

VI. NATIONAL SECURITY CASES

REFERENCES: MCM (1995 Edition), Appendix 3
AFPD 51-2, paragraph 1.9
AFI 51-201, paragraphs 3.3.2, 6.6.4, 6.12, 12.7.2.2.
AFI 31-501, Personnel Security Management Program
AFI 31-401, Managing the Information Security Program
AFI 14-302, Control, Protection, and Dissemination of Sensitive
Compartmented Information
USAFINTEL 201-1 (To be replaced by AFMAN 14-304, The Security,
Use, and Dissemination of Sensitive Compartmented Information (U).)
18 USC §§792-798, 1382, 1386, 2155

GENERAL CONSIDERATIONS:

- **Military justice actions involving espionage, subversion, aiding the enemy, sabotage, spying, or violation of punitive regulations and criminal statutes concerning classified information or the foreign relations of the United States will not begin without coordination through AFLSA/JAJM, DSN 297-1539, commercial (202) 767-1539. (AFPD 51-2, para 1.9.)**
- From a staff judge advocate's perspective, national security cases differ from ANY other cases in a number of ways:
 - There are extensive reporting requirements.
 - Permission must be obtained to proceed.
 - Rigorous safeguards must be employed to protect against further unauthorized dissemination of classified material.
 - Secure facilities are required for classified portions of trial.
- Treat the following as national security cases:
 - Spying (Art 106).
 - Espionage (Art 106a).
 - Aiding the enemy (Art 104).

- Sabotage (Art 108, 18 USC §2155).
- Violations of punitive regulations or criminal statutes dealing with classified information (Article 92, 18 USC §§792-798, 1382, 1386).
- Include any investigations of attempts, conspiracies, or solicitations to commit any of the above offenses.
- Coordination is required by agreement between DOD and DOJ about how an investigation will proceed (searches, seizures, immunity grants, polygraphs, etc.) and whether a prosecution will occur and, if so, which agency will try the case, in what court. (MCM, Appendix 3). AFLSA/JAJM is responsible for coordinating security cases with various federal agencies and must be notified as soon as possible in the investigative stages!

REPORTING REQUIREMENTS:

- Who must be notified and when, whose permission is needed and when, and what safeguards must be employed are functions of the following:
 - The classification level of the material;
 - The organization that classified it;
 - The security clearance held by the accused;
 - The extent of the accused's access to classified material;
 - The entity that acquired the material; and
 - The nature of the resulting compromise.
- The starting point for negotiating this bureaucratic maze is AFLSA/JAJM. Any case that has the potential for becoming a national security case must be reported to JAJM as soon as possible after the base staff judge advocate learns of it. (AFPD 51-2, para 1.9, AFI 51-201, para 12.7.2.2). Additional reporting and procedural requirements are found in AFI 31-501 and other instructions.
- Reporting requirements in a given case can involve numerous DOD and DOJ departments, agencies, and offices, e.g. FBI, CIA, NSA, SAF, HQ USAF/IN/JA/RD/XO, HQ AFOSI, HQ AFOSP, AIA/JA, and some offices the existence of which is classified. In all cases notify JAJM. Let JAJM help you sort it out.

- **Don't forget security considerations when making the reports, e.g. secure telephones and secure fax machines.**

EVIDENTIARY CONSIDERATIONS:

- **MRE 505** provides a privilege for classified information. SAF is the only person who may assert the privilege or give specific authorization to another to assert the privilege.
 - Get an early start on any request for authority to assert an MRE 505 privilege.
 - All requests must be sent to AFLSA/JAJM.
 - Coordination with all interested agencies is required, resulting in a lengthy process.
- **MRE 506** provides a privilege for government information other than classified information, including assertions of privilege by the IG. Authority to assert the privilege is limited.
 - All requests to assert the privilege must be sent to AFLSA/JAJM.
 - Again, get an early start if you are going to assert the privilege.

OTHER CONSIDERATIONS:

- Issues that arise in connection with preventing further dissemination can also be involved. They can range from the mundane: What computer is used to type the transcript? (TEMPEST); to the esoteric: Which court has jurisdiction over electronic surveillance of foreign governments? (Foreign Intelligence Surveillance Court, 50 USC §1801, *et seq.*); and what procedures are required for the dissemination of Sensitive Compartmented Information (SCI)? (AFI 14-302).
- When classified material is contained in a document, photograph, etc., it must be secured and protected from unauthorized disclosure at all times. Consult your SP Security Office and base Intelligence Office for assistance in handling procedures. Some court sessions may need to be closed to the public. RCM 806(b); MRE 505; *United States v. Gonzalez*, 12 MJ 747 (AFCMR 1981). Don't forget to have a security check performed on the court room, court reporting equipment, etc.
- If the identities of intelligence sources need to be protected for security reasons, the use of aliases in pre-trial documents, discovery, stipulations, search authorizations, and other situations, is permissible. See *United States v. Lonetree*, 35 MJ 396 (CMA 1992)

- Prior to referring any charges (*whether dealing with national security offenses or not*) to a general or special court-martial against a member who has SCI, SIOP-ESI, or other special program access, permission must first be obtained from the appropriate OPR for that program. (AFI 31-501, paragraph 8.14.) (This rule also applies to administrative discharges and civilian removal actions.)
- However, in cases where HQ USAF/IN and HQ USAF/XO are the appropriate OPR, e.g., for SCI, SIOP-ESI and other XO special access programs, it is possible to proceed with preferral and an Article 32 investigation while the request is being considered. Since there is no guarantee that authorization will be granted, bear in mind before proceeding that you may have to discontinue the case should the request be denied. Therefore, in cases where an Article 32 investigation might require considerable effort and expense, it may be preferable to delay preferral of charges pending final approval from the appropriate agency.
- Under no circumstances, however, should the charges be referred to trial until the appropriate authorization is obtained from the OPR.