CHAPTER 9

Military Rule of Evidence 505

Unlike the other rules of privilege contained in the Manual for Courts-Martial, Military Rule of Evidence (M.R.E.) 505 is a rule of both privilege and procedure. M.R.E. 505 was created prior to the promulgation of the Rules for Courts-Martial (R.C.M.) in 1984. Thus, extensive procedural requirements were included in M.R.E. 505 to aid with the application of the classified information privilege. [1] The actual text of M.R.E. 505 is drawn from the House version of the Classified Information Procedures Act (CIPA), which was the version that did not make it into law. It is important to understand M.R.E. 505's genesis when considering the intent and operation of various sections of the Rule, especially the procedure under 505(i). Most importantly, the procedural portions are effective and in operation even if there is no assertion of the classified information privilege.

The procedural overlay of M.R.E. 505 is complex and not easy to understand. This is especially true when you consider the interplay of the various sections of M.R.E. 505 with the later-promulgated R. C. M. (especially the provisions on discovery, Article 32 investigations, exculpatory evidence, and courtroom closure). Closing the courtroom is the subject of the next chapter. The remainder of this chapter will explore and explain the operation of the classified information privilege contained in M.R.E. 505 on the discovery and use of classified evidence in Article 32 investigations and trials.

A. Classified Discovery. One of the most important and critical practice differences in cases involving classified information is that trial counsel cannot permit "open file" discovery. The government cannot provide the defense with copies of, or access to, the classified information in the investigative file in order to simply avoid litigation over discovery. In fact, even a cursory reading of M.R.E. 505 reveals that the rule explicitly contemplates extensive litigation over classified information discovery.

Certainly, one of the restrictions on "open file" discovery is the requirement that the recipient have a "need-to-know" the classified information. The fact remains, though, that "need-to-know" is an ill-defined, broad concept under which it is very easy to articulate a need, especially if you are defending a client charged with a serious crime involving that same classified information. Instead, by far the biggest discovery restriction in classified information cases is the need to get the permission of the originator/owner of the information prior to disclosing that information to the defense. As has been stated before in this Primer, this is most critical in cases involving Sensitive Compartmented Information from national-level members of the Intelligence Community, specifically the National Security Agency and the Central Intelligence Agency .

[1] The Military Rules of Evidence were drafted in 1979-80. For those interested in more information on the development and promulgation of the Military Rules of Evidence, the best source is an article by Professor Fredric I. Lederer, THE MILITARY RULES OF EVIDENCE: ORIGINS AND JUDICIAL IMPLEMENTATION, *130 Mil. L. Rev. 5,* Fall 1990.

Under M.R.E. 505(d), the convening authority is in control of the discovery process before referral. While the investigating officer may at times have to apply the provisions of M.R.E 505 during the course of the investigation, the investigating officer has limited ability to control discovery since the investigating officer does not have the full authority vested in a military judge after referral. After referral, the military judge is responsible for overseeing the bulk of the M.R.E. 505 procedures that relate to discovery and use of the classified information, as well as any assertion of privilege to prevent disclosure of information. When the case is before the military judge, the defense can object to the convening authority's prior handling of discovery.[2]

Because of the length of time needed to complete classification reviews and the requirement to get Original Classification Authority (OCA) approval before providing classified discovery, convening authorities should forego or dismiss charges that would unnecessarily bring classified information into the case. Further, trial counsel should carefully select case-in-chief evidence to avoid having to introduce or provide discovery of any more classified information than is necessary to meet the government's burden. While every trial counsel wants to present overwhelming evidence on every charge and specification, trial counsel must resist that urge with respect to classified evidence.

B. <u>Actions Prior to Disclosure to Defense.</u> Whenever possible, before beginning classified discovery, trial counsel *should* ensure that:

- The classification review of the material to be produced has been completed;
- Improperly marked documents have been corrected with proper markings; and
- Classified information no longer warranting protection in the interests of national security has been declassified.

In other words, trial counsel must be sure that the classified document is properly classified before providing discovery of any classified document. While the proper classification of a

[2] While M.R.E. 505(d) does provide that "[a]ny objection by the accused to the withholding of information or to the conditions of disclosure shall be raised through a motion for appropriate relief at a pretrial session," counsel should be aware that the some objections may be made and resolved at the Article 32 by the investigating officer and/or the convening authority. Like M.R.E. 412, M.R.E. 505 speaks of the military judge as the decision-maker. Despite that wording, R.C.M. 405(i) provides that rules of privilege in Section V of the M.C.M., like M.R.E. 412, apply to the Article 32. The obvious tension between rules that seem to provide for application by the investigating officer despite the fact that the investigating officer lacks any real authority to invoke the sanctions of a military judge has not been resolved. At a minimum, the investigating officer should have the authority to perform those tasks that clearly impact the conduct of the Article 32, such as issuance of a protective order, ordering compliance with the notice provisions of M.R.E. 505(h), and following the procedures within M.R.E. 505(i) when the government has made the classified material available to the hearing. Where the original classification authority or the convening authority do not make classified information available, there may be little the investigating officer can do. As with litigation over the failure of an investigating officer to employ M.R.E 412 correctly at an Article 32, the likely remedy for failure to provide classified information at the Article 32 where required would be reopening the hearing, ordering a new Article 32, or simply ordering disclosure to the defense for use at trial. Note that an objection by the government on grounds of privilege, rather than a simple withholding of the documents by the convening authority under M.R.E. 505(d)(5), will result in an *in camera* proceeding under M.R.E. 505(i).

document may be irrelevant to the elements of an offense, it is necessary for invoking the protections of M.R.E. 505.

While the formal protections of M.R.E. 505 privilege assertion are not yet available at this juncture, i.e., pre-referral, the convening authority can, through the protective order (see Section D, below), permit discovery of information with OCA approval. While the classification of the information may later be modified as a result of the classification review, the convening authority, again with OCA approval, can permit discovery with presumptive classification markings that will ensure protection of the possibly classified information.

 **Practice Pointer.** It is possible for multiple versions of the same classified information to be present in a case! In addition, different OCAs may view the classification of the same document (containing information from both OCAs) differently. The trial counsel must resolve these conflicts with the OCAs prior to using the information in any proceeding.

One suggestion is to limit discovery, at least at the outset, to a viewing in a secure space, rather than allowing physical custody by the defense. This will serve the dual purpose of ensuring security over the classified information and facilitating substitution of the properly marked information when the classification review is completed. These measures must not be unduly restrictive of the defense's rights of access. Incorporation of the discovery "rules of engagement" in the convening authority's protective order is highly encouraged (see Section D below).

C. <u>Pre-Referral Discovery</u>. During the early stages of a classified information case, the convening authority controls the pace and amount of classified information turned over in discovery. Effectively, it is the trial counsel that manages this process and coordinates these efforts with the OCAs. Code 17 is always available to assist coordination efforts with intelligence agencies. It is not unusual for an extensive amount of classified information to be turned over to the defense in order to properly prepare for the Article 32 process. M.R.E. 505(d)(4) gives the convening authority this authority. The information can be provided in other formats and trial counsel should be aware that these alternatives are available to avoid actual disclosure of classified information, in discovery, and later, at trial.

1. Classified Information Alternatives. The permissible alternatives are:

(a) <u>Redaction</u>. The first alternative--redacting the classified information out of the document--is the preferred alternative when the classified information is not relevant to the case. In other cases, the fact that a document contains classified information is relevant, but the substance of the classified information and the propriety of the classification are irrelevant. Examples of such offenses include

violations of 18 USC §§ 798[3] and 1924, and 50 USC § 783(b),[4] all of which can be assimilated under Art. 134. In addition, violations of general orders for handling classified information do not require a showing that the classified information at issue was properly classified, but rather that the information was marked as classified and was handled contrary to the governing orders. In such cases, trial counsel might redact all of the classified information from the document and leave the classification markings. In cases in which the government must prove either that the information was properly classified or related to the national defense, trial counsel could select a limited amount of classified information to use as evidence for such purposes and redact the rest of the classified information from the document.

(b) Substitution. The next alternative is to replace the classified information with a substitute. A portion of the document may be replaced with language that either lowers the overall classification of the document (e.g., from SCI to Secret) or may make the entire document unclassified (for instance, if only limited portions are classified). Many times, information may be rewritten to be more general or eliminate or obscure specific sources and methods, yet still keep much of the substance of the information at a lower or unclassified level. The second type of substitution contemplated by the rule is a summary. Especially useful for larger amounts of classified information contained in documents, an unclassified summary of the information may be substituted for the classified information, or for the entire document, as appropriate. These options will require extensive coordination with the owner of the classified information to ensure that the proposed substitutes are, in fact, unclassified. All of the intelligence agencies are familiar with these methods of substitution because they prepare them on a routine basis for cases that the Department of Justice prosecutes using CIPA. Remember, the origins of M.R.E. 505 lie in CIPA and these alternatives should be the trial counsel's first option for introducing evidence at trial rather than immediately succumbing to the lure of a closed session, with its attendant procedural complications (i.e., *Grunden* hearing) and opportunities to introduce appellate error. Substitutions are also an excellent method of dealing with information that will be referred to routinely throughout the trial. A coded

[3] "Under section 798, the propriety of the classification is irrelevant. The fact of classification of a document or documents is enough to satisfy the classification element of the offense." *United States v. Boyce*, 594 F.2d 1246, 1251 (9th Cir. 1979), cert. denied 444 U.S. 855 (1979).

[4] "There is no suggestion in the language of Section 783(b), by specific requirement or otherwise, that the information must properly have been classified as affecting the security of the United States. The essence of the offense described by Section 783(b) is the communication--by a United States employee to agents of a foreign government--of information of a kind which has been classified by designated officials as affecting the security of the United States, knowing or having reason to know that it has been so classified. The important elements for present purposes are the security classification of the material by an official authorized to do so and the transmission of the classified material by the employee with the knowledge that the material has been so classified. Indeed, we think that the inclusion of the requirement for scienter on the part of the employee is a clear indication of the congressional intent to make the superior's classification binding on the employee, once he knows of it." *Scarbeck v. United States*, 317 F.2d 546, 558-59 (D.C. Cir. 1963), cert. denied 374 U.S. 856 (1963).

substitution is often used to avoid the necessity of going into closed session to prevent inadvertent disclosure to the public. An example might be the name of a covert intelligence agency employee. In such a case, the Government might substitute "CIA employee 1" or “John Doe” in place of the real name. Pseudonyms were used in such a way for certain witnesses in the SEAL detainee abuse trial, *United States v. Ledford*. In the Weinmann case, the name of the country that received the classified information from the accused was, and remains, classified. In place of the country name, “Country X” was used during the plea and sentencing, thus avoiding the need for closed sessions.

(c) Stipulation. The third alternative to the disclosure of classified information in discovery, or the use of classified information at trial, is a statement admitting the relevant facts the classified information would tend to prove. This usually takes the form of a stipulation between the parties. This is a very effective method to protect classified information and have the Article 32 investigation and court-martial as open to the public as possible. It is a method that is used often in federal trials under CIPA and one that deserves much more consideration in courts-martial involving classified information. Stipulations may be helpful to both sides to narrow the issues to be litigated at trial and assist in shaping the case. Given the requirement of R.C.M. 806(b)(2) that reasonable alternatives to closing the court-martial must be considered, the stipulation admitting relevant facts that the classified information would tend to prove is an important alternative to consider. As an example, assume the defense wants to introduce classified operational and intelligence information to show the extent of the threat/violence faced by a unit in a particular area. Rather than introducing all of the classified details, a stipulation of fact acknowledging the level of threat and providing an unclassified description of the conditions faced by the unit would likely suffice.

 **Practice Pointer.** The defense team may find that the stipulation alternative is the most beneficial alternative for the accused. By definition, a stipulation must be agreed to by the parties and the accused. This creates opportunities for creative drafting and is another opportunity for advocacy on behalf of the client. *See, e.g.*, Turning The Tables: Using The Government's Secrecy And Security Arsenal For The Benefit Of The Client In Terrorism Prosecutions, Sam A. Schmidt and Joshua L. Dratel, *48 N.Y.L. Sch. L. Rev. 69, 84.*

These alternatives are designed to minimize the release of classified information and have as open a court-martial as possible, but they do not necessarily mean less work for trial counsel. The redaction of classified information by itself is straightforward and a classification review is not necessary to perform a simple redaction (this assumes, of course, that the material was properly portion-marked and it is easy to tell what paragraphs are classified). However, if the defense is not willing to stipulate that the redacted material is not relevant to the case, or contests the redaction (depending on the

purpose of the redaction), the government must assert the classified information privilege over the redacted information. Likewise, when unclassified substitutes are proposed in lieu of the actual classified information, and the defense objects, classification reviews are required because classified information is being withheld. As for unclassified stipulations, the need for a classification review will depend on the particular facts and circumstances of each case. The stipulation itself may need to be reviewed to ensure that it does not contain any classified information.

2. Protective Orders. During the pre-referral stage, if the Government agrees to produce classified discovery to the defense, the convening authority may disclose it "subject to **conditions** that will guard against the compromise of the information." M.R.E. 505(d)(4) (emphasis added.). One type of condition that could be used is a protective order, which is specifically referred to in Rule for Courts-Martial 405(g)(6). Although R.C.M 405(g)(6) does not require the entry of a protective order, the convening authority should, at a minimum, enter a protective order when classified information is disclosed to the defense. The protective order should contain all the provisions of M.R.E. 505(g). Sample protective orders are included in this guide as appendixes to Chapter Six. However, it should be noted that the only specific suggestion of a **pre-referral** protective order comes in R.C.M 405(g)(6). The language used in M.R.E. 505(d)(4) is "conditions," a much broader term which means the convening authority is only limited by his imagination and the Constitution in developing conditions designed to ensure the protection of classified information. Some "conditions" that would not be considered unusual, but are certainly NOT required in a classified information case are: requiring the defense to have a GSA-approved safe prior to storing classified material in government defense spaces; using a "reading room" as a central point of storage for all classified information, thereby providing access to the material, but not providing copies; and requiring the accused to be in the presence of his counsel or a cleared member of the defense team when the accused is reviewing classified information in the case.

While not specifically provided for under the R.C.M. or the M.R.E., the defense may object to the terms of the protective order imposed by the convening authority if the defense believes the terms are unduly restrictive or otherwise interfere with the rights of the accused. *See United States v. King*, No. 00-8007/NA, 2000 CAAF LEXIS 472 (C.A.A.F May 8, 2000) (finding that the convening authority's appointment of an Investigation Security Officer to monitor conversations between defense counsel and the accused does not "appear" to be the "least restrictive means of providing appropriate protection of classified information.") In a recent non-espionage case, defense objections to the protection order terms and "special instructions" issued by the convening authority were the subject of an extraordinary writ that, again, made it all the way to the Court of Appeals for the Armed Forces. *See Doe v. Commander, Naval Special Warfare Command*, 61 M.J. 14 (C.A.A.F. 2005). In this case, the convening authority's initial Article 32 convening order had not permitted the introduction of classified information. After an extraordinary writ was filed with the Navy-Marine Corps Court of Criminal Appeals, a revised order was issued directing the investigating officer to inform the convening authority if it appeared that there was classified information requested by the defense that the investigating officer thought was relevant to the case. Although the

second order effectively mooted the extraordinary writ, CAAF specifically stated that the accused could file a further petition for extraordinary relief upon a showing that the convening authority "did and continues to refuse to permit the investigating officer to consider classified information in the hearing that the investigating officer deems relevant to the investigation." *Id*.

3. Article 32 Proceedings. Article 32 proceedings, like courts-martial, are open to the public. This means that Article 32 investigations may only be closed in accordance with the procedures discussed in the next chapter. Under M.R.E. 505, the assertion of the classified information privilege may not occur at the Article 32 stage of the court-martial proceeding. Instead, under M.R.E. 505(d)(5), the convening authority may chose to withhold disclosure of the information, if disclosure would cause identifiable damage to the national security. Where the information is withheld, the investigating officer does not hold a hearing under M.R.E. 505(i) to determine the classified information's relevance and necessity to an element of an offense. Those provisions all apply post-referral, in front of the military judge. If the convening authority provided classified information to the defense in discovery, it is entirely possible that classified information will be introduced during the Article 32 proceeding, by one of the parties or through witness testimony, without substantive discussion of their contents. This is most commonly referred to as the "silent witness" rule. Alternatively, the parties may decide to introduce the evidence in a closed session. When that happens, the IO will need to conduct a closure hearing under R.C.M. 806(b)(2), as discussed in Chapter Ten.

Convening authorities should seriously consider avoiding convening orders that bar the introduction of classified information at Article 32 proceedings or that order the entire proceeding to be held either in a closed or open forum. Barring the introduction of classified information and ordering an entirely open proceeding may deprive the accused of the opportunity to effectively represent himself and unconstitutionally restrict his presentation of evidence in his defense.[5] By ordering an entire Article 32 proceeding to be held in closed session, a convening authority is going to violate the accused's and public's right to an open trial. *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977). Because there may be cases in which the government does not foresee a defense request for discovery of classified information, the investigating officer may have to notify the convening authority "as soon as practicable" upon receipt of such a request. R.C.M. 405(g)(1)(B).

> (a). Reasonably Available? Upon receiving a defense request for discovery of classified information or permission to use classified information in the proceeding, the investigating officer (beyond notifying the convening authority) must make an initial determination whether the information requested is "reasonably available." R.C.M. 405(g)(3)(C). "Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on military

[5] See the discussion of *Doe v. Commander, Naval Special Warfare Command*, 61 M.J. 14 (C.A.A.F. 2005) under subsection 2 on protective orders for an example of a case in which a convening authority attempted to restrict the introduction of classified information at an Article 32 proceeding.

operations of obtaining the evidence." R.C.M. 405(g)(1)(B). The determination of whether classified evidence is reasonably available would rest on the normal factors for determining whether information must be produced; this is, whether the requested information is relevant to the investigation, not cumulative, and was requested in a timely manner. *Id.*

If the investigating officer finds classified information requested by the defense to be reasonably available, the investigating officer must request the "custodian of the evidence" to produce it. If the custodian of the evidence determines the classified evidence is not reasonably available, the investigating officer and the accused are bound by that determination. R.C.M. 405(g)(2)(c). With respect to classified information, the "custodian of evidence" may include both the OCA and the convening authority. The originator is a custodian of the evidence because it may be the only agency with physical custody of the evidence and it may bar another holder of the evidence from releasing it without the originator's approval. The convening authority may also be a custodian of the evidence if it has physical custody of the evidence. However, unless the convening authority is also the OCA for the classified information, the convening authority lacks the authority to release the classified information.

If the defense objects to a determination that classified evidence is not reasonably available, the investigating officer must include a statement of the reasons for that determination in the record of investigation. R.C.M. 405(g)(2)(D). The government, therefore, should be prepared to assist the investigating officer in making a full and articulate record of the reasons relied upon by the OCA and the convening authority -- if both have determined the classified evidence is not reasonably available. A good record on this determination will be important since, if the case is referred to a general court-martial, the accused is permitted under R.C.M. 906(b)(3) to move the military judge to review the determination during a pretrial session. Unless the defense request was wholly frivolous, the defense should file such a motion as soon after referral of charges as possible.

(b) Defense Duty of Notification. Although M.R.E. 505 reads as if the notice provisions only apply at trial, recall that R.C.M. 405(i) makes Part V of the M.R.E.'s apply at the Article 32. Therefore, the M.R.E. 505(h) requirement that the defense notify the government of any possible use of classified information appears to apply at the Article 32. Regardless, the convening authority should place a requirement on the defense in the Article 32 convening order. The intent of the M.R.E. 505(h) notice requirement is to allow the government time to complete any necessary classification reviews and to decide whether or not to invoke the privilege. It is also intended to allow the hearing to accommodate classified information without compromise. Although privilege may be a non-issue at the Article 32 stage, the need to get classification reviews and be prepared to address potential closure issues is very important. The convening authority should require the defense to provide this notice well in advance of the date of the Article 32 proceeding, even if this means delaying the Article 32 longer than

would occur in a non-classified information case. In short, the convening order should order the defense to comply with the notice requirements of M.R.E. 505(h), discussed more fully below.

D. Post-Referral Discovery. M.R.E. 505(e) places the post-referral processes squarely in the lap of the military judge, who is to set the timing of requests for discovery, the defense notice obligation under subsection (h), and the in camera review hearings of subsection (i). The convening authority's role is now confined to responding, on behalf of the government (including the intelligence community), to the rulings of the military judge. *See* M.R.E. 505(f).

1. Protective Orders. When the government has previously disclosed classified information to the defense, or has agreed to do so post-referral, the onus is on the government, under M.R.E. 505(g), to request an appropriate protective order from the military judge. Trial counsel should ALWAYS request such a protective order in classified information cases. The order previously issued by the convening authority is arguably no longer effective now that the military judge is in control of the litigation. Of course, the defense counsel and accused's duty to safeguard classified information as embodied in the non-disclosure agreement they already signed does not go away. Still, the protective order issued by the military judge ensures that all the parties are aware of the military judge's requirements and expectations with respect to classified information. At a minimum, the protective order proposed by the government for the military judge should include all of the provisions discussed in subsections M.R.E. 505 (g)(1)(A) through (G).

2. Alternatives to Full Disclosure. After referral, under M.R.E. 505(g)(2) the military judge, like the convening authority before him, is authorized to approve the same alternatives to full disclosure or use: redaction, substitution, and admissions of relevant facts. The same considerations as discussed above with regard to those alternatives also apply post-referral. Under this section, however, the military judge is required to consider whether disclosure of the classified information is required to allow the defense "to prepare for trial." Note that a finding that certain information is necessary to "prepare" for trial does not guarantee that the information will be allowed to be used at trial, or used in its classified form. Any motion by the government for using these alternatives are to be considered by the judge *in camera*, which utilizes the procedures contained in subsection (i) of M.R.E. 505, the operation of which is discussed more fully below.

3. *Brady* Material. Notwithstanding the number of methods and opportunities the government has to avoid full disclosure of classified information, defense counsel are likely to assume that potentially exculpatory information regarding the accused must be disclosed under the principles of *Brady v. Maryland* and R.C.M. 701. However, this assumption may be erroneous when the information at issue is classified. The typical practice in courts-martial is for the government counsel to disclose, per R.C.M. 701(a)(6), "the existence of evidence known to the trial counsel which reasonably tends to: (A) negate the guilt of the accused of an offense charged; (B) reduce the degree of guilt of the accused of an offense charged; or (C) reduce the punishment." This is the codification of

the constitutionally required test set forth by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. U.S.*, 405 U.S. 150 (1972).

The major factor complicating the discovery of classified information is that regardless of the defense's need-to-know, the Government may not disclose classified information to the defense without the consent of the agency originating that information. "An agency shall not disclose information originally classified by another agency without its authorization." E.O. 12958, § 4.4(b). If the OCA refuses to release exculpatory material, then the exculpatory material cannot be provided to the defense. Of course, from the defense standpoint, this is not all bad as the failure to provide exculpatory material would require the military judge to impose one of the sanctions listed in M.R.E. 505(i)(4)(E) because exculpatory information certainly meets the heightened discovery standard for classified information of "relevant and necessary to an element of the offense or a legally cognizable defense." M.R.E. 505(i)(4)(B) and 505(f).

The biggest hurdle in classified information is simply determining whether any potential *Brady* information even exists, especially when intelligence agencies are involved in the case. Because most military lawyers are not familiar with the operation of intelligence community agencies, neither trial nor defense counsel may even know what to ask for. One possible solution is for counsel to look to the Department of Justice procedures for classified information in federal criminal cases for some good rules of thumb.

Section 2052 of the U.S. Attorney's Manual, Title 9 Criminal Resource Manual ("Manual"),[6] sets forth DoJ procedures for "Contacts with the Intelligence Community Regarding Criminal Investigations or Prosecutions." The guidance discusses the concept of a "prudential search" of Intelligence Community (IC) files, generally before charges are brought, if the government has "objective articulable facts justifying the conclusion" that IC files "probably contain classified information that may have an impact" on charging and other decisions. Of course, one means by which a prosecutor can come to this conclusion is by a detailed proffer in a discovery request by the defense for information known or believed by the accused to be in the IC files. This certainly makes the government's obligation to conduct a prudential search that much more compelling!

Along those lines, Section 2052 of the Manual also details when a prosecutor is compelled to search for discovery material within IC files. Because we recommend to counsel that they read the Manual we will not repeat the Manual's content *in toto* here. However, the relevant sections may be summarized as follows:

> [The] prosecutor's affirmative obligation to search the IC files for *Brady* material is not triggered merely by the defendant's (or the prosecutor's) speculation that such files contain discoverable information. Nor is the government required to search the files of every intelligence agency that conceivably may have exculpatory information…On the other hand, where there is an explicit request for discovery that has been approved by the court, the scope of the search may have

[6] Available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02052.htm.

> to be broadened. It may not reasonably be confined to merely the prosecution team if there are known facts that support the possible existence elsewhere of the requested information… If the prosecutor has actual or implied knowledge that the IC files contain … Jencks [or] *Brady* materials, the prosecutor must search the IC files.

Manual, Sections 2052(2)(a)(2), 2052(2)(b).

The bottom line is that there are no fishing expeditions for classified material. The intelligence community and its litigation attorneys will not tolerate such forays. However, they will respond to court orders based on non-speculative defense requests. Defense counsel will best serve their client by making such requests as specific as possible. By doing so it is much easier to locate the information among the vast amounts of data held by the intelligence community and it is harder for the government to deny the request.

4. Disclosure of *Brady* Information. Determining the existence of potential *Brady* material does not completely answer the question of whether it has to be disclosed to the defense. There is a limited amount of military case law on this topic. However, *United States v. Lonetree*, 31 M.J. 849 (N-M.C.C.A. 1990), which applies a CIPA analysis to the discovery of potentially exculpatory information at a court-martial, is particularly helpful. The standard the court used is set forth in *U.S. v. Roviaro*, 353 U.S. 53 (1957). At its essence, the standard is a 3-part test on relevance; the existence of a colorable privilege; and whether the information is "helpful to the defense" or "is essential to a fair determination of a cause." *See e.g., United States v. Yunis*, 867 F.2d 617 (DC Cir. 1989); *United States v. Moussaoui*, 382 F.3d. 453 (4th Cir. 2004).

5. Jencks Act/R.C.M. 914 Prior Statements. R.C.M. 914 codifies for military courts-martial the provisions of the Jencks Act (18 U.S.C. §3500), which relates to prior statements of a witness available in discovery to the opposing side following that witness's testimony. The usual R.C.M. 914 rules do not apply, however, when the witness's prior statement is classified in accordance with Executive Order 12958, as amended. When the privilege against disclosure is invoked over such statements because of their classified nature, the military judge must conduct an *in camera* review of the material to determine whether the classified statement is consistent or inconsistent with the witness's testimony. If the statement is consistent, then the judge will excise the consistent classified portion from the prior statement and deliver the redacted statement to the defense. If the statement is inconsistent, then the military judge must give the government an opportunity to invoke 505(i) proceeding. Essentially, there is no harm in not disclosing prior consistent statements to the defense. However, the onus of making that determination is placed on the military judge. If the military judge finds that the statement is inconsistent, but the government still refuses to permit disclosure to the defense, this, again, presents an opportunity for the defense to get the military judge to invoke one or more of the sanctions of M.R.E. 505(i)(4)(E) against the government.

If there are prior statements of witnesses that are classified, those statements will need to undergo a classification review just like any other potential classified evidence to be used at trial. Trial counsel and staff judge advocates need to plan accordingly, well in advance of trial, so that delays will not derail the court-martial process. The defense is also obligated to notify the government under M.R.E. 505(h) if they are aware of any prior statements by defense witnesses that may be classified. This will permit the government the time to have a classification review completed and determine whether or not it will invoke the classified information privilege over the material.

6. Defense Duty of Notification. M.R.E. 505(h) imposes a mandatory requirement on the defense to notify the government of any classified information that it "reasonably expects to disclose," or cause to be disclosed, in the defense case. It should be noted upfront that there is no reciprocal notice requirement within M.R.E. 505(h) imposed on the government. This is very different from most other R.C.M. notice provisions, which generally impose reciprocal notification requirements on the government. Despite the lack of reciprocal notice, where the government does intend or expect to disclose information at trial, the defense will get notice either at the evidentiary stage under M.R.E. 505(i), or at the closure stage under R.C.M. 806(b)(2), as the government will have to move the court for authority to conduct a closed session for purposes of taking classified evidence. Since notice will occur anyway, defense counsel should consider a motion requesting reciprocal notice from the government at the same time defense notice is due. After all, if there is any case where the military judge and the parties want to avoid trial by surprise, it is a case involving classified information. The court must know this evidence is coming in order to adequately prepare for the hearing.

The M.R.E. 505(h) defense notice must be served on trial counsel and the military judge within the time frame specified by the military judge or, if no time has been specified, prior to arraignment. M.R.E. 505(h)(1). This notification obligation is a continuing duty and the defense must notify the trial counsel and military judge "as soon as possible" after learning of the reasonable expectation to disclose information for which notice was not previously given. M.R.E. 505(h)(2). The notice must include a brief description of the classified information but must be "more than a mere general statement of the areas about which the evidence may be introduced." M.R.E. 505(h)(3). Rather the notice "must state, with particularity, which items of classified information he reasonably expects will be revealed by his defense." *Id.* This provision is in keeping with the idea that fishing expeditions for classified information are not allowed. The defense must list the particular items of classified information that will be used at trial.

Although "particularity" refers to identification of the classified information to the extent possible, and not the intended use of that information, it may not be entirely possible for the defense to avoid sharing the purpose for which it intends to use the information. Under the procedures of M.R.E. 505(i), discussed in the next section, if the government objects to information contained in the defense notice on classified privilege grounds or proposes an alternative to the requested defense information, the defense will need to argue why the information itself is relevant and necessary to the defense's case. Likewise, there may be situations in which the government argues that the classified

information sought by the defense is not relevant under the standard of R.C.M. 401 (discussed in section E below). In such an instance, the defense will also need to reveal to the government and the military judge the intended use that makes the information relevant to the case.

Practice Pointer. Defense counsel should note that the notice requirement encompasses information that the defense will "cause the disclosure" of, for instance on cross-examination of witnesses during the government's case-in-chief! Defense counsel must carefully plan out all aspects of their case well in advance to ensure that they are not foreclosed from pursuing a classified line of questioning. *See* M.R.E. 505(j)(4) (permitting government objection to any line of inquiry not previously found to be relevant and necessary to the defense).

7. The *In Camera* Proceeding. The evidentiary hearing to which all M.R.E. 505 roads lead[7] is the *in camera* proceeding under M.R.E. 505(i). The primary purpose of the *in camera* proceeding is to litigate the government's assertion of privilege over classified information. As it is rare that information is withheld from disclosure to the accused,[8] the secondary purpose of the *in camera* proceeding is evidentiary, i.e., the consideration and approval of classified information alternatives and substitutes. The *in camera* proceeding is separate from the hearing used to close the courtroom. A hearing to close the courtroom has traditionally been called a *Grunden* hearing, but is actually best thought of as a hearing under R.C.M. 806(b)(2) and is discussed in the next chapter.

M.R.E. 505(i)(2) places the burden of moving for an *in camera* proceeding on the government, after all, it is the government's privilege. The government needs to provide the classified information at issue and an affidavit to the military judge, who examines the material *ex parte*. The affidavit must demonstrate that the disclosure of the information could cause damage to the national security in the degree required to warrant classification under the applicable Executive Orders and regulations. The classification review completed by the subject matter expert and endorsed by the Original Classification Authority fulfills this requirement. The military judge does not review the propriety of the classification, but does ensure that the information has been classified in accordance with the Executive Order. As discussed in Chapter 7, every properly prepared classification review will describe the damage to national security in the term

[7] The other sections that refer to the in camera proceeding are: (e), (g)(2), (g)(3)(B), and (h)(4).

[8] One of the rare instances was the case of *United States v. Lonetree*, 31 M.J. 849 (N-M.C.M.R. 1990), aff'd 35 M.J. 396 (C.M.A. 1992). In *Lonetree*, the government withheld the name and background information of a government agent who was called to testify about facts that would corroborate Lonetree's confession. The agent was to testify that a known Soviet agent appeared at a time and place indicated by Lonetree as the location he was to meet this known Soviet agent. The trial judge agreed with the government's motion and allowed the agent to testify under the pseudonym John Doe, without his real name and background known to the accused and his counsel. The Navy-Marine Corps Court of Military Review and the Court of Appeals for the Armed Forces both determined that withholding the information did not violate the accused's Sixth Amendment confrontation right because the accused had all that was needed to place the witness "in his proper setting" and to provide the context for the testimony. *Lonetree*, 35 M.J. at 42-43.

concomitant with the requisite level of classification: damage for Confidential; serious damage for Secret; and extremely grave damage for Top Secret. Once the military judge reviews the properly prepared classification review affidavit, he will conduct an *in camera* proceeding.

Interestingly, although there are repeated references to this as an *in camera* proceeding, the defense has a role to play. The government is required to give the accused notice of the information that is the subject of the *in camera* proceeding. This is to allow the defense the opportunity to prepare an argument to be presented to the military judge regarding the material that is the subject of the proceeding. If the classified information has never been made available to the accused in conjunction with pretrial proceedings, then the government may provide a generic description of the material to the defense team. This generic description must be approved by the military judge. If the classified information has previously been available to the accused during the course of the proceedings, usually in discovery, then the government's notice must specifically identify the information that will be at issue in the proceeding. Thus, the more the accused knows about the information, the more information must be contained in the government's notice.

Before the military judge makes his ruling, both the government and the defense are given the opportunity to brief and argue their respective positions to the military judge, ostensibly as part of the *in camera* proceeding. If the military judge finds, in writing,[9] that the classified information is "relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence," M.R.E. 505(i)(4)(B), he can then order the government to disclose the information to the accused for use at trial. The government then has the option to either produce the material, stipulate to admissible facts, or propose an alternative that the military judge finds an acceptable substitute. If the military judge finds there is no acceptable substitute or replacement for the material itself and the government still refuses to disclose the information (as is its prerogative), then the military judge "shall issue any order that the interests of justice require" pursuant to M.R.E. 505(i)(4)(E). M.R.E. 505(i)(4)(E) provides a non-exhaustive list of possible sanctions.

M.R.E. 505(i)(4)(D) makes it clear that a full discussion of evidentiary alternatives to full disclosure is a primary purpose of the in camera proceeding. The rule clearly contemplates situations in which the government does not contest the relevance, necessity, and admissibility of the issue. In such circumstances, the focus of the inquiry is not whether the information should be disclosed or not, but whether or not there is an acceptable alternative. "Acceptable," of course, is up to the military judge, whose decisions will be subject to appellate review as the record of the *in camera* proceeding, including the complete version of the classified information, is sealed and attached as an appellate exhibit to the record of trial.

[9] M.R.E. 505(i)(4)(C) states that the information may not be disclosed "[u]nless the military judge makes a written determination that the information meets the standard set forth (above)." (emphasis added)

8. Consequences for Invoking the Classified Information Privilege: Sanctions Under M.R.E. 505(i)(4)(E) and M.R.E. 505(f). Although they are phrased in a similar fashion, the sanctions of these two sections arise under very different circumstances and are imposed by two different entities. The military judge is the primary sanctioner under M.R.E. 505(i) if the government continues to refuse to disclose classified information following a fully litigated *in camera* proceeding. In such a proceeding, the military judge has had full access to the classified information at issue, thus he can take a nuanced approach to sanctioning the government. The military judge's options are greater under M.R.E. 505 (i)(4)(E) than the convening authority's are under M.R.E. 505 (f). Pursuant to M.R.E. 505(i)(4)(E), the military judge may do nothing, strike testimony, or even dismiss the charges or specifications to which the classified information relates.

Unlike the sanctions under M.R.E. 505 (i)(4)(E), the sanctions under M.R.E. 505 (f) come into play in large part because the classified information is not being made available to the court for review. M.R.E. 505(f) places the onus on the convening authority to locate classified information that is apparently relevant and necessary, even if the appearance is only due to the defense's notice under M.R.E. 505 (h). The military judge is simply not able to make the same ruling that he can under M.R.E. 505(i)(4)(E) since he has not had a chance to actually evaluate the merits of the information. The military judge is simply relying on the defense's proffer and whatever is offered by the government. But note that the military judge is not empowered to order discovery of the information. He can only place the ball back in the convening authority's court.

The convening authority is then put in the challenging position of making major decisions in the case with respect to classified information that is likely not under his control. The convening authority can "institute action to obtain the classified information for the use by the military judge in making a determination under subdivision (i)." M.R.E. 505(f)(1). This will likely include negotiating with the equity owner for disclosure of the information, at least to the military judge, to permit the more thorough review under 505(i). As discussed below, the 505(i) review may ultimately result in the information being protected from discovery or use in the case anyway, but it must be disclosed *in camera* to the military judge and be made a part of the sealed record. For particularly sensitive information that may not be a viable option. In certain cases and for certain information this negotiation may take place at the Secretary level in the inter-agency process. Code 17 is always available to assist throughout this process.

The convening authority's other options are to dismiss the charges completely or only those charges and specifications to which the information relates, M.R.E. 505(f)(2)-(3), or to "take such other action as may be required in the interests of justice." M.R.E. 505(f)(4). One possible such action is to negotiate a pre-trial agreement in order to eliminate evidentiary issues at trial or on appeal.

While the military judge cannot order discovery under this provision, he does have some tools that can be used if the convening authority does not resolve the issues. The military judge must make a determination that proceeding without the information "would materially prejudice a substantial right of the accused" and shall, "after a reasonable

period of time," "dismiss the charges or specifications or both to which the classified information relates." M.R.E. 505(f). Notice that the dismissal is mandatory under these circumstances if the judge finds material prejudice.

9. Extraordinary Writs. As discussed in various places throughout this Primer, counsel should not forget the many other provisions in the R.C.M. and M.R.E. just because there are special rules for classified information. The rest of a case involving classified information progresses according to the "normal" rules of practice. Consequently, in addition to the sanctions and remedies available under M.R.E. 505 for discovery limitations, defense counsel should also explore the availability of extraordinary relief at the Navy-Marine Corps Court of Criminal Appeals or even at the Court of Appeals for the Armed Forces if you meet the criteria for an Extraordinary Writ. But, as our appellate colleagues like to say, "they are called extraordinary writs for a reason!"

A court will look to see that the accused has demonstrated a "clear and indisputable right" to the relief. Among the factors that a court may consider are that there is no other means for relief, that the damage is not correctable on appeal, that the action by the military judge is clearly erroneous (*i.e.*, there is no dispute on the law), that this is an example of a recurring error (*i.e.*, continuing application will disrupt the judicial process), or that this is a new/important issue of law. As can be seen, these are difficult hurdles to overcome for the defense. *But see, Doe v. Commander, Naval Special Warfare Command San Diego*, 2004 CCA LEXIS 276 (Unpub. Op. December 15, 2004), and *Denver Post v. U.S. and Captain Robert Ayers*, ARMY MISC 20041215 (ACCA, 23 February 2005).

A major problem for defense counsel attempting to challenge withholding of *Brady* information is the fairly significant test for prejudice. As set out by the Court of Appeals for the Armed Forces, the test is first, was the information or evidence at issue subject to disclosure or discovery; and second, if not disclosed, what was the effect of that nondisclosure on the trial outcome. *U.S. v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). The very presence of the second test indicates that a court may not be willing to entertain an extraordinary writ on a *Brady* disclosure issue since there is no "trial outcome" upon which to test the alleged harm. However, counsel should conduct their own research into the current state of the law as it relates to their case facts and circumstances and take appropriate action.

E. Motions *in Limine* Regarding Admissibility and Relevance. A recent phenomenon of cases arising from the Global War on Terror is litigation over the timing of classification reviews for classified information the defense seeks to introduce at trial. In these cases, the convening authority has made a policy decision to provide broad discovery (for instance, access to the intelligence database of a Marine command for a substantial portion of its deployment) to the defense team. The defense then properly files the notice of intent to use particular classified items under M.R.E. 505(h). Prior to undertaking the staffing and coordination required to conduct classification reviews of this material, the government contests the basic relevance of the requested material to the case. Essentially, the government argues that the defense request

requires an unnecessary and burdensome assertion of executive privilege for information that is not relevant.

This issue highlights an area of ambiguity under M.R.E. 505. However, the stronger argument is that the government can argue relevance and materiality issues prior to initiating steps to assert privilege. Of course, if the government adopts this tactic, the government may have to frantically gather classification reviews if the military judge rules that the disputed classified information is relevant. Another issue is the timing of this government effort. In the pre-referral period the convening authority may limit discovery and disclosure per M.R.E. 505(d). However, once the military judge is in control of the case the issue may become problematic for the government although having a detached final arbitrator may also help advance the government's position. The proper way to evaluate this issue is to remember that M.R.E. 505 does not exist in a vacuum in the court-martial process. Other evidentiary and procedural rules operate in conjunction with M.R.E. 505 and are not specifically superseded by the privilege unless indicated in the other rule. *See, e.g.*, R.C.M. 701(a)(6) compared with 701(f) (limits discovery of information "protected from disclosure by the Military Rules of Evidence.")

Government counsel can argue that the plain language of M.R.E. 505(e) does not require assertion of the privilege prior to preliminary R.C.M. 802 and/or Art. 39(a) sessions to discuss various issues relating to the case including the need to hold a *Grunden* closure hearing under 505(i) (*See* Chapter 10). The last paragraph of 505(e) provides that the military judge **"may consider any other matters that relate to classified information or that may promote a fair and expeditious trial."** (emphasis added) The government may want to argue that this language permits, and in fact encourages, the military judge to use this forum to rule on relevance and materiality under M.R.E. 401-403 as they might in other cases when the government seeks a Motion *in Limine* under R.C.M. 906(b)(13) and M.R.E. 104, without the need for classification review and privilege assertion. While there is nothing that prohibits such arguments early in a classified information case, there is the issue of what to do should there be a need to discuss the substance of the classified information at the motions hearing (as opposed to just discussing its legal significance). Under R.C.M. 806(b)(2), the military judge has the discretion and authority to close the proceeding, even without a classification review. This possibility is discussed in more detail in Chapter 10.

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