

CHAPTER 4

National Security Cases

“National Security Cases” are a unique subset of cases that involve classified information. In fact, only a relatively small number of cases that involve classified information are designated as national security cases. Such designation is an administrative designation only within the Navy and Marine Corps and such designation does not supersede or modify the Uniform Code of Military Justice or the Manual for Courts-Martial. The potential for qualification as a national security case is an important determination, because only an officer designated as a National Security Case Disposition Authority (NSCDA) may initially dispose of such cases. Additionally, Navy Legal Service Command has assigned a limited number of commands to maintain special national security counsel available for worldwide assignment to such cases.¹ Once designated as a national security case, the case is subject to special procedural requirements with respect to pretrial agreements, immunity and post-trial processing. In addition, the security and litigation issues applicable to all cases involving classified information, and discussed throughout this Primer, apply to these cases as well.

A. National Security Case Disposition Authority (NSCDA). The limitation on initial disposition authority is pursuant to R.C.M. 306 and JAGMAN § 0126c. JAGMAN § 0126c limits the initial disposition authority for such cases to listed officers. The list is made up of very senior commanders, typically 3-star and 4-star admirals and generals. The following officers are currently designated NSCDAs:

- Chief of Naval Operations;
- Commandant of the Marine Corps;
- Vice Chief of Naval Operations;
- Assistant Commandant of the Marine Corps;
- Commanders, Fleet Forces Command, U.S. Pacific Fleet, U.S. Naval Forces Europe, U.S. Naval Forces Central Command;
- Commander, U.S. Marine Corps Forces Command;
- Commander, U.S. Marine Corps Forces, Pacific;
- Commanders, Sixth and Seventh Fleets;
- Commanding General, Marine Expeditionary Forces;
- Commanders, Naval Air Force, Submarine, and Surface Forces;
- Commander, Naval Education and Training Command;
- Commanding General, Marine Corps Combat Development Command, Quantico, VA;
- Commanding General, Marine Corps Bases, Japan;
- Commanding Generals, Marine Corps Installations East and West;
- Commander, U.S. Marine Forces, Reserve; and
- Commander, Naval Special Warfare Command

¹ The designated commands are NLSO Mid-Atlantic and RLSO Mid-Atlantic in Norfolk, Virginia, and NLSO Southwest and RLSO Southwest located in San Diego, California. See COMNAVLEGSVCCOMINST 5800.1E, paragraph 1005. In practice, a designated national security case is likely to be tried in one of those two locations as the necessary infrastructure support is located there, as well as military judges specially designated by the trial judiciary.

An officer who is a convening authority, but not an NSCDA, must forward a potential national security case to the first NSCDA in the administrative chain-of-command. The NSCDA may then dispose of the case by any method authorized under R.C.M. 306, to include returning the case to the original convening authority for disposition.



Practice Pointer. In certain cases the NSCDA may designate a case as a national security case but return the case to another commander to serve as the convening authority. This may be done for the pragmatic reason that the other commander may regularly convene general courts-martial and may have the staff experience and processes in place to most expeditiously handle the case. If the NSCDA passes the case to another convening authority, the NSCDA retains overall reporting responsibility and is in the administrative chain of command to the Secretary of the Navy but may not, pursuant to R.C.M. 401(c)(2)(B) and 407(a)(2), direct specific action on disposition of the charges in the case.

B. Identification of a National Security Case. A significant amount of discretion is involved in designating a case as a national security case, and that discretion is vested in the NSCDA. This discretion is contained in the definition of a National Security Case. According to JAGMAN § 0126a, a "National Security Case" is one which:

to any serious degree, involves the compromise of a military or defense advantage over any foreign nation or terrorist group; involves an allegation of willful compromise of classified information, affects our military or defense capability to successfully resist hostile or destructive action, overt or covert; or involves an act of terrorism.

Eligible offenses include an attempt or conspiracy to commit such offenses, as well as conduct aiding and abetting in the commission of such offenses or subsequent unlawful assisting. Examples of offenses which may be designated as national security cases include, but are not limited to, UCMJ Articles 81, 92 (for violations of SECNAV M-5510.36, "Department of the Navy Information Security Program, June 2006" and U.S. Navy Regulations, 104, 106, 106a, 107, 131, and 134; and provisions of the U.S. Code, such as 18 U.S.C. §792, 793, 798, 1001, 2151-56, 2331-39b, 2381-85, 2388-90; 42 U.S.C. § 2272-77; and 50 U.S.C. 783. See Chapter 8 of this Primer for a more detailed discussion of charges.

Designation of a case as a national security case requires the NSCDA to weigh many objective and subjective factors. Even a case that involves a charge under 18 U.S.C. § 793, the federal espionage statute, may not be a national security case if no actual compromise occurred or if the offense is not of a "serious degree." Likewise, even if an actual compromise did occur, it might not be a national security case if the unauthorized recipient was, for example, another U.S. government employee who simply happened not to have a clearance or a need to know the particular information. On the other hand, if no actual compromise occurred and the case did not involve an unauthorized recipient, it still could be a national security case if the accused had the

intent to give the information to a foreign agent. For instance, the *Lessenthien* court-martial in 1996 involved a sailor who provided classified information to an FBI agent whom the accused thought was an agent of a foreign power.

The factors which the NSCDA must consider include whether an actual compromise occurred, the status of the recipient, the intent of the accused, the type of information involved, and the gravity of the risk created by the accused. Because designation of a case as a national security case involves a significant amount of discretion and the consequences of such a designation are significant, a command that has a potential national security case should forward the case to an NSCDA for review.



Practice Pointer. The staff judge advocate should consult with both OJAG Code 17 and the staff judge advocate of the NSCDA in the chain of command when the staff judge advocate believes the command may have a potential national security case. There is no stigma attached to seeking an NSCDA opinion on national security case designation at an appropriate time early in the process. A good rule of thumb is that the command should forward a case if it meets any of the listed criteria (e.g., actual compromise, allegation of willful compromise), and then let the NSCDA determine if it rises to a “serious degree.” The NSCDA bases its decision on the facts developed during the investigation. Therefore, while “early and often” contact and coordination is recommended, there is little value added for the NSCDA to review a case if the investigation has not progressed to an appropriate stage. Additional evidence uncovered after an NSCDA has reviewed a case may warrant a new NSCDA determination.

Quick Quiz: Which of the following scenarios could result in designation of the matter as a National Security Case?

1. Sailor apprehended in NCIS sting operation as he tries to sell information related to the Naval nuclear propulsion system.
2. Marine being investigated for leaving laptop containing classified information in a Dubai hotel room safe.
3. Sailor who posted on his blog unclassified information about his ship’s inport security arrangements to show his buddies the “cool machine gun” he was assigned to.
4. Naval officer who uses unclassified e-mail to send logistics information for a ship preparing for a port visit in Aqaba, Jordan “because the SIPRNET computer was down and they needed the information right away!”
5. All of the above.
6. None of the above.

Answer: You simply don’t know without more information! It could be any, all, or none of the above scenarios, depending on the facts developed and the objective and subjective analysis of the NSCDA. While all may be chargeable, not all may be national security cases.

C. Identification of NSCDA and Convening Authority. In most cases, the accused's commanding officer will not be an NSCDA. Thus, the first step is to determine the appropriate NSCDA. The rules are no different than those for determining the appropriate special court-martial convening authority (SPCMCA) or general court-martial convening authority (GCMCA) when the accused's commanding officer does not have such authority. JAGMAN § 0126e clarifies that if the commander has separate operational and administrative chains of command with NSCDAs in each chain, the NSCDA in the administrative chain of command is the primary NSCDA. If there is a specific reason to later change this designation to the operational chain of command NSCDA or another NSCDA, substitution is permissible as discussed below.

If the CO does not have the proper level of authority, he simply forwards the case up his administrative chain of command to the first officer with the proper authority. The only significant difference from the usual GCMCA determination is that the NSCDA may be several levels higher up the chain of command. For this reason also, the cognizant NSCDA may be geographically remote from the local command. In some cases, it may be advisable for the local command and the cognizant NSCDA to request that an alternate NSCDA act on the case. Substitution of NSCDAs should only be done on a case-by-case basis and with coordination between the legal staffs of both NSCDAs and Code 17. Factors to consider are geographic location, availability of secure facilities, and the caseload and legal resources of the NSCDAs.

After the appropriate NSCDA has determined whether a case is a national security case, the next step is to identify who will act as convening authority. The NSCDA may retain the case and act as convening authority, or may forward the case to any other competent convening authority. If the case is not a national security case, normally it will be returned to the original command for processing, although this is not required. If the case is a national security case, the NSCDA will, most commonly, either retain it or forward it to a GCMCA better equipped for convening courts-martial, such as an area coordinator. Often, the NSCDA is senior enough that subordinate commanders and area coordinators handle most military justice matters, including general courts-martial. As discussed above in a Practice Pointer, it is not required that an NSCDA act as convening authority in a national security case, as long as an NSCDA has made the designation and sent the case to a competent convening authority. Remember that regardless of designation as a national security case, the procedures for handling classified evidence, discussed throughout this Primer, must be followed.

D. Special Requirements – Pretrial Agreements and Immunity.

1. Pretrial Agreements. One of the most significant special requirements in a national security case is that the government may not enter into a pretrial agreement without the approval of the Secretary of the Navy.² In accordance with JAGMAN § 0137c, the NSCDA must request permission from the Secretary of the Navy before actually executing a pretrial agreement. The request is sent from the convening authority (who

² In *United States v. Allen*, 31 M.J. 572 (N-M.C.M.R. 1990), the Navy-Marine Corps Court of Military Review ruled that such Secretarial control and involvement in the court-martial process did not constitute unlawful command influence. Essentially, the Manual for Courts-Martial specifically permits the Secretary to withhold authority in a type of case and provides specific authority for the Secretary to issue regulations on the handling of national security cases. See R.C.M. 306(d) and R.C.M. 407(b).

may or may not be the NSCDA) directly to the Secretary of the Navy, with information copies provided to OJAG (Code 17) and the Chief of Naval Operations or Commandant of the Marine Corps, as appropriate. In addition to the text of the proposed pretrial agreement, the convening authority's request must provide the factual background of the case, summarize the available evidence that could be introduced by either the government or defense on the merits and during sentencing, and summarize the factors warranting acceptance of the pretrial agreement. See JAGMAN § 0137c. A careful review of the strengths and weaknesses of the government's case is necessary to ensure that the Secretary is well-equipped to make this decision, especially in cases where the proposed terms are much less than the statutory maximums. Code 17 can assist in preparing the package to the Secretary of the Navy. It is important to note that while the approval of the Secretary of the Navy is required before entering into a pretrial agreement, other decisions by the NSCDA are not subject to secretarial approval, such as identification of an appropriate convening authority or the decision to dispose of the case at a particular forum (e.g., NJP, SPCM).

2. Immunity. If the government intends to grant immunity to any witness in a National Security Case, it must first consult with the Department of Justice, per the "Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes." This Memorandum of Understanding requires consultation with DoJ for a proposed grant of immunity in a case involving espionage, subversion, aiding the enemy, sabotage, spying, or violation of rules or statutes concerning classified information or the foreign relations of the United States. (DoD Instruction 5525.07, recently reissued on 18 June 2007, implements this MOU. See Annex E) JAGMAN § 0138d also requires consultation with DoJ in all cases involving national security or foreign relations of the United States. DoJ must also be consulted when an accused is given post-trial immunity as part of a pretrial agreement when he has agreed to be debriefed, including a polygraph. Chapter 11 provides further discussion on pretrial agreements and grants of immunity.

E. Special Requirements - Post-Trial.

1. Supplemental Clemency. If a case has been designated as a national security case, the Secretary of the Navy has reserved "supplemental clemency." This reservation of authority is found in JAGMAN § 0159 and correlates to the requirement that the Secretary of the Navy must approve any proposed pretrial agreement in a National Security Case. JAGMAN § 0159 provides that "[n]o official of the DON, other than the Secretary of the Navy, may **remit or suspend**, pursuant to article 74(a), UCMJ, and R.C.M. 1107, MCM, any part or amount of the **approved** sentence in any case designated as a national security case in accordance with section 0126." (Emphasis added.) It is important to remember that the convening authority can still exercise clemency pursuant to UCMJ Article 60 when the convening authority takes initial action approving the findings and sentence. The Secretary of the Navy has only reserved "supplemental clemency" authority in national security cases. U.S. v. Allen, 31 M.J. 572 (1990)

2. Record of Trial. If any part of the record of trial contains classified information, it must be protected just like any other classified document. The overall record of trial should be kept unclassified to the greatest extent possible, and the classified portions removed and placed under separate cover. The classified portion must be handled and stored in accordance with SECNAV M- 5510.36, “Department of the Navy Information Security Program,” June 2006. Before forwarding a record of trial that contains any classified portions, contact Code 17 to coordinate transfer and storage.

Further discussion of post-trial matters can be found in Chapter 13.



Practice Pointer. A command may have the need to explain the rationale for, and impact of, designating a case as a national security case. Code 17 has prepared a summary and talking points that may be adapted by the command for use in working with the public affairs staff on media issues. Those documents are appended to this chapter.

Key Elements of National Security Case Definition

In the opinion of the NSCDA, a case which “to any **SERIOUS DEGREE**” involves:

- **COMPROMISE** of military or defense advantage over any foreign nation or terrorist group;
- Allegation of **WILLFUL** compromise of classified information;
- Affects military or defense **CAPABILITY** to successfully resist hostile or destructive action; or
- Involves an act of **TERRORISM**.

APPENDIX 4-A

Information Paper on National Security Cases

In military justice, the term “national security” is defined as “the national defense and foreign relations of the United States.” Military Rule of Evidence 505(b)(2). A court-martial case may be designated a “National Security Case” by certain Navy and Marine Corps Flag and General officers pursuant to the Manual of the Judge Advocate General (JAGMAN) section 0126. These designated officers are called National Security Case Disposition Authorities (NSCDA’s).

A National Security Case is defined as a case, which, in the opinion of a designated NSCDA, "to any serious degree, involves the compromise of a military or defense advantage over any foreign nation or terrorist group; involves an allegation of willful compromise of classified information; affects our military or defense capability to successfully resist hostile or destructive action, overt or covert; or involves an act of terrorism." JAGMAN section 0126a. The JAGMAN provides an extensive list of potential violations of the Uniform Code of Military Justice (UCMJ) that might be present in a National Security Case. Since the JAGMAN’s list is by no means exclusive, any violation of the UCMJ could be present in a National Security Case once all the factors surrounding the case have been considered.

The test for designation is a combination of objective criteria, *i . e .* , the circumstances are one of the four listed in the section, and the subjective evaluation of seriousness of the activity by the NSCDA. Since not all cases involving matters or information related to national security will rise to the level of requiring the designation of a National Security Case, the JAGMAN’s key phrase is “to a serious degree.” A variety of factors will need to be considered such as whether an actual compromise of classified information occurred. If, in fact, information was passed, it will be necessary to determine who may have received the classified information. The sensitivity of the information can affect the potential designation as a national security case as can the accused’s intent. Certainly, a willful intent to harm the nation’s security by passing highly classified sensitive compartmented information will weigh more heavily than a negligent or inadvertent compromise.

JAGMAN section 0126 directs special procedures for the investigation, review, and referral of cases that may qualify for designation as National Security Cases. It also mandates certain periodic and recurring reporting obligations in such cases. Other than these special procedures, the case is handled in the same manner as any other court-martial.

The designation of a case as a National Security case does not in any way limit the rights of an accused during the court-martial process. If an NSCDA designates a case as a National Security Case it triggers certain special reporting mechanisms within the Department of the Navy, and mandates the Secretary of the Navy approval of pre-trial agreements, immunity requests, and post-trial relief. Other procedural requirements for protection of classified information are the same as for any case involving classified information. These can include closure of portions of the Article 32, UCMJ, investigation and subsequent court-martial to members of the public, including the media, pursuant to the provisions of Military Rule of Evidence 505.

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APPENDIX 4-B

Talking Points on National Security Cases

Q1. What is a National Security Case?

A1. This is a court-martial that has been specifically designated as such because the case involves, to a serious degree, the compromise of a military or defense advantage over any foreign nation or terrorist group; involves an allegation of willful compromise of classified information; affects our military or defense capability to successfully resist hostile or destructive action, overt or covert; or involves an act of terrorism.

Q2. Are all courts-martial involving national security designated as National Security Cases?

A2. No, only those cases of a serious enough nature to require the designation should be so designated. A case may involve national security matters, such as an inadvertent disclosure of classified information, but does not rise to the level of requiring such a designation and the additional procedural requirements that accompany the designation.

Q3. Who makes this determination and how do they do so?

A3. The JAGMAN lists the National Security Case Disposition Authorities at Section 0126(f). They are high level Officers within the Department of Navy chain of command. The JAGMAN tasks the NSCDA with looking at the facts of the case to determine whether they fall within the category of a National Security Case and whether the facts and circumstances are of a serious degree to warrant such a designation.

Q4. Is a National Security Case different than a typical court-martial?

A4. A National Security Case involves the application of special procedures to the regular court-martial process for cases designated pursuant to JAGMAN section 0126. These procedures do not impact the rights of the accused or change the court-martial process. These procedures are intended to ensure that the Navy's senior leadership is involved in such critical matters as approval of a pre-trial agreement, granting immunity to a witness, or making a determination that an accused deserves clemency following a conviction.

Q5. Why does the Navy designate cases as National Security Cases? Do the other Services have similar designations?

A5. The Department of the Navy established this designation for certain serious cases to ensure that the Secretary of the Navy was actively involved in specific critical decisions in a case. One reason is that these cases often involve information from sources outside of the Navy or outside of the Department of Defense. The Secretary or his designee can ensure that the interests of those organizations are properly considered in rendering certain decisions in the case, though the final decision rests with the Secretary or his designee. This designation only applies to Navy and

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Marine Corps cases. No other Service has such a designation though they may have special procedures for certain types of courts-martial.

Q6. Does designation as a National Security Case pre-determine that the accused is guilty of committing serious offenses endangering national security?

A6. No. Just as the decision to send a case to a general court-martial does not pre-judge an accused's guilt, the decision to designate a case as a National Security Case does not change the presumption of innocence nor does it change the Government's burden to establish the accused's guilt beyond a reasonable doubt. It is simply a procedural mechanism to ensure that senior Navy and Marine officers are supervising the case, and that the Secretary of the Navy makes certain decisions in the case if those decisions are necessary in the case. While the facts and circumstances known to the NSCDA may indicate that the case "involves the compromise of a military or defense advantage over any foreign nation or terrorist group; involves an allegation of willful compromise of classified information; affects our military or defense capability to successfully resist hostile or destructive action, overt or covert; or involves an act of terrorism," the Government must still prove the charges at court-martial beyond a reasonable doubt.

Q7. Doesn't the involvement of the Secretary of the Navy constitute unlawful command influence in a case?

A7. No. The Secretary is not involved in the court-martial process except to render certain decisions for which intra-DoD or interagency coordination may be required. The NSCDA is a general court-martial convening authority and makes all of the decisions in the case as to charges, appointment of an investigating officer, review of the case following investigation for referral to a court-martial, and assignment of court-martial members, among other routine court-martial responsibilities.

The Secretary is notified of the designation of the case as a National Security Case but takes no action unless and until a pre-trial agreement proposal, whose terms are mutually agreeable to both the accused and the convening authority, is presented for approval [JAGMAN section 0137c], or a request for immunity is submitted which must be coordinated with the Attorney General [JAGMAN section 0138d].

Q8. Does a National Security Case have to involve classified information?

A8. No. The definition of a National Security Case in JAGMAN section 0126a specifies only one of the four general types of qualifying cases as involving classified information. Most if not all designated National Security cases do involve classified information to some degree but that it not a requirement for designation.