

CHAPTER 13

Post-Trial Matters

In a court-martial with classified information issues, responsibilities pertaining to the protection of classified information continue throughout the post-trial process. This chapter starts by introducing two general issues. The first issue, post-trial debriefs, is primarily relevant to national security cases, but is also potentially relevant to high-visibility mishandling cases. The second issue, a specific limitation on authority to remit and suspend sentences, is unique to national security cases. Additionally, this chapter discusses the post-trial responsibilities for the parties to a court-martial with classified information issues: trial counsel, defense counsel, staff judge advocate, Navy and Marine Corps Appellate Review Activity, appellate counsel, and appellate courts.

A. Post-Trial Debriefs. All judge advocates involved in a national security case or other case involving classified information issues that the intelligence community (IC) is concerned about should not underestimate the importance of a post-trial debrief to the IC. The debrief is a valuable tool the IC uses to, among other matters, better understand the extent of the compromise of classified information, e. g., damage control, and support counter-intelligence efforts. The IC wants to learn as much about the information compromised and techniques of U.S. adversaries as possible. In a national security case, the post-trial debrief is more often focused on intelligence issues than law enforcement matters.

1. Timing of the Debrief. One issue that judge advocates involved in a classified information case have to consider is the timing of the post-trial debrief, with the options being pretrial, between entry of plea and sentencing, or post-sentencing. In the federal criminal system, there is normally a considerable gap between the trial on the merits and sentencing phase of a criminal trial. The intelligence debrief in a federal espionage case usually begins, and is often completed, during this gap between conviction and sentencing. The court-martial process does not normally include such a gap between the trial on the merits and sentencing phases, but it could be agreed to by the parties as part of pretrial negotiations. Although the norm for courts-martial would be to conduct the debrief after sentencing, there are situations where one of the other options would be preferable. If there is concern about the accuracy of what the accused is agreeing to admit as part of his plea, the convening authority may desire the debrief and polygraph to occur prior to entry of pleas to ensure that the accused is being completely truthful. Debriefs that occur before entry of pleas or between entry of plea and sentencing provide an additional incentive for the accused to fully cooperate and be truthful, because such cooperation may result in a lesser sentence than he otherwise would have received. It should be noted that convening authorities may be reluctant to give an accused the opportunity to claim full cooperation with the government as part of his mitigation case on sentencing, however, this is the norm in federal court. In addition, especially in espionage cases, the intelligence community has a vested interest in the accused's full and complete cooperation, using as many incentives as possible (e.g., immunity, reduced sentence, recommendations on confinement location). When the debrief and polygraph occur post-sentencing, there will likely still be a period of suspended confinement (the

difference between the adjudicated sentence and the confinement cap in the pretrial agreement) to hold over the accused's head in an effort to ensure his truthful cooperation. However, as in any regular court-martial, there is a certain amount of inertia that works against vacating a suspended sentence, which is further strengthened in espionage cases due to the classified nature of the information. Particularly in espionage cases, the staff judge advocate to the convening authority should ensure that the intelligence community stakeholders have an opportunity to comment on the timing and urgency of the debrief before entering a pretrial agreement with the accused.

Contested Cases. Of course, pretrial debriefs are not usually an option in a contested case. Following trial, and assuming there has been a conviction, the convening authority may still order the accused to submit to a debrief by providing testimonial immunity to him, thereby eliminating any Fifth Amendment self-incrimination problem.

2. Immunity. Immunity is an important component of the debrief because it is another mechanism to encourage the accused to be truthful. If the debrief occurs prior to the trial, Military Rule of Evidence 410 provides the necessary protection to the accused because his statements are being made essentially during the course of plea negotiations and are not admissible in any court-martial proceeding against the accused. Grants of immunity in cases with classified information issues require consultation with the Department of Justice. The "Memorandum of Understanding (MOU) Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes" 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.) Additionally, JAGMAN 0138d requires consultation with DoJ in all cases involving national security or foreign relations of the United States.

3. Post-Trial Polygraphs. When an accused agrees to be debriefed, he normally also agrees to subject himself to polygraph examinations in order to verify his truthfulness. Any pretrial agreement containing a polygraph requirement should specify, to the extent feasible, what the government expects of the accused, who will conduct the polygraph, the scope of the polygraph, and what, if any, role the defense counsel can have, and the consequences if the accused can not "pass" the polygraph.

Chapter 11, Pretrial Agreements, contains a more detailed discussion of the issues associated with polygraphs and immunity since the pretrial agreement usually covers these issues.

B. Limitation on Authority to Remit and Suspend Sentences. 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. *United States v. Allen*, 31 M.J. 572 (N-M.C.C.R. 1990).

C. Responsibilities. The conclusion of a court-martial involving classified information involves more work on the part of all responsible parties than does a regular court-martial. Usually some portion, or all, of the record of trial will require special handling and storage throughout the process of review, authentication, and forwarding to the appellate court. In addition, extra copies of classified information used during the trial must be disposed of properly. Defense counsel in particular should conduct a thorough review and screening of their case file to ensure that no classified information or notes remain when they retain their files after transferring from the command.

1. Trial Counsel:

- (a) Ensure that all classified evidence is properly marked and stored.
- (b) Inform interest agencies, particularly the original classification authority’s agency, e.g., NSA, CIA, of the results of the court-martial. Code 17 can support this effort.
- (c) Confirm with the court security officer and court reporter that all classified material is accounted for and secured, including a sweep of the deliberation room, judge’s chamber, and other relevant areas.
- (d) Remind defense counsel to return all defense copies of classified material. Defense counsel notes may be retained but must be properly marked and stored.
- (e) Ensure that the record of trial is properly marked and stored.
- (f) Consider feasibility of separating classified portions of record of trial into a classified annex, leaving bulk of record of trial unclassified.
- (g) Work with the staff judge advocate to ensure accused complies with any pretrial agreement debrief and polygraph requirements.

2. Defense Counsel:

- (a) Account for and return or properly dispose of unneeded classified material.
- (b) Properly mark and store any classified or potentially classified notes.
- (c) Work with trial counsel and staff judge advocate to ensure client complies with any pretrial agreement debrief and polygraph requirements.
- (d) Consider value of post-trial cooperation with intelligence community or law enforcement

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(e) Ensure that any appellate defense counsel have appropriate clearances prior to initiating classified discussions.

3. Staff Judge Advocate:

(a) Account for classified material contained in record of trial and make sure pages and the record of trial are properly marked and stored.

(b) Prior to authentication, discuss with trial counsel feasibility of separating classified portions of record of trial into a classified annex, leaving bulk of record of trial unclassified.

(c) Work with trial counsel and defense counsel to ensure accused complies with any pretrial agreement debriefs and polygraph requirements.

(d) Ensure that record of trial and allied papers are properly marked, wrapped, and sent to appellate review activity.

(e) Comply with special handling rules that may apply depending on the type of classified information contained in the record of trial.

(f) Alert Navy and Marine Corps Appellate Review Activity (NAMARA/Code 40) that a classified record of trial is incoming.

(g) Confirm receipt by NAMARA.

(h) Ensure that command copies are properly marked and stored.

4. Navy and Marine Corps Appellate Review Activity:

(a) Confirm that the record of trial and allied papers are properly marked, wrapped, and accounted for upon receipt and receiving personnel are properly cleared and trained.

(b) Contact staff judge advocate to acknowledge receipt of record of trial.

(c) If the record of trial is separated into classified and unclassified portions, only enter the unclassified portions into the "standard" record of trial system. Classified portion of record of trial must be properly marked and stored in accordance with its classification level. Code 17 can store SECRET records of trial.

(d) Notify Appellate Defense and Appellate Government of the receipt of a classified case.

5. Appellate Defense and Appellate Government:

(a) Ensure assigned appellate defense and appellate government personnel have appropriate clearances and all classified material is handled and stored properly, including the record of trial.

(b) Coordinate appellate review with appellate court officials to ensure the proper handling and storage of classified material.

6. Appellate Court:

(a) Ensure all appellate court officials have appropriate clearances and all classified material is handled and stored properly, including the record of trial.

(b) Consider the potential need to close the courtroom.

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