UNITED STATES OF AMERICA	)	
	)	
v.	)	**Prosecution Objection to**
	)	**Providing an "Example" Witness**
Manning, Bradley E.	)	**to Examine the Viability of**
PFC, U.S. Army,	)	**Reasonable Alternatives to Closure**
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	
Fort Myer, Virginia 22211	)	**3 April 2013**

The United States respectfully objects to providing an "example" witness for the next Article 39(a) session to examine the viability of alternatives to closure. Based on the facts and circumstances of this case, an "example" witness would not assist the Court in testing whether alternatives short of closure are reasonable under Rule for Courts-Martial (RCM) 806. Examining whether alternatives are reasonable by way of an "example" witness would not be indicative as to whether alternatives are reasonable for the remaining witnesses and would only lead to frustration of judicial economy. To the contrary, there are no alternatives that are reasonable because those portions of testimony for which closure is sought are entirely and inextricably linked to classified information.

FACTS

On 31 January 2013, the United States requested courtroom closure, in whole or in part, for the testimony of 37 of the 141 government witnesses and provided the particular subject matter to which each witness would testify in a closed session. *See* Appellate Exhibit (AE) 479. The United States estimated that the requested closures comprised approximately 30% of its case.

On 1 March 2013, the Court ordered the United States to provide more specificity with respect to which portions of testimony closure was sought. *See* AE 503. In its supplemental response dated 15 March 2013, the United States provided a greater degree of specificity. *See* AE 505. Further, in light of reasonable alternatives available short of closure, the United States narrowed its list of witnesses for whose testimony closure was sought to 28. The United States requested courtroom closure for the entirety of four witnesses' testimony and for a limited portion of twenty-four witnesses' testimony. The United States currently estimates that the requested closures comprise approximately 25% of its case. *See id.*

On 28 March 2013, the defense argued that the United States must provide more specificity with respect to the classified information it intends to elicit from the 28 identified witnesses in order for this Court to consider all reasonable alternatives to closure. *See* Defense Request for Appropriate Relief: Closure Witness, dated 28 March 2013. The defense stated as follows:

> [T]he only way to achieve the necessary level of specification is to actually hear the testimony of a witness delivered in a closed court session. Thereafter, while the Court remains closed, either party or

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> the Court may attempt to elicit the same information through the use of alternatives. Then, the Court will be in a better position to determine whether closure or use of an alternative is appropriate.

Id.

On 1 April 2013, the Court asked the United States whether it had any objection to providing an "example" witness for the next Article 39(a) session to examine the viability of alternatives to closure. Later that day, the United States stated its objection and requested an opportunity to file a written brief, which the Court granted.

WITNESSES/EVIDENCE

The United States requests the Court consider the enclosures to this filing and the Appellate Exhibits cited herein.

LEGAL AUTHORITY AND ARGUMENT

The United States respectfully objects to providing an "example" witness for the next Article 39(a) session to examine the viability of alternatives to closure for two reasons. First, an "example" witness would not assist the Court in testing whether alternatives short of closure are reasonable during portions of testimony from the remaining 27 witnesses. To the contrary, there are no alternatives that are reasonable because those portions of testimony for which closure is sought are entirely and inextricably linked to classified information.

I: PROVIDING AN "EXAMPLE" WITNESS TO TEST WHETHER ALTERNATIVES SHORT OF CLOSURE ARE VIABLE FOR ALL TWENTY-EIGHT WITNESSES IS UNPRECEDENTED AND WILL NOT ASSIST THE COURT IN DETERMINING WHETHER ANY SUCH ALTERNATIVES ARE REASONABLE UNDER RCM 806.

For closure inquiries, the Court must consider whether alternatives to closure exist and, if so, whether those alternatives are reasonable. *See* RCM 806(b)(2) (stating that courts-martial shall be open to the public unless, *inter alia*, "reasonable alternatives to closure were considered and found inadequate"). Generally, the determination of what portion of testimony is to be closed "must be made on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis." *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997). For closures relating to classified information, the Court in *Lonetree* is instructive. *See United States v. Lonetree*, 31 M.J. 849, 853 (N-M. C.M.R. 1990, *aff'd and rem'd*, 35 M.J. 396 (C.M.A. 1992).

In *Lonetree*, the appellant argued the military judge improperly closed the courtroom during classified portions of witness testimony by failing to make specific findings each time the court was closed and by failing to narrowly tailor each closure, thus denying the accused his right to a public trial under the Sixth Amendment. *See Lonetree*, 31 M.J. at 853. The Court disagreed. In determining whether specific findings are required, the Court delineated the distinction for cases involving closures to protect classified information. *See Lonetree*, 31 M.J. at 853 (stating that "Military Rule of Evidence 505 is directed towards the *information* sought to

be exempted from disclosure at a public trial"). The Court reasoned that when classified "information may be divulged by a number of witnesses or documents, or both, the focus of exclusion is upon that *specific information*" and the "specificity required [for closure] addresses the information to be protected." *Lonetree*, 31 M.J. at 853 (emphasis added). On the other hand, for closures based on the rights of privacy of individuals, the Court noted that the focus is upon the individual rights requiring particularized rulings as to each individual situation. *Lonetree*, 31 M.J. at 853.

Under RCM 806(b)(2), the Court must consider whether alternatives to closure exist and, if so, whether those alternatives are reasonable. *See* RCM 806(b)(2). The defense proposes the Court adopt a trial-by-error approach to determine whether alternatives are reasonable, specifically that a witness be ordered to testify so that the parties may "attempt to elicit the same information through the use of alternatives." The defense cites no authority supporting its proposal. Further, the United States is aware of no precedence involving a courtroom closure based on classified information where an "example" witness was ordered to testify for the *sole* purpose of testing whether alternatives are reasonable. Instead, military courts have relied largely upon classification determinations, the scope of testimony to be elicited in a closed session, and the Government's rationale for requesting closure. *See e.g. Lonetree*, 31 M.J. at 853 (relying upon sworn affidavits identifying those witnesses who will testify about classified matters and the government's rationale for requesting closure); *United States v. Anderson*, 68 M.J. 378 (C.A.A.F. 2010) (reviewing the evidence, classification declarations, and portion of testimony involving the classified information); Enclosures 1, 6, and 7 of Prosecution's Supplement to Prosecution Response to Scheduling Order, dated 15 March 2013 (records from *United States v. Diaz*, 69 M.J. 127 (C.A.A.F. 2010) where the Court considered the invocation of the classified information privilege, a memorandum from the Original Classification Authority, a declaration that the document at issue was classified, and classification guides).

On 1 February 2013 and then with greater specificity on 15 March 2013, the United States delineated those portions of testimony relating to classified information that it seeks to elicit during a closed session, cited portions of the Original Classification Authority (OCA) classification guides confirming the information's classification level, and stated its rationale for requesting closure. *See* AE 505. The United States has enclosed the applicable OCA classification guides, with pinpoint cites for the classified information that the United States requests to elicit in a closed session, to this filing. *See* Enclosures 1-2.[1] Enclosure 3 is a list of pinpoint citations to the applicable classification guides based on the most recent *Grunden* filing. Through these materials, the United States provided the Court with facts necessary to make specific findings for <u>each individual closure</u>, a standard beyond what is required under *Lonetree*.

The focus of closure should be upon that particular classified information set forth in Appellate Exhibit 505; put another way, the issue before this Court is whether alternatives short of closure exist for each piece of classified information and, if so, whether those alternatives for each piece of classified information are <u>reasonable</u>. Whether alternatives exist and are reasonable for the classified information that the United States intends to elicit from one witness is not indicative as to whether alternatives exist and are reasonable for classified information that

[1] Enclosure 1 is provided *ex parte* because the United States does not have approval to disclose this classified information to the defense.

the United States intends to elicit from another witness. That is true for all 28 witnesses, to include witnesses who share a "common" purpose. Whether alternatives exist and are reasonable for one OCA, subject matter expert or sentencing witness is not indicative as to whether alternatives exist and are reasonable for another OCA, subject matter expert, or sentencing witness. For example, the background, experiences, expertise, opinions, observations, and analyses of subject matter experts that may be elicited are completely different from one another and cannot be consolidated under one common legend of "code words." The defense's own filing under MRE 505(h) highlights its intent to explore these areas also during cross-examination. Therefore, should the Court require testimony through a mock-court session, to test whether alternatives are reasonable, it would be necessary for the Court to test the reasonableness of alternatives with each witness. Should the closure inquiry be focused at the information-level, as held in *Lonetree*, any such testimony would be of no value to the Court.

II: ALTERNATIVES SHORT OF CLOSURE ARE NOT *REASONABLE* FOR THIS SUBSET OF CLASSIFIED INFORMATION THAT IS INEXTRICABLY INTERTWINED AND REQUIRES CLOSURE TO PERMIT A CONTEXTUAL AND COMPLETE UNDERSTANDING OF THE CLASSIFIED TESTIMONY.

Military courts agree that reasonable alternatives should be employed to the extent possible, but not at the risk of causing utter confusion or impairing the ability to adequately present and explore the classified content, either by the parties, the Court, or the witness. *See Lonetree*, 31 M.J. at 854 (noting that although some unclassified information was disclosed in the closed session, "[f]urther bifurcation of other witnesses' testimony, other than as occurred, was impracticable and would have created unnecessary chaos" and that "[t]he procedure utilized allowed both parties a reasonably normal context within which to pursue their respective positions"); Enclosures 1, 6, and 7 of the Prosecution's Supplement to Prosecution Response to Scheduling Order, dated 15 March 2013 (records from *United States v. Diaz*, 69 M.J. 127 (C.A.A.F. 2010) where the Court ruled that court closure was "necessary to permit a contextual and complete understanding of the classified testimony"). In *Denver Post*, the Army Court of Criminal Appeals even noted that "in a few instances, the witnesses' testimony could be fairly characterized as so inextricably linked to classified matters as to make it all properly received in a closed session." *Denver Post Corp. v. United States*, 2005 WL 6519929, at 3 (A.C.C.A. 2005) (noting that this is an exception, not the rule).

The portion of testimony for which the United States requests closure is distinct from any other testimony the United States intends to elicit at trial. That testimony primarily consists of the following: (1) detailed factual observations necessary to put charged documents in their proper context with what was transpiring, both internationally and domestically; (2) factual observations of impact caused by the WikiLeaks disclosures not memorialized in writing; (3) expert opinions relating to the impact caused by the WikiLeaks disclosures not memorialized in writing; and (4) testimony relating to forensic analysis consisting of classified information so inextricably intertwined based on the alleged misconduct. The testimony for which closure is sought consists of numerous, inextricably commingled classified facts originating from several OCAs. This testimony cannot be sanitized merely by using a "code word" for a country, person, or name of a military operation. Instead, "code words" would also have to be employed, *at a minimum*, for past and current events taking place both domestically and internationally, the

reasons those events took place, the actions taken after those events took place, the reasons those actions were taken, the details of government operations, foreign persons, and so forth. In light of the defense specifically contesting whether the charged documents relate to the national defense, this type of detail can only be elicited in a closed session to permit a full contextual and complete understanding of the charged documents. For that limited portion of testimony, the alternatives to closure set forth in the prosecution's original *Grunden* filing cannot reasonably be employed without causing utter confusion to all parties involved, or impairing the ability to adequately present and explore the classified content, either by the parties, the Court, or the witness. *See* AE 479. To illustrate the inherent confusion with this specific type of testimony, the United States has enclosed the classified transcript of testimony provided during a closed session of the Article 32 investigation, along with an unclassified version of this testimony with the use of "code words" substituted over the original text to illustrate this point. *See* Enclosures 4 and 5 (the highlighted portions reflect the unclassified testimony directly related to the closed session within the classified portions of the enclosures). These enclosures also illustrate how a scalpel can be applied to such testimony and the topics can be discussed in open session and then more detail of those topics which are classified in closed session.

Practically, employing alternatives to this limited portion of testimony would frustrate justice, place an unreasonable burden upon the 28 witnesses and the Court Security Officer, and elevate the risk spillage of classified information. Based on the amount of, and inextricably commingling of, classified information through testimony for the information outlined with these witnesses, a legend of "code words" would be quite lengthy and, undoubtedly, would not be exhaustive. Until those witnesses are excused, the need for additional or modified "code words" for all parties to explore areas at trial is evitable. Further, should any witness seek to testify to matters outside the scope of this legend, immediate additions would be necessary.[2]

Further, no matter how detailed the legend may be, having these portions of testimony in open court would place an unreasonable burden on the 28 witnesses and the Court Security Officer. Requiring the Court Security Officer to monitor the proceeding with an incredibly lengthy and convoluted legend is impractical. Lastly, the risk of spillage is a *known* reality in this court-martial. Members of the public have already sought to reveal what has been redacted in Court filings and posted their conclusions on the Internet. *See* Enclosures 6-8 (Enclosure 6 is a printout of a website that was dedicated to determining what information was redacted during the Article 32. Enclosure 7 is the webpage if the user clicks on the highlighted text on page 17 of Enclosure 6. Enclosure 8 is the webpage if the user clicks on the highlighted text on page 18 of Enclosure 6). Overall, these enclosures show that a savvy spectator is able to piece together unclassified but protected information while conducting independent research. A sophisticated adversary of the United States would have greater resources and capabilities to perform this task, if given the opportunity, especially when it comes to classified information. Further, members of the public have brought recording devices to previous Article 39(a) sessions, which would allow a spillage to be recorded and distributed outside the control of the United States Government. *See* Enclosure 9. Based on these facts and the world-wide publicity of this case, should the Court not close the court for this testimony, the risk that foreign adversaries come into possession of classified information is a heightened possibility.

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[2] The United States acknowledges that these issues exist for all witnesses relying on syllabi and legends.

CONCLUSION

The United States respectfully objects to providing an "example" witness for the next Article 39(a) session to examine the viability of alternatives to closure for two reasons. First, an "example" witness would not assist the Court in testing whether alternatives short of courtroom closure during portions of testimony from the remaining twenty-seven witnesses are reasonable. To the contrary, reasonable alternatives are not available because those portions of testimony for which closure is sought are entirely and inextricably linked to classified information.

J. HUNTER WHYTE
CPT, JA
Assistant Trial Counsel

9 Encls
1. OCA Classification Guides [classified SECRET//NOFORN] [*ex parte*]
2. OCA Classification Guides [unclassified]
3. *Grunden* Motion with OCA Classification Guides Pinpoint Cites
4. Article 32 Transcript of SA David Shaver [classified SECRET//NOFORN]
5. Article 32 Transcript of SA David Shaver w/ Codeword Substitutions [classified SECRET//NOFORN]
6. Webpage Screenshot #1
7. Webpage Screenshot #2
8. Webpage Screenshot #3
9. Email from Mr. Coombs, 12 Mar 13

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel, via electronic mail on 3 April 2013.

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