



Victim Privacy Issues in Military Sexual Assault Cases – Privileges and Protections

A. COMPETING INTERESTS AND DISTINCT CHALLENGES

Sexual assault prosecutions often involve conflicts between the right of an accused person to present a defense and the desire to protect the privacy interests of the alleged victim. In military judicial proceedings, evidentiary issues regarding the victim's sexual history or mental health often are the cause of such conflicts. These issues arise frequently in military cases because information about victims may be less private or more accessible than it is outside of the military.

Characteristics that are unique to the military environment create dynamics in military judicial proceedings that are different from civilian sexual assault prosecutions.⁴⁹⁴ The work environment and social sphere for military personnel are often more interconnected than they are for their civilian counterparts. Military regulations and common practice commonly require unmarried Service members of junior ranks to reside on base, where they live close to one another and experience little separation between their professional and private lives. Military members generally receive all medical treatment, including mental health counseling, from their local military treatment facility. Commanders and supervisors must ensure that Service members are fit to perform their duties, so they may need access to information about a military member's medical and mental health treatment.

The merging of the social and professional lives of military personnel increases the likelihood, or at least the perception, that victims of sexual assault in the military will be unable to safeguard their privacy if they report their victimization.⁴⁹⁵ A 2003 study at the U.S. Air Force Academy illustrates the challenges inherent to military service and their impact on the reporting of sexual assault.⁴⁹⁶ The top two reasons cited for failing to report were fear of embarrassment and fear of ostracism by peers.⁴⁹⁷ A more recent DoD survey indicated that 70% of women who did not report stated they did not make a report because they did not want anyone to know about the incident, and 51% said they did not believe their report would be kept confidential.⁴⁹⁸ The unique facts of military life, combined with aggressive investigation and case development—which is common in sexual assault cases—increases the potential for unnecessarily invading a victim's privacy.⁴⁹⁹

In military judicial proceedings, issues involving private information about a victim often arise in disputes under M.R.E. 412 (Sex offense cases: relevance of alleged victim's sexual behavior or sexual predisposition) and M.R.E. 513 (Psychotherapist-patient privilege). M.R.E. 412 and M.R.E. 513

494 See generally 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, 179–80 (2005).

495 *Id.*

496 See REPORT OF PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY 52 (2003), available at <http://www.defense.gov/news/Sep2003/d20030922usafareport.pdf>.

497 *Id.*

498 DEFENSE MANPOWER DATA CENTER, 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: BRIEFING ON SEXUAL ASSAULT AND SEXUAL HARASSMENT 106 (Mar. 2013), available at http://www.sapr.mil/public/docs/research/2012_Workplace_and_Gender_Relations_Survey_of_Active_Duty_Members-Survey_Note_and_Briefing.pdf.

499 See Schimpf, *supra* note 494, at 180.

are both rules of exclusion that generally prevent the introduction of evidence to protect the victim's privacy.⁵⁰⁰ However, the rules include exceptions that allow an accused to present his or her defense in certain circumstances,⁵⁰¹ leading to concerns about balancing the rights of the accused against the privacy interests of the victim. The rules, recent changes, and current issues are detailed below.

B. MILITARY RULE OF EVIDENCE 412 (SEX OFFENSE CASES: RELEVANCE OF ALLEGED VICTIM'S SEXUAL BEHAVIOR OR SEXUAL PREDISPOSITION)

1. The Military's Rape Shield Rule

Before 1978, evidentiary rules allowed an individual prosecuted for a sexual assault crime in the federal court system to present evidence of a victim's sexual history in his defense.⁵⁰² This line of defense often transformed trials into "inquisitions into the victim's morality, not trials of the defendant's innocence or guilt."⁵⁰³ The Privacy Protection for Rape Victims Act of 1978 amended the Federal Rules of Evidence to include Rule 412. M.R.E. 412 "is substantially similar in substantive scope to Federal Rule of Evidence 412" and exists for the same reasons.⁵⁰⁴ But M.R.E. 412 also has some notable differences, because of the unique nature of the military environment and practice.⁵⁰⁵ In particular, M.R.E. 412 does not refer to civil proceedings, "as these are irrelevant to courts-martial practice"; tailors the procedures to "military practice"; and replaces the federal rule's *in camera* review with a closed hearing in which the victim "is afforded a reasonable opportunity to attend and be heard."⁵⁰⁶ The purpose of M.R.E. 412 is provided in the rule's analysis:

Rule 412 is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses. In so doing, it recognizes that the prior rule, which it replaces, often yields evidence of at best minimal probative value with great potential for distraction and incidentally discourages both the reporting and prosecution of many sexual assaults.⁵⁰⁷

M.R.E. 412 is a rule of relevance, not a rule of privilege.⁵⁰⁸ M.R.E. 412 excludes two broad categories of evidence as irrelevant: (1) evidence offered to prove that an alleged victim engaged in sexual behavior other than that charged and (2) evidence offered to prove an alleged victim's sexual predisposition (that is, information about dress, speech, or lifestyle).⁵⁰⁹ However, M.R.E. 412(b)

500 M.R.E. 412(a); M.R.E. 513(a).

501 M.R.E. 412(b)(1)(A-C); M.R.E. 513(d)(1-8).

502 Major Shane R. Reeves, U.S. Army, *Time to Fine-Tune Military Rule of Evidence 412*, 196 MIL L. REV. 47, 54 (2008).

503 124 CONG. REC. 34,912-13 (1978) (statement of Rep. Elizabeth Holtzman).

504 2012 MCM, app. 22 at 36.

505 *Id.* (stating that application of Rule has been somewhat broadened and procedural aspects of Federal Rule have been modified to adapt them to military practice).

506 *Id.* at 37.

507 *Id.* at 36.

508 *Transcript of JPP Public Meeting* 76-77 (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army).

509 *Id.* (referring to M.R.E. 412(a)(1) and (2)).

includes three exceptions that may be used to find that otherwise excluded evidence is relevant and admissible.⁵¹⁰

First, M.R.E. 412 allows the admission of specific instances of sexual behavior by a victim intended to demonstrate that a person other than the accused was the source of semen, injury, or other physical evidence.⁵¹¹ This exception has been encountered less frequently since the advent of sophisticated forensic and DNA analysis.⁵¹²

Second, M.R.E. 412 allows the admission of specific instances of sexual encounters between the alleged victim and the accused to prove consent in the case at hand.⁵¹³ Critics of this exception often observe that consent at some past point does not prove subsequent consent. Some states and commonwealths have limited its application by requiring that admissible sexual activity with the accused must be within a certain period of time in relation to the charged offense.⁵¹⁴ Nonetheless, the exception remains part of federal and military jurisprudence.

Third, M.R.E. 412 allows admission of evidence when exclusion would violate the accused’s constitutional rights.⁵¹⁵ This exception recognizes “the fundamental right of the defense under the Fifth Amendment . . . to present relevant defense evidence.”⁵¹⁶ In practice, this exception has been used to offer evidence that the alleged victim has previously made a demonstrably false sexual assault allegation or evidence of sexual behavior or predisposition that is so distinctive and so similar to the reported sexual offense that it provides context for or explains the allegations at issue. Of the three, the “constitutionally required” exception has generated the greatest amount of litigation in the military justice system.⁵¹⁷ The federal courts, eleven states, and the District of Columbia have a similar written exception, while thirty-nine states do not.⁵¹⁸

510 The exceptions contained in M.R.E. 412(b) mirror those included in F.R.E. 412. The original version of F.R.E. 412 presented in the Subcommittee on Criminal Justice of the House Committee on the Judiciary allowed for the introduction of evidence of a victim’s sexual history only if: (1) there was a past sexual relationship with the accused and consent was at issue; or (2) the accused presented evidence that another individual caused the physical harm to the victim. Recognizing the constitutional concerns raised by opponents of the original bill and that these two exceptions were inadequate protections for defendants, the Subcommittee on Criminal Justice added an exception for the introduction of evidence that was “constitutionally required.” Major Shane R. Reeves, U.S. Army, *Time to Fine-Tune Military Rule of Evidence 412*, 196 MIL. L. REV. 47, 58 (2008); accord Michelle J. Anderson, *From Chastity Requirement to Sexuality and License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 92 (2002).

511 M.R.E. 412(b)(1)(A).

512 *Transcript of JPP Public Meeting 77* (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army).

513 M.R.E. 412(b)(1)(B).

514 *Transcript of JPP Public Meeting 77–78* (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army).

515 M.R.E. 412(b)(1)(C).

516 2012 MCM, app. 22 at 36.

517 *Transcript of JPP Public Meeting 78–79* (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army).

518 Anderson, *supra* note 510, at 83-84.

2. Use of M.R.E. 412 Evidence at Article 32 Hearings

Before any criminal charges are referred for trial by a general court-martial, the UCMJ requires a preliminary inquiry or hearing to be conducted to consider the charges and appropriate case disposition.⁵¹⁹ The nature of and procedures for Article 32 hearings have been the subject of significant public scrutiny, particularly in cases that involve sexual assault offenses.⁵²⁰ Some presenters contended that Article 32 hearings in military sexual assault cases had devolved into “their own trials” regarding a victim’s sexual behavior and history, and that “[i]f this is what Article 32 has come to be, then it is time to either get rid of it or put real restrictions on the conduct during them.”⁵²¹ As a result, Congress enacted substantial changes to Article 32 pretrial hearings in the FY14 NDAA.⁵²²

Previously, an Article 32 pretrial investigation required an “inquiry as to the truth of the matter set forth in the charges, consideration of the form of the charges, and a recommendation as to disposition which should be made of the case in the interest of justice and discipline.”⁵²³ In Section 1702 of the FY14 NDAA, Congress revised the purpose of Article 32 hearings and the procedures used to conduct them. Article 32 was modified to require a “preliminary hearing,” limited to determining “whether there is probable cause to believe an offense has been committed and the accused committed the offense,” whether the convening authority has jurisdiction over the offense and the accused, and the form of the charges, and then providing a recommendation as to “the disposition that should be made of the case.”⁵²⁴

Rule for Courts-Martial (R.C.M.) 405 governs pretrial hearings conducted under Article 32.⁵²⁵ Prior to June 13, 2014, R.C.M. 405(i) provided that the military rules of evidence do not apply to Article 32 pretrial investigations, except the following exclusionary rules and privileges in M.R.E.s 301, 302, 303, 305, 412 and Section V, including M.R.E. 513.⁵²⁶ Although the rule stated that M.R.E.s 412 and 513 applied at Article 32 hearings, the procedures were not set out in clear detail for investigating officers who were responsible for conducting the hearings, and until recently were not required to be judge advocates.⁵²⁷

519 10 U.S.C. § 832 (UCMJ art. 32, 2012); R.C.M. 405(a).

520 *See, e.g.*, Jennifer Steinhauer, *Navy Hearing in Rape Case Raises Alarm*, N.Y. TIMES, Sept. 21, 2013, at A1.

521 *Id.* (citing comment of Professor Jonathan Lurie, Rutgers University School of Law).

522 *See Transcript of JPP Public Meeting* 60–66 (Aug. 7, 2014) (testimony of Mr. Dwight Sullivan and presentation, “Overview of Military Justice System and Legislation Update”).

523 10 U.S.C. § 832 (UCMJ art. 32, 2012).

524 FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013). Section 1702 required that changes to Article 32 take effect in one year and apply to any offenses committed on or after that date. Section 531 of the FY15 NDAA clarified that the new rules and procedures would apply for all Article 32 hearings conducted after December 26, 2014, irrespective of the date the offense was committed. FY15 NDAA, Pub. L. No. 113-291, § 531, 128 Stat. 3292 (2014).

525 2012 MCM pt. II, at 34.

526 2012 MCM pt. II, at R.C.M. 405(i) (2013). M.R.E. 301, 302, 303, and 305 address the privilege concerning compulsory self-incrimination, the privilege concerning mental examination of an accused, degrading questions, and rights warnings.

527 R.C.M. 405(i) and disc. The discussion portion of the rule notes that an “investigating officer should exercise reasonable control over the scope of inquiry” and “an investigating officer may consider any evidence, even if that evidence would not be admissible at trial.” *Id.* Cf. U.S. DEP’T OF DEF., JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, PROPOSED AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 79 FED. REG. 59,938, 59,941 (proposed Oct. 3, 2014), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2014-10-03/pdf/2014-23546.pdf>.

On June 13, 2014, the President issued Executive Order (EO) 13669, modifying various sections of R.C.M. 405. The EO stated that M.R.E.s 301, 302, 303, 305, and Section V (Privileges, e.g., M.R.E. 513) “shall apply in their entirety.” The EO also specified that M.R.E. 412 “shall apply in any case defined as a sexual offense in Mil. R. Evid. 412(d).”⁵²⁸

EO 13669 clarified the authority and procedures to be used by an Article 32 investigating officer in making evidentiary determinations. The revised rule provides that the investigating officer assumes the military judge’s powers to exclude evidence from Article 32 hearings and requires the investigating officer to follow the procedures set forth in the applicable rule.⁵²⁹ The EO further provides that any M.R.E. 412 evidence admitted at an Article 32 hearing, including closed hearing testimony, must be protected pursuant to the Privacy Act of 1974. The EO requires evidence that is deemed admissible by the hearing officer to be made a part of the report of investigation. Evidence that is deemed inadmissible is not to be included in the ROI, and the evidence must be safeguarded using procedures modeled after R.C.M. 1103A (Sealed exhibits and proceedings).⁵³⁰

At the JPP’s request, the military Services described the impact of EO 13669 on the litigation of M.R.E. 412 issues at Article 32 proceedings. Before the President issued EO 13669, R.C.M. 405 clearly stated that M.R.E. 412 applied to Article 32 hearings. But practices among the Services differed as to application of the rule. The Air Force said EO 13669 put defense counsel “on clear notice that if they want to elicit evidence of sexual behavior or sexual predisposition, they must follow a distinct set of rules with oversight by a neutral, Judge Advocate, acting as Investigating Officer.” The Marine Corps said EO 13669 has had “little impact” on Article 32 hearings in the Marine Corps because investigating officers have “always” decided whether an exception has been satisfied only after the parties have litigated whether protected evidence should be disclosed. The Coast Guard said the “most significant change” introduced by EO 13669 in the Coast Guard is that the procedures followed at court-martial to determine the admissibility of M.R.E. 412 “now clearly apply” at Article 32 hearings, including closure of the hearing, *in camera* review, and the sealing of exhibits.⁵³¹

Some presenters who appeared before the JPP harshly criticized the EO’s amendment to R.C.M. 405(i), and several advised the JPP to recommend that it be rescinded.⁵³² They argued that it was never appropriate for Article 32 investigating officers to consider M.R.E. 412 evidence at Article 32 hearings, and that they should be explicitly forbidden from doing so.⁵³³ These critics contended that the Article 32 hearings’ shift in focus—to determining whether probable cause exists to support the

528 Exec. Order No. 13,669, 79 FED. REG. 34,999, 35,002 (June 18, 2014).

529 *Id.* (stating “[i]n applying these rules to a pretrial investigation, the term ‘military judge,’ as used in these rules, shall mean the investigating officer, who shall assume the military judge’s powers to exclude evidence from the pretrial investigation, and who shall, in discharging this duty, follow the procedures set forth in the rules cited in paragraphs (1) and (2)”).

530 *Id.*

531 *Id.* Services’ Responses to JPP Request for Information 46 (Nov. 6, 2014). The Army and Navy did not provide information.

532 See, e.g., *Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, to JPP* paras. 2–4 (Oct. 10, 2014); *Transcript of JPP Public Meeting* 261–64 (Oct. 10, 2014) (testimony of Ms. Petersen); Letter from Protect Our Defenders, para. 6 (Sept. 25, 2013), available at http://jpp.whs.mil/Public/docs/03_Topic-Areas/03-Victim_Privacy/20141010/22_POD_Letter_MRE412_Obama_20130925.pdf; Press Release of Protect Our Defenders, paras. 4–6 (July 28, 2014), available at http://jpp.whs.mil/Public/docs/03_Topic-Areas/03-Victim_Privacy/20141010/23_POD_SummaryConcerns_MRE412_ExecOrder_20140728.pdf; *Transcript of JPP Public Meeting* 361–63 (Oct. 10, 2014) (testimony of Lt Col Brian Thompson, U.S. Air Force, Chief Senior Trial Counsel); *Transcript of JPP Public Meeting* 377 (Oct. 10, 2014) (testimony of Maj Pete Houtz, U.S. Marine Corps, Regional Trial Counsel).

533 *Id.*

charges—made pretrial consideration of M.R.E. 412 even less appropriate.⁵³⁴ Moreover, emphasizing that M.R.E. 412 requires difficult evidentiary determinations, several presenters argued that investigating officers often lack the expertise needed to consider such evidence at Article 32 hearings.⁵³⁵

Responding to the criticisms of the EO 13669 amendment, Mr. Paul Koffsky of the DoD Office of the General Counsel advised the JPP that before the order was issued, testimony about victims' prior sexual history was "frequently elicited at Article 32 hearings, even when such evidence would not be admissible at courts-martial." The amendment, according to Mr. Koffsky, "was designed to ensure that procedures to protect victims and their privacy are followed at Article 32 investigations, not to allow the admission of any evidence that would have been inadmissible at an Article 32 investigation before the rule change."⁵³⁶

On October 3, 2014, the Joint Service Committee recommended additional revisions to R.C.M. 405 in a draft Executive Order (Draft EO) in order to better align its procedures with the FY14 NDAA changes to the Article 32 preliminary hearing.⁵³⁷ The Draft EO proposes that a new Discussion section be added to R.C.M. 405(a) to clarify that

The function of the preliminary hearing is to ascertain and impartially weigh the facts needed for the limited scope and purpose of the preliminary hearing. The preliminary hearing is not intended to perfect a case against the accused and is not intended to serve as a means of discovery or to provide a right of confrontation required at trial.⁵³⁸

The Draft EO suggests adding language to the Discussion section of R.C.M. 405(i)(1) to limit the preliminary hearing officer to considering evidence only within the limited purpose of that hearing.⁵³⁹ The changes also would provide the hearing officer with explicit authority to safeguard information by ordering exhibits, proceedings, or other matters sealed under R.C.M. 1103A.⁵⁴⁰

If the Draft EO is signed by the President, one of its most significant changes would be to eliminate the "constitutionally required" exception to M.R.E. 412 at Article 32 hearings.⁵⁴¹ Military justice experts told the JPP that the Draft EO's restriction would significantly reduce M.R.E. 412 issues at Article 32 hearings, where M.R.E. 412 evidence, such as bias and motive to fabricate prior false allegations,

534 See, e.g., Press Release of Protect Our Defenders, para. 8 (July 28, 2014) (arguing that victims' prior sexual behavior "is irrelevant to the determination of whether there is probable cause" to support sexual assault charges); *Transcript of JPP Public Meeting* 333 (Oct. 10, 2014) (testimony of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders); *id.* at 364–67 (Oct. 10, 2014) (testimony of CDR Jonathan Stephens, U.S. Navy, Senior Trial Counsel).

535 See, e.g., *Transcript of JPP Public Meeting* 364–67 (Oct. 10, 2014) (testimony of CDR Jonathan Stephens, U.S. Navy, Senior Trial Counsel) (noting that even in the Navy and Marine Corps, where investigating officers must be judge advocates, investigating officers generally are not military judges and sometimes are either second- or third-tour attorneys who lack military justice experience); *id.* at 335 (testimony of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders); *id.* at 368–69 (testimony of MAJ Rebecca DiMuro, U.S. Army, Special Victim Prosecutor).

536 Letter from Mr. Paul S. Koffsky, Deputy General Counsel for Personnel and Health Policy, U.S. Department of Defense, to the Honorable Elizabeth Holtzman, Chair, JPP Panel, para. 3 (Oct. 16, 2014) (quoting EO 13669) (citation omitted).

537 U.S. DEP'T OF DEF., JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, PROPOSED AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 79 FED. REG. 59,938 (proposed Oct. 3, 2014).

538 *Id.* at 59,949.

539 *Id.* at 59,950. The Discussion currently suggests that investigating officers can consider all evidence, even if it would not be admissible at trial. 2012 MCM, app. 21, at 27.

540 *Id.* at 59,941–42.

541 *Id.* at 59,938.

is commonly offered under the “constitutionally required” exception.⁵⁴² Defense counsel argued that precluding “constitutionally required” M.R.E. 412 evidence at Article 32 hearings would prevent the defense from providing information that might undermine the government’s case and would, by extension, prevent the convening authority from considering such information in determining the case’s disposition.⁵⁴³

According to Mr. Koffsky, the Draft EO is “legally permissible because an accused does not have a Sixth Amendment right to confrontation or to present a defense at an Article 32 preliminary hearing.”⁵⁴⁴ Mr. Koffsky added that “[t]he proposed change would eliminate what in practice appears to be the most-used Military Rule of Evidence 412 exception and the exception whose application has proved the most controversial at Article 32 investigations.”⁵⁴⁵ The Draft EO would make clear that such evidence is not admissible at Article 32 preliminary hearings.

The JPP recognizes that the significant recent changes to the rules governing Article 32 investigations will have a substantial impact on the use of M.R.E. 412 evidence at pretrial hearings. The FY14 NDAA changes to Article 32 of the UCMJ, which took effect on December 26, 2014, limit the purpose of the preliminary hearing, the matters that an accused can present, and the ability to require victims to appear and testify. EO 13669 also amended R.C.M. 405(i) to clarify for preliminary hearing officers their power to exclude evidence and the procedures they should follow when applying M.R.E. 412. The JSC Draft EO proposes additionally to eliminate the “constitutionally required” exception to M.R.E. 412 at the preliminary hearing, a change that may substantially reduce the frequency with which M.R.E. 412 issues are raised at Article 32 hearings.

These changes must be evaluated in practice before the JPP can provide its full assessment. However, information received by the JPP about practices and proceedings conducted before the recent changes will provide helpful background for the JPP as it continues to monitor pretrial consideration of M.R.E. 412 issues and evidence.

542 See, e.g., *Transcript of JPP Public Meeting* 104–05 (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army) (discussing practical impact of promulgation of proposed EO). The Air Force informed the JPP that investigating officers for Air Force Article 32 hearings already “generally” do not apply the “constitutionally required” exception at pretrial hearings. Air Force’s Response to JPP Request for Information 46 (Nov. 6, 2014).

543 *Transcript of JPP Public Meeting* 423–46 (Oct. 10, 2014) (testimony of CDR Stephen C. Reyes, U.S. Navy, Director, Defense Counsel Assistance Program); see also *id.* at 434–35 (testimony of MAJ Shari Shugart, U.S. Army, Senior Defense Counsel); *id.* at 429–30 (testimony of Maj Andrea Hall, U.S. Air Force, Senior Defense Counsel) (testifying that while EO 13669 helped clarify whether M.R.E. 412 evidence could be considered at Article 32 hearings, it was unclear whether the “constitutionally required” exception applied, and the issue typically depends on whether the IO is a military judge or not, with military judges being more likely to allow M.R.E. 412 issues to be raised at an Article 32 hearing).

544 Letter from Mr. Paul S. Koffsky, Deputy General Counsel for Personnel and Health Policy, U.S. Department of Defense, to the Honorable Elizabeth Holtzman, Chair, JPP, para. 4 (Oct. 16, 2014); U.S. DEP’T OF DEF., JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, PROPOSED AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 79 FED. REG. 59,938, 59,950 (proposed Oct. 3, 2014). The JSC proposal also notes there is no constitutional requirement for a pretrial hearing officer to consider evidence under M.R.E. 513(d)(8) and 514(d)(6) at an Article 32 hearing. *Id.*

545 Letter from Mr. Paul S. Koffsky, Deputy General Counsel for Personnel and Health Policy, U.S. Department of Defense, to the Honorable Elizabeth Holtzman, Chair, JPP, para. 4 (Oct. 16, 2014).

3. Use of M.R.E. 412 Evidence at Courts-Martial (Military Judges' Consideration of Victims' Privacy Interest)

M.R.E. 412(c) sets forth the procedure to determine the admissibility of relevant evidence offered under the three exceptions to the rule. At a closed hearing, the military judge determines whether the evidence proffered by the defense

- (1) is relevant to support one of the three M.R.E. 412(b) exceptions,
- (2) meets the rule's balancing test (i.e., whether "the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy"),⁵⁴⁶ and
- (3) survives any challenge under the M.R.E. 403 balancing test, according to which the probative value is outweighed by the danger of unfair prejudice, such as confusion of the issues or misleading the panel members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.⁵⁴⁷

The M.R.E. 412 balancing test was amended in 2007 to clarify "that in conducting the balancing test, the inquiry is whether the probative value of the evidence outweighs the danger of unfair prejudice to the victim's privacy."⁵⁴⁸ Four years later, in *United States v. Gaddis*, the Court of Appeals for the Armed Forces found that the balancing test in M.R.E. 412(c)(3) "is needlessly confusing and could lead a military judge to exclude constitutionally required evidence."⁵⁴⁹ The Court noted that the rule does not provide "that if the privacy interest is high, M.R.E. 412 turns into a rule of absolute privilege."⁵⁵⁰ Therefore, the Court concluded that "the 'alleged victim's privacy' interests cannot preclude the admission of evidence 'the exclusion of which would violate the constitutional rights of the accused.'"⁵⁵¹ If the evidence is constitutionally required, then the proffered evidence "is admissible no matter how embarrassing it might be to the alleged victim."⁵⁵²

A military justice expert told the JPP that under *Gaddis*, "the constitutional right to present a defense will always trump the victim's privacy interest."⁵⁵³ Nevertheless, several presenters testified that in practice, when M.R.E. 412 evidence survives application of the balancing test, military judges

⁵⁴⁶ M.R.E. 412(c)(3); such evidence is admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

⁵⁴⁷ *Id.*

⁵⁴⁸ 2012 MCM, app. 22 at 37; *see also* M.R.E. 412(c). The amendment is intended to aid practitioners in applying the balancing test of M.R.E. 412. Specifically, the amendment clarified: (1) that under M.R.E. 412, the evidence must be relevant for one of the purposes highlighted in subdivision (b); (2) that in conducting the balancing test, the inquiry is whether the probative value of the evidence outweighs the danger of unfair prejudice to the victim's privacy; and (3) that even if the evidence is admissible under M.R.E. 412, it may still be excluded under M.R.E. 403. *See United States v. Banker*, 60 M.J. 216 (C.A.A.F. 2004).

⁵⁴⁹ *United States v. Gaddis*, 70 M.J. 248, 250 (C.A.A.F. 2011).

⁵⁵⁰ *Gaddis*, 70 M.J. at 255 (pointing out that "in fact, the Drafters' Analysis states precisely the opposite) (quoting MCM, app. 22 at 35 ("[I]t is the Committee's intent that the Rule not be interpreted as a rule of absolute privilege.")).

⁵⁵¹ *Gaddis*, 70 M.J. at 250 (citing M.R.E. 412(b)(1)(C)).

⁵⁵² *Id.* at 256.

⁵⁵³ *Transcript of JPP Public Meeting* 86–87 (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army) (noting that *Gaddis* was a divided opinion but opining that C.A.A.F. "is united in its skepticism towards the applicability of this provision and whether the victim's privacy interest is ever relevant to the determination of the admissibility of evidence in a court-martial").

frequently issue a narrowly tailored ruling that limits the evidence that is actually presented to the fact finder.⁵⁵⁴

At the JPP October public meeting, some presenters testified that there was considerable uncertainty following the *Gaddis* decision about whether the victim’s privacy interest and the danger of unfair prejudice to the victim would be considered by a military judge.⁵⁵⁵ Noting that military criminal cases usually arise in communities with relatively small populations, they observed that the M.R.E. 412 balancing test accounts for the greater danger in close-knit communities that a victim’s privacy will be violated when prior sexual behavior is made part of the record.⁵⁵⁶ These presenters emphasized the “twin purposes” of the military justice system, as described in the preamble to the *Manual for Courts-Martial*—namely, not only justice but also good order and discipline within the Armed Forces.⁵⁵⁷ Two witnesses told the JPP that the unique nature of military society and justice justifies consideration of a victim’s privacy interests in circumstances in which doing so might be constitutionally suspect in civilian jurisdictions.⁵⁵⁸

In a written statement submitted after appearing before the JPP, two presenters urged that the M.R.E. 412 balancing test be restructured to “clarif[y] that there is no determination of whether evidence is constitutionally required until after the military judge first finds that the evidence is relevant, its probative value outweighs the unfair prejudice to the victim’s privacy, and its probative value is not substantially outweighed by the usual M.R.E. 403 considerations.”⁵⁵⁹ The presenters further advised that M.R.E. 412(c)(3) should be amended to clarify that the victim’s privacy is “a legitimate government interest that promotes good order and discipline in the Armed Services.”⁵⁶⁰

554 See, e.g., *Transcript of JPP Public Meeting* 448 (Oct. 10, 2014) (testimony of Maj Matthew Powers, U.S. Marine Corps, Senior Defense Counsel); *id.* at 92 (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army) (offering as an example that military judges often narrow the scope of permissible cross-examination); *Written Statement of CDR Stephen C. Reyes, U.S. Navy, Director, Defense Counsel Assistance Program, to JPP* para. 3 (Oct. 24, 2014).

555 See, e.g., *Transcript of JPP Public Meeting* 87–88 (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army).

556 *Transcript of JPP Public Meeting* 89–90 (Oct. 10, 2014) (testimony of Col John Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division).

557 *Transcript of JPP Public Meeting* 90–91 (Oct. 10, 2014) (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army).

558 *Id.* at 87–91 (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army) (“This puts judges in a bit of a conundrum because if they follow the law as promulgated by the President, then they risk an ad hoc evaluation of their decision by [CAAF] and their action being deemed unconstitutional. The incentive might be for, perhaps, an inexperienced judge . . . to disregard the Military Rule of Evidence and obey the dicta in the [CAAF] decision. None of these options are [sic] desirable.”); *id.* at 89–90 (testimony of Col John G. Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division). In any event, the JPP was advised, certain civilian jurisdictions have “incorporated” victim privacy protections into their criminal evidentiary codes in various ways “without raising constitutional issues of the sort that the Court of Appeals for the Armed Forces attached such significance to” in *Gaddis*. *Id.* at 119–21 (testimony of Mr. William Barto, Highly Qualified Expert and Attorney-Advisor to the U.S. Army).

559 *Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, and Mr. Ryan Guilds, Counsel, Arnold & Porter LLP, to JPP* 6 of M.R.E. 412 Analysis (Oct. 24, 2014) (“Mil. R. Evid. 412 should be amended to explicitly state that victims’ privacy is a legitimate governmental interest that promotes good order and discipline in the Armed Services, and should be further revised structurally to address concerns expressed in the *Gaddis* majority regarding the 412 balancing test. The rule should be further revised to make clear that the purpose of the hearing set forth in Mil. R. Evid. 412 is not for discovery.”).

560 *Id.* at 4; *id.* at 1-2 (quoting *Gaddis*, 70 M.J. at 252 (quoting *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (“[T]he right to present relevant testimony is not without limitation. The right may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.”) (citation and quotation marks omitted).”) and citing *Delaware v. Van*

Other presenters who appeared before the JPP defended CAAF’s decision in *Gaddis*. They argued that *Gaddis* merely recognized that the Constitution is supreme and that all rules—in particular, criminal evidentiary rules—must respect it.⁵⁶¹ While prefacing his comments by noting that the victim’s privacy interest cannot override the accused’s constitutional rights, one presenter observed that M.R.E. 412 still requires military judges to consider the danger of unfair prejudice and allows them to limit the scope of cross-examination.⁵⁶²

Some presenters advised the JPP to recommend that the “constitutionally required” exception of M.R.E. 412 be removed.⁵⁶³ They argued that the exception creates no additional requirement, because it is already presumed that no statute directs an unconstitutional outcome. Several critics contended that the exception does harm by increasing the likelihood of military judges fearing that decisions to exclude evidence offered under the exception will be reversed on appeal, potentially resulting in the invalidation of courts-martial results.⁵⁶⁴

Other presenters appearing before the JPP spoke in support of the “constitutionally required” exception in M.R.E. 412. A senior military defense counsel pointed out that the President specifically and intentionally prescribed the exception. He contended that removing the exception from M.R.E. 412 would send an inappropriate message about the fairness of the military justice system.⁵⁶⁵

4. JPP Analysis and Recommendations on M.R.E. 412 Issues

Numerous recent modifications to Article 32 and the rules by which preliminary hearings are conducted will change how and how often issues regarding private information about victims will be considered. To assess potential effects that may result from modifying M.R.E. 412, the JPP must consider the sum of all other changes to the rules for preliminary hearings. The members agree that the JPP will continue to monitor M.R.E. 412 issues at Article 32 hearings in light of these changes.

Although M.R.E. 412 applies to Article 32 hearings, investigating officers (IOs) have used different procedures when applying the rule. For instance, some IOs close M.R.E. 412 hearings, whereas others do not. The JPP believes that Executive Order 13669’s clarification that IOs assume the same power to exclude M.R.E. 412 evidence at an Article 32 hearing as military judges have at courts-martial and requiring IOs to utilize M.R.E. 412 procedures at preliminary hearings, makes perfect sense. However, IOs may not be military judges, and it is not clear whether IOs will have the background or expertise to make these difficult evidentiary decisions. The JPP will monitor how the IOs carry out their duties in light of the other changes to Article 32 proceedings.

Arsdall, 475 U.S. 673, 679 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973); *Washington v. Texas*, 388 U.S. 14, 23, (1967)) (emphasis omitted).

561 See, e.g., *Transcript of JPP Public Meeting* 161–62 (Oct. 10, 2014) (testimony of Ms. Laurie Rose Kepros, Director of Sexual Litigation, Office of (Colorado) State Public Defender).

562 *Written Statement of CDR Stephen C. Reyes, U.S. Navy, Director, Defense Counsel Assistance Program, to JPP* para. 5 (Oct. 24, 2014).

563 See, e.g., *Transcript of JPP Public Meeting* 350 (Oct. 10, 2014) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP); see also *id.* at 329–30 (testimony of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, and Mr. Greg Jacob, Policy Director, Service Women’s Action Network).

564 See, e.g., *Transcript of JPP Public Meeting* 344, 350–53 (Oct. 10, 2014) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP).

565 E.g., *Transcript of JPP Public Meeting* 422 (Oct. 10, 2014) (testimony of CDR Stephen C. Reyes, U.S. Navy, Director, Defense Counsel Assistance Program).

The JPP supports that portion of the Joint Service Committee’s October 14, 2014, draft Executive Order that proposes to eliminate the “constitutionally required” exception of M.R.E. 412 at Article 32 hearings. Defense counsel stated that the change would prevent IOs and convening authorities from making proper credibility determinations and would make it impossible for accused military members to challenge some victim accounts of alleged incidents. However, the JPP agrees with DoD’s rationale that the “constitutionally required” exception is not necessary if there is no right of confrontation at the pretrial hearing. Indeed, one JPP member observed that the exception is meaningless if the Sixth Amendment’s Confrontation Clause does not apply to Article 32 hearings. Therefore, the members supported the JSC’s proposal to remove the language from the rule for the purpose of Article 32 hearings.

The JPP heard numerous presenters testify that M.R.E. 412 evidence has been unnecessarily admitted during Article 32 hearings, thereby jeopardizing victim privacy, and that its primary avenue of admission has been the “constitutionally required” exception. Together, procedural changes that were enacted in EO 13669 and the proposed elimination of the “constitutionally required” exception in M.R.E. 412 at Article 32 hearings should enhance the capability of investigating officers at Article 32 hearings to properly consider and exclude irrelevant evidence and protect the privacy of victims.

The proposal submitted to the JPP to recommend elimination of the “constitutionally required” exception in M.R.E. 412 at trial is a more complex matter. The UCMJ generally requires the military to follow the principles and rules of evidence used in the federal system, and F.R.E. 412 also contains “constitutionally required” language. The JPP considered a number of issues related to this exception, as detailed below.

According to M.R.E. 412, the military judge is first required to determine if the evidence offered by the accused is relevant to support the exception being raised. The JPP agreed that this relevancy determination must be made first, but recognized concerns raised about how military judges are determining relevance, especially as it pertains to the “constitutionally required” exception. Two presenters suggested that the rule should be restructured. The members agreed that the JPP needs more information on how judges make the M.R.E. 412 relevance determination before making a recommendation.

The JPP members also reviewed balancing tests used by military judges when determining the admissibility of M.R.E. 412 evidence. After establishing that evidence offered by the accused is relevant to one of the exceptions, military judges conduct an M.R.E. 412 balancing test to assess whether the probative value outweighs the danger of unfair prejudice to the alleged *victim’s privacy interest*. Judges also consider M.R.E. 403 factors to assess whether the probative value of the proffered evidence outweighs the danger of unfair prejudice in general. These tests protect the victim’s privacy interest and ensure that other dangers of unfair prejudice are appropriately considered.

Even when the degree of unfair prejudice seems high, current military case law makes clear that M.R.E. 412 cannot limit the introduction of evidence required by the Constitution. To give greater weight to the victim’s privacy interests in the M.R.E. 412 balancing test, two presenters asserted, M.R.E. 412(c)(3) should be amended to specify that a victim’s privacy is “a legitimate interest.” Those presenters relied on federal Supreme Court precedent, which notes that relevant testimony may bow to accommodate other legitimate interests. The JPP has not yet determined whether a victim’s privacy interest should trump a defendant’s right to confrontation at trial when an accused can show that the evidence is relevant. The members do not have enough information to make recommendations relating to this suggestion to change the language in M.R.E. 412 to establish a “legitimate interest” for the victim.

In sum, the JPP plans to complete its statutory task of reviewing records that deal with M.R.E. 412 issues and to receive additional evidence before providing recommendations related to the “constitutionally required” exception in M.R.E. 412. The JPP recognizes that the “constitutionally required” language may be redundant, because a judge must always decide if something is constitutionally required, regardless of the language of the rule. However, removing this language from the rules for criminal trials may raise other concerns, particularly regarding the balance between the rights of defendants and the rights of victims. The members will return to issues relating to the “constitutionally required” exception after receiving more evidence about how the rule is being applied in practice.

C. MILITARY RULE OF EVIDENCE 513 (PSYCHOTHERAPIST-PATIENT PRIVILEGE)

1. The Military’s Rule Pertaining to Victims Mental Health Records

In 1999, the President established M.R.E. 513 as a military rule of privilege to protect the communications between patients and psychotherapists.⁵⁶⁶ M.R.E. 513(a) protects “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.”⁵⁶⁷ The privilege provided in M.R.E. 513 “belongs to the patient,”⁵⁶⁸ and M.R.E. 513(a) specifies that the patient has “a privilege to refuse to disclose and to prevent another person from disclosing a confidential communication.”⁵⁶⁹ Other persons, including guardians, conservators, and psychotherapists or assistants to psychotherapists, may claim the privilege on the patient’s behalf.⁵⁷⁰

M.R.E. 513 is based on the social benefit of confidential psychotherapist counseling, which was recognized in 1996 by the U.S. Supreme Court in *Jaffee v. Redmond*.⁵⁷¹ In *Jaffee*, the Supreme Court held that communications between a patient and her therapist and the notes taken during their counseling sessions were protected from compelled disclosure in a civil proceeding under the general

⁵⁶⁶ See Exec. Order No. 13,140, 64 FED. REG. 55,115 (Oct. 7, 1999).

⁵⁶⁷ M.R.E. 513(a).

⁵⁶⁸ Stacy E. Flippin, *Military Rule of Evidence (MRE) 513: A Shield to Protect Communications of Victims and Witnesses to Psychotherapists*, 2003-SEP ARMY LAW., at 1, 7 (2003).

⁵⁶⁹ M.R.E. 513(a).

⁵⁷⁰ *Id.*

⁵⁷¹ *Jaffee v. Redmond*, 518 U.S. 1 (1996); see 2012 MCM, app. 22, at 45 (“Rule 513 clarifies military law in light of the Supreme Court decision *Jaffee* In keeping with American military law since its inception, there is still no physician-patient privilege for members of the Armed Forces. See analyses for Rule 302 and 501.”); see also Flippin, *supra* note 568, at 7 (detailing the development of M.R.E. 513).

rule of privilege in F.R.E. 501.⁵⁷² M.R.E. 513 was also based on the proposed F.R.E. 504,⁵⁷³ although F.R.E. 504 was never adopted.

In explaining the nature of the privilege in M.R.E. 513, a presenter told the JPP that different privileges provide varying degrees of protection for covered communications.⁵⁷⁴ The M.R.E. 513 psychotherapist-patient privilege is a qualified privilege, because the rule provides the military judge the authority to conduct an *in camera* review and apply a balancing test to determine whether to release the records.⁵⁷⁵ This is in contrast to other privileges in M.R.E.s 502, 503, and 504—the attorney, spouse, and clergy privileges, respectively—which do not provide the military judge with authority to conduct an *in camera* review of protected material.⁵⁷⁶

Exceptions to the privilege provided in M.R.E. 513 were “developed to address the specialized society of the military and separate concerns that must be met to ensure military readiness and national security.”⁵⁷⁷ M.R.E. 513(d) specifies eight exceptions when the privilege will not apply:

1. when the patient is dead;
2. when the communication is evidence of child abuse or of neglect, . . . ;
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 . . . ;
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;

⁵⁷² *Jaffee*, 518 U.S. at 2. The *Jaffee* case involved a police officer who sought counseling after shooting and killing a suspect. The survivors of the suspect filed a civil suit, claiming civil rights violations by the police officer. *Id.* at 4–5. At trial, the court instructed the jury they could infer that the defendant’s refusal to turn over records was evidence that the records contained unfavorable information. The jury ruled for the plaintiffs and awarded damages. The defendant police officer appealed, arguing she had a psychotherapist-patient privilege to refuse to release her records. *Id.* at 5–6. The Supreme Court interpreted F.R.E. 501 to create a federal psychotherapist-patient privilege in civil proceedings and referred federal courts to state laws to determine the extent of that privilege. *Id.* at 15.

⁵⁷³ Proposed F.R.E. 504, which was not adopted, would have created a psychotherapist-patient privilege substantially similar to M.R.E. 513, and would have provided: “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 purpose 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.” F.R.E. app. II (Rule 504(b)). Privileges under the Federal Rules of Evidence are set out in F.R.E. 501 (Privileges in General) and F.R.E. 502 (Attorney-Client Privilege and Work Product; Limitations on Waiver). Any claim of privilege under a psychotherapist-patient doctrine in federal court is addressed by F.R.E. 501, which states, “The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court.”

⁵⁷⁴ *Written Statement of Ms. Viktoria Kristiansson, Attorney Advisor, Æquitas, to JPP 2 n.2* (Oct. 10, 2014).

⁵⁷⁵ Schimpf, *supra* note 494, at 173; Flippin, *supra* note 568, at 7 (asserting that overall, M.R.E. 513 affords more protections to statements of victims than to statements of accuseds).

⁵⁷⁶ Schimpf, *supra* note 494, at 173.

⁵⁷⁷ 2012 MCM, app. 22 at 45.

7. when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation . . . ;
8. when admission or disclosure of a communication is constitutionally required.⁵⁷⁸

The analysis to M.R.E. 513 explains that the exceptions “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.”⁵⁷⁹ Therefore, if an exception applies, “psychotherapists are to provide such information despite a claim of privilege.”⁵⁸⁰

Criminal defendants to sexual assault charges may have sound reasons for pursuing information from a victim’s mental health records. A defendant may seek access to determine whether the victim made statements to his or her psychotherapist that are either exculpatory for an accused or impeach the victim’s credibility, such as prior inconsistent statements or evidence of bias, prejudice, or motive to misrepresent.⁵⁸¹ Alternatively, a defendant may seek mental health record information to discover whether the victim is taking prescription medication that might alter his or her ability to accurately recall or comprehend the incident in question.⁵⁸² However, claims of interest must be balanced against the concern that misuse of evidence pertaining to mental health records may lead to an attack on the victim’s character rather than introducing or considering relevant information.⁵⁸³

When an exception to the rule’s privilege is asserted, M.R.E. 513(e) provides procedures for the military judge to determine the admissibility of patient records or communications, which include the requirement to conduct a hearing at which the patient may appear and be heard.⁵⁸⁴ If necessary to rule on its admissibility, the military judge may conduct an *in camera* review of the evidence or a proffer of it. If the military judge determines that an exception applies, he or she may issue protective orders or admit only portions of the evidence.

The scope of protection and procedures provided in M.R.E. 513 have been the subject of recent public consideration, and Congress directed a number of significant changes to M.R.E. 513 in the FY15 NDAA. Section 537 requires the following modifications to the rule, effective on June 17, 2015:

- include communications with other licensed mental health within the communications covered by the privilege;

578 M.R.E. 513(d).

579 2012 MCM, app. 22 at 45.

580 *Id.*

581 M.R.E. 608(c) allows an accused to admit such evidence “to impeach the witness either by examination of the witness or by evidence otherwise adduced.”

582 *Transcript of JPP Public Meeting* 438–39 (Oct. 10, 2014) (testimony of MAJ Shari Shugart, U.S. Army, Senior Defense Counsel).

583 For instance, in the 1991 Florida sexual assault trial of William Kennedy Smith, defense attorneys alleged that the victim had a “psychological disorder that led her to make false allegations.” Defense attorneys said they had “strong and compelling evidence” that the victim was mentally unstable. They sought permission to examine “all relevant records of psychological or psychiatric treatment” that she might have received. In the end, the judge in the case declined to let the jury hear evidence of the victim’s psychiatric history, but the controversy over her background received wide attention in the news media, which was freely available to potential jurors. Smith was acquitted. Jeffrey Toobin, *The Consent Defense, Rape Laws May Have Changed, But Questions About the Accuser Are Often the Same*, THE NEW YORKER, Sept. 1, 2003, at 43.

584 M.R.E. 513(e).

- eliminate the rule’s “constitutionally required” exception (M.R.E. 513(d)(8));
- clarify the burden on the party seeking production or admission of protected communications or records;
- revise the standard for when a military judge can conduct an *in camera* review of communications or records; and
- require that any production or disclosure permitted by the military judge be narrowly tailored to only the specific records or communications, or portions of them, that meet the requirements for one of the enumerated exceptions to the privilege.⁵⁸⁵

The JPP recognizes that the FY15 NDAA modifications to M.R.E. 513 will change procedures and common practices for accessing and introducing mental health records and communications in judicial proceedings, particularly insofar as they eliminate the “constitutionally required” exception and establish standards for the initial hearing and *in camera* review. Although testimony and information received by the JPP regarding M.R.E. 513 addressed the rule prior to these amendments, they remain relevant as the JPP considers the issues they raise and assesses whether the revisions, as implemented, resolve problems with the privilege.

In addition, Section 537 addresses only procedures and practice for accessing mental health records in military judicial proceedings. The JPP reviewed how mental health care information for military members is protected outside of the judicial process and considered the ways in which the information may be accessed, which also affect the privacy interest of sexual assault victims.

2. Privacy Protection for Service Members’ Mental Health Care Information

Laws and regulations protect the records and privacy interests of military members who seek mental health care, but provisions permit such information to be disclosed in certain circumstances. These exceptions are often based on obligations that do not exist outside the military, such as requirements for commanders to ensure a member’s fitness for duty or fitness to perform a particular mission.⁵⁸⁶

In general, personal medical information, including information about mental health care, is protected from release by 45 C.F.R. Part 164, Subpart E,⁵⁸⁷ which establishes privacy regulations for the use and disclosure of protected health information in compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA).⁵⁸⁸ Personal medical records are also protected records under the Privacy Act.⁵⁸⁹

HIPAA and Privacy Act requirements apply to DoD, which has implemented rules to cover protected health information and personally identifiable health information with limited exceptions consistent

585 FY15 NDAA, Pub. L. No. 113-291, § 537, 128 Stat. 3292 (2014).

586 *See* Services’ Responses to JPP Request for Information 49 (Nov. 6, 2014).

587 Privacy of Individually Identifiable Health Information, 45 C.F.R. Part 164, Subpart E (2000).

588 Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996). Privacy protections under HIPAA prohibit disclosure of the existence of an individual’s protected records or the release of those records, except in certain circumstances. The HIPAA Privacy Rule provides federal protections for individually identifiable health information, held by a covered entity, which concerns the health status, provision of health care, or payment for health care that can be used to identify an individual. 45 C.F.R. § 160.103 (2000).

589 5 U.S.C. § 552a (2012); *see also* generally U.S. DEP’T OF DEF., INSTR. 6025.18, PRIVACY OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION IN DoD HEALTH CARE PROGRAMS (Dec. 2, 2009), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/602518p.pdf>.

with HIPAA's privacy requirements.⁵⁹⁰ Department of Defense Instruction (DoDI) 6490.08, *Command Notification Requirements to Dispel Stigma in Providing Mental Health Care to Service Members*, specifically requires DoD to “foster a culture of support in the provision of mental health care in order to dispel the stigma of seeking mental health care.”⁵⁹¹ Health care providers “are not to notify a Service member’s commander when the Service member obtains mental health care” unless specific circumstances related to fitness and suitability for military service make disclosure necessary. In such cases, the instruction requires health care providers to “provide the minimum amount of information . . . as required to satisfy the purpose of the disclosure.”⁵⁹²

a. Disclosure to Commanders for Fitness for Duty Purposes

While limiting disclosure from health care providers, DoD Regulation 6025.18-R, *DoD Health Information Privacy Regulation*, permits commanders to use or have access to protected health information, including mental health treatment information, “to determine a member’s fitness for duty.”⁵⁹³ No authorization from the patient is required when disclosure “[i]s necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public and is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat.”⁵⁹⁴

Specific regulations implemented by the military Services provide additional guidance, and they differ regarding how much information, if any, is provided to commanders, down to the company grade level, when a Service member has sought medical care for reasons related to mental health. For example, Army Regulation 40-66 mandates that commanders may be given access to treatment records when necessary, but they still must “ensure that information . . . is kept private and confidential,” and must keep the information secure.⁵⁹⁵ Air Force Instruction 44-109 mandates that commanders be notified when one of their personnel is placed on or removed from the HIL (High Interest Log) because he or she is at “serious risk” of harming him- or herself or others.⁵⁹⁶ Protected health information includes medical and mental health records.⁵⁹⁷

590 See generally U.S. DEP’T OF DEF., DIR, 6025.18-R, DoD HEALTH INFORMATION PRIVACY REGULATION para. C1.1 (Jan. 24, 2003), available at <http://www.dtic.mil/whs/directives/corres/pdf/602518r.pdf>.

591 U.S. DEP’T OF DEF., INSTR. 6490.08, COMMAND NOTIFICATION REQUIREMENTS TO DISPEL STIGMA IN PROVIDING MENTAL HEALTH CARE TO SERVICE MEMBERS para. 3.a (Aug. 17, 2011), available at <http://www.dtic.mil/whs/directives/corres/pdf/649008p.pdf>.

592 *Id.* at para. 3.b, encl. 2 para. 1b, para. 3.b.2.

593 U.S. DEP’T OF DEF., 6025.18-R, DoD HEALTH INFORMATION PRIVACY REGULATION para. C7.11.1.3.1 (Jan. 24, 2003).

594 *Id.* at C7.10.1.1.; see also U.S. DEP’T OF DEF., INSTR. 6025.18, PRIVACY OF INDIVIDUALLY IDENTIFIABLE HEALTH INFORMATION IN DoD HEALTH CARE PROGRAMS encl. 2, para 1c. (Dec. 2, 2009) (stating that “healthcare providers shall provide the minimum amount of information to satisfy the purpose of the disclosure”).

595 U.S. DEP’T OF ARMY, REG. 40-66, MEDICAL RECORD ADMINISTRATION AND HEALTHCARE DOCUMENTATION para. 1-4 (Jan. 4, 2010), available at http://armypubs.army.mil/epubs/pdf/r40_66.pdf.

596 U.S. DEP’T OF AIR FORCE, INSTR. 44-109, MENTAL HEALTH, CONFIDENTIALITY, AND MILITARY LAW 10 (July 17, 2014), available at http://static.e-publishing.af.mil/production/1/af_sg/publication/afi44-109/afi44-109.pdf.

597 For instance, protected health information (PHI) may be used or disclosed with the patient’s consent. PHI may be released as ordered by and only to the extent authorized by court order or administrative subpoena. PHI of military members may be released to the appropriate military command authority to assure proper execution of the military mission and determine the member’s fitness for duty. PHI may be released for a law enforcement purpose to a law enforcement official, in compliance with and as limited by relevant requirements of a subpoena, summons or investigative demand, if the information sought is relevant and material to a legitimate law enforcement inquiry; the request is in writing, specific and limited in scope to the information that is sought; and information that does not identify the individual could not reasonably be used. PHI may be released in response to a law enforcement official’s request for such information

The JPP recognizes that such disclosure is limited to commanders to determine fitness for duty and is not an appropriate means for obtaining mental health records for use in military judicial proceedings.

b. Disclosure for Law Enforcement Purposes

In general, military treatment facilities may not release protected health information, including information about mental health treatment, pertaining to a victim of a crime without specific authorization from the individual, but there are exceptions. According to section C7.6.1.2.3.1 of DoD 6025.18-R, protected health information may be released without a crime victim’s consent to a law enforcement official in response to an administrative request if the “information sought is relevant and material to a legitimate law enforcement inquiry.”⁵⁹⁸ The definition of “law enforcement official”—a person empowered by law to “[i]nvestigate or conduct an official inquiry into a potential violation of law” or “[p]rosecute or otherwise conduct a criminal, civil, or administrative proceeding arising from an alleged violation of law”—includes both military investigators and prosecutors.⁵⁹⁹ To obtain access without the victim’s authorization, the requestor must indicate that the individual’s consent for release cannot be obtained because of incapacity or other emergency circumstance, that the information “is needed to determine whether a violation of law by a person other than the victim has occurred, and [that the] information is not intended to be used against the victim.”⁶⁰⁰

Some Service regulations provide additional guidance in this area. Air Force Instruction 44-109, *Mental Health, Confidentiality, and Military Law*, provides that “confidential communications will be disclosed to persons or agencies with a proper and legitimate need for the information and who are authorized by law or regulation to receive it,” unless the evidence is privileged under M.R.E. 513.⁶⁰¹ When information is requested for a criminal investigation, the military treatment facility must first determine if such disclosure is authorized by an applicable exception to the M.R.E. 513 privilege. Army Regulation 40-66, *Medical Record Administration and Healthcare Documentation*, requires that when treatment records are sought for criminal investigations, a records custodian must review the requests and determine what information will be provided.⁶⁰² According to Army Regulation 195-2, *Criminal Investigation Activities*, which cites DoD 6025.18-R, medical records remain under the control of the records custodian, who will make either the records or legible certified copies available for judicial, non-judicial, or administrative proceedings.⁶⁰³

regarding a crime victim only if the victim consents; or, if the victim is unable to consent or there is some other emergency circumstance. If the victim is unable to consent, law enforcement must represent that the information won’t be used against the victim and the information is necessary to investigate a crime committed by someone other than the victim. U.S. DEP’T OF DEF., 6025.18-R, DoD HEALTH INFORMATION PRIVACY REGULATION (Jan. 24, 2003).

598 *Id.* at para. C7.6.1.2.3. This DoD guidance applies only to treatment records that are maintained or controlled by a military treatment facility. Treatment records and information that are outside DoD control may be obtained only with the consent and authorization of the individual or by subpoena.

599 *Id.* at para. DL1.1.22.

600 *Id.* at paras. C7.6.3.

601 U.S. DEP’T OF AIR FORCE, INSTR. 44-109, MENTAL HEALTH, CONFIDENTIALITY, AND MILITARY LAW paras. 2.1–2.5 (July 17, 2014).

602 U.S. DEP’T OF ARMY, REG. 40-66, MEDICAL RECORD ADMINISTRATION AND HEALTHCARE DOCUMENTATION para. 5-23.e (Jan. 4, 2010).

603 U.S. DEP’T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES para. 3-17.b (June 9, 2014), *available at* http://www.apd.army.mil/pdffiles/r195_2.pdf.

There is no requirement to notify victims before any government representative, including investigators, commanders, or prosecutors, takes action to obtain their mental health records, but DoD policy allows individuals to request information about when their protected health information is disclosed without their authorization. DoD 6025.18-R, paragraph C13.1.2.1, permits military criminal investigators to request in writing that such notice be temporarily suspended if disclosure would likely impede an investigation.⁶⁰⁴

The JPP recognizes that such disclosure is limited to law enforcement investigative purposes and is not an appropriate means for obtaining mental health records for use in military judicial proceedings.

3. Disclosure of Mental Health Records in Military Judicial Proceedings

a. Disclosure for Pretrial Purposes and at Article 32 Hearings

In their responses to the JPP's requests for information, the Services described common approaches and practices regarding pretrial access to the mental health records of victims.⁶⁰⁵ The Air Force informed the JPP that its trial counsel generally do not seek consent to the release of victims' mental health records, but that some counsel have sought non-military victims' assistance "in securing such records, sealed, in anticipation of litigation under MRE 513(d)(8) regarding *in camera* review." The Air Force advised that "[s]uch a practice may be beneficial as it may avoid a delay in trial," but noted that the Service's trial counsel "routinely object to review and release of such information and aggressively litigate the issues in pretrial proceedings." Moreover, according to the Air Force, there is no known case in which an Article 32 investigating officer actually conducted an *in camera* review and released records under the procedure that applies to military judges regarding disclosures as set forth in M.R.E. 513 (e).⁶⁰⁶

According to the Navy, "[u]nless specifically relevant to the determination of probable cause," mental health records that are requested from military medical providers "are separated from medical records and sealed unless directed open by a military judge." While "no specific regulations or policies" other than R.C.M. 405 and M.R.E. 513 govern the handling of mental health information by Article 32 investigating officers, convening authorities "often include guidance in the appointing order directing specific protections, and investigating officers are trained to follow the restrictions of MRE 500 (series)."⁶⁰⁷

Similarly, the Marine Corps' response stated that M.R.E. 513 information "should not be released by an Article 32 hearing officer," and if inadvertently obtained or disclosed it "will be sealed pursuant to RCM 1103A." Marine Corps trial counsel do "not provide any MRE 513 materials to the defense at Article 32 hearings."⁶⁰⁸

The Coast Guard's response noted that the analysis of R.C.M. 405(i) suggests that investigating officers can preserve and protect private information contained in victims' mental health records. The Coast Guard added that "[t]his [rule's] guidance [for Article 32 hearings] is modeled after the processes

604 U.S. DEP'T OF DEF. DIR. 6025.18-R, DoD HEALTH INFORMATION PRIVACY REGULATION para. C13.1.2.1 (Jan. 24, 2003).

605 See Services' Responses to JPP Request for Information 49 (Nov. 6, 2014).

606 Air Force's Responses to JPP Requests for Information 49, 51 (Nov. 6, 2014).

607 Navy's Responses to JPP Requests for Information 49, 51 (Nov. 6, 2014).

608 Marine Corps' Responses to JPP Requests for Information 46, 51 (Nov. 6, 2014).

used by military judges at courts-martial, and thus the two are similar,” except that investigating officers lack the authority to seal an exhibit.⁶⁰⁹ The Army similarly highlighted the power of investigating officers under R.C.M. 405, as modified by EO 13669, to exclude evidence from pretrial investigations.⁶¹⁰

While the Services’ explanations indicate a generally consistent approach for safeguarding a victim’s mental health records before a military judge is detailed to a case, military justice practitioners appearing before the JPP provided differing perspectives on how mental health records are handled in practice. For instance, an Army trial counsel told the JPP that “overall in the field mental health records are being protected better.”⁶¹¹ In contrast, a defense counsel said it was “easy” to have mental health records “turned over,” for use by both the government and the accused.⁶¹² A special victims’ counsel and a civilian victim advocate told the JPP that mental health records are routinely obtained from the medical facility, sealed, and brought to court before a M.R.E. 513 motion is even litigated, rather than waiting until a military judge rules on a M.R.E. 513 motion and orders records to be produced, as required by the rule.⁶¹³

According to the Services, EO 13669 has had little effect on how M.R.E. 513 issues are litigated at Article 32 hearings.⁶¹⁴ The Air Force noted that EO 13669 “has not had significant impact [because] MRE 513 issues have rarely been raised during Article 32 investigations.”⁶¹⁵ One presenter agreed with the general assessment that M.R.E. 513 evidence typically does not “come out” until after charges have been referred to a court-martial with a military judge presiding.⁶¹⁶ Air Force IOs understand the text of M.R.E. 513 and R.C.M. 405(i) as not giving them the power to order disclosure of victims’ mental health records. Instead of requesting such records, defense counsel typically seek to ascertain merely whether a victim has received counseling and, if so, of what nature. The Marine Corps similarly indicated that for M.R.E. 513 issues as for M.R.E. 412 issues, EO 13669 has had “little impact” on its Article 32 hearings, where investigating officers have “always” decided whether an exception has been satisfied only after the parties have litigated whether protected evidence should be disclosed.⁶¹⁷

Recent legislative and executive changes will likely substantially reduce issues regarding consideration of mental health records at Article 32 hearings. Amendments in the FY14 NDAA revised Article 32 procedures, and EO 13669 clarified the power of investigating officers to exclude evidence at Article 32 hearings and to use the procedures used by military judges at trial. The proposed draft Executive Order that was published on October 3, 2014, would grant the preliminary hearing officer authority to seal records under R.C.M. 1103A. The FY15 NDAA eliminated the “constitutionally required”

609 Coast Guard’s Response to JPP Request for Information 51 (Nov. 6, 2014).

610 Army’s Response to JPP Request for Information 51 (Nov. 6, 2014).

611 *Transcript of JPP Public Meeting* 372 (Oct. 10, 2014) (testimony of MAJ Rebecca DiMuro, U.S. Army, Special Victim Prosecutor).

612 *Transcript of JPP Public Meeting* 437 (Oct. 10, 2014) (testimony of MAJ Shari Shugart, U.S. Army, Senior Defense Counsel).

613 *Transcript of JPP Public Meeting* 243 (Nov. 14, 2014) (testimony of Capt Aaron Kirk, U.S. Air Force, Special Victims’ Counsel); *Transcript of JPP Public Meeting* 309–11 (Oct. 10, 2014) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP).

614 Services’ Responses to JPP Request for Information 46 (Nov. 6, 2014).

615 Air Force’s Response to JPP Request for Information 46 (Nov. 6, 2014).

616 *Transcript of JPP Public Meeting* 338–39 (Oct. 10, 2014) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP).

617 Marine Corps’ Response to JPP Request for Information 46 (Nov. 6, 2014).

exception to M.R.E. 513. The JPP will continue to monitor M.R.E. 513 issues in Article 32 hearings in light of these changes.

b. Seeking an Interlocutory Ruling for Production or Admission of Mental Health Records

Once charges are referred to trial and a court-martial is convened, the military judge who is detailed to the case serves as the presiding officer with authority and responsibility for court-martial proceedings.⁶¹⁸ This includes responsibility for controlling the production or admission of mental health communications or records. A party seeking the production or admission of such information must file a written motion with the military judge and all parties at least five days before pleas are entered, specifically describing the evidence and stating the purpose for which it is sought or offered.⁶¹⁹ The motion must be served on the opposing party and the military judge. The party seeking the information must also, “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”⁶²⁰

The practice and rules governing motions at courts-martial are set forth in R.C.M.s 905 and 906. The burden of proof for most factual issues decided by motion is a preponderance of the evidence, and it is assigned to the party filing the motion.⁶²¹ In practice, motions under M.R.E. 513 are most often filed by the defense, seeking the production and admission of the victim’s mental health records. Thus, the defense usually has the burden of proof.

c. Initial Hearing

Before ordering that evidence of a patient’s records or communication be produced or admitted, the military judge has always been required by M.R.E. 513 to conduct a hearing,⁶²² which may be closed for good cause shown (upon the motion of counsel for either party). The parties may call witnesses at the hearing, including the patient, and offer other relevant evidence. M.R.E. 513(e)(2) requires that “[t]he patient shall be afforded a reasonable opportunity to attend the hearing and be heard,” but “the proceedings shall not be unduly delayed for this purpose.”⁶²³

Presenters told the JPP that some judges order records to be produced for an *in camera* inspection without requiring the defense to meet its burden of proof.⁶²⁴ Two witnesses said that military judges cite the “constitutionally required” exception of M.R.E. 513 to justify automatic *in camera* review of all mental health records, which often results in fishing expeditions for information, contrary to the intent of the rule.⁶²⁵

618 See R.C.M. 501–503.

619 M.R.E. 513(e)(1)(A). The military judge may alter the rule’s five-day requirement for good cause shown.

620 M.R.E. 513(e)(1)(B).

621 R.C.M. 905(c), (d).

622 In a case before a court-martial composed of a military judge and members (a jury trial), the hearing must be conducted outside the presence of the members.

623 M.R.E. 513(e)(2).

624 E.g., *Transcript of JPP Public Meeting 266* (Oct. 10, 2014) (testimony of Ms. Miranda Petersen, Program and Policy Director, Protect Our Defenders).

625 *Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, to JPP* para. 7 (Oct. 10, 2014); *Transcript of JPP Public Meeting 264* (Oct. 10, 2014) (testimony of Ms. Petersen); *Written Statement of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP, to JPP* para. 10 (Oct. 10, 2014); *Transcript of JPP Public Meeting 274* (Oct. 10,

Other presenters told the JPP that *in camera* reviews of mental health records have not been automatic in their experience and that records were not requested until after a motion for the review is filed and reviewed.⁶²⁶ More specifically, several military counsel testified that military judges apply the threshold test for *in camera* review that is set forth in *United States v. Klemick*, a 2006 decision of the Navy-Marine Corps Court of Appeals.⁶²⁷ The *Klemick* test imposes three requirements before a military judge may order an *in camera* review: (1) the defense must provide a “specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield” evidence admissible under an M.R.E. 513 exception; (2) the information sought must not merely prove the same point as other available information; and (3) the defense must have made “reasonable efforts to obtain the same or substantially similar information through non-privileged sources.”⁶²⁸ One presenter added that even when military judges find an *in camera* review of M.R.E. 513 evidence to be warranted after applying the *Klemick* test, they often exercise their discretion to limit the scope of examination or of such evidence that counsel can introduce.⁶²⁹

The FY15 NDAA modifications to M.R.E. 513 incorporate the *Klemick* standards and directly address the requirements for the moving party to meet new standards at the initial hearing:

- (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

2014) (testimony of Mr. Guilds); *Written Statement of Ms. Petersen and Mr. Guilds, Counsel, Arnold & Porter LLP, to JPP 1 of M.R.E. 513 Analysis* (Oct. 24, 2014) (quoting 2012 MCM Analysis) (emphasis omitted).

626 *Transcript of JPP Public Meeting 125–26* (Oct. 10, 2014) (testimony of Col John G. Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division); *Written Statement of CDR Stephen C. Reyes, U.S. Navy, Director, Defense Counsel Assistance Program, to JPP para. 3* (Oct. 24, 2014); *see also Transcript of JPP Public Meeting 405–07* (Oct. 10, 2014) (testimony of CDR Jonathan Stephens, U.S. Navy, Senior Trial Counsel) (explaining that mental health records are now “very, very closely guarded” by the legal offices at Navy hospitals pursuant to Navy regulations, and testifying that although he could recall “being able to just ask for” victims’ mental health records and “just g[etting] them” when he was a defense counsel ten years ago, “now they are not freely turned over”); *Transcript of JPP Public Meeting 242* (Nov. 14, 2014) (testimony of CDR Colleen Shook, U.S. Navy, Officer-in-Charge, Victims’ Legal Program Mid-Atlantic) (testifying that unlike when she “came onboard,” VLCs now lately “have been pretty successful at keeping [M.R.E. 513 evidence] protected”).

627 65 M.J. 576 (N-M. Ct. Crim. App. 2006). The Court of Appeals for the Armed Forces did not review the *Klemick* case or the Navy-Marine court’s analysis, but CAAF has subsequently cited the *Klemick* case positively in other contexts. *See L.R.M. v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013). The *Klemick* opinion is authoritative only for Navy and Marine Corps cases, but several military counsel told the JPP that military judges in the other military Services also apply the *Klemick* test. *See Transcript of JPP Public Meeting 378* (Oct. 10, 2014) (testimony of Maj Pete Houtz, U.S. Marine Corps, Regional Trial Counsel); *id.* at 404 (Oct. 10, 2014) (testimony of Lt Col Brian Thompson, U.S. Air Force, Chief Senior Trial Counsel) (noting that there is no other guidance requiring a higher burden); *id.* at 443 (testimony of Maj Matthew Powers, U.S. Marine Corps, Senior Defense Counsel); *id.* at 431–32 (testimony of Maj Andrea Hall, U.S. Air Force, Senior Defense Counsel); *Written Statement of CDR Stephen C. Reyes, U.S. Navy, Director, Defense Counsel Assistance Program, to JPP para. 3* (Oct. 24, 2014); *Transcript of JPP Public Meeting 242* (Nov. 14, 2014) (testimony of CDR Colleen Shook, U.S. Navy, Officer-in-Charge, Victims’ Legal Program Mid-Atlantic); *id.* at 243 (testimony of Capt Aaron Kirk, U.S. Air Force, Special Victims’ Counsel); Navy’s Response to JPP Request for Information 49 (Nov. 6, 2014).

628 *United States v. Klemick*, 65 M.J. 576, 580 (N-M. Ct. Crim. App. 2006).

629 *Written Statement of CDR Stephen C. Reyes, U.S. Navy, Director, Defense Counsel Assistance Program, to JPP para. 3* (Oct. 24, 2014).

(D) to show that the moving party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.⁶³⁰

The modifications to M.R.E. 513 in the FY15 NDAA will change how military judges consider M.R.E. 513 issues and when they will conduct *in camera* reviews of evidence. The revised rule will permit *in camera* review of records only when the moving party has met its burden at the initial hearing and an examination of the information is necessary to rule on whether protected records or communications should be produced or admitted.⁶³¹ The JPP will continue to monitor how M.R.E. 513 matters are addressed by military judges in light of these changes.

d. In Camera Inspection of Mental Health Records

Numerous presenters told the JPP that defense counsel in civilian criminal proceedings seeking *in camera* reviews of psychotherapist communications and orders of production by a judge must meet a strict burden of proof, and that reviews and orders for production often are not granted.⁶³² In most jurisdictions, a general assertion by a defendant that he or she needs a complainant's counseling records to attack the accuser's credibility or to develop possible areas of attack is insufficient to justify an *in camera* review.⁶³³ In a significant number of jurisdictions, a defendant may not access the victim's mental health records unless the defendant can establish a "factual predicate" that there is information in the records that would demonstrate "the unreliability of either the criminal charge or the complaining witness."⁶³⁴ Other courts have found that a defendant must "establish a reasonable likelihood that the privileged records contain exculpatory information."⁶³⁵

According to civilian experts who testified before the JPP, the defense must meet various standards to trigger *in camera* reviews in state and federal courts. One expert testified that while courts have used "dozens of different phrases"—such as a "reasonable ground to believe, a reasonable probability, a reasonable belief, a reasonable likelihood"—all such judicial formulas require more than mere speculation that because a victim received mental health treatment, such records might contain information that would be useful to the defense.⁶³⁶

Some presenters told the JPP that the military's standard for *in camera* review of M.R.E. 513 evidence should be further clarified, requiring the defense to show with greater certainty that material evidence is contained in the victim's mental health records.⁶³⁷ Professor Clifford Fishman, who proposed a

630 FY15 NDAA, Pub. L. No. 113-291, § 537(3), 128 Stat. 3292 (2014).

631 *Id.*

632 *Transcript of JPP Public Meeting 215–17* (Oct. 10, 2014) (testimony of Ms. Jennifer Long, Director, *Æquitas*); *id.* at 253 (testimony of Ms. Patricia Powers, Senior Deputy Prosecuting Attorney, Yakima County (Wash.) Prosecuting Attorney's Office).

633 *E.g.*, *Transcript of JPP Public Meeting 216* (Oct. 10, 2014) (testimony of Ms. Jennifer Long, Director, *Æquitas*).

634 *See* 1 PAUL DEROHANNESIAN II, *SEXUAL ASSAULT TRIALS* 23–25 (Matthew Bender 3d ed. 2006).

635 *Id.*

636 *Transcript of JPP Public Meeting 191* (Oct. 10, 2014) (testimony of Prof. Clifford S. Fishman, Catholic University School of Law); *see also* Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 65 OR. L. REV. 1, 50 (2007); *Written Statement of Ms. Viktoria Kristiansson, Attorney Advisor, Æquitas, to JPP 3 & n.8* (Oct. 10, 2014) (citing Michigan requirements of "reasonable probability" and "particularized need"); *Transcript of JPP Public Meeting 202–07* (Oct. 10, 2014) (testimony of Ms. Laurie Rose Kepros, Director of Sexual Litigation, Office of (Colorado) State Public Defender) (describing Colorado's waiver standard).

637 *Transcript of JPP Public Meeting 192-95, 222-23* (Oct. 10, 2014) (testimony of Prof. Clifford S. Fishman, Catholic

probable cause standard, explained that courts must protect against fishing expeditions but must also accommodate the accused's lack of concrete knowledge. While acknowledging that *in camera* reviews do intrude into the privacy of witnesses, Professor Fishman said the intrusion associated with a probable cause standard is relatively minor and controlled; only after the judge determines, upon reviewing the records, that the defense has satisfied the higher burden will it go further.⁶³⁸ Other presenters proposed even higher standards to trigger *in camera* review, such as showing “clear and convincing evidence” or functional necessity.⁶³⁹

If the military judge must examine the records at issue before ruling on the motion, he or she must do so *in camera*.⁶⁴⁰ Changes to M.R.E. 513 made by the FY15 NDAA will clarify that a military judge may conduct an *in camera* review only when the moving party has met its burden at the hearing and an examination of the information is necessary to rule on the production or admissibility of protected records or communications.⁶⁴¹

e. Production or Admission of Mental Health Records

Once the moving party meets its burden for production or admission of M.R.E. 513 evidence, the rule is silent regarding the legal standard a military judge must apply, other than requiring any production to be narrowly tailored. Unlike M.R.E. 412, which provides specific guidance to determine relevancy and weigh factors in the appropriate balancing tests, M.R.E. 513 offers no other standards to assist military judges in determining what records or communications should be disclosed or admitted.

One reviewer proposed that M.R.E. 513 should be modified to add a standard for review similar to that found in M.R.E. 412.⁶⁴² M.R.E. 412(c)(3) states that evidence is admissible under the rule if the military judge determines that it is relevant for a specified purpose and that its probative value outweighs the danger of unfair prejudice to the alleged victim's privacy. The reviewer asserted that establishing a relevancy requirement and balancing test as the standard for disclosure and admissibility could clarify the military judge's determination and make reviews of M.R.E. 513 evidence more uniform.⁶⁴³

Information from presenters did not clarify for the JPP what standard military judges currently apply, or should apply, for disclosing M.R.E. 513 evidence to the defense after *in camera* review. One military defense counsel told the JPP that military judges “often times” do not release records after reviewing them *in camera*, but she did not describe a standard that the military judges used in arriving at their

University School of Law) (articulating proposal); *accord id.* at 222–23; *see id.* at 224–25 (testimony of Ms. Laurie Rose Kepros, Director of Sexual Litigation, Office of (Colorado) State Public Defender) (supporting proposal); *id.* at 369–70 (testimony of MAJ Rebecca DiMuro, U.S. Army, Special Victim Prosecutor) (same).

638 Fishman, *supra* note 636, at 53–54.

639 *Transcript of JPP Public Meeting* 403 (Oct. 10, 2014) (testimony of Lt Col Brian Thompson, U.S. Air Force, Chief Senior Trial Counsel) (arguing also in favor of eliminating “constitutionally required” exception); *id.* at 197, 221 (testimony of Ms. Patricia Powers, Senior Deputy Prosecuting Attorney, Yakima County (Wash.) Prosecuting Attorney's Office).

640 M.R.E. 513(e)(3).

641 FY15 NDAA, Pub. L. No. 113-291, § 537(4), 128 Stat. 3292 (2014).

642 *See* Flippin, *supra* note 568, at 7 (citing STEPHEN A. SALTZBURG, LEE D. SCHINASI, AND DAVID A. SCHLUETER, *MILITARY RULES OF EVIDENCE MANUAL* 129 (cum. supp. 2001)).

643 A standard of relevancy comports with the reasoning in *Klemick* and follows the review of at least one recent Service appellate court. *United States v. Hudgins*, No. ACM 38305, 2014 CCA LEXIS 227 (A.F. Ct. Crim. App. Apr. 3, 2014) (unpublished decision affirming military judge's finding that the records sought were not relevant).

decisions.⁶⁴⁴ Another presenter said that in her experience, some military judges allow counsel to review records *in camera* along with the judge, which allows counsel to highlight what they believe is appropriate, whereas other military judges review the records alone, resulting in what she perceived as “somewhat arbitrary” release decisions. She recommended that “[s]ome kind of standard practice” should be “articulated in the statute.”⁶⁴⁵

In a 2007 article, Professor Fishman described one possible standard for disclosure of M.R.E. 513 evidence to the defense. In his view, “information contained in a prosecution witness’s counseling or therapy records is likely to be relevant only to the extent that it undermines or impeaches that witness’s testimony. Thus, the appropriate standard should be expressed in that context: information in such records should be disclosed to the defense only if, and to the extent, it raises significant doubts upon the truthfulness or accuracy of an important government witness’s testimony.”⁶⁴⁶

While the FY15 NDAA changes to M.R.E. 513 establish a clear burden for the moving party to meet in order for the military judge to conduct a review of the M.R.E. 513 evidence, the amendment does not provide a standard for military judges to use when determining whether the evidence should be produced or admitted. The revisions note only that the military judge must limit the information that is released, requiring that “any production or disclosure permitted by the military judge must be ‘narrowly tailored’ to the specific records or communications, or the portions thereof 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.”⁶⁴⁷

4. Other Issues Relating to M.R.E. 513

a. *The “Constitutionally Required” Exception to M.R.E. 513*

The “constitutionally required” evidence exception in the current version of M.R.E. 513 closely mirrors the provision in M.R.E. 412(b)(1)(C), allowing evidence otherwise excluded in sexual assault cases to be produced or admitted by the defense. In the FY15 NDAA, Congress directed that the “constitutionally required” exception be removed from M.R.E. 513, effective June 17, 2015.⁶⁴⁸

A civilian expert on evidentiary privileges told the JPP that “[n]o state rules of evidence that cover the psychotherapist-patient privilege specifically include a ‘constitutionally required’ exception.”⁶⁴⁹ Practitioners told the JPP that litigation over the exception often arises when the defense believes evidence favorable to the accused, such as evidence of bias or prior inconsistent statements affecting the victim’s credibility, or evidence that the victim was taking medications that might affect his or her ability to perceive or recall the incident, is contained in the victim’s mental health records.⁶⁵⁰

644 See *Transcript of JPP Public Meeting* 431–32 (Oct. 10, 2014) (testimony of Maj Andrea Hall, U.S. Air Force, Senior Defense Counsel).

645 *Transcript of JPP Public Meeting* 371 (Oct. 10, 2014) (testimony of MAJ Rebecca DiMuro, U.S. Army, Special Victim Prosecutor).

646 Fishman, *supra* note 636, at 52 (footnote omitted).

647 FY15 NDAA, Pub. L. No. 113-291, § 537(5), 128 Stat. 3292 (2014).

648 FY15 NDAA, Pub. L. No. 113-291, § 537(2), 128 Stat. 3292 (2014).

649 *Transcript of JPP Public Meeting* 215 (Oct. 10, 2014) (testimony of Ms. Jennifer Long, Director, Æquitas).

650 *Transcript of JPP Public Meeting* 127 (Oct. 10, 2014) (testimony of Col John G. Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division); *Transcript of JPP Public Meeting* 438–39 (Oct. 10, 2014) (testimony of MAJ Shari

Case law provides little guidance on this exception to M.R.E. 513.⁶⁵¹ The two Service courts that have addressed it have analyzed the issue in terms of whether the records sought were “material” and “relevant” to preparing a defense. They have held that an accused must do more than merely describe evidence in terms of credibility, truthfulness, or bias. Instead, he or she must establish “a real and direct nexus” between the proffered evidence and a fact or issue in the case.⁶⁵²

Before passage of the FY15 NDAA, some presenters recommended to the JPP that Congress remove the “constitutionally required” exception in M.R.E. 513. Witnesses who criticized the exception argued that its language seems to make this privilege “different” from others, inviting military defense counsel to attempt to breach the privilege and military judges to read too much breadth into it.⁶⁵³ Other presenters argued that the exception is unnecessary, because all M.R.E. privileges, by implication, must yield to constitutional requirements.⁶⁵⁴ In any event, two witnesses, citing Supreme Court case law, told the JPP that the Constitution does not require disclosure of privileged communications, because withholding such communications does not violate a defendant’s Sixth Amendment right to confront witnesses or Fifth Amendment right to due process. Pointing to thirteen states with stronger statutes on psychotherapist-patient privilege modeled after the attorney-client privilege, these presenters noted that those laws have never been overturned on due process grounds.⁶⁵⁵

While the FY15 NDAA does eliminate the “constitutionally required” exception to M.R.E. 513, it is possible that issues may continue to arise if courts recognize that M.R.E. privileges, by implication, must yield to constitutional requirements.

b. Strengthening the Military’s Psychotherapist-Patient Privilege

Some presenters advised the JPP that the military’s psychotherapist-patient privilege should be strengthened. Specifically, one presenter recommended that exceptions to the privilege should be made only if (1) the defense has made substantial showing that the victim is incapacitated and unable to recollect or testify truthfully, or (2) the reported sexual assault occurred during the course of the victim’s mental health treatment.⁶⁵⁶ These witnesses said the risk currently perceived by victims that their mental health records will be disclosed in court has a chilling effect both on their desire to seek

Shugart, U.S. Army, Senior Defense Counsel).

651 The Court of Appeals for the Armed Forces has discussed the exception only once, doing so only in the context of the procedural mechanics of a judge who abated a case after ordering a civilian third party to produce records for an *in camera* inspection. *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006).

652 See, e.g., *United States v. Hohenstein*, No. ACM 37965, 2014 CCA LEXIS 179 (A.F. Ct. Crim. App. Mar. 20, 2014) (unpublished opinion); *United States v. Wallace*, No. NMCCA 201100300, 2012 CCA LEXIS 109 (N-M. Ct. Crim. App. Mar. 30, 2012) (unpublished opinion analyzing issue in terms of applicability of M.R.E. 608(c) to M.R.E. 513 evidence).

653 *Written Statement of Ms. Viktoria Kristiansson, Attorney Advisor, Æquitas, to JPP 4* (Oct. 10, 2014); *Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, and Mr. Ryan Guilds, Counsel, Arnold & Porter LLP to JPP 4 n.5 of M.R.E. 513 Analysis* (Oct. 24, 2014) (arguing that M.R.E. 513’s uniquely explicit “constitutionally required” exception causes military judges to apply “different” standard than they would under M.R.E. 502, 503, or 504).

654 *Transcript of JPP Public Meeting 294, 354* (Oct. 10, 2014) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP); *Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, and Mr. Guilds to JPP 4 n.5 of M.R.E. 513 Analysis* (Oct. 24, 2014).

655 *Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, and Mr. Ryan Guilds, Counsel, Arnold & Porter LLP to JPP 5 n.7 of M.R.E. 513 Analysis* (Oct. 24, 2014) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-53 (1987), and *Brady v. Maryland*, 373 U.S. 83 (1963)).

656 *Transcript of JPP Public Meeting 300–01* (Oct. 10, 2014) (testimony of Mr. Ryan Guilds, Counsel, Arnold & Porter LLP).

treatment and on their willingness to cooperate with prosecutions.⁶⁵⁷ Some presenters also noted that strengthening the psychotherapist-patient privilege would bring M.R.E. 513 in line with M.R.E. 502 (attorney-client privilege), M.R.E. 503 (clergy privilege), and 504 (spousal privilege), as well as with the psychotherapist-patient privileges recognized in thirteen civilian jurisdictions.⁶⁵⁸

Other presenters testifying before the JPP said that the military's psychotherapist-patient privilege should remain qualified.⁶⁵⁹ Multiple senior defense counsel told the JPP that victims' mental health records occasionally contain evidence that is necessary to present the accused's defense and is otherwise not available.⁶⁶⁰

5. JPP Analysis and Recommendations on M.R.E. 513 Issues

The JPP considered the pending changes to M.R.E. 513 that were mandated by the FY15 NDAA and will take effect in June 2015. The JPP agreed that expanding the M.R.E. 513 privilege and eliminating the "constitutionally required" exception are positive steps toward protecting a victim's privacy interests.

The JPP considered laws and Service regulations that apply during an investigation of an alleged sexual assault offense. They generally keep the existence and content of mental health records private and confidential with a few exceptions, including exceptions for law enforcement purposes. Some presenters expressed concern to the JPP that mental health records were too easily located and obtained by criminal investigators, who may then turn over those records to prosecutors or defense counsel unnecessarily, without authorization or appropriate legal oversight by a legal advisor for the medical facility or by a military judge. The JPP's review makes clear that Service guidance and common practice among investigators is not uniform across DoD.

The JPP deliberated about whether these Service regulations and guidance regarding the release of mental health records for law enforcement purposes should be revised or standardized. Numerous presenters told the JPP that mental health records are sometimes obtained by criminal investigators and prosecutors in advance of hearings or proceedings and that this practice may chill victims' willingness to participate in sexual assault prosecutions. The JPP believes that the release of mental health records, or even the acknowledgment that mental health records exist, pierces the psychotherapist-patient privilege and constitutes a serious invasion of privacy. The Secretary of Defense should issue specific, uniform guidance to ensure that mental health records are neither sought from a medical treatment facility by investigators or military justice practitioners nor acknowledged or released by medical

657 *Written Statement of Ms. Viktoria Kristiansson, Attorney Advisor, Æquitas to JPP 5* (Oct. 10, 2014); *Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders to JPP* para. 9 (Oct. 10, 2014); *Transcript of JPP Public Meeting 266-67* (Oct. 10, 2014) (testimony of Ms. Petersen); *Attachment to Written Statement of Ms. Petersen to JPP* paras. 9, 10 (Oct. 10, 2014) (describing unnamed civilian victim's experience during Article 32 investigation); *Written Statement of Ms. Petersen and Mr. Ryan Guilds, Counsel, Arnold & Porter LLP, to JPP 6 of M.R.E. 513 Analysis* (Oct. 24, 2014).

658 *Written Statement of Ms. Miranda Petersen, Program & Policy Director, Protect Our Defenders, and Mr. Ryan Guilds, Counsel, Arnold & Porter LLP, to JPP 2 of M.R.E. 513 Analysis* (Oct. 24, 2014) (footnote omitted); *see also* National Crime Victim Law Institute (NCVLI), *Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases*, VIOLENCE AGAINST WOMEN BULL., at 3 (June 2011) (arguing against pretrial disclosure of victims' records, citing lack of constitutional requirement that defendants receive pretrial access to victims' privileged materials).

659 *See, e.g., Transcript of JPP Public Meeting 242-43* (Oct. 10, 2014) (testimony of Prof. Clifford S. Fishman, Catholic University School of Law); *id.* at 432-33 (testimony of Maj Andrea Hall, U.S. Air Force, Senior Defense Counsel).

660 *See, e.g., Transcript of JPP Public Meeting 438-39* (Oct. 10, 2014) (testimony of MAJ Shari Shugart, U.S. Army, Senior Defense Counsel); *id.* at 443-44 (testimony of Maj Matthew Powers, U.S. Marine Corps, Senior Defense Counsel).

treatment facility personnel until a military judge or Article 32 hearing officer has ordered their production. The JPP intends to continue to assess this issue in order to provide additional comments and recommendations.

The JPP also considered the modifications in the FY15 NDAA that will change how military judges review motions to produce mental health records at trial. Current practice, which may produce records more readily for *in camera* inspection, may also deter victim participation. Changes to M.R.E. 513 in the FY15 NDAA will require military judges to follow clear standards at initial hearings and permit judges to conduct *in camera* reviews of records only after a moving party has met its burden at the initial hearing and an examination of the information is necessary to rule on the production or admissibility of protecting records or communications.⁶⁶¹ The modification incorporates requirements and procedural standards that are similar to those described in *United States v. Klemick* to ensure that *in camera* review is necessary. In addition, the FY15 NDAA removed the “constitutionally required” exception from M.R.E. 513. The JPP will continue to monitor how M.R.E. 513 matters are addressed by military judges in light of the FY15 NDAA changes.

⁶⁶¹ FY15 NDAA, Pub. L. No. 113-291, § 537(4), 128 Stat. 3292 (2014).