

**ANNEX A**

**STAFF JUDGE ADVOCATE/TRIAL COUNSEL CHECKLIST  
FOR  
CLASSIFIED INFORMATION CASES**

References:

28 C.F.R., Part 17

Executive Order 12958, Part 4.1(i)

SECNAVINST 5510.36, DoN Information Security Program

JAGMAN 0126, 0137, 0138, 0143, 0144, 0150, 0159

M.R.E. 505

R.C.M. 707, 1104

A. Notification of Investigation

- \_\_\_ 1. Identify cognizant NSCDA from JAGMAN 0126; notify SJA for NSCDA.
- \_\_\_ 2. Ensure Command is following classified information loss/compromise procedures found in Ch. 12, SECNAVINST 5510.36, including notifications of OCAs.
- \_\_\_ 3. Advise OJAG Code 17 of case status: (DSN 325-5464/5, (202) 685-5464/5; FAX DSN 325-5467, (202) 685-5467).
- \_\_\_ 4. Identify prospective TC that holds an appropriate security clearance (at the same or higher level as the classified information) at earliest stage of investigation.
- \_\_\_ 5. Notify Senior Trial Counsel at TSO East or TSO West, as appropriate, of possible national security case.

B. Investigation

- \_\_\_ 1. Assess litigation consequences of each proposed investigatory action (e.g. search and seizure, chain of custody, etc.).
- \_\_\_ 2. Ensure that the NCIS case agent has contacted the NCIS-HQ National Security Law Unit: 202-433-0877.
- \_\_\_ 3. Call OJAG Code 17 for estimate of time requirements for classification reviews.
- \_\_\_ 4. Assess speedy trial consequences of the timing of apprehension, if applicable.

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- \_\_\_ 5. Remind investigators of speedy trial implications of apprehension when other investigative techniques and avenues remain to be explored.
- \_\_\_ 6. Adhere strictly to the "third agency rule" (E.O. 12958, Part 4.1(i)) when dealing with non-DOD intelligence agencies (must have permission of originating agency).
- \_\_\_ 7. Request assistance from OJAG Code 17 to resolve any problems.
- \_\_\_ 8. If the accused has agreed to speak to investigators, verify his or her understanding of the classification level of the information.
- \_\_\_ 9. Determine what classified information is at issue.. Determine if sensitive compartmented information is involved.
- \_\_\_ 10. Obtain a determination from the NSCDA whether the case is a "national security case" as defined in JAGMAN 0126. Does the case involve, to "a serious degree":
  - \_\_\_ the compromise of a military or defense advantage over any foreign nation?
  - \_\_\_ an allegation of willful compromise of classified information?
  - \_\_\_ military or defense capability to successfully resist hostile or destructive action, overt or covert?
  - \_\_\_ terrorist activities?
- \_\_\_ 11. Obtain a decision from the NSCDA about the proper disposition of the case.
- \_\_\_ 12. Contact Program Manager in special access programs to determine special access requirements.
- \_\_\_ 13. Consider speedy trial implications and the existence of possible exclusions under RCM 707 or case law for the time required to complete classification reviews.
- \_\_\_ 14. Coordinate with OJAG Code 17 to initiate classification reviews of materials at issue in the case and likely to be entered into evidence.

C. Charges

- \_\_\_ 1. Identify all potential charges under UCMJ and Federal criminal statutes.
- \_\_\_ 2. Draft charges and specifications.

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- \_\_\_ 3. Consider selection of a representative sample of specifications and supporting documentary evidence to demonstrate the subject's pattern and scope of activities.

**D. Convening Authority**

- \_\_\_ 1. Identify and contact appropriate convening authority IAW JAGMAN 0126 and the determination of the NSCDA.

- \_\_\_ 2. Discuss accuser/command influence issues, if any, with CA and OJAG Code 17.

**E. Security Clearances**

- \_\_\_ 1. Confirm appropriate level security clearances for:

\_\_\_ Art. 32 investigation officer

\_\_\_ military judge

\_\_\_ trial counsel

\_\_\_ military defense counsel

\_\_\_ civilian defense counsel

\_\_\_ court reporters

\_\_\_ bailiff(s)

\_\_\_ investigation security officer(s)

\_\_\_ court security officer(s)

\_\_\_ members

\_\_\_ witnesses

\_\_\_ brig chasers

- \_\_\_ 2. Obtain appointment of an investigation security officer in writing. Appointment may be in a Protective Order issued by the CA if an Article 32 investigation is directed.

- \_\_\_ 3. Obtain appointment of a court security officer in writing in a Protective Order issued by the CA before referral of charges or by the military judge after referral of charges.

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- \_\_\_4. Ensure that members with proper security clearances are detailed.
- \_\_\_5. Maintain a record of due diligence in submission of appropriate clearance applications and requests for completion of classification reviews, for speedy trial purposes.

**F. Security Officers**

- \_\_\_1. Establish contact with command special security officer (SSO).
- \_\_\_2. Obtain SSO review of security clearance application packages of court personnel before transmittal.
- \_\_\_3. In cases before members, consult with SSO to prepare request for special instructions from the military judge on security matters.

**G. Civilian Defense Counsel**

- \_\_\_1. Via OJAG Code 17, request CNO (N09N2) issue a Limited Access Authorization for civilian defense counsel, if required.
- \_\_\_2. If request is denied, coordinate with Appellate Government on preparation of counter briefs on motions to dismiss on 6th Amendment grounds.

**H. Protection of Classified Evidence**

- \_\_\_1. Determine if investigative reports are classified and how quickly they can be declassified or redacted (see SECNAVINST 5510.36).
- \_\_\_2. After classification reviews, determine whether closed sessions will be necessary at trial.
- \_\_\_3. Before charges are preferred, have the CA issue a protective order to all parties. Include a written admonishment to the accused that disclosure of classified information to counsel who does not have the required security clearance is a violation of the UCMJ. The military judge should also be requested to issue a protective order after referral of charges.
- \_\_\_4. Brief the civilian defense counsel on requirements for handling classified information and prohibitions on disclosure of such information and accompanying penalties.
- \_\_\_5. Obtain a written acknowledgement of the briefing from civilian counsel.

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\_\_\_ 6. Ensure defense counsel knows of duty to notify trial counsel in writing of anticipated disclosure of classified information at trial per M.R.E. 505(h).

**I. Pretrial Agreements**

\_\_\_ 1. Ensure pretrial agreements are consistent with JAGMAN 0137 and approved by SECNAV in national security cases.

\_\_\_ 2. Include, as appropriate, provisions for the accused to:

\_\_\_ cooperate in debriefings and damage assessments

\_\_\_ submit to polygraph examination(s)

\_\_\_ agree to UNCLASSIFIED stipulation of facts as to general subject matter and classification of evidence

\_\_\_ UNCLASSIFIED forum

**J. Immunity**

\_\_\_ 1. Draft grants of immunity to apply only to court-martial.

| \_\_\_ 2. Alternatively, obtain permission from DOJ/DOD GC to extend the grant of immunity to all Federal prosecutions.

\_\_\_ 3. Have all grants of immunity approved by DOJ via Codes 17/20 per JAGMAN 0138

**K. Protective Orders/Courtroom Security**

\_\_\_ 1. Include requirements for handling and disclosure of classified information in a protective order.

\_\_\_ 2. Aggressively employ and demonstrate a full understanding of M.R.E. 505 to counsel and intelligence agencies' operational staffs to foster cooperation.

\_\_\_ 3. Ensure proper application of all required security measures in:

\_\_\_ E.O. 12958, Part 4

\_\_\_ 28 C.F.R., Part 17

\_\_\_ SECNAVINST 5510.36

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- 4. Where evidence is collected under a warrant issued pursuant to the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801-1811, immediately contact OJAG Code 17 for guidance and assistance.
- 5. Anticipate situations that may require the trial to be closed to protect disclosure of classified information.

L. Evidentiary Considerations and Discovery

- 1. Seek declassification or redaction of information requested by the defense in lieu of nondisclosure under M.R.E. 505.
- 2. Ensure the CA responds in writing to a defense request for classified material.
- 3. Consider all options when the Government seeks nondisclosure of classified information requested by the defense.
- 4. Resist disclosure by providing information required for military judge determinations and actions under M.R.E. 505(i).
- 5. Identify possible alternatives to complete nondisclosure of classified information:
  - substitute unclassified information
  - enter into unclassified stipulation of facts
  - disclose only a redacted version of the information
  - disclose under limiting conditions of a protective order
  - dismiss selected charges/specifications
  - dismiss all charges and substitute alternative disciplinary or administrative actions against the accused
- 6. Take steps to avoid dismissal by the military judge under M.R.E. 505(f) when classified information is not disclosed.
- 7. When classified information is disclosed, move for a protective order from the military judge.
- 8. Ensure that the military judge excises unneeded portions of classified information before delivery of remaining material to the accused.

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- \_\_\_ 9. Ensure all parties understand that disclosure during discovery and subsequent use at trial are distinct issues.

**M. Evidentiary Considerations at Trial**

- \_\_\_ 1. Identify and prepare expert witnesses to prove proper classification of materials.
- \_\_\_ 2. Invoke M.R.E. 505 privilege if the accused requests under Brady the production of Government witness statements that include classified information.
- \_\_\_ 3. Anticipate that certain classified portions of prior witness statements will be inconsistent with testimony and be prepared to move for an in camera proceeding pursuant to M.R.E. 505(i).
- \_\_\_ 4. In coordination with military judge and CSO, determine if and when the courtroom should be closed to the general public per M.R.E. 505.

**N. Interlocutory Appeal**

- \_\_\_ 1. If the military judge dismisses any charges or specifications, request a stay for up to 72 hours.
- \_\_\_ 2. If an appeal of the ruling is considered:  
\_\_\_ contact NAMARA for approval  
\_\_\_ file a notice of appeal within 72 hours with proper certification
- \_\_\_ 3. If there will be no appeal, promptly inform the military judge and defense counsel.

**O. Sentencing**

- \_\_\_ 1. Obtain witnesses to testify about the amount of damage to national security caused by the accused's actions.
- \_\_\_ 2. Obtain witnesses/affidavits via OJAG Code 17 on significance of the accused's actions.
- \_\_\_ 3. Obtain witnesses/affidavits via OJAG Code 17 on other situations that could cause similar compromise of national security.

**P. Post-Trial Duties**

- \_\_\_ 1. Ensure that a proper security classification is assigned to the record of trial and on each of its pages that contain classified information.

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- \_\_\_2. Contact the Court Security Officer for assistance.
- \_\_\_3. Where there is an appeal on grounds of objections sustained to withholding evidence under M.R.E. 505, prepare sealed exhibits of the text of relevant documents and submit them along with motion and materials with the record of trial.
- \_\_\_4. Follow JAGMAN 0150C in the handling of classified records of trial
- \_\_\_5. Remove classified portions from the Record of Trial before forwarding to the Accused, in accordance with R.C.M. 1104(b)(1)(D).
- \_\_\_6. If the record of trial contains Sensitive Compartmented Information, follow procedures set forth in the Memorandum of Agreement between OJAG and NCIS.
- \_\_\_7. Permit the Court Security Officer to detach from his/her duties only after completion of the post-trial classification review and portion marking of the record of trial.