

## **CHAPTER 5**

### **Other Cases Involving Classified Information**

As discussed in Chapter 4, “National Security Cases” are a unique subset of cases that involve classified information. However, only a relatively small number of cases that involve classified information will actually be designated as national security case. Therefore, the odds are that a judge advocate assigned to a case involving classified information will in fact have a non-national security designated case. The general rules and procedures for handling and securing classified information are essentially the same for any case involving classified information as they are for national security designated cases.

These more routine cases involving classified information are less complicated because they do not involve the complicating factor of a National Security Case Disposition Authority (NSCDA) as the disposition authority in the case. In non-national security designated cases, the command follows the normal process for convening a court-martial. There is also no requirement for SECNAV approval of pretrial agreements and certain post-trial actions. However, grants of immunity still need to be coordinated with the Department of Justice in accordance with JAGMAN § 0138. This is especially crucial if the accused agrees to a polygraph as part of a pretrial agreement, which is often the case in a court-martial involving classified information. Again, the “ordinary” rules apply to this type of case in addition to the application of M.R.E. 505 (detailed in Chapters 9 and 10), coordination with Code 17, security requirements, and other specific issues discussed in this Primer.

**A. Types of Cases Likely to be Seen.** Non-national security designated cases generally fall into one of two categories: mishandling cases and cases where the classified information is not directly relevant to an element of an offense. The latter category of cases has seen a dramatic increase because the ongoing military operations in Iraq and Afghanistan have resulted in a significant increase in courts-martial involving classified information. Both categories are discussed more fully below.

**1. Mishandling Cases.** Mishandling cases generally involve an individual either intentionally or negligently failing to properly safeguard classified information in accordance with applicable regulations. Such cases may result in actual loss of classified information or even compromise to someone without a clearance, but for various reasons are not designated national security cases. For instance, they may not meet the “serious degree” requirement of JAGMAN § 0126a or there may not be sufficient evidence that an actual loss or compromise occurred.

(a) Negligent Handling. Negligent failure to properly follow security regulations that results in classified information exposed to possible loss or compromise is a common mishandling case. Often such cases do not result in court-martial, but are resolved at non-judicial punishment and usually result in a review of security procedures and increased training. Negligent mishandling cases that go to court-martial are often the result of repeated incidents and warnings. More often than not, negligent mishandling charges are charges added to other, more serious,

offenses that do not involve classified information. Another consideration that may lead to a negligent mishandling case being referred to a court-martial is the amount or level of classified information negligently lost or mishandled. In other words, the seriousness of the potential loss or compromise. Conversely, Code 17 is aware of one recent case where a large amount of extremely sensitive material was lost through what can only be described as gross negligence given the controls in place for that level of material. Nonetheless, the case was not referred to court-martial precisely because of the extreme sensitivity of the material that was lost.

(b) Intentional Mishandling. This type of mishandling case results from a willful and knowing disregard of security regulations by the accused. In these cases, the accused is well aware of the requirements of the regulations, but chooses to ignore them because he did not want to be subject to such constraints. This type of case is often characterized as a “self-help” case. The most common types of self-help cases are:

*“I needed some extra study time before my qualification exam.”* This excuse is especially prevalent in ratings that routinely use classified information and will be tested on various items on their rating exams. This leads to removal of study texts or notes from the command, which are often found and turned over to the authorities either by a disgruntled spouse or ex-roommate.

*“I needed to cut a few corners in order to get the mission accomplished!”* This excuse is most commonly used by those who view the classification regulations as impediments to their ability to do their jobs effectively or efficiently. A common scenario is taking classified information from one job to the next, but doing so by improperly copying information to CDs, thumb drives, and personal laptops. It is very possible to accomplish the same end using the security regulations (see Chapter 2 on transportation and transmission of classified information), but rather than do so, the individual takes the easy way out and knowingly violates the regulations.

*“There was no time to get to the base so I secured the material in my room.”* Laziness or poor planning is a common component of mishandling cases. Such cases often evolve into more egregious cases because after the initial failure to safeguard, the perpetrator is usually in no hurry to return the material reasoning that the harm has already occurred. However, the longer the material remains outside proper controls the greater the possibility of loss or inadvertent compromise. In addition, after the first instance of failing to safeguard classified information properly, it becomes easier for the course of conduct to continue.

*“Everyone knew this report was not properly classified as Secret so I went ahead and took off the markings.”* This excuse is not seen in courts-martial as often as the others are, but the first part of the statement is a common sentiment in many intelligence circles. Most of those who work in the field, however,

understand that just because something has been published by the media does not mean it is no longer classified. Information remains classified until it is formally declassified by proper authority.

While compelling, and often creative, such excuses rarely amount to a legal defense or justification to dereliction of duty or orders violation charges, but may be persuasive as to forum or disposition. Especially when the use was designed by the accused to benefit the Navy, such excuses are often used in the defense extenuation and mitigation case. Additionally, a self-help case on a battlefield, e.g., sharing classified information with a coalition partner that does not have the appropriate clearance, could contain significant facts to support a relatively lenient command response.

**2. Operational Cases.** In cases arising from the Global War on Terror, the classified information generally does not form the basis for the charges, but rather is relevant in some way to the allegations in the case. For example, in the cases of the Marines charged with murdering an Iraqi man in Hamdania, Iraq, the defense sought to use classified information to characterize the victim as one of the “bad guys.” The defendants in the Hamdania cases were all alleged to have taken an active role in the planning, abduction, and murder of the victim. These “shooter” cases generally involve the use of classified information such as the Rules of Engagement (ROE) in place at the time of the killing, the use of force rules, operations orders, battle updates, and intelligence briefings. The average Marine or soldier, such as those involved in the Hamdania cases, will not have direct knowledge of the latter two categories of information. It is possible, though, that they will have a very good idea of the results of the update and intelligence briefings, e.g., who the targets are and other information needed to complete the intelligence picture. Thus, in the Hamdania cases some of that material was found to be relevant and admissible to the accused’s state of mind regarding the threat faced by the Marines in their operations area.

A second category of cases involve “non-shooter” cases, i.e., senior personnel in the chain-of-command charged with offenses such as dereliction of duty for failing to investigate possible war crimes, obstruction of justice, false official statement and other “non-shooter” offenses. In the Haditha cases, the battalion commander, his staff judge advocate, Human Exploitation Team Leader, and the platoon commander were all charged with dereliction of duty for failing to investigate the deaths of 24 Iraqis, including women and children, following the explosion of an improvised explosive device that killed a Marine and wounded two others. In this type of case, the classified information is relevant to proving or defending against the charges because there is often a great deal of SIPR-net email traffic and classified briefing slides prepared before, during, and/or after the operation at issue. ROE are less important to these types of charges because the actions of the shooters are not as relevant as actions taken by the chain-of-command. Operation orders containing information on Commander’s Critical Information Requirements and watch logs are also very important to understand the requirement for reports on various topics, as well as a historical record of what reports were actually made.

**B. Military Commissions.** The Military Commission detainee cases represent another group of cases involving classified information. Although the applicability of the Military Commission rules is very narrow, they bear mentioning because of the fact that Military Commission Rule of Evidence (M.C.R.E.) 505 is drawn directly in many respects from M.R.E. 505. As a result, much of the discussion contained in this guide on M.R.E. 505 is directly relevant to commission practice. Those working on the commission cases are encouraged to conduct a thorough comparison of the two rules so that they are aware of the subtle differences between them. A full understanding of M.R.E. 505 coupled with the unique features of M.C.R.E. 505 allow counsel to both appreciate and take advantage of the gaps, advantages, and opportunities present in M.C.R.E. 505.