

Phase 2 is MRE 505(j)-(k), which addresses the presentation and handling of classified information at trial, as well as security procedures for potential appellate review.

B. Phase 1: Pretrial Discovery and Litigation

In addition to the more in-depth analysis provided by Chapters 9 and 10 of the Code 30 Primer (*see* enclosures 2 and 3), it is useful to highlight the difference between MRE 505(i) and MRE 505(j). The procedure or “in camera” proceeding described in MRE 505(i) is used, in most cases, to determine whether the Government can preclude the accused from disclosing classified information during the court-martial. *See* MRE 505(i)(4)(A). In other words, the MRE 505(i) hearing is primarily an evidentiary procedure that leads the Court to a determination of what classified evidence sought to be disclosed by the accused is relevant and necessary to an element of the offense or a legally cognizable defense. The MRE 505(i) hearing also contemplates the consideration of constitutionally acceptable alternatives to classified information, which would still afford the accused a fair trial. *See* MRE 505(i)(4)(D).

C. Phase 2: Presentation of Classified Information during the Court-Martial

MRE 505(j) contemplates the appropriate means of *presenting* classified information after determinations have been made regarding its *use* under MRE 505(i). *See* MRE 505(j). Specifically, MRE 505(j)(5) permits the military judge to close the courtroom for the presentation of evidence that discloses classified information—thus defining classified information as an “overriding interest.” *See* MRE 505(j)(5).

II. RCM 806 and *Grunden*

Once classified information is determined to be relevant, RCM 806(b)(2) “recognizes and codifies the basic principle that, with limited exceptions, court-martial proceedings will be open to the public.” RCM 806, Analysis at A21-48. The accused, under the Sixth Amendment and *Grunden*, has a right to a public trial. *See id.* (citing *United States v. Brown*, 22 C.M.R. 41 (C.M.A. 1956); *United States v. Zimmerman*, 19 C.M.R. 806 (A.F.B.R. 1955)). The public also has a right to attend criminal trials under the First Amendment. *See id.* (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)). To justify the exclusion of the public from a court-martial, a military judge must find that “there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open.” RCM 806(b)(2). Then, the military judge must ensure that “closure is no broader than necessary to protect the overriding interest” and that “reasonable alternatives to closure were considered and found inadequate.” *Id.* In short, RCM 806(b)(2), like MRE 505(j), is concerned with the presentation of classified information during the court-martial. It takes no position on whether classified information should be part of the court-martial proceeding in the first place.

III. Interplay between MRE 505 and RCM 806 (*Grunden*)

While MRE 505 and RCM 806 are somewhat related in practice, there is no basis for the defense proposition that the procedures under MRE 505(i) should be utilized for the RCM 806(b)(2) or *Grunden* hearing. As the Code 30 Primer indicates, had the drafters intended that

the two rules would share the same procedures under MRE 505(i), there would have been a cross-reference to (i) in either MRE 505(j)(5) or the Analysis. Accordingly, the difference between MRE 505 and RCM 806 is clear. The primary purpose of the *in camera* proceeding under MRE 505(i) is to litigate the Government's assertion of privilege over classified information. RCM 806(b)(2) is the next step and assumes that any litigation over the use of classified information by the accused has been completed. For example, the Government may have lost the MRE 505(i) litigation and must authorize disclosure of classified information by the accused or face sanctions; (2) the Government may not have invoked the classified information privilege; or (3) the Government may be seeking to use classified information during its case-in-chief.


CONCLUSION

The MRE 505(i) and RCM 806 (*Grunden*) matters before this Court during the last Article 39(a) session relied on distinct authorities and requested different relief. They should, therefore, be kept separate. Through its *Grunden* filing, the United States seeks the Court's approval to close the courtroom during trial when classified information is to be disclosed by the United States and no alternatives are available. While the defense certainly has a limited role to play during the MRE 505(i) process – as articulated by the rule itself – the Government's *Grunden* hearing is used only to determine what classified information will actually need to be discussed in testimony, requiring exclusion of the public IAW MRE 505(j)(5) and RCM 806(b)(2).


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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 13 March 2013.

- 3 Enclosures
1. Code 30, Chapter 1
 2. Code 30, Chapter 9
 3. Code 30, Chapter 10


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