

CHAPTER 12

The Sentencing Case

Issues associated with classified information continue during the presentencing stage of a court-martial. The evidence rule for introducing classified information during a presentencing proceeding is unique. Under Military Rule of Evidence (M.R.E.) 505, the standard for admissibility of classified information in sentencing is stricter than for the case on the merits. M.R.E. 505(i) (4)(B) provides that in presentencing proceedings, classified evidence, even if previously found to be relevant and material, is only admissible if there is no unclassified version of the evidence available. Therefore, defense and trial counsel should not assume that the military judge will allow either side to introduce classified evidence during the presentencing stage of a court-martial. If the military judge allows classified evidence during the presentencing stage, the same rules and procedures pertaining to classified information for earlier stages of the court-martial apply.

A. Sentencing Issues in a National Security Case. The government case in aggravation and the defense case in extenuation and mitigation are both limited because court-martial parties, including members, will rarely, if ever, fully understand the true extent and nature of the actual harm to the national security caused by the misconduct. Although the victims in such cases are easy to identify--all U.S. citizens-- the traditional concept of victim impact is challenging because of the difficulty in quantifying and describing the harm. Further, any such evidence is normally classified and subject to M.R.E. 505. Additionally, it is very possible in some cases that, depending on the sensitivity of the evidence, the owner of the classified information will not allow any mention or discussion of their information at any stage of a court-martial. As a result, members may never see the most damaging and sensitive pieces of information passed or mishandled by an accused. Likewise, the owner of classified information may prevent a trial counsel from introducing information in aggravation based on similar sensitivity concerns.

1. Case in Aggravation. In the sentencing stage, the trial counsel can typically argue a theory of general deterrence. In a national security case, the deliberate divulging of secrets is an extremely serious offense against the government and the nation, and as such, arouses intense passion. The compromise of classified material can not only reveal sensitive substantive information, but also betray sources and methods. At the worst, the compromise can place the lives of military personnel and others directly in jeopardy. In either case, the special trust that the government placed in the accused has been violated. The personnel security program makes the protection of classified material a personal responsibility. Trial counsel should emphasize the deterrent effect that a well-publicized punishment of the accused will have on all those with access to classified information.

In developing a case in aggravation, the trial counsel should be prepared to present witnesses to testify about the harm to national security that could result

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from the accused's conduct.¹ There is no requirement to demonstrate actual harm, but only to demonstrate the level of harm that could occur. For instance, in *United States v. Weinmann*, the accused admitted to passing a manual on the Tomahawk weapon system to an agent of a foreign government. The government's sentencing case included a stipulation of expected testimony from the Tomahawk Program Manager detailing exactly what type of information and vulnerabilities in the weapon system an adversary could learn from the compromised manual. The government then presented the testimony of a Strike Group Commander (a Rear Admiral) who they qualified as an expert in battle planning and questioned as to what effect a compromised Tomahawk system would have on the planning to attack an enemy Integrated Air Defense System (IADS).

When the compromised information is intelligence information, an official from the intelligence agency concerned would be the best witness to testify about the level of harm to national security. If the accused's actions led to the compromise of sources and methods, that would be an important fact to bring out in aggravation and should be able to be stated in an unclassified manner.² If they are unavailable to provide live testimony, affidavits can be substituted. Code 17 can assist in identifying and obtaining appropriate witnesses and affidavits.

If the accused had a particular duty to safeguard classified information, above and beyond the average service member, that would be an aggravating factor, e.g., the accused was a Top Secret Control Officer. For the average service member, trial counsel can show the special trust provided to the accused by presenting the non-disclosure agreements he signed when first granted access to classified material. In these agreements, the accused recognizes that the government is affording the accused a special trust and acknowledges the severe penalties he may incur if that trust is breached. The agreements also demonstrate that the accused was on notice of both the government's trust and confidence in the accused, and the harm that could result from the compromise of classified material.

Another possible aggravating factor is the accused's knowledge of the importance of the classified information that he disclosed or mishandled. The more it can be shown that the accused was aware of the potential harm that resulting from disclosure, the stronger the case in aggravation. In the *Weinmann* case, the

¹ Note well, though, that a formal damage assessment will not likely be initiated until AFTER the completion of the court-martial when the accused would then be available for debriefing.

² Although the unclassified manner may simply be to put as senior an official as possible on the stand to say "We lost valuable sources and methods," without any other details provided. However, trial counsel can develop a more effective case in aggravation by working diligently with the intelligence agency concerned to develop additional unclassified details about the value and worth of the compromised sources and methods. For example, the number of years it took to develop the source and method, an imprecise valuation of the amount of money it took to develop the particular source (e.g., over 100 million dollars), whether the source or method had to be removed from operation and/or whether or not it could be replaced by other means.

government presented the testimony of one of Weinmann's former instructors who had trained him on the classified information at issue in the case. The instructor testified about the training Weinmann received on the Tomahawk system and about Weinmann's rating, which routinely dealt with the Tomahawk system.

2. Case in Extenuation and Mitigation. The defense has two goals with its sentencing case: mitigate the case in aggravation presented by the government and place an affirmative case in extenuation before the military judge or members

In preparing to mitigate the harm to the national defense, defense counsel must thoroughly review the government's allegations of harm and ensure it is not overstated. Depending on the facts and circumstances of a particular case, a defense expert may be needed to assist in this review. In addition to reviewing the government's assertions, an expert can also point out ways that the harm can be, or has been, minimized and the impact of the government taking or, more often, not taking any of these measures. To return to the *Weinmann* case by way of example, the defense presented an unclassified stipulation of testimony from the Tomahawk Program Manager that laid out the defense argument on what the Tomahawk manual revealed. Specifically, the defense pointed out what facts were not contained in the manual, such as Tomahawk flight paths, and what areas an adversary would be disappointed to learn were not covered in the manual. This second stipulation by the Program Manager also pointed out that the compromised manual had not been rescinded or revised by the Navy and that the Navy had not taken any steps to mitigate the loss of the manual. Defense cross-examination of the government's battle planning expert confirmed that he was not aware of any promulgated changes in Tomahawk employment tactics as a result of the compromised manual.

In a mishandling case, it is often the case that no compromise occurred, which mitigates any potential harm to the national security. In mishandling cases, the reason why the accused improperly stored or mishandled the information is often an important mitigating factor. For instance, if the accused took the information home to study for rate exams, as often seems to be the case, it can be shown that he had good intentions, although he used improper means. This can be a very effective mitigating factor, especially if the accused has a good record of performance.³

Another way to mitigate the harm to national defense is to demonstrate that the classified information at issue was either available in the public domain or has since been released to the public. Again, this type of inquiry is dependent on the facts of each particular case. It must be emphasized that simply because information is in the public domain, whether a commercial source or an

³ Staff Judge Advocates should urge commanding officers to take such factors into account when deciding whether NJP or court-martial is the appropriate forum for disposition of a mishandling case.

anonymous leak, does not make the information unclassified, nor does it excuse the accused's conduct. Just because information is publicly available does not mean that properly classified information should be afforded a lesser level of protection.⁴

Especially in mishandling cases, defense counsel should review the command's security procedures in light of the requirements of the information security manual, SECNAV M-5510.36. A lax security environment may provide a useful argument in extenuation or mitigation. The command security manager should be interviewed with an eye toward discovering how the command has handled other instances of mishandling, whether more or less serious than the case confronting the accused.

Finally, as in any court-martial, defense counsel can argue such extenuating factors as the accused's youth and inexperience, difficult personal or family circumstances, or dire financial situation. In an espionage case, there may be evidence that the accused was initially misled by aggressive enemy agents. In mishandling or espionage cases, there may be evidence that the defendant had a lack of familiarity with classified material and/or the Intelligence Community.

B. Special Issues in National Security Cases. There are two provisions of federal law that are likely to be implicated in cases involving classified information and that counsel need to be aware of when preparing a sentencing case. One provision, the Hiss Act, is unique to such cases while the other, the Smith Amendment, is implicated by any conviction resulting in more than a year of actual confinement. The Smith Amendment is important to understand in classified information cases because of its potential impact on an accused's security clearance.

1. Hiss Act, 5 U.S.C. § 8312. The Hiss Act states that individuals convicted of specified offenses are not eligible to receive an annuity or retirement pay. All of the offenses relate to national security. The Hiss Act includes three Uniform Code of Military Justice articles: aiding the enemy (104), spying (106), and espionage (106a). Federal offenses listed in the Hiss Act include gathering, transmitting, or losing defense information (18 U.S.C. § 793), gathering or delivering defense information to aid a foreign government (18 U.S.C. § 794), disclosure of classified information (18 U.S.C. § 798), treason (18 U.S.C. § 2381), rebellion or insurrection (18 U.S.C. § 2383), activities affecting armed forces generally (18 U.S.C. 2387), activities affecting armed forces during war (18 U.S.C. § 2388), recruiting for service against the United States (18 U.S.C. § 2389), and enlistment to serve against the United States (18 U.S.C. § 2390). The offense within the purview of the Hiss Act that is most often charged in courts-martial is 18 U.S.C. § 793: gathering, transmitting, or losing defense information.

⁴ Paragraph 4-12 of SECNAV M-5510.36 provides the mechanism by which someone in possession of classified information that they believe is improperly or no longer classified can challenge the classification of information. Defense counsel should carefully consider the impact of using this procedure once an accused is facing court-martial.

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A historical review of relatively recent courts-martial with classified information issues suggests that 18 U.S.C. § 793 is the most common offense charged in all courts-martial involving classified information issues, whether the case involves espionage or is a relatively straightforward mishandling case. If a court-martial assimilates one of these federal crimes, the Hiss Act is only triggered when the executed sentence includes death, dishonorable discharge, or dismissal from service.

(a) Defense Counsel and the Hiss Act. Defense counsel must consider the implications of the Hiss Act any time they have a case with classified information. Defense counsel should read the Hiss Act to determine whether it applies to any of the charged offenses and strategize accordingly. An important issue that defense counsel must recognize is the possibility that failing to advise the accused on the implications of the Hiss Act may result in ineffective assistance of counsel issues on appeal. In 1960, a military court addressed this specific issue in the government's favor, ruling that counsel's failure to advise an accused that a conviction would result in a denial of retirement benefits under the Hiss Act did not render the plea improvident. United States v. Pajek, 11 C.M.A. 686 (1960). However, considerable ineffective assistance of counsel case law has developed since 1960. Above and beyond any ineffective assistance of counsel issue, it is simply good practice to ensure that the accused is fully informed of all potential consequences of the court-martial, whether contested or by plea.

(b) Trial Counsel and the Hiss Act. From a trial counsel perspective, the implications of the Hiss Act are less significant in an egregious case involving classified information, such as espionage and treason, since most sentences would include a punitive discharge. However, the likelihood of a punitive discharge is less certain when facing less serious offenses, e.g. mishandling classified information cases. In these less serious cases it is important for the trial counsel to recognize what is truly at stake when negotiating plea agreements with defense counsel and discussing the case with the convening authority. The trial counsel must fully understand what if any charges are within the purview of the Hiss Act and whether the additional requirement of an executed sentence including death, dishonorable discharge, or dismissal from service is applicable. Perhaps most importantly, it is imperative that staff judge advocates develop a clear strategy prior to charging so that the government has options during later stages of the court-martial process. Trial counsel and staff judge advocates are encouraged to consult with Code 17 for support during the development of charges.

2. The Smith Amendment, 10 U.S.C. § 986. The Smith Act, enacted in 2000 and amended in 2006, prohibits a person from obtaining a security clearance if convicted of any crime in any U.S. court that results in not less than one year of confinement actually served. The Smith Amendment applies to grants of new security clearances and periodic renewals for DoD employees, active duty members of the Army, Navy, Air Force, or Marine Corps, and employees of DoD contractors. While the law does allow for waivers of this prohibition, senior DoD

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officials have granted very few waivers. Although less consequential than the Hiss Act, defense counsel especially should consider the application of a potentially qualifying conviction. The relevance of a post-conviction security clearance is more likely in a case involving classified information issues since the accused probably possessed a security clearance prior to the court-martial.