

Doctor-Patient Privilege Rules Overseas

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I. Introduction

Trying courts-martial overseas can be a challenge. Foreign laws often differ from American law and can affect the ability to obtain witnesses and evidence. One area where this can occur is when foreign doctors are needed as witnesses. This note will discuss the special challenges in this area and suggest methods to address these challenges.

Under the Military Rules of Evidence (MRE), there is no general doctor-patient privilege.¹ While there are limited exceptions for communications between psychotherapists and patients² and statements made by the accused during a mental examination ordered under Rule for Courts-Martial 706,³ medical doctors do not have any general privilege to refuse to disclose matters relating to their treatment of servicemembers. The analysis to the MRE explains that a doctor-patient privilege

[W]as considered to be totally incompatible with the clear interest of the armed forces in ensuring the health and fitness for duty of personnel. . . . [T]he law of the forum determines the application of privilege. Even if a servicemember should consult with a doctor in a jurisdiction with a doctor-patient privilege for example, such a privilege is inapplicable should the doctor be called as a witness before the court-martial.⁴

Outside of the United States, a number of countries recognize a general doctor-patient privilege.⁵ Because the only way to compel foreign witnesses to attend U.S. courts-martial rests on agreements with foreign nations where they

reside; these foreign laws may interfere with a court-martial's ability to obtain relevant evidence from doctors.

II. Status of Forces Agreements

Most countries where American troops are stationed have some form of agreement defining the status of U.S. forces and their ability to obtain foreign witnesses, including doctors, to testify at U. S. courts-martial.⁶ The detail and extent of these agreements vary from country to country.

The status of forces agreement applicable in Germany is one of the most detailed. Germany is bound by the North Atlantic Treaty Organization (NATO) Status of Forces Agreement that requires the parties to "assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence . . ."⁷ Germany also entered into a supplemental agreement implementing the NATO Status of Forces Agreement,⁸ which, among other things, requires the German government to assist in securing attendance of civilian witnesses at U.S. courts-martial. The supplemental agreement states:

Where persons whose attendance cannot be secured by the military authorities are required as witnesses or experts by a court or a military authority of a sending State, the German courts and authorities shall, in accordance with German law, secure the attendance of such persons before the court or military authority of that State.⁹

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¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 501(d) (2012) [hereinafter MCM]. This rule provides that "Notwithstanding any other provision of the rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." *Id.*

² *Id.* MIL. R. EVID. 513. This privilege was adopted in 1999 in response to *Jaffee v. Redmond*, 518 U.S. 1 (1996). MCM, *supra*, at A22-45 (analysis).

³ *Id.* R.C.M. 706 (2012). *See id.* MIL. R. EVID. 302.

⁴ *Id.* MIL. R. EVID. 501 at A22-39 (analysis).

⁵ For example, in Germany doctors have a privilege to refuse to provide information related to a patient. §53 StPO, [CODE OF CRIMINAL PROCEDURE], http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0199; §383 ZPO [CODE OF CIVIL PROCEDURE], http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p1455.

⁶ A complete list of all status of forces agreements can be found in U.S. DEP'T OF STATE, TREATIES IN FORCE (Jan. 1, 2013), <http://www.state.gov/documents/organization/218912.pdf>; U.S. DEP'T OF STATE, TREATIES IN FORCE 2014-SUPPLEMENT (Dec. 31, 2013), <http://www.state.gov/documents/organization/235185.pdf>.

⁷ Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, Jun. 19, 1951, art. VII, para. 6(a), 4 U.S.T. 1792, T.I.A.S. 2846, http://www.nato.int/cps/en/natolive/official_texts_17265.htm [hereinafter NATO SOFA].

⁸ Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Revised Supplementary Agreement), 3 Aug. 1959, amended 21 Oct. 1971, amended 18 May 1981, amended 18 Mar. 1993, 14 U.S.T. 689; T.I.A.S. 5352; 490 U.N.T.S. 30, http://www.europe.forces.gc.ca/Resources/log_unit_heb/AJAG/_doc/nato-sofa-revised-supplementary-agreement.pdf [hereinafter German Supplement to NATO SOFA]. For a general discussion of the supplemental agreement and its amendments, see Major Wes Erickson, *Highlights of the Amendments to the Supplementary Agreement*, ARMY LAW., Dec. 1993, at 14.

⁹ German Supplement to NATO SOFA, *supra* note 8, art. 37, para. 2.

The supplemental agreement specifically discusses privilege rules. It states that:

Privileges and immunities of witnesses . . . and experts shall be those accorded by the law of the court or authority before which they appear. The court or authority shall, however, give appropriate consideration to the privileges and immunities which witnesses . . . and experts . . . would have before a German court.¹⁰

The status of forces agreement applicable in Korea is also relatively robust. It contains language on assistance in investigating offenses and obtaining evidence that is identical to the NATO Status of Forces Agreement.¹¹ The agreed upon minutes to the Korean Status of Forces Agreement contains more detail on the obligation to assist in securing attendance of civilian witnesses:

The military authorities of the United States and the Authorities of the Republic of Korea shall assist each other in obtaining the appearance of witnesses necessary for the proceedings conducted by such authorities within the Republic of Korea. . . . When citizens or residents of the Republic of Korea are required as witnesses or experts by the military authorities of the United States, the courts and authorities of the Republic of Korea shall, in accordance with the law of the Republic of Korea, secure the attendance of such persons. In these cases the military authorities of the United States shall act through the Attorney General of the Republic of Korea, or such other agency as is designated by the authorities of the Republic of Korea.¹²

Unlike the German supplemental agreement, the Korean Status of Forces Agreement does not discuss any privilege rules for witnesses.

The status of forces agreement between the United States and Japan contains language similar to the NATO and Korean status of forces agreements.¹³ Although the agreement itself does not contain any specific provisions requiring Japan to assist in obtaining witnesses, an “agreed view” between the parties provides that the United States may submit requests for witnesses to “the nearest Procurator’s office or judicial police official or Judge, so that summons may be issued.”¹⁴ The agreed view contains no details on witness privilege rules.¹⁵

The Bilateral Security Agreement between the United States and Afghanistan, concluded in 2014, states that Afghanistan “authorizes the United States to hold trial[s] . . . in the territory of Afghanistan” in criminal cases involving U.S. forces and its civilian component.¹⁶ It also states that Afghanistan and the United States shall “assist each other in investigation of incidents, to include the collection of evidence.”¹⁷ However, it does not contain any specific provisions requiring Afghanistan to provide witnesses at U.S. courts-martial, nor does it address privilege rules.¹⁸

III. Effect of Foreign Doctor-Patient Privilege Rules

As discussed above, in many countries where U.S. troops are stationed, civilian host-nation doctors can be required to appear as witnesses at U.S. courts-martial with the assistance of host-nation officials. While such doctors do not enjoy a general doctor-patient privilege,¹⁹ the applicable status of forces agreement may require the U.S. military judge to “give appropriate consideration” to host-nation doctor-patient

¹⁰ *Id.* art. 39.

¹¹ Agreement under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea Regarding Facilities and Area and the Status of United States Armed Forces in the Republic of Korea, Jul. 9, 1966, U.S.-S. Korea, art. XXII, para. 6(a), 17 U.S.T. 1677; T.I.A.S. 6127; 674 U.N.T.S. 163, http://web.archive.org/web/20050607080358/http://www.shaps.hawaii.edu/security/us/sofa1966_1991.html. This paragraph provides that “[t]he military authorities of the United States and the authorities of the Republic of Korea shall assist each other in the carrying out of all necessary investigation into offenses, and in the collection and production of evidence . . .” *Id.*

¹² *Id.*; Agreed Minutes to the Agreement under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea Regarding Facilities and Area and the Status of United States Armed Forces in the Republic of Korea, Jul. 9, 1966, U.S.-S. Korea, 17 U.S.T. 1677; T.I.A.S. 6127; 674 U.N.T.S. 163, http://web.archive.org/web/20050607080358/http://www.shaps.hawaii.edu/security/us/sofa1966_1991.html.

¹³ Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1652; T.I.A.S. 4510; 373 U.N.T.S. 248, <http://www.mofa.go.jp/mofaj/area/usa/sfa/pdfs/fulltext.pdf>. Article XVII, paragraph 6(a) of the agreement provides that, “The military

authorities of the United States and authorities of Japan shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense.” *Id.*

¹⁴ Agreed View 26 of the Joint Committee Regarding the Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, 22 Oct. 1953, (on file with author) [hereinafter Agreed View 26]. Although a number of these agreed views predate the current status of forces agreement between the United States and Japan, they have all been incorporated into the current agreement. See Lieutenant Commander Timothy D. Stone, *U.S.-Japan SOFA: A Necessary Document Worth Preserving*, 53 NAVAL L. REV. 229, 234 (2006).

¹⁵ *Id.*

¹⁶ Security and Defense Cooperation Agreement Between the United States and the Islamic Republic of Afghanistan, Sept. 30, 2014, U.S.-Afg., art. 13, para. 1, <http://photos.state.gov/libraries/afghanistan/231771/PDFs/BSA%20English.pdf>.

¹⁷ *Id.* art. 13, para. 3.

¹⁸ *Id.*

¹⁹ MCM, *supra* note 1, MIL. R. EVID. 501(d).

privilege rules.²⁰ What this means in an individual court-martial is unclear.

In addition, many host-nation doctors may be unfamiliar with U.S. law and, as a result, refuse to testify if they believe a local doctor-patient privilege applies. To obtain the presence of these witnesses at U.S. courts-martial, the trial counsel must rely on foreign prosecutors or officials, who also may not be familiar with U.S. privilege rules. As a result, enforcing the U.S. military rules requiring such doctors to testify may be difficult. Using American contempt proceedings²¹ to force the doctors to testify may not be permitted by the applicable status of forces agreement.²² Host-nation prosecutors may refuse to enforce U.S. evidentiary rules requiring doctors to testify, if those rules contradict host-nation privilege rules.²³ Even if the military rules requiring doctors to testify can be successfully enforced, such enforcement may lead to lack of cooperation in obtaining host-nation witnesses in the future.

IV. Solutions

Prosecutors and defense counsel seeking to get the testimony of a host-nation doctor in an overseas court-martial should initially attempt to obtain written consent from the patient involved. This will usually serve as a proper waiver for a host-nation doctor-patient privilege rule.²⁴

If it is impossible to obtain consent from the patient, counsel should carefully research host-nation law. Most overseas U.S. military legal offices have an international law section with local attorneys that can determine the existence and extent of a host-nation doctor-patient privilege.²⁵ If such a privilege exists, the parties should educate both the doctor (potential witness) and the local prosecutor on the lack of such a privilege at a U.S. military court-martial. Such education may be sufficient to allay the doctor's fears and obtain his or her cooperation.

If this education is insufficient to obtain the host-nation doctor's cooperation, the parties should raise the problem to

the military judge in a pretrial motion.²⁶ It may be helpful to have an expert on host-nation law and the local status of forces agreement available to testify at the motion hearing to educate the judge on the legal status of the privilege being asserted by the doctor. At this point an appropriate order to testify by the military judge²⁷ may be sufficient to convince the doctor to testify.

If an order by the judge is still insufficient, the parties and the military judge should examine enforcement options. Usually, a military judge's order to testify can only be enforced against a foreign doctor by a host-nation prosecutor.²⁸

If it proves impossible to obtain the doctor's testimony, counsel should examine alternatives to his or her testimony. Foreign medical records may qualify for an exception to the hearsay rule, if they qualify as statements for the purpose of medical treatment or records of regularly conducted activities.²⁹ Lay witnesses who witnessed medical examinations may also be able to testify as to their observations, although they may not be as helpful as a medical professional.³⁰ Since it may take significant preparation to present such alternatives, it is important to resolve all issues surrounding testimony by foreign doctors at a motion hearing well before trial on the merits.

V. Conclusion

Foreign doctor-patient privilege rules can create serious difficulty in obtaining necessary testimony at courts-martial overseas. If a foreign doctor refuses to testify based on such a doctor-patient privilege, it is critical for the parties to identify and raise this issue early. Educating foreign doctors on the lack of a doctor-patient privilege at a court-martial may allay their fears and obtain their testimony. However, if this does not work, the parties should seek appropriate pretrial orders from the military judge and approach the host-nation prosecutors to enforce those orders. If all else fails, the parties should consider alternatives to the doctor's testimony.

²⁰ See *supra* note 10 and accompanying text.

²¹ UCMJ art. 48(a) (2012). Military judges detailed to courts-martial have the authority to punish "any person" for contempt who willfully disobeys a lawful order of the court-martial. *Id.*

²² For example, the North Atlantic Treaty Organization (NATO) Status of Forces agreement provides that its jurisdictional provisions "shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State." NATO SOFA, *supra* note 7, art. VII, para. 4.

²³ While status of forces agreements can be useful tools, it may be difficult to find remedies for violations by the host-nation. See, e.g., Captain Benjamin P. Dean, *An International Human Rights Approach to Violations of the NATO SOFA Minimum Fair Trial Standards*, 106 MIL. L. REV. 219 (1984).

²⁴ For example, in Germany doctors can be "released" from the obligation to refuse to provide information related to a patient. §53 StPO [CODE OF CRIMINAL PROCEDURE], http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0199.

²⁵ See U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES, 30 Sept. 1989, paras. 2-1g, 5-2a(7), 9-3(f). The U.S. Army is required to create studies of the criminal law of each foreign country where its forces are located. U.S. DEP'T OF ARMY, REG. 27-50, STATUS OF FORCES POLICIES, PROCEDURE AND INFORMATION, 15 Dec. 1989, para. 1-6.

²⁶ MCM *supra* note 1, R.C.M. 906(a).

²⁷ *Id.* R.C.M. 906(b)(13).

²⁸ See *supra* notes 21-23 and accompanying text.

²⁹ MCM, *supra* note 1, MIL. R. EVID. 803(3), (4). Unfortunately, the foreign doctor who has refused to testify may be the only person who can establish the requisite foundation for these exceptions.

³⁰ Lay persons generally may not provide testimony in the form of opinions unless they are rationally based on their perceptions, helpful to a clear understanding of their testimony or a fact in issue, and are not based on specialized knowledge generally provided by experts. See *id.* MIL. R. EVID. 701.