UNITED STATES OF AMERICA	)	
	)	**DEFENSE RESPONSE TO**
v.	)	**GOVERNMENT MOTION**
	)	**TO CLOSE THE COURTROOM**
Manning, Bradley E.	)	**FOR SPECIFIED TESTIMONY**
PFC, U.S. Army,	)	**DATED 31 JANUARY 2013**
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**14 FEBRUARY 2013**
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

1. The Defense requests this Court deny, in part, the Government's request for closure of the courtroom for specified testimony.

LEGAL AUTHORITY

2. Rule for Courts-Martial (RCM) 806(2) establishes that court "shall be open to the public unless (1) there is 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 on the record justifying closure."

3. Under the Rule, the military judge can order the proceedings closed if she first finds a substantial probability that an overriding interest will be prejudiced by keeping the proceedings open. RCM 806(b)(2)(1). In the case of classified information, the overriding interest is the prevention of harm to the national security. The Rule requires that the military judge use the *Grunden* scalpel by ensuring that the "closure is no broader than necessary to protect the overriding interest." *Id.* at (b)(2)(2); *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977). RCM 806(b)(2) requires the military judge to place her case-specific finding justifying closure on the record for later review on appeal.

ARGUMENT

4. In order to ensure that "closure is no broader than necessary" the military judge must consider reasonable alternative to closure. Only once the military judge determines all reasonable alternatives to closure are inadequate, should the military judge order the proceedings closed.

5. The alternatives that are available under Military Rule of Evidence (MRE) 505(i) would be viable alternatives to closing the courtroom. However, they are not the only alternatives available to closing the courtroom in the event that the MRE 505(i) evidentiary hearing determines that there is no adequate redaction, summary, or substitution for the actual classified information being presented to the members. There are a number of alternatives to testimony for introducing the actual classified information at trial that should be considered before the military judge decides to close the courtroom.

6. The Government has discussed some of those possible alternatives such as the "Silent Witness" rule, the use of code words, or the use of special terms. However, alternatives to closure are bound only by one's imagination. It is the Defense's position that, with respect to many of the witnesses at issue, the witness's opinion or testimony about a particular piece of testimony would not require closure. Any interest the Government may have would be in segregating a witness's opinion or testimony about an issue from the issue itself. That is, the Government may have an interest in ensuring the public does not know that a particular type of damage is connected to a certain piece of leaked information. Likewise, the Government may have an interest in avoiding the association of how an issue is related to the national security. However, to the extent that a disconnect can be established between an issue or piece of information and a witness's testimony about that issue or piece of information, closure is not necessary. As such, the Defense envisions that various hybrids of the Silent Witness Rule could be employed.

7. For example, say Witness A is going to testify that the release of X information caused Y damage. Any alternative that allows for the discussion of Y (the damage) without associating it with X information would not require closure. It is the Defense's position that the articulation of a type of damage on the record would only be classified if it were associated with a particular fact, issue or piece of information.

8. In the above example, Witness A could have a prepared list of issues/facts/pieces of information. Counsel could indicate that we are now going to talk about X and then question the witness about X. Witness A would be free to testify about X because their testimony would only be associated with X for the record; the public would know the testimony, but have no idea what that testimony related to.

9. Likewise, assume Witness B is going to testify that Z piece of information is related to the national security. An articulation that Z is related to the national security because of E, F, and G would not be classified so long as the explanation was not associated with Z. Again, Witness B could easily be provided with a list of topics. All necessary parties would have the list of topics and could easily direct Witness B to issue Z. In many cases, Witness B could then talk freely about that issue Z without necessitating closure of the Court.

10. Other variations on the "Silent Witness" rule are easily contemplated. The Government could type up the classified testimony which they plan to elicit. The witness could then adopt that document as an accurate reflection of what the witness's testimony would be in a closed hearing. Then, the document could be discussed in open court, with both Government and Defense counsel referencing the document. Counsel could tab or mark specific portions so that the fact-finder, court reporter and counsel all know what a witness is referencing during his/her testimony. Then, the witness would be free to discuss that particular topic.

11. The Defense contends that either of the above scenarios is plausible with respect to many, if not all, of the witnesses the Government has earmarked for closure. No doubt, the Government knows what issues or pieces of information they plan to discuss with their witnesses. Indeed, in many cases they have already made such associations as part of their 505 filings. Implementing

either procedure discussed above that creates a disconnect between the issue and the witnesses testimony would allow for the court to remain open.

12. The Government, in its request for closure, has essentially stated that the classified information needs to be protected and that the Court should close the hearing because it does not see how alternatives could work. Closing the courtroom on the conclusory basis provided by the Government alone would be error. There must be a consideration of either alternatives to the information or alternative methods of presentation in an open session that would not disclose the classified information. Only by considering alternatives can the Court make findings about why the proposed alternatives are either adequate or inadequate for use at trial. In this instance, the Government has demonstrated that it will elicit classified information, but it has not demonstrated why alternatives to closure are not adequate.

13. The Defense asserts that reasonable alternatives such as a hybrid "Silent Witness" submission, or the use of summaries or substitutions would be adequate for use at trial. This is especially true given the trier of fact will be the military judge. The Government has failed to demonstrate why alternative methods of presenting the evidence without disclosing its classified substance are not available. As such, while alternatives should be employed, the Government's request to close the hearings should be denied.

14. Additionally, the Government is dismissive of declassification. In support of their dismissal of declassification the Government points to the fact that the classified information in this case is "recent." It was not too long ago that the Government made passing references to information that was so damaging that they were not sure they would even be able to use the information at trial. As time passed it became clear that the Government was referring to information seized during the raid on UBL's compound and, indeed, they expressed their intention to introduce such evidence at trial. Lo and behold, despite its recency, that information has been declassified. Information seized during the raid at Abbottabad is more recent than any charged document in this case, and it has been declassified. Clearly, a piece of information's recency is not a dispositive factor when considering declassification. As such, the Government should be required to look more closely at declassification before dismissing it out of hand.

CONCLUSION

15. As indicated above, the Defense respectfully requests the Court deny, in part, the Government's requests for judicial notice.

JOSHUA J. TOOMAN
CPT, JA
Defense Counsel

I certify that I served or caused to be served a true copy of the above on MAJ Ashden Fein, via electronic mail, on 14 February 2013.

JOSHUA J. TOOMAN
CPT, JA
Defense Counsel