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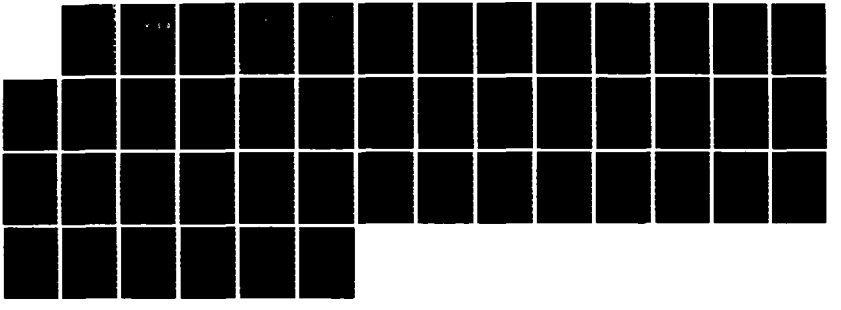

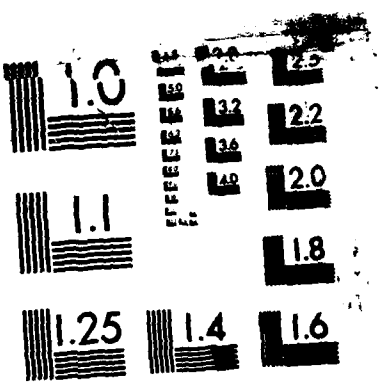

AIR COMMAND AND STAFF COLLEGE

STUDENT REPORT

SCOPE OF THE MARITAL PRIVILEGES
UNDER MILITARY LAW

MAJOR ANDREW C. PRATT 86-2040

"insights into tomorrow"

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REPORT NUMBER 86-2040

TITLE SCOPE OF THE MARITAL PRIVILEGES UNDER MILITARY LAW

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Submitted to the faculty in partial fulfillment of
requirements for graduation.

AIR COMMAND AND STAFF COLLEGE
AIR UNIVERSITY
MAXWELL AFB, AL 36112

A168 389

UNCLASSIFIED
SECURITY CLASSIFICATION OF THIS PAGE

REPORT DOCUMENTATION PAGE

1a. REPORT SECURITY CLASSIFICATION UNCLASSIFIED	1b. RESTRICTIVE MARKINGS
2a. SECURITY CLASSIFICATION AUTHORITY	3. DISTRIBUTION/AVAILABILITY OF REPORT STATEMENT "A" Approved for public release; Distribution is unlimited.
2b. DECLASSIFICATION/DOWNGRADING SCHEDULE	
4. PERFORMING ORGANIZATION REPORT NUMBER(S) 86-2040	5. MONITORING ORGANIZATION REPORT NUMBER(S)
6a. NAME OF PERFORMING ORGANIZATION ACSC/EDCC — 6b. OFFICE SYMBOL (If applicable)	7a. NAME OF MONITORING ORGANIZATION
6c. ADDRESS (City, State and ZIP Code) Maxwell AFB AL 36112-5542	7b. ADDRESS (City, State and ZIP Code)
8a. NAME OF FUNDING/SPONSORING ORGANIZATION — 8b. OFFICE SYMBOL (If applicable)	9. PROCUREMENT INSTRUMENT IDENTIFICATION NUMBER
8c. ADDRESS (City, State and ZIP Code)	10. SOURCE OF FUNDING NOS. PROGRAM ELEMENT NO. — PROJECT NO. — TASK NO. — WORK UNIT NO.
11. TITLE (Include Security Classification) SCOPE OF THE MARITAL PRIVILEGES UNDER	
12. PERSONAL AUTHOR(S) Pratt, Andrew C., Major, USAF	
13a. TYPE OF REPORT — 13b. TIME COVERED FROM _____ TO _____	14. DATE OF REPORT (Yr., Mo., Day) 1986 April — 15. PAGE COUNT 39
16. SUPPLEMENTARY NOTATION ITEM 11: MILITARY LAW	

17. COSATI CODES			18. SUBJECT TERMS (Continue on reverse if necessary and identify by block number)
FIELD	GROUP	SUB. GR.	

19. ABSTRACT (Continue on reverse if necessary and identify by block number)

This project consists of a Research Guide on the topic of marital privileges under military law. The Research Guide is primarily targeted for use by military judges, aimed at providing them with a ready reference to this topic. As such, it is intended to provide the reader both with an understanding of the topic and with ready citations for further research into various aspects of the topic, as necessary. The guide includes an analysis of Military Rule of Evidence 504, Husband-Wife Privilege, discussing and differentiating the testimony privilege of M.R.E. 504(a) and the confidential communications privilege of M.R.E. 504(b), including their distinct backgrounds, evolution at common law, scope of application, exceptions, and waiver provisions. Also discussed are related rules (M.R.E.s 510,511 and 512) and the interplay of the marital privileges with the hearsay rules (particularly M.R.E.s 801,803 and 804).

20. DISTRIBUTION/AVAILABILITY OF ABSTRACT UNCLASSIFIED/UNLIMITED ☐ SAME AS RPT. ☒ DTIC USERS ☐	21. ABSTRACT SECURITY CLASSIFICATION UNCLASSIFIED
22a. NAME OF RESPONSIBLE INDIVIDUAL ACSC/EDCC Maxwell AFB AL 36112-5542	22b. TELEPHONE NUMBER (Include Area Code) (205) 293-2483 — 22c. OFFICE SYMBOL

DD FORM 1473, 83 APR — EDITION OF 1 JAN 73 IS OBSOLETE.

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SECURITY CLASSIFICATION OF THIS PAGE

USAF JUDICIARY

Research Guide

MARITAL PRIVILEGES: MILITARY RULE OF EVIDENCE 504

This research guide is designed to provide a general understanding of the scope and application of the marital privileges contained in Military Rule of Evidence 504. It is intended as a relatively thorough introduction to the Rule, and as a source of citations for further research into various aspects of the Rule, as necessary. However, it is not exhaustive and should not be relied upon exclusively.

Prepared by

Major Andrew C. Pratt
Air Command and Staff College
Maxwell AFB AL

March 1986

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PREFACE

This document was developed as a Research Guide on the topic of marital privileges under military law. More specifically, it consists of an analysis of Military Rule of Evidence 504 (Husband-Wife Privilege), including discussion and differentiation of the testimony privilege of M.R.E. 504(a) and the confidential communications privilege of M.R.E. 504(b), as well as related rules and the interplay of the marital privilege rules with the hearsay rules.

Designed to provide the reader with both an understanding of the topic and ready citations for further research, the research guide is primarily targeted for use by military judges. It was written in support of a program initiated by its sponsor, the Chief Judge of the Air Force, to generate a series of such research guides as ready reference materials for military judges. Thus, after review and approval, it is expected that this document will be distributed to Air Force judges, and elsewhere as the Chief Judge may deem appropriate. Accordingly, a separate cover and table of contents have been included in the appropriate format to facilitate such use.

ABOUT THE AUTHOR

Major Andrew C. Pratt received a Bachelor of Arts degree in Economics from the University of Notre Dame in 1972, and a Juris Doctor degree from the National Law Center, George Washington University, in 1975. Major Pratt accepted a direct appointment to the Air Force Judge Advocate General's Department in 1975. His most recent assignments include: Staff Judge Advocate, HQ AFOSI, Bolling AFB DC from March 1981 to August 1983, and Circuit Military Judge, Second Judicial Circuit, Maxwell AFB AL from September 1983 to August 1985.

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Chapter One

INTRODUCTION

As a rule of evidence, the "marital privilege" has long been recognized in this country and within the military justice system. As it has evolved at common law, it is an area of the law which has traditionally engendered considerable confusion, compounded in recent years by substantial disagreement and controversy. Although a full historical analysis is well beyond the scope of this research guide, a brief mention of the background of the privilege and some relatively recent developments is essential to a full understanding of the latest rule which has been adopted for use in the military justice system: Military Rule of Evidence 504.

At various times during its evolution at common law, the so-called "marital privilege" has encompassed four distinct concepts:

(1) The incompetency of one spouse to be a witness against the other;

(2) The privilege of the accused-spouse to prevent adverse testimony by the witness-spouse;

(3) The privilege of the witness-spouse not to testify against the accused-spouse; and

(4) The privilege against disclosure of confidential communications between the spouses.

The concept of incompetency has long been abandoned by the federal courts and by most state courts. U.S. v. Funk, 290 U.S. 371(1933). More recently, as discussed herein, the Supreme Court abandoned the concept of an accused-spouse's privilege to prevent adverse testimony by the other spouse. Thus, this research guide will concentrate on the two remaining concepts, (3) and (4) above, which make up the "marital privilege" as it is currently recognized in the federal courts and within the military justice system.

At the outset, it is important to recognize that these two concepts which comprise the so-called "marital privilege" (or "husband-wife privilege") are in fact two entirely separate and

distinct privileges - one which protects one spouse from being compelled to testify against the other, and one which protects against the disclosure of confidential communications between spouses. U.S. v. Sims, 755 F.2d 1239(6th Cir. 1985). Each of these privileges has its own distinct background, public policy interests, evolution, scope of application, exceptions and waiver provisions. One traditional source of confusion, from which neither the courts nor their practitioners seem to have been immune, stems from a failure to keep these distinctions clearly in mind. Perhaps indicative of this confusion, and certainly adding to it, are the seemingly endless variety of descriptive names used in discussing such privileges: marital privilege, husband-wife privilege, anti-marital facts privilege, spousal competency privilege, spousal testimony privilege, spousal incapacity privilege, confidential communication privilege, marital communications privilege, spousal communications privilege, etc., etc. For purposes of this research guide, the two privileges will be referred to as the testimony privilege and the confidential communications privilege, and together will be referred to as the marital privileges.

As mentioned above, the marital privileges had their origin and evolution at common law. Claims that these privileges are somehow grounded in various constitutional amendments, and implement constitutionally-protected rights of marital privacy, have not gained support. U.S. v. Lefkowitz, 618 F.2d 1313(9th Cir. 1980); U.S. v. Doe, 478 F.2d 194(1st Cir. 1973). Although both privileges are rooted in a general public policy aimed at fostering marital harmony and preserving marital relationships, the specific aim of each privilege is distinct, and therefore each has been affected differently by shifting policy interests over time. See generally, 8 Wigmore, Evidence sec. 2227 and 2332 et seq. (McNaughton rev. 1961). Succinctly stated, the confidential communications privilege is designed to protect a particular class of information from disclosure, i.e., intra-spousal communications. The testimony privilege, on the other hand, is not designed to protect any particular information as such, but rather is intended to protect one spouse from the act of testifying against the other, i.e., from being the means of the other spouse's legal condemnation. An awareness of this distinction will be helpful in understanding the differences between the two privileges in terms of scope, exceptions, waiver, etc.

Prior to the development of the Federal Rules of Evidence, the federal courts had applied the law of privileges governed by the principles of common law as interpreted by the courts "in the light of reason and experience." See Rule 26, Federal Rules of Criminal Procedure. The common law development of various privileges (including the marital privileges) was marked by considerable disagreement, criticism, and controversy

amongst legal scholars, state courts, and within the federal court system itself. Provisions of the various editions of the Manual For Courts-Martial(MCM) generally adopted current common law principles, with minor variations. In the course of the development of the Federal Rules of Evidence, a series of rules were proposed relating to various privileges. Often the product of political compromise, the proposed privilege rules embodied a number of controversial provisions which represented a significant departure from existing common law principles. Although these proposed privilege rules were ultimately approved by the Supreme Court enroute to Congress, Congress responded to the continuing controversy and lack of consensus by replacing them with a general rule which essentially directs that the federal courts will continue to be governed by the principles of common law. (See generally S. Saltzburg & K. Redden, Federal Rules of Evidence Manual, 200-201, 217-219 (2d Ed. 1977).)

Given this turn of events, one might expect that the ensuing common law evolution of the marital privileges would "drift" in a direction consistent with the proposed rule which had been approved by the Supreme Court. Such has not been entirely the case. Prior to the proposed rule, common law recognized the confidential communications privilege and considered both spouses to be co-holders of the testimony privilege. The proposed rule would have eliminated the confidential communications privilege entirely and designated the accused-spouse as the sole holder of the testimony privilege. Since rejection of the proposed rule by Congress, however, the Supreme Court continues to give full recognition to the confidential communications privilege and has held that the witness-spouse, not the accused-spouse, is the sole holder of the testimony privilege. Trammel v. U.S., 445 U.S. 40(1980).

With this backdrop, the Military Rules of Evidence (M.R.E.) were assembled. As a general proposition, they align closely with the Federal Rules of Evidence (Fed.R.Evid.). However, in the area of privileges, the M.R.E. drafters apparently decided that the military justice system needed more concretely defined privilege rules than would be afforded by adopting the common law theme of the corresponding federal rule. Accordingly, the Military Rules of Evidence contain separately-defined privilege rules. Amongst these, of course, is M.R.E. 504, entitled Husband-Wife Privilege.

It is significant to note that the substantive content of M.R.E. 504 appears to represent a "blend" of principles from the proposed Federal Rules of Evidence, prior MCM provisions, common law, and a few "new ideas" designed to reflect the uniqueness of the military setting. This "blended" composition, together with the near absence of relevant military case law since its adoption, makes it very difficult to perform or

provide definitive analysis of this relatively new rule. By necessity, most of the citations contained herein are citations to federal case law. Care has been taken to choose and cite case authority that appears to have continuing applicability to the portion of the rule to which it relates. In addition, much of the analysis necessarily represents conclusions reached by this author, untested as yet by military case law.

In an attempt to aid the reader in understanding both the development of the rules as discussed in this Chapter and the analysis of the rules which follows, the language of Federal Rule of Evidence 501 and proposed Federal Rule of Evidence 505 has been included in appendices.

Chapter Two

TESTIMONY PRIVILEGE

GENERALLY

M.R.E 504(a) provides that a person has a privilege to refuse to testify against his or her spouse. As pointed out in the Analysis to the rule (MCM, 1984, App. 22, M.R.E. 504(a)), this privilege represents a significant departure from pre-MRE rules in that it vests the privilege in the witness-spouse alone. Prior MCM provisions, as well as the long-standing common law rule, had entitled both spouses to prevent testimony by the witness-spouse against the accused-spouse. MCM,1969(Rev.) para 148e; Hawkins v. U.S., 358 U.S. 74(1958). This traditional posture of the privilege gave way in the case of Trammel v. U.S., 445 U.S. 40(1980), which apparently served as the source for M.R.E. 504(a). In that case, the Supreme Court reasoned:

> When one spouse is willing to testify against the other in a criminal proceeding - whatever the motivation - their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace.
>
> . . . . . .
>
> This modification - vesting the privilege in the witness-spouse - furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs. Id., at 52,53.

It is interesting to note that at the time of the Trammel decision, less than half of the State jurisdictions continued to allow an accused a privilege to prevent adverse spousal testimony. Indeed, a third of the States had abolished the privilege altogether. Id., note 9 at 48. The Supreme Court in Trammel elected to preserve the privilege while at the same time silencing the many critics of the privilege by removing the accused-spouse as a holder thereof. As a result, then, unless the testimony privilege is removed by operation of one of the

exceptions thereto, the witness-spouse alone decides whether or not to provide adverse testimony against the accused-spouse. The witness-spouse can be neither barred by the accused nor compelled involuntarily by the Government. Id. at 53. (Note that in Trammel, the Court held that a grant of immunity to the witness-spouse and assurances of lenient treatment did not render her testimony involuntary).

The removal of the accused-spouse as a co-holder of the testimony privilege has significant practical impact. Prior to this change, an accused was able to bar adverse testimony by the other spouse even though that spouse was willing (and at times anxious) to assist in the judicial process. In addition, some degree of disagreement and controversy had evolved in the courts over claims by accuseds that their testimony privilege barred the admissibility of out-of-court statements of their spouses, as well as any evidence derived from such extrajudicial statements. See e.g., U.S. v. Mackiewicz, 401 F.2d 219(2d Cir. 1968); Peck v. U.S., 321 F.2d 934(9th Cir. 1963); U.S. v. Price, 577 F.2d 1356(9th Cir. 1978); U.S. v. Seiber, 31 C.M.R. 106(CMA 1961). Now, with the witness-spouse as sole holder of the privilege, an accused no longer has standing to bar the willing testimony of a spouse or to raise exclusionary claims based upon the spouse's willing cooperation with law enforcement authorities. (See, however, Chapter Three, Derivative Evidence, concerning confidential communications.)

Accordingly, in the wake of Trammel and MRE 504(a), it is clear that a willing spouse can unilaterally decide to testify against an accused-spouse, can provide information which serves as the basis for search authorizations, and can provide leads and other evidence (subject to existing restrictions) to criminal investigators.

More common, perhaps, are situations where the witness-spouse is not willing to assist in the investigation and prosecution of the accused-spouse. In the typical case, the accused is a military member while the witness-spouse is not. In this situation, there is no formal means to compel cooperation by the witness-spouse except by subpoena in a judicial proceeding; and at the judicial proceeding stage, the witness-spouse is protected by the testimony privilege of M.R.E. 504(a). It is noteworthy, however, that although the witness-spouse has a privlege to refuse to testify, neither that spouse nor the accused has a privilege to object to the introduction of her out-of-court statements made prior to trial. U.S. v. Archer, 733 F.2d 354(5th Cir. 1984). (See Chapter Four, Interplay With Hearing Rules.)

An interesting situation develops, however, where both spouses are military members. It appears to be the controlling view that the testimony privilege, by its own language, protects only

against the act of testifying. See M.R.E. 504(a); In Re Clark, 461 F.Supp 1149(S.D. New York 1978); In Re Rovner, 377 F.Supp 954(E.D. Penn. 1974); Trammel v. U.S., supra, note 12 at 52. Thus, the military witness-spouse has no privilege to invoke at the investigative stage of a case. Furthermore, unlike a civilian, a military member can be compelled (lawfully ordered) to provide information concerning crimes, so long as such information would not be self-incriminating. Theoretically, then, a military witness-spouse, although privileged against testifying, could be compelled to assist in the criminal investigation of the accused-spouse. (Even if the privilege were broadly interpreted to have been violated by such compulsion, it could be readily argued that the accused-spouse has no standing to claim relief since the privilege now belongs solely to the witness-spouse.) The author suggests, however, that the military courts could (and likely would) find that such compulsion improperly undermines both the privilege and the public policy which it is designed to serve. Unique military situations often result in unique military solutions.

SCOPE

Since the other marital privilege specifically covers confidential communications, the scope of the testimony privilege can be said to include all non-confidential communications and all other non-communicative acts or matters. Although it is clear that the privilege covers information learned or acts performed during the period of marriage, there has been some disagreement in the federal courts concerning the application of the privilege to matters occurring prior to the marriage. U.S. v. Byrd, 750 F.2d 585(7th Cir. 1984) (privilege includes matters occurring prior to marriage); U.S. v. Clark, 712 F.2d 299(7th Cir. 1983) (applied "pre-marriage acts" exception). The so-called "pre-marriage acts" exception operates to deny application of the privilege to matters occurring prior to marriage. It was created from language in the proposed (but later rejected) Fed.R.Evid. 505(c) and was specifically designed to eliminate the possibility that an accused would attempt to suppress testimony by marrying a witness. U.S. v. Van Drunen, 501 F.2d 1393(7th Cir. 1974). Like the majority of Federal circuits, however, it is clear that drafters of the M.R.E. chose to address that problem through the adoption of a "sham marriage" exception instead, leaving intact the general coverage of the testimony privilege to acts and matters occurring prior to marriage.

Another aspect of the scope of this privilege is its application at various stages of a criminal case. M.R.E. 1101(a), (b), and (d) provide that this privilege, along with all others, applies "at all stages of all actions, cases, and proceedings". Thus, it is apparent that a witness-spouse may

exercise this privilege, for example, during both the findings and sentencing phases of courts-martial (notwithstanding M.R.E. 1101(c)), at Art. 32 investigative hearings, at pre-trial confinement hearings, and at all other proceedings authorized under the UCMJ or the MCM.

EXCEPTIONS

Marital Status

As discussed earlier, the public policy underlying the testimony privilege involves concerns for the encouragement of marital harmony and the preservation of marital relationships. Obviously, then, a prerequisite for the application of the privilege is the existence of a valid marriage.

Validity. Questions concerning the validity of a marriage will be resolved by reference to the State law of the parties' domicile. U.S. v. Lustig, 555 F.2d 737(9th Cir. 1977); U.S. v. Richardson, 4 C.M.R. 150(CMA 1952). For example, when the claim of privilege is based upon a common law marriage, but common law marriages are not legally recognized by the State of domicile, no privilege exists. Id.; U.S. v. White, 545 F.2d 1129(8th Cir. 1976). The test of validity is not whether the parties honestly believe they are lawfully married, but whether they are in fact. U.S. v. Lewis, 363 F.Supp 614(W.D. Penn. 1973).

"Sham Marriage". A somewhat different issue of validity arises when the parties have entered a technically valid marriage, but have done so solely for the purpose of qualifying for the protection of the testimony privilege. In the case of such "sham marriages," the federal courts have readily imposed an exception to the privilege based upon fraud. U.S. v. Mathis, 559 F.2d 294(1977). Although in some cases it may be difficult to detect and establish the "sham" nature of the marriage, the timing and circumstances of such marriages carry great weight in the determination. U.S. v. Apodoca, 522 F.2d 568(10th Cir. 1975) (The accused married the government's key witness three days before trial.) M.R.E. 504(c)(2)(B) codifies such an exception, but recognizes the possibility that such marriages, begun as a "sham," may later evolve into true marital relationships. Thus, M.R.E. 504(c)(2)(B) invokes an exception to the testimony privilege only if the marriage was a "sham" at its inception and remains such at the time the testimony of one party is to be introduced against the other. (See Analysis, MCM, 1984, App. 22, M.R.E. 504.)

Termination. Even assuming the validity of the marriage, M.R.E. 504(c)(1) provides that the testimony privilege terminates upon divorce or annulment. In keeping with the

underlying purpose of the privilege, and consistent with prior MCM provisions, this exception simply recognizes that once a marriage has terminated, there is no longer a marital relationship to foster or protect. Note that informal or formal (legal) separation, even if such separation is in contemplation of divorce, does not remove the testimony privilege. It is forseeable that military judges, in seeking to comply with this M.R.E. provision, may be called upon to determine the finality of pending decrees of divorce and annulment. It is also likely that strict compliance with the Rule will be required in this task. It is interesting to note, however, that at least one Federal appellate court, in applying the similar common law rule, declined to determine the finality of a pending divorce: instead, it simply chose to deny the privilege on the basis that the marriage had deteriorated well beyond the public policy benefit underlying the privilege. U.S. v. Fisher, 518 F.2d 836 (2nd Cir. 1975).

Crimes Against Spouse

Another traditional exception to the testimony privilege involves crimes committed by one spouse against the other. Wyatt v. U.S., 362 U.S. 525(1960). This exception, like those previously discussed, reflects the underlying policy of the privilege. Since that policy seeks to preserve marital harmony, there is no logical reason to apply the privilege in cases involving injury to the witness-spouse. This continues to be true even though the witness-spouse, the injured party, is now the sole holder of the privilege. See Analysis, MCM, 1984, App. 22, M.R.E. 504(c)(2). As this exception has evolved at common law, it has been interpreted as including crimes against the property of the other spouse as well as crimes against children of either spouse. U.S. v. Herman, 220 F.2d 219(4th Cir. 1955); U.S. v. Allery, 526 F.2d 1362(8th Cir. 1975).

Consistent with this general evolution, M.R.E. 504(c)(2)(A) provides that the testimony privilege is unavailable in cases in which the accused is charged with an offense "against the person or property of the other spouse or a child of either, or with an offense against the person or property of a third person committed in the course of committing a crime against the other spouse." This exception is taken from proposed Fed.R.Evid. 505(c) and specifically removes the testimony privilege from the victim-spouse, thus enabling the government to actually compel the testimony of the victim-spouse in such situations. The clearly stated intent of this provision (i.e., to withhold the privilege) effectively moots prior (pre-Trammel) assertions that this exception destroys the privilege of the accused-spouse but leaves the privilege of the victim-spouse intact. See Wyatt v. U.S., supra (thoroughly discussed in dissenting opinion); U.S. v. Moore, 34 C.M.R. 415(CMA 1964). M.R.E. 504(c)(2)(A) leaves no doubt that, in cases falling

within that portion of the rule, a victim-spouse cannot refuse to testify.

The inherent difficulty posed by this exception lies in determining whether a particular offense qualifies as one "against the person or property of the other spouse." An analysis of past military case law, interpreting similar exceptions contained in the prior editions of the MCM, reflects this difficulty. The 1951 MCM spoke in terms of offenses which "injured" the other spouse, and provided examples which included not only assaults, but also such offenses as bigamy and wrongful cohabitation. Initially, the Court of Military Appeals accepted this broad application and announced that the "injury" contemplated was not limited to physical injury, but also embraced "mental suffering arising from violations of the marriage relationship." U.S. v. Leach, 22 C.M.R. 178(CMA 1956). Indeed, holding in that case that the exception was triggered by offenses of wrongful cohabitation and adultery, the Court found that the examples listed in the MCM provision were intended to be illustrative, not exhaustive. Id. Taking this cue, subsequent lower court decisions continued a liberal interpretation of the injury exception. U.S. v. Parker, 33 C.M.R. 111(CMA 1963) (sodomy by husband with another man, witnessed by wife); U.S. v. Massey, 35 C.M.R. 246(CMA 1965) (indecent liberties with daughter); U.S. v. Rener 37 C.M.R. 329 (CMA 1967)(adultery and unlawful cohabitation). Thereafter, however, citing a perceived reluctance by the Supreme Court to expand the exceptions to the privilege, the Court of Military Appeals reversed its position and announced a much more restrictive approach:

> . . .the proper approach to consideration of whether an offense charged against one spouse injures the other depends not upon the outrage to her sensibilities or a violation of the marital bonds, but upon some direct connection with her person or property. . .if the exception to the privilege is not limited to a direct invasion of the wife's rights, the rule will soon be judicially eliminated. (underlines added) U.S. v. Massey, supra at 254.

Accordingly, the Court found the injury to the spouse to be too indirect in cases involving offenses such as sodomy with another, adultery, unlawful cohabitation, and offenses against children. U.S. v. Parker, supra; U.S. v. Rener, supra; U.S. v. Massey, supra.

Subsequently, however, the 1969 edition of the MCM was issued with a revised set of examples intended to trigger the exception. MCM,1969(Rev.), para 148e. The list of example offenses continued to include those listed in the 1951 MCM and specifically added adultery and mistreatment of a child of the

other spouse. At that point, the Court of Military Appeals gave recognition to the specific intent of the drafters and to the President's authority to promulgate rules of evidence "without regard to what the rule might be in the federal civilian courts." U.S. v. Menchaca, 48 C.M.R. 538(CMA 1974) (various sex offenses by husband against wife's daughter). At the very least, then, the specific offenses listed in the MCM (assault, bigamy, unlawful cohabitation, adultery, abandonment or failure to support, mistreatment of a child of the other spouse, and forgery of other spouse's signature) served to defeat the testimony privilege. MCM,1969(Rev.), para 148e.

All this has been somewhat mooted by the enactment of M.R.E. 504, but it is useful in demonstrating the difficulty that has accompanied the development and interpretation of this exception within and without the military justice system. The new provision, M.R.E. 504(c)(2)(A), was taken from the proposed Fed.R.Evid. 505(c)(1) and has yet to be tested or interpreted by our military courts. In that regard, it should be noted that the language of M.R.E. 504(c)(2)(A) is somewhat different in content and "tone" from the prior MCM provisions. Clearly, the reference to property offenses, as well as the more broadly-worded reference to children of either spouse, are a welcome expansion and clarification. However, the specific choice of words in the reference to offenses "against the person" of the other spouse, could rekindle past confusion and disagreement. In view of past interpretive battles over direct versus indirect injury to the other spouse, it could be argued that this choice of words reflects an intent to restrict the exception to direct-injury offenses, thus excluding indirect offenses such as adultery. This argument is bolstered by the fact that one of the main indirect-injury categories -- offenses against children -- has been provided for separately. Ultimately, however, this argument is likely to fail in view of the precedent set in the 1969 MCM and in the present drafters' continued reference to "anti-marital" offenses in the Analysis relating to the rule. See Analysis, MCM, 1984, App. 22, M.R.E. 504.

Crimes Against a Child

As mentioned earlier, M.R.E. 504(c)(2)(A) provides an exception to the testimony privilege when the accused-spouse is charged with an offense against a child of either spouse. See also U.S. v. Allery, supra. This represents a change from the prior MCM provision which limited the exception to offenses involving the mistreatment of a child of the witness-spouse only. MCM, 1969(Rev.), para 148e. This new rule reflects, perhaps, society's heightened awareness of child abuse issues, and the increased attention given to prosecuting child abusers within the military.

In conjunction with M.R.E. 504(a), this provision precludes both the accused from barring the testimony of the witness-spouse and the witness-spouse from refusing to testify against the accused.

Crimes Against Third Party

Traditionally, application of the "injury exception" to the testimony privilege was limited to situations in which the accused was actually charged with the offense by which the witness-spouse had been injured. U.S. v. Walker 176 F.2d 564 (2nd Cir. 1949). As the Court of Military Appeals explained in U.S. v. Massey, supra:

> . . .it is the offense charged against the accused, or a lesser degree thereof, which must govern the issue before us, and not the fact that evidence in proof thereof tends to establish also the commission of a separate and distinct offense against the spouse. Id. at 253 (underline added)

M.R.E. 504(c)(2)(A) represents a departure from that principle. The last part of that provision establishes an exception to the testimony privilege when the accused is charged with an offense against the person or property of a third party. Although this rule requires that the offense charged was committed in the course of committing an offense against the witness-spouse, there is apparently no requirement that the offense against the spouse be among the offenses with which the accused is charged.

Statutory Exceptions

Another category of offense against the other spouse that will trigger an exception to the privilege is separately addressed in M.R.E. 504(c)(2)(C). Taken from the proposed Fed.R.Evid. 505(c)(3), this provision includes violations of the U.S. Code involving the importation of aliens for immoral purposes, transportation in interstate commerce for immoral purposes (the Mann Act), or other similar statutes. Such offenses are deemed inimical to the type of marital establishment which society has an interest in protecting.

WAIVER

The Military Rules of Evidence do not contain any provisions specifically relating to waiver of the testimony privilege. M.R.E. 504 is silent on the issue and the waiver provisions of M.R.E. 510 (as well as M.R.E. 511) are limited to confidential communications. A few observations are possible, however.

Recall that the privilege applies at all stages of all actions, cases, and proceedings. M.R.E. 1101(b). Reason would seem to dictate that "waiver" of this privilege will be determined on a "stage-by-stage" basis. For instance, the fact that a witness-spouse elects to provide adverse information during the investigative stage of a case would not preclude that spouse from exercising the privilege not to testify when the case comes to trial. Similarly, a witness-spouse could elect to testify at an Art. 32 hearing and still retain the right to refuse to testify at trial. (But see Chapter Four, INTERPLAY WITH HEARSAY RULES.)

However, if the witness-spouse voluntarily testifies at a particular proceeding (e.g., pre-trial confinement hearing, Art. 32 hearing, trial), a "waiver" of sorts would occur for that particular proceeding in the sense that the witness would be subject to cross-examination. Reason would suggest this to be true whether the witness has testified for or against the accused. Certainly the witness-spouse cannot elect to testify favorably for the accused on direct and then assert a privilege not to answer questions on cross-examination which are adverse to the accused. Of course, the scope of cross-examination is generally limited to matters testified to on direct examination. M.R.E. 611(b). Thus, by limiting the subject matter of direct testimony, the witness-spouse can generally limit the scope of cross-examination. However, M.R.E. 611(b) gives the military judge discretion to permit inquiry into "additional matters." In keeping with the spirit of M.R.E. 512(b), it may be advisable (in a trial with court members) to resolve issues of scope at a prior Art. 39(a) session so as to avoid forcing the witness to claim (or attempt to claim) the privilege in open court. A similar problem arises if the court members elect to ask questions beyond the scope of direct examination. Again, the judge is afforded discretion under M.R.E. 611(b), but may wish to clarify the matter in an Art. 39(a) session.

Chapter Three

CONFIDENTIAL COMMUNICATIONS PRIVILEGE

GENERALLY

M.R.E. 504(b) governs the second of the marital privileges -- the confidential communications privilege. The general statement of the rule is found at M.R.E. 504(b)(1):

> A person has a privilege during and after the marital relationship to refuse to disclose, or to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided be law. (Underlines added)

This privilege, like the testimony privilege, evolved at common law and found expression in prior MCM provisions. See MCM,1969(Rev.), para 151(b)(2). It bears repeating once again, however, that this privilege is entirely distinct and separate from the testimony privilege of M.R.E. 504(a).

Indeed, it is more akin to the other privileges recognizing confidential communications, i.e., lawyer-client privilege (M.R.E. 502) and priest-penitent privilege (M.R.E. 503). Dean Wigmore, although somewhat skeptical of the testimony privilege, acknowledges that the confidential communications privilege fulfills the four fundamental conditions which should underlie any communications privilege:

> (1) The communications originate in confidence. (2) The confidence is essential to the relation. (3) The relation is a proper object of encouragement by the law. (4) The injury that would inure to it by disclosure is probably greater than the benefit that would result in the judicial investigation of truth. 8 Wigmore, Evidence sec. 2332 (McNaughton rev. 1961).

It is interesting to note, however, that even this long-standing privilege is not without its critics. Although not enacted, and therefore not the law of the federal courts, the proposed Fed.R.Evid. 505 would have done away with this

privilege entirely, recognizing only a testimony privilege vested in the accused-spouse. (See Chapter One and Appendix B).

SCOPE

Unlike the testimony privilege, which applies to the act of testifying itself, the confidential communications privilege applies only to the disclosure of intra-spousal confidential communications. In assessing the applicability of the privilege to a particular situation, the initial query should be "Was it a communication?"; and second, "Was it confidential?" If the answer to either of these questions is "no", then the confidential communications privilege does not apply.

Communication

Typically, a "communication" consists of verbal utterances or written communications. However, the courts uniformly recognize that in certain instances even conduct can qualify as "communicative," if the conduct is specifically intended by one spouse to convey a message to the other. U.S. v. Lustig, 555 F.2d 737(9th Cir. 1977); U.S. v. Smith, 533 F.2d 1077(8th Cir. 1976). See generally, 8 Wigmore, Evidence sec. 2337 (McNaughton rev. 1961). The mere fact that conduct is performed in the presence of the other spouse is not sufficient. There must be some indication, from the circumstances or otherwise, that the conduct was intended almost as a substitute for a verbal utterance. U.S. v. Lewis, 433 F.2d 1146(D.C. Cir. 1970).

Certainly, then, if the accused-spouse tries to conceal certain conduct from the other spouse, or is simply indifferent to the presence of the other spouse, the accused cannot be heard later to claim that the conduct was intended as a "communication." Id.

Confidentiality

Confidentiality is the second necessary prong of this privilege, i.e., communications between spouses are privileged under this rule only if they were confidential. M.R.E. 504(b)(2) defines communications as "confidential" if "made privately" between spouses and "not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication." In other words, the communication must be made under circumstances indicative of confidentiality, with at least an implicit understanding that it is to remain confidential. At common law, the courts have long recognized a presumption of confidentiality with regard to spousal communications. Wolfe v. U.S., 291 U.S. 7(1934). The burden of overcoming the presumption rests on the government

and may be met by proof of facts or circumstances which tend to negate the existence of an intent for confidentiality. Blau v. U.S., 340 U.S. 332(1951); U.S. v. Martel, 19 M.J. 917(ACMR. 1985). Circumstances commonly cited by the courts as negating confidentiality include the presence of a third person at the time the communication is made, and evidence of an intent that the information be transmitted to a third person at some later time. Pereira v. U.S., 347 U.S. 1(1953); U.S. v. Thompson, 716 F.2d 248(4th Cir. 1983).

In assessing the issue of confidentiality, it is important to remember that the person whom the privilege is designed to protect is the communicating spouse. (See next section, Holder of the Privilege.) Therefore, in applying the principles cited above, it is the intent and knowledge of the communicating spouse which will control the outcome. For instance, if the communicating spouse intends confidentiality and is unaware of the presence of a third person, the privilege will nevertheless apply despite the fact that the other spouse knew that a third person was present. U.S. v. Neal, 532 F.Supp 942(D. Colorado 1982)(wife permitted FBI to monitor telephone call, unbeknownst to husband). Similarly, in determining whether there was intent that information be transmitted to a third person, it is the intent of the communicating spouse which governs. U.S. v. Nees, 39 C.M.R. 29(CMA 1969)(wife turned letters over to authorities; husband (author) intended privacy). On the other hand, if the communicating spouse is aware of the presence of a third party, or knows that information will be transmitted to a third person, confidentiality does not exist and the privilege will not attach. U.S. v. Klayer, 707 F.2d 892(6th Cir. 1983)(third person on phone); Grulkey v. U.S., 394 F.2d 244(8th Cir. 1968) (husband knew letters would have to be read to his wife by a third person).

An interesting practical problem is presented by the fact that, in most verbal communications of any length, both spouses are the "communicating spouse" as to those portions of the conversation which they speak. Hypothetically, then, a situation could easily arise wherein one spouse does not have this privilege (or elects not to exercise it) while the other spouse does. (For instance, the situation presented in U.S. v. Neal, supra.) Technically, the witness-spouse could be barred from disclosing those parts of the conversation attributable to the accused-spouse, but be allowed to disclose her own parts of the conversation. Such a disclosure of half of a conversation could readily serve to convey, by implication at least, the protected half of the conversation as well. Although unable to find a case addressing this particular point, this author suggests that the courts should take whatever steps are necessary to give meaningful effect to the existing privilege. Depending upon the situation, this could mean limiting the disclosure of the unprotected half of the conversation, or even barring it altogether.

The final phrase of M.R.E. 504(b)(2), "other than those reasonably necessary for transmission of the communication," is said to be in recognition of situations wherein transmission of a communication through third parties may be reasonably necessary. See Analysis, MCM, 1984, App.22, M.R.E. 504. The extent to which third parties will be held to be "reasonably necessary" in various communicative situations will be a matter for judicial interpretation. Although arguably not limited by it, this aspect of the rule should at least be read in conjunction with M.R.E. 511(b).

M.R.E. 511(b) differentiates between telephone communications and other electronic means of communication. As to the telephone, the use of this mode of communication does not affect the privileged character of information. In other words, if information is otherwise privileged, it does not lose its privileged status simply because it has been transmitted via telephone. As to other electronic modes (e.g., radio), M.R.E. 511(b) provides similar protection for otherwise privileged information, but only when such mode is "necessary and in furtherance of the communication." (See Analysis, MCM, 1984, App.22, M.R.E. 511). These rules are apparently designed to avoid the application of the "third party exception" to situations where administrative monitoring may occur or where third parties are administratively or technologically necessary for transmission." See M.R.E. 504(b)(2).

Holder of the Privilege

As provided in M.R.E. 504(b)(1), the holder of the privilege is the spouse who made the confidential communication. M.R.E. 504(b)(3) further explains that, in the absence of a waiver, the other spouse is presumed to have authority to claim the privilege on behalf of the communicating spouse; but the privilege itself belongs only to the communicating spouse. M.R.E. 504(b)(3) also includes one exception to this scheme -- in situations where the witness-spouse is the holder of the privilege, the accused-spouse may nevertheless require disclosure even if the witness-spouse objects. This apparently represents a situation where the rights of the accused to defend himself/herself are deemed to outweigh the policy benefits of protecting privileged communications. U.S. v. Ammar, 714 F.2d 238(3rd Cir. 1983). Taken as a whole, then, this rule gives the accused considerable control over the disclosure of confidential communications. Note, however, that the accused's control does not extend to situations in which the witness-spouse, as communicating spouse, elects to testify or otherwise disclose such communications.

Disclosure

The holder of the confidential communications privilege is

entitled to refuse to disclose confidential communications personally and to prevent "another" from disclosing such communications. In this context, "another" refers not only to the other spouse, but also to anyone else who may have improperly gained knowledge of the communication. This protection is considerably broader than that previously afforded by the MCM,1969(Rev.). Under para 151b(2) of the MCM:

> The privilege. . .will not prevent allowing or requiring a person outside the privileged relationship who either by accident or design gained knowledge of the communication to testify concerning it, nor will it prevent the reception in evidence of a writing containing the communication which was obtained by such a person either by accident or design.

In keeping with the underlying purpose of the privilege, this exception did not apply, however, if the person gained such knowledge through the "connivance" of the spouse to whom the communication was made. MCM, 1969(Rev.), para 151b(2). Nevertheless, this old rule afforded no protection in situations wherein a third party accidently overheard, intentionally eavesdropped (e.g., wiretap), accidentally found a written communication (e.g., a letter), intentionally stole it, discovered it during a lawful search, etc.

The new rules, however, do offer such protection. M.R.E. 511(a) provides:

> Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege. (Underlines added.)

Read in conjunction with M.R.E. 504(b), this rule effectively precludes the use in evidence of involuntary disclosures, whether they resulted from accident, design, collusion by other spouse, improper compulsion, or otherwise. See Analysis, MCM, 1984, App.22, M.R.E. 504 and 511. This represents significantly expanded protection for holders of the privilege.

Derivative Evidence

A key issue not addressed in either M.R.E. 504 or M.R.E. 511 involves the admissibility of evidence derived from impermissible disclosures. For instance, a wife discloses to authorities confidential statements by the husband, thereby enabling the authorities to secure a search warrant and conduct

a fruitful search. At trial, the husband can clearly preclude disclosure of his confidential statements by his wife or by the authorities. M.R.E. 511(a). But what about the fruits of the search? This author has been unable to find cases clearly addressing this point either pre- or post-M.R.E. Coming closest perhaps was the Court of Military Appeals in U.S. v. Seiber, 31 C.M.R. 106(CMA 1961), wherein the Court declined "to apply the poison tree doctrine to marital confidences." Although apparently on point, the Court's opinion in that case seemed somewhat "strained," inasmuch as it concluded at the outset that no marital confidences appeared to be involved, and it cited reliance on several cases which dealt with situations addressing the testimony privilege instead of the confidential communications privilege. See also U.S. v. Cleveland, 477 F.2d 310(7th Cir. 1973). More recently, in U.S. v. Lefkowitz, 618 F.2d 1313(9th Cir. 1980), the Ninth Circuit Court of Appeals faced a similar issue, but also concluded that confidential communications were not involved. In so doing, however, the Court clearly implied that protection of privileged communications would require the invalidation of a search warrant supported by such communications.

This issue remains unresolved. On one hand, it can be argued that such an exclusionary sanction was implicitly intended, or is otherwise appropriate, since it represents the major incentive against abuse of the privilege. On the other hand, especially in view of recent trends toward curbing exclusionary sanctions, it could be argued with equal force that M.R.E. 511(a) specifically addresses unconsented diclosures, significantly expands the protection afforded by the privilege, and represents the sole remedy for violations of the privilege. (See M.R.E. 1101(b) and (d) for possible impact on this issue.)

Marital Status

Illustrative of the fundamental differences between the testimony privilege and the confidential communications privilege are the differing ways in which marital status, and the termination thereof, impacts upon each privilege. Both privileges depend upon the existence of a valid marriage, as determined by the law of the domicile. U.S. v. Lustig, supra. (See Chapter Two, Marital Status). However, the testimony privilege requires a valid marriage at the time of trial, regardless of marital status at the time of the events in question. On the other hand, the confidential communications privilege requires a valid marriage at the time of the confidential communication, regardless of the marital status at the time of trial or disclosure. U.S. v. Byrd, 750 F.2d 585 (7th Cir. 1984). Furthermore, the testimony privilege is not affected by legal separation. The confidential communications privilege, on the other hand, is drastically affected in that

the privilege will not apply to communications which take place while the parties are "separated as provided by law." M.R.E. 504(b)(1). Finally, the testimony privilege terminates when the marriage ends, whereas once the confidential communications privilege attaches, it never terminates (except upon waiver). U.S. v. Bolger, 556 F.2d 948(9th Cir. 1977). In other words, confidential communications are protected both during and after the marriage. M.R.E. 504(b)(1).

EXCEPTIONS

"Sham Marriage"

Carrying forward a prior MCM provision, M.R.E. 504 (c)(2)(B) codifies an exception to the confidential communications privilege in the case of "sham marriages." See Chapter Two, "Sham Marriage", for general discussion. Specifically, M.R.E. 504(c)(2)(B) provides that no privilege exists if the marriage was a "sham" at the time of the communication in issue. Thus, as regards the confidential communications privilege, it matters not whether the marriage began or ended as a "sham", but whether it was a "sham" at the time of the communication.

Crimes Against Spouse, Child, or Third Party

M.R.E. 504(c)(2)(A) applies an exception to both the testimony and confidential communications privileges in cases in which one spouse is charged with a crime against the other, against a child of either, or against a third person (committed in the course of a crime against the other spouse). A similar set of "injury exceptions' (though less broad) appears in the prior MCM, but only in the section dealing with the testimony privilege. MCM,1969(Rev.), para 148e. There was no mention of such exceptions in the MCM section dealing with confidential communications. MCM,1969(Rev.), para 151b(2). Although Dean Wigmore suggests that similar exceptions were applied at common law to the confidential communications privilege, this author has found no military cases in which such exceptions have been applied by the courts. 8 Wigmore, Evidence sec. 2338 (McNaughton rev. 1961). Thus, it would appear that the present application of these "injury exceptions" to both privileges represents an expansion of the exceptions, at least within the military judicial system. A full discussion of these exceptions is included in Chapter Two, EXCEPTIONS.

Statutory Exceptions

As with the general "injury exceptions" discussed above, the so-called statutory exceptions found in M.R.E. 504(c)(2)(C) were contained in the prior MCM, but only in the section

relating to the testimony privilege. MCM,1969(Rev.),para 148e. It is clear, however, that this new Rule applies these statutory exceptions to the confidential communications privilege as well. See Chapter Two, EXCEPTIONS.

WAIVER

It was noted in an earlier section that the Military Rules of Evidence significantly increase the protection of the privilege-holder against loss of the privilege through involuntary disclosure. See Disclosure (this chapter) and M.R.E. 511. On the other hand, however, the Rules also recognize and define that the privilege may be waived by voluntary disclosure. This is governed by M.R.E. 510 which applies not exclusively to the spousal communication privilege, but to each of the other communication privileges in Section V of the Rules as well.

M.R.E. 510 is generally consistent with its federal counterpart, Fed.R.Evid. 511, and with the prior MCM provision, MCM, 1969(Rev.), para 151. The Rule itself is written in somewhat non-specific language, apparently designed to allow flexibility in applying the Rule to a wide variety of situations. This may, however, complicate its interpretation. For instance, the Rule provides that waiver occurs if the holder of the privilege voluntarily discloses or consents to disclosure of "any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege." Arguments are inevitable concerning whether a particular disclosure represents a "significant part" of a communication and whether circumstances are such as to render a claim of privilege "inappropriate."

Within the context of the marital confidential communications privilege, it is clear that the privilege may be waived either expressly or by implication. U.S. v. Benford, 457 F.Supp 589(E.D. Michigan 1978). Thus, for example, when the holder of the privilege voluntarily discloses the communication to a third party, the communication is no longer confidential and the privilege is waived. U.S. v. Lilley, 581 F.2d 182(8th Cir. 1978). Similarly, if the privilege-holder directs, fails to stop, acquiesces in, or otherwise consents to disclosure by the other spouse to a third party, waiver has occurred. Once again, note that disclosure by the other spouse without the consent or acquiescence of the privilege-holder will not constitute waiver under these new rules. M.R.E. 511(a). Nor will waiver occur if, although voluntary, the disclosure is itself privileged, i.e., disclosure to a clergyman under M.R.E. 503 or within the attorney-client privilege of M.R.E. 502. See M.R.E. 510(a). Otherwise, however, as long as the

privilege-holder has an opportunity to assert the privilege, the failure to do so will imply consent and constitute waiver. U.S. v. Neal, supra; U.S. v. Figueroa-Paz, 468 F.2d 1055(9th Cir. 1972). In that regard, it has been held that in-court assertions of the privilege must be timely, must specifically refer to the privilege, and must be made before disclosure has occurred. U.S. v. Gibbs, 4 M.J. 922(AFCMR 1978). Unlike the testimony privilege, once waiver has occurred, the privilege cannot be restored or reasserted at a later time. In Re Grand Jury Proceedings, 604 F.2d 804(3rd Cir. 1979).

M.R.E. 510(b) simply restates the prior MCM principle that an accused or an immunized witness does not, merely by reason of testifying, waive an existing confidential communications privilege. See MCM,1969(Rev.), para 151(b)(2). Of course, if the accused or the witness voluntarily testifies about the confidential communication, the privilege is waived and full cross-examination into the communication will be permitted. U.S. v. Gibbs, supra.

Chapter Four

RELATED ISSUES

COMMENT/INFERENCE ON CLAIM OF PRIVILEGE

This topic is not deemed to merit extensive discussion in this research guide. Suffice it to say that M.R.E. 512 is new to military practice, applies to marital privileges, and deserves close attention and adherence by military judges and counsel alike. Generally speaking, M.R.E. 512 provides that no comments be made or inferences be drawn upon the exercise of a privilege by the accused or by a witness; that all practical steps be taken to avoid forcing an accused or a witness to exercise a privilege in front of the court members, if any; and that either party will normally be entitled to an instruction directing that no inference be taken.

"JOINT PARTICIPATION" EXCEPTION

A potentially critical issue for military courts will be the applicability of the so-called "joint participation" exception to the marital privileges. The difficulty in assessing this issue is compounded by the fact that there is a lack of uniformity on this issue in the federal courts, at least as regards the full scope of its applicability. Consequently, a twofold issue presents itself. First, what is the applicability of the exception at common law? And second, will the exception apply in the military justice system?

Common Law

Sometimes referred to as a "coconspirator" or "crime-fraud" exception, the joint participation exception initially evolved at common law with regard to the confidential communications privilege. In U.S. v. Kahn, 471 F.2d 191(7th Cir. 1972), the Court concluded that "where both spouses are substantial participants in patently illegal activity," the public interest in preserving the family was not great enough to justify protecting conversations in furtherance of crimes. As the Court in U.S. v. Mendoza, 574 F.2d 1373(5th Cir. 1978), explained:

> . . .conversations between husband and wife about crimes in which they are jointly participating when the conversations occur are not marital communications for purpose of the marital privilege, and thus do not fall within the privilege's protection of confidential marital communications. Id. at 1381.

Application of this exception to the confidential communications privilege is generally accepted throughout the federal court system. U.S. v. Harrelson, 754 F.2d 1153(5th Cir. 1985); U.S. v. Neal, 743 F.2d 1441(10th Cir. 1984); U.S. v. Byrd, 750 F.2d 585(7th Cir. 1984); U.S. v. Shipp, 578 F.Supp 980(S.D.N.Y. 1984); U.S. v. Petty, 602 F.Supp 996(D.Wyoming 1984).

There is less unanimity, however, with regard to the application of this exception to the testimony privilege. Not long after its decision in Kahn, supra, the Seventh Circuit Court of Appeals faced this companion issue in U.S. v. Van Drunen, 501 F.2d 1393(7th Cir.), cert. denied, 419 U.S. 1091 (1974). In that case, although recognizing that the two marital privileges must be "sharply distinguished," the Court nevertheless applied the exception to the testimony privilege, reasoning that the public interest underlying that privilege ". . .does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or coconspirator he is creating another potential witness." Id. at 1396.

This reasoning, while perhaps valid at the time, lost its vitality when the Supreme Court (in Trammel, supra) removed the testimony privilege from the accused and vested it solely in the witness-spouse. (See Chapter Two, GENERALLY). Accordingly, although the Seventh Circuit Court of Appeals continues to apply the exception to the testimony privilege, other Circuits have either declined to do so or have elected not to address the issue. U.S. v. Clark, 712 F.2d 299(7th Cir. 1983); Appeal of Malfitano, 633 F.2d 276(3rd Cir. 1980); In Re Grand Jury Subpoena United States, 755 F.2d 1022(2nd Cir. 1985) (excellent discussion of this issue); U.S. v. Archer, 733 F.2d 354(5th Cir. 1984). This issue, therefore, has not yet been clearly resolved, but the majority view clearly limits application of the "joint participation" exception to the confidential communications privilege.

Military Courts

The question facing military practitioners is to what extent, if at all, the joint participation exception will be recognized and applied by the military courts. M.R.E. 504, although delineating several exceptions, makes no mention of joint participation/coconspirator situations. This failure to address the common law exception may be an indication of a

conscious intent not to apply it. Indeed, the absence of such an exception under M.R.E. 504 is especially "conspicuous" in view of the presence of a similar exception under M.R.E. 502 (attorney-client privilege). On the other hand, M.R.E. 501(a)(4) invites the application of common law principles, as recognized by the federal courts, when "practicable and not contrary to or inconsistent with" the UCMJ, the M.R.E.s, or the MCM. The drafters' Analysis to M.R.E. 501 suggests that this provision was specifically intended to provide military courts with necessary flexibility in the unsettled area of privileges. See Analysis, MCM, 1984, App.22, M.R.E. 501.

The Army Court of Military Review recently had occasion to address this very issue. In U.S. v. Martel, 19 M.J. 917(ACMR 1985), the Court cited its considerable authority under M.R.E. 501(a)(4) and proceeded to resolve "deficiencies and ambiguities" in M.R.E. 504 by "interpreting and applying those federal common law principles which seem, in the light of our reason and experience, most compatible with the unique needs of military due process." Citing a host of federal case authority, and "balancing the need for truth in criminal trials against the importance of the policy behind M.R.E. 504(b)," the Court concluded that the "joint participation" exception does apply to the confidential communications privilege. Id. at 929.

INTERPLAY WITH HEARSAY RULES

The impact of the marital privileges on the application of the hearsay rules, Section VIII of the Military Rules of Evidence, is directly tied to the purpose of each privilege. As explained in Chapter One, the public policy interests underlying both privileges are quite similar and involve the promotion of marital harmony and stability. Nevertheless, the more immediate aim or design of each privilege is quite different. In brief, as explained in Chapter One, the testimony privilege is not designed to protect any particular information, as such, but rather is intended to protect one spouse from the act of testifying against the other, i.e., to protect the witness-spouse from being compelled to be the instrument of the other spouse's legal demise. The confidential communications privilege, on the other hand, is specifically designed to protect a particular class of information from disclosure, i.e., confidential intra-spousal communications.

Testimony Privilege

The hearsay rules, when properly triggered, allow for the admission into evidence of certain statements as reported by someone other than the declarant. As applied to the witness-spouse as declarant, these rules are neither inconsistent with, nor do they undermine, the testimony privilege. They do not

compel the witness-spouse to do that which the testimony privilege protects against -- testify. Indeed, as a general proposition, the hearsay rules are either indifferent to the presence of the spouse as a witness or specifically require the spouse's unavailability as a witness. Accordingly, it is generally accepted that the application of hearsay rules to the out-of-court statements of the witness-spouse is not inconsistent with that spouse's privilege to refuse to testify at trial. U.S. v. Archer, supra.

Out-of-court statements by the witness-spouse are often available and quite valuable. In some instances, the witness-spouse initially elects to cooperate with investigators, providing sworn written statements and other valuable information, and later chooses not to testify. In other cases, valuable information has been obtained from a witness-spouse through the use of undercover agents or lawfully authorized wiretaps. In yet other cases, the witness-spouse may elect to testify at an Article 32 hearing, but refuse to testify at trial. In any event, trial counsel will still be required to proffer an applicable hearsay exception; but it is suggested that the existence of the testimony privilege will not, in and of itself, preclude otherwise admissible evidence.

Thus, applying this principle to practical situations, the following examples of the use of hearsay would appear to be permissible: Use in support of search authorization. M.R.E. 315(f)(2); U.S. v. Lefkowitz, 618 F.2d 1313(9th Cir. 1980). Use as statements of a coconspirator under M.R.E. 801(d)(2(E). U.S. v. Dillon, 12 M.J. 641(AFCMR 1981)(statements to undercover agent); U.S. v. Ward, 13 M.J. 626(AFCMR 1982). Use as an "excited utterance" under M.R.E. 803(2). U.S. v. Tsinnijinnie, 601 F.2d 1035(9th Cir. 1979)("He ran over my mother!"). Use as former testimony under M.R.E. 804(b)(1) (where witness has testified previously). Use as a statement against interest under M.R.E. 804(b)(3). (This basis was rejected in both Dillon and Ward, supra, but only because there was no showing that the witness-spouse would have invoked the privilege and thus no showing of "unavailability" as required by M.R.E. 804(a)(1).)

The foregoing examples are not necessarily all-inclusive. The point being made is that the testimony privilege does not bar application of the hearsay rules. With that premise as a foundation, "regular" hearsay analysis takes over. For example, the viability of using "residual hearsay" exceptions (M.R.E.s 803(24) and 804(b)(5)) will depend upon the factors typically analyzed in connection with those exceptions. The fact that a marital situation is involved will neither add nor detract from the analysis, except perhaps to the extent that the involvement of a spouse is seen as adding to (or perhaps lessening) the "circumstantial guarantees of trustworthiness."

Confidential Communications Privilege

As noted earlier, this privilege is specifically intended to protect a class of information. Indeed, it's protection, once properly vested, is not terminated by the end of the marriage or by any other factor (except waiver). Unlike the testimony privilege, it is clear that the protection afforded by this privilege would be significantly undermined by application of the hearsay rules. It comes as no surprise, then, that M.R.E. 504(b) and M.R.E. 511 effectively preclude such application. M.R.E. 504(b) gives the privilege-holder the authority to preclude others from disclosing confidential communications, and M.R.E. 511 renders inadmissible any disclosures which have been erroneously compelled or which have come into the possession of third parties without the consent of the privilege-holder. (See Chapter Three, Disclosure). In other words, any hearsay which constitutes a confidential communication is inadmissible, absent a waiver by the privilege-holder.

Thus, in effect, the confidential communications privilege bars the application of the hearsay rules. Having said that, however, it must hastily be added that there will be numerous situations in which the privilege will be deemed not to apply and in which, therefore, the hearsay rules may render such spousal communications admissible. (For example, where the communications are deemed non-confidential, when they occur prior or subsequent to marriage, when they occur within a "sham" or otherwise invalid marriage, when crimes against a spouse or child are involved, when the "joint participation" exception is invoked, when waiver has occurred, etc.) In such situations, wherein the privilege is found not to have attached or has been waived, application of the hearsay rules would be unrestricted. U.S. v. Broome, 732 F.2d 363(4th Cir.1984).

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APPENDIX

Appendix A

EXTRACT FROM
FEDERAL RULES OF EVIDENCE

RULE 501

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. . .

APPENDIX

Appendix B

PROPOSED RULE 505:

HUSBAND-WIFE PRIVILEGE
[Not Enacted]

(a) General rule of privilege. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

(b) Who may claim the privilege. The privilege may be claimed by the accused or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.

(c) Exceptions. There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage, or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of 8 U.S.C. 1382, with transporting a female in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. 2421-2424, or with violation of other similar statutes.

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