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| **UNITED STATES OF AMERICA** | ) | |
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| **v.** | ) | **Government Targeted Brief on Courtroom Closures** |
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| **Manning, Bradley E.** | ) | |
| **PFC, U.S. Army,** | ) | **<u>Enclosure 8</u>** |
| **HHC, U.S. Army Garrison,** | ) | |
| **Joint Base Myer-Henderson Hall** | ) | **29 March 2013** |
| **Fort Myer, Virginia 22211** | ) | |

Encl 8 to
APPELLATE EXHIBIT 511
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GENERAL COURT-MARTIAL
UNITED STATES NAVY
SOUTHWEST JUDICIAL CIRCUIT
SAN DIEGO, CALIFORNIA

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| UNITED STATES | ) | 3 May 2005 |
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| | ) | |
| V. | ) | ORDER TO CLOSE CERTAIN |
| | ) | TRIAL PROCEEDINGS |
| | ) | |
| ANDREW K. LEDFORD | ) | |
| LT U.S. NAVY | ) | |

By written notice, the defense seeks to introduce classified information during closed sessions of this trial. By written motion, as amended orally during argument, the government requests that the court order the trial proceedings closed to the public only while certain classified information is being introduced or is the subject of examination or argument to ensure that the information specified in oral argument and in the attached appellate exhibits is not disclosed to the public. The defense does not object to closure on a limited basis as necessary to protect classified information. Two sessions under Article 39(a) were held on this matter. The parties were given the opportunity to present evidence and make argument.

Findings:

1. Both the government and the defense intend to introduce into evidence certain items that have been deemed classified. This information is not within the public domain. This evidence includes the names of protected-identity witnesses, the identity of participants in certain operations, and discussions or viewings of tactics/rolls/positions/locations, as well as the identification of the alleged victim. The defense additionally seeks to introduce classified information on sentencing that includes other direction actions in which the accused was involved, his current duties, the background of the alleged victim, and videos of other operations. This order addresses only the evidence to be offered on the merits. The court specifically withholds any ruling regarding evidence to be offered during presentencing to allow the parties to complete their preparations for presentencing.

2. Specifically, the government will seek to present to the members testimony from identity-protected witnesses, as well as testimony from or regarding witnesses whose mere presence on or association with particular missions is classified. The government does not object to this

being presented in closed session, but seeks to safeguard their identity from public view.

3. The government will also seek to offer into evidence the written statements allegedly made by the accused. While the government intended to offer redacted versions of the statements to avoid the presentation of classified passages from those documents, the defense desires that the entire statement be offered so that the members have the benefit of seeing the entire statement, and to avoid any speculation on the part of the members as to what might be missing from these documents. Although not specifically stated, the defense concern is that a limiting instruction from the court would not be sufficient to prevent prejudice to the accused. The government therefore seeks to offer the unredacted version of the statement, with the understanding that the classified portions will not be reference in open sessions. Neither party anticipates the need to discuss the classified contents of the statement in open court. Since members' questions will all be written, the court will have the benefit of knowing whether the members' question, if any, will necessitate a limited closed session of the court.

4. The defense will seek to introduce evidence regarding the positions, tactics, roles and activities of witnesses as those matters bear on ability to observe, ability to supervise, and the context in which some of the charged offenses occurred. In order to establish where certain witnesses were at particular times when events were observed, the defense may need to elicit classified information that would disclose, or at least permit a clear inference of, tactics, techniques and procedures of operational forces. They will also seek to introduce evidence regarding the positive identification of the alleged victim as it bears on the state of mind of the team members on the night in question and as it relates to establishing the identity of the named victim. Finally, because the government seeks to introduce a still photo from a video clip showing a prisoner wearing a mask that the government alleges amounts to mistreatment, the defense desires to offer entire video clip showing the capture of the prisoner so that the members can view the alleged offense in context. The entire video clip is less than 5 minutes long. The government does not object to this being presented in closed session, but seeks to safeguard these classified matters from public view because they will disclose classified tactics, techniques and procedures.

5. My review of the evidence and the accompanying security classification declarations show that the government has established by a preponderance of the evidence that the evidence in the form of documents, photographs, video and testimony sought to be introduced which has been marked as classified at the "confidential" and "secret" level was properly classified by an original classification authority applying

the standards of Executive Order 12958, as amended by Executive Order 13292, and various departmental regulations.

6. Public disclosure of the classified information in this case would harm the national security of the United States in the manner described within the declarations. Specifically, disclosure would reveal foreign government information, intelligence sources and methods, organization/functions/ names of agency employees, and the tactics/techniques/procedures of operations, and would thereby enable an enemy or other persons to learn specific vulnerabilities or otherwise impair future direct action missions of coalition forces.

7. The classified information sought to be introduced on the merits will tend to provide some evidence from which the members can determine the ability to perceive on the part of percipient witnesses, the extent and context of the witnesses' involvement in the charged offenses, and the identification of, and the ability of the accused to adequately supervise, subordinates on these missions.

8. The Secretary of the Navy and the Directory of Central Intelligence invoked the claim of privilege under Military Rule of Evidence 505 with regard to the same material the court has reviewed. Both the Secretary and the DCI are authorized as agency heads to invoke the privilege, and both have determined that disclosure of this material reasonably could result in damage to national security. Their determinations were based upon personal review of the evidence and declarations from subject matter experts. The invocation of the privilege satisfies the requirements of Mil.R.Evid. 505.

Conclusions:

1. The accused and the public enjoy the right to a public trial, but that right is not absolute. A military judge may, if necessary, close portions of the trial proceedings to public view if the government makes an adequate showing of necessity and the closure is tailored to limit the close sessions to the minimum necessary. *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977); Mil.R.Evid. 505.

2. To support a closed proceeding, the government must make a showing that closure is necessary to prevent public disclosure of information that must be protected. Closure is necessary when alternative means of presenting the evidence are not sufficient or available.

3. The court has carefully applied the balancing test described in *Grunden* and it's progeny. Even though neither party objects to closure of the trial during receipt of classified information, I have applied the balancing test

nonetheless in analyzing whether the proceedings may be closed during the receipt of classified information.

4. The government has met its burden of establishing that the evidence at issue has been properly classified.

5. The government has met its burden of establishing that there is a reasonable danger that the presentation of these matters before the public will harm the national security.

6. The parties have delineated the subject matter that will involve classified information, and the subject matters are relevant, necessary and otherwise admissible.

Order of the Court:

1. The trial proceedings in this case will be closed to the public during the introduction of classified evidence. Closure will occur only during the portions of a witness' testimony in which it is reasonably expected that the protected exhibit or testimony will be displayed or discussed, or when counsel will make direct reference to the contents of the same during argument or in questioning, and cannot do so without discussing the testimony or evidence in open court. Closure will also occur when the military judge must discuss the exhibit or testimony on the record and cannot do so without disclosing the protected contents in open court. The proceedings will be reopened to the public at the earliest opportunity.

2. In addition to the preceding generalized order, the following specific orders apply:

    a. The identity-protected witnesses shall testify behind a physical barrier that prevents the public from viewing the witnesses' physical appearance. However, the witnesses shall remain in the view of the members, counsel, the accused and the court at all times. The witnesses shall otherwise testify in open court, except during an initial closed session during which the witnesses' protected identity shall be established. All classified direct and cross-examination for identity protected witnesses shall be conducted during the initial closed sessions. The proceedings with thereafter be reopened to the public. No reference to the true names of these witnesses shall be made in open court. Counsel shall refer to them in open court with agreed upon pseudonyms.

    b. Any references to specific missions that link particular individuals or particular agencies to those missions shall, if classified, be made in

closed sessions. Counsel shall thereafter refer to them in open court with agree upon pseudonyms.

c. If a classified video footage is to be played for the members, video screens shall be adjusted so as to shield them from view of the public. Where possible, the court will remain open to the public during the playing of the video. Any classified testimony regarding the video, or classified portions of an audio track accompanying the video, shall be taken during closed sessions. The proceedings will thereafter be reopened to the public, shielding the screens from public view.

d. Any classified document that can be offered in open session without addressing its classified contents shall be offered in open session.

e. Any witness that shall testify in both classified and unclassified matters shall testify first during a closed session as to classified matters. The sponsoring counsel shall conduct a direct examination in a closed session on only the matters from which the public must be excluded. That examination will be immediately followed by a cross-examination and examination by the court on those same classified matters. Counsel and court will then conduct examination and cross-examination on matters not subject to closure in open court. While this procedure may force counsel to depart from normal practice, the manner directed will not impede the fair administration of justice and will ensure that the proceedings are closed only as absolutely required. If counsel desire to conduct the open session of examination and cross-examination first, with the closed session to follow, they shall notify the court.

f. Counsel are instructed that they shall use alternative means of presenting evidence when available and acceptable to avoid the use of classified information. For example, if counsel intend to elicit testimony that at an agreed upon event, the witness passed a codeword signifying some relevant event, and the codeword is classified but the rest of the testimony is unclassified, counsel shall not elicit the classified codeword unless the codeword itself it necessary. Trial and defense counsel shall notify the court prior to opening statements precisely which witnesses they anticipate will require closed sessions. Counsel are further directed to notify the military judge in advance before eliciting classified evidence in open court, or discussing same.

g. Counsel are instructed that they shall instruct their witnesses of the procedures to be used by the court. Witnesses shall be instructed by counsel that they are not to offer classified information while in an open, public session.

**So ordered this 3rd day of May 2005.**

C. L. REISMEIER
CDR, JAGC, USN
Military Judge