Unmarked redactions were present when Army received this document. Redactions in accordance with (b)(1)(B)

[redacted]

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Government Motion for**
	)	***in camera* Proceeding**
Manning, Bradley E.	)	**Under MRE 505(i)(2)**
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**31 January 2013**
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

(U) COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests this Court hold an *in camera* proceeding pursuant to Military Rule of Evidence (MRE) 505 to address the Government's motion for the application of certain measures to ensure the safety of a Government witness and to protect against the unauthorized disclosure of classified information. Specifically, the Government requests that the Court enter an order: (1) permitting a witness to testify under a pseudonym in civilian clothing and light disguise; (2) limiting discovery and cross-examination regarding information that could reveal the true identity of the witness; and (3) limiting discovery and cross-examination by precluding defense from questioning the witness regarding certain irrelevant and highly classified information, including: his training for a specific classified mission, preparation for the mission, or details of the mission's execution outside the scope of direct examination. Additionally, the United States requests the Court permit the witness to testify at a secure off-site location in the Military District of Washington, rather than the Fort Meade courthouse, for both national security reasons and to ensure the safety of the witness. In furtherance of this motion, the Secretary of Defense claimed the classified information privilege over information related to the identity of the witness, and the Acting Director of the Central Intelligence Agency (CIA) claimed the classified information privilege over information related to the still classified details of the UBL raid.

BURDEN OF PERSUASION AND BURDEN OF PROOF

(U) As the moving party, the United States has the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion. Rule for Courts-Martial (RCM) 905(c)(2). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

(U) To obtain an *in camera* proceeding under MRE 505(i), the United States must show good cause or claim of privilege under MRE 505(c), and must submit an affidavit demonstrating that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation. MRE 505(i)(2)-(3).

[redacted]

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APPELLATE EXHIBIT 414
PAGE REFERENCED:_____
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FACTS

(U) On 2 May 2011, Usama bin Laden (UBL) was killed during a raid on his compound, located in Abbottabad, Pakistan. The raid was carried out by United States government officials.

(U) On 8 November 2012, this Court granted the Government's request to redact and delete information from evidence the Government made available to the defense, pursuant to MRE 505(g)(2). The Court found that the redacted and deleted information was not relevant to this case, that disclosure of the redacted and deleted information risked exposing intelligence activities, sources, and methods, and that disclosure of the redacted and deleted information could reasonably cause damage to the national security of the United States. *See* AE 386.

(U) On 21 November 2012, the United States government declassified the following information for use in this case:

> During the raid on Usama bin Laden's compound in Abbottabad, Pakistan, United States government officials collected several items of digital media. From the items of digital media, the following items relevant to this case were obtained: (1) a letter from UBL to a member of al-Qaeda requesting the member gather Department of Defense material posted to WikiLeaks; (2) a letter from the same member of al-Qaeda to UBL, attached to which were all the Afghanistan significant activity reports as posted by WikiLeaks; and (3) Department of State information.

See AE 422.

(U) The witness (hereinafter "the DoD Operator") that the United States seeks to protect through this motion is one of the "United States government officials" described above. At trial, the prosecution intends to present evidence that the DoD Operator collected three pieces of digital media during the raid (hereinafter "digital media") relevant to the misconduct that forms the basis of the Specification of Charge I and Specification 1 of Charge II, and presentencing proceedings. After the UBL raid, the DoD Operator transferred custody of the digital media to an agent of the Federal Bureau of Investigation (FBI), who will also testify at trial as the next link in the chain of custody. **The United States is offering the DoD Operator's testimony for the sole purpose of authentication as the first link in the chain of custody of the digital media.**

(U) Terrorist organizations and affiliated individuals seek out the true identity of DoD operators and their families in order to target the personnel who participated in the raid on the UBL compound. *See* Enclosures 2 [unclassified reports] and 3 [classified report provided *ex parte*].

(U) The United States presented its case-in-chief to the defense on 8 November 2011 and 18 November 2011, which included notifying the accused and defense of the digital media and the Government's intent to use the digital media at trial.

(U) On 31 January 2013, the Secretary of Defense claimed the classified information privilege over information related to the identity of the DoD Operator and authorized the trial counsel to claim the privilege on his behalf. *See* Enclosure 4. This claim was based on a review of a classified declaration and a classified Original Classification Authority (OCA) determination that the information in the declaration is properly classified. *See* Enclosure 1 [classified declaration provided *ex parte*] and Enclosure 5 [classified OCA endorsement provided *ex parte*]. This claim was also based on an endorsement by the Commander, U.S. Special Operations Command, who is also an OCA. *See* Enclosure 6 [unclassified OCA endorsement].

(U) On 31 January 2013, the Acting Director, Central Intelligence Agency claimed the classified information privilege, over information related to the still classified details of the UBL raid, and authorized the trial counsel to claim the privilege on his behalf. *See* Enclosure 7. This claim was based on a review of a classified declaration by an OCA, which determined the information is properly classified. *See* Enclosure 8.

(U) With both claims of the classified information privilege, the United States seeks to protect information relating to military plans, weapons systems, or operations; foreign government information; intelligence activities (including covert actions), intelligence sources or methods, or cryptology; foreign relations or foreign activities of the United States, including confidential sources; vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; and the development, production, or use of weapons of mass destruction.

WITNESSES/EVIDENCE

(U) The United States does not request any witnesses be produced for this motion. The United States requests that the Court consider the enclosures, including those that are *ex parte*, listed at the end of this motion.

LEGAL AUTHORITY AND ARGUMENT

I. (U) INTRODUCTION

(U) MRE 505 is based on the Classified Information Procedures Act (hereinafter "CIPA"), 18 U.S.C. App. 3 (2012). MRE 505 is procedure-oriented and states the procedures and standards for the use of classified information in a court-martial. *See United States v. Lonetree*, 31 M.J. 849, 856 (N.M.C.M.R. 1990), *aff'd*, 35 M.J. 396 (C.M.A. 1992). Additionally, MRE 505 balances the interests of an accused's access to classified information to prepare his defense against the United States' interest in preventing disclosure of the classified information. *Id.* The CIPA authorizes the United States to use substitutions and redactions for its own evidence. *See United States v. Rosen*, 520. F.Supp.2d 786, 790 (E.D. Va. 2007). Moreover, under the CIPA, limited restrictions on an accused's access to evidence may not unfairly prejudice him. *See generally United States v. Mejia*, 448 F.3d 436, 458 (D.C. Cir. 2006) (discussing close analogies where the defendant is not entitled to access evidence reviewed by the court *in camera*, including disclosures under the Jencks Act, 18 U.S.C. § 3500(b) (2012) and *Brady v. Maryland*, 373 U.S. 83 (1963)). However, the CIPA does not displace the United States' common law privilege in classified information. *Rosen*, 520. F.Supp.2d at 800.

(U) Upon invocation of the classified information privilege, the classified information is not subject to disclosure. *See* MRE 505(i)(4)(B). To overcome the classified information privilege, the accused must demonstrate that the information sought is "relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence." *Id.* The defense must present more than "a mere showing of theoretical relevance" because the information "is at least helpful to the defense of the accused." *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (citing *United States v. Roviaro*, 353 U.S. 53, 60-61 (1957) (holding that the classified information privilege gives way for information that is "relevant and helpful" or "essential to a fair determination of a cause")); *United States v. El-Mezain*, 664 F.3d 467, 520-21 (5th Cir. 2011) (also known as "The Holy Land Foundation Case") *cert. denied* 133 S.Ct. 525 (2012) (citing *United States v. Smith*, 780 F.2d 1102, 1110 (4th Cir. 1985)); *but see United States v. Libby*, 453 F.Supp.2d 35, 42 (D.C. Cir. 2006).

II. (U) PROPOSED MEASURES TO PROTECT WITNESS IDENTITY

A. (U) The Court Should Permit the DoD Operator to Testify Under a Pseudonym, in Civilian Clothing and Light Disguise

(U) The United States requests that the Court permit the DoD Operator to testify in light disguise and civilian clothing. The light disguise requested does not violate the accused's right to confrontation because the light disguise will only conceal the DoD Operator's identifying physical features; the factfinder and accused will be able to assess the DoD Operator's credibility based on his demeanor and responses. The civilian clothing will protect affiliating the DoD Operator with a specific branch of service, as discussed below.

(U) An accused possesses the right to confront witnesses against him. U.S. Const. amend. VI. The right to confrontation provides an accused the right to cross-examine witnesses and physically to face those who testify against him. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 51-53 (1987). In particular, "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974)) (emphasis omitted). Thus, the opportunity to cross-examine a witness takes precedence over the opportunity to confront a witness face-to-face. *See Morales v. Artuz*, 281 F.3d 55, 59 (2d Cir. 2002) (describing the Supreme Court's valuing cross-examination more than a face-to-face encounter "by rejecting challenges to use out-of-court testimony that was subject to prior cross-examination") (citing *California v. Green*, 399 U.S. 149, 165-68 (1970); *Douglas v. Alabama*, 380 U.S. 415, 419 (1965); *Mattox v. United States*, 156 U.S. 237, 243-44 (1895); *Wigmore on Evidence* § 1395 at 150). However, an accused's rights to cross-examination and face-to-face confrontation are subject to limitations. *See Maryland v. Craig*, 497 U.S. 836, 850 (1990); *Lonetree*, 35 M.J. at 406. Specifically, under Sixth Amendment jurisprudence, public policy interests in witness safety and protection of classified information justify limiting an accused's face-to-face confrontation. *See Lonetree*, 35 M.J. at 410-11 (citing *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (holding that face-to-face confrontation should be treated similarly to other protections under the Confrontation Clause)). Indeed, "no governmental interest is more compelling than the security of the Nation." *United States v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008) (holding that national security justifies limiting face-to-face confrontation) (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)).

(U) Additionally, a public policy interest limits an accused's right to unfettered face-to-face confrontation where the reliability of the testimony is otherwise assured. *See Craig*, 497 U.S. at 850; *see also Coy* 487 U.S. at 1021 (stating that exceptions to right to meet face-to-face "would surely be allowed only when necessary to further an important public policy"). Sworn testimony by the witness, cross-examination by opposing counsel, and observation of the witness's testimony by the factfinder assure the testimony's reliability, thereby satisfying *Craig*. *See Abu Ali*, 528 F.3d at 241-42.

(U) Here, the DoD Operator's identity warrants protection, for both reasons of national security and witness safety. *See* Enclosures 1 and 3. Accordingly, a light disguise that protects the DoD Operator's identity from being discovered also protects his safety and the national security interest in his unit and involvement with specific operations. Furthermore, light disguise does not violate an accused's right to confrontation where it does not impair the fact finder's ability to assess witness credibility. *See Morales*, 281 F.3d at 60 (deciding that dark sunglasses did not impair the jury's ability to assess the witness' credibility sufficiently to violate the accused's right to confrontation). A fact finder assesses credibility by observing evident nervousness, body language, and demeanor. *See id.* at 61-62. Consequently, the right to confrontation is preserved where the fact finder combines observation of demeanor and appearance with the substance and consistency of testimony, any hostile motive, and "all other traditional bases for evaluating testimony." *See id.* Thus, the United States requests the Court permit the DoD Operator to testify in civilian clothing and light disguise, to include no more than but not necessarily each of the following components: eyewear, colored contacts, real or false facial hair, a wig, makeup, and/or facial prosthetics.

(U) The light disguise requested herein satisfies the accused's right to confront the DoD Operator because the fact finder will be able to assess the DoD Operator's demeanor in conjunction with the substance of his testimony. The light disguise will prevent the accused or counsel from identifying the DoD Operator; however, the light disguise will not change the ability either to pose questions or evaluate the DoD Operator's responses. The light disguise requested will only conceal the DoD Operator's identifying physical characteristics but not his facial expressions. The light disguise is narrowly tailored because it will not obscure the DoD Operator's emotive expressions and reactions while testifying. Accordingly, the DoD Operator's demeanor, body language, nervousness, and facial reactions will be visible to the fact finder, and the fact finder will possess the ability fully to assess the DoD Operator's credibility. Furthermore, the DoD Operator's testimony will be sworn and subject to cross-examination. Thus, the requested light disguise will not violate the accused's right to a face-to-face confrontation.

B. (U) <u>The Court Should Restrict Discovery and Cross-Examination That Could Reveal the True Identity of the Witness</u>

(U) The United States <u>requests</u> that the Court prohibit discovery and defense inquiry into the specific background of the DoD Operator during cross-examination. The United States requests that the Court instead authorize an alternative to providing detailed personal and military information to the defense, which allows the DoD Operator to be placed in his proper setting.

(U) The Sixth Amendment does not create an absolute right to inquire fully about a witness' background. *See Lonetree*, 35 M.J. at 405-06 (citing *Smith v. Illinois*, 390 U.S. 129 (1968); *Alford v. United States*, 282 U.S. 687 (1931)) (determining that a limitation on the availability of a witness' background for potential impeachment of the witness is not a *per se*

violation the Sixth Amendment); *see also Smith*, 390 U.S. at 133-34 (1968) (White, J., concurring) (stating that cross-examination that might endanger the personal safety of the witness should be prohibited). However, the prosecution has the burden of demonstrating a basis to justify its proposed limit on cross-examination. *See Lonetree*, 35 M.J. at 406 (citing *Smith*, 390 U.S. at 133-34).

(U) An accused's right to inquire into background details of a witness in order to test the credibility and weight of testimony may be limited to protect the safety of the witness. *See Lonetree*, 35 M.J. at 407; *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969) (holding that "where there is a threat to the life of the witness, the right of the [accused] to have the witness's true name, address and place of employment is not absolute"). Additionally, protection of classified information serves as a proper basis for limiting cross-examination, including about the witness' background details. *See Lonetree*, 35 M.J. at 410 ("We further find that the Government, using the safety-of-persons and classified-information-privileges bases, has met its burden of 'coming forward with some showing of why the witness must be excused from answering the question.'"); *cf. Grunden*, 2 M.J. at 122 (stating that the government's strong interest in protecting national security should be accorded "special deference").

(U) An accused's right to background information of a prosecution witness may be limited if the abridgement is not prejudicial to his defense. *See Lonetree*, 35 M.J. at 406. Prejudice accrues from the "denial of the opportunity to place the witness in his proper setting." *Alford v. United States*, 282 U.S. at 692; *Lonetree*, 35 M.J. at 406. Placing the witness in his proper setting requires providing a basis on which cross-examination may be based for the purposes of contradiction or impeachment. *See Lonetree*, 35 M.J. at 406. In *Lonetree*, the accused was not permitted to examine a witness concerning his true name, address, other background information, and whether he had been aided or assisted by other covert agents during a mission. *See id.* at 407. In the instant case and in *Lonetree*, identifying a witness by a pseudonym and identifying him as a "DoD Operator" places the witness in his proper setting and environment. *See id.* at 410. Additionally, the need for specific background information is decreased where the witness' inherent reliability is increased based on his occupation. *See id.* (attributing more credibility to an intelligence agent than a police informant who may have been a narcotics addict and criminal); *see also Lonetree* 31 M.J. at 858 (explaining the need for additional background information required for an informant). Here, the DoD Operator's title, general occupation, and summarized background information increase his inherent reliability and decrease the need for specific background information.

(U) The DoD Operator's true name, address, and other personal identifying information are neither relevant nor necessary because they do not place DoD Operator in his proper setting. *See id.* at 410. Providing grounds for cross-examination and impeachment creates a proper setting. *See id.* at 406. The DoD Operator's personal information cannot serve as a meaningful basis for cross-examination and impeachment and therefore should be excluded from inquiry. Instead, a pseudonym ("John Doe") and the title of "a DoD operator" place the DoD Operator in his proper context as a service member who performs sensitive missions. *See*

id. at 410 (determining that a pseudonym and identification as an intelligence agent better established the witness's setting than "anything connected with [the witness's] 'true identity'"). Placing the DoD Operator in his proper setting satisfies the accused's right to confrontation. *See id.*

(U) Accordingly, the United States specifically requests that the Court limit discovery and inquiry into the background of the DoD Operator during cross-examination. The United States requests that the Court authorize the United States to withhold from the defense the following personal information of the DoD Operator: (1) true name; (2) current and past addresses; (3) contact information; (4) actual age; (5) marital status; and (6) actual rank. Additionally, the United States requests that the Court authorize the United States to withhold from the defense the following military information of the DoD Operator: (1) branch of service; (2) command, unit, or organization; (3) prior units of assignment; (4) service or unit specific training, to include special weapons, infiltration/exfiltration techniques, and assessment courses; (5) specific missions and deployments; (6) actual years of service; (7) actual years of active duty status during service; (8) uncommon or branch of service awards; and (9) specialized qualifications.

(U) The United States requests the Court authorize a summarized alternative of the detailed personal and military information described above for discovery and use at trial so that the DoD Operator can be placed in his proper setting. *See* Enclosure 9 (*ex parte* listing of original and summarized information). With the summarized personal and military information provided to the defense, the proposed limitations on discovery and cross-examination are narrowly tailored because they restrict discovery and cross-examination to relevant topics, thereby minimizing any prejudice to the accused.

III. (U) PROPOSED MEASURES TO PROTECT CLASSIFIED INFORMATION RELATED TO THE UBL RAID

A. (U) The Court Should Restrict Discovery and Preclude the Defense from Cross-Examining Witnesses on Details Irrelevant to Authentication

(U) The United States requests that the Court limit cross-examination of the DoD Operator to the scope of his testimony establishing the authenticity of evidence. The United States requests this limitation to protect irrelevant classified information pertaining to the UBL mission from disclosure.

(U) Cross-examination should not exceed the scope of direct examination except for matters of witness credibility. MRE 611(b). Furthermore, cross-examination should be limited to relevant topics. *See* MRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *see* MRE 401,

analysis (defining relevant evidence as evidence that "must involve a fact 'which is of consequence to the determination of the action'").

[redacted]

(U) Given the exceedingly narrow scope of the DoD Operator's proffered testimony, which restricts the permissible scope of defense cross-examination, the limitations requested do not offend the accused's right to confrontation. The information sought to be protected – mission-specific training, intelligence leading to the mission, or details of the mission not raised on direct examination – is not relevant or necessary for the accused to prepare for trial. The information sought to be protected will not be relevant at trial because it does make the digital media evidence less genuine; the information would only serve to strengthen authentication for the purposes for which it is offered by the Government. The information elicited during the DoD Operator's testimony will be related strictly to details necessary for authentication. Accordingly, the proposed limitations are narrowly tailored to comport with the limited scope of the proffered testimony.

B. (U) <u>The Court Should Limit Discovery and Preclude the Defense from Cross-Examining Witnesses on Details Irrelevant to the UBL Mission and Unnecessary to Place the Witness in his Proper Setting</u>

[redacted]

(U) The classified information privilege additionally permits limiting cross-examination in this case. Classified information is privileged unless "relevant and necessary" to an element of the offense or a legally cognizable defense. *Lonetree*, 31 M.J. at 857. MRE 505 balances the interest of an accused who desires classified information for his defense against the interest of the United States in protecting that information. *Id.* at 857-58 (citing MRE 505 analysis, at A22-37 (1984)). In *Lonetree*, the Court of Military Appeals upheld a limitation on cross-examination based on an invocation of the classified information privilege because: (1) the prosecution met its burden of "com[ing] forward with some showing of why the witness must be excused from answering the question" by using the "safety-of-persons and classified-information-privileges bases," and (2) the accused required nothing more to place the witness in his proper setting. *Lonetree*, 35 M.J. at 410.

C. (U) Limitations Requested Permit A Meaningful Basis of Cross-Examination of Relevant and Necessary Information

(U) The accused is entitled only to effective cross-examination, not to cross-examination that is "effective in 'whatever way, and to whatever extent, the defense might wish.'" *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)). Accordingly, military judges retain "wide latitude" to impose reasonable limits to mitigate harassment, prejudice, and confusion of the issues, witness safety, or interrogation that is repetitive or only marginally relevant. *See Van Arsdall*, 475 U.S. at 679. Exposure of the witness's motive for testifying is an important function of cross-examination. *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974) (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)); *United States v. James*, 61 M.J. 132, 134 (C.A.A.F. 2005). Cross-examination also includes the right to confront witnesses regarding bias, credibility, and truthfulness. *See United States v. Sullivan*, 70 M.J. 110, 115 (C.A.A.F. 2010). However, classified information on which a witness does not rely is irrelevant. *See United States v. Hammoud*, 381 F.3d 316, 340 (4th Cir. 2004) (en banc) (holding classified information not relied upon for formation of opinion given during expert testimony irrelevant), *vacated, Hammoud v. United States*, 543 U.S. 1097 (2005), *aff'd, United States v. Hammoud* 405 F.3d 1034 (4th Cir. 2005).

IV. (U) LIMITATIONS ON CROSS-EXAMINATION APPROPRIATE FOR OTHER WITNESSES TESTIFYING RELATED TO UBL RAID

V. (U) CLOSED SESSION AT SECURE LOCATION IN MDW

(U) The United States requests the Court authorize the DoD Operator to testify at a secure off-site location in order to provide adequate physical and information security to protect the witness and the national security.

(U) "[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The right to a public trial also extends to the public's right to attend courts-martial. *See United States v. Hershey*, 20 M.J. 433, 435-36 (C.M.A. 1985). However, "the right to a public trial is not absolute." *Grunden*, 2 M.J. at 120. In particular, MRE 505 authorizes the closure of a court-martial during presentation of classified information. MRE 505(j)(5). Additionally, RCM 806 states that courts-martial 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. *See* RCM 806(b)(2); *Hershey, supra.*

(U) In order to ensure the safety and security of the DoD Operator during trial and protect against the unauthorized disclosure of classified information – both overriding interests – the Court should permit the witness to testify during a closed session of the court-martial and at a secure off-site location with limited and controlled access. The DoD Operator's identity risks being revealed if he is seen or his image is recorded in connection with this court-martial. Permitting members of the public or non-authorized personnel to watch *any* of the DoD Operator's testimony increases the risk of revealing his identity, even if the DoD Operator is in light disguise. If the DoD Operator's identity is revealed or the public or non-authorized personnel can follow the DoD Operator into and out of the courtroom, it will place him at substantial personal risk and compromise his ability to complete future missions. *See* Enclosure 1.

(U) Furthermore, allowing the DoD Operator to testify during a closed session and at a secure location does not materially prejudice the accused because his rights to confrontation will be protected in accordance with constitutional principles. *See* Parts I-III, *supra.* The courtroom at Fort Meade is inadequate to provide required security, as it has a perimeter and three points of ingress and egress that are all visible to the public. Moreover, during the court-martial, all persons entering and exiting the building will be conducting business associated with the court-martial; their presence will associate their activities with the court-martial in public view. Therefore, any location where DoD Operator testifies must be secure and cannot be associated solely with the court-martial. The MDW secure location will provide a perimeter with controlled routes of ingress and egress for authorized persons, and the secure location will be associated with other missions, thus allowing the DoD Operator in light disguise to enter and exit the building without association with the court-martial.

(U) The Court should be closed for the entire testimony of the DoD Operator, which is no broader than necessary to protect the national security interest in his identity. There is no alternative. The classified content of the material the witness will address, and not just its overall significance, is necessary and relevant. Therefore, unclassified summary is untenable. Finally, the witness will be testifying to nuanced information requiring complicated explanation and must remain free to describe it to the fact-finder and parties as they may require. Therefore, the DoD Operator's testimony cannot be reduced to code. No stipulations have been agreed upon to date. Nonetheless, stipulations may be useful to memorialize the admissibility of material. Finally, for the reasons articulated in Enclosures 1 and 8 [declarations], the information at issue is currently classified and will be at the time of the trial; therefore, declassification is not warranted.

(U) The MDW secure location will be able to hold all parties and a panel, if necessary. The prosecution will ensure that all logistical requirements are satisfied, to include providing transportation between a rally point for all designated personnel and the MDW secure location. Consequently, the United States requests the Court grant its narrowly tailored request to take the *entire* testimony of the DoD Operator at a secure MDW location in a closed session.

VI. (U) NOTICE IAW MRE 505(i)(4)(A)

(U) Prior to an *in camera* proceeding the United States "shall provide the accused with notice of the information that will be at issue." MRE 505(i)(4)(A). This motion serves as the required notice for the accused and defense counsel.

VII. (U) ADVERSE RULING

(U) Should the Court find the proposed alternatives to full disclosure are not adequate and do not afford the accused a fair trial, then the United States requests the opportunity to address the Court's findings with the relevant government agency to determine whether a different alternative is appropriate and file that alternative with the Court.

CONCLUSION

(U) The United States respectfully requests that the Court hold an *in camera* proceeding and thereafter enter an order: (1) permitting the DoD Operator to testify under a pseudonym in civilian clothing and light disguise; (2) limiting discovery and cross-examination regarding information that could reveal the true identity of the DoD Operator; and (3) limiting discovery and cross-examination by precluding defense from questioning the DoD Operator regarding his training for a specific classified mission, preparation for the mission, or details of the mission's execution not raised on direct examination. Additionally, the United States requests the Court permit the DoD Operator to testify in a closed session at a secure off-site location in the Military District of Washington, rather than the Fort Meade courthouse, to ensure the safety of the witness.

[redacted]

ASHDEN FEIN
MAJ, JA
Trial Counsel

(U) I certify that I served or caused to be served a true copy of the above, via SIPRNET email, to Mr. David Coombs, Civilian Defense Counsel, though the defense security experts on 31 January 2013.

ASHDEN FEIN
MAJ, JA
Trial Counsel

11 Enclosures
1. Command Declaration [classified, submitted *ex parte*]
2. Witness Protection Reports (Unclassified)
3. Witness Protection Reports (Classified) [classified, submitted *ex parte*]
4. SecDef Claim of Privilege [unclassified, submitted *ex parte*]
5. Command (OCA) Memorandum [classified, submitted *ex parte*]
6. Command (OCA) Memorandum [unclassified, submitted *ex parte*]
7. Acting Director CIA Claim of Privilege [classified, submitted *ex parte*]
8. CIA Declaration [classified, submitted *ex parte*]
9. Original and Summarized Witness Information [classified, submitted *ex parte*]
10. Example of Prosecution Direct Examination [classified, submitted *ex parte*]
11. Example of Defense Possible Lines of Cross-Examination [classified, submitted *ex parte*]

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