

Dissenting Views of JPP Panel Member Victor D. Stone, Esq., Concluding that M.R.E. 513 and 1101(b) Prohibit Distribution of Privileged Materials

The Judicial Proceedings Panel (JPP) has decided to recommend that military appellate courts deny sexual assault victims the same rights those military sexual assault victims currently have before military trial judges under M.R.E. 513, that is, to adversarially contest under M.R.E. 513's standards and procedures, any proposed release to defense counsel of that victim's sealed privileged records, including a victim's psychotherapist-patient records, before those records are released even to trial judges. Our JPP Report recommends adopting procedures currently utilized by the Air Force that do not require any substantive reason for unsealing and distributing previously privileged documents to counsel even if they were given no access to the documents by the trial court. The Joint Service Committee on Military Justice (JSC) has endorsed a proposal that is pending and not yet acted upon that allows appellate judges, unlike military trial judges, immediate access to victim's privileged records, which they can *sua sponte* release to appellate counsel based on a lower standard than is provided in M.R.E. 513. A JPP request for views from the various military services reveals that all the services, other than the Army, do not recommend retaining the current Air Force procedures but instead recommend adopting the JSC's proposals. I believe that the JPP proposal and the JSC proposal are both constitutionally insufficient. Moreover, I believe that these procedures, that are not similar to rules followed in any non-military appellate court, violate the letter and spirit of the Military Rules of Evidence as promulgated by the President, so I respectfully dissent from the JPP's recommendation.

It has taken a lot of time and effort for the military justice system to recognize the universally accepted Anglo-American legal right at the trial court level, that subjects of privileged records have constitutional rights under the Due Process and Privileges and Immunities Clauses of 5th and 14th Amendments to the U.S. Constitution to a fair opportunity to defend their rights of privacy and privileges, whether attorney/client, husband/wife, or doctor – including psychotherapist/patient, before those privileges are breached by anyone, including judges. Not all constitutional claims are foreclosed to military members: “our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.” *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (quoting E. Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181, 188 (1962)).

As a practical matter, the JSC's proposal would release previously unreleased privileged and privacy protected documents to any requestor if there is a judicial finding of “good cause.” This proposal ignores the right of the subject of the records (whether the crime victim or just an ordinary witness) to protect their records from all prying eyes until after there has been an adversarial showing based on independent evidence that “good cause” exists to breach the privilege. Essentially, the JSC proposes an “ex parte” immediate appellate court review of a subjects' previously judicially (i.e., trial court) determined privileged and irrelevant records. Even worse, the crime victim (or ordinary witness) is entirely denied an opportunity to learn about the scope of the request, to raise or waive their own rights, and to answer any questions raised by the court or counsel in the course of the review. This proposed procedure would violate the rights of the subject of the records who has standing per M.R.E. 513, and is in the best factual position to explain his or her privacy rights and unsealing concerns, and has the

primary motivation to object (which a prosecutor might not have), or even possibly decide to waive (unbeknownst to the prosecutor) his or her privilege. For example, privileged records could do great collateral damage to the sexual assault victim (or other “patient” who is not a victim per M.R.E. 513) if the irrelevant psychotherapist records revealed for the first time to military officials that the military sexual assault victim (or other trial witness “patient”) was bisexual, gay, or a lesbian. Unless the subject of these privileged records is told, just like in the trial court under M.R.E. 513, that he or she has some ability to contest even a protected release of such privileged records to the trial counsel (which is no different than what the victim can contest in the trial court), which records a military trial judge has already ruled on and protected, then military sexual assault victims will be discouraged from filing unrestricted complaints reporting their sexual victimization. That is the exact opposite of the goal of Congress and this JPP panel. The Constitution, and as I explain below, the President, require that if any judges, trial or appellate, take up a request to unseal privileged records, then the subject of the record must first be given timely advance notice and a fair opportunity under M.R.E. 513 to adversarially contest the requested violation of his or her privilege before anyone, including a judge, looks at those privileged records. That procedure also satisfies the Fourteenth Amendment, Section 1.

Current M.R.E. 101(a) states that the M.R.E.’s, as Presidentially promulgated, are applicable to courts-martial, “to the extent and with the exceptions stated in Mil. R. Evid. 1101.” M.R.E. 1101 states in section (b) that “The rules with respect to privileges in Section III and V [which is where M.R.E. 513 and 514 are located] apply at all stages of all actions, cases and proceedings.” (Emphasis added.) Therefore, it is explicit that the President of the United States, who has promulgated the M.R.E.’s, has determined that if privileged documents -- including those covered by M.R.E. 513 -- are at issue, then military judges at all stages of the case are obligated by Rule 513 to follow its specific procedures and apply its specific legal standards. The appellate military judges are military judges and consequently, the language of M.R.E. 513 extends to military appellate judges, since an appeal to a military appeals court is undeniably a “stage of a case” covered by M.R.E. 1101(b). This is logical and not only makes eminent good sense, but it is a current and binding military legal rule, and it satisfies the constitutional mandates of the Constitution. I expect that if military appellate courts do not follow this binding Presidential directive, once victims start getting timely notice of all appellate pleadings, as the JPP separately recommends, that the issue will be appealed to CAAF, especially if the additional JPP recommendation that CAAF entertain petitions for relief from victim’s counsel is adopted.¹ Until now, victims were neither notified in a timely manner of what was going on at the appellate court level, nor allowed to file pleadings, both of which M.R.E. 513 mandates. The fact that legal challenges, to the loss of a patient’s privilege by routine appellate unsealing not complying

¹ Congress and the President have determined that patients shall enjoy a privilege from disclosing confidential communications with their psychotherapists. Military courts must presume the constitutionality of the rules of evidence, *United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F. 2000), and military judges cannot overrule the Congress or the Commander in Chief when they are exercising their constitutional power. M.R.E. 513 “is the result of both a legislative and executive act. . . . Accordingly, the President was likely at the apex of his authority in implementing Mil. R. Evid. 513 as he acted in his constitutional role as Commander in Chief and under a specific legislative direction. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

with M.R.E. 513 & 1101(b), were not previously filed is evidence to me that the interests of prosecutors, who either did not have a governmental interest in maintain the privilege or may have affirmatively wanted access to the privileged documents, does not align with the privacy interests of the victim on this issue. The text of R.C.M. 1103A never once mentions privileged records and was designed initially to deal with M.R.E. 412 (c)(2) motions which are not privileged materials, and also are contained in a chapter of the M.R.E.'s which is not covered by M.R.E. 1101(b). Manual for Courts-Martial, United States, A21-86 (2012 ed.). The language of R.C.M. 1103A does mention documents containing "classified national security information," but classified documents are not "privileged" documents and they are not constitutionally protected. Consequently, since R.C.M. 1103A does not explicitly state that it covers constitutionally protected privileged materials, as it easily could, and since M.R.E. 513 and 1101(b) do explicitly cover privileged materials, to the extent that the JPP's Report on proposed changes to R.C.M. 1103A does not recommend privileged material distribution procedures in connection with unsealing decisions that are equivalent to the procedures contained in M.R.E. 513, I believe the JPP's proposal is inadequate. Materials found to be privileged, also including attorney/client communications, husband/wife communications, and priest/penitent communications, involve candid communications that civilized society has decided for at least the last two hundred years are sacrosanct, must be encouraged not discouraged, and must be kept private unless the privilege holder chooses otherwise. These communications do not lose their privileged character when they are subsequently sealed or unsealed by military court officials. If they did lose their privileged character, then there would be no subsequent military appellate decisions discussing those privileged documents, or decisions under the current procedures discussing any privileged documents, because the issue of privilege would by then be moot. The sealing process courts employ is no more than an internal housekeeping process designed to maintain the status quo and privacy of the privilege holder and of the defense pending the defendant's appeal. That is not occurring under the current regime where privileged and private documents that even a trial judge has decided do not warrant invasion by that court, are being distributed to appellate counsel without any new equivalent M.R.E. 513 process. Instead, current military practice and the JPP proposal allow the sealing and unsealing process to undercut the holder's privilege and privacy, which at that point still exists, and allow additional distribution of the privileged material without a new M.R.E. 513 process. In this context, ministerially distributing documents which the trial court found privileged and which the appellate court may later substantively affirm are privileged, does not maintain the status quo nor comply with M.R.E. 513 and 1101(b). These documents cannot be treated by appellate administrative judges under R.C.M 1103A as if they were something less than privileged documents, i.e. only confidential documents, and doing so in a non-adversarial fashion violates the status quo on appeal, the victim's constitutionally protected privilege and privacy rights, and the explicit Presidentially approved provisions of M.R.E. 513 and 1101(b).

Turning to the JSC proposal that does not satisfy M.R.E. 513 and 1101(b), I believe that it also will lead to undesirable policy ramifications. It matters not that the military has appellate privacy protective conditions confining the release of these privileged records to just a few persons. Similar protective rules also apply to the trial court's handling of these materials, and yet the stricter M.R.E. 513 standards and rules about privileged document distribution

nonetheless apply in that setting. At all events, what matters is that sexual assault victims will subjectively fear leaks of this information, just as they do at the trial court level, even mistaken and inadvertent leaks, knowing that a leak can completely derail their future military career. Therefore the victims will avoid any possibility of revictimization, and the derailing of their career and their social relationships that might stem from even inadvertent speculation or innuendo about their privileged records. Therefore these victims will continue to be chilled from reporting when they have been sexually assaulted. The alternative course, which non-military private sexual assault assistance programs will likely promote, will be to encourage military sexual assault victims to see off base non-military psychotherapists, who will have been vetted ahead of time to resist military subpoenas for their counseling records. Then the military authorities will have to convince federal civilian officers, if they can, to enforce the military's subpoenas, and resistance to those subpoenas will be litigated in the local civilian court which will apply civilian not military law. If that occurs, that scenario would not only deny military sexual assault victims all the counseling and medical assistance that the military has taken great pains in recent years to stand up to assist those victims, and about which services the military seeks to collect meaningful quantitative data, but it will set up regular clashes in non-military courts between victim's attorneys and military officials over the scope of the doctor/patient privilege under non-military state codes and laws that protect doctor/patient constitutionally privileged documents. I do not believe that such an outcome is desirable.

The current JPP proposal, to implement a system that provides virtually automatic access by non-judicial military appellate lawyers to the privileged records, would misapply current Rule 1103A that states that it applies to confidential documents, and incorrectly apply them to these privileged documents, as long as the request stems from a defense counsel whose client was convicted of an offense relating to the victim whose records are sought. This conforms closely to the current Air Force appeals court rules that even the Air Force has now responded to the JPP that the Air Force is ready to abandon. No showing of any need and no adversarial process is required to abrogate the victim's psychotherapist/patient privilege. Prior similar unauthorized access to these records by military investigators who did not share the records with others, but who on their own demanded these documents from military hospital administrators, was stopped after the JPP shined a light on that unauthorized access. Similarly, this proposal would retain an indefensible virtually automatic appellate discovery system that will undercut the current provisions stated in M.R.E. 513 and 1101(b). To the extent that JPP members might seek to rely on a defendant's Due Process right to have their appellate counsel review privileged records that their defense trial counsel was prohibiting from seeing, no legal statutory or case support for that legal assertion has been cited to the JPP and no appellate courts outside the military disclose privileged documents in the manner proposed by the JPP. If a defendant's mental health privileged documents were at issue, or a defendant's attorney client privileged documents (after a claim that they concealed a crime or fraud), no one would suggest that after a trial court refused to review or distribute them and then sealed them to maintain the status quo on appeal, that prior to an appellate court permitting an adversarial hearing establishing the need for anyone to review and distribute those records, that there should be distribution of those privileged documents to all counsel on appeal.

Allowing counsel for the interested adversaries to fully brief matters and then submit them for a judicial decision, as M.R.E. 513 requires, is a foundational part of the rule of law and constitutionally required before a right of privacy or a privilege is violated. If that adversarial presentation became a resource problem, the military could appoint more judges, assign more law clerks to assist them, or else refer more of these sexual assaults for non-military prosecution, since we have heard no testimony that the vast majority of the cases involve either military secrets or any other unique military concerns that a civilian criminal court could not accommodate. Some argue about needing routine appellate breaching of privileged materials because military trial judges or trial defense counsel may be too inexperienced or busy to properly rule on M.R.E. 513 claims at trial, even though the JPP has heard that the defense has highly qualified experts and experienced legal supervisors available to them. Not only have many military witnesses expressed to the JPP confidence in the training and experience of the trial judges and defense counsel that handle these matters, but that concern is alleviated by the fact that the entire record below, including the sealed material, is transmitted to the appellate court which reviews the entire record. If an inexperienced trial judge or defense counsel has acted below the standard of professionalism that is required, then their incompetence will either be apparent on appeal or raised by the defense on appeal, when the whole record is reviewed, and should result in a reversal for a new trial. The JPP has heard no testimony about any frequency of appellate reversals due to incorrect or incompetent trial court rulings on privileged materials, which if this was a problem, should be easily available to collect. Absent such court rulings, individual opinions and predictions about the military sexual assault prosecution system being overbalanced in favor of the prosecution, similar to what appears in the report of the JPP subcommittee, amounts to disputed anecdotal evidence. Second, if defense counsel had a plausible argument before trial for unsealing privileged material under M.R.E. 513, then the defense should have an even better argument for doing so on appeal after there is a complete trial record, with which record the military appellate defense counsel must become familiar because it is that counsel's duty to know the full trial record in order to make all meritorious appellate objections. The statistical evidence and appellate decisions about which we have been advised does not suggest that sexual assault trials are now improperly weighted against defendants, either on this basis or any other basis, and they overwhelmingly result in acquittals. What the JPP hearings and my official multi-day visit to the Special Victim Counsel Training Program exposed is a great variety of undesirable consequences when military sexual assault victims refuse to file unrestricted reports, and then prematurely abandon their chosen military career. Of course, even if the JPP had collected data and found that appellate reversals of military convictions on the basis of improperly protected privileged material were common, which as noted above should be easy to find, and the JPP has not, a proposal to undercut the protections of Presidentially approved and constitutionally warranted M.R.E. 513, and to continue to allow the inappropriate appellate release of privileged material "to balance" the effect of substandard trial judges or defense counsel is indefensible in a civilized society. Two "wrongs," subjecting defendants to trial before substandard judges or with substandard defense counsel, and then revictimizing sexual assault victims by summarily taking away on appeal their Presidentially and constitutionally protected privacy privileges under M.R.E. 513, does not "make a right." Instead, both "wrongs" violate the constitutional requirement of providing Due Process of law.

In sum, neither the JSC's nor the JPP's proposed course of action adequately recognize or protect the constitutional rights of sexual assault victims and their current M.R.E. 513 rights during the appellate stage of military trials. Both proposals would undercut the recent progress in related areas that has been made to rectify out of date military sexual assault procedures, and both also would lead to undesirable policy choices. Since I support M.R.E. 513 and 1101(b) as written, in their application to all stages of a case including during appeals, I cannot support either the JPP proposal or the JSC proposal that would undermine M.R.E. 513, which Rule the JPP has previously endorsed.

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