

- (i) requests for discovery;
- (ii) the provision of notice required by subdivision (i) of this rule; and
- (iii) the initiation of the procedure established by subdivision (j) of this rule.

(B) *Other Matters*. At the pretrial conference, the military judge may also consider any matter that relates to classified information or that may promote a fair and expeditious trial.

(4) *Convening Authority Notice and Action*. If a claim of privilege has been made under this rule with respect to classified information that apparently contains evidence that is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial proceeding, the matter must be reported to the convening authority. The convening authority may:

- (A) institute action to obtain the classified information for the use by the military judge in making a determination under subdivision (j);
- (B) dismiss the charges;
- (C) dismiss the charges or specifications or both to which the information relates; or
- (D) take such other action as may be required in the interests of justice.

(5) *Remedies*. If, after a reasonable period of time, the information is not provided to the military judge in circumstances where proceeding with the case without such information would materially prejudice a substantial right of the accused, the military judge must dismiss the charges or specifications or both to which the classified information relates.

(g) *Protective Orders*. Upon motion of the trial counsel, the military judge must issue an order to protect against the disclosure of any classified information that has been disclosed by the United States to any accused in any court-martial proceeding or that has otherwise been provided to, or obtained by, any such accused in any such court-martial proceeding. The terms of any such protective order may include, but are not limited to, provisions:

- (1) prohibiting the disclosure of the information except as authorized by the military judge;
- (2) requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;
- (3) requiring controlled access to the material during normal business hours and at other times upon reasonable notice;
- (4) mandating that all persons requiring security clearances will cooperate with investigatory personnel in any investigations that are necessary to obtain a security clearance;
- (5) requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;
- (6) regulating the making and handling of notes taken from material containing classified information; or
- (7) requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

(h) *Discovery and Access by the Accused*.

(1) *Limitations*.

(A) *Government Claim of Privilege*. In a court-martial proceeding in which the government seeks to delete, withhold, or otherwise obtain other relief with respect to the discovery of or access to any classified information, the trial counsel must submit a declaration invoking the United States' classified information privilege and setting forth the damage to the national security that the discovery of or access to such information reasonably could be expected to cause. The declaration must be signed by the head, or designee, of the executive or military department or government agency concerned.

(B) *Standard for Discovery or Access by the Accused*. Upon the submission of a declaration under subdivision (h)(1)(A), the military judge may not authorize the discovery of or access to such classified information unless the military judge determines that such classified information would be noncumulative and relevant to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing. If the discovery of or access to such classified information is authorized, it must be addressed in accordance with the requirements of subdivision (h)(2).

(2) *Alternatives to Full Discovery*.

(A) *Substitutions and Other Alternatives*. The military judge, in assessing the accused's right to discover or access classified information under subdivision (h), may authorize the government:

- (i) to delete or withhold specified items of classified information;
- (ii) to substitute a summary for classified information; or

(iii) to substitute a statement admitting relevant facts that the classified information or material would tend to prove, unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial.

(B) *In Camera Review*. The military judge must, upon the request of the prosecution, conduct an in camera review of the prosecution's motion and any materials submitted in support thereof and must not disclose such information to the accused.

(C) *Action by Military Judge*. The military judge must grant the request of the trial counsel to substitute a summary or to substitute a statement admitting relevant facts, or to provide other relief in accordance with subdivision (h)(2)(A), if the military judge finds that the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information.

(3) *Reconsideration*. An order of a military judge authorizing a request of the trial counsel to substitute, summarize, withhold, or prevent access to classified information under subdivision (h) is not subject to a motion for reconsideration by the accused, if such order was entered pursuant to an ex parte showing under subdivision (h).

(i) *Disclosure by the Accused*.

(1) *Notification to Trial Counsel and Military Judge*. If an accused reasonably expects to disclose, or to cause the disclosure of, classified information in any manner in connection with any trial or pretrial proceeding involving the prosecution of such accused, the accused must, within the time specified by the military judge or, where no time is specified, prior to arraignment of the accused, notify the trial counsel and the military judge in writing.

(2) *Content of Notice*. Such notice must include a brief description of the classified information.

(3) *Continuing Duty to Notify*. Whenever the accused learns of additional classified information the accused reasonably expects to disclose, or to cause the disclosure of, at any such proceeding, the accused must notify trial counsel and the military judge in writing as soon as possible thereafter and must include a brief description of the classified information.

(4) *Limitation on Disclosure by Accused*. The accused may not disclose, or cause the disclosure of, any information known or believed to be classified in connection with a trial or pretrial proceeding until:

(A) notice has been given under subdivision (i); and

(B) the government has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in subdivision (j).

(5) *Failure to comply*. If the accused fails to comply with the requirements of subdivision (i), the military judge:

(A) may preclude disclosure of any classified information not made the subject of notification; and

(B) may prohibit the examination by the accused of any witness with respect to any such information.

(j) *Procedure for Use of Classified Information in Trials and Pretrial Proceedings*.

(1) *Hearing on Use of Classified Information*.

(A) *Motion for Hearing*. Within the time specified by the military judge for the filing of a motion under this rule, either party may move for a hearing concerning the use at any proceeding of any classified information. Upon a request by either party, the military judge must conduct such a hearing and must rule prior to conducting any further proceedings.

(B) *Request for In Camera Hearing*. Any hearing held pursuant to subdivision (j) (or any portion of such hearing specified in the request of a knowledgeable United States official) must be held in camera if a knowledgeable United States official possessing authority to classify information submits to the military judge a declaration that a public proceeding may result in the disclosure of classified information.

(C) *Notice to Accused*. Before the hearing, trial counsel must provide the accused with notice of the classified information that is at issue. Such notice must identify the specific classified information at issue whenever that information previously has been made available to the accused by the United States. When the United States has not previously made the information available to the accused in connection with the case the information may be described by generic category, in such forms as the military judge may approve, rather than by identification of the specific information of concern to the United States.

(D) *Standard for Disclosure*. Classified information is not subject to disclosure under subdivision (j) unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence. In presentencing proceedings, relevant and material classified information pertaining to the appropriateness of, or the appropriate degree of, punishment must be admitted only if no unclassified version of such information is available.