



THE ARMY LAWYER

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BOOK REVIEW

Washington's Immortals: The Untold Story of an Elite Regiment Who Changed the Course of the Revolution

Reviewed by *Major Rebecca M. Harvey*

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Lore of the Corps

A Letter to President Richard M. Nixon

By Fred L. Borch

Regimental Historian and Archivist

On March 29, 1971, First Lieutenant William L. “Rusty” Calley was found guilty by a general court-martial of the premeditated murder of 22 Vietnamese civilians—infants, children, women, and old men—at the small hamlet of My Lai 4. He also was convicted of assault with intent to murder a child of about two years. Two days later, the court-martial panel of six officers, five of whom had served in Vietnam, sentenced Calley to dismissal from the Army, total forfeiture of all pay and allowances, and confinement at hard labor for life.¹

What happened the following day, as Calley was confined in the post stockade awaiting transfer to the Disciplinary Barracks at Fort Leavenworth, was unprecedented in military legal history: President Richard M. Nixon announced that he would personally review Lieutenant Calley’s case before the sentence took effect. In the interim, Calley would be released from the stockade and placed under house arrest in his on-post quarters.² Nixon’s intervention, occurring as it did before the court reporter had even finished typing the record of trial, much less before the convening authority had taken any action in the proceedings, greatly upset the two Army judge advocates who had prosecuted Calley. They were so disturbed by the President’s involvement in the judicial process that they each wrote a letter to Nixon—protesting his interference in the court-martial. This Lore of the Corps article is about those letters, and their importance in military legal history.

On March 16, 1968, Lieutenant Calley and Soldiers in Company C, 1st Battalion, 20th Infantry, 11th Infantry Brigade (Light) of the 23d (Americal) Division massacred between 300 and 500 Vietnamese civilians. The war crime went undiscovered because of a cover-up perpetrated by the brigade and division staffs.³

A year later, the Army’s Criminal Investigation Division and a formal Army Regulation 15-6 inquiry conducted by Lieutenant General William R. Peers, finally brought the incident into the open. General Peers’ report identified 30 individuals, mostly officers, who knew about the murders at My Lai 4.⁴ Ultimately, however, only fourteen Soldiers were charged with crimes. For a variety of reasons, charges were either dismissed or the accused was found not guilty at trial. Lieutenant Calley, the most junior ranking officer, was the

only soldier to be convicted, but for fewer murders than actually had been committed.

Before and during Calley’s trial, Americans from many different walks of life expressed their displeasure with the case. Immediately after he was convicted, this unhappiness increased; a public opinion poll found that “nearly 80 percent were bitterly opposed to the finding” of guilty.⁵ Some insisted that Calley, even if guilty, was being made a scapegoat. Others insisted that he was innocent because he had done nothing more than kill the enemy. Draft boards in Arkansas, Florida, Kansas, Michigan, Montana and Wyoming resigned—insisting that they would not draft young American men for duty in Vietnam. Some state governors flew the American flag at half-mast. Veterans groups like the American Legion and Veterans of Foreign Wars protested against the verdict and demanded clemency. One woman, who had been part of a crowd outside the Fort Benning courtroom when the sentence was announced, had screamed that Calley had “been crucified”, and instead of being punished for killing Communists, “should get a medal” and “be promoted to general.”⁶



First Lieutenant
William L. Calley

On April 1, 1971, the day after the court members announced the sentence in *United States v. Calley*, President Nixon directed that Calley be released from the stockade on Fort Benning and moved to his on-post quarters, where he would be under house arrest. While this presidential interference was surprising because it was so unprecedented, participants and observers of the *Calley* proceedings were even more startled two days later. This was because, after “waking in the middle of the night in turmoil over the Calley case and his responsibilities to the nation about it,” Nixon proclaimed that he would personally review “Captain Calley’s” [sic] case before the sentence took effect and decide

¹ *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973). See also *Calley v. Hoffman*, 519 F.2d 184, (5th Cir. 1975) cert. denied, 425 U.S. 911 (1976) (No. 75-773); *Calley v. Calloway*, 382 F. Supp. 650 (M.D. Ga. 1974); *United States v. Calley*, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973).

² RICHARD HAMMER, *THE COURT-MARTIAL OF LT. CALLEY* 380 (1971).

³ WILLIAM R. PEERS, *THE MY LAI INQUIRY* 199-209 (1979).

⁴ *Id.* at 212-216.

⁵ Hammer, *supra* note 2, at 374.

⁶ *Id.* at 369.

whether the panel that had found him guilty had done the right thing.⁷



Captain Aubrey Daniel III

Captain (CPT) Aubrey M. Daniel III had been the lead trial counsel in *United States v. Calley*. As the most experienced trial attorney at Fort Benning, Daniel had done most of the direct and cross-examination of witnesses in the trial, including Calley.⁸ Together with his assistant trial counsel, CPT John P. Partin, the two Army lawyers

had worked hundreds of hours preparing for trial. At least for Partin, the trial had been all consuming; from the day he reported for duty at Fort Benning in September 1969, until April 1971, John Partin's "sole concern" was the Calley trial.⁹

Both CPT's Daniel and Partin were distressed by President Nixon's actions. As a result, each judge advocate wrote a letter to the President in which they argued that the President not only had been wrong to intervene in the court proceedings but that his actions were both harmful and immoral. Aubrey Daniel began his lengthy letter as follows:

Sir:

It is very difficult for me to know where to begin this letter as I am not accustomed to writing letters of protest. I can only hope that I can find the words to convey to you my feelings as a United States citizen, and as an attorney, who believes that respect for law is one of the fundamental bases upon which this nation is founded.

On November 26, 1969, you issued the following statement through your press secretary, Mr. Ronald Ziegler, in referring to the My Lai incident . . . as in direct violation not only of

United States military policy, but also abhorrent to the conscience of all the American people.

Daniel continued his letter by reminding President Nixon that on December 8, 1969, after being asked to comment on the My Lai case at a press conference, that Nixon had called it "a massacre" and said that "under no circumstances was it justified." After all, explained Nixon, "[o]ne of the goals we are fighting for in Vietnam is to keep the people of South Vietnam from having imposed on them a government which has atrocity against civilians as one of its policies. We cannot ever condone or use atrocities against civilians to accomplish that goal." Daniel continued:

These expressions of what I believed to be your sentiment were truly reflective of my own feelings when I was given the assignment of prosecuting the charges which had been preferred against Lieutenant Calley.

Throughout the proceedings there was criticism of the prosecution but I lived with the abiding conviction that once the facts and the law had been presented there would be no doubt in the mind of any reasonable person about the necessity for the prosecution of this case and the ultimate verdict. I was mistaken.

Daniel's letter goes on to explain how Calley got a fair trial and that the six officers serving on the court-martial panel had "performed their duties in the very finest tradition of the American legal system." He wrote that, after the verdict in the trial was announced, he was "totally shocked and dismayed at the reaction of many people across the nation." He continued:

I would have hoped that all leaders of this nation, which supposed to be a leader within the international community for the protection of the weak and the oppressed regardless of nationality, would have either accepted and supported the enforcement of the laws of this country as reflected by the verdict of the court or not made any statement concerning the verdict until they had had the same opportunity to evaluate the evidence that the members of the jury had.

In view of your previous statements . . . I have been particularly shocked and dismayed at your decision to intervene in these proceedings in the midst of public clamor. . . Your intervention has, in my opinion, damaged the military judicial

⁷ *Id.* at 380.

⁸ A 1963 graduate of the University of Virginia, Aubrey Daniel received his law degree from the University of Richmond. He accepted a direct commission in the Corps in 1967, after receiving a draft notice. Hammer, *supra* note 2, at 51.

⁹ A 1966 Vanderbilt University graduate, John Partin completed law school at the University of Virginia in May 1969 and entered the Corps the next month. Mr. Partin spoke about his experiences in *United States v. Calley* when he delivered the 11th Annual George S. Prugh Lecture in Military Legal History on April 25, 2017. *Id.* at 52.

system and lessened any respect it may have gained as a result of the proceedings.

Not only has respect for the legal process been weakened . . . [but] support has been given to those people who have so unjustly criticized the six loyal and honorable officers who have done this country a great service by fulfilling their duties as jurors so admirably. Have you considered those men in making your decision?

I would expect that the President of the United States, a man whom I believed should and would provide the moral leadership for this nation, would stand fully behind the law of this land on a moral issue which is so clear and about which there can be no compromise.

For this nation to condone the acts of Lieutenant Calley is to make us no better than our enemies and make any pleas by this nation for the human treatment of our own prisoners meaningless.

I truly regret having to have written this letter and wish that no innocent person had died at My Lai on March 16, 1968. But innocent people were killed under circumstances that will always remain abhorrent to my conscience.

While in some respects what took place at My Lai has to be considered a tragic day in the history of our nation, how much more tragic would it have been for this country to have taken no action against those who were responsible.

That action was taken, but the greatest tragedy of all will be if political expediency dictates the compromise of such a fundamental moral principle as the inherent lawlessness of the murder of innocent persons, making the action and the courage of six honorable men who served their country so well meaningless.

About the same time that CPT Daniel sent his letter to the White House, CPT Partin typed a three and one half page, single-spaced letter. This letter is dated April 4, 1971, and was mailed to Washington, D.C. shortly after it was written.¹⁰

Partin's letter opens with this sentence: "Dear Mr. President: 1 April 1971 was the most discouraging night of my life."

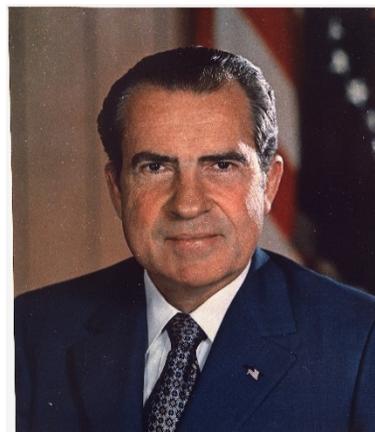
After explaining that Calley had received an exceptionally fair trial, Partin wrote that it was wrong for President Nixon "to carve out a new set of rules for Lt.

Calley" that applied only to Calley. This was because the rules released Calley from confinement in the post stockade but left some 200 soldiers confined there, "none of whom were even charged with capital offenses." Partin continued:

At a time when there is an enormous need for respect for the [law], this case could have served as a true vehicle for the respect in the military justice system which is so badly needed.

It was reported on 4 April that you would personally review this case after the appeal system operated. Sir, you were reported as wanting to wait . . . because it would be interfering to act before then. It is my belief that any action which makes this case extraordinary is interfering and unwarranted.

Expediency and politics are not going to provide the backbone for a rejuvenation of the spirit of America which you have said you wanted for this country. These actions can only delay that much needed rejuvenation.



President Richard M. Nixon

Although the White House received both letters, President Nixon never replied to either CPT Daniel or CPT Partin. Nixon also never took any further action in Rusty Calley's case, although one occasionally hears erroneous claims in the media that Nixon 'pardoned' Calley. In fact, nothing of the sort occurred since, on May 3, 1974, President Nixon notified the

Secretary of the Army that he had reviewed the proceedings and would take no action in the matter.¹¹ But some might conclude that the president's very public pronouncements were command influence that definitely affected the results.

On August 21, 1971, the Commanding General, Third U.S. Army, took action as the general court-martial convening authority. He approved the findings of premeditated murder against Calley but reduced his sentence of confinement to twenty years. In April 1974, after the Army Court of Military Review (the forerunner of today's Army Court of Criminal Appeals) and the Court of Military Appeals (the forerunner of today's U.S. Court of Appeals for the Armed Forces) had

were completed; the U.S. Fifth Circuit did not decide Calley's *habeas corpus* petition until September 1975 and the U.S. Supreme Court did not deny *certiorari* in the case until 1976.

¹⁰ Letter from CPT John P. Partin to President. Richard M. Nixon (4 April 1971) (on file with author).

¹¹ Calley v. Callaway, 519 F.2d. 184 (5th Cir. 1975). President Nixon resigned in August 1974, long before judicial proceedings in the Calley case

rejected Calley's appeals and affirmed both the findings and sentence, the Secretary of the Army, Howard H. Calloway, reduced his sentence further to ten years. Calley, who had been in house arrest the entire time since April 1971, was now transferred to Fort Leavenworth, Kansas. But he was eligible for parole in six months—because he had served one-third of his ten year sentence. As a result, after a short time behind bars, Calley was paroled in November 1974.¹²

The *Calley* verdict should have been an opportunity for national self-examination—an opportunity for Americans to look within themselves and to reaffirm that the systematic killing of a large number of defenseless old men, women and children was a horrific event and that the American soldiers who committed this war crime must be held responsible. As Lieutenant General Peers put it, Calley was not an innocent scapegoat and the evidence of his guilt was “overwhelming.” Consequently, his trial should have reminded “the American people of this country’s obligation to punish those who commit war crimes.”¹³

Instead, the decision was viewed by more than a few American citizens as an attack on the United States and themselves. Rightly or wrongly, these men and women believed that condemning Calley was to condemn every American who had fought in Vietnam and to condemn every soldier who had simply tried to do his duty under very difficult circumstances. This is the chief reason that the letters written by Captains Aubrey Daniel and John Partin are so important in our legal history—because the letters reflect that both prosecutors were men of principle who recognized that Calley not only had committed horrendous crimes deserving of punishment but that Nixon’s interference was harming the rule of law and damaging America’s moral authority.

Today, Americans are not surprised when a fellow citizen sends an email or twitter message to the White House, or even takes the time to write a letter to the president. In the early 1970s, however, members of the public were more reticent about making their views known. It certainly was unheard of for an active duty Army officer to write a letter to the President, much less a letter that criticized him and questioned his morality. Yet Daniel and Partin, believing the military justice system required them to speak up, took the time to write these letters. Members of The Judge Advocate General’s Corps can be proud of them.

¹² *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973). *See also* *Calley v. Hoffman*, 519 F.2d 184, (5th Cir. 1975) *cert. denied*, 425 U.S. 911 (1976) (No. 75-773); *Calley v. Calloway*, 382 F. Supp. 650 (M.D. Ga. 1974); *United States v. Calley*, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973).

¹³ Peers, *supra* note 3, at 254.

Notices of Violation and Other Consequences of Environmental Noncompliance

Major David T. Callan*

In today's world, it is no longer unimaginable to think that business can operate - and even thrive - in an environmentally-friendly manner.¹

I. Introduction

You are the Chief of Administrative Law at Fort Swampy, Virginia. You receive a call from the garrison commander to come to his office immediately. After you arrive, he hands you a letter from the Virginia Department of Environmental Quality (VDEQ) titled "Notice of Violation." It details violations for an unpermitted backup generator, unpermitted storage of hazardous waste, failure to characterize waste from a parts washer, failure to properly maintain and submit wastewater discharge-monitoring reports, and exceeding a disinfection byproduct limit in drinking water.

The garrison commander then provides information he learned in previous staff meetings. He describes that the contract to transport the installation's hazardous waste lapsed, and the Directorate of Public Works recommended storing the waste for six months until money opened up in the budget.

The installation's environmental law specialist (ELS) quit several months ago, and the position has not been filled due to an ongoing hiring freeze. The garrison commander then asks a series of questions about the Notice of Violation (NOV). "What reporting requirements, if any, are required? Should my office pay the penalty now? How can my office help prevent these violations in the future? Are there any other issues I need to be worried about? Why should I care about these NOV's and complying with environmental law?"

This scenario presents a unique problem for judge advocates with little environmental law experience. A NOV or other enforcement action imposed by an environmental regulatory agency is a potential consequence of

environmental noncompliance, but with appropriate preparation can be avoided.

To understand the purpose of environmental compliance and its regulation, Part II of this paper discusses how environmental law developed and describes the four environmental laws that result in the most NOV's for the Army. Part III details possible enforcement actions and issues regarding civil penalties that result from those enforcement actions. Part IV provides information on how to respond to the NOV. Finally, Part V analyzes the trends in Army NOV's and suggests recommendations to minimize environmental noncompliance, thereby reducing the number of NOV's.

II. Background

Environmental law developed in response, in part, to environmental events in the 20th century.² Reviewing these events provides appropriate context to interpret the environmental movement that was pivotal in the evolution of U.S. environmental law and its development. To develop this understanding, this part describes several events that contributed to the development of environmental law. Then, it focuses on the four environmental laws that most affect Army installations.

A. Development of Environmental Law

Several significant environmental events contributed to the development of modern environmental law. The deadly smog in Donora, Pennsylvania, is but one example.³ In October 1948, an atmospheric inversion⁴ prevented pollutants from the local industries in Donora from being released into

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¹ JOSEPH M. DEMAKIS, THE ULTIMATE BOOK OF QUOTATIONS 97 (2012). The quote is from Olympia Snowe who served as a U.S. Senator for Maine

starting in 1995 and announced her retirement in 2012. Paul Kane & Chris Cilliza, *Sen. Olympia Snowe, a Maine Moderate, Won't See Another Term*, WASH. POST (Feb. 28, 2012), https://www.washingtonpost.com/politics/sen-olympia-snowe-a-maine-moderate-wont-see-another-term/2012/02/28/gIQAnvOAhR_story.html?utm_term=.cfbe7cfccd06.

² See, e.g., Eliza Griswold, *How 'Silent Spring' Ignited the Environmental Movement*, N.Y. TIMES (Sept. 21, 2012), <http://www.nytimes.com/2012/09/23/magazine/how-silent-spring-ignited-the-environmental-movement.html>.

³ DEVRA DAVIS, WHEN SMOKE RAN LIKE WATER: TALES OF ENVIRONMENTAL DECEPTION AND THE BATTLE AGAINST POLLUTION 15 (2002).

⁴ *Id.* at 78. An atmospheric inversion happens when a layer of dense, cold air is trapped beneath a layer of less dense, warm air. *Id.* Any pollutants emitted would be stuck in the cold air mass until it moves on. *Id.*

the atmosphere.⁵ In a span of five days, the subsequent ground-level haze killed twenty residents and left thousands ill.⁶ Seven years later, Congress passed the Air Pollution Control Act, the predecessor of the Clean Air Act, which will be further discussed in Section B.⁷

The 1962 book *Silent Spring* by Rachel Carson also contributed to the development of environmental law.⁸ Her book described the devastating effects on birds from the widespread use of synthetic pesticide to control pests like mosquitoes.⁹ Her book and subsequent advocacy eventually led to the ban of the pesticide dichloro-diphenyl-trichloroethane (DDT).¹⁰

The Cuyahoga River Fire in 1969 was another event leading to change in environmental laws. The Cuyahoga River flows through Cleveland, Ohio, and empties into Lake Erie.¹¹ People routinely used the river to dispose of industrial waste and sewage.¹² This disposal led to the river catching fire multiple times and as far back as 1868.¹³ A fire in June 1969, though, received national news attention.¹⁴ Congress subsequently passed extensive amendments to the Clean Water Act in 1972.¹⁵

These three environmental events are not the only events that lead to the enactment of all environmental laws. Other events, like the hazardous waste discovery in the residential neighborhood known as “Love Canal” contributed to the environmental movement.¹⁶ That being said, these three

environmental events do provide insight into the four environmental laws that most affect Army installations.

B. The Four Environmental Laws Most Violated by the Army

There are four environmental laws in which regulatory agencies cite the Army for the most NOVs. These four environmental laws, in no particular order, are the Resource Conservation and Recovery Act (RCRA), the Clean Air Act (CAA), the Clean Water Act (CWA), and the Safe Drinking Water Act (SDWA).

1. Resource Conservation and Recovery Act

Congress passed the RCRA in 1976 to reduce or eliminate the generation of hazardous waste as fast as possible.¹⁷ “[W]aste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment”¹⁸ To effectuate that goal, Congress established rules to identify and govern the handling of hazardous waste, including its generation, transport, treatment, storage, and disposal.¹⁹ Apart from requiring permits to dispose of hazardous waste,²⁰ other requirements ensuring proper handling include employee training,²¹ labeling,²² and recordkeeping.²³ The Act also regulates underground storage tanks.²⁴

⁵ *Id.* at 15.

⁶ *Id.* at 29. A firefighter who went door-to-door to provide oxygen to residents described, “There never was such a fog. You couldn’t see your hand in front of your face, day or night. Hell, even inside the station the air was blue. I drove on the left side of the street with my head out the window, steering by scraping the curb.” *Id.* at 18.

⁷ Air Pollution Control Act of 1955, Pub. L. No. 84-159, 69 Stat. 322 (1955).

⁸ RACHEL CARSON, *SILENT SPRING* (1962).

⁹ *Id.* at 146. As an example, by 1963 there were only 417 nesting pairs of bald eagles left in the continental United States. AMBER TRAVSKY & GARY BEAUVAIS, *SPECIES ASSESSMENT FOR BALD EAGLE (HALIAEETUS LEUCOCEPHALUS) IN WYOMING* 3 (2004), <https://www.blm.gov/style/medialib/blm/wy/wildlife/animal-assessmnts.Par.41209.File.dat/BaldEagle.pdf>. By the year 2000, that number increased to 6,471 nesting pairs. *Id.* This recovery led to the U.S. Fish and Wildlife Service removing bald eagles from the list of endangered species. *See* Endangered and Threatened Wildlife and Plants; Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife, 72 Fed. Reg. 37,346, 37,372 (July 9, 2007).

¹⁰ Griswold, *supra* note 2.

¹¹ *About Cuyahoga River AOC*, EPA, <https://www.epa.gov/cuyahoga-river-aoc/about-cuyahoga-river-aoc> (last updated Aug. 23, 2016).

¹² Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 *FORDHAM ENVTL. L.J.* 89, 100 (2002).

¹³ *Id.* In November 1952, a fire on the river caused approximately \$1 million in damage. *Id.*

¹⁴ *The Cities: The Price of Optimism*, *TIME*, Aug. 1, 1969, at 51. The article’s most apt description is that the Cuyahoga River is “[c]hocolate-brown, oily, bubbling with subsurface gases, it oozes rather than flows.” *Id.*

¹⁵ Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972). This law is commonly referred to as the Clean Water Act. *See* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977).

¹⁶ *See* LOIS M. GIBBS, *LOVE CANAL: AND THE BIRTH OF THE ENVIRONMENTAL HEALTH MOVEMENT* 9 (1982). *See also* CAROLE S. SWITZER & LYNN A. BULAN, *COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT 3* (2001) (describing the Love Canal residential neighborhood in which a company previously buried hazardous waste underground as the impetus behind passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)).

¹⁷ 42 U.S.C. § 6902(b) (2016).

¹⁸ *Id.*

¹⁹ *Id.* §§ 6921-6934. The hazardous waste regulation scheme in the Resource Conservation and Recovery Act (RCRA) is regularly referred to as “cradle to grave” regulation. *See, e.g.,* *City of Chicago v. Env’tl. Def. Fund*, 511 U.S. 328, 331 (1994).

²⁰ *See id.* § 6925(a).

²¹ 40 C.F.R. § 265.16 (2016).

²² *Id.* § 262.31.

²³ *Id.* § 262.20.

²⁴ 42 U.S.C. § 6991 (2016). Underground storage tanks are nearly always used to store petroleum underground for use in vehicles. *Learn about*

2. Clean Air Act

The CAA was passed in 1963²⁵ to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare”²⁶ The CAA requires the Environmental Protection Agency (EPA) to set National Ambient Air Quality Standards (NAAQS) for pollutants that pose a threat to public health.²⁷ These NAAQS include limits on the concentration level for each pollutant.²⁸ These pollutants now include carbon monoxide, ground-level ozone, lead, nitrogen and sulfur oxides, and particulate matter.²⁹ If the concentration level of a criteria pollutant is above the NAAQS, then the EPA designates it a nonattainment area.³⁰ The state must submit a plan on how they intend to meet the NAAQS taking into account any nonattainment areas.³¹

The CAA also regulates the emission of hazardous air pollutants (HAPs).³² It defines HAPs as those that present “a threat of adverse human health effects . . . or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise”³³ Examples of these pollutants include formaldehyde and methanol.³⁴ The EPA imposes standards for each product that emits a significant amount of HAPs.³⁵ As an example, backup generators on an Army installation would likely be subject to regulation by these standards because the EPA regulates them as a significant source of HAPs.³⁶

Underground Storage Tanks (USTs), EPA, <https://www.epa.gov/ust/learn-about-underground-storage-tanks-usts> (last updated Aug. 2, 2016).

²⁵ Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (1963).

²⁶ 42 U.S.C. § 7401(b)(1) (2016).

²⁷ *Id.* § 7409(b)(1).

²⁸ *Id.*

²⁹ 40 C.F.R. §§ 50.4-50.19 (2016). Particulate matter is a combination of solid particles or liquid droplets suspended in the air. *Particulate Matter (PM) Pollution*, EPA, <https://www.epa.gov/pm-pollution/particulate-matter-pm-basics#PM> (last updated Sept. 16, 2016). The Environmental Protection Agency (EPA) regulates particulate matter with a diameter of ten micrometers or less since those small particles pose a higher health risk due to their penetration into people’s lungs and bloodstream. *Id.*

³⁰ 42 U.S.C. § 7407(d) (2016). A nonattainment area is defined as a geographical area that does not meet the National Ambient Air Quality Standard for a particular criteria pollutant. *See id.* *See also* 40 C.F.R. § 51.491 (2016).

³¹ *See* 42 U.S.C. § 7407(a) (2016).

³² *Id.* § 7412.

³³ *Id.* § 7412(b)(2).

³⁴ *Id.* § 7412(b)(1).

³⁵ *Id.* § 7412(c).

³⁶ 40 C.F.R. § 63.6585 (2016).

³⁷ 33 U.S.C. § 1251(a) (2016). Although the official title is the Federal Water Pollution Control Act, it is more commonly referred to as the Clean

3. Clean Water Act

Congress passed the modern version of the CWA in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³⁷ The CWA prohibits the discharge of pollutants into U.S. waters without a permit.³⁸ It established a permitting program that requires all point sources³⁹ to obtain a permit in order to discharge pollutants into U.S. waters.⁴⁰ The regulatory agency ensures the pollutants will not affect the water quality in the body of water in which they are discharged.⁴¹ Examples of point sources include discharges from industrial facilities, sewage treatment plants, storm sewer systems, and construction sites.⁴² Regulators require point sources to keep detailed records of their discharges in accordance with their permit.⁴³

4. Safe Drinking Water Act

In 1974 Congress passed the Safe Drinking Water Act (SDWA) to protect the quality of drinking water in the United States.⁴⁴ The SDWA authorized the EPA to establish drinking water standards for contaminants that may cause adverse public health effects.⁴⁵ The EPA enacts a Maximum Contaminant Level (MCL)⁴⁶ to protect human health for each contaminant and mandates public water systems⁴⁷ comply with the MCL.⁴⁸ The SDWA requires public water systems to publish annual reports for consumers regarding the level of contaminants in the drinking water.⁴⁹ In addition, the SDWA

Water Act (CWA). *See* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977).

³⁸ 33 U.S.C. § 1311(a) (2016).

³⁹ 33 U.S.C. § 1342 (2016). Point source is defined as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” *Id.* § 1362(14).

⁴⁰ *Id.* § 1342.

⁴¹ *Id.* § 1312(a).

⁴² *Id.* § 1362(14).

⁴³ *Id.* § 1318(a)(A).

⁴⁴ *See* 42 U.S.C. §§ 300f-300g-7 (2016).

⁴⁵ *Id.* § 300g-1(b)(1)(A).

⁴⁶ 40 C.F.R. § 141.2 (2016). The EPA defines a Maximum Contaminant Level (MCL) as the maximum concentration level allowed in the water provided to consumers by a public water system. *See id.*

⁴⁷ 42 U.S.C. § 300f-4(4)(A) (2016). The statute defines public water system as “a system for the provision to the public of water for human consumption through pipes or other constructed conveyances” *Id.*

⁴⁸ *Id.* § 300g-1(4)(B).

⁴⁹ *Id.* § 300g-3(c)(4)(A).

regulates underground injection wells to protect groundwater.⁵⁰

Applying these descriptions to the Fort Swampy NOV, the unpermitted storage of hazardous waste is a violation of the RCRA. The failure to characterize waste from the parts washer is also a violation of the RCRA. The unpermitted backup generator is a violation of the CAA. The failure to maintain and submit wastewater discharge-monitoring reports is a violation of the CWA. Lastly, the disinfection byproduct exceedance is a violation of the SDWA. These four environmental laws account for most of the Army violations that result in NOVs,⁵¹ however, a regulatory agency has different options when it comes to enforcement of these Army environmental violations apart from a NOV.

III. Enforcement Actions and Civil Penalties

To fully brief the garrison commander on the potential consequences, it is important to understand the different enforcement options available to the regulator and any required reporting. There are different enforcement actions available to a regulatory agency like the EPA or the VDEQ, and the potential consequences will vary.

A. Enforcement Actions

A regulatory agency has informal and formal tools available to address potential violations. At the least serious end of the spectrum, a regulatory agency may informally discuss a potential issue during an inspection.⁵² If the issue is addressed in written form, the Department of Defense (DoD) refers to this as a warning letter as long as it does not cite specific violations of environmental laws and regulations.⁵³ This informal action does not necessarily preclude, more serious, further action. In addition to the informal methods, the regulatory agency can take more formal steps.

The level of seriousness increases when a regulatory agency pursues a more formal enforcement action. A formal

enforcement action includes civil administrative action through a NOV, or similarly worded notice, that identifies the specific violation and requests the installation take corrective action.⁵⁴ Also, it may include the regulatory agency's position on the installation's maximum penalty exposure.⁵⁵ The NOV serves as a starting point for negotiation and prompt compliance with the applicable standard.⁵⁶ The regulatory agency could also impose a more formal administrative order that it could enforce in court.⁵⁷

A filing in court is an even more serious response from a regulatory agency. Although the regulatory agency could begin by filing in court, it is more common for it to file in court only after the regulated entity fails to comply with a previous administrative notice or order.⁵⁸ The regulatory agency's court filing can be either civil or criminal.⁵⁹

The EPA accomplishes the vast majority of its enforcement through administrative actions, that is, through informal or formal civil administrative action. One reason for this situation is that it takes less time than civil or criminal court. Court is a lengthy and more expensive process. If filing in court, the agency is more likely to pursue civil action. The burden of proof is only a preponderance of the evidence.⁶⁰ Criminal actions, on the other hand, take considerably more time, involve proof beyond a reasonable doubt, and require more than mere negligence to be found guilty.⁶¹

Based on the facts from Fort Swampy's NOV, it fits most with a formal administrative action at this point. The NOV describes specific violations, so it does not qualify as a mere warning letter. You must read the rest of the NOV to see whether the VDEQ requests any corrective action and the VDEQ's position on the installation's maximum penalty exposure.

The additional information from the garrison commander should raise concerns. The DPW's advice was, in essence, to store the hazardous waste until money opens up in the budget. The VDEQ could interpret this action as a knowing violation

⁵⁰ *Id.* § 300h-3. An underground injection well is a common method to dispose of wastes from industrial activities including, for example, oil and gas production. See *General Information About Injection Wells*, EPA, <https://www.epa.gov/uic/general-information-about-injection-wells> (last updated Sept. 6, 2016).

⁵¹ See Appendix C.

⁵² *Enforcement*, VIRGINIA DEP'T OF ENVTL. QUALITY, <http://www.deq.virginia.gov/Programs/Enforcement.aspx> (last visited Jan. 8, 2017).

⁵³ Memorandum from Under Secretary of Defense to Deputy Assistant Secretary of the Army (Environment, Safety & Occupational Health) *et al.*, subject: *Revised Pollution Prevention and Compliance Metrics*, (Oct. 1, 2004).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See Craig N. Johnston, *Fall Essay Series: Sackett: The Road Forward*, 42 ENVTL. L. REP. 993, 1006 (2012).

⁵⁷ *Types of Enforcement Actions*, EPA, <https://www.epa.gov/enforcement/enforcement-basic-information> (last updated Feb. 1, 2017). The EPA defines an administrative order as an "order (either with or without penalties) directing an individual, or business, or other entity to take action to come into compliance"

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Jeremy Firestone, *Enforcement of Pollution Laws and Regulations: An Analysis of Forum Choice*, 27 HARV. ENVTL. L. REV. 105, 145 (2003). In this article the author studied all EPA cases from 1990-1997 and discovered EPA pursued 411 criminal actions, 785 civil judicial actions, and 3,465 administrative cases. *Id.*

⁶¹ See, e.g., 42 U.S.C. §§ 6928(d), 7413(c) (2016) (addressing criminal knowledge requirement under the RCRA and the Clean Air Act (CAA)).

of the requirement to obtain a permit before storing hazardous waste.⁶² Although it is unlikely that the VDEQ would pursue criminal action without the storage of the hazardous waste posing additional environmental or human health risk or causing a release of the hazardous waste to the environment, regulatory agencies do pursue criminal charges against DoD employees in some cases.⁶³ Even though Fort Swampy will likely avoid criminal enforcement action and the courtroom, the garrison commander should expect civil penalties imposed in the NOV.

B. Civil Penalties

A civil penalty⁶⁴ as part of a NOV from a regulatory agency is the most common remedy for violation of environmental laws. As the EPA describes, they “act as an incentive for coming into compliance and staying in compliance with the environmental statutes and regulations. Penalties are designed to recover the economic benefit of noncompliance and to compensate for the seriousness of the violation.”⁶⁵ The discussion of civil penalties will address the importance of the doctrine of sovereign immunity and its application to civil penalties, the general process of how a regulatory agency calculates the penalty, the applicable statutory maximum, and the funding of civil penalties in the Army.

1. Doctrine of Sovereign Immunity and Civil Penalties

As a federal agency, the Army is immune from any suit unless Congress specifically waives sovereign immunity.⁶⁶ In environmental law, sovereign immunity is important

because although the laws are federal, the EPA approves individual states to implement federal standards.⁶⁷ Once the EPA has approved this transfer of primary regulatory authority, the state possesses “primacy” over regulation as it relates to that environmental law.⁶⁸ In practice, many states have their own enforcement program approved by the EPA for each environmental law.⁶⁹ Because of this delegation by the EPA, each installation may be subject to state regulation if Congress waived sovereign immunity in the applicable statute.

Now apply the concept of sovereign immunity to the Fort Swampy example. If you advised the garrison commander to comply with the NOV and pay the penalty, then this compliance would be without authority if Congress did not waive sovereign immunity. Without congressional authorization from a sovereign immunity waiver, there is no way to correct the unauthorized payment.⁷⁰ The result would be an Anti-Deficiency Act violation and its consequences.⁷¹ Given the importance of sovereign immunity in the context of environmental laws, it is important for you to understand the interplay that civil penalties and sovereign immunity have with each other.

There is no broad sovereign immunity waiver that applies to all environmental laws. Each situation requires an analysis of each law. Congress, however, has waived sovereign immunity for federal agencies with regard to the substantive

⁶² See *United States v. Laughlin*, 10 F.3d 961 (2d Cir. 1993), cert. denied, 511 U.S. 1071 (1994). A standard defense response to criminal charges under the RCRA is that they did not know about the RCRA permit requirements; therefore, they cannot be held criminally liable under the RCRA statute. For example, in the cited case from the 2nd Circuit, the court said, “[w]hen knowledge is an element of a statute intended to regulate hazardous or dangerous substances, the Supreme Court has determined that the knowledge element is satisfied upon a showing that a defendant was aware that he was performing the proscribed acts; knowledge of regulatory requirements is not necessary.” *Id.* at 965. This rationale for criminal liability also applies in the Fourth Circuit. See *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990), cert. denied, 499 U.S. 919 (1991).

⁶³ See, e.g., *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990). In this egregious case, three civilian DoD employees at Aberdeen Proving Grounds were convicted of violations of the RCRA. *Id.* at 743. They directed dumping of hazardous chemicals directly on the ground and storing hazardous chemicals in a storage shed even after being told by subordinates about the dangerous conditions in the storage shed. *Id.* at 747. There is additional guidance for those interested in learning when EPA chooses to pursue criminal charges. See EPA OFFICE OF CRIMINAL ENFORCEMENT, *MEMORANDUM ON THE EXERCISE OF INVESTIGATIVE DISCRETION* (1994), <https://www.epa.gov/sites/production/files/documents/exercise.pdf>. See also Steven P. Solow, *Preventing an Environmental Violation from Becoming a Criminal Case*, 21 GPSOLO 36 (2004).

⁶⁴ A civil penalty is just another word for a monetary penalty or fine and is defined by the EPA as “monetary assessments paid by a person of regulated entity due to a violation or noncompliance.” *Types of Enforcement Results*, EPA, <https://www.epa.gov/enforcement/enforcement-basic-information> (last updated December 22, 2016).

⁶⁵ *Types of Enforcement Actions*, supra note 57.

⁶⁶ *Briggs v. A Light Boat*, 93 Mass. 157, 162 (1865) (“[N]o direct suit can be brought against the sovereign in his own courts without his consent.”).

⁶⁷ *Primary Enforcement Responsibility for Public Water Systems*, EPA, <https://www.epa.gov/dwreginfo/primacy-enforcement-responsibility-public-water-systems> (last updated Nov. 2, 2016).

⁶⁸ See *Pa. Fed'n of Sportsmen's Clubs, Inc. v. Kempthorne*, 497 F.3d 337, 340 (3d Cir. 2007).

⁶⁹ See, e.g., 40 C.F.R. § 272 (2016). Under this regulation, the EPA lists each state with an approved RCRA program. *Id.*

⁷⁰ U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 14, ch. 7, para. 020102.C.1 (Sept. 2015) [hereinafter DOD FMR]. The use of a wrong appropriation can be corrected if there are proper funds available at the time of the erroneous obligation in another appropriation and there are proper funds available at the time of correction. *Id.* Here, there is no other proper appropriation, so there is no way to correct the Anti-Deficiency Act (ADA) violation.

⁷¹ See generally *id.* An ADA violation requires significant investigation and reports. *Id.* The ADA report includes the “violation, its cause(s) and circumstances, the names of the individual(s) responsible for the violation, and the disciplinary action taken.” *Id.* para. 070502. Verified ADA violations are reported to the President, Senate, House of Representatives, and Comptroller General. *Id.* para. 070501.

provisions of the CWA,⁷² the RCRA,⁷³ the SDWA,⁷⁴ and the CAA.⁷⁵ Although sovereign immunity is waived for the substantive provisions for these four, there are significant differences regarding whether or not payment of civil penalties is authorized. Under the CWA, there is no sovereign immunity waiver for a federal agency to pay a civil penalty to a state regulatory agency.⁷⁶ Under the RCRA and the SDWA, Congress waived sovereign immunity allowing a federal agency to pay a civil penalty to a state regulatory agency.⁷⁷ The CAA is much different. Under the CAA, courts disagree whether Congress waived sovereign immunity, so the answer depends on whether a state imposed the civil penalty and the location of the installation.⁷⁸

In practice, the differences among these environmental statutes regarding sovereign immunity require you to review the NOV and link each specific violation to the specific environmental law. There may be no authority to pay the penalty in cases where a state regulatory agency imposed a civil penalty.⁷⁹ Given the complexity of the application of sovereign immunity, you should contact the subject matter experts at the Environmental Law Division (ELD) if you have any questions.

It is important to keep in mind, though, that even if the VDEQ cannot impose a civil penalty under the specific environmental law, the VDEQ can still obtain injunctive relief to mandate compliance.⁸⁰ For example, under the CWA, the VDEQ could obtain an injunction from a court to force compliance with the CWA since Congress specifically waived sovereign immunity in that law as it relates to

complying with all “Federal, State, interstate, and local requirements. . . .”⁸¹

2. Civil Penalty Calculation

To understand how a regulatory agency calculates the civil penalty in a NOV, it is important to know how they calculate penalties for environmental law violations. A regulatory agency calculates a penalty depending upon the statute or regulation for the specific violation. This section only analyzes the EPA’s RCRA Penalty Policy (Penalty Policy) to provide a general understanding.⁸²

Under the Penalty Policy, the EPA determines the penalty by calculating the gravity-based component, multi-day component, necessary adjustments, and economic benefit.⁸³ The gravity-based component is a measure of the violation’s seriousness, and the EPA evaluates it based on two factors.⁸⁴ The EPA assesses the seriousness of the violation by evaluating its potential for harm and its deviation from a statutory or regulatory requirement.⁸⁵ Each factor receives a classification of minor, moderate, or major depending on their significance.

For example, assume that Fort Swampy stored twenty drums of hazardous waste on the installation for over a year past the ninety day limit. Due to its seriousness, this violation would receive a higher classification than if one of Fort Swampy’s hazardous waste employees did not attend required training under the RCRA.

⁷² 33 U.S.C. § 1323(a) (2016).

⁷³ 42 U.S.C. § 6961(a) (2016) for hazardous waste management and 42 U.S.C. § 6991(f)(a) (2016) for Underground Storage Tanks.

⁷⁴ *Id.* § 300j-6.

⁷⁵ *Id.* § 7418(a).

⁷⁶ 33 U.S.C. § 1323(a) (2016).

⁷⁷ 42 U.S.C. § 6961(a) (2016) for hazardous waste management, 42 U.S.C. § 6991(f)(a) (2016) for Underground Storage Tanks, and 42 U.S.C. § 300j-6 (2016) for drinking water.

⁷⁸ Compare *United States Tenn. Air Pollution Control Bd.*, 185 F.3d 529, 534 (6th Cir. 1999) (requiring the Army pay civil penalties to Tennessee for violations under the CAA), and *California v. United States*, 215 F.3d 1005, 1011 (9th Cir. 2000) (reversing district court decision to dismiss civil penalties imposed by California for violations of the CAA against the Air Force) with *City of Jacksonville v. Dep’t of Navy*, 348 F.3d 1307, 1320 (11th Cir. 2003) (holding that the CAA did not waive sovereign immunity for the Navy to pay civil penalties to Hawaii for violations of the CAA). Based on those decisions, installations in the 6th and 9th Circuits have the authority to pay civil penalties for CAA violations, but installations in the 11th Circuit do not have the authority to pay civil penalties for CAA violations. Installations must pay penalties imposed by the EPA. See U.S. DEP’T OF JUSTICE, ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AGAINST FEDERAL AGENCIES UNDER THE CLEAN AIR ACT (1997), <https://www.epa.gov/sites/production/files/2015-01/documents/cleanairp.pdf>.

⁷⁹ See, e.g., 33 U.S.C. § 1323(a) (2016). Assume that the notice of violation (NOV) imposed by the Virginia Department of Environmental

Quality (VDEQ) to Fort Swampy imposed a \$5,000 penalty for failure to properly maintain and submit wastewater discharge-monitoring reports and a \$30,000 penalty for the storage of hazardous waste without obtaining a permit. The failure to properly maintain and submit wastewater discharge-monitoring reports is a violation of the CWA, and the storage of hazardous waste without obtaining a permit is a violation of the RCRA. Because the CWA does not waive sovereign immunity to pay civil penalties to state regulatory agencies, Fort Swampy could not pay the \$5,000 civil penalty to the VDEQ for that violation. See *id.* On the other hand, the RCRA does waive sovereign immunity to pay civil penalties to state regulatory agencies. See 42 U.S.C. § 6961(a) (2016). Thus, Fort Swampy has congressional authority to pay the \$30,000 civil penalty to the VDEQ for the RCRA violation.

⁸⁰ See 33 U.S.C. § 1323(a) (2016).

⁸¹ *Id.*

⁸² EPA, RCRA CIVIL PENALTY POLICY (2003), <https://www.epa.gov/sites/production/files/documents/rcpp2003-fnl.pdf> [hereinafter PENALTY POLICY]. Analysis of the RCRA Penalty Policy is also helpful since most civil penalties involve the RCRA, and the policy’s concepts are common in other laws. See ENVIRONMENTAL LAW DIVISION, U.S. ARMY LEGAL SERVICES AGENCY, ENVIRONMENTAL CRIMINAL AND CIVIL LIABILITY HANDBOOK 91 (2015) [hereinafter ELD HANDBOOK].

⁸³ PENALTY POLICY, *supra* note 82, at 1.

⁸⁴ *Id.* at 2.

⁸⁵ *Id.*

The penalty range for each violation varies depending on the classification.⁸⁶ Thus, the Penalty Policy includes nine potential penalty ranges.⁸⁷ The Penalty Policy permits the EPA discretion to choose the appropriate penalty amount within each penalty range.⁸⁸

The Penalty Policy also takes into account violations present for multiple days. For this multi-day penalty component, the Penalty Policy uses the classification for each gravity-based component factor and the number of days of noncompliance.⁸⁹ Depending on the seriousness of the gravity-based factors and the length of noncompliance, the Penalty Policy could add a multi-day penalty in addition to the gravity-based penalty.⁹⁰ For example, if the EPA evaluates both factors of the gravity-based component to be major and the violation was ongoing for 180 days, then the Penalty Policy imposes a mandatory multi-day penalty that is added to the gravity-based component.⁹¹

The next component is the calculation of adjustment factors. This component allows the EPA to increase or decrease the penalty amount based on a number of factors including the installation's good faith efforts to comply, degree of willfulness or negligence, and history of noncompliance among other factors.⁹² The Penalty Policy allows the EPA to adjust the penalty upward when the economic benefit received by noncompliance exceeds the penalty.⁹³ For example, assume Fort Swampy avoided \$100,000 in costs by storing the twenty drums of hazardous waste instead of properly disposing of them. The EPA would adjust the penalty upwards to ensure there is no economic incentive to break the law.

The most salient information regarding civil penalties is how quickly they can add up. Penalty amounts increase quickly because they are per violation, per day.⁹⁴ The maximum penalty for RCRA violations is \$71,264; the maximum penalty for CAA violations is \$95,284; the

maximum penalty for CWA violations is \$52,414; and the maximum penalty for SDWA violations is \$54,789.⁹⁵ Keep in mind, though, the penalty maximum varies based on the specific statutory provision and the EPA's inflation regulation.⁹⁶ Thus, if an installation has two RCRA violations of the same statute and both existed for ten days, then the maximum potential civil penalty is over \$1.4 million.⁹⁷ Although this information provides some context for the garrison commander, it does not address who pays for these penalties.

3. Civil Penalty Funding

Any garrison commander deeply cares about who pays for the associated civil penalties incurred in a NOV. You start to explain to your command the Judgment Fund. It is a permanent appropriation that pays for monetary judgments against the United States and for compromise settlements negotiated by the Department of Justice.⁹⁸ It is only available, though, when "payment is not otherwise provided for."⁹⁹ President George H.W. Bush in a signing statement said that payment of environmental civil penalties from the Judgment Fund "would take away the coercive effect penalties might have on the agencies and turn the waiver of sovereign immunity into a revenue sharing program. Accordingly, fines or penalties imposed as a result of this legislation will be paid from agency appropriations"¹⁰⁰

The Army implemented this requirement in Army Regulation 200-1, which provides that, "Fines, penalties, and supplemental environmental project costs will be paid by the organization against which the fine or penalty has been assessed, using applicable Army appropriations unless otherwise required by law. Payment of fines and penalties will be charged to the funding account of the operation causing the violation."¹⁰¹ For Army installations, this funding account is usually Operations and Maintenance (O&M)

⁸⁶ *Id.* at 2.

⁸⁷ *Id.* at 18. Appendix E to this paper includes a copy of the EPA's RCRA penalty matrix as of 2003. See Appendix E. Since 2003, the penalties increased significantly to compensate for inflation. See 40 C.F.R. § 19.4 (2016). Additionally, the Penalty Policy refers to the potential for harm first and the extent of the deviation second. PENALTY POLICY, *supra* note 82, at 18 n.17. Thus, major-moderate would involve a major potential for harm and a moderate deviation from the regulatory requirement. *Id.*

⁸⁸ *Id.* at 19. These factors include "the seriousness of the violation . . . , the environmental sensitivity of the areas potentially threatened by the violation, efforts at remediation or the degree of cooperation evidenced by the facility, the size and sophistication of the violator, the number of days of violation, and other relevant matters." *Id.*

⁸⁹ *Id.* at 25.

⁹⁰ *Id.* at 23.

⁹¹ *Id.* at 25.

⁹² *Id.* at 3. Additional factors include ability to pay, agreements to undertake environmentally beneficial projects, and the cooperation of the facility during the inspection, case development, and enforcement process. *Id.*

⁹³ *Id.* at 1.

⁹⁴ See, e.g., 33 U.S.C. § 1319(c) (2016).

⁹⁵ 40 C.F.R. § 19.4 (2016).

⁹⁶ *Id.*

⁹⁷ $\$71,264$ (RCRA violation penalty maximum) $\times 2$ (reflecting the number of violations) = $\$142,528 \times 10$ (reflecting the number of days in violation) = $\$1,425,280$.

⁹⁸ *Judgment Fund Background*, U.S. DEP'T OF THE TREASURY, <https://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/background.htm> (last updated Oct. 16, 2014).

⁹⁹ 31 U.S.C. § 1304 (2016).

¹⁰⁰ Presidential Statement on Signing H.R. 2194, 28 WEEKLY COMP. PRES. DOC. 1868, reprinted in 1992 U.S.C.A.N. 1337-1 (Oct. 12, 1992).

¹⁰¹ U.S. DEP'T OF ARMY REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT para. 15-1d (12 Dec. 2007) [hereinafter AR 200-1].

funds.¹⁰² Based on that information, you would advise the garrison commander of the requirement that the O&M dollars the installation spends to support operations would be used to pay any appropriate penalty. There are also other requirements the garrison commander needs to be tracking.

IV. Responses to the NOV

After reading through the NOV, you must succinctly advise Fort Swampy's garrison commander on appropriate responses. Assuming the NOV involves an associated civil penalty, the command must include that fact in the online database titled "Army Environmental Data Base – Environmental Quality" and send confirmation of receipt of the NOV through command channels to Army Environmental Command and the ELD.¹⁰³ Your command must complete the database entry, command notification, and legal notification within forty-eight hours.¹⁰⁴

Next, contact the Environmental Program Manager and ask for assistance to find out whether the violations detailed in the VDEQ's NOV are accurate.¹⁰⁵ If the NOV does detail accurate violations, then the command must implement corrective measures to cure any violation as soon as possible; otherwise, the associated civil penalty will increase.¹⁰⁶ Armed with fully developed facts, you should coordinate the command's settlement position regarding the NOV with the environmental law specialist at your Major Command (MACOM) and ELD.¹⁰⁷ You will then be ready to identify ways to avoid future violations.

V. Army NOV Trends and Recommendations to Minimize Environmental Noncompliance

In addition to asking what to do immediately after receiving the NOV, the garrison commander asked how to prevent NOV's altogether. In order to provide a knowledgeable answer, it is important to examine the Army's

NOV trends and to fully understand available tools and resources.

A. Army NOV Trends

You can properly advise where the Army most often sees issues and learn what areas in which to concentrate resources by reviewing the Army NOV trends. Over the past four years, the number of NOV's and the associated penalties have increased.¹⁰⁸ This trend suggests either that the EPA and state regulatory agencies are increasing their regulatory oversight of Army installations or that the Army is violating rules more often. The fact that the EPA's inspections now focus more on larger facilities may suggest the EPA and state regulatory agencies are increasing their regulatory oversight.¹⁰⁹

Over seventy percent of the NOV's assessed during those four years involved violations of the RCRA.¹¹⁰ The most common violations of the RCRA over the past two years related to records and reports, storage, labeling, and training. These violations included: not keeping copies of waste determinations and addresses of emergency personnel, not labeling hazardous waste with the accumulation start date, not ensuring all personnel are properly trained, and storing hazardous waste over ninety days in violation of the applicable permit.¹¹¹

In one particular case from 2014, California took judicial action against the Riverbank Army Ammunition Plant for RCRA violations. In its complaint, California detailed violations for failing to train employees, conduct inspections, maintain records, and remove stored hazardous waste within ninety days.¹¹² Knowing the general nature of previous NOV's arms you with knowledge of what to avoid, and coupled with coordinating with the Environmental Program Manager, allows you to dramatically improve compliance with the RCRA and other environmental laws.

¹⁰² See, e.g., Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2335 (2015). Almost all Army organizations use funds from Operations and Maintenance (O&M) funds to pay environmental civil penalties since O&M funds can be spent on "expenses, not otherwise provided for, necessary for the operation and maintenance of the Army." *Id.*

¹⁰³ AR 200-1, *supra* note 101, para. 16-4.

¹⁰⁴ *Id.*

¹⁰⁵ ELD HANDBOOK, *supra* note 82, at 78.

¹⁰⁶ *Id.* at 79.

¹⁰⁷ *Id.* at 79-80.

¹⁰⁸ See Appendices A and B.

¹⁰⁹ EPA, FISCAL YEAR 2014 EPA ENFORCEMENT AND COMPLIANCE ANNUAL RESULTS 9 (2014), <https://www.epa.gov/sites/production/files/2014-12/documents/fy-2014-enforcement-annual-results->

[charts-12-8-14.pdf](#). Additionally, the Environmental Law Division (ELD) notes there has been an increase in the number of inspections from both EPA and state regulatory agencies based on communication with installation environmental law specialists. See Major Kevin Cox, Environmental Law Attorney, ELD, Enforcement Data & Trends, at slide 10 (Jan. 18, 2017) (unpublished PowerPoint presentation) (on file with author). MAJ Cox is the current environmental law attorney in charge of tracking Army environmental law violations at ELD.

¹¹⁰ See Appendix C.

¹¹¹ Major Kevin Cox, Environmental Law Attorney, ELD, Enforcement Data & Trends, at slide 10 (Jan. 18, 2017) (unpublished PowerPoint presentation) (on file with author).

¹¹² First Amended Complaint for Civil Penalties and Injunctive Relief Pursuant to Hazardous Waste Control Law, California *ex rel.* Department of Toxic Substances Control v. U.S. Army, No. 2011608, <http://www.dtsc.ca.gov/HazardousWaste/Projects/upload/First-Amended-Complaint-for-Civil-Penalties-RBAAP.pdf>, filed Oct. 17, 2014.

B. Recommendations to Minimize Environmental Noncompliance and Enforcement Actions

There are a number of recommendations to minimize environmental noncompliance and enforcement action. These recommendations can be divided into advice during inspections conducted by a regulatory agency and advice apart from inspections.

1. Recommendations During a Regulatory Agency Inspection

The key to a successful inspection is proper planning prior to the arrival of the inspector at the installation. The installation should have a plan in place for who will compose the team that will escort the inspector throughout the visit. The ELD recommends this team include “environmental and legal personnel familiar with both the day-to-day operations and management of the on-post facilities.”¹¹³ Each media area¹¹⁴ should have a designated media manager that is ready to be a part of the escort team to ensure that the appropriate manager is included regardless of which media areas the inspector wants to inspect.¹¹⁵

The escort team should have a recorder responsible for documenting everything that occurs during the inspection.¹¹⁶ The recorder takes detailed notes of the inspector’s actions, including any questions asked and answers provided, and any photographs of any alleged violation or area of concern.¹¹⁷ In addition, whenever the inspector takes a sample, the recorder should ask to split the sample to allow the installation to keep its own sample.¹¹⁸ Overall, it is important to keep in mind that inspectors have significant discretion, so making their job easy and keeping a cooperative mindset can only help.¹¹⁹

2. Recommendations Apart from a Regulatory Agency Inspection

Apart from the inspection itself, conducting internal audits in addition to mandatory audits is the greatest help to ensure your installation minimizes noncompliance and associated enforcement action. Although the Army mandates that an installation conducts an internal audit under the Environmental Performance Assessment System (EPAS) at least once per calendar year, nothing prevents an installation from conducting additional audits.¹²⁰ The audits serve several purposes. First, they provide a baseline to the installation command on issues the command must address.¹²¹ Second, they substantiate the state of the installation’s compliance at a specific point of time, which may assist in future litigation.¹²² Lastly, the installation could avail itself of the benefits of self-reporting violations to a regulatory agency discovered during an audit.¹²³

Another preferred practice would be to ensure you stay in contact with the Regional Environmental and Energy Office (REO). The REO monitors current legislative and regulatory activity at both the federal and state level in their specific region that might impact Army operations.¹²⁴ Installations can use this information to ensure they are capable of complying with proposed legal changes.

VI. Conclusion

With the information provided, you can answer most of the questions asked by the garrison commander. You can offer a basic description of the four environmental laws that the NOV references for the alleged violations. You also understand the civil and criminal enforcement actions combined with civil penalties that the VDEQ could pursue. You know the reporting requirements and recommended courses of action to respond to the NOV. You also have an idea of what preventive actions the installation should take to prevent further NOVs.

Hopefully, the potential for criminal action along with the civil penalties deducted from the garrison commander’s

¹¹³ ELD HANDBOOK, *supra* note 82, at 6.

¹¹⁴ *See id.* at 8. Examples of media area include water program, air program, and solid and hazardous waste program. *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* The inspector must allow sample splitting. For example, under the RCRA Congress includes statutory authority for split sampling. *See* 42 U.S.C. § 6927(a)(2) (2016).

¹¹⁹ *See, e.g.,* ELD HANDBOOK, *supra* note 82, at 8.

¹²⁰ AR 200-1, *supra* note 101, para. 16-1c(1). In addition, the regulation provides a checklist to evaluate the environmental program in Appendix B. *Id.* at B-1.

¹²¹ *See* Brent C. Anderson, *Practical Approaches to Preventing Environmental Liability*, 13 PREVENTIVE L. REP. 3, 4 (1994).

¹²² *See id.* For example, regulatory agencies must identify the start date of any violation to determine the number of days of noncompliance to calculate the multi-day penalty component. PENALTY POLICY, *supra* note 82, at 25. The more days of noncompliance, the higher the associated civil penalty. *Id.* The installation could use an audit as evidence of compliance during a specific time period to decrease the associated civil penalty. *See* Anderson, *supra* note 121, at 4.

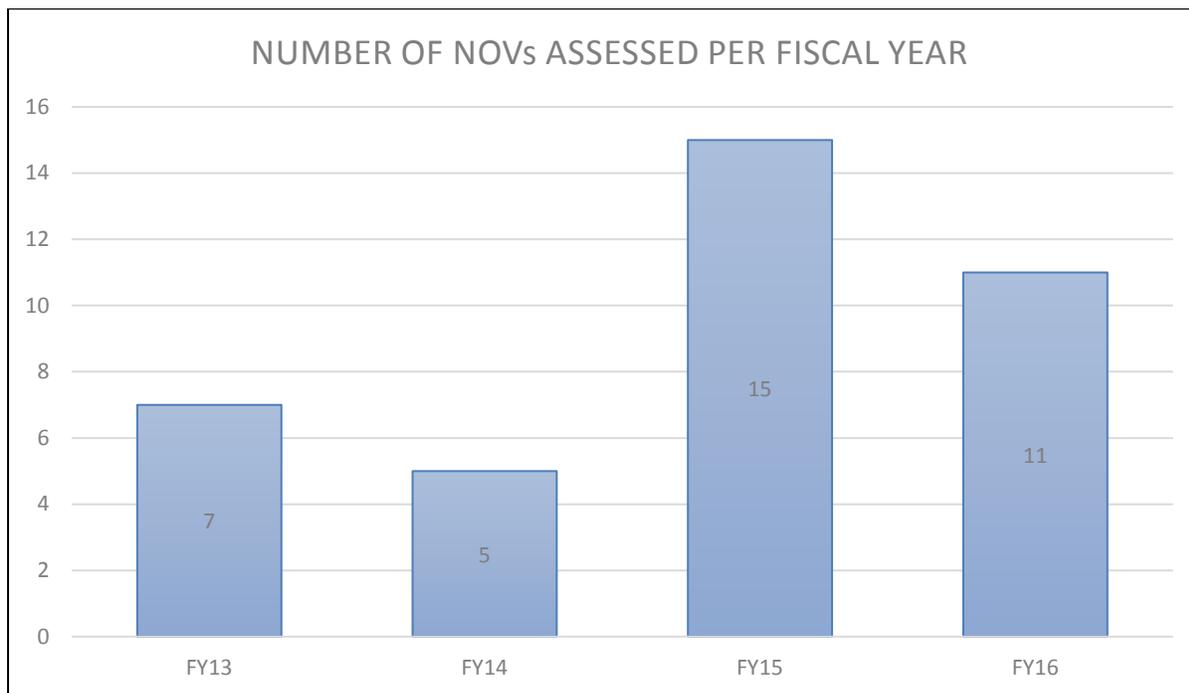
¹²³ *See* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000). Under this EPA policy, self-reported violations revealed in an audit allow for the gravity-based component of the civil penalty to be reduced to zero. *Id.* at 19,620. Before self-reporting, ELD recommends coordination with their office to ensure the installation properly weighs the costs and benefits of voluntary disclosure. *See* ELD HANDBOOK, *supra* note 82, at 12. For example, it may be advisable not to report the violation and just correct the issue before the regulatory agency discovers it. *Id.* at 13.

¹²⁴ Martha M. Miller & Laura Carney, *Understanding the Army Environmental Structure*, 39 ENGINEER 62, 62, <http://www.wood.army.mil/engrmag/PDFs%20for%20May-Aug%2009/May-August%20complete%20low%20res.pdf>, (2009).

O&M budget is enough to convince him of the importance of environmental compliance. If not, it is imperative you are able to explain that environmental laws are considered of such importance that an agency or court can issue orders and injunctions that directly affect or prevent our training mission. For example, in 1997, the EPA issued an administrative order to the Massachusetts Military Reservation, which placed significant limitations on their training missions based on potential violations of the RCRA and the SDWA. These limits included prohibiting: 1) all lead ammunition or other live ammunition at small arms ranges, 2) all artillery firing, 3) all mortar firing, 4) live demolition, and 5) propellant use. These limitations were all based on potential violations of the RCRA and the SDWA.¹²⁵ This action is just one example of how environmental noncompliance can render an entire installation mission incapable. The Army must focus on training to fight for our nation. Proactive measures and an effective environmental compliance program avoids resource draining orders and injunctions that can affect this critical mission, ensuring the Army is ready to fight and win the nation's wars.

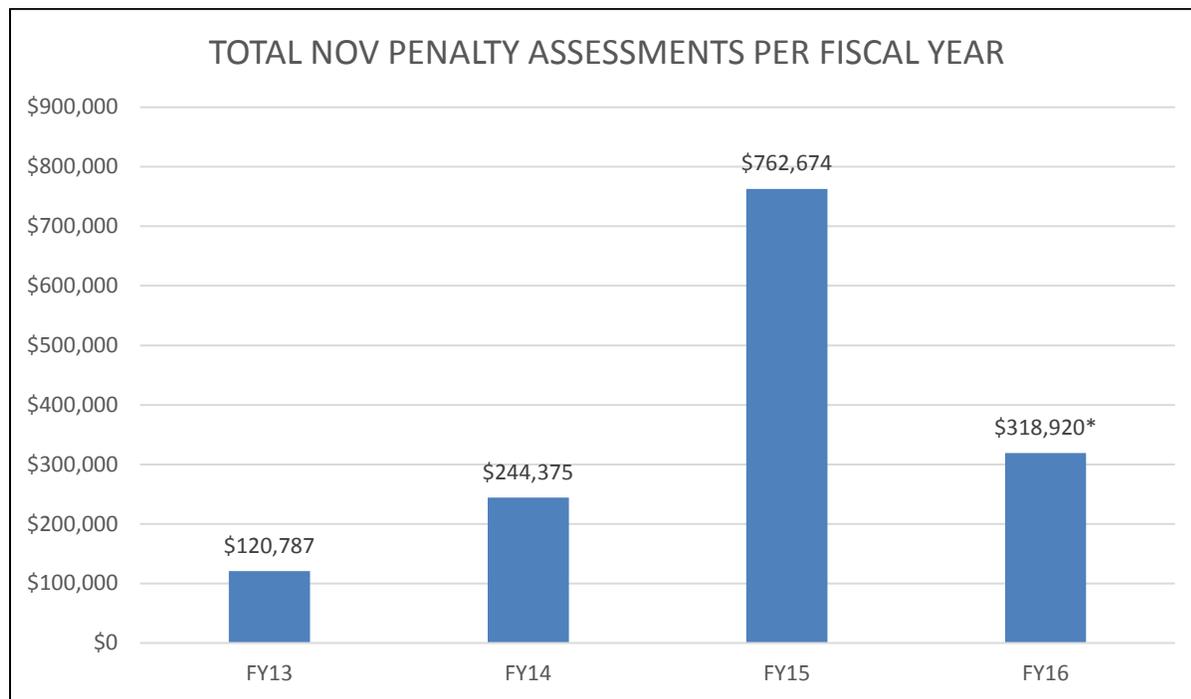
¹²⁵ WILLIAM F. FITZPATRICK, THE LESSONS OF MASSACHUSETTS MILITARY RESERVATION 25 (2001), <http://www.aepi.army.mil/publications/cleanup-munitions/docs/mass-mil-reservation-lessons.pdf>.

Appendix A. Number of NOVs Assessed



Source: Major Kevin Cox, Environmental Law Attorney, ELD, Enforcement Data & Trends, at slide 5 (Jan. 18, 2017) (unpublished PowerPoint presentation) (on file with author).

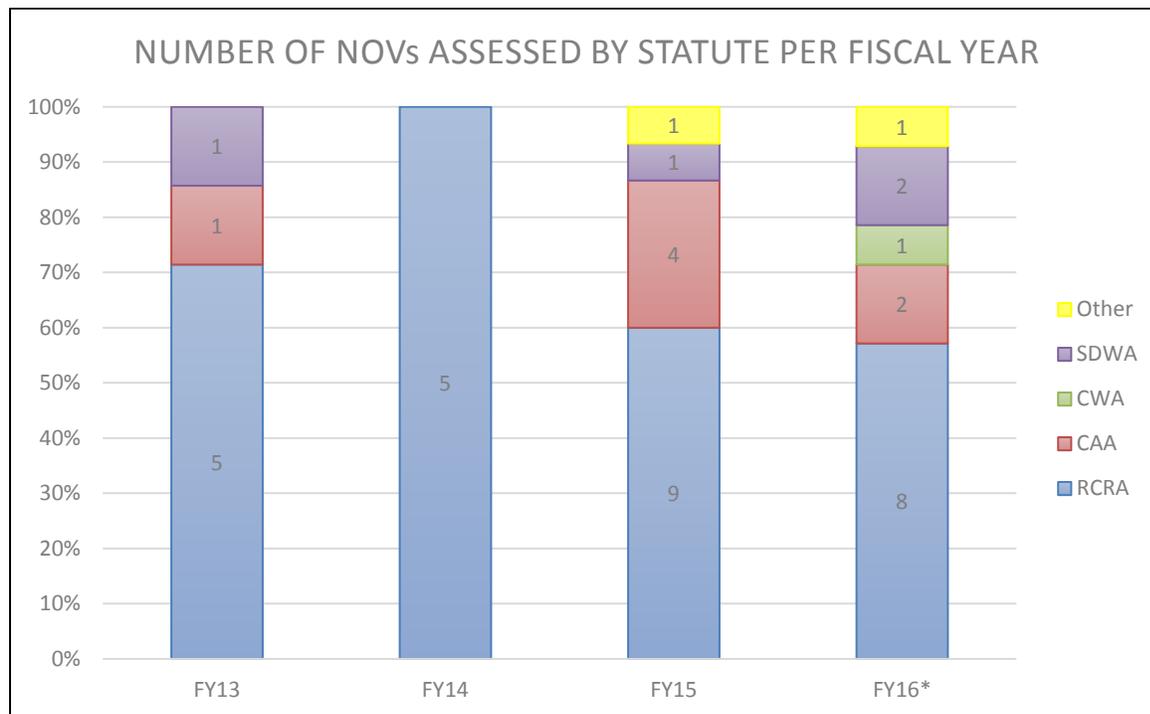
Appendix B. Notice of Violation Penalty Assessments



* As of 17 January 2017, 4 out of the 11 FY16 penalties assessed have yet to specify a total amount, so FY16's total will be higher.

Source: Major Kevin Cox, Environmental Law Attorney, ELD, Enforcement Data & Trends, at slide 6 (Jan. 18, 2017) (unpublished PowerPoint presentation) (on file with author).

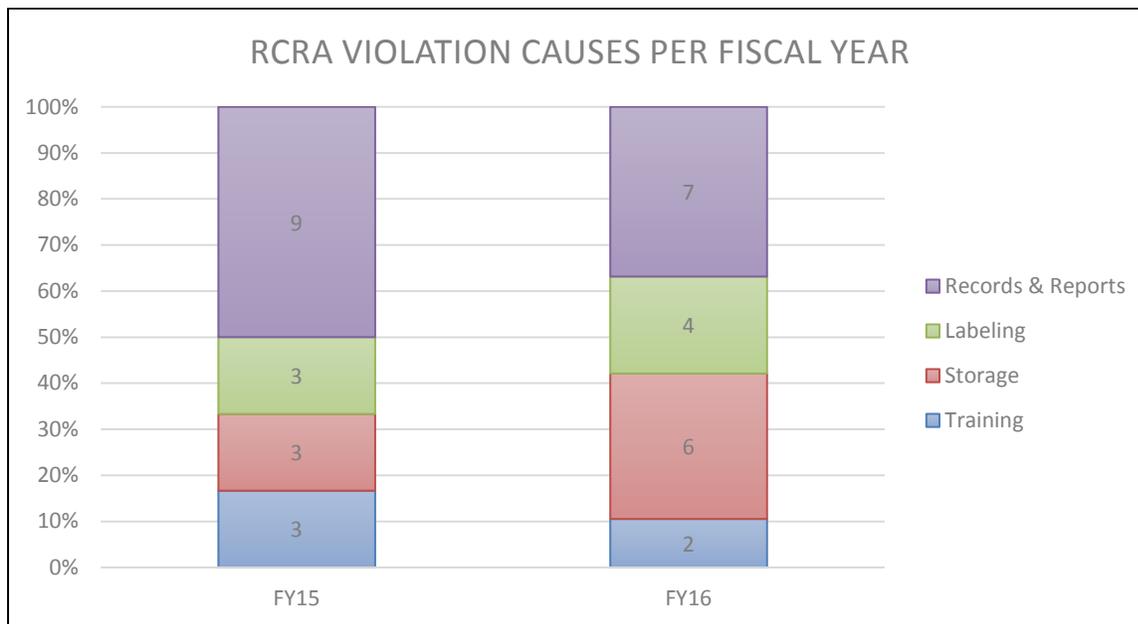
Appendix C. Notice of Violations Assessed by Statute



* Some NOVs involved violations of multiple statutes, so the total for FY16 is higher than the number of NOVs assessed as presented in Appendix A.

Source: Major Kevin Cox, Environmental Law Attorney, ELD, Enforcement Data & Trends, at slide 7 (Jan. 18, 2017) (unpublished PowerPoint presentation) (on file with author).

Appendix D. The RCRA Violation Causes



Source: Major Kevin Cox, Environmental Law Attorney, ELD, Enforcement Data & Trends, at slide 8-9 (Jan. 18, 2017) (unpublished PowerPoint presentation) (on file with author).

Appendix E. Penalty Policy Matrix

Extent of Deviation from Requirement

	MAJOR	MODERATE	MINOR
Potential for Harm	MAJOR	\$27,500 to 22,000	\$21,999 to 16,500
	MODERATE	\$12,099 to 8,800	\$8,799 to 5,500
	MINOR	\$3,299 to 1,650	\$1,649 to 550
		\$16,499 to 12,100	\$5,499 to 3,300
			\$549 to 110

Source: EPA, RCRA CIVIL PENALTY POLICY 18 (2003), <https://www.epa.gov/sites/production/files/documents/rcpp2003-fnl.pdf>.

Navigating Government Information Protections and Privileges: Using Protected Government Information in Courts-Martial

Major Michael Petrusic*

I. Introduction

Although litigating any court-martial challenges the counsel involved, those involving classified information or controlled unclassified information (CUI)¹ pose unique challenges for all participants during every phase of the proceedings. Any failure to follow procedure or miscommunication can cause issues on numerous levels. On a personal level, mishandling this information may trigger disciplinary action and threaten a judge advocate's security clearance—a requirement for service in the Corps.² On a tactical level, mistakes can affect the availability of evidence and may result in the dismissal of charges. And on a strategic level, these issues can damage the Department of Defense's (DoD) relations with the intelligence community and other government agencies. Unlike in most cases, many challenges that arise cannot be resolved solely by the military judge or mitigated with remedial action; rather, the decision on whether a case survives or counsel are sanctioned may be dependent on the determinations of an agency that is not even a party to the case.

Two trends suggest these complicated cases will become more common in future practice. First, overprotection of information is greatly increasing the volume of classified information and CUI—collectively referred to as protected information in this article—and a substantial number of persons are eligible to access this information.³ Second, the increasing ease of information sharing and public interest in military justice create an environment ripe for unauthorized disclosures of protected information.⁴ In this environment, trial and defense counsel must understand how to identify when protected information is at issue, and how to deal with

this information throughout court-martial proceedings. This can be a daunting task because of the web of overlapping information security guidance in executive orders, DoD manuals, and Army regulations, and the fact that there is little case law interpreting the complex Military Rules of Evidence (MRE) that govern protected information.

This article will provide counsel inexperienced with protected information a framework to navigate these cases by first addressing issues counsel should consider at the earliest phases of the proceedings. This part will focus on how to identify if protected information is involved, and the potentially damaging unanticipated effects of hasty early decisions. The article will next discuss preparations counsel can make before referral to establish processes, minimize pre-trial delay, and avoid any unauthorized disclosures of information. It will then conclude with a roadmap for working with MRE 505 and 506—the rules governing the use of protected information in courts-martial.

II. Planning: Identifying the Protected Information Issue and Working Strategically

A. Identifying the Protected Information Problem

The first step to effectively working with protected information in a court-martial is identifying that it may be a factor. This is simple in espionage and other cases where the compromise of classified information is the actual offense.⁵ But classified information can also be an issue in other cases, including where it is used to establish an element of an offense, during discovery in cases originating from a

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¹ Appendix A contains a glossary of terms unique to working with classified information and controlled unclassified information (CUI).

² See U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 9-2f (24 Jan. 2017).

³ There were 53,425 original classifications of information, and 52,778,354 derivative classifications in Fiscal Year 2015. INFO. SEC. OVERSIGHT OFF., NAT'L ARCHIVES & REC. ADMIN., 2015 REPORT TO THE PRESIDENT 1 (2016). Although still in development, the government's online registry of CUI currently contains twenty-three categories and eighty-three subcategories of unclassified information. *Id.* at 41-42. As of Fiscal Year 2013, 5,150,379 persons were eligible to access classified information. OFF. OF MGMT. & BUDGET, SUITABILITY AND SECURITY PROCESSES REVIEW, REPORT TO THE PRESIDENT, FEBRUARY 2014 3 (2014).

⁴ See Julie Tate, *Bradley Manning Sentenced to 35 Years in WikiLeaks Case*, WASH. POST, Aug. 21, 2013, https://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html; *US v. Bergdahl*, RMDA FREEDOM OF INFO. ACT LIBR., <https://www.foia.army.mil/ReadingRoom/Detail.aspx?id=103> (last visited Mar. 9, 2017) (reading room of filings in newsworthy court-martial); *Chelsea (Bradley) Manning Court-Martial Documents*, RMDA FREEDOM OF INFO. ACT LIBR., <https://www.foia.army.mil/ReadingRoom/Detail.aspx?id=92> (last visited Mar. 9, 2017).

⁵ The most recent high-profile example of such a case is the U.S. Army court-martial of Bradley (now Chelsea) Manning for giving a large amount of classified information to WikiLeaks. See Tate, *supra* note 4.

deployment, and in the defense sentencing case where an accused has held a sensitive position.⁶ And CUI can be even more common as it can include things as basic as law enforcement information.⁷ Counsel detailed to a case that may involve protected information must constantly be alert for any indications that access to documents or information they are working with is restricted, and should closely review DoD guides for standardized marking of protected information⁸ to ensure they are able to recognize these markings and comply with information security requirements.

Once identified, the sensitivity of the protected information determines the scope of the problem. Though harder to identify, CUI is less problematic than classified information because handling it does not require security clearances or onerous information security practices.⁹ The DoD recognizes several main categories of CUI, with Law Enforcement Sensitive being the most commonly seen in courts-martial.¹⁰ Counsel encountering CUI, or other sensitive information that they think an agency may want to invoke privilege over in accordance with MRE 506 because

“disclosure would be detrimental to the public interest,”¹¹ should promptly and carefully review safeguarding procedures for the information at issue.

Contrary to CUI, classified information is easy to identify, but much more of a burden in a court-martial. Only designated original classification authorities (OCA) can initially classify information, but others—including counsel drafting motions—who incorporate information originally classified by an OCA, can derivatively classify a document.¹² Information can be classified Confidential, Secret, or Top Secret, depending on the expected damage to national security that unauthorized disclosure would cause. These categories have the same three basic prerequisites before a person is eligible for access: a security clearance at the right level, a signed nondisclosure agreement, and a need-to-know the information.¹³ But classified information can be further put into one of five categories with enhanced access and handling requirements.¹⁴ The most common of these is sensitive compartmented information (SCI), which includes intelligence sources and methods, and can only be accessed

⁶ See, e.g., David Stout, *U.S. Pilots Avoid Prosecution for Bombing Canadian Troops*, N.Y. TIMES, June 19, 2003, <http://www.nytimes.com/2003/06/19/national/us-pilots-avoid-prosecution-for-bombing-canadian-troops.html> (discussing case of U.S. pilots who inadvertently bombed Canadian troops in Afghanistan); *United States v. Bergdahl*, No. 20160118, 2016 CCA LEXIS 274 (A. Ct. Crim. App. Apr. 28, 2016) (resolving a discovery dispute in a case originating from a deployment to Afghanistan with substantial classified discovery); *United States v. Murphy*, No. 2007-03, 2008 CCA LEXIS 511 (A.F. Ct. Crim. App. Dec. 22, 2008) (ruling in the case of a White House Military Office staffer who sought to use highly classified information in his sentencing case).

⁷ U.S. DEP’T OF DEF., MANUAL 5200.01, VOL. 4, DoD INFORMATION SECURITY PROGRAM: CONTROLLED UNCLASSIFIED INFORMATION (CUI) 9 (24 Feb. 2012) [hereinafter DoDM 5200.01, VOL. 4].

⁸ U.S. DEP’T OF DEF., MANUAL 5200.01, VOL. 2, DoD INFORMATION SECURITY PROGRAM: MARKING OF CLASSIFIED INFORMATION (24 Feb. 2012) (C2, 19 Mar. 2013) [hereinafter DoDM 5200.01, VOL. 2]. Appendix A contains detailed definitions of the protected information categories, along with common markings for each.

⁹ See DoDM 5200.01, VOL. 4, *supra* note 7, at 9–27 (detailing CUI protection in the Department of Defense (DoD)); U.S. DEP’T OF ARMY, REG. 380-5, DEPARTMENT OF THE ARMY INFORMATION SECURITY PROGRAM 57–62 (29 Sept. 2000) [hereinafter AR 380-5] (detailing CUI protection in the U.S. Army).

¹⁰ Other main categories of DoD-recognized CUI include: For Official Use Only; DoD Unclassified Controlled Nuclear Information (UCNI); Limited Distribution; Department of State Sensitive but Unclassified; and Drug Enforcement Agency Sensitive (DEA Sensitive) information. Although each has limits on who can access the information, only DEA Sensitive and Limited Distribution information have significantly restrictive protections. See DoDM 5200.01, VOL. 4, *supra* note 7, at 9–27. The National Archives and Records Administration (NARA) website describes the 106 current categories and subcategories of CUI from across the executive branch, and marking and handling requirements for each. See *CUI Registry—Categories and Subcategories*, NAT’L ARCHIVES & REC. ADMIN., <https://www.archives.gov/cui/registry/category-list> (last visited Mar. 9, 2017). In addition to CUI, the federal criminal code protects “defense information,” which can include things like blueprints of ships, and maps and photos of military installations. 18 U.S.C. § 793 (2012).

¹¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 506(a) (2016) [hereinafter MCM]. Because the scope of information an agency could protect with Military Rule of Evidence (MRE) 506 is vague, trial

counsel should consult with the originating agency whenever working with CUI, or information that otherwise appears sensitive or worthy of protection. Examples of information courts have determined warrant protection under MRE 506 include information provided by an informant regarding an unrelated case and a confidential witness utilization report. See *United States v. Rivers*, 44 M.J. 839, 840–41 (A. Ct. Crim. App. 1996) (informant); *United States v. Taylor*, 60 M.J. 720, 725 (N-M. Ct. Crim. App. 2004) (confidential witness).

¹² See Exec. Order No. 13,526, 75 Fed. Reg. 707, 708–09, 712 (Jan. 5, 2010) [hereinafter EO 13,526]. In addition to original and derivative classification, it is possible to create classified information by compiling multiple pieces of individually unclassified information that, when combined, meet classification standards. See *id.* at 711. Classified information designation, access requirements, and safeguarding are governed by EO 13,526, as implemented by DoD Manual 5200.01, volumes 1–3, and in the Army by AR 380-5.

¹³ See *id.* at 707–08, 720. Any authorized holder of classified information must verify that a potential recipient meets all of these requirements before providing that person any classified information.

¹⁴ Special access programs (SAP) have read-on requirements and require high-level approval before a person gains access. See U.S. DEP’T OF DEF., MANUAL 5205.07, VOL. 2, SPECIAL ACCESS PROGRAM (SAP) SECURITY MANUAL: PERSONNEL SECURITY 8–11 (24 Nov. 2015) [hereinafter DoDM 5205.07, VOL. 2]. Department of Defense information can be subject to alternative compensatory control measures (ACCM), which require read-ons and approval for access; counsel encountering ACCM information should coordinate with the command control officer for access and safeguarding procedures. See U.S. DEP’T OF DEF., MANUAL 5200.01, VOL. 3, DoD INFORMATION SECURITY PROGRAM: PROTECTION OF CLASSIFIED INFORMATION 29, 32 (24 Feb. 2012) (C2, 19 Mar. 2013) [hereinafter DoDM 5200.01, VOL. 3]. North Atlantic Treaty Organization (NATO) information has a read-on requirement, which can be coordinated through the command NATO control officer. See U.S. DEP’T OF DEF., MANUAL 5200.01, VOL. 1, DoD INFORMATION SECURITY PROGRAM: OVERVIEW, CLASSIFICATION, AND DECLASSIFICATION 26, 28 (24 Feb. 2012) [hereinafter DoDM 5200.01, VOL. 1]. Information collected through the Foreign Intelligence Surveillance Act (FISA) requires coordination with the Department of Justice (DoJ) and Attorney General approval prior to use in a criminal proceeding. See 50 U.S.C. §§ 1801(h), 1806 (2012).

by those with a clearance eligible for SCI who have received an initial briefing (read-on) for the information at issue.¹⁵ Counsel encountering any information subject to one of these categories must promptly coordinate with command security or control officers, as the programs can require significant coordination and potentially an additional background investigation before access is granted.

B. Avoiding Costly Early Mistakes when Working with Protected Information

Once protected information has been identified as an issue in a court-martial, counsel must adopt a more deliberative approach to early decision-making. The mere presence of protected information, whether its volume is massive or miniscule, can complicate the simplest courts-martial and significantly derail trial timelines. Consequently, even the most basic actions require thorough consideration, particularly in the following areas:

Communication. Both trial and defense counsel must consider who else needs to know at this early phase of the case. When dealing with cases involving classified information, trial counsel and their supervisors may have to coordinate actions with the Office of The Judge Advocate General (OTJAG), Army counterintelligence authorities, or the Department of Justice.¹⁶ And even if not required to do so, trial counsel should notify OTJAG of the circumstances of the case in order to identify subject matter experts who can assist them, and to ensure OTJAG is aware that the trial counsel will begin coordinating with outside agencies. Trial defense counsel must also immediately inform their technical chain if classified information may be at issue.¹⁷ Finally, both trial and defense counsel should keep an open dialog with

each other regarding protected information at issue as this could potentially benefit both sides.¹⁸ But while counsel must proactively communicate, they must also be more cautious about their communications when discussing the case over unclassified information systems, outside secure areas, or to the media to avoid security violations.

Timelines. Trial counsel must be wary of early actions that may trigger the Rule for Courts-Martial (RCM) 707 120-day clock or result in an Article 10 violation,¹⁹ and must realistically assess when the government will be ready for trial before making representations to the military judge.²⁰ As discussed *infra*, these cases require months—and potentially more than a year—in preparation, including conducting background investigations for clearances, coordinating information security requirements, gaining access to special access program (SAP) or alternative compensatory control measure (ACCM) information, gaining consent of agencies with equities in protected information to disclose that information to the defense, and working through the MRE 505 or MRE 506 privilege processes.²¹ Because of the extended and uncertain timelines for these tasks, simple decisions like imposing pretrial confinement or when to prefer charges could later haunt the government; if they occur too early, trial counsel will find themselves constantly racing to complete these tasks throughout the case. The government can seek to exclude reasonable periods of delay from the RCM 707 clock and argue that it has proceeded with reasonable diligence in the case,²² but the safer course is to avoid the issue by only imposing pretrial restraint when absolutely necessary and preferring charges after the government has completed its initial preparations.

Charging. Trial counsel should take a thoughtful approach to charging by analyzing whether the charge sheet

¹⁵ See U.S. DEP'T OF DEF., MANUAL 5105.21, VOL. 1, SENSITIVE COMPARTMENTED INFORMATION (SCI) ADMINISTRATIVE SECURITY MANUAL: ADMINISTRATION OF INFORMATION AND INFORMATION SYSTEMS SECURITY 12–13 (19 Oct. 2012) (stating the special security officer manages the sensitive compartmented information (SCI) program); U.S. DEP'T OF DEF., MANUAL 5105.21, VOL. 3, SENSITIVE COMPARTMENTED INFORMATION (SCI) ADMINISTRATIVE SECURITY MANUAL: ADMINISTRATION OF PERSONNEL SECURITY, INDUSTRIAL SECURITY, AND SPECIAL ACTIVITIES 10–14 (19 Oct. 2012) [hereinafter DODM 5105.21, VOL. 3].

¹⁶ See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE 2–3 (11 May 2016) (requiring a summary to the Office of The Judge Advocate General (OTJAG) regarding cases with “national security implications”); 50 U.S.C. § 402a(e)(1) (2012) (requiring agencies to immediately advise the Federal Bureau of Investigation if classified information has been disclosed in an unauthorized manner to a foreign power); U.S. DEP'T OF DEF., INSTR. 5525.07, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE DEPARTMENTS OF JUSTICE (DOJ) AND DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES 7, 10 (18 June 2007) (requiring DoD to confer with DoJ on cases involving theft of government property that may warrant federal prosecution, and to consult with DoJ on proposed immunity in cases involving the mishandling of classified information); U.S. DEP'T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING 21 (27 Sept. 2016) (requiring “unauthorized or intentional disclosure of classified information” and other potential national security offenses to be reported to Army counterintelligence).

¹⁷ See U.S. ARMY TRIAL DEF. SERV., STANDARD OPERATING PROCEDURES 9 (5 Aug. 2013) [hereinafter TDS SOP] (requiring notification “upon forming an attorney-client relationship in a potential classified case”).

¹⁸ Trial counsel will be able to more quickly conduct any required administrative and logistical coordination, and will help prevent unauthorized disclosures by ensuring defense counsel take appropriate measures to safeguard any information in their possession. And defense counsel can educate the trial counsel on the scope of protected information at issue, which may influence the disposition decision in the case.

¹⁹ See MCM, *supra* note 11, R.C.M. 707(a) (requiring the accused to be tried within 120 days of referral or imposition of pretrial restraint); UCMJ art. 10 (2016) (“When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken . . . to try him or to dismiss the charges.”).

²⁰ See U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL 1, 16 (1 Nov. 2013) (requiring counsel to submit an Electronic Docket Request including requested trial dates).

²¹ See *infra* Parts III, IV.

²² See MCM, *supra* note 11, R.C.M. 707(c)(1) (stating the convening authority can exclude reasonable delays from the 120-day clock, including to enable counsel to prepare for a complex trial or to obtain security clearances); United States v. Kossman, 38 M.J. 258, 262 (C.M.A. 1993) (holding that following imposition of confinement, the government must proceed to trial with reasonable diligence).

can be drafted in a way that minimizes the impact of protected information.²³ If, for example, mishandling classified information is a small part of the total scope of the alleged misconduct, trial counsel should consider whether the burden of dealing with this information is worth charging the offense; that is, there may be no need to charge a mishandling offense if the government has a solid murder case. This may not be possible where mishandling protected information is the main misconduct, but even then, the trial counsel can consider charging as to only a subset of the information to minimize the volume or sensitivity of the information at issue.²⁴ Though this will leave some offenses off the charge sheet, it may also significantly reduce the time, cost, and effort required to prosecute the case. Conversely, the strategic defense counsel should start considering what protected information they can make at issue, as this could significantly change the government posture regarding whether to proceed and its willingness to accept an offer to plead guilty.

Safeguarding. Finally, counsel should consider what actions they must take to obtain and safeguard protected information. The next part of this article discusses information security in detail, but at the earliest phases of the case, counsel must at least contact the command G-2 to begin coordinating clearances, read-ons, access to information systems, and security incident procedures. Depending on the sensitivity of the information, counsel may also have to coordinate with the special security officer regarding SCI, an ACCM control officer, or the agency that originated the

information to complete these tasks.²⁵ Counsel should consider seeking the appointment of security officers for the government and defense at this point to advise counsel on safeguarding protected information and give counsel more freedom to focus on legal aspects of the case rather than any protected information at issue.²⁶

III.. Preparation: Protected Information Pre-Trial and During Discovery

A. Establishing the Framework for Working with Protected Information

Acquiring clearances to access classified information is a very time-consuming process and must be one of the first preparatory steps counsel take. Processing just one Top Secret clearance may delay a case for over eight months,²⁷ and additional time may be required to obtain access authorizations and read-ons for SCI, SAP, and ACCM information.²⁸ Anyone who will access classified information during pretrial preparation and discovery, or will be in the hearing room or courtroom during classified sessions, needs a clearance.²⁹ Trial counsel must consider this as the command decides whether to seek suspension, revocation, or downgrade of the accused's clearance. These actions should be taken only when absolutely required and prudent because it may be very difficult to later restore the accused's access.³⁰

In addition to seeking any required security clearances,

through command channels except for those of civilian members of the defense team, which must be submitted through OTJAG for certification the clearance "is necessary to adequately represent their client," and then to Army G-2. U.S. DEP'T OF ARMY, REG. 380-67, PERSONNEL SECURITY PROGRAM 13 (24 Jan. 2014) [hereinafter AR 380-67].

²⁸ See *supra* notes 14–15 and accompanying text. Defense counsel can facilitate access to SCI, SAP, NATO, or ACCM information through the trial counsel or defense security officer. There is no bar to defense counsel coordinating access and read-ons directly with the applicable government agency, but those entities will likely require concurrence from the trial counsel that the defense has a valid need-to-know before granting access.

²⁹ Appendix B lists resources the parties may require in classified information cases, including a list of persons who will likely need clearances. Courts have been critical of trial and defense counsel who impede clearances for members of the defense. See *United States v. Pruner*, 33 M.J. 272, 275 (C.M.A. 1991) (holding counsel can be required to provide personal information to facilitate processing, and rejecting defense argument that where counsel does not have a clearance, the government must declassify information or dismiss charges); *Schmidt v. Boone*, 59 M.J. 841, 852 (A.F. Ct. Crim. App. 2004) (stating case may continue if defense counsel refuses to initiate a clearance or is dilatory in providing information); *United States v. Halsema*, No. 200001337, 2008 CCA LEXIS 405, at *6–7 (N-M. Ct. Crim. App. Dec. 23, 2008) (holding government infringed accused's right to counsel where it refused to process a defense request for SCI access where SCI was at issue in the case).

³⁰ See AR 380-67, *supra* note 27, at 15 (stating an individual seeking SCI access cannot be flagged). An accused without a clearance could be problematic at trial because MRE 505 requires that "information admitted into evidence . . . must be provided to the accused." MCM, *supra* note 11, MIL. R. EVID. 505(c).

²³ See U.S. DEP'T OF JUST., U.S. ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL § 2052 (2002), <https://www.justice.gov/usam/criminal-resource-manual-2052-contacts-intelligence-community-regarding-criminal-investigations> [hereinafter DOJ CRIMINAL RESOURCE MANUAL] (stating prosecutors may be able to "tailor the indictment in a way that will reduce or eliminate the relevance of any classified information").

²⁴ For example, the government could charge the accused for mishandling Secret information rather than SCI if both were compromised. Trial counsel should coordinate promptly with agencies that have equities in any compromised information as they may have a strong preference that the accused face charges regarding certain information, or may indicate at this early phase that the agency will assert privilege over certain information.

²⁵ See *supra* notes 14–15 and accompanying text. Counsel should familiarize themselves with DoD and Army guidance on information security, particularly DoD Manual 5200.01 and AR 380-5. Trial defense counsel are directed to familiarize themselves with AR 380-5. See TDS SOP, *supra* note 17, at 9. Because the defense likely has less organic capability to deal with protected information than trial counsel, they should communicate their needs regarding clearances, work areas, and information systems to the government early to ensure proper resourcing. See *id.* (stating defense counsel should contact command security personnel for assistance).

²⁶ See *infra* notes 31–32 and accompanying text.

²⁷ In the last quarter of Fiscal Year 2016, government agencies required an average 166 days to process a Secret clearance and 246 days to process a Top Secret clearance. *Insider Threat and Security Clearance Reform, Cross Agency Priority Goal Quarterly Progress Update*, PERFORMANCE.GOV, <https://www.performance.gov/node/3407?view=public#progress-update> (last visited Mar. 9, 2017). Agencies may grant interim clearances in less time, but these may have limited validity. See DODM 5105.21, VOL. 3, *supra* note 15, at 8 (stating outside agencies may not recognize an interim SCI clearance). Counsel can initiate clearances

counsel should take two additional steps to establish an initial framework to handle protected information. First, if the command has not yet appointed security officers for the parties, and for the preliminary hearing officer or judge in a classified information case, it should do so at this point.³¹ These advisors are critical to ensuring the parties properly disseminate and safeguard classified information, and to avoid unauthorized disclosures that will require significant effort to remediate. The command should appoint persons experienced in information security who already possess adequate clearances, and should ensure the defense team can maintain confidentiality with their security officer on all matters besides the reporting of security incidents.³²

The second step counsel should take to establish a framework for working with protected information is to seek a protective order (PO) governing access to, and the handling of, that information. Trial counsel can seek a pre-referral PO from the convening authority,³³ and can file a motion seeking a PO from the military judge after referral.³⁴ The PO can address a range of topics, including: requiring those needing clearances to cooperate with background investigations; procedures governing disclosure of protected information between parties; who can access protected information in the case and how; safeguarding of the information; and the provision of storage facilities and other resources to the defense.³⁵ Both trial and defense counsel must carefully consider every term of the PO as that order will become the rulebook by which protected information is accessed and handled before and during trial. Failure to do so may force the parties to either live with terms that are unnecessarily

burdensome or arbitrary, or to seek amendment of the PO later in the proceedings.

B. Administrative and Logistical Preparation

Once the parties have initiated clearances and established a framework for working with protected information, they must begin coordinating for the resources needed to comply with information security regulations. The safeguarding procedures for CUI are much less burdensome than those for classified information. These safeguards generally only require that the information be stored in a minimally secure environment, but do mandate that some categories of information be transmitted via secure communications means.³⁶

Unlike CUI, the presence of classified information will significantly increase the burdens of safeguarding information, and may require the creation of distinct systems to process classified discovery and evidence. Both parties will require private workspaces and safes to handle Secret, Top Secret and SCI, or SAP information, and they may also need multiple information systems to process classified information, including separate computers, phones, printers, and email accounts.³⁷ These needs may significantly burden limited resources, particularly at small installations. Depending on the volume of classified information in the case, these safeguards may require counsel to spend part of each day rotating between their office, a secure facility, and a SCI facility, and to work on several computer systems

³¹ Both MRE 505 and MRE 506 note that a court's protective order (PO) can include provisions regarding government security personnel. MCM, *supra* note 11, MIL. R. EVID. 505(g)(7), MIL. R. EVID. 506(g)(6). Counsel can use security officers in various ways to ease the burden of working with protected information, including coordinating physical security, properly transferring protected information, marking derivative classified information, verifying clearances and read-ons, ensuring adherence to the PO, and remediating any unauthorized disclosures. In addition to these tasks, the court security officer can facilitate information security at the court, monitor compliance with the PO, monitor the proceedings to help identify when a closed session is required, maintain access lists for closed sessions, and supervise procedures to open and close the court.

³² See AR 380-5, *supra* note 9, at 105 (detailing the reporting of security incidents).

³³ See MCM, *supra* note 11, R.C.M. 404A(d); Denver Post Corp. v. United States, No. 20041215, 2005 CCA LEXIS 550, at *9 n.3 (A. Ct. Crim. App. Feb. 23, 2005) (noting with approval that the appointing authority issued a PO before the preliminary hearing).

³⁴ See MCM, *supra* note 11, MIL. R. EVID. 505(g), MIL. R. EVID. 506(g) (stating the military judge must issue a PO requested by the trial counsel where protected information is at issue). The rules envision the trial counsel initially seeking the PO, but there is no bar to defense counsel providing the first draft of the PO. The defense counsel may find advantage in doing so as they would be able to set the starting point for the document.

³⁵ See MCM, *supra* note 11, MIL. R. EVID. 505(g), MIL. R. EVID. 506(g) (stating the PO can address areas beyond those specifically listed). Counsel can seek example POs from previous cases involving protected information, but must carefully scrutinize each term as those POs were likely the product of much litigation and argument among the parties. See *supra* note 4 (citing online reading rooms of previous classified information cases). Trial counsel should vet the draft PO with the agencies that provided protected

information as the extent to which the PO protects their information may affect their willingness to allow disclosure to the defense.

³⁶ Only DEA Sensitive information and UCNI have significant limits on electronic transmission. See DODM 5200.01, VOL. 4, *supra* note 7, at 17-26 (detailing safeguarding of CUI within DoD). Counsel can refer to DoD Manual 5200.01, volume 4, and AR 380-5 to verify distribution controls and safeguarding procedures for the most common categories of CUI, and can refer to the NARA CUI registry for procedures governing other categories of CUI within the government. See *CUI Registry—Categories and Subcategories*, *supra* note 10.

³⁷ Confidential and Secret information can only be handled in a secure facility and on information systems accredited for Secret information, such as the Secret Internet Protocol Router Network (SIPR). See DODM 5200.01, VOL. 3, *supra* note 14, at 33, 36-37. Top Secret information and SCI can only be handled in a SCI facility and on information systems accredited for SCI, such as the Joint Worldwide Intelligence Communications System (JWICS). See *id.* at 35-36, 110-11. Counsel must handle SAP information only in an approved SAP facility. See U.S. DEP'T OF DEF., MANUAL 5205.07, VOL. 3, DOD SPECIAL ACCESS PROGRAM (SAP) SECURITY MANUAL: PHYSICAL SECURITY 6-7 (23 Apr. 2015) (C1, 21 Sept. 2015). Counsel can generally handle ACCM information the same as other information classified at the same level if safeguards are in place to ensure only authorized personnel can access the ACCM material. See DODM 5200.01, VOL. 3, *supra* note 14, at 32-33. Classified NATO information must be processed on information systems accredited for NATO information. See *id.* at 111. Trial counsel should anticipate having to review particularly sensitive information from the intelligence community at the originating agency as these entities may not permit counsel to remove information from their facilities. The temporary duty costs associated with these on-site reviews may become significant and must be incorporated into the budget for the case.

throughout the day. Counsel must factor these inefficiencies into their timelines and work schedules. Defense counsel may not have access to these assets in their offices, therefore they must be proactive in identifying their needs and ensuring they are reflected in the PO, and trial counsel should be proactive in anticipating and facilitating resources for all parties.

The trial counsel—in coordination with the court security officer—should also be proactive in anticipating and resourcing the needs of the preliminary hearing officer and the court if classified evidence may be introduced. In addition to secure facilities, storage, and information systems, the trial counsel must also consider issues unique to the proceedings, including whether classified sessions can be held in the courtroom, where closed sessions for Top Secret, SCI, or SAP information will be held, whether the court reporter has equipment designated for classified sessions, and how classified motions and filings will be submitted. The trial counsel should also plan for the procedural aspects of closing the preliminary hearing or trial for classified sessions, including keyword lists to identify the need for an unplanned closure because a session has inadvertently strayed into a classified discussion, access lists specifying personnel who are permitted in closed sessions, procedures to close and reopen the courtroom, and scripts to document the closure and reopening on the record.³⁸

C. Receiving and Reviewing Protected Information During Discovery

The primary principle of document review and discovery involving protected information is that the organization that originated the information controls it and can limit its distribution throughout the case.³⁹ This principle affects every aspect of discovery and can make the process more complicated than most counsel are used to. Unlike in most cases, the trial counsel may not get a packet of documents from the unit or law enforcement that makes up most of the

potential discovery in the case; instead, because access to protected information is inherently limited, the trial counsel may have to seek the bulk of the discovery from agencies across the government that originated some information relevant to the case.

The trial counsel gathers information from other government agencies through requests for information (RFI), which are called prudential search requests (PSR) outside of the DoD.⁴⁰ The RFI/PSR's purpose is to ask organizations to search their files for pre-existing intelligence or other information where the trial counsel has reason to believe the files contain information that is discoverable or otherwise relevant to the proceedings.⁴¹ The RFI/PSR is simply a memorandum or letter to an agency⁴² that should provide a summary of the matter, the identity of the accused, a description of the information sought, a request to preserve the information, and a request to provide the information for counsel review.⁴³

Although the RFI/PSR should provide agencies all the information they need to collect responsive documents for government review, it should not be the trial counsel's first contact with the agency. Rather, the trial counsel should coordinate with the agency over the phone or in person before sending a RFI/PSR to familiarize agency counsel with the case, discuss any preferred terms for the RFI/PSR, ensure the RFI/PSR is sent through the proper means based on its classification,⁴⁴ and familiarize agency counsel with MRE 505 and 506.⁴⁵ Early direct contact with the agency should help develop a positive relationship, which will likely be beneficial later in the process, and may give the trial counsel a sense of how permissive the agency will be regarding disclosing its information to the defense or using it in court.

Starting at this first contact, the trial counsel must begin tracking all dates in the discovery process, including dates of contacts with agencies, when a RFI/PSR was sent, response

³⁸ See *Chelsea (Bradley) Manning Court-Martial Documents*, *supra* note 4 (containing procedures proposed by the government in the Manning court-martial at Appellate Exhibit 479). Counsel can consult with trial and defense counsel on previous cases involving classified information, and refer to public reading rooms from high-profile cases dealing with classified information for methods used in those cases. See *supra* note 4. Appendix E contains sample checklists for closing and opening the proceedings.

³⁹ See *infra* Part IV.

⁴⁰ See DOJ CRIMINAL RESOURCE MANUAL, *supra* note 23. The intelligence community is generally familiar with the term prudential search request (PSR) because the DoJ uses PSRs extensively in their prosecutions, *see id.*, but DoD entities may be more familiar with the term request for information (RFI).

⁴¹ See *id.* (stating relevant information can include information that may impact whether to charge an offense).

⁴² The General Counsel of the Office of the Director of National Intelligence and OTJAG can help identify points of contact—ideally within the office of the staff judge advocate or general counsel—for organizations in the DoD and intelligence community. Defense counsel can reach out to agencies as part of their own investigation, but these agencies may be reluctant to work directly with the defense.

⁴³ See U.S. DEP'T OF JUST., U.S. ATTORNEYS' MANUAL § 9-90.210 (2016), <https://www.justice.gov/usam/usam-9-90000-national-security#9-90.210>; DOJ CRIMINAL RESOURCE MANUAL, *supra* note 23. Some agencies may ask the trial counsel to provide search terms to assist in their document collection. Trial counsel should be cautious in providing search terms both because the organization is likely better situated to identify the best terms to search their own systems, and because providing terms may lead to later litigation regarding whether the scope of the terms was too narrow. If trial counsel provide search terms, they should consider consulting with the defense on proposed joint terms prior to submission to avoid later disputes.

⁴⁴ The RFI/PSR may be classified based on its content and some organizations may consider their mere involvement with certain matters to be a classified fact.

⁴⁵ This is critical to avoid misunderstandings with the agencies. Although MRE 505 is similar to the Classified Information Procedures Act (CIPA), 18 U.S.C. App. III (2012), used in federal court, there are differences between military and civilian practice, including the fact that members of the defense and panel likely already have security clearances, and the military judge's ability to close the court for classified sessions. See MCM, *supra* note 11, MIL. R. EVID. 505 analysis, at A22–47 (stating MRE 505 is based on an early version of CIPA). These factors may make an agency more comfortable with disclosing information than they normally would be.

dates, and review dates. The process of obtaining documents and seeking agency permission to disclose protected information to the defense may take a long time because the trial counsel will be working with agencies that have their own procedures and priorities. These dates may therefore be useful later to demonstrate the government's diligence to the military judge and justify delays.⁴⁶ Furthermore, because the information-gathering process may be time consuming, the trial counsel should put sufficient thought into the government's discovery obligations and initially cast a wide enough net to avoid having to repeat this process later.⁴⁷

While awaiting responses, trial counsel should consider the document review process they will execute when they receive documents. The trial counsel must carefully plan this process because the documents they receive may require review on several different systems and by different counsel due to their classification.⁴⁸ The process should include a system to identify which agencies originated the information in a document and to mark information in a disclosable document that does not meet discovery requirements. The originating agencies control their protected information and must consent before it is disclosed to the defense⁴⁹. The first step to getting consent is figuring out the agencies from whom consent is required.

D. Preparing for Spillage and other Security Incidents

Security incidents—which can occur whenever protected information is lost, disclosed to an unauthorized person, processed on an information system not accredited at the

proper level, or otherwise compromised⁵⁰—are always a significant risk when working with a large volume of protected information or in a fast-paced court-martial. Counsel and their security officers must plan procedures for efficiently reporting and remediating incidents because that process can grind trial preparation to a halt.⁵¹ Though information security personnel will be responsible for coordinating the bulk of the investigation and remediation,⁵² well-prepared counsel can take steps immediately after an incident to contain and minimize the damage.

To help avoid significant incidents, counsel working with protected information must be particularly cautious about publicly disclosing any case information such as on reading rooms in high-publicity cases or to the media. Before doing so, they must develop systems to ensure any information released is reviewed and deemed appropriate for public release.⁵³

IV. Execution: Working with MRE 505 and MRE 506⁵⁴

A. Application of MRE 505 and MRE 506 Pre-Referral

Following referral, MRE 505 and MRE 506 play the main role in the disclosure of protected information to the defense, and the use of that information during the preliminary hearing and court-martial. The purpose of MRE 505 is to prevent “graymail,” where “the defendant . . . seeks disclosure of sensitive national security information . . . which

⁴⁶ See *supra* notes 19–22 and accompanying text.

⁴⁷ Trial counsel should consider the effect of recent case law on the government's discovery obligations. See, e.g., *United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (broadening the scope of the government's Rule for Courts-Martial (RCM) 701(a)(2) disclosure obligation beyond materials in the physical possession, custody, or control of military authorities). They can even consider working with the defense early to identify information of particular interest so that the government can properly scope the initial calls for information.

⁴⁸ See *supra* Parts II.A, III.B. The trial counsel must determine which counsel can review documents based on classification, what read-ons the counsel require, and whether documents have to be reviewed in a certain secure facility. The trial counsel must also plan how they will reconcile and track attorney work product for document reviews occurring in multiple locations and on multiple systems because they may have to maintain a tracker on an unclassified system, another on SIPR, a third on JWICS, and maybe even a fourth for reviews that occur at agency facilities. If the case has a large volume of potential discovery, trial counsel should consider using Bates numbering to assist in coordinating and deconflicting this multiple-system review.

⁴⁹ See *infra* Part IV.B. Identifying the originator of CUI is simple as each category is generally associated with a certain agency. See *supra* note 10. Identifying original classification authorities (OCA) is more complicated, and counsel should use the security officer to help execute this process. The fact that a DoD entity provided a document does not mean it is the OCA as the document may have been created by an intelligence community agency, or may contain information originally classified by another agency. See EO 13,526, *supra* note 12, at 721 (stating classified information can generally be shared among agencies). The easiest way to identify an OCA is to check the classification markings on the document's first page, which should state who classified it and the authority for doing so. DoDM

5200.01, VOL. 2, *supra* note 8, at 23–30. But many classified documents are improperly marked or were derivatively classified from “multiple sources,” which means there will be multiple OCAs for information in the document. See *id.* If that is the case, counsel will have to either determine the OCAs based on context or ask the organization that provided the document to identify the OCA.

⁵⁰ See DoDM 5200.01, VOL. 3, *supra* note 14, at 86. Common scenarios can include: disclosing classified information to someone without sufficient clearance, read-on, or need-to-know; sending Secret information over unclassified systems; and sending SCI over SIPR. See *id.* at 86–111.

⁵¹ For example, if SCI is placed on a SIPR share drive, the command will have to treat the share drive as classified at the SCI level until remediation—which may include erasing or destroying the media containing the share drive—thereby depriving a large part of the unit from accessing their files. See *id.* at 106–07. Counsel should consider reviewing protected information on stand-alone systems not connected to a network as this will help avoid these types of scenarios and contain the effects of any data spillage.

⁵² See AR 380-5, *supra* note 9, at 104–08. Appendix C contains a sample security incident response checklist.

⁵³ U.S. DEP'T OF DEF., DIR. 5230.09, CLEARANCE OF DoD INFORMATION FOR PUBLIC RELEASE 2 (22 Aug. 2008) (C1, 16 Mar. 2016) (stating DoD information must be “reviewed for clearance” prior to release); DoDM 5200.01, VOL. 4, *supra* note 7, at 10 (stating DoD unclassified information must be approved for release).

⁵⁴ This part discusses the most significant aspects of MRE 505 and MRE 506, and practical points for working with the rules. Appendix D contains a more detailed roadmap for working with MRE 505 and MRE 506.

may force the government to discontinue the prosecution.”⁵⁵ The rule states that classified information “is privileged from disclosure if disclosure would be detrimental to the national security,”⁵⁶ and establishes procedures balancing “the interests of an accused who desires classified information for his or her defense and the interests of the government in protecting that information.”⁵⁷ Military Rule of Evidence 506 plays a similar role in establishing a privilege for government information whose “disclosure would be detrimental to the public interest.”⁵⁸

Only portions of these rules apply during the preliminary hearing, including the scope of the privilege, a government requirement to provide the accused classified information admitted into evidence at the hearing, a defense requirement to notify the preliminary hearing officer and trial counsel if they seek to disclose protected information, and procedural rules regarding the record.⁵⁹ Most significantly, the rules have procedures governing the extent of the accused’s access to protected information prior to referral. These require the accused to make a showing that the “information sought is relevant and necessary to an element of the offense or a legally cognizable defense;” the convening authority must then respond in writing if a privilege is invoked over any protected information sought, and may then fully withhold the information or provide an alternative to full disclosure.⁶⁰ The defense can only object to the withholding of information before a military judge after referral.⁶¹

B. Application of MRE 505 and MRE 506 During Discovery

⁵⁵ MCM, *supra* note 11, MIL. R. EVID. 505 analysis, at A22–47.

⁵⁶ MCM, *supra* note 11, MIL. R. EVID. 505(a).

⁵⁷ MCM, *supra* note 11, MIL. R. EVID. 505 analysis, at A22–47.

⁵⁸ MCM, *supra* note 11, MIL. R. EVID. 506(a). “Government information” is vaguely defined as unclassified communications and documents in federal government custody. MCM, *supra* note 11, MIL. R. EVID. 506(b).

⁵⁹ See MCM, *supra* note 11, R.C.M. 405(h) (stating that MRE 505(a)–(e), (i), and (k)–(l), and MRE 506(a)–(e), (i), and (l) apply during the preliminary hearing).

⁶⁰ MCM, *supra* note 11, MIL. R. EVID. 505(e)(1), MIL. R. EVID. 506(e)(1) (stating the convening authority’s options if privilege is invoked over protected information requested by the defense include redacting information from documents provided to the accused, providing a summary or statement admitting relevant facts the information would tend to prove, providing the information subject to a PO, or withholding the information). The wording of these sections is awkward and the defense can make a colorable argument that there is no initial showing required from the defense. The disclosure of RCM 404A information is not required if the matters are classified or protected by MRE 506. See MCM, *supra* note 11, R.C.M. 404A(c).

⁶¹ MCM, *supra* note 11, MIL. R. EVID. 505(e)(3), MIL. R. EVID. 506(e)(2).

⁶² The government can appeal a number of decisions made by the military judge, including orders dismissing specifications, orders directing disclosure of protected information, sanctions for nondisclosure of protected information, or the failure to issue or enforce a PO. MCM, *supra* note 11, R.C.M. 908(a), MIL. R. EVID. 506(k).

The military judge takes the lead in managing the MRE 505 and MRE 506 processes after referral,⁶² starting with a pretrial conference to discuss protected information issues. Either party can request, and the judge must hold, this Article 39(a) conference.⁶³ The trial counsel should request the pretrial conference and a PO either at referral or shortly thereafter as this conference is an ideal time for both counsel to educate the court on the challenges protected information will cause in the case and give the court a realistic idea of the extent to which the trial timeline may be extended to work through the MRE 505 and MRE 506 processes.

Indeed, the presence of protected information will likely result in some discovery delays in the case. Open file discovery has become a practical norm in many jurisdictions, but trial counsel cannot just turn over the case file in cases with protected information.⁶⁴ Instead, they must carefully identify any information that may be subject to an invocation of privilege, and then get consent from the agencies that originated the information to disclose it to the defense. This is the only way to afford those agencies a reasonable opportunity to assert privilege⁶⁵ because an agency will never have a chance to invoke its privilege over information if it does not even know the trial counsel plans on turning it over to the defense.

The simplest way to get agency consent to disclose protected information to the defense is a letter or memorandum to all agencies that originated the information at issue describing the information the trial counsel seeks to disclose and its relevance to the case,⁶⁶ requesting verification

⁶³ MCM, *supra* note 11, MIL. R. EVID. 505(f)(1), MIL. R. EVID. 506(f)(1). The military judge can conduct the conference *ex parte* if necessary to safeguard protected information. MCM, *supra* note 11, MIL. R. EVID. 505(f)(2), MIL. R. EVID. 506(f)(2).

⁶⁴ *Bergdahl*, 2016 CCA LEXIS 274, at *8 (stating MRE 505 “does not contemplate ‘open discovery’”). Open file discovery in classified information cases would also be improper because the defense probably has no need to know classified information that is not relevant to the proceedings. See EO 13,526, *supra* note 12, at 720.

⁶⁵ *Bergdahl*, 2016 CCA LEXIS 274, at *7 (“[G]overnment agencies which possess classified information must have reasonable opportunity to assert a claim of privilege.”). Counsel must consider that protected information can reside in both documents and in the minds of witnesses. Consequently, trial counsel should give agencies a reasonable opportunity to assert privilege before a witness interview that could result in disclosure of classified information to the defense. Although trial counsel can argue the reasonable opportunity to assert privilege requires defense counsel to inform an agency head or designee of defense investigative efforts that may result in disclosure of classified information to the defense, the *Bergdahl* decision found that if the defense itself seeks access to classified information “it is incumbent on the government to ensure that any access . . . is provided in accordance with applicable law” and the government obligation “is not diminished regardless of where defense counsel seeks access or whether they have pre-cleared their efforts with the trial counsel.” *Id.* at *8–10. In short, when the defense seeks classified information from a possessor of the information, it is incumbent on the possessor to do their homework to ensure they have disclosure authority before providing the information. *Id.*

⁶⁶ Trial counsel should identify to the agencies what information within a document need not be disclosed to the defense to meet the government’s discovery and production obligations, and can therefore be redacted. For example, assume trial counsel have reviewed a 100-page report with

that the information is still classified or controlled, and requesting consent to disclose the information.⁶⁷ In response, agencies can deny originating the information, declassify the information, consent to disclosure of the information to the defense with or without additional conditions, consent to disclosure of the information *and* its use at court-martial, or seek an assertion of privilege.⁶⁸

If an agency seeks to assert privilege, the trial counsel must work with the agency to draft a MRE 505(h) or MRE 506(h) motion and supporting enclosures, which should include a declaration invoking the privilege, the protected information itself, and any alternatives to full disclosure of the information that the agency offers to provide.⁶⁹ The privilege must be invoked by a declaration from the “head, or designee, of the executive or military department or government agency concerned” setting forth the basis for the privilege.⁷⁰ Although these are fairly straightforward requirements, counsel must always carefully assess whether the declarant is proper and has provided sufficient basis to adequately invoke

information originally classified by ten OCAs, but only one page of the report classified by a single OCA must actually be disclosed to the defense. There is no need to send the report to nine different agencies seeking disclosure consent for ninety-nine pages of non-disclosable information. Instead, trial counsel need only send the report to the one OCA who classified the one page of disclosable information, with the remaining portions of the report designated for redaction before being turned over to the defense. First, if the bulk of the classified information does not warrant disclosure, the defense likely has no need to know that information and providing it to the defense would therefore be improper. See EO 13,526, *supra* note 12, at 720. Second, it would be a significant waste of resources to have nine agencies review for disclosure a large volume of classified information that is not even relevant to the case.

⁶⁷ Because military justice differs from civilian practice where the defendant and counsel may not have security clearances, see *supra* note 45, trial counsel should ensure agencies understand the PO terms, that information will only be disclosed to eligible persons, and that counsel is not seeking declassification. If either counsel believes information is improperly classified, they can seek a mandatory declassification review, which compels an OCA to determine whether it should remain classified. See DODM 5200.01, VOL. 1, *supra* note 14, at 64–66.

⁶⁸ Conditions can include that the information be provided to the defense in specified facilities, restrictions on reproduction, etc. Trial counsel should carefully track which agencies provided disclosure consent over what documents to ensure all agencies have had a reasonable opportunity to assert privilege, particularly where there is an extensive amount of protected information or where documents have multiple originating agencies.

⁶⁹ MCM, *supra* note 11, MIL. R. EVID. 505(h), MIL. R. EVID. 506(h). Although agencies can invoke privilege to withhold information from the defense, the government must provide the full information to the military judge so that he can make the determinations required by MRE 505(h) and MRE 506(h), or risk sanctions. See *id.*

⁷⁰ MCM, *supra* note 11, MIL. R. EVID. 505(h)(1)(A), MIL. R. EVID. 506(d). For MRE 505, the declarant must “[set] forth the damage to the national security that the discovery of or access to such information reasonably could be expected to cause.” MCM, *supra* note 11, MIL. R. EVID. 505(h)(1)(A). For unclassified information, MRE 506 requires the declarant “[set] forth the detriment to the public interest that the discovery of or access to such information reasonably could be expected to cause.” MCM, *supra* note 11, MIL. R. EVID. 506(h)(1)(A).

⁷¹ Merely being an OCA does not make one a proper declarant to invoke privilege; rather, the declarant must be the actual head of the agency or that

the privilege.⁷¹

The military judge must review the motion—in camera, if requested by trial counsel⁷². The review is to determine if the information the government seeks to withhold is noncumulative and relevant to a legally cognizable defense, rebuttal of the prosecution case, or sentencing.⁷³ If the information does not meet this standard, the government need not disclose it to the defense in any form. If the information does meet the standard, the government can either fully disclose the information (with agency consent) or offer alternatives to full disclosure, including a redacted version, a summary, or a stipulation.⁷⁴ The judge must grant this request to use alternatives if the alternative “would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific . . . information.”⁷⁵

C. Using Protected Information in Court

Unlike with most evidence, both the government and

person’s designee. See MCM, *supra* note 11, MIL. R. EVID. 505(h)(1)(A), MIL. R. EVID. 506(d). If the declarant is a designee, the trial counsel should either request a written designation from the agency, or ensure the designee states her authority in her declaration. In most cases, the identification of the proper declarant is simple. For example, if classified information at issue was originally classified by an OCA within an Army command, the proper declarant would be the Secretary of the Army, or the Secretary’s designee. But identifying the right declarant can be trickier for agencies that have multiple reporting structures, such as the National Security Agency, which is part of both the DoD and the intelligence community. See *Frequently Asked Questions*, NAT’L SEC. AGENCY, <https://www.nsa.gov/about/faqs/oversight-faqs.shtml> (last visited Mar. 9, 2017). Trial counsel must be diligent in these situations to ensure they are seeking a declaration from a declarant with proper authority. See *United States v. Flannigan*, 28 M.J. 988, 990–91 (C.M.R. 1989) (dismissing a specification where the privilege was invoked by someone lacking authority to do so). The defense counsel may not be able to see the declaration if it is submitted for in camera review, but they can still educate the military judge of any concerns they have that a potential declarant may be improper.

⁷² MCM, *supra* note 11, MIL. R. EVID. 505(h)(2)(B), MIL. R. EVID. 506(h)(2)(B). Either party can request an on or off the record ex parte discussion with the military judge during this process, which the judge can grant for good cause. MCM, *supra* note 11, MIL. R. EVID. 505(b)(5), MIL. R. EVID. 506(c)(3). Trial counsel can use this discussion to discuss the details of the government’s motion, declaration, or potential alternatives to disclosure, while defense counsel can use the discussion to discuss their theory of the case or possible defenses to assist the judge in deciding whether to authorize disclosure of the protected information over the assertion of privilege.

⁷³ MCM, *supra* note 11, MIL. R. EVID. 505(h)(1)(B), MIL. R. EVID. 506(h)(1)(B).

⁷⁴ See MCM, *supra* note 11, MIL. R. EVID. 505(h)(2), MIL. R. EVID. 506(h)(2).

⁷⁵ See *id.* Trial counsel must closely coordinate alternatives to full disclosure with the owning agency. The trial counsel may have to write the first draft of any summaries or substitutions, and must understand which aspects of the protected information the agency seeks to safeguard so that they can provide the maximum amount of discoverable information to the defense while still protecting the agency interests. To streamline this process, trial counsel can draft the alternatives and get the agency’s concurrence on those alternatives early, and then add those products as another enclosure to the motion.

defense must provide notice to the other party and the military judge if they seek to use protected information in court. The defense must provide a brief description of the information it wants to use to the trial counsel and judge before arraignment or by the court's deadline.⁷⁶ Although this provision does not apply to the government, the rules allow a party seeking to use protected information to move for a hearing regarding its use, creating a de facto government notice requirement.⁷⁷ Once trial counsel receive defense notice or decide they want to use protected information in their own case, they must go back to the originating agencies to seek their consent, providing these agencies yet another opportunity to restrict the further disclosure of their information.⁷⁸

During a MRE 505(j) or MRE 506(j) hearing regarding the use of protected information in court—which may be conducted in camera⁷⁹—the military judge will review the information to determine if use of the information is “relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible” or is “relevant and material” to sentencing.⁸⁰ If the judge authorizes use of the protected information, the trial counsel

can request that the court order the use of an alternative to full disclosure; the judge must grant this motion if the alternative provides the accused “substantially the same ability to make his or her defense.”⁸¹ If the judge determines that alternatives are not sufficient and the trial counsel continues to object to defense use of the protected information, the judge “must issue any order that the interests of justice require,” which can include dismissal.⁸²

In addition to litigating the admissibility of protected information during these hearings, counsel should use this opportunity to finalize logistical and administrative preparations to close the courtroom to the public if required. The trial counsel has the primary burden of showing the substantive requirements to close proceedings to the public are met.⁸³ They must ensure the military judge makes detailed findings on these requirements on the record to avoid appellate issues⁸⁴ and that the judge provides appropriate instructions to the panel where the court was closed to hear

⁷⁶ See MCM, *supra* note 11, MIL. R. EVID. 505(i), MIL. R. EVID. 506(j) (stating the military judge can preclude the use of protected information if the defense fails to provide notice). Although the rules only require the defense to give a “brief description” of the information, the defense should be as specific as possible because failure to do so may delay the proceedings as the government seeks agency consent to use the information or may result in the judge precluding admission if she determines the defense did not comply with the notice requirement. The defense is not required to provide notice of discussions between counsel and the accused that result in disclosure of protected information, such as may occur when the accused discloses relevant classified information he already knows to cleared counsel. See *United States v. Schmidt*, 60 M.J. 1, 4 (C.A.A.F. 2004).

⁷⁷ See MCM, *supra* note 11, MIL. R. EVID. 505(j)(1), MIL. R. EVID. 506(j)(1) (stating the trial counsel must provide the defense with notice of the information at issue before the hearing). The motion for a MRE 505(j) or MRE 506(j) hearing is optional rather than required, but trial counsel effectively must move for a hearing if they need to litigate alternatives to full disclosure or discuss procedures to close the proceedings.

⁷⁸ Although this secondary consent opportunity is not stated in the rules, the requirements for a judicial determination that protected information meets the standards for admission into evidence, the potential use of alternatives, and the provision of remedies if the prosecution continues to object to disclosure following a judge's decision that alternatives may not be used indicate the agencies retain the discretion to restrict use of their information in court. See MCM, *supra* note 11, MIL. R. EVID. 505(j), MIL. R. EVID. 506(j).

⁷⁹ MCM, *supra* note 11, MIL. R. EVID. 505(j)(1)(B), MIL. R. EVID. 506(j)(1)(B) (hearing must be in camera if an OCA submits a declaration that public proceedings may disclose classified information, or if an agency head or designee submits a declaration that disclosure of unclassified information could damage public interest).

⁸⁰ MCM, *supra* note 11, MIL. R. EVID. 505(j)(1)(D) (also stating that in presentencing, classified information may be admitted only if no unclassified version is available). The MRE 506 standard requires the party seeking use of the information to show the evidence “is relevant to the guilt or innocence or to punishment of the accused, and is otherwise admissible.” MCM, *supra* note 11, MIL. R. EVID. 506(j)(1)(D).

⁸¹ MCM, *supra* note 11, MIL. R. EVID. 505(j)(2), MIL. R. EVID. 506(j)(2). In support of a MRE 505(j) motion, the trial counsel “may” submit a supporting declaration from an agency head or designee; this wording

suggests the declaration is not a requirement. See MCM, *supra* note 11, MIL. R. EVID. 505(j)(2)(B).

⁸² MCM, *supra* note 11, MIL. R. EVID. 505(j)(4), MIL. R. EVID. 506(j)(4). The military judge can also dismiss charges or take other action if the government fails to produce the original protected information to facilitate the judge's MRE 505(j) or MRE 506(j) review. See MCM, *supra* note 11, MIL. R. EVID. 505(f)(4)–(5), MIL. R. EVID. 506(f)(4)–(5); *Murphy*, 2008 CCA LEXIS 511, at *37–38 (holding military judge did not abuse discretion by ordering the maximum punishment members could adjudge was no punishment where government failed to provide classified information defense sought to use at sentencing for the military judge's MRE 505(j) review).

⁸³ These requirements include: “(1) . . . a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (2) closure is no broader than necessary to protect the overriding interest; (3) reasonable alternatives to closure were considered and found inadequate; and (4) the military judge makes case-specific findings.” MCM, *supra* note 11, R.C.M. 806(b)(5). Similar closure requirements apply during the preliminary hearing. See MCM, *supra* note 11, R.C.M. 405(i)(4). Trial counsel can demonstrate an overriding interest exists by providing a declaration from an OCA (for classified information) or agency head or designee (for CUI) establishing the information is classified or protected, and detailing the potential damage disclosure of the information could cause. See MCM, *supra* note 11, MIL. R. EVID. 505(k)(3); *United States v. Grunden*, 2 M.J. 116, 120–22 (C.M.A. 1977) (recognizing the presentation of “classified or security matters” as a potential basis for excluding the public during courts-martial and stating the trial counsel must demonstrate the classified nature of the materials). Counsel can establish the closure is no broader than necessary by ensuring—on a witness-by-witness, question-by-question basis—that no more than those portions of the proceedings where protected information will be discussed are closed. *Id.* at 120–23 (“In excising the public from the trial, the trial judge employed an ax in place of the constitutionally required scalpel.”). Finally, counsel can meet the third element by ensuring the judge considers all alternatives to closure that would allow consideration of the evidence without actually disclosing classified information or CUI.

⁸⁴ See *United States v. Ortiz*, 66 M.J. 334, 342 (C.A.A.F. 2008) (finding “erroneous deprivation of the right to a public trial is a structural error, which requires this Court to overturn the Appellant's conviction without a harmlessness analysis” where the trial judge failed to make sufficient findings on the record to justify closure).

classified evidence.⁸⁵

D. Post-Trial Considerations

Because protected information remains protected both during and after a court-martial, properly processing the record can be complicated in cases with a large volume of protected information, or significant litigation over discovery or admission of such information. Exhibits and transcript portions that are classified or otherwise protected should be placed under seal during the trial and after its conclusion.⁸⁶ Furthermore, the trial counsel may have to ensure that protected information that was not offered or even provided to the defense becomes part of the record as the rules require that if any information is withheld from the accused over objection, the original information and the government's motion must be sealed and attached as an appellate exhibit.⁸⁷ Finally, MRE 505 and MRE 506 require that the military judge seal and preserve records from an in camera hearing if she determines the protected information at issue cannot be disclosed in court.⁸⁸ Due to the multiple ways in which portions of the record can be sealed, trial counsel must always consider the record whenever protected information arises in the case, and ensure the court reporter and others involved in post-trial are cognizant of their responsibilities to safeguard the information.

V. Conclusion

Classified or otherwise sensitive government information can greatly increase the complexity, visibility, and number of interested parties in what would otherwise be a simple court-martial. Though the procedures governing the handling and use of this information in a court-martial and the consequences of failing to abide by these rules can be daunting, proper planning, preparation, and resourcing will ease both the burden and the risk. Counsel on both sides of the courtroom must allow sufficient time to properly work through these issues, ensure they properly resource their

teams with knowledgeable personnel, and draw from the experience of peers who have previously worked with protected information to safeguard this sensitive information and best represent the interests of their client.

⁸⁵ See *Grunden*, 2 M.J. at 123–24; U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK 1124–27 (10 Sept. 2014) (detailing instructions to be given prior to the first closure, during findings, and upon excusal).

⁸⁶ See MCM, *supra* note 11, MIL. R. EVID. 505(k)(1)(B), MIL. R. EVID. 506(l)(2) (stating the military judge may, upon motion of the government and submission of a declaration from an OCA (for classified information) or agency head or designee (for unclassified information), seal exhibits containing protected information in accordance with RCM 1103A for any period after trial necessary to prevent disclosure).

⁸⁷ MCM, *supra* note 11, MIL. R. EVID. 505(l), MIL. R. EVID. 506(m). The trial counsel should discuss this requirement with OCAs early as some agencies may not allow some information to leave their facilities; the trial counsel may consequently have to coordinate with the agency, and gain approval from the judge, for parts of the appellate record to remain in the custody of the intelligence community. Defense counsel should note that RCM 1103A includes appellate defense counsel as a reviewing authority. See MCM, *supra* note 11, R.C.M. 1103A(b)(4). *But see* *United States v. Rivers*, 49 M.J. 434, 437–38 (C.A.A.F. 1998) (finding appellate defense counsel could not review material withheld from the defense at trial under

MRE 506); *United States v. Romano*, 46 M.J. 269, 275 (C.A.A.F. 1997) (finding appellate defense counsel could only review material withheld from defense at trial under MRE 505 to the extent permitted by the Court of Criminal Appeals). Although the language of RCM 1103A as of the publication date of this article suggests that appellate defense counsel can review information at the appellate level that was withheld from defense counsel at trial pursuant to MRE 505 or MRE 506, draft amendments to RCM 1103A in a proposed Executive Order scheduled for signature no later than 23 December 2017 remove appellate defense counsel and appellate government counsel from the definition of reviewing and appellate authorities, and permit appellate counsel to review sealed materials only upon authorization by an appropriate reviewing or appellate authority. Memorandum from Dep't of Def. Gen. Counsel to Chair, Joint Serv. Comm. on Mil. Justice, subject: Public Notice of Proposed Changes to the Manual for Courts-Martial (26 June 2017) (Annex 1 of the proposed Executive Order is an attachment to this memorandum and is available at <http://jsc.defense.gov/Portals/99/Documents/ANNEX1.pdf?ver=2017-07-19-103116-403>).

⁸⁸ MCM, *supra* note 11, MIL. R. EVID. 505(j)(3), MIL. R. EVID. 506(j)(3).

Appendix A. Definitions

This appendix provides definitions for terms unique to working with classified information, controlled unclassified information, and courts-martial involving protected information. The definitions for the categories of protected information include common markings for each to aid counsel in identifying the information. This appendix is UNCLASSIFIED. All classification markings are for illustration purposes only.

Alternative Compensatory Control Measure (ACCM): Department of Defense classified information that requires enhanced need-to-know and access protections beyond those of normal safeguarding measures. These protections include maintenance of an access control list containing the names of the persons authorized to access the information and a specific read-on requirement.⁸⁹ This information will be marked ACCM, typically followed by a two-word program nickname.⁹⁰

Classification Guide: A document “issued by an original classification authority that identifies the elements of information regarding a specific subject that must be classified and establishes the level and duration of classification.”⁹¹ For example, a classification guide may contain guidance indicating that information regarding troop movements or a specific military capability must be classified at a certain level.

Classified Information: “[A]ny information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulations, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. § 2014(y).”⁹² Information is broadly defined as “any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics.”⁹³ Information can be classified at one of the following levels:

Confidential: “[I]nformation, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security”⁹⁴ Information classified at this level will be marked CONFIDENTIAL or C.⁹⁵

Secret: “[I]nformation, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.”⁹⁶ Information classified at this level will be marked SECRET or S.⁹⁷

Top Secret: “[I]nformation, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.”⁹⁸ Information classified at this level will be marked TOP SECRET or TS.⁹⁹

Compilation: An aggregation of preexisting pieces of unclassified information that becomes classified because the combined information meets the standards for classification.¹⁰⁰ For example, the name of an organization and a specific operation may both be unclassified, but a document indicating that organization was involved in that operation could be classified.

Controlled Unclassified Information (CUI): “Unclassified information that requires safeguarding or dissemination controls.”¹⁰¹ Controlled unclassified information does not include “information a non-executive branch entity possesses and maintains in its own systems that did not come from, or was not created or possessed by or for, an executive branch agency or

⁸⁹ See DoDM 5200.01, VOL. 3, *supra* note 14, at 29–33.

⁹⁰ DoDM 5200.01, VOL. 2, *supra* note 8, at 97–98.

⁹¹ EO 13,526, *supra* note 12, at 727.

⁹² MCM, *supra* note 11, MIL. R. EVID. 505(b)(1).

⁹³ EO 13,526, *supra* note 12, at 728.

⁹⁴ *Id.* at 708.

⁹⁵ DoDM 5200.01, VOL. 2, *supra* note 8, at 64.

⁹⁶ EO 13,526, *supra* note 12, at 707–08.

⁹⁷ DoDM 5200.01, VOL. 2, *supra* note 8, at 64.

⁹⁸ EO 13,526, *supra* note 12, at 707.

⁹⁹ DoDM 5200.01, VOL. 2, *supra* note 8, at 64.

¹⁰⁰ EO 13,526, *supra* note 12, at 711, 727.

¹⁰¹ DoDM 5200.01, VOL. 4, *supra* note 7, at 36.

an entity acting for an agency.”¹⁰² Information can be designated as CUI or decontrolled—that is, determined to no longer be entitled to CUI safeguarding and dissemination controls—by any authorized holder of the information, so long as those actions are done in accordance with implementing regulations.¹⁰³ The National Archives and Records Administration maintains a registry of twenty-three categories and eighty-three subcategories of CUI, and markings, safeguarding, and dissemination procedures for CUI from across all government agencies.¹⁰⁴ This information will be marked CONTROLLED or CUI.¹⁰⁵

Department of Defense Unclassified Controlled Nuclear Information: “Unclassified information on security measures (including security plans, procedures, and equipment) for the physical protection of DoD [Special Nuclear Material], [Special Nuclear Material] equipment, [Special Nuclear Material] facilities, or nuclear weapons in DoD custody, designated and controlled pursuant to the provisions of [Department of Defense Directive 5210.83].”¹⁰⁶ This information will be marked DOD UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION, DOD UCNI, or DCNI.¹⁰⁷

Department of State Sensitive but Unclassified: “Information originated within the [Department of State] which that agency believes warrants a degree of protection and administrative control and meets the criteria for exemption from mandatory public disclosure in accordance with provisions of the [Freedom of Information Act].”¹⁰⁸ This information will be marked SENSITIVE BUT UNCLASSIFIED, SBU, or SBU-NOFORN.¹⁰⁹

Drug Enforcement Agency Sensitive Information: “Unclassified information that the [Drug Enforcement Agency] originates and that requires protection against unauthorized disclosure to protect sources and methods of investigative activity, evidence, and the integrity of pretrial investigative reports.”¹¹⁰ This information will be marked DEA SENSITIVE or DSEN.¹¹¹

Derivative Classification: “[T]he incorporating, paraphrasing, restating, or generating in new form information that is already classified, and marking the newly developed material consistent with the classification markings that apply to the source information.”¹¹² For example, a motion incorporating classified information that was originally classified Secret by an original classification authority would be derivatively classified Secret because it contains that classified material.

Downgrading: “[A] determination by a declassification authority that information classified and safeguarded at a specified level shall be classified and safeguarded at a lower level.”¹¹³

Ex parte: “[A] discussion between the military judge and either the defense counsel or prosecution, without the other party or the public present. This discussion can be on or off the record, depending on the circumstances. The military judge will grant a request for an ex parte discussion or hearing only after finding that such discussion or hearing is necessary to protect classified information or other good cause.”¹¹⁴ Counsel can request these discussions to confidentially discuss MRE 505(h) and (j), and MRE 506(h) and (j) motions with the military judge.

Foreign Intelligence Surveillance Act Information (FISA): Information collected pursuant to the Foreign Intelligence Surveillance Act that can only be used in a criminal proceeding with advance authorization from the Attorney General of the United States. This information will be marked FISA and should also carry a statement regarding authorized uses.¹¹⁵ Counsel

¹⁰² *Controlled Unclassified Information (CUI)*, NAT’L ARCHIVES & REC. ADMIN., <https://www.archives.gov/cui/registry/cui-glossary.html> (last visited Mar. 9, 2017).

¹⁰³ *See id.*

¹⁰⁴ *See CUI Registry—Categories and Subcategories*, *supra* note 10.

¹⁰⁵ NAT’L ARCHIVES & REC. ADMIN., MARKING CONTROLLED UNCLASSIFIED INFORMATION 6 (2016), <https://www.archives.gov/files/cui/20161206-cui-marking-handbook-v1-1.pdf>.

¹⁰⁶ DoDM 5200.01, VOL. 4, *supra* note 7, at 37.

¹⁰⁷ *Id.* at 20–22.

¹⁰⁸ *Id.* at 37.

¹⁰⁹ *Id.* at 24–25.

¹¹⁰ *Id.* at 36.

¹¹¹ *Id.* at 25–26.

¹¹² EO 13,526, *supra* note 12, at 728.

¹¹³ *Id.* at 728.

¹¹⁴ MCM, *supra* note 11, MIL. R. EVID. 505(b)(5).

¹¹⁵ DoDM 5200.01, VOL. 2, *supra* note 8, at 107–08.

encountering this category of information will have to coordinate with the Department of Justice before further disseminating the information.

For Official Use Only: Information whose disclosure to the public “would reasonably be expected to cause a foreseeable harm to an interest protected by one or more provisions of the [Freedom of Information Act],” including information that qualifies for protection under the Privacy Act of 1974.¹¹⁶ This information will be marked FOR OFFICIAL USE ONLY or FOUO.¹¹⁷

In Camera Hearing: “[A] session under Article 39(a) from which the public is excluded.”¹¹⁸ Counsel can request in camera hearings pursuant to MRE 505(j) or MRE 506(j) to discuss the use at trial of classified information or information subject to a claim of privilege under MRE 506.¹¹⁹

In Camera Review: “[A]n inspection of documents or other evidence conducted by the military judge alone in chambers and not on the record.”¹²⁰ Counsel can request in camera review of materials submitted pursuant to a motion under MRE 505(h) or MRE 506(h), and can further request that any materials provided in support of the motion not be disclosed to the accused.¹²¹

Intelligence Community (IC): Seventeen “executive branch agencies and organizations that work separately and together to conduct intelligence activities necessary for the conduct of foreign relations and the protection of the national security of the United States.”¹²² The Office of the Director of National Intelligence coordinates the IC, and members include the intelligence organizations of the military departments and the Coast Guard, the Central Intelligence Agency, Defense Intelligence Agency, Department of Energy, Department of Homeland Security, Department of State, Department of Treasury, Drug Enforcement Agency, Federal Bureau of Investigation, National Geospatial-Intelligence Agency, National Reconnaissance Office, and National Security Agency.¹²³

Joint Personnel Adjudication System (JPAS): The Department of Defense’s personnel security management system on which security managers can verify a person’s eligibility to access classified information.¹²⁴

Joint Worldwide Intelligence Communications System (JWICS): An information system accredited to process Top Secret and Sensitive Compartmented Information.¹²⁵

Law Enforcement Sensitive: Information from the Department of Justice or other law enforcement agencies that “was compiled for law enforcement purposes and should be afforded appropriate security in order to protect certain legitimate government interests.”¹²⁶ This information will be marked LAW ENFORCEMENT SENSITIVE or LES.¹²⁷

Limited Distribution: “[A] select group of sensitive, unclassified imagery or geospatial information and data created or distributed by [the National Geospatial-Intelligence Agency] or information, data, and products derived from such information.”¹²⁸ This information will be marked LIMITED DISTRIBUTION or DS.¹²⁹

¹¹⁶ DoDM 5200.01, VOL. 4, *supra* note 7, at 37.

¹¹⁷ *Id.* at 11–18.

¹¹⁸ MCM, *supra* note 11, MIL. R. EVID. 505(b)(3).

¹¹⁹ *See* MCM, *supra* note 11, MIL. R. EVID. 505(j)(1)(B), MIL. R. EVID. 506(j)(1)(B).

¹²⁰ MCM, *supra* note 11, MIL. R. EVID. 505(b)(4).

¹²¹ *See* MCM, *supra* note 11, MIL. R. EVID. 505(h)(2)(B), MIL. R. EVID. 506(h)(2)(B).

¹²² *ODNI FAQ*, OFF. OF THE DIR. OF NAT’L INTELLIGENCE, <https://www.dni.gov/index.php/about/faq> (last visited Mar. 9, 2017).

¹²³ *Members of the IC*, OFF. OF THE DIR. OF NAT’L INTELLIGENCE, <https://www.dni.gov/index.php/intelligence-community/members-of-the-ic> (last visited Mar. 9, 2017).

¹²⁴ *See Joint Personnel Adjudication System (JPAS) Frequently Asked Questions (FAQs)*, DEF. MANPOWER DATA CTR., https://www.dmdc.osd.mil/psawebdocs/docRequest/filePathNm=PSA/appId=560/app_key_id=1559jsow24d/siteId=7/ediPnId=0/userId=public/fileNm=JPAS+General+FAQ.pdf (last visited Mar. 9, 2017).

¹²⁵ *See* DoDM 5200.01, VOL. 2, *supra* note 8, at 71.

¹²⁶ DoDM 5200.01, VOL. 4, *supra* note 7, at 37–38.

¹²⁷ *Id.* at 18–20.

¹²⁸ *Id.* at 38.

¹²⁹ *Id.* at 22–24.

Mandatory Declassification Review: “[T]he review for declassification of classified information in response to a request for declassification” made pursuant to Executive Order 13,526 or implementing regulations.¹³⁰ Counsel can request a declassification review if they believe information was improperly classified or should no longer be classified.

North Atlantic Treaty Organization (NATO) Classified Information: “[I]nformation prepared by or for NATO and information of the NATO member nations that has been released into the NATO security system.”¹³¹ This information will be marked (depending on its classification level) COSMIC TOP SECRET, CTS, COSMIC TOP SECRET BOHEMIA, CTS-B, NATO SECRET, NS, NATO CONFIDENTIAL, NC, NATO RESTRICTED, NR, NATO UNCLASSIFIED, NU, COSMIC TOP SECRET ATOMAL, CTS-A, SECRET ATOMAL, NS-A, or CONFIDENTIAL ATOMAL, NC-A.¹³²

Need-to-Know: “A determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.”¹³³

Not Releasable to Foreign Nationals: Information an original classification authority has determined may not be provided to any foreign governments, international organizations, foreign nationals, or immigrant aliens without the original classification authority’s approval. This information will be marked NOFORN or NF.¹³⁴

Originator Controlled: Information whose dissemination—either in original or derivative form—is fully controlled by the originator or original classification authority. This information will be marked Originator Controlled, ORCON or OC.¹³⁵ Originator controlled information should never be further disseminated without coordinating with the original classification authority.

Original Classification Authority (OCA): “[A]n individual authorized in writing, either by the President, the Vice President, or by agency heads or other officials designated by the President, to classify information in the first instance.”¹³⁶ A single organization may have several OCAs authorized to classify information at specific levels. The general counsel or office of the staff judge advocate of an organization should be able to provide a list of current OCAs within that organization.

Read-On: Instructions a person requires before accessing SCI, SAP, ACCM, or NATO classified information that “convey[s] the unique nature, unusual sensitivity, and special security safeguards and practices” the individual is responsible for when accessing that information. Read-ons are also be called indoctrinations.¹³⁷

Special Access Program (SAP): “[A] program established for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level.”¹³⁸ These classes of information require high-level approval before a person is granted access and have unique read-on requirements.¹³⁹ Special Access Program information will be marked SPECIAL ACCESS REQUIRED or SAR, typically followed by a two-word program nickname or one-word codeword. Additionally, information marked HANDLE VIA SPECIAL ACCESS CHANNELS ONLY or HVSACO must be handled within SAP channels.¹⁴⁰

Sensitive Compartmented Information (SCI): “[C]lassified national intelligence information concerning, or derived from, intelligence sources, methods or analytical processes that require handling within formal access control systems established by the Director of National Intelligence (DNI).”¹⁴¹ Sensitive Compartmented Information can, depending on its content, be

¹³⁰ EO 13,526, *supra* note 12, at 729.

¹³¹ DoDM 5200.01, VOL. 2, *supra* note 8, at 66.

¹³² *Id.* at 66–67.

¹³³ DoDM 5200.01, VOL. 3, *supra* note 14, at 119.

¹³⁴ DoDM 5200.01, VOL. 2, *supra* note 8, at 63.

¹³⁵ *See id.* at 88–89.

¹³⁶ EO 13,526, *supra* note 12, at 729.

¹³⁷ DoDM 5105.21, VOL. 3, *supra* note 15, at 12.

¹³⁸ EO 13,526, *supra* note 12, at 729.

¹³⁹ DoDM 5205.07, VOL. 2, *supra* note 14, at 8–11.

¹⁴⁰ DoDM 5200.01, VOL. 2, *supra* note 8, at 72–73.

¹⁴¹ *Id.* at 70.

marked SCI, G, GAMMA, HCS, HUMINT, KDK, KLONDIKE, COMINT, SI, TK, or TALENT KEYHOLE.¹⁴² A person seeking access to SCI must have a clearance eligible for SCI access and must have already been read-on to the compartment at issue.¹⁴³

Secret Internet Protocol Router Network (SIPR): An information system accredited to process Confidential or Secret information.¹⁴⁴

Special Security Officer (SSO): Personnel within a command who manage all aspects of the SCI security program.¹⁴⁵

¹⁴² *Id.* at 70–71.

¹⁴³ *See* DoDM 5105.21, VOL. 3, *supra* note 15, at 12.

¹⁴⁴ *See* DoDM 5200.01, VOL. 3, *supra* note 14, at 110–11.

¹⁴⁵ U.S. DEP'T OF DEF., MANUAL 5105.21, VOL. 1, SENSITIVE COMPARTMENTED INFORMATION (SCI) ADMINISTRATIVE SECURITY MANUAL: ADMINISTRATION OF INFORMATION AND INFORMATION SYSTEMS SECURITY 12 (19 Oct. 2012).

Appendix B. Resources to Coordinate

The table below illustrates the various resources counsel may have to coordinate in a protected information case. Although most of the items will apply only in classified information cases, counsel working on cases involving controlled unclassified information should review the information security guidelines for the information at issue to determine whether they must coordinate any of the resources listed below.

Resource	Government	Defense	Court
Security clearance (Secret, Top Secret, or SCI, as required)	Judge Advocates, 27Ds, convening authority, SJA, security officer, government experts, government witnesses	Accused, counsel, 27Ds, security officer, defense experts, defense witnesses	Military Judge/ Preliminary Hearing Officer, security officer, court reporter, members, bailiffs, escorts
Access authorization and read-ons (SCI, SAP, ACCM, NATO, as required)	Judge Advocates, 27Ds, convening authority, SJA, security officer, government experts, government witnesses	Accused, counsel, 27Ds, security officer, defense experts, defense witnesses	Military Judge/ Preliminary Hearing Officer, security officer, court reporter, members, bailiffs, escorts
Security officer	X	X (part of defense team with confidentiality)	X
Spillage checklist	X	X	Recommended
Secure facility/SCI facility space (as required)	X	X	X
Storage space in safes	X	X	X
SIPR/JWICS computer	X	X	X
SIPR/JWICS phone	X	Recommended	Optional
SIPR/JWICS printer/ copier	X	X	X
SIPR/JWICS email	X	Recommended	Recommended
SIPR/JWICS court reporter recording equipment			X
Classified information keyword lists			X (drafted by government)
Access lists for closed sessions			X (drafted by government with defense input)
Closure/opening security checklists			X
Closure/opening scripts and instructions			X

Appendix C. Security Incident Response

The checklist below is a sample counsel can use to document and supervise the internal office response to any spillage or security incidents that may occur when working with classified information. Security incidents most commonly occur when classified information is disclosed to a person not eligible to receive it (for example, a person with a Secret clearance reviews Top Secret or SCI information, or a person reviews ACCM or SCI information without having previously been read-on), or when classified information is processed on information systems not accredited to process information at that classification (for example, Secret information is processed on unclassified systems, or Top Secret or SCI information is processed on a system other than JWICS).¹⁴⁶

Counsel using the checklist below should tailor their specific response process to their particular situation as not all steps apply to all scenarios. Furthermore, counsel should always coordinate with their own command's security and information management sections when creating their office-internal procedures to ensure they are following all command guidelines or standard operating procedures for security incident response. In addition to the actions below, the command's security and information management sections will conduct their own response and remediation actions, which could include an inquiry or investigation into the incident.¹⁴⁷

Date Completed	Task	Comments
	Person exposed stops reading information as soon as the material is discovered	
	Person exposed immediately disconnects any computers or other information systems affected from any networks	
	Person exposed does not expose others without proper access to the material	
	Person exposed safeguards the material until proper authority takes custody	
	Person exposed informs supervising judge advocate	
	Supervising judge advocate informs security officer, and security manager/SSO/ACCM control officer/NATO control officer (as appropriate based on nature of the material)	
	Supervising judge advocate ensures other copies of the material do not reside on other information systems or computers, in other case files, or in other areas of the office	
	Supervising judge advocate ensures team work product has not incorporated the material	
	Security officer secures the material and ensures persons without proper access cannot be exposed (for example, secures media, secures documents, restricts access to affected share drive folders, etc.)	
	Supervising judge advocates determines if the team has further disseminated the material and informs all potential recipients	
	Security officer ensures the material is transported to the proper storage facility using a courier or that access to the material is restricted to only those with proper access	
	Security officer verifies clearances and read-ons of all persons exposed on JPAS	

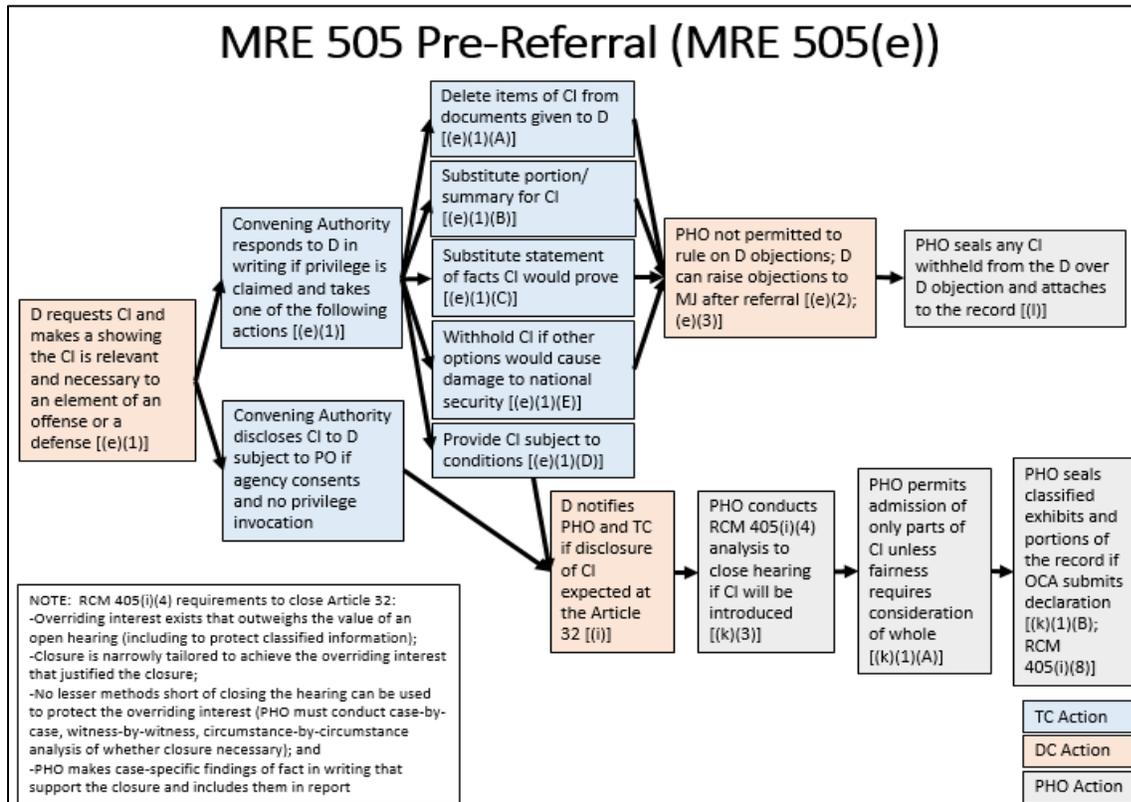
¹⁴⁶ See *supra* note 50 and accompanying text.

¹⁴⁷ See AR 380-5, *supra* note 9, at 104–08.

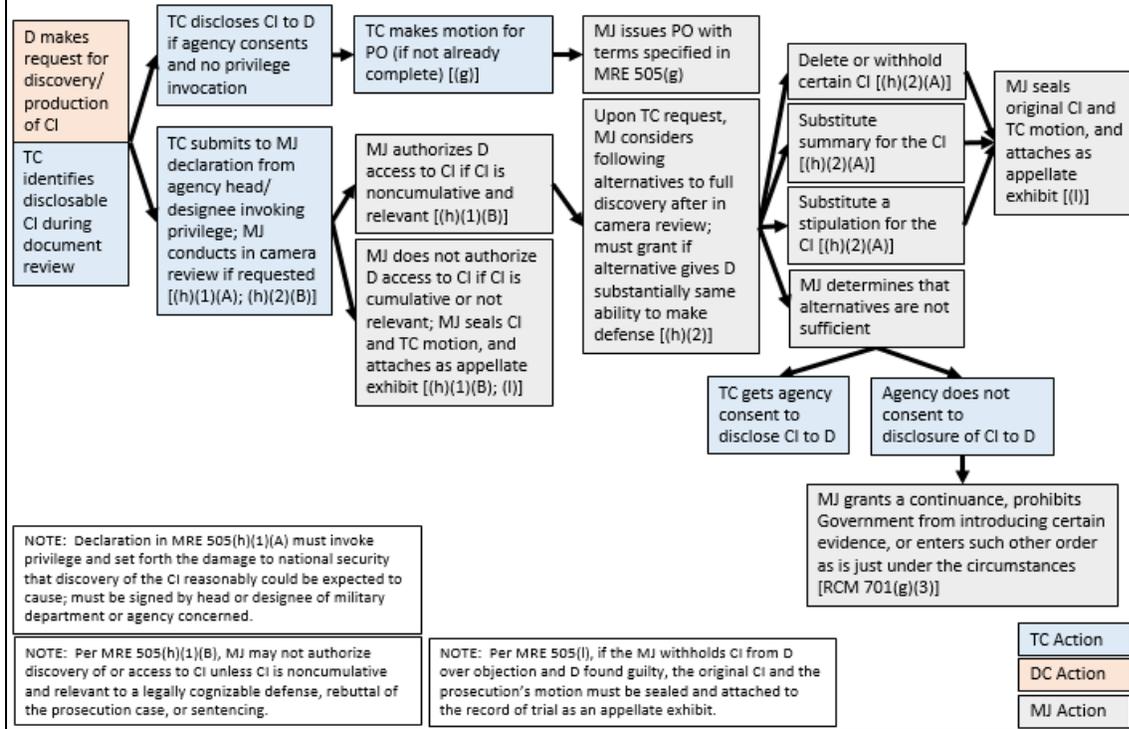
	(For SCI material) If person exposed does not have adequate clearance for SCI, security officer has him fill out inadvertent disclosure form and provide to SSO	
	(For ACCM and NATO Information) If person exposed does not have required read-on, security officer coordinates with control officer to execute read-on if necessary	
	Supervising judge advocate informs contact for organization that provided the material/OCA about the incident	
	Supervising judge advocate verifies proper classification of the material with OCA contact	
	Supervising judge advocate/security officer inform command security manager/SSO/ACCM control officer/NATO control officer (as appropriate based on the nature of the material) and command G6 (if applicable) if document is verified by OCA to be properly classified in order to coordinate sanitizing all affected media	
	Supervising judge advocate informs Staff Judge Advocate or Senior Defense Counsel of incident	
	Supervising judge advocate reports incident to military judge if required by the protective order	

Appendix D. MRE 505 and MRE 506 Roadmaps

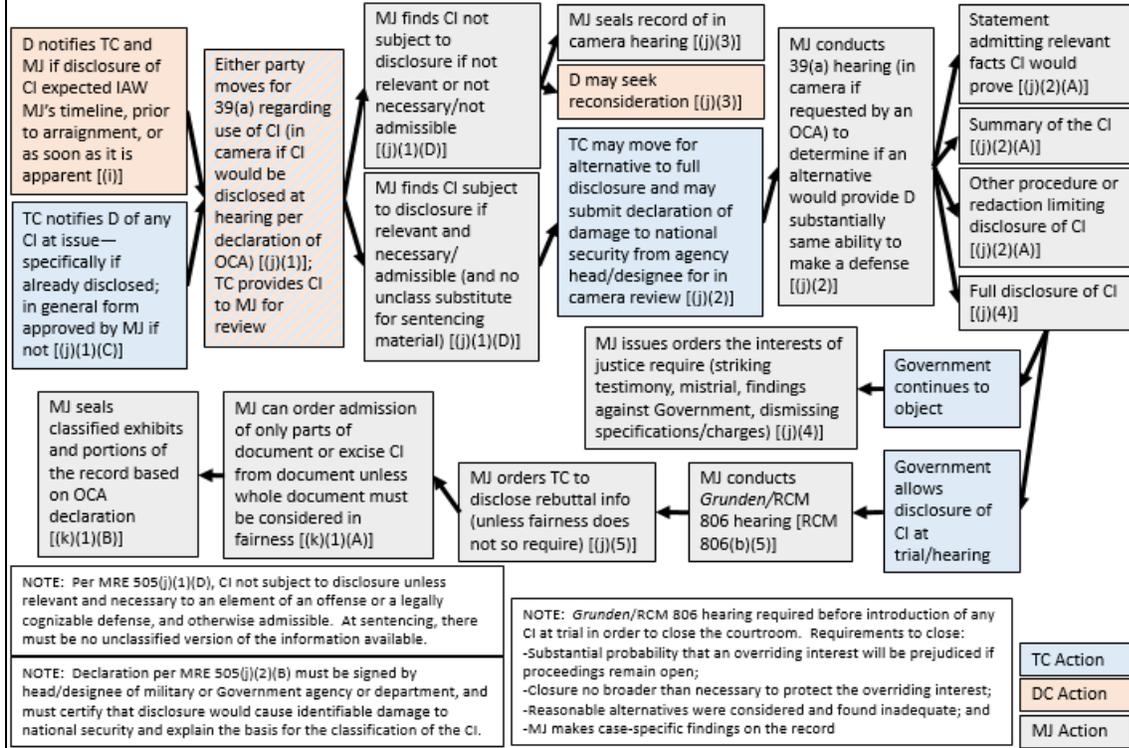
The following flowcharts illustrate the operation of MRE 505 regarding classified information (CI) and MRE 506 regarding CUI during the preliminary hearing, discovery, and at trial. This appendix is provided to help counsel visualize the operation of these rules throughout the proceedings. The actions of the trial counsel (TC), defense counsel (DC), and preliminary hearing officer (PHO)/military judge (MJ) are color-coded as indicated on the charts. The citations in brackets (i.e., []) indicate the particular sections of the rule referenced in that step. Text boxes have been added to provide additional information where required.



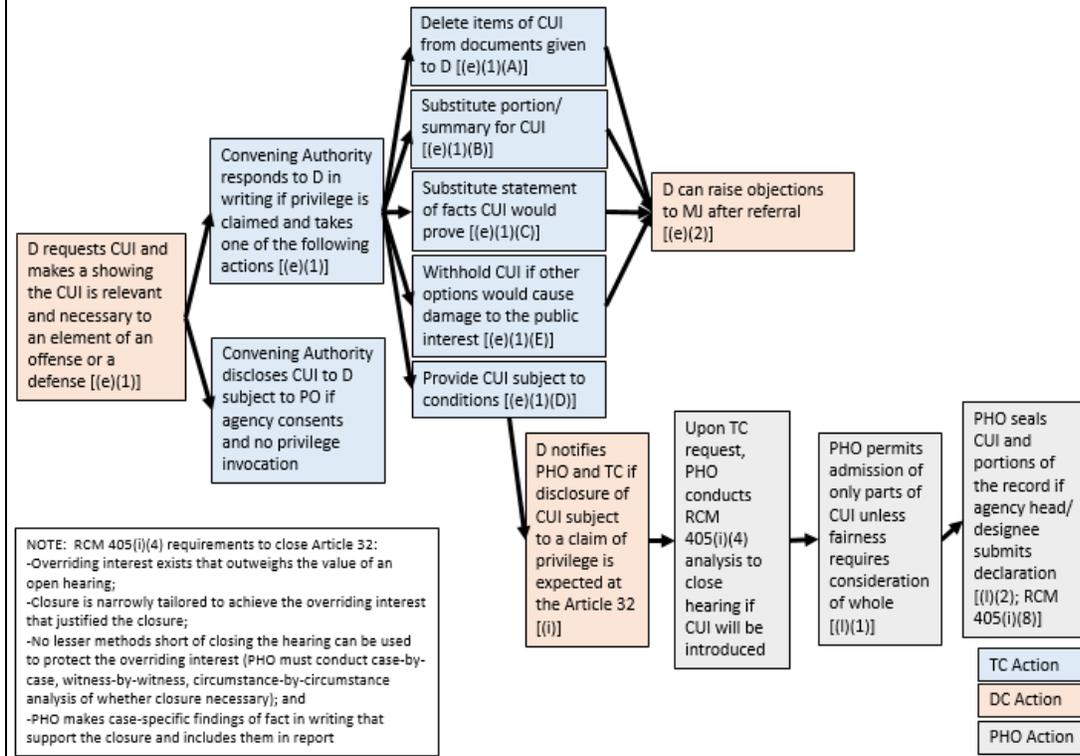
MRE 505 at Discovery (MRE 505(h))



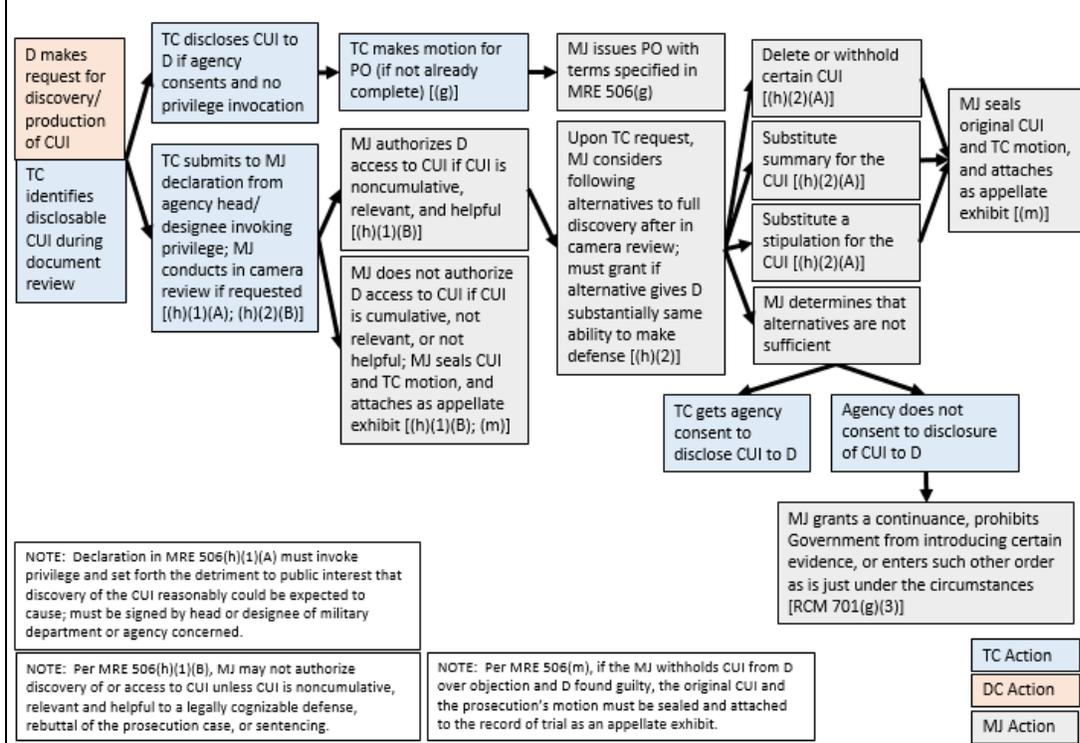
MRE 505 at Trial/39(a) (MRE 505(i), (j))



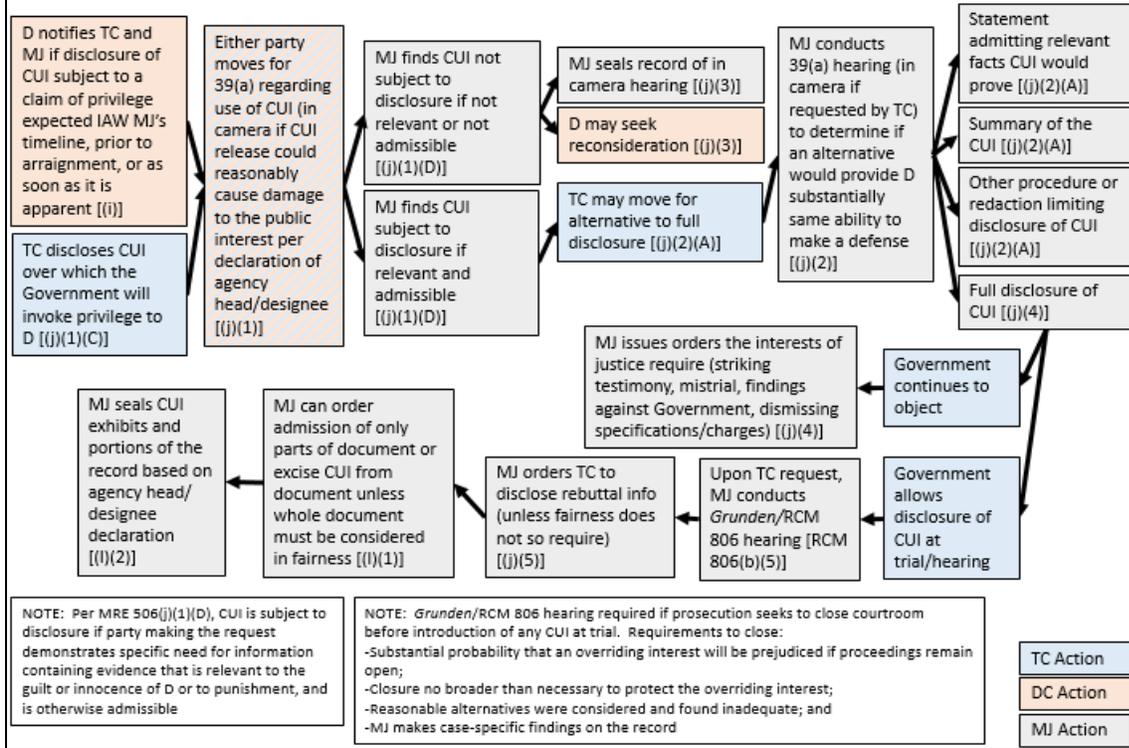
MRE 506 Pre-Referral (MRE 506(e))



MRE 506 at Discovery (MRE 506(h))



MRE 506 at Trial/39(a) (MRE 506(i), (j))



Appendix E. Closure/Opening Checklists

The checklists below are sample procedures counsel can propose for closure and opening of the court-martial or preliminary hearing in accordance with RCM 806 to hear classified evidence.¹⁴⁸ When transitioning to a closed session to hear classified evidence, counsel must ensure that—in addition to the normal precautions for closed sessions—all information security requirements have been met to hear classified evidence in the courtroom or hearing room. Counsel using the checklists below should tailor their process to their particular situation. Furthermore, counsel should always coordinate with their own command’s information security personnel when creating their checklists to ensure they are following all command guidelines or standard operating procedures.

Closure Task	Responsible Party
Identify possible introduction of classified information in the proceedings	Trial Counsel/Defense Counsel/Security Officers
Conduct RCM 806 discussion; make decision to close the courtroom and order closure	Military Judge
Make closure announcement to the gallery to clear the courtroom	Bailiff
Inform Military Police (MP) that the proceedings have been closed	MP NCOIC
Physically clear courtroom of all personnel not on access list and all transmitting electronic devices; verify all personnel present against access list	Court Security Officer
Conduct sweep of courtroom and surrounding area for electronic devices	Court Security Officer
Post closure notice and guards outside of courtroom	MP NCOIC
Disconnect audio and video feeds to overflow rooms (if applicable)	Operator
Retrieve classified information to be offered into evidence, classified information recording equipment and media, and Military Judge/counsel classified information work product from safes	Security Officers
Transition from Unclassified to Classified recording equipment and media	Court Reporter
Verify that feeds to overflow rooms are inactive (if applicable)	Court Security Officer
Final verification of all personnel present against access list	Court Security Officer
Announcement on the record specifying personnel present and classification level of the current portion of the proceedings	Military Judge

¹⁴⁸ These checklists are based on drills to close and open the courtroom proposed by the government in the Manning court-martial. Those drills were proposed in Appellate Exhibit 479, which contains significantly more detailed procedures, and proposed scripts for closing and opening the court. Appellate Exhibit 479 can be downloaded from the online reading room for the Manning court-martial. See *Chelsea (Bradley) Manning Court-Martial Documents*, *supra* note 4.

Opening Task	Responsible Party
Verify no further classified information will be offered during current portion of the proceedings	Military Judge
Transition from Classified to Unclassified recording equipment and media	Court Reporter
Prepare unclassified summary of the subject matter of the classified proceedings for reading onto unclassified record	Military Judge
Security Officers and pertinent OCA representatives review the unclassified summary	Security- Officers/OCA Representatives
Collect all classified exhibits, Military Judge/counsel classified information work product, and any other documents/media containing classified information	Security Officers
Return all classified information to safes	Security Officers
Perform final check to ensure no classified information remains in courtroom	Court Security Officer
Inform all present that classified information may no longer be discussed in the courtroom and reopen courtroom	Military Judge
Inform MP detail the proceedings will resume upon reconnection of audio and video feeds (if applicable)	MP NCOIC
Inform spectators that the proceedings will resume upon reconnection of audio and video feeds (if applicable)	MP NCOIC
Remove closure notice from outside of courtroom and permit spectators to enter courtroom	MP NCOIC
Reconnect audio and video feeds to overflow rooms (if applicable)	Operator
Verify that feeds to overflow rooms are active (if applicable)	Operator
Announcement on the record specifying personnel present and that the current portion of the proceedings is unclassified; read the unclassified summary onto the record	Military Judge

Book Review

Washington's Immortals: The Untold Story of an Elite Regiment Who Changed the Course of the Revolution¹

Reviewed by Major Rebecca M. Harvey*

*Old men forget: yet all shall be forgot,
But he'll remember with advantages
What feats he did that day: then shall our names
Familiar in his mouth as household words
Harry the king, Bedford and Exeter,
Warwick and Talbot, Salisbury and Gloucester,
Be in their flowing cups freshly remember'd.
This story shall the good man teach his son...
From this day to the ending of the world,
But we in it shall be remember'd;
We few, we happy few, we band of brothers.²*

I. Introduction

Few names become “familiar . . . as household words,”³ even the names of heroes. Most are eventually lost to time despite the devotion of their comrades at arms to their memories, despite the written narratives of poets and historians, and, despite the intentions of the civilizations their sacrifice gave birth to. The best authors are able to call forth the ghosts of the lost and summon them to our tables for a time by sharing their stories in gripping and immediate ways. For many students of military history, one such author is Steven Ambrose, whose seminal work on World War II, *Band of Brothers*, brought to life the men of Easy Company, ensuring their story would remain for subsequent generations.⁴ *Washington's Immortals* represents Patrick O'Donnell's ambitious attempt to replicate the literary alchemy that brought those veterans to life for millions of readers by rendering martial prose on behalf of Revolutionary War veterans.⁵ The narrative focuses on a lesser known group

of Revolutionary War heroes described by the author as the Maryland 400, or the Immortal 400.⁶

II. Background

In December 1774 a group of prominent Maryland men assembled under the leadership of Baltimore native Mordecai Gist and formed a militia that would become known as the Baltimore Independent Company.⁷ They were sixty men of “honor, family, and fortune.”⁸

Early in the tale, O'Donnell relates that the Company received a letter from an anonymous militia supporter comparing the young men to the 300 Spartan heroes of Thermopylae who held a crucial pass against the Persian Xerxes' horde of 100,000 or more “Immortals” while serving as the rear guard of the Greek Army.⁹ The author forms his larger literary paradigm around that structure and works to call out portions of key engagements throughout the war

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¹ PATRICK O'DONNELL, *WASHINGTON'S IMMORTALS: THE UNTOLD STORY OF AN ELITE REGIMENT WHO CHANGED THE COURSE OF THE REVOLUTION* (2016).

² WILLIAM SHAKESPEARE, *KING HENRY THE FIFTH*, act 4, sc. 3. Much like the warriors whose names Shakespeare invoked to mark the supposed immortality that accompanies heroic battlefield exploits, the names and stories of the Maryland men described in O'Donnell's work are known to few. Credit is due for his attempt to highlight their brave efforts on behalf of a young nation.

³ *Id.*

⁴ See generally STEPHEN AMBROSE, *BAND OF BROTHERS: E COMPANY, 506TH REGIMENT, 101ST AIRBORNE FROM NORMANDY TO HITLER'S EAGLE'S NEST* (3rd ed. 2001).

⁵ O'DONNELL, *supra* note 1, at front cover. Marketing materials and interviews by the author encourage direct comparison with *Band of Brothers*.

⁶ O'Donnell states that his First Maryland Regiment protagonists were called the “Maryland 400” or the “Immortal 400” following their desperate stand at the Battle of Brooklyn but provides no sourced authority to support his contention. *Id.* at 71, 137. But see Ryan Polk, *Holding the Line: The Origin of the “the Old Line State”* (2005), ARCHIVES OF MARYLAND ONLINE, <http://aomol.msa.maryland.gov/html/oldline.html>. (discussing the history and significance of the Maryland Line's commonly known nickname “the Old Line,” Polk writes, “The Maryland Line . . . achieved a reputation as the saviors of the Continental Army and the cause of independence. References to the ‘Old Line’ are a tribute to the Maryland Line, but more specifically, to the first incarnation of the Maryland Line” Polk, a research archivist, provides an extensive bibliography and impeccable endnotes.).

⁷ O'DONNELL, *supra* note 1, at 3-5.

⁸ *Id.* at 4. (citing Mordecai Gist, *GIST PAPERS, ROLL 1*, (Maryland Historical Society)).

⁹ *Id.* at 11.

which provide support for the comparative premise, with limited success.¹⁰

Still, the significance of the Maryland Battalion is clear from the text. Initially the Continental Army was largely a ragtag assortment of civilians formed into state militias. On the eve of America's war for independence the majority of our nation's troops were poorly supplied, negligibly trained, and only nominally lead.¹¹ While the bulk of the force would remain under-provisioned throughout the war, and novice recruits would plague General Washington for the duration of the conflict, leadership from members of established militias like the Baltimore Company represented the Continental's best hope for survival.¹² By forming in 1774, Gist's Baltimore Company was able to conduct critical training, while acquiring arms and uniforms prior to the start of the conflict.¹³ The book captures sacrifices made by the Maryland Regiment at the Battle of Brooklyn, where they provided a valiant rear guard, which charged repeatedly into withering fire allowing a routed Patriot force to retreat to safety.¹⁴ The book then follows these early patriots through nine years of conflict.¹⁵

A military reader may appreciate the plain language and expansive coverage of the Revolutionary War's major clashes as the book accompanies members of the Maryland Line over the better part of a decade at war. However, readers may be let down by shallow coverage, novice prose, and potential scholastic miscues that undermine the author's overall effort.

III. The Good

O'Donnell is at his best when he abandons the shaky premise of "Patriots at Thermopylae" to focus on the aspects of warfighting he truly understands due, no doubt in part, to his time embedded with the Marines in Fallujah.¹⁶ He shines when describing General Nathaniel Greene's hours of careful study of the topography at Guilford Courthouse and renders accessible the evolution of Continental tactics during the war.¹⁷ Similarly, his most gripping character sketches feature notable non-Maryland partisans, Francis Marion and Thomas Sumter.¹⁸ Known as the "Swamp Fox" and "Fighting Gamecock" respectively, the two reigned terror on the British through their skillful application of tactics recognizable as enduring features of asymmetric war.¹⁹

Reading this book, a clearer picture of the "civil" nature of the war did emerge. The text recounts communities ripped apart by divisions between those who would remain subjects of the British Crown and those who ultimately desired to form a new nation. The citizenry of both Britain and the United States proved to be the war's center of gravity.²⁰

At many points the book provides examples of inhumane practices that would, years later, result in a series of needed reforms to mitigate the most egregious violations of human dignity perpetuated in the midst of warfare.²¹ These include: failure to grant quarter to those who had surrendered,²² abysmal conditions on prison ships,²³ looting,²⁴ execution of prisoners,²⁵ and primitive medical care.²⁶

Finally, the manuscript nominally describes the importance of the French to the war effort and the frictions

¹⁰ The author notes instances where Marylander's and others are tasked with a seemingly impossible mission or "forlorn hope." *Id.* at 206, 213. That said, the size and scope of the missions do not compare to the gravity of Thermopylae (to include enemy troop strength) in any significant way. The invocation of "the Immortals" and comparison to Greek legend seems a marketing ploy more than a legitimately applicable metaphor. Further, rather than die to a man, the Marylander's and the rest of the Continentals strategically fled the majority of battles. This proved critical to the preservation of their forces, ground down the opposition, and ultimately led to victory. *See, e.g., Id.* at 66 (Battle of Brooklyn retreat), 160 (describing the Marylander's route at Germantown), 173 (abandonment of Mud Island), 240 (surrender at Charleston), 253 (describing a desperate escape at Waxhaws), 335 (retreat from Camden). General Greene is quoted as noting, "We fight, get beat, rise and fight again." *Id.* at 338.

¹¹ *Id.* at 13-16.

¹² *Id.* at 115, 176 Conditions were especially dire during the first winter in Valley Forge at the close of 1776. Washington made multiple requests for supplies to Congress.

¹³ *Id.* at 9-10.

¹⁴ *Id.* at 105 (Enlistments for many troops ended in December of 1776. This, coupled with factors including desertion, sickness, capture, and death obliterated the original Maryland Battalion. A handful of original members would go on to serve as key leaders in the new "Old Line" and other regiments.).

¹⁵ *Id.*

¹⁶ Patrick O'Donnell, *Biography of Patrick K. O'Donnell*, <http://patrickkodonnell.com/bio.html> (last visited Sept. 23, 2016).

¹⁷ O'DONNELL, *supra* note 1, at 309-16.

¹⁸ *Id.* at 242-43.

¹⁹ *Id.* at 244.

²⁰ *Id.* at 255 (commenting that the "war's true center of gravity . . . was the civilian population.") *See also* GORDON S. WOOD, *THE AMERICAN REVOLUTION*, at 78 (2003) ("[I]n the end, independence came to mean more to the Americans than reconquest did to the English.").

²¹ *See generally* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

²² O'DONNELL, *supra* note 1, at 64, 66.

²³ *Id.* at 96 (noting that as many as 10,000 Continentals perished while held on prison ships).

²⁴ *Id.* at 45, 79, 109, 138-39 (looting was common and was perpetuated by participants on both sides of the conflict).

²⁵ *Id.* at 99, 240.

²⁶ *Id.* at 134 (noting that many doctors of the time lacked formalized training and utilized primitive surgery techniques with poor tools under unsanitary conditions).

that accompanied coalition action, even in our earliest attempts to wage war with allied partners.²⁷ One finds that a preference for domestic command endures to present day no matter the expertise of a foreign commander.²⁸

IV. The Bad

While there is something to be gleaned from the examination of the lesser known Maryland participants, the narrative as a whole is clunky and repetitive, replete with overly fawning descriptions of Patriots.²⁹ It belongs to a class of military literature which, through hero worship, permanently places a nation's warriors at some remove from ordinary men. Cast then as mythic figures, the desperate nature of the contest endured is not so keenly felt. The tone at times would place combat veterans among a pantheon of god-like warriors. Far from illuminating the complex nature of war and the unambiguous moral horror that accompanies it, this variety of writing gilds the bloodshed and turns it into mere entertainment for the 99% of citizens who will never serve. Moreover, if our heroes are almost universally mythic men, rather than ordinary men with doubts and flaws who chose courage in spite of human frailty, the average citizen can more easily abdicate his role in service since he can hardly be expected perform such legendary feats. As result of the author's largely uncritical analysis, the reader concludes the work with only the shallowest insights concerning the character and motivations of the men described therein.³⁰

V. The Ugly

Disturbingly, the treatment of female Patriot contemporaries is predominantly negative.³¹ The author has little to say about the enormity of contributions made by the women who accompanied the force, known as camp followers.³² He has far more to say on the pervasiveness of prostitution in a neglected portion of the city known as Holy Ground³³ on the eve of the Battle of Brooklyn. O'Donnell writes the women there engaged in "pandering to the carnal needs of the men—even the most chaste."³⁴ He then records "A New York survey shortly after the war estimated that 20 percent of the women of childbearing age were prostitutes."³⁵ In other corners he ably marks the relative worthlessness of Continental currency, rampant inflation, raiding and recrimination by both sides, as well as food and clothing shortages.³⁶ A modicum of research would have afforded him insight into the common struggles of women during and following years of war. In such times, the commodification of labor often centers on two primal forces, sex and violence.³⁷ Instead of demonstrating empathy for the women of New York, O'Donnell uses the opportunity to call them names.³⁸ While a recitation of unflattering contemporary accounts is appropriate, a broader contextual examination of the economic and social upheaval which contributed to the decision of many to engage in sexual labor would have elevated the text.

Of perhaps greater concern is the author's questionable diligence in ensuring thorough attribution of sources. When reading a number of passages, echoes of David McCullough's *1776* are clearly heard.³⁹ Comparing O'Donnell's passage concerning American standards at the outset of the Revolutionary War with that of McCullough's is one of the clearer examples of a place where more rigorous citation would have potentially been appropriate. O'Donnell wrote,

²⁷ O'DONNELL, *supra* note 1, at 162, 195 (while the French entry was critical to the American cause, the funding and other resources provided never satisfied Washington and did little to bring the war to a swift conclusion).

²⁸ *Id.* at 135, 189-90.

²⁹ *Id.* at 3-4, 6, 13, 51. The author also records Hessian Colonel Johan Rall as uttering essentially the same exhortations to his men on at least two occasions. *Id.* at 94, 116.

³⁰ The superficial treatment is not limited to Patriot forces. Tentative actions on the part of British generals are noted at multiple points. O'DONNELL, *supra* note 1, at 71, 106, 122. *But see* WOOD, *supra* note 20, at 78-79.

³¹ O'DONNELL, *supra* note 1, at 48 (describing the socialite Margaret Jane Ramsey, "[J]enny didn't perform manual labor. Instead, she acted as a hostess, and her tent or quarters became the center of social life for the officers..."), 179 (when the line had decamped to Valley Forge where she maintained a log cabin, "Mrs. Ramsey played the role of hostess and entertained with refreshments such as coffee.").

³² *Id.* at 47-48 (describing the tension between the followers, comprised of women and children, and some officers while giving minimal treatment to the contributions of those followers at this passage and throughout the book).

³³ DAVID MCCULLOUGH, *1776*, at 124 (2005) (noting that Holy Ground earned its name by virtue of its ownership by Trinity Church).

³⁴ O'DONNELL, *supra* note 1, at 50 (he continues the paragraph with quoted references to myriad slurs ascribed to sex workers of the period).

³⁵ *Id.*

³⁶ *Id.* at 203.

³⁷ *See generally* KEITH LOW, *SAVAGE CONTINENT: EUROPE IN THE AFTERMATH OF WWII* 110 (2003) (observing that after the war "Women of all classes and ages prostitute themselves for food and protection. There is no shame. There is no morality. There is only survival.").

³⁸ O'DONNELL, *supra* note 1, at 50 ("Tarts who entered the Maryland camp in an unauthorized manner could be seized. Then their heads were shaved, and they were drummed out of camp at a slow cadence known as the whore's march.").

³⁹ MCCULLOUGH, *supra* note 33, at 20-22, 124-25, 151, 153, 158, 168-69, 171-72 (portions of the cited text, generally primary source quotations, seem to show up in like arrangement in *WASHINGTON'S IMMORTALS*). *C.f.* O'DONNELL, *supra* note 1, at 49-50, 53-54, 60, 62-63 (primary source material and other analysis is reminiscent of the arrangement and treatment of the same in *1776*). Additional research would assist in clarifying for this reviewer how other secondary sources have approached these particular sources and the circumstances surrounding the battles described in both books.

“Most of America’s colonists were of middling class and enjoyed a higher standing of living than the rest of the world. For many of the British, the perceived wealth and plentitude seemed to be proof that the colonists got rich off the crown.”⁴⁰ While years earlier, McCullough opined, “To many of the English, such affluence as they saw on Long Island was proof that America had indeed grown rich at the expense of Great Britain. In fact, the Americans of 1776 enjoyed a higher standard of living than any people in the world.”⁴¹ To further complicate matters, quotes from a number of primary sources, arranged by O’Donnell, which precede the non-attributed portion of the text are organized in structure, content, and context in a manner nearly identical to McCullough’s presentation of the same.⁴² Additional time would have enabled a more definitive pronouncement on the nature of the similarities between the two works, extensive commentary is inappropriate where full comparisons have not been made. The benefit of the doubt belongs to the author. Ultimately the similarities were distracting and suggest little to be drawn from at least portions of the book that have not been already declared elsewhere.

VI. Conclusion

While O’Donnell’s work covers much ground, it does not travel smoothly. The surfeit descriptions of maneuvers accompanying discussions of key battles bogs down the telling, and a lack of depth leaves the reader feeling fatigued rather than invigorated. There were instructive portions and the time spent reading was not without interesting moments, but far better works on the Revolutionary War, as well as the battles described in *Washington’s Immortals*, already exist.

It seems likely that Mr. O’Donnell, in his first work requiring exhaustive research after having spent the main of his career recording and recounting first person narratives, found his reach to exceed his grasp. By all estimations his sincere affection for those who serve and his efforts to tell their tales reflect genuine affection for his subjects. Perhaps subsequent work will reflect growth as an author and his narrative style will rise to the level of the legend he lays claim to, reflecting a story in akin to *Band of Brothers*.⁴³

In the long run, this book reflects a missed opportunity to shed meaningful light on the nature of a little known group of patriots. While a quick search of the internet or library will demonstrate that the Battle of Brooklyn and the Maryland Line are both mentioned, what the author had was the opportunity to explore in greater detail the circumstances and attributes that made the men unique. What remains is a

general survey of the war, nearly across its entirety, that fails to add new insight and offers a mediocre retelling of predominately old tales. Unable to provide a ringing endorsement of *Washington’s Immortals* to either novice enthusiasts or serious students of history, this reviewer would instead submit that it is always a good time to read a great book. That book, in this case, is McCullough’s *1776*.

⁴⁰ O’DONNELL, *supra* note 1, at 54.

⁴¹ MCCULLOUGH, *supra* note 33, at 58.

⁴² See *supra* note 33 and accompanying text.

⁴³ Ironically, Ambrose himself has faced criticism for citation errors, his clear contributions to the field of military history notwithstanding. David

Plotz, *The Plagiarist: Why Stephen Ambrose is a vampire*, SLATE (Jan. 11, 2002, 11:19 A.M.), http://www.slate.com/articles/news_and_politics/assessment/2002/01/the_plagiarist.html.

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