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To Privilege or Not to Privilege: A Rational Solution to Claiming the Deliberations Privilege under Military Rules of Evidence 509 and 606(b)

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TO PRIVILEGE OR NOT TO PRIVILEGE: A RATIONAL SOLUTION TO CLAIMING THE DELIBERATIONS PRIVILEGE UNDER MILITARY RULES OF EVIDENCE 509 AND 606(b)

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I. INTRODUCTION

Privileges, by their very nature, are a mystery: they cover disposition-changing information that does not reveal itself as a matter of policy. Although disfavored in the law, they play an important role in the legal process, particularly at trial.[1] The Military Rules of Evidence detail an enumerated list of privileges, and while most apply at several pretrial proceedings, some apply only at trial, and some apply only at posttrial proceedings.

Military Rule of Evidence 509 matches the latter description. It declares that "[e]xcept as provided in MIL. R. EVID. 606, the deliberations of courts, courts-martial, military judges, and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the result of the deliberations are not privileged."[2] Lacking from this rule, however, is information on who may claim the privilege and how it may be claimed.[3]

This Article will narrow in on Military Rule of Evidence 509 and its lack of guidance on how the members deliberations privilege may be claimed and who may claim the privilege. Part II of this Article will detail the history of and policy reasons for privilege, dating back to *Trammel v. United States*,[4] which is the paramount doctrinal case on the issue of privilege. In Part III, the Article will examine the relation between Military Rules of Evidence 509 and 606(b). Part IV will analyze whether the deliberations privilege should be treated as a claimable privilege under the Wigmore standard. Parts V and VI will discuss the nature of the deliberations privilege and the differences classification as a claimable privilege would provide. Part VII examines voir dire. Finally, Part VIII provides proposed alternatives, as shown in practice by Part IX.

1. *See* STEPHEN A. SALZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 501.02 (9th ed. 2022) (citing Trammel v. United States, 445 U.S. 40, 50 (1980)); *see generally* MIL. R. EVID. sec. V.

2. MIL. R. EVID. 509.

3. *See id.*

4. Trammel v. United States, 445 U.S. 40 (1980).

II. HISTORY OF PRIVILEGE

The earliest reference to privilege arises from Roman law, which prevented compulsion of attorney testimony against clients.[5] Privilege jurisprudence further flourished during the Middle Ages, where European codes "occasionally prohibited testimony from the clergy" originating from the "secular recognition of the seal of confession and canon law."[6] These early privileges, although not as potent as modern-day privilege, founded a trunk from which the branches of modern confidentiality derived.

Privileges develop from a variety of unique sources. For example, the privilege against self-incrimination hails from the Fifth Amendment.[7] In state courts, privileges generally originate from statutory law.[8] In contrast, federal privileges usually arise from common law.[9]

The courts reveal that privileges are generally disfavored in the law.[10] "The public . . . has a right to every man's evidence."[11] Thus, privileges must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[12]

There are several important considerations when asking whether a particular privilege should be recognized, as stated by Dean Wigmore.[13] First, one must ask whether "the communication originated in a confidence that it would not be disclosed."[14] Second, the question is whether "the element of confidentiality [is] essential to a full and satisfactory maintenance of the parties' relationship."[15] Third, one must ask whether "the relationship [is] one which the opinion of the community should be fostered."[16] Finally, the last

5. Daniel W. Shuman, *The Origins of the Physician-Patient Privilege and Professional Secret*, 39 SW. L. J. 661, 667 (1985).

6. *Id.* at 668.

7. U.S. CONST. amend. V.

8. Deborah Paruch, *The Psychotherapist-Patient Privilege in the Family Court: An Exemplar of Disharmony Between Social Policy Goals, Professional Ethics, and the Current State of the Law*, 29 N. ILL. U. L. REV. 499, 501 (2009).

9. *Id.*

10. *See generally* Branzburg v. Hayes, 408 U.S. 665, 690 n.29 (1972) (describing how privileges are disfavored in the law with footnote stating the "creation of new testimonial privilege has been met with disfavor by commentators since such privileges obstruct the search for truth").

11. Trammel v. United States, 445 U.S. 40, 50 (1980) (internal citations omitted).

12. Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

13. SALZBURG ET AL., *supra* note 1, § 501.02 (citing 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2285 (John T. McNaughton rev. 1961)).

14. *Id.*

15. *Id.*

16. *Id.*

question is whether "the injury that would inure to the relationship, because of disclosure, would be greater than the benefit thereby gained for correct disposal of the litigation."[17]

Once a privilege is recognized, analysis is necessary to determine the nature of the privilege, including whether the privilege is communicative or testimonial.[18] Then, it must be determined who holds the privilege, may claim the privilege, and whether there are any exceptions to the privilege.[19] In totality, these questions provide a workable framework for practitioners on the use of privilege in legal proceedings. However, when the rules of evidence are silent on one of these questions, as in Military Rule of Evidence 509, it blurs the lines of the affected privilege and dampens its use and effectiveness.

III. MILITARY RULE OF EVIDENCE 509 AND MILITARY RULE OF EVIDENCE 606(b)

A. Military Rule of Evidence 509

Military Rule of Evidence 509 creates a privilege covering deliberations of "courts, courts-martial, military judges, and grand and petit juries" to the extent that such matters are privileged in federal district courts in civilian criminal cases.[20] The results of these deliberations, however, are not privileged.[21] This rule of evidence cross-references Military Rule of Evidence 606, which prevents members of courts-martial from testifying as witnesses, specifically excluding "any statement made or incident that occurred during the deliberations of that court-martial; the effect of anything on that member's or another member's vote; or any member's mental processes concerning the finding or sentence."[22] However, members may testify about extraneous prejudicial information, unlawful command influence or other outside influence, or a mistake in the verdict forms.[23]

Privilege protecting deliberations dates back to before the Military Rules of Evidence.[24] There is no mirroring federal evidence rule, but a similar

17. *Id.*

18. *Compare* TEX. R. EVID. 504(b); *with* TEX. R. EVID. 503. Texas Rule of Evidence 504(b) codifies the spousal privilege against testifying as recognized in *Trammel*. Texas Rule of Evidence 503 is a communicative privilege protecting the attorney-client relationship.

19. *See, e.g.*, TEX. R. EVID. 503 (defining who holds the attorney-client privilege, who may claim the privilege, and detailing exceptions to the privilege, including communications in furtherance of a crime or fraud).

20. MIL. R. EVID. 509.

21. *Id.*

22. *Id.* at 606(b)(1); *see id.* at 509 ("Except as provided in [Rule 606]. . . .").

23. *Id.* at 606(b)(2).

24. SALZBURG ET AL., *supra* note 1, § 509.02.

privilege is recognized in United States district courts.[25] One hallmark case explaining Military Rule of Evidence 509 is *United States v. Matthews*.[26]

In *Matthews*, the issue was whether Military Rule of Evidence 509 barred the government from calling a military judge in a bench trial to testify in an evidentiary hearing concerning his deliberations.[27] Analyzing the beginnings of the privilege, the Court turned to the Manual for Courts-Martial, which stated that "[t]he deliberations of courts and of grand or petit juries are privileged, but the results of their deliberations are not privileged."[28] The Court further looked to federal common law and the location of the privilege in Section V of the Military Rules of Evidence for the suggestion that the deliberations privilege should be interpreted similarly to other privileges in the law.[29] The Court noted that federal common law reveals that United States district courts generally recognize a general rule against review of the deliberative process rather than "a privilege over such information that can be invoked and waived, such as the privilege that exists in the context of the attorney-client relationship."[30]

However, the Court's logic is seemingly backwards: it points to the location of a specific privilege contained in Military Rule of Evidence 509, yet recognizes the federal general prohibition against testimony concerning deliberations and concludes the military deliberations privilege is not a claimable or waivable privilege. It is unreasonable to conclude that the drafters of the Military Rule of Evidence created a separate rule titled "Deliberations of Courts and Juries," located within a section of the Military Rules of Evidence dedicated exclusively to privileges, intending for it to mimic the federal bar against testimony concerning deliberations rather than a claimable privilege.[31] Furthermore, if the drafters intended to reduce the "privilege" to just a general bar against testimony, it still had Military Rules of Evidence 605 and 606 to prevent factfinders from testifying.[32] There is no federal counterpart to Military Rule of Evidence 509; as a military criminal justice system evermore mirroring the federal criminal justice system, and the fact that the deliberations privilege was specifically added in the Military Rules of Evidence, it is reasonable to conclude that the deliberations privilege

25. *Id.*
26. United States v. Matthews, 68 M.J. 29 (C.A.A.F. 2009).
27. *Id.* at 30.
28. *Id.* at 36 (citing DEP'T OF DEF., JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL UNITED STATES, A22–44 (2008 ed.)).
29. *Id.* at 38.
30. *Id*.
31. *See* MIL. R. EVID. 509.
32. *See id.* at 605–06.

means something different in the military criminal justice system than the federal criminal justice system.[33]

Another important case showing the role of the deliberative process is *United States v. Jimenez-Victoria*.[34] In *Jimenez-Victoria*, an accused soldier proceeded to a bench trial and was subsequently convicted of sexual assault.[35] The Army Court of Criminal Appeals rejected sufficiency of the evidence challenges and discussed the deliberative process in depth, albeit in a footnote.[36] Appellant asserted in his brief that the presiding military judge discussed various aspects of his deliberative process, including opining on the credibility of the accused.[37] The Court stated that, if the allegations were true, the military judge overstepped the bounds of proper feedback in the "bridging the gap" session and should not have discussed the deliberative process with counsel.[38] Additionally, the Court plainly stated that these deliberations were privileged and did not provide any limitation on this privilege.[39] Other things that the Court declared should not be disclosed in such sessions include personal impressions, thought processes, tactical decisions by counsel, credibility, factors considered, and the weight given to anything at trial.[40] This case is important to establish that consideration of the deliberative process as privileged is not a concept of first impression and military courts seemingly already give some status to the deliberative process as privileged.

Similarly, the sanctity of deliberations is an interest consistently preserved. This is shown in *United States v.Perez-Pagan*,[41] where the Army Court of Military Review, recognizing that the sanctity of the deliberations must be preserved, refused to consider an affidavit stating that a member ignored one of the judge's instructions and used a voting procedure that was improper.[42] But the problem remains consistently preserved concerning procedural issues.[43] In camera review has been suggested as an alternative for examining improprieties during deliberations.[44] There are also ethical considerations with a deliberative privilege, including sensitivity to contacting members.[45] Likewise, if such information is considered as a privilege, inquiry

33. SALZBURG ET AL., *supra* note 1, § 509.02; *see generally* FED. R. EVID. art. V.
34. United States v. Jiminez-Victoria, 75 M.J. 768 (A. Ct. Crim. App. 2016).
35. *Id.* at 769.
36. *Id.* at 771, n.2.
37. *Id.*
38. *Id.*
39. *See id.* ("[T]he deliberations of a military judge are privileged.").
40. *Id.*
41. United States v. Perez-Pagan, 47 C.M.R. 719 (A.C.M.R. 1973).
42. *Id.*
43. Larry R. Dean, *The Deliberative Privilege Under M.R.E. 509*, 1981 ARMY LAW. 1, 3.
44. *Id.* at 6.
45. *Id.*

near the time of verdict is likely necessary to prevent waiver.[46] Major Larry R. Dean stated the following concerning the deliberative privilege:

> The preference of appellate courts for preserving the finality of verdicts is extremely strong, and generally verdicts are not subject to attack. In this light, post-trial statements about the deliberations are viewed with skepticism, because of the inability to recreate the conditions that existed at the time of the verdict or sentence. Indicative of this preference for finality is a federal case in which the court refused to consider the post-trial affidavit of a juror who indicated he voted not guilty, even though he stated to the contrary in a jury poll. Military authority is in accord. A military accused has 'no standing' to assert an impropriety in the deliberations when he delays six weeks in bringing the allegation of impropriety to the attention of the convening authority. Likewise, an impropriety raised for the first time during a motion for new trial has been viewed as an eleventh hour defense contention and rejected.[47]

Although written several decades ago, Major Dean's revelations align with current case law surrounding the attitude of military courts towards information claimed post-trial about deliberations by members.

Perhaps the most perplexing aspect of the current rule is that Military Rule of Evidence 509 privileges communications made during deliberations only "to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the result of the deliberations are not privileged."[48] However, this reference renders little protection, particularly with military judges. *Fayerweather v. Ritch*, which the Court of Appeals for the Armed Forces cited in *Matthews*, reveals that "civilian courts recognize a general rule against review of a trial judge's deliberative process, rather than a privilege over such information that can be invoked and waived, such as the privilege that exists in the context of the attorney-client relationship."[49] Another issue with this privilege is that it is vague and non-static. The current deliberations protections track federal common law day by day, and without consistency, counsel is prejudiced by never having a steadfast rule to follow concerning member deliberations in posttrial proceedings.

46. *Id.*
47. *Id.*
48. MIL. R. EVID. 509.
49. United States v. Matthews, 68 M.J. 29 (C.A.A.F. 2009) (citing Fayerweather v. Ritch, 195 U.S. 276, 306–07 (1904) (other citations omitted).

B. Military Rule of Evidence 606(b)

Military Rule of Evidence 606 guides testimony of members and when the Court should allow it. Generally, members are not allowed to testify about anything concerning deliberations, except for those scenarios enumerated in 606(b).[50] The rule also includes post-trial inquiries into the reasons "a military judge or court members adjudged a sentence."[51] What 606(b) aims to prevent is the chilling of independent judgment.[52] In *United States v. Dugan*,[53] the United States Court of Appeals for the Armed Forces remarked as such while holding that an inquiry into unlawful command influence was necessary, stating that "[t]his is exactly the type of command presence in the deliberation room—whether intended by the command or not—that chills the members' independent judgment and deprives an accused of his or her constitutional right to a fair and impartial trial."[54]

This holding is pivotal to the analysis of the deliberations privilege for two reasons. First, the United States Court of Appeals for the Armed Forces recognized the danger in restricting members from voicing their true and honest judgment in the deliberations room.[55] Second, the court noted the effect this may have on an accused at trial, implicating constitutional standards.[56] These points direct analysis into the necessity of privileged deliberations, due to the high stakes of constitutional implications and the "chilling" effect on speech, similar to what is described in First Amendment jurisprudence.[57]

Rule 606, in general, is designed to protect the integrity of the courts-martial process.[58] The heart of the rule is that members are unlikely to evaluate their own actions without bias.[59] Rule 606(b), however, only addresses testimony by court members; it does not address third parties testifying about "what they heard during deliberations."[60] Facially, 606(b) only applies to statements made during deliberations and does not include statements made before deliberations or misconduct.[61]

50. MIL. R. EVID. 606.
51. *See* United States v. Hill, 2004 WL 5862521, at *3 (A. Ct. Crim. App. 2004) (mem. Op.).
52. United States v. Dugan, 58 M.J. 253, 259 (C.A.A.F. 2003).
53. *Id*.
54. *Id*. at 259.
55. *Id.* at 256, 259.
56. *Id.* at 259.
57. *See generally* Dombroski v. Pfister, 380 U.S. 479 (1965) (discussing the chilling effect of speech).
58. SALZBURG ET AL., *supra* note 1, § 606.02.
59. *Id.*
60. *Id.*
61. *Id.*

IV. ANALYSIS OF THE DELIBERATIONS PRIVILEGE UNDER THE WIGMORE STANDARD

Now that the basis of Military Rules of Evidence 509 is established, it is necessary to determine whether the deliberations privilege should be treated as a claimable privilege. Dean Wigmore's inquiries into the recognition of a privilege provide an airtight framework for analyzing whether a privilege should be recognized. First, the communications made during deliberations originate in confidence that they will not be disclosed.[62] The circumstances surrounding deliberations support this claim: generally, members are taken into a private room and are advised that they may not disclose anything occurring in deliberations.[63] One key point to note is that in cases of judicial deliberations, as in *Matthews*, there are no communications made; the "deliberations" are merely the dialogue of ideas between the deliberating judge's mind and, thus, there is no communication made.[64] As such, the deliberations privilege passes the first question of Dean Wigmore's analysis.

Turning to the second question, the element of confidentiality is essential to a full and satisfactory maintenance of the parties' relationship.[65] It is clear that one party to this question consists of either the factfinding judge or the members participating in the deliberations. However, it is less clear who the other party, or parties, are. The other party could be society, the court, the accused, or the prosecution. However, it is unlikely that an amorphous and vague concept such as society could serve as the distinct relational party to a privileged relationship. If either the accused or prosecution suffices as the other party, then one party, as a matter of course, is prejudiced because the opposing party gains a relationship with the panel excluding the other party. What is most rational is that the court, rather than the individual trial judge, bears this relationship with the deliberator(s). This aligns with the judicial interest in fair and just deliberations. Thus, the element of confidentiality is essential to maintenance of the relationship between the court and the members, because of such mutual interests.

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62. *See* WIGMORE, *supra* note 13.

63. The judge will instruct members that "[the] oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may discuss your personal observations in the courtroom and the process of how a court-martial functions but not what was discussed during deliberations." DEP'T OF THE ARMY, MILITARY JUDGES' BENCHBOOK, § 2-5-16 (2020). This admonishment is important because it already prevents disclosure of deliberations by members. *See* Gary J. Holland et al., *Annual Review of Developments in Instructions (1995)*, 1996 ARMY LAW. 3, 13.

64. *Communication*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/communication [https://perma.cc/5YR8-HKWJ] (defining "communication" as "a process by which information is exchanged between individuals through a common system of symbols, signs, or behavior").

65. *See* WIGMORE, *supra* note 13.

Third, the relationship is one where the opinion of the community should be fostered.[66] Simply put, the panel is the community; it consists of court members who serve as factfinders.[67] In military proceedings, members may question witnesses.[68] Additionally, the relationship between the panel and the community should be fostered because courts-martial may cover a variety of security-sensitive topics; this is evidenced by the creation of Military Rule of Evidence 505, protecting disclosure of classified information.[69] Furthermore, the ultimate purpose of the military is to fight in wars and protect national security; destroying the reliability of the panel system would slow its effects and summarily ineffectuate any reliable sense of good order and discipline by creating distrust among military members and its disciplinary justice system.[70] Thus, the relationship is one where the opinion of the community should be fostered.

Finally, the injury that would inure to the relationship between the Court and the panel, because of disclosure, would be greater than the benefit thereby gained for correct disposal of the litigation.[71] Consider the interest in influence-free deliberations against the shadow of unlawful command influence in the military.[72] There is also an interest in having members deliberate without worrying about how their statements will sound in court, with the exception of the instances identified in Military Rule of Evidence 606(b).[73] These interests are protected by nondisclosure and largely outweigh any benefit gained for correct disposal of the litigation. Therefore, the deliberations privilege should be recognized as a privilege rather than a simple bar against testimony.

V. WHAT DOES BEING A PRIVILEGE REALLY MEAN?

As shown, it is appropriate under the Wigmore standard to recognize the deliberations privilege as a claimable privilege.[74] However, there are

66. *Id.*

67. DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 15-2[F] (2022) (internal citations omitted).

68. *Id*. (internal citations omitted).

69. *See* MIL. R. EVID. 505 (protecting the disclosure of information that "would be detrimental to national security").

70. United States v. Warner, 73 M.J. 1, 9 (C.A.A.F. 2013) (Baker, J., dissenting) (explaining that "the purpose of the military is to fight the nation's wars and 'no question can be left open as to the right to command in the officer'") (citing Parker v. Levy, 417 U.S. 733, 734 (1974)).

71. WIGMORE, *supra* note 13.

72. *See generally* Monu Bedi, *Unraveling Unlawful Command Influence*, 93 WASH. U. L. REV. 1401 (2016) (describing the prevalence of unlawful command influence in the military).

73. *See* MIL. R. EVID. 606(b).

74. WIGMORE, *supra* note 13.

structural differences between what the Military Rules of Evidence prohibit currently versus what making the deliberations privilege claimable would do.[75] Generally, privileges protect "statements made by certain persons within protected relationships."[76]

In federal district courts, there is already a "deliberative privilege" recognized, but it differs from that described by the Military Rules of Evidence.[77] In this privilege, the "internal deliberations of officials in federal government agencies or other government entities" are privileged.[78] This privilege has been extended to materials that are related to the policy formulation process that, if disclosed, would "expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."[79] The privilege may be overridden by a sufficient showing of need.[80]

Along with its similar name, the federal deliberative process holds several similarities with what a deliberations privilege under the Military Rules of Evidence could look like. First, the deliberations privilege could protect "internal deliberations" between members of the panel. Second, the privilege could be overridden by a sufficient showing of need, based on the exceptions listed in Military Rule of Evidence 606(b).[81] Third, the policy reasons behind having a deliberations privilege, as noted under the Wigmore standard, closely track the policy reasons for having a deliberative privilege; in other words, the privilege could be extended to material exposing a panel's decision-making process "in such a way as to discourage candid discussion within the" panel and undermine the panel's ability to perform its functions.[82] This justification also tracks limitations of other privileges under the Military Rules of Evidence and its requirement that the privileged information be in furtherance of the parties' relationship.[83] Thus, the federal deliberative privilege resembles what the structure, function, and purposes of a military deliberations privilege could be.

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75. *Compare* FED. R. EVID. art. V; *with* MIL. R. EVID. sec. 5.

76. Joseph A. Woodruff, *Privileges Under the Military Rules of Evidence*, 92 MIL. L. REV. 5, 8 (1981).

77. *See generally* Kirk D. Jensen, Note, *The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information Under the Federal Deliberative Process Privilege*, 49 DUKE L.J. 561 (1999).

78. *Id.* at 561.

79. *Id.* at 562 (quoting Dudman Commc'ns Corp. v. Dep't of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987).

80. *Id.* at 570 (citing United States v. Farley, 11 F.3d 1385, 1389 (7th Cir. 1993)) ("The deliberative process privilege may be overcome where there is a sufficient showing of a particularized need to outweigh the reasons for confidentiality.").

81. MIL. R. EVID. 606(b) (providing exceptions to the general bar against testimony).

82. Jensen, *supra* note 77, at 562.

83. *See, e.g.*, MIL. R. EVID. 502.

VI. WHAT SHOULD BE THE NATURE OF THE DELIBERATIONS PRIVILEGE?

It is clear from Dean Wigmore's standard of analysis that the deliberations privilege should be recognized as a privilege, and the federal deliberative privilege provides options for how such privilege could operate. But what does this really mean? Military Rule of Evidence 501 provides this answer.[84] It limits privileges to those provided by the Constitution (as applied to the Armed Forces), federal statutes applicable to trial by courts-martial, the Military Rules of Evidence, the Manual, or the principles of common law governing cases in federal district courts, insofar as "the application of such principles in trials by courts-martial is practicable and *not contrary to or inconsistent* with the Uniform Code of Military Justice, [the Military Rules of Evidence], or this Manual."[85]

A. Differences Between Federal Criminal Trial and Courts-Martial

At this intersection there arises several notable distinctions between federal criminal trials and military courts-martial. First, courts-martial are more likely to cover security-sensitive information.[86] This is shown by the creation of a national security privilege in Military Rule of Evidence 505.[87] Unlike the Federal Rules of Evidence, the lawyer-client privilege in the military is trumped by this prohibition.[88]

Second, there are crimes in the Uniform Code of Military Justice that carry no meaning or culpability in federal criminal trials. For instance, there is no federal criminal statute prohibiting desertion, disrespect towards a superior officer, and misbehavior before the enemy.[89] The primary purpose of the military is to fight in wars, and thus, courts-martial serve a specific disciplinary role distinct from that of the federal district courts.[90] In other words, deliberations in courts-martial are different from those in federal criminal trials: they serve different roles and are more likely to involve security-sensitive information. As such, it is inconsistent with the Military Rules of Evidence and Dean Wigmore's analysis to not treat deliberations as privileged.

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84. *See generally* MIL. R. EVID. 501.

85. MIL. R. EVID. 501(a) (emphasis added).

86. *See, e.g.*, MIL. R. EVID. at 505 (creating a privilege for national security matters, with no such federal rule or counterpart).

87. *Id.*

88. *See id.*

89. 10 U.S.C. § 885 art. 85; 10 U.S.C. § 889 art. 89; 10 U.S.C. § 899 art. 99.

90. *See* State v. Mitchell, 659 S.W.2d 4, 5–6 (Mo. Ct. App. 1983); United States v. Rice, 80 M.J. 36, 40 n.10 (C.A.A.F. 2020) (noting district courts and courts-martial as distinct adjudicative bodies under one sovereign).

B. Is the Deliberations Privilege Testimonial or Communicative?

Furthermore, the deliberations privilege differs from other enumerated privileges under Section V of the Military Rules of Evidence in both structure and substance. It should be determined whether it is a testimonial privilege, such as in Military Rule of Evidence 504, or a communications privilege, similar to the lawyer-client privilege under Military Rule of Evidence 502. In short, treating the deliberations privilege as a communications privilege is more appropriate.

Testimonial privileges, such as in Military Rule of Evidence 504, provide a person with a privilege to refuse to testify.[91] The privilege under Military Rule of Evidence 504 is valid during and after the marital relationship to "refuse to disclose, and 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 by law."[92] This privilege "may be claimed by the spouse who made the communication or by the other spouse on his or her behalf."[93] However, this testimonial role is unnecessary for the deliberations privilege: Military Rule of Evidence 605 and 606 already prohibit judges and members from serving as a witness at courts-martial.[94]

In contrast, communications privileges, such as in Military Rule of Evidence 502, protect confidential communications made for the purpose of facilitating the lawyer-client relationship.[95] Communications are considered confidential "if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance [of the relationship]."[96] The privilege may be claimed "by the client, the guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative."[97]

It is apparent from the comparison that the deliberations privilege does not arrange neatly inside either category. A testimonial privilege is unnecessary because of the prohibition on member and judge testimony. On the other hand, communications privileges generally contain those communications made between two persons. Thus, there is no easy alternative. An appropriate limitation, if such deliberations were recognized as privileged, is that communications are limited to those in furtherance of

91. MIL. R. EVID. 504.
92. MIL. R. EVID. 504(b)(1).
93. MIL. R. EVID. 504(b)(3).
94. MIL. R. EVID. 605; MIL. R. EVID 606.
95. MIL. R. EVID. 502.
96. MIL. R. EVID. 502(b)(4).
97. MIL. R. EVID. 502(c).

deliberations. This mirrors the Military Rule of Evidence 502 requirement that the communication is made in furtherance of the privileged relationship.[98]

When traditional privileges may be invoked, they may also be waived.[99] However, this requirement should not apply to the deliberations privilege for several reasons. First, waiver would be inequitable considering the important policy reasons for privileging deliberations. Second, it would create a separate problem of how many members must act to waive the privilege. The reasoning for this justification is that the deliberations privilege is not a traditional privilege; it does not fall neatly into the category of testimonial nor communicative privileges.

A final issue exists in whether the exceptions listed in other privileges should apply. For example, under the lawyer-client privilege, exceptions exist when "the communication clearly contemplates the future commission of a fraud or crime," is "relevant to an issue between parties who claim through the same deceased client," or a lawyer or client breaches duty.[100] The deceased client and breach of duty provisions are irrelevant for purposes of the deliberations privilege. However, there may be issues with statements made during deliberations in furtherance of crimes or fraud.

This problem is exemplified in *Tanner v. United States*.[101] In *Tanner*, a defendant was convicted of conspiracy to defraud the United States and several counts of mail fraud.[102] After trial, counsel learned through interview of a juror that seven of the jurors drank alcohol during the noon recesses, four jurors consumed between a pitcher and three pitchers of beer and mixed drinks during recesses, and one juror consumed a liter of wine each recess.[103] The interviewed juror also stated that he and other jurors smoked marijuana regularly during the trial and observed a separate juror ingest cocaine five times and another juror ingest cocaine several times as well.[104] As if it could not get any worse, the juror detailed the sale of a quarter pound of marijuana between jurors during the trial, and said juror took marijuana, cocaine, and drug paraphernalia into the courthouse.[105]

The Supreme Court rejected the admissibility of the sworn interview. Citing *McDonald v. Pless*, the Court stated as follows concerning the role of testimony of those participating in deliberations:

98. MIL. R. EVID. 502(b)(4).
99. *See* MIL R. EVID. 502.
100. *See* MIL R. EVID. 502(d).
101. Tanner v. United States, 483 U.S. 107 (1987).
102. *Id.* at 112–13.
103. *Id.* at 115.
104. *Id.*at 115–16.
105. *Id.* at 116.

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could thus be used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.[106]

Despite the egregious nature of the jurors' conduct, the Supreme Court still sided with the interest in honest deliberations. Members are, in theory, more disciplined than the average civilian and presumably will act with better standards than the conduct described in *Tanner*. But members are humans, too, and such crime-fraud exception to the deliberations privilege is necessary to preserve the administration of justice.

VII. THE IMPORTANCE OF VOIR DIRE AND ITS ROLE IN PREVENTING POTENTIAL BIAS

There is a clear procedural issue with Military Rule of Evidence 509 and claiming any protection that exists under its language. It is unclear what the resolution to this issue is. Ultimately, there are no ultra-enticing options to remedy the problem at hand. An analysis of several issues with claiming the privilege and the guidance past cases can provide follows.

First, there is a potential issue that privileging deliberations may invite member bias. In *United States v. Hollingsworthmata*, during voir dire, a member denied any bias against an accused who did not take the stand in his own defense.[107] After trial and as a witness in an unrelated matter, the member made a statement referring to the accused's failure to take the stand in his defense, insinuating that this meant the accused was guilty.[108] The Court ultimately affirmed the military judge's exclusion of this information.[109]

United States v. Hollingsworthmata shows the importance of voir dire and its role in the deliberations privilege. In theory, if voir dire is done successfully, biased members are removed from serving on the panel. "The

106. *Id*. at 119–20 (quoting McDonald v. Pless, 238 U.S. 264, 267–68 (1915)).
107. United States v. Hollingsworthmata, 72 M.J. 619, 620 (A. Ct. Crim. App. 2012).
108. *Id*.
109. *Id.* at 623.

very purpose of voir dire is to determine the impartiality and/or reveal the bias of jurors . . . . [If an] impartial jury cannot be selected, that fact should become evident at voir dire."[110] However, each party only gets one peremptory challenge during courts-martial, and thus, it is inevitable that biased members will be on nearly every panel.[111] This realization makes a deliberations privilege all the more necessary because it is important to protect the deliberations of members who may be potentially familiar with the accused or another person part of the courts-martial in light of unlawful command influence.

Similarly, there could be an issue with racial bias. However, this issue is minor, considering the Supreme Court's holding in *Pena-Rodriguez v. Colorado*.[112] In *Pena-Rodriguez v. Colorado*, the Supreme Court held that whenever a juror makes a clear statement that he relied on racial stereotypes to convict an accused, the trial court must permit and consider the evidence of the juror's statement and any denial of the right to a jury trial.[113] This abrogates and trumps any question of members claiming the privilege to protect their racially-charged decisions for finding a certain way at court-martial. Thus, this should not be an issue.

The greatest harm is the danger of a biased military judge in a bench trial. This is a problem for the sheer fact that the parties may not voir dire a judge. However, there are other methods for removing such judge, including under Rules for Courts-Martial 902.[114] Ultimately, all these issues falter at the interests protected by privileging deliberations.

VIII. PROPOSED ALTERNATIVES

Without a method of claiming a privilege, there is no privilege. Now that it is clear that there is an issue with Military Rule of Evidence 509, namely, how the privilege may be claimed and by who, there must be solutions proposed to negate or lessen the problem. A discussion as to whether any exceptions to the deliberations privilege should exist is necessary. Exceptions exist for testimony of members within an inquiry into the validity of a finding or sentence when there is extraneous prejudicial information, unlawful command influence, outside influence, or a mistake in the verdict or sentencing form.[115]

110. United States v. Torres-Crespo, 40 F. Supp. 3d 233, 239 n.4 (D.P.R. 2014).

111. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R. 912(g)(1) (2019) [hereinafter MCM].

112. *See* Pena-Rodriguez v. Colorado, 580 U.S. 206 (2017).

113. *Id.* at 225.

114. MCM, *supra* note 111, M. 902 (explaining how and when a military judge must be recused).

115. MIL. R. EVID 606(b)(2).

Proposal 1 is to have no privilege and keep Military Rule of Evidence 509 the same as it is treated now. This proposal is attractive because of its continuity. Additionally, there is still some protection under the clause tracking the treatment of deliberations in federal district criminal courts. However, the proposal fails because it does not truly solve the problem, as the procedural issues still exist. Similarly, important policy considerations are potentially thwarted by the chilling effect on independent judgment and lack of guidance on claiming whatever protection is available. Thus, Proposal 1 fails because of its inability to protect independent judgment and influence-free deliberations.

Proposal 2 recognizes the deliberation privilege; it proposes to have the person who made the statement be able to claim the privilege. The benefit to Proposal 2 is that it tracks the individual nature of other privileges.[116] However, the deliberations privilege is unlike any other privileges; it involves a group of members rendering a verdict. Proposal 2 is also a problem because deliberations, by nature, are back and forth; if all members claimed the privilege but four did not, then there would be a piecemeal collection of statements making it difficult to decipher.[117] And if the unprivileged information is easy to decipher, then it endangers the information of other members participating in deliberations who claimed the privilege. Therefore, Proposal 2 fails.

Proposal 3 is to have the judge claim the privilege on behalf of the panel. This option is attractive because it allows a neutral third party to claim the privilege on the panel's behalf. Similarly, courts-martial may cover a wide variety of security sensitive information, and members are biased themselves one way or another if a verdict has been rendered.[118] An issue with this proposal include the fact that the judge was not there, and thus, he or she is not keyed in and familiar with everything occurring during deliberations. Similarly, there is an issue with the military judge having too much power, and who will now get sentencing power mimicking the federal criminal justice system.[119] It is also inconsistent with other privileges and their individual nature.[120] Thus, Proposal 3 fails.

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116. *See, e.g.*, MIL. R. EVID. 502 (detailing the lawyer-client privilege).

117. Deliberation, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/deliberation [https://perma.cc/7YQP-9AWV] (defining deliberation as "a discussion and consideration by a group of persons (such as a jury or legislature) of the reasons for and against a measure").

118. *See* MIL. R. EVID. 505.

119. Michael Lewis, *Major Changes in the Uniform Code of Military Justice*, A.B.A, https://www.americanbar.org/groups/judicial/publications/judicial division record home/202/vol26-1/major-changes-in-uniform-code-of-military-justice/ [https://perma.cc/JXG8-M9GL].

120. *See, e.g.*, MIL. R. EVID. 502.

Proposal 4 allows any member to claim the privilege individually, thus shielding all deliberations from disclosure. This proposal is attractive because the panel is treated as a unit.[121] This is similar to civilian jury practice. However, Proposal 4 does not track the individual nature of other privileges under the rule. However, the deliberations privilege does not neatly fall into either communications or testimonial privilege categories.

Another issue with this proposal is that only one member could prevent disclosure of all statements made during deliberations in furtherance of deliberations. However, that scenario is justified because of the compelling interest in preventing chilling of independent judgment, the interest in true and honest verdicts and verdict integrity, and the accused's right to a fair trial. Also, any issues with bias can potentially be avoided through rigorous and effective voir dire and effective use of strikes for cause. Therefore, Proposal 4 is the least unattractive proposal of the four because it protects the policy considerations important to the existence of the rule and necessary to the privilege.

IX. HOW A REVISION OF MILITARY RULE OF EVIDENCE 509 MAY LOOK

The current text of Military Rule of Evidence 509 is as follows:

> Except as provided in Mil. R. Evid. 606, the deliberations of courts, courts-martial, military judges, and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the result of the deliberations are not privileged.[122]

Here is what an edited version of the statute could look like, removing parts inconsistent with Proposal 4:

> Except as provided in MIL. R. EVID. 606, the deliberations of courts, courts-martial, military judges, and grand and petit juries are privileged ~~to the extent that such matters are privileged in trial of criminal cases in the United States district courts~~, but the result of the deliberations are not privileged.

121. *But see* Dan Maurer, *Why Are Non-Unanimous (Court-Martial) Guilty Verdicts Still Alive After Ramos?*, 60 AM. CRIM. L. REV. 127 (2023) (detailing how nonunanimous verdicts are still allowed in the military).

122. MIL. R. EVID. 509.

Here is how a clean copy of a revised Military Rule of Evidence 509 may look, similar to the formatting used in the other privileges under Section V of the Military Rules of Evidence:

> (a) *General Rule*. Any factfinder, including courts, courts-martial, military judges, grand juries, and petit juries, has a privilege to refuse to disclose and to prevent any other person from disclosing communications made by any factfinder in furtherance of deliberations.
> (b) *Who May Claim the Privilege*. The privilege may be claimed by any factfinder participating in deliberations.
> (c) *Exceptions*. There is no privilege under this rule under any of the following circumstances:
>
> (1) Extraneous prejudicial information was improperly brought to the members' attention;
> (2) Unlawful command influence or any other outside influence was improperly brought to bear on any member;
> (3) A mistake was made in entering the finding or sentence on the finding or sentence forms; or
> (4) Communication was made in furtherance of a crime or fraud or for future commission thereof.

X. HOW THIS PROPOSAL WOULD LOOK IN PRACTICE

Consider the following hypothetical to understand how Proposal 4 would apply in practice: Sergeant Schmedlapp shoots and kills his wife on base while stationed at Fort Bragg in Fayetteville, North Carolina. Charges are subsequently preferred against Sergeant Schmedlapp for murder in violation of Article 118 of the Uniform Code of Military Justice (UCMJ).[123] Sergeant Schmedlapp, believing he was justified in shooting his wife because of self-defense, rejects all offered plea agreements and proceeds to trial. During voir dire, Sergeant Schmedlapp's counsel asks prospective members about their beliefs in the Second Amendment and the inherent right to self-defense. No questions are asked during voir dire by either side about the members' knowledge of any witnesses.

At trial, along with his self-defense claim, Sergeant Schmedlapp puts on character witnesses to testify that Sergeant Schmedlapp has a reputation of being peaceful. One of these character witnesses is Private Jones, an outspoken and brutally honest soldier.[124] The trial proceeds, and the members retire to deliberate. The panel is instructed to only consider the evidence

123. *See* 10 U.S.C. § 918 art. 118.
124. *See* MIL. R. EVID. 404(a).

before it. During deliberations, Member Smith, the foreperson, reveals, by passing a note around the deliberation room, that he despises Private Jones for telling him privately he was a poor leader. Because of Private Jones's comments, Member Smith wants to find Sergeant Schmedlapp guilty. Member Smith also discloses Private Jones has a reputation for being noncredible and is known to frivolously report every officer he works under for violations. The other members do not believe Sergeant Schmedlapp is factually guilty but are so enraged by their new knowledge of Private Jones that they want to convict Schmedlapp. They convict Sergeant Schmedlapp of murder.

After interviewing the panel, counsel for the accused learns of Member Smith's disclosure to his fellow members of the panel. He files a motion for new trial, citing Member Smith's disregard for the court's instruction only to consider the evidence before it. Defense counsel subpoenas Member Smith, four other members, and Smith's note to his fellow members.

Now, Proposal 4 applies. At the motion for new trial hearing, Member Smith simply claims the deliberations privilege to prevent disclosure of any and all communications made during deliberations, including his note. Any of the other members on Sergeant Schmedlapp's panel could claim the deliberations privilege as well and prevent the release of these communications. All statements made during deliberations are now privileged. Note, however, that this privilege is still subject to Military Rule of Evidence 606(b) and may only be disclosed in cases of extraneous prejudicial information, unlawful command influence, outside influence, or mistake in the verdict form.[125] The Court then denies Sergeant Schmedlapp's motion for new trial, as there is no evidence before it to support defense counsel's claims of member misconduct.

XI. CONCLUSION

In conclusion, the deliberations privilege should be recognized as a privilege. Under the Wigmore standard of analysis, it is clear that the deliberations privilege should be recognized as such because of the interest in influence free deliberations and independent judgment. The deliberations privilege is much different than other privileges under Section V of the Military Rules of Evidence and does not neatly fall into one category of testimonial privileges or communicative privileges. The latter is more similar because members are already prohibited from testifying under Military Rule of Evidence 606, except for the narrow list of exceptions which are incorporated into the rule.[126]

125. *See* MIL. R. EVID. 606(b).
126. *See* MIL. R. EVID. 606.

Voir dire is an important method of keeping biased members off panels at courts-martial. However, each party only gets one peremptory challenge, which makes having adequate counsel, particularly for the accused, much more necessary. Voir dire solves some issues of potential biases on the panel, and the Supreme Court significantly filled these holes in *Pena-Rodriguez v. Colorado*.[127]

There is ultimately no perfect solution to the problem of who may claim the privilege. But one solution mentioned in this Article, Proposal 4, protects important policy considerations more than its counterparts. While it is true that most other privileges are of an individual nature, members at courts-martial serve a role in society different than the holders of other privileges. Such an individual privilege as shown in Proposal 2 would direct a piecemeal, tattered analysis of what was said during deliberations and, as such, may serve more harm than good. The policy considerations supporting Proposal 4 include avoiding chilling independent judgment, keeping influence out of the deliberation room, and protecting an interest in public confidence in the criminal justice system, particularly in the military. Military Rule of Evidence 509 must be amended to properly act as the deliberations privilege.

127. *See* Pena-Rodriguez v. Colorado, 580 U.S. 206 (2017).