

# Primer for Litigating Classified Information Cases



## Prosecuting, Defending, and Adjudicating Cases Involving Classified Information

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## **ACKNOWLEDGEMENTS**

This Primer, as well as the very existence of Code 17, is due in large part to the recommendations of the National Security Case Commission Report, signed by Brigadier General David C. Hague, USMC (Ret), on 29 June 2001. This well written and insightful document, also known as the King Commission Report (KCR), is available at Code 17's NKO website. The KCR and this Primer are mandatory reading for any judge advocate facing a case with classified information issues.

This Primer builds on previous editions. Specifically, the 2002 "Handbook for Litigating National Security Cases" finalized by Captain P.M. Delaney, JAGC, U.S. Navy; its predecessor, "Prosecuting National Security Cases: A Handbook for Trial Counsel," promulgated by Commander Homer S. Pointer, JAGC, USN (Ret); and an earlier addition drafted by Major Frank Short, USMC (Ret). These documents, along with the vision of Captain Peter J. McLaughlin, JAGC, USN (Ret), the original Code 17 Division Director, provided a firm foundation for this Primer.

Since 2002, many have dedicated their time and effort to making this Primer a reality. Lieutenant Commander Paul Walker, JAGC, USN, spent hundreds of hours during his Code 17 tenure updating issues and collecting insights including the rewrite of several chapters. Paul's effort was indispensable. Also, Commander George Reilly and Lieutenant Commander Laurin Eskridge spent a great deal of time on this project during their Code 17 tenures as well as members of the reserve unit supporting Code 17, especially Captain Bill Wheeler, JAGC, USNR, Lieutenant Commander Todd Lundquist, JAGC, USNR, and Lieutenant Commander Jennifer Strazza, JAGC, USNR. Finally, two very important individuals assigned to Code 17, Ms. Heidi Beasley and CTA1 Edward Reeves, helped the cause on a daily basis, both directly and indirectly by taking care of other Code 17 business while others were focusing on this Primer.

/s/

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**TABLE OF CONTENTS**

<b><u>Introduction</u></b>	
<b><u>Chapter 1:</u></b>	<b>Litigation of Classified Information Cases – An Overview</b>
<b><u>Chapter 2:</u></b>	<b>Classified Information</b> - Appendix 2-A (Classified Information References)
<b><u>Chapter 3:</u></b>	<b>Reporting Requirements</b> - Appendix 3-A (Reporting Check List)
<b><u>Chapter 4:</u></b>	<b>National Security Cases</b> - Appendix 4-A (Information Paper on National Security Cases) - Appendix 4-B (Talking Points on National Security Cases)
<b><u>Chapter 5:</u></b>	<b>Other Cases Involving Classified Information</b>
<b><u>Chapter 6:</u></b>	<b>Security Requirements</b> - Appendix 6-A (Attorney Access Authorization Request) - Appendix 6-B (Accused Access Request) - Appendix 6-C (Sample Protective Order and MOU)
<b><u>Chapter 7:</u></b>	<b>Classification Reviews</b> - Appendix 7-A (Sample Classification Review Affidavit) - Appendix 7-B (Sample OCA Cover Letter)
<b><u>Chapter 8:</u></b>	<b>Charges in Classified Information and National Security Cases</b> - Appendix 8-A (Sample Specifications)
<b><u>Chapter 9:</u></b>	<b>Military Rule of Evidence 505</b>
<b><u>Chapter 10:</u></b>	<b>Courtroom Closures</b>
<b><u>Chapter 11:</u></b>	<b>Pretrial Agreements &amp; Grants of Immunity</b> - Appendix 11-A (Sample Pretrial Agreement) - Appendix 11-B (18 USC 793 Provisory & Element Breakdown)
<b><u>Chapter 12:</u></b>	<b>The Sentencing Case</b>
<b><u>Chapter 13:</u></b>	<b>Post-Trial Matters</b>
<b><u>Annex A:</u></b>	<b>Staff Judge Advocate/Trial Counsel Checklist</b>
<b><u>Annex B:</u></b>	<b>Defense Counsel Checklist</b>

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<b>Annex C:</b>	<b>Investigation/Court Security Officer Summary</b>
<b>Annex D:</b>	<b>Classified Information Protections: MRE 505 &amp; CIPA Comparison</b>
<b>Annex E:</b>	<b>DOD-DOJ Memorandum of Understanding</b>

## INTRODUCTION TO SECOND EDITION

The “Primer for Litigating Classified Information Cases” (the Primer) applies to investigations and courts-martial with classified information issues. It builds on a first edition, released in August 2002. While judge advocates from other services and civilian practitioners involved in the military justice process are encouraged to use this Primer as a reference, the Primer does not include a comprehensive review of Army and Air Force guidance and regulations. However, there are many areas of classified information practice that are universal to all courts-martial, most importantly the application of Military Rule of Evidence 505 and Rule for Court Martial 806. Judge advocates of all services will benefit from the Primer.

Since the release of the first edition, the Navy has successfully litigated two designated national security cases, the first since the *King* case came to an abrupt end in 2001. One of those cases involved espionage on behalf of a foreign power and ended in a guilty plea (*Weinmann*). The other involved a willful compromise of classified information to an unauthorized representative of a non-governmental organization and ended in a conviction following trial before members (*Diaz*). Code 17 is also involved in numerous other cases with classified information issues, including several arising from actions in Operations Iraqi Freedom and Enduring Freedom. These military operations have generated a number of courts-martial and other proceedings in which classified information, although not an element of charged offenses, is relevant and material, to the prosecution’s case, the defense case, or both. In these cases, classified information, such as rules of engagement or SIPR-net email, has been subject to discovery or introduced into evidence. As discussed more fully in Chapter Five, the classified information need not be an element of a charge or specification to be discoverable and potentially relevant to a case. Therefore, it is important for all judge advocates to be aware that the involvement of any classified material in a case literally and figuratively changes the rules.

This Primer is for staff judge advocates, trial and defense counsel, civilian counsel, investigating officers, military judges, and personnel detailed as investigation security officers and/or court security officers. Code 17 will update this Primer as needed, based upon suggestions and comments from practitioners, court opinions, and changes in rules, regulations, or statutes. The Primer is available on the Navy Knowledge Online (NKO) website.

An article in the June 1986 *Army Lawyer* provides an interesting perspective on litigating a case involving classified information:

The hope of trying a “Big Case” is the fuel that fires the furnace of ambition inside every trial lawyer. For the civilian plaintiff and defense bars, Big cases are usually defined in terms of money damages ... for the military criminal lawyer [a Big case] is defined in terms of the offense... Among the murders, rapes, and other mayhem that we traditionally associate with big cases is a category which is unsurpassed in importance, complexity, and potential for hazard to the advocate—those cases involving classified information. This is so for a fairly obvious reason. The government’s interest in prosecution outweighs its interest in limiting access to the classified material. This usually means that the underlying offense is one involving big money, big issues, or big people. In any event, the lawyer who girds himself or herself with shield and sword to champion the cause of his or her client, faces difficulties and challenges in classified trials that are not encountered in his normal practice.

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Major Joseph A. Woodruff, U.S. Army, *Trial Defense Service Notes: Practical Aspects of Trying Cases Involving Classified Information*, 1986 Army Lawyer 50.

Checklists, sample documents, and background information to help illustrate points and issues are appended to this Primer. Annex A is a checklist for staff judge advocates and trial counsel to use when preparing a case involving classified information. Annex B is a checklist for defense counsel to use when defending a case involving classified information. Annex C is summary for investigation and court security officers. Annex D is a comparison of the classified information protections offered by the Classified Information Procedures Act used in federal court and Military Rule of Evidence 505. Annex E is a Department of Defense Instruction that implements the Memorandum of Understanding between the Departments of Justice and Defense regarding the investigation and prosecution of certain types of crimes.