence which is "relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice" (citing United States v. Gaddis, 70 M.J. 248, 255 (C.A.A.F. 2011))). The psychotherapist privilege's "constitutionally required" exception requires a different determination: when does the Constitution require a trial judge to pierce an evidentiary privilege to search for *unknown* evidence? If defense can pierce the privilege by merely speculating that the communication might contain admissible evidence, the privilege offers hollow protection.

[57] 2013 Amendments to the MCM, *supra* note 35.

[58] *See supra* notes 46–48 and accompanying text.

[59] *See supra* notes 50–55 and accompanying text.

[60] MCM, *supra* note 3, MIL. R. EVID. 513(e).

[61] Jaffee v. Redmond, 518 U.S. 1, 17 (1996).

[62] *Id.* at 18 (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).

[63] 2015 NDAA, *supra* note 8, at 3369.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] Manual for Courts-Martial; Proposed Amendments, 80 Fed. Reg. 6057, 6059 (Feb. 4, 2015).

[69] *Id.*

[70] *Id.*

[71] *See* MCM, *supra* note 3, MIL. R. EVID. 513(d)(1)–(7).

[72] *See* United States v. Gaddis, 70 M.J. 248, 253 (C.A.A.F. 2011) (finding that an MRE may not "limit the introduction of evidence that is required to be admitted by the Constitution").

[73] *See supra* note 10 and accompanying text.

[74] *See* Marbury v. Madison, 5 U.S. 137, 177–79 (1803) (asserting that the judiciary is responsible for determining the applicable law and that the Constitution is superior to legislatively passed laws).

Before assessing the military judiciary's options when interpreting the new, more protective MRE 513, one must determine the constitutional limitations of evidentiary privileges. The analysis begins by addressing when, or if, the Constitution requires piercing the privilege.

A. When Does the Constitution Require Exceptions to a Psychotherapist Privilege?

A review of case law from the U.S. Supreme Court and federal courts provides more confusion than clarity regarding when the Constitution requires privilege piercing. Commentators note that determining privilege limitations requires an assessment of the requirements of the Due Process Clause of the Fifth Amendment and the Confrontation Clause of the Sixth Amendment.[75] The Due Process Clause guarantees procedures characterized by "that fundamental fairness essential to the very concept of justice."[76] A defendant's right under the Confrontation Clause of the Sixth Amendment serves the "main and essential purpose . . . to secure for the opponent the opportunity of cross-examination" of adverse witnesses.[77] Additionally, the Supreme Court recognized that, whether based on the Fifth or Sixth Amendment, a defendant has a constitutional right to present a complete defense.[78] Although the Fifth Amendment, Sixth Amendment, and "complete defense" rights potentially restrict evidentiary privileges, the contours of such restrictions are poorly defined.

1. Supreme Court Guidance

The Supreme Court serves as the ultimate arbiter of constitutional interpretation,[79] yet its guidance on the mandatory limits of evidentiary privileges is incomplete and opaque.[80] The two leading Supreme Court cases regarding the constitutional limits of privileges leave significant room for interpretation of their scope.[81] In *Davis v. Alaska*, the Court ruled that, despite the state's interest in juvenile offender confidentiality, the Confrontation Clause guaranteed the defense the opportunity to present such evidence suggesting witness bias.[82] However, *Davis* addressed whether the Confrontation Clause guaranteed the opportunity to cross-examine a witness using matters the defense already possessed,[83] not whether the Clause mandated access to material of unknown content such as privileged mental health records.

In *Pennsylvania v. Ritchie*, the Court ruled that the Due Process Clause entitled the defendant to an in camera review of privileged Children and Youth Services (CYS) records to uncover potentially exculpatory information.[84] However, in explaining its ruling, the Court noted that the CYS records were not protected by an absolute privilege;[85] the privilege at issue contained exceptions for court orders and criminal investigations, along with nine other exceptions.[86] The Court observed that the Pennsylvania statute—creating the privilege—explicitly envisioned the privilege's use in judicial proceedings whereas the state's unqualified sexual assault counselor's privilege was not explicitly envisioned for judicial use.[87] The Court "express[ed] no opinion" whether the case results would differ for an absolute privilege.[88]

Therefore, neither *Davis* nor *Richie* clarifies whether the Constitution requires in camera review of materials protected by an absolute privilege or a privilege limiting judicial reviews to strictly defined circumstances.

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[75] *See* Fishman, *supra* note 12, at 9. Fishman also observes that the Compulsory Process Clause of the Sixth Amendment may place limits on privileges. *Id.*

[76] Lisenba v. California, 314 U.S. 219, 236 (1941).

[77] Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986) (emphasis omitted) (quoting Davis v. Alaska, 415 U.S. 308, 315–16 (1974)).

[78] *See* Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (citing Crane v. Kentucky, 476 U.S. 683, 690 (1986)). Although evidentiary rules must yield to a criminal defendant's constitutional rights, this precept only restricts those evidentiary rules that "infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Id.* at 324–25 (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998)) (internal quotation marks omitted). The Supreme Court weighed the costs and benefits of a psychotherapist privilege in *Jaffee* and recognized the privilege. Jaffee v. Redmond, 518 U.S. 1, 10 (1996). Therefore, one can hardly find the privilege generally "arbitrary" or "disproportionate" to the societal good the privilege creates.

[79] *See Marbury*, 5 U.S. at 173.

[80] *See* Commonwealth v. Barroso, 122 S.W.3d 554, 561 (Ky. 2003) ("[T]o date, the United States Supreme Court has held that the denial of the right to impeach a prosecution witness violates the Confrontation Clause but has yet to muster a majority on whether the denial of pretrial access to impeachment evidence is also a denial of confrontation rights. It has declared that evidentiary rules and at least one recognized evidentiary privilege must yield to a criminal defendant's due process right to present a defense. It has also stated that a defendant's due process right to discover exculpatory evidence in the possession of the government cannot be defeated by a qualified privilege, and that the 'fair administration of justice' requires that privileged inculpatory evidence in the hands of a third party be turned over to the prosecution. It has further held that the right to compulsory process includes the right to elicit favorable testimony from defense witnesses, but has yet to specifically decide whether that same right prevails over an absolute privilege . . . .") (citations omitted).

[81] *See* Flippin, *supra* note 56, at 11 (observing that the Supreme Court has yet to provide guidance for the plethora of scenarios not covered by *Ritchie* and *Davis*).

[82] Davis v. Alaska, 415 U.S. 308, 319 (1974).

[83] *Id.* at 313–14.

[84] Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987).

[85] *Id.* at 57–58.

[86] *Id.* at 43 n.2.

[87] *Id.* at 57–58.

[88] *Id.* at 57 n.14.

Significantly, the Court decided *Jaffee* after both *Davis* and *Ritchie*;[89] presumably, the Court determined that the absolute psychotherapist privilege established in *Jaffee* complied with its prior rulings.

2. Federal Court Confusion

Almost two decades after the *Jaffee* decision, the Supreme Court's incomplete guidance predictably causes inconsistent psychotherapist privilege application in federal criminal trials.[90] The privilege *Jaffee* created was absolute, refusing to allow judicial review to determine the privilege's applicability.[91] However, *Jaffee* was a civil case and the majority did not discuss the implication of the psychotherapist privilege in criminal trials;[92] federal courts determining the constitutional limits of the privilege arrive at different conclusions.

Despite the clarity in *Jaffee*, Federal courts split on how the psychotherapist privilege applies in criminal trials.[93] The District Court of Oregon found it comparable to the lawyer-client privilege, ruling that only a waiver would allow for in camera review of counseling records.[94] However, a later opinion within the district determined that, based on the facts of the case, the Due Process Clause required an in camera review of a witness's mental health records.[95] The District Court of Massachusetts flatly determined that the federal psychotherapist privilege did not apply in a criminal trial.[96] The Southern District of West Virginia determined that the Sixth Amendment does not require piercing the psychotherapist privilege in criminal trials, even for in camera reviews, noting "the emphatic language used by the *Jaffee* court regarding the fallacy of a balancing test . . . ."[97] Recently, the same district pierced the privilege for an in camera review, yet cautioned, "[T]his holding must necessarily be limited to this perfect storm of facts."[98] Categorizing application of the psychotherapist privilege in federal criminal trials as "neither comprehensive nor uniform,"[99] the court complained, "The dearth of substantive treatment of this crucial issue is somewhat inexplicable."[100] Until the Supreme Court expands upon the precedent of *Davis*, *Ritchie*, and *Jaffee*, the constitutional limits of psychotherapy privileges remains open to wide judicial interpretation.

B. Possible Judicial Interpretations of the New MRE 513

Faced with clear instructions from Congress and the President but unclear guidance on privileges' constitutional limitations, the military judiciary has several options for interpreting the new MRE 513.

1. Removal of the "Constitutionally Required" Exception is Inconsequential

The military judiciary might determine that, because Congress and the President cannot prevent the Constitution's application to a rule of evidence,[101] removing a "constitutionally required" exception has no effect. Under this interpretation, the courts would continue to recognize a "constitutionally required" exception despite its removal from MRE 513 and continue following the military case law detailed above.[102]

This interpretation is unsupported by applicable case law precedent[103] and would likely result in further legislation.[104] As discussed above, the Supreme Court

[89] *See supra* notes 1, 82, 84.

[90] *See* United States v. White, No. 2:12-cr-00221, 2013 U.S. Dist. LEXIS 49426, at *29 (S.D. W. Va. Apr. 5, 2013) (noting that federal court application of *Jaffee's* psychotherapist privilege lacks uniformity).

[91] Jaffee v. Redmond, 518 U.S. 1, 15 (1996).

[92] However, the dissent noted that the privilege may prevent establishing a defense, implying the ruling's applicability in criminal trials. *Id.* at 19 (Scalia, J., dissenting).

[93] *See White*, 2013 U.S. Dist. LEXIS 49426, at *29 (noting that federal court application of *Jaffee's* psychotherapist privilege lacks uniformity).

[94] United States v. Doyle, 1 F. Supp. 2d 1187, 1191 (D. Or. 1998).

[95] Dispennett v. Cook, No. 98-1252-ST, 2001 U.S. Dist. LEXIS 22196, at *30–31 (D. Or. Oct. 23, 2001). *See also* Bassine v. Hill, 450 F. Supp. 2d 1182, 1185–86 (D. Or. 2006) (determining that the due process and confrontation clauses mandate in camera review of mental health records, distinguishing *Jaffee* as a civil case).

[96] United States v. Mazzola, 217 F.R.D. 84, 88 (D. Mass. 2003). *See also* United States v. Tarantino, No. 08-CR-655 (JS), 2011 U.S. Dist. LEXIS 13630, at *2 (E.D.N.Y. Feb. 11, 2011) (ruling that the privilege "must yield to the Defendant's effort to obtain information helpful to his defense"); United States v. Alperin, 128 F. Supp. 2d 1251, 1253–55 (N.D. Cal. 2001) (ordering an in camera review of mental health records to determine their evidentiary value to the defendant using California state law as guidance for the federal privilege).

[97] United States v. Shrader, 716 F. Supp. 2d 464, 472 (S.D. W. Va. 2010).

[98] *White*, 2013 U.S. Dist. LEXIS 49426, at *49.

[99] *Id.* at *29.

[100] *Id.* at *35 (referring to the psychotherapist privilege as a clash between privacy rights in psychological treatment and constitutional rights of a fair trial and confrontation).

[101] *See* United States v. Gaddis, 70 M.J. 248, 253 (C.A.A.F. 2011) (finding that an MRE may not "limit the introduction of evidence that is required to be admitted by the Constitution").

[102] *See supra* notes 40–55 and accompanying text.

[103] *See supra* notes 80–89 and accompanying text.

[104] For instance, in *LRM v. Kastenberg*, CAAF declined to grant a reported victim's writ of mandamus, determining that the military judge had discretion under Rule for Court Martial (R.C.M.) 801 to limit the ability of a victim to be heard regarding MREs 513 and 412. LRM v. Kastenberg, 72 M.J. 364, 372 (C.A.A.F. 2013). Seemingly in response to this opinion, the following year Congress amended the UCMJ to grant victims the right to

provides no clear mandate that the Constitution requires courts to pierce strictly defined privileges to search for exculpatory evidence. Nor is there support within the military courts' treatment of other privileges. Most other MREs, which must also satisfy constitutional requirements, are not routinely breached for in camera reviews.[105]

If the judiciary replaces the textual "constitutionally required" exception, removed by Congress and the President, with an identical judicially created one, it invites further rule revisions. Proponents of this interpretation might argue that because Congress did not remove MRE 513's in camera review mechanism, the privilege is qualified; therefore, *Ritchie* subjects it to judicial piercing and review. While such an interpretation of *Ritchie* is debatable,[106] Congress could revise MRE 513 to resemble the absolute clergy privilege found in MRE 503 which contains no exceptions and offers no framework for in camera reviews.[107]

This interpretation merely maintains the status quo, serves neither the interests of justice nor patient privilege, and willfully thwarts congressional and presidential intent. Instead of ignoring the "constitutionally required" exception removal, the judiciary could interpret the changes by the letter of the new rule.

2. Military Rule of Evidence 513 is Absolute Outside of the Enumerated Exceptions

The judiciary could strictly interpret MRE 513 by its current text, essentially making it an absolute privilege for victim records. Other jurisdictions employ similar interpretations, finding there is no constitutionally required breach of the psychotherapist privilege.[108] The Supreme Court of Pennsylvania recognized the "clear mandate" of the state's statutory psychotherapist privilege and found it was not outweighed by the Confrontation or Due Process Clause rights.[109] The Colorado Supreme Court similarly upheld the state's privilege against a constitutionality challenge, concluding that only a patient's waiver permitted breaching the state's psychologist privilege for an in camera review.[110] Two Florida appellate courts[111] also determined that the Constitution did not require piercing the state's absolute privilege.[112]

This interpretation is unduly limited, leaving no room for judicial discretion in extreme cases, such as if the accused demonstrates that a victim is unable to distinguish fantasy from reality. While the new MRE 513 offers no framework for conducting in camera review in such cases, the third and best possible judicial interpretation of the new rule offers the judiciary a way to preserve the accused's right to a fair trial while complying with the new rule's requirements.

3. Judges May Bar a Witness's Testimony, Under Exceptional Circumstances, Unless the Witness Waives the Privilege for an in Camera Review

Eschewing the more restrictive interpretations above, the judiciary might instead follow the states that recognize that the psychotherapist privilege restricts access to mental health records, yet still conclude that, at times, the defendant's constitutional rights require at least an in camera review of mental health records.[113] These jurisdictions resolve the conflict by conducting a review only if the patient waives the privilege; if the witness refuses to grant the waiver, the courts suppress the witness's testimony.[114] If a judge determines that a review of privileged communications is required, this approach grants the witness

petition appellate courts for writs of mandamus if the victim believed their rights were violated. 2015 NDAA, *supra* note 7 at 3368.

[105] *See* 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, 173 (2005) (classifying MRE 513, with its in camera review mechanism, as a "second-tier privilege" compared with lawyer-client, spousal, and clergy privileges).

[106] For example, the new MRE 513 offers far more protection than the privilege in *Ritchie*. *Compare* Manual for Courts-Martial; Proposed Amendments, 80 Fed. Reg. 6057, 6059 (Feb. 4, 2015) (permitting judicial review, production, and disclosure under an enumerated exception) *with* Pennsylvania v. Ritchie, 480 U.S. 39, 43 n.2 (1987) (making privileged materials available to "[a] court of competent jurisdiction pursuant to a court order"). Outside of the strictly limited privilege exceptions, the current MRE 513 is more analogous to an absolute privilege, to which *Ritchie's* rule explicitly did not extend. *Ritchie*, 480 U.S. at 57 n.14.

[107] MCM, *supra* note 3, MIL. R. EVID. 503.

[108] *See* 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 (2005) (observing that five states have some form of a counselor-patient privilege which permits no release for court proceedings).

[109] Commonwealth v. Counterman, 719 A.2d 284, 295 (Pa. 1998).

[110] People v. Dist. Ct. of Denver, 719 P.2d 722, 727 (Colo. 1986).

[111] State v. Famiglietti, 817 So. 2d 901, 906 (Fla. Dist. Ct. App. 2002); State v. Roberson, 884 So. 2d 976, 980 (Fla. Dist. Ct. App. 2004).

[112] *But see* Fishman, *supra* note 12, at 23 (describing Florida appellate courts as divided).

[113] *See id.* at 18 (finding that Connecticut, Michigan, Nebraska, New Mexico, Wisconsin, and South Dakota use this approach).

[114] *See* State v. Shiffra, 499 N.W.2d 719, 724 (Wis. Ct. App. 1993) (finding that when the Constitution requires an in camera review of a witness's mental health records and the witness refuses to release her records, suppressing the witness's testimony is the only appropriate remedy), *abrogated on other grounds by* State v. Green, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298; State v. Peeler, 857 A.2d 808, 841 (Conn. 2004) (finding that once a defendant makes a preliminary showing that privileged records are necessary to impeach a witness, the state must either secure the patient's privilege waiver or the court will strike her testimony); People v. Stanaway, 521 N.W.2d 557, 562, 577 (Mich. 1994) (ruling that if a defendant establishes a "reasonable probability" that the records likely contain information necessary to defense and the patient does not waive her privilege, courts must suppress the patient's testimony).

the ability to prevent access to their records, yet preserves the defendant's constitutional rights.[115] Under such an interpretation, the judiciary empowers patients to retain confidentiality of their psychotherapist records even to the detriment of the criminal prosecution.[116]

It is logical for military courts to follow this interpretation, because Wisconsin, a state applying the psychotherapist privilege in this manner, served as the basis for the new changes to MRE 513.[117] The Wisconsin Supreme Court articulated that, to warrant an in camera review, a defendant must "set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant."[118] Like other jurisdictions of this type, Wisconsin courts only permit judicial review of privileged mental health records once the patient waives his or her privilege.[119] When a defendant's rights require in camera review and the patient declines to waive his or her privilege, the only "appropriate" remedy is suppression of the patient's testimony.[120]

When such situations arise, this interpretation essentially grants victims veto power over the criminal trial. Although some may find this an anathema to the military justice system, it merely continues the trend toward granting victims a greater voice in the process. Just as a victim may choose to file a restricted or unrestricted report of sexual assault[121] and choose to testify or not at an Article 32 preliminary hearing,[122] this privilege interpretation gives the victim authority in the trial process with regard to his or her privileged records.

Military judges should adopt this third interpretation of the new MRE 513 because it satisfies the competing interests of the accused and the patient, it does not undermine the 2015 NDAA by crafting a judicial "constitutionally required" exception, and it follows the Wisconsin interpretation which served as the inspiration for the MRE 513 changes. As articulated by the Nebraska Supreme Court, "this appears to be the only method by which both the right of the witness and the right of the defendant may be accommodated."[123]

C. Applying the Best Interpretation of MRE 513

If the military judiciary follows the Wisconsin interpretation of the MRE 513 changes, one question remains. What types of potential evidence necessitate a military judge barring a witness's testimony, absent privilege waiver for an in camera review? Clifford S. Fishman, professor of law at the Catholic University of America, found a limited number of possible reasons why judges presiding over rape and child abuse cases should pierce the psychotherapist privilege.[124] He determined that they fell into three specific categories: "Recantation or [o]ther [c]ontradictory [c]onduct[;] . . . [e]vidence of [b]ehavioral, [m]ental, or [e]motional [d]ifficulties[;] . . . [and] [c]omplainant's ability to [p]erceive, [r]emember, and [r]elate [e]vents . . . ."[125]

If the judiciary adopts the Wisconsin interpretation of the new MRE 513, it should only ask witnesses to waive their privilege for in camera reviews if there is a "reasonable likelihood" the privileged records contain evidence within one of these categories. Potential evidence of inconsistent statements should never satisfy this standard. As Fishman describes,

> On one point there appears to be a unanimous consensus. In sexual-assault and child abuse cases, there is general agreement that a defendant must do more than speculate that, because the complainant has participated in counseling or therapy after the alleged assault, the records in question might contain statements about the incident or incidents that are inconsistent with the complainant's testimony at trial.

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[115] *See Shiffra*, 499 N.W.2d at 724 (finding that when the Constitution requires an in camera review of a witness's mental health records and the witness refuses to release their records, suppressing the witness's testimony is the only appropriate remedy).

[116] *But see* Fishman, *supra* note 12, at 24 (arguing that this approach creates problems with limiting prosecutorial discretion, poor social policy, unworkable judicial administration, and under age witnesses).

[117] *See* JUDICIAL PROCEEDINGS PANEL, INITIAL REPORT 117 (Feb. 2015) (asserting that the 2015 NDAA incorporates the *Klemick* standard into MRE 513). As noted above, *Klemick* adopted the Wisconsin standard. United States v. Klemick, 65 M.J. 576, 579–80 (N-M. Ct. Crim. App. 2006) (citing *Green*, 2002 WI 68).

[118] *Green*, 2002 WI 68, ¶ 34.

[119] *See* State v. Solberg, 564 N.W.2d 775, 780 (Wis. 1997) (finding that even appellate courts must ensure a patient waived her privilege prior to conducting a review of the patient's psychological record).

[120] *See Shiffra*, 499 N.W.2d at 724 (finding that when the Constitution requires a court to review privileged mental health records but the patient refuses release, the only way to ensure the defendant's fair trial is to suppress the witness's testimony).

[121] U.S. DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES, enclosure 4, para. 1. (28 Mar. 2013). While the proposed interpretation at times allows suspects to avoid prosecution regardless of the government's intent, a restricted report results in the same outcome based solely on the victim's reporting preference. *Id.* Both restricted reports and the interpretation proposed here favor victim preference over the government's in certain circumstances.

[122] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, 954 (2013).

[123] State v. Trammell, 435 N.W.2d 197, 201 (Neb. 1989).

[124] Fishman, *supra* note 12, at 41.

[125] *Id.* at 41–45. Fishman also includes a fourth generic category of "Other Situations Involving Rape and Child Abuse Complaints." *Id.* at 46.

> Because this assertion can be plausibly made in every sexual-assault or child molestation case, if this was enough to trigger an in camera review, a court would be required to conduct the review in virtually every such case.[126]

When establishing the new MRE 513's scope, military courts should adopt Wisconsin's jurisprudence, coupled with Fishman's three categories. Doing so protects the victim by granting her access and control over her privileged mental health records. This interpretation protects the accused by offering the ability to prove an in camera review is necessary based on a reasonable likelihood the records contain evidence falling into one of Fishman's three categories. Once the accused meets the threshold, the victim will only testify if she allows an in camera review of her mental health records. The interpretation complies with the new MRE 513 requirements, improves the military justice system's protection of patient privilege, and ensures that the accused receives a fair trial.

VI. Conclusion

The military psychotherapist privilege is only meaningful if it offers significant protections, both from their production and capricious in camera reviews. The modifications to MRE 513 convey this intent by removing a commonly used privilege exception and creating a greater burden for parties seeking in camera review of mental health records.[127] Military judges now have the opportunity to protect privileged mental health records, while respecting the accused's constitutional rights, by adopting Wisconsin's approach to the psychotherapist privilege in conjunction with Fishman's three categories necessitating review of privileged communication.

Evaluating the SVC scenario from Part I illustrates the benefits of the proposed interpretation of the MRE 513 changes. Under the Wisconsin model for the privilege, the SVC can comfort the victim by explaining that there is a significant barrier preventing anyone from reviewing the client's records. Ordinarily, either the SVC or government counsel will represent the victim's position in any trial proceeding to contest production of the mental health records.[128] The attorney contesting mental health record production should focus on the policy justifications for the psychotherapist privilege articulated in *Jaffee*.[129] Further, the attorney should articulate that ordering an in camera review or production would result in victims being less forthcoming in counseling sessions, or even from seeking counseling at all. The overall result of an in camera review would result in less effective psychotherapist treatment, directly undermining the goal of the privilege.

Notwithstanding these arguments, if a judge determines a review of the records is required, an SVC must execute her responsibility to advise her client even when the victim's interest conflicts with the government's.[130] The victim, most likely unfamiliar with legal processes, must rely on insightful advice from her SVC to make an informed decision. Under the Wisconsin interpretation of the privilege, the victim may bar the in camera review, likely resulting in dismissal of the charges dependent upon the victim's testimony. Alternatively, the victim may determine that seeking justice outweighs her privacy interest in the privileged communication and allow the review. The victim holds the key to her privilege.

Although privileges "are not lightly created" and impede courts' truth seeking function,[131] they manifest the value legislatures and the judiciary, representing public interest, place on protecting some relationships from court intrusion. The psychotherapist-patient relationship requires "confidence and trust."[132] Adopting Wisconsin's privilege interpretation protects this trust by guarding against routine in camera reviews. Simultaneously, this interpretation protects an accused's right to a fair trial by allowing courts, under exceptional circumstances, to make a witness's testimony contingent upon privilege waiver for an in camera review. Adopting Wisconsin's privilege model, coupled with Fishman's categories of evidence requiring review, would increase protection of victims and enhance military justice.

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[126] *Id.* at 37–38 (footnote omitted). *See also* State v. Green, 646 N.W.2d 298, 311 (Wis. 2002) ("The mere assertion . . . that the sexual assault was discussed during counseling and that the counseling records may contain statements that are inconsistent with other reports is insufficient to compel an in camera review."); People v. Stanaway, 521 N.W.2d 557, 576 (Mich. 1994) ("The defendant overstates his case when he asserts that his right to discovery, confrontation, and effective cross-examination compels that he be granted an opportunity to discover any potentially exculpatory evidence.").

[127] 2015 NDAA, *supra* note 8, at 3369.

[128] *See* LRM v. Kastenberg, 72 M.J. 364, 372 (C.A.A.F. 2013) (finding that MRE 513 affords the victim the "right to a reasonable opportunity to be heard on factual and legal grounds"). *See also* 2015 NDAA, *supra* note 8, at 3368 (granting victims the right to petition criminal appeals courts for writs of mandamus to enforce MRE 513).

[129] In particular, the attorney should note the importance of psychotherapy in alleviating mental problems, that the therapy's effectiveness depends upon a trusting environment, and that any threat of disclosure or review harms the trust of the psychotherapist-patient relationship. Jaffee v. Redmond, 518 U.S. 1, 10–11 (1996).

[130] *See* Memorandum from The Judge Advocate General to Judge Advocate Legal Service Personnel, subject: Office of the Judge Advocate General Policy Memorandum #14-01, Special Victim Counsel (1 Nov. 2013) (establishing special victim counsels' "primary duty" to represent their client's interest, even if opposed to the government).

[131] United States v. Nixon, 418 U.S. 683, 710 (1974).

[132] *Jaffee*, 518 U.S. at 10.