

UNITED STATES OF AMERICA

v.

Manning, Bradley E.  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

Government Targeted Brief  
on Courtroom Closures

Enclosure 2

29 March 2013

Encl 2 to  
APPELLATE EXHIBIT 511  
PAGE REFERENCED: \_\_\_\_\_  
PAGE \_\_\_\_ OF \_\_\_\_ PAGES

1 MJ: Do you understand that even though you believe you are  
2 guilty, you have the legal and moral right to plead not guilty and to  
3 place upon the government the burden of proving your guilt beyond a  
4 reasonable doubt?

5 ACC: Yes, sir, I understand that.

6 MJ: Lieutenant Colonel Steele, take a moment now and consult  
7 again with your defense counsel and then tell me whether you still  
8 want to plead guilty.

9 [Accused complied.]

10 ACC: Yes, Your Honor, I still want to plead guilty to the  
11 three charges I pled guilty to.

12 MJ: Lieutenant Colonel Steele, I find that your plea of  
13 guilty is made voluntarily and with full knowledge of its meaning and  
14 effect. I further find that you have knowingly, intelligently, and  
15 consciously waived your rights against self-incrimination, to a trial  
16 of the facts by a court-martial and to be confronted by the witnesses  
17 against you. Accordingly, your plea of guilty is provident and is  
18 accepted. However, I advise you that you may request to withdraw  
19 your guilty plea at any time before the sentence is announced, and if  
20 you have a good reason for your request, I will grant it.

1 Trial counsel, is the government going forward on any of the  
2 charges or specifications to which the accused pled not guilty or the  
3 excepted language?

4 ATC2: Not the excepted language, Your Honor, however, all other  
5 charges that were not dismissed prior to referral, we are going  
6 forward.

7 MJ: So all the remaining charges and specifications but not  
8 the excepted language? Okay, thank you.

9 ATC2: Yes, sir.

10 MJ: In that case, I will not enter findings at this time.

11 The trial is set for 0900 hours on 15 October. There will be an  
12 Article 39(a) session to litigate motions and issues concerning  
13 Military Rule of Evidence 505 and Military Rule of Evidence 506 on 12  
14 October at 0900 hours.

15 Counsel, are there any issues to address before the court  
16 recesses?

17 ATC2: No, sir.

18 DC: No, sir.

19 MJ: The court is in recess.

20 [The Article 39(a) session recessed at 1629, 7 October 2007.]

21 [END OF PAGE.]

1 [An Article 39(a) session was called to order at 0908, 12 October  
2 2007.]

3 MJ: This Article 39(a) session is called to order. All  
4 parties present on 7 October 2007 are again present and no additional  
5 parties are present today.

6 Now counsel, I just want to check, I had thought that at prior  
7 Article 39(a)s before October 7th there might have been security  
8 officers for each side, is that correct? Trial counsel, do you have  
9 a security officer appointed on your side?

10 ATC2: Yes, sir, and just for clarification for the record,  
11 Captain Inurell Chester for the government is the court security  
12 officer and Major Dennis Daniels, the defense----

13 MJ: And that's exactly why I was asking.

14 ATC2: It's the only change that's occurred since 7 October,  
15 sir, in terms of accounting for the parties.

16 MJ: And they're behind the bar, that's why I'm asking to see  
17 if they are here. So, all parties present on 7 October are again  
18 present and the two additions are Captain Chester and Major Daniels  
19 are both present in the courtroom.

20 Prior to coming into the courtroom today, I conducted an R.C.M.  
21 802 conference, present were the seven counsel and myself, and we  
22 discussed marking of the documents, which was kind of painful, how

1 those were going to be marked, but I think we worked through a system  
2 where we can get them marked appropriately, and we'll find that out  
3 as we go along today.

4 Do counsel for either side have any objections, corrections or  
5 additions to my characterization of the R.C.M. 802 conference?

6 ATCl: No, Your Honor.

7 DC: No, sir.

8 MJ: And also during the R.C.M. 802 conference, counsel let me  
9 know that the witnesses for an Article 13 motion weren't going to be  
10 ready until the afternoon. So what we're going to do is we're going  
11 to handle the *Grunden* hearing first and then we'll deal with the two  
12 motions that are still pending, those are a motion to dismiss, we'll  
13 do that first as far as the motions, and then the Article 13 motion  
14 we'll do second.

15 Also, the defense hasn't had an opportunity to compare a  
16 redacted version of some documents that they were intending to offer  
17 with the unredacted version to see what impact that has on what they  
18 were wanting to offer. They're going to need that when we litigate  
19 that part of the *Grunden* hearing. So, I anticipate that after we get  
20 started in a little while, I'm going to have to give a decent length  
21 recess for the defense counsel to accomplish that before we move on.  
22 But what I want to do is we're going to get started with the *Grunden*

1 hearing so I'm going to close the court based on the motion by the  
2 parties for this *Grunden* hearing is the reason for the court to be  
3 closed. So what we're going to do is we're going to change and go  
4 into a closed session and then the only ones that will be present  
5 will be the seven counsel, the three court security officers, the  
6 court reporter and myself. And just for the record, there's only one  
7 other person in the courtroom right now that that affects and then  
8 she's going to have to leave the courtroom. So what we're going to  
9 do is take a brief recess to accomplish that.

10 The court is in recess.

11 [Court recessed at 0912, 12 October 2007.]

12 [The next session is a closed session which contains pages 249

13 through 312 and is contained in the original record of trial, only.

14 The next numbered page of the unclassified portion of this record of  
15 trial is page 313.]

16 [END OF PAGE.]

[REDACTED]

1 (U) [An Article 39(a) session was called to order at 0912, 12 October  
2 2007.]

3 (U) MJ: Court is called to order. All parties present before  
4 the court recessed are again present. And just for the record, the  
5 court is closed now. The only parties present are the parties I  
6 mentioned a little while ago.

7 (U) And during the recess, the trial counsel stated that the  
8 bailiff had a proper security clearance, if I wanted her in the  
9 courtroom. I just found that she wasn't necessary so she's not in  
10 the courtroom.

11 (U) Okay, counsel, so what we're going to do is to conduct a  
12 hearing under Military Rule of Evidence 505. There's a couple  
13 reasons why a hearing is conducted under Military Rule of Evidence  
14 505. Now, I hadn't mentioned when we were conducting the R.C.M. 802  
15 conference, I did also ask the trial counsel if they were opposing  
16 the defense's offer, the evidence that the defense intended to offer  
17 as far as relevance or for any other reason, or if they were just  
18 wanting the court to be closed when the defense offered that  
19 evidence. And the trial counsel stated that they weren't opposing  
20 that the defense could offer that evidence but they just wanted the  
21 court to be closed during those portions of the court-martial. Well,

[REDACTED]

[REDACTED]

1 I mentioned to them, I said, "Well, perhaps with the exception of the  
2 evidence that's been redacted, if they could use the redacted version  
3 versus an unredacted version, and that's a way in which the court  
4 would not have to close as often and ensure a public trial for a  
5 greater portion of the trial, which would be in the interest of  
6 justice. So, I already mentioned that we're going to give the  
7 defense time to review the redacted version and see if that  
8 accomplishes what they want, or at least in most part.

9 (U) But anyhow, so what we're going to go do is we're just going  
10 to go in to see if there is sufficient reason to close the court  
11 during portions of the court-martial. And the way I'm going to  
12 handle it, and we've started when I talked with counsel to talk about  
13 it, is round one, round two and round three, is the classified  
14 information that was processed went up in about three different  
15 rounds. The first round has already been marked as Appellate Exhibit  
16 XXI, and it contains 20 different documents, 11 that went up to one  
17 original classification authority and nine that went up to a  
18 different original classification authority. And that was processed  
19 relatively early in the court-martial process. And that's round one.

20 (U) Round two consisted of exhibits that we're going to talk  
21 about at a later time, but it was copies of documents that the

[REDACTED]

[REDACTED]

1 defense wanted to use and also some documents that the government  
2 wanted to use, and that was contained in three different binders that  
3 we will address later. And then three is evidence that went up  
4 recently to the Commander of the Multi-National Force, Iraq; I think  
5 it went up on 6 October, and that's a smaller round, but that's round  
6 three. And so, what we're going to do right now is we're just going  
7 to handle round one and then we're going to have to take a recess  
8 before we cover round two.

9 (U) What I'll do is I have reviewed all of the documents that  
10 are contained within Appellate Exhibit XXI. And counsel, do you have  
11 any evidence to present on this issue, trial counsel?

12 (U) ATCl: No, Your Honor.

13 (U) MJ: Defense counsel?

14 (U) DC: No, sir.

15 (U) MJ: I'll allow you to argue then. Trial counsel, go  
16 ahead.

17 (U) ATCl: Yes, Your Honor.

18 (U) The standard under M.R.E. 505(3), demonstration of national  
19 security nature, requires that the affidavit demonstrates the  
20 disclosure of the information reasonably could be expected to cause  
21 damage to the national security and the degree caused required to

[REDACTED]

[REDACTED]

1 warrant classification under the applicable executive order or statute  
2 or regulation. In both the 11 and 9 documents contained in Appellate  
3 Exhibit XXI, the affidavits completed by Gunnery Sergeant and Captain  
4 Gawlick demonstrate that. And again, this was ratified in the OCA  
5 memos that are also contained in that exhibit, Appellate Exhibit XXI.  
6 So Your Honor, we ask that we close the courtroom for that portion of  
7 the trial related to those documents. The government intends to  
8 offer two witnesses, Gunnery Sergeant Whalen and Captain Gawlick, who  
9 are going to discuss those documents. And while they're discussing  
10 those documents--not here today, sir, but at trial. And while  
11 they're discussing those documents, we ask that you close the  
12 courtroom to the public, Your Honor. Thank you.

13 (U) MJ: Defense counsel, you may argue.

14 (U) DC: Yes, sir. Sir, with regards to these documents and  
15 the showing that the government has made in terms of closing the  
16 courtroom for testimony with regards to these documents or the  
17 presentation of these documents, defense does not object to the  
18 closing of the courtroom regarding these documents. However, we do  
19 reserve the right to object to foundational objections or other  
20 objections of that nature with regards to putting these things into  
21 evidence or the testimony that would be elicited.

[REDACTED]

[REDACTED]

1 (U) MJ: Sure, absolutely. I mean, that's a good point.  
2 Obviously, the court's not going to admit any of these documents.  
3 We're just determining whether or not we're going to receive this  
4 evidence in a closed session, that's all.

5 (U) DC: Yes, sir. So, the defense has no objections to  
6 receiving the information of this nature related to these documents  
7 in a closed session.

8 (U) MJ: Okay. [Pause.]

9 (U) Okay, I'm going to address the documents contained in  
10 Appellate Exhibit XXI. First of all, there are 11 documents that  
11 fell within the purview of the Commander of Multi-National Force,  
12 Iraq. The first document is OPLAN 0601, is a defense plan for Camp  
13 Cropper, and it's dated 15 March 2006. It is marked "secret". It's  
14 a full OPLAN with the situation, mission, execution, service support  
15 and command and signal with annexes that include photographs and  
16 diagrams of the camp. Most internal portions are marked "secret" and  
17 some are marked "unclassified".

18 (U) Second is a chemical response assessment for Fort Suse, is  
19 that it?

20 (U) ATC2: Yes, sir.

[REDACTED]

[REDACTED]

1 (U) MJ: Suse is how they pronounce it? Okay...dated 9 May  
2 2006. It's marked "secret". This five-page document depicts a  
3 theater internment facility's ability to respond to a chemical  
4 attack. It includes the status of detection assets and  
5 recommendations for future CBRN defense for that facility.

6 (U) Third, there is an info brief for the Commander of 4th  
7 Infantry Division concerning Camp Cropper; it's dated 6 April 2006.  
8 It's marked "secret". These 22 PowerPoint slides show the unit's  
9 mission, commander's intent, organization, equipment and facilities  
10 and has two detailed diagrams.

11 (U) Fourth is the Charlie 1/142d FA guard force chart and two  
12 photos. It's undated; it's marked "secret". This three-page  
13 document contains a chart with a number of guards and two aerial  
14 photos with captions.

15 [REDACTED]

16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
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[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

14        (U) Eighth, a troop to task info brief, it's undated; it's  
15 marked "secret". This document contains slides with charts and  
16 diagrams showing the staffing, shifts, and layout for an internment  
17 facility.

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18        (U) Ninth, an update briefing to the Commander of the 43d MP  
19 Brigade on the movement of HVC number 1. It is undated; it's marked  
20 "secret". These 40 PowerPoint slides show the mission and methods of

[REDACTED]

[REDACTED]

1 movement with the routes, alternate routes, maps and force  
2 protection. It also contains slides on visitor issues.

3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]

8 (U) Eleventh, slides with pictures and identities of detainees  
9 with classification of "other," dated 27 June 2006. It's marked  
10 "secret". It has pictures, identities, ID numbers and in some cases,  
11 disposition from adjudication for other detainees separated by  
12 category. I find that these eleven documents have been properly  
13 classified as secret by the proper original classification authority,  
14 which is the Commander of the Multi-National Force, Iraq, which is  
15 currently General Petraeus. It also has been done in accordance with  
16 Executive Order 12958, as amended most recently on 25 March 2003,  
17 specifically sections 1.4 Alpha, 1.4 Charlie and 1.4 Golf.

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18 (U) Next, I want to go into the documents that fell within the  
19 purview of United States Army Central. First, there is an executive  
20 brief from Major General Dunlavey, dated 31 March 2002, marked  
21 "secret". These PowerPoint slides focus on detainee operations in

[REDACTED]

[REDACTED]

1 Afghanistan with the concept of the operations, photographs,  
2 diagrams, operational issues, and lessons learned.

3 (U) Second, "Detainee Movement Plan," undated, marked "secret".  
4 This one-page document contains a map and flight schedules.

5 (U) Third, more of a detainee movement plan, undated, marked  
6 "secret". This one-page document contains a map and times.

7 (U) Fourth, an email dated 8 February 2002, marked "secret".  
8 This email discusses release of a named detainee.

9 (U) Fifth, Al-Qaeda and Taliban Leadership, undated, marked  
10 "secret". This two-page document shows leadership structure of Al-  
11 Qaeda and Taliban with pictures, identities and most current status.

12 (U) Sixth, Southwest Asia Air Defense Artillery Update, dated 4  
13 April 2002, marked "secret". These PowerPoint slides contain  
14 information on the threat and friendly capabilities, including  
15 problems with--correction, including problems with recommendations  
16 and missile inventory. Internally, most portions are marked "secret"  
17 with some marked as "unclassified".

18 (U) Seventh, email dated 21 May 2002, marked "secret". This  
19 email contains the number of detainees as reported by the National  
20 Detainee Records Center in the Pentagon.

[REDACTED]

[REDACTED]

1 (U) Eighth, detainee report, dated 19 May 2002, marked "secret".  
2 This document lists ten detainees by ISN with location, full name,  
3 nationality, date of birth, gender, physical condition and  
4 information about their capture.

5 (U) And ninth, slides on Coalition, dated 7 February 2007,  
6 marked "secret". These PowerPoint slides with comments show and  
7 discuss the support that Coalition countries are providing. I find  
8 that these documents have been properly classified as "secret" by the  
9 proper original classification authority, which is the Commander of  
10 the United States Army Central, which is currently Lieutenant General  
11 Whitcomb. And I find that this has been done in accordance with  
12 Executive Order 12958, as amended most recently on 25 March 2003,  
13 specifically sections 1.4 Alpha, 1.4 Bravo, 1.4 Charlie, 1.4 Delta,  
14 and 1.4 Golf.

15 (U) From all the evidence, I am satisfied that there is a  
16 reasonable danger that presentation of these 20 documents before the  
17 public will expose military matters that, in the interest of national  
18 security, should not be divulged. Specifically, disclosure in open  
19 court would increase the vulnerability of Camps Cropper and Suse. It  
20 would decrease the effectiveness of current military operations in  
21 Iraq. It would increase the vulnerability of Coalition Forces

[REDACTED]

[REDACTED]

1 against chemical attack. It will jeopardize the relationship that  
2 the United States has with friendly and Coalition Forces. It will  
3 endanger the lives and safety of Coalition Forces and it will  
4 decrease the effectiveness of intelligence collection during the  
5 current operations.

6 (U) Counsel, the next part is just to discuss how that  
7 information is going to be disclosed in court. And what I'm willing  
8 to do is we can talk about the information first and all the  
9 different rounds, and then we can go by witnesses if witnesses are  
10 going to discuss information in multiple rounds. Or, if it's easy  
11 and this evidence is just going to come out through a specific  
12 witness or just in documentary form, then we can discuss that now.  
13 Trial counsel?

14 (U) ATCl: Sir, for those documents that you've just discussed,  
15 for the MNF-I documents, the government intends to call Captain  
16 Gawlick to offer testimony as to how those documents relate to the  
17 national defense and how they could be used to the injury of the  
18 United States or to the advantage of a foreign nation as an element  
19 of the 18 USC 793 Echo charge. So, probably what we expect at this  
20 point is that Captain Gawlick will testify as to the specifics of  
21 those documents as it relates to those two elements of that offense.

[REDACTED]

[REDACTED]

1 The same thing for Gunnery Sergeant Whalen, Your Honor, we intend to  
2 call him and to offer similar testimony, how they relate to the  
3 national defense and how they could be used to the injury of the  
4 United States.

5 (U) MJ: Now for those two witnesses, is that the only thing  
6 that they're going to talk about?

7 (U) ATCl: Yes, Your Honor. And Your Honor, if I may just add  
8 on one other thing.

9 (U) MJ: Sure.

10 (U) ATCl: We'll argue that in closing, as well, so it will come  
11 out in the closing argument, as well.

12 (U) MJ: Okay, so in closing, you're going to talk about the  
13 actual contents of each of these documents, okay.

14 (U) Trial counsel, any other witnesses going to talk about these  
15 documents, foundational witnesses?

16 (U) ATCl: Yes, Your Honor. And there's really one of two ways  
17 we could do that for the foundational witnesses. We could put a  
18 "secret" cover on the documents to show them or to have them look at  
19 that on the stand without revealing it to anybody who happens to be  
20 in the court and then testify that, "Yes, I found this particular

[REDACTED]

1 document on this particular CD," or "I found this particular document  
2 in----"

3 (U) MJ: So they're going to authenticate it as a document  
4 that they found somewhere, but they're not going to talk about the  
5 content.

6 (U) ATC1: The substance of what's in the document, roger, sir.

7 (U) MJ: So you're not asking to close any portion of those  
8 foundational witnesses' testimony, are you?

9 (U) ATC2: We don't think it's necessary, Your Honor, but if you  
10 don't want us to put a "secret" cover on that and give it to the  
11 witness like that, we can----

12 (U) MJ: There's no problem having a "secret" cover on there.  
13 If it's supposed to have a "secret" cover, then it can have a  
14 "secret" cover. No, I understand, it appears to be no need for you  
15 to go into the contents of it so there's no need to close any portion  
16 of that foundational witness' testimony. But these other two  
17 witnesses that that's all they're going to talk about and these  
18 documents are all "secret," defense counsel, do you want to be heard  
19 on that as far as whether or not these documents are going to be  
20 addressed by any other witnesses?

[REDACTED]

[REDACTED]

1 (U) DC: Sir, as far as we can see right now, none of the  
2 defense witnesses are going to address the contents of those  
3 documents.

4 (U) MJ: All right, well based on that, for the two witnesses  
5 that are going to talk about the impact of these, their only  
6 testimony is going to be about these documents. Apparently, one will  
7 talk about 11 documents and the other will talk about 9 documents.  
8 That's going to be the only testimony that those witnesses provide.  
9 I don't see any way in which any of their substantive testimony can  
10 be conducted in open court based on the nature. It has been clear, I  
11 fully read all those documents and it just can't be discussed in open  
12 court without risking national security. However, what I do want to  
13 do because I'm balancing the right to a public trial with the  
14 interest of national security, is even if a witness is going to  
15 testify only about classified information, that's all the substantive  
16 information, to the public, it is in their interest for a public  
17 trial that they at least know who is in here testifying. So although  
18 it may be a logistical pain for certain people, but what I do want to  
19 do is when that witness is called, the court will be open. So the  
20 witness will come in. The witness will take the oath. The witness  
21 will state the name, unit, etcetera, do any foundational requirements

[REDACTED]

1 as far as who this person is. And then once the trial counsel is  
2 getting into the documents, at that point, you can close...you can  
3 ask that the court be closed at that point.

4 (U) Trial counsel, are you tracking where I'm going?

5 (U) ATC1: Yes, Your Honor.

6 (U) MJ: I see that as it's different than if the members of  
7 the public can't even see who's being brought in here, it looks like  
8 a secret star chamber in here and that's not what we want. We want  
9 the public to be able to view everything that they can view, and I  
10 think that accomplishes that for those witnesses. As far as the  
11 other witness, I see no need to close any portion of the foundational  
12 witnesses' testimony based on what we know right now. So, none of  
13 that testimony will be conducted in closed court.

14 (U) ATC1: Sir, if I may?

15 (U) MJ: Sure.

16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

[REDACTED]

[REDACTED]

1 (U) MJ: Are they going to talk about other matters, too, or  
2 just these documents?

3 (U) ATCl: Lieutenant Evans, just the document, General Gardner  
4 may get into other material, as well.

5 (U) MJ: Let me ask you about Lieutenant Evans' testimony.  
6 When he testifies, everyone realizes that the finder of fact has read  
7 the documents. Is he going to discuss the contents of the documents  
8 or is he going to talk about the impact? And if he's talking about  
9 the impact, will it be getting into classified information or will he  
10 necessarily have to disclose? I mean, there's two possibilities; I  
11 don't know what his testimony is going to be, but I would envision  
12 that he could talk about impact without disclosing any classified  
13 information. But I also could see a situation where he couldn't.  
14 Which do you think it is?

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[REDACTED]

[REDACTED]

1 (U) MJ: So he actually will be getting into classified  
2 information.

3 (U) ATC1: Yes, Your Honor.

4 (U) MJ: All right. And is that what's going to be his...his  
5 testimony is going to be about site assessment and vulnerabilities?

6 (U) ATC1: Yes, Your Honor.

7 (U) MJ: Okay, I'm inclined to close all that. I mean,  
8 knowing exactly what's in the documents and the risk involved,  
9 defense counsel, I'm intending to close that portion of his  
10 testimony. Do you want to be heard on that?

11 (U) DC: No, sir, we don't have an objection to those portions  
12 of Lieutenant Evans' testimony being closed. We would have objection  
13 if the complete testimony of General Gardner were closed because we  
14 believe that he's going to be testifying about various different  
15 matters.

16 (U) MJ: Absolutely, no, I haven't touched that yet because I  
17 don't envision closing all his testimony and I think that would be  
18 very unlikely.

19 (U) I find that based on the proffer by the trial counsel, all  
20 the substantive evidence by Lieutenant Evans about impact of  
21 disclosure on site assessment and vulnerabilities must be held in

[REDACTED]

[REDACTED]

1 closed court because it poses a serious risk to national security  
2 otherwise. For him, for Lieutenant Evans, obviously we handle it the  
3 same way as with the other witnesses I talked about whose testimony  
4 was all about classified testimony. He'll still come in, do the  
5 initial questions in open court and then only when you're ready to  
6 get into the substance of his testimony will we close the court.

7 (U) ATC1: Sir, if I may just jump in there. Lieutenant Evans,  
8 his duty position and his existence within the Army may itself be  
9 classified. We're trying to run that to ground.

10 (U) MJ: Okay.

11 (U) ATC1: He would be the one witness where that would probably  
12 be an exception to the--I understand what you're saying, Your Honor,  
13 where the witness comes in----

14 (U) MJ: I understand. I understand duty position. So you're  
15 saying even his existence within the Navy?

16 (U) ATC1: Well, the fact that he....

17 (U) MJ: You're saying even his existence that he's in the

18 Navy?

19 (U) ATC1: We're going to have to verify that, Your Honor.

20 (U) MJ: Yes, okay, we can address that later.

21 (U) Do you want to be heard on that, defense counsel?

[REDACTED]

1 (U) DC: Yes, sir, his name and position were on--or not duty  
2 position, but at least his name was on all the witness lists that  
3 were unclassified, so I don't think his identity, itself, is a  
4 classified matter. Maybe the nature of his work and what he does, so  
5 I think he can at least come in and be identified as a witness and we  
6 can just close it as to those duties that would be considered of a  
7 classified nature.

8 (U) MJ: Unless you come back with further argument on  
9 why...and I understand that there might be an argument why actually  
10 his name might be removed from certain lists for a tour of assignment  
11 and perhaps there's an argument there but I don't have it in front of  
12 me. And I agree with defense counsel, is in that case, perhaps his  
13 current assignment, duties, that may be classified. So, where  
14 oftentimes you might ask a person their name and then next ask the  
15 unit of assignment and then go into their background, but this  
16 witness, what you could do, is ask his name. Unless I get a  
17 different ruling based on further argument from you, get his name,  
18 perhaps how long he's been in the Navy and maybe some of this  
19 background. Don't ask his current duty assignment until you get that  
20 foundational part done. And then ask for the court to be closed, and

[REDACTED]

[REDACTED]

1 then you can get out his current assignment after the court's closed  
2 and then go on from there.

3 (U) Do you understand, trial counsel?

4 (U) ATCl: Yes, Your Honor.

5 (U) MJ: That's my ruling as far as right now. I'm open to  
6 reconsider if you come back with an argument that just his name and  
7 the fact that he's in the Navy right now is a classified matter,  
8 you're going to have to convince me of that beforehand, otherwise my  
9 ruling stands as I just stated, okay?

10 (U) Now, as far as Lieutenant General Gardner, trial counsel,  
11 what portions...correction, what subject matters is he going to  
12 cover? Is he going to cover various sentencing information? Well,  
13 first of all, I don't think you asked for Lieutenant General  
14 Gardner's total testimony to be closed, is that right?

15 (U) ATCl: No, Your Honor, it would be limited in scope.

16 (U) MJ: All right, now, for the part where he's talking about  
17 any of these documents, is he going to have to get into the contents  
18 of the documents like Lieutenant Evans will have to?

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

[REDACTED]

[REDACTED]

1 [REDACTED]

2 [REDACTED]

3 (U) MJ: All right, I see. So he's not just talking about in  
4 any hypothetical situation, "When you disclose this type of  
5 information, this is the risk," he's going to actually talk about in  
6 this specific case, this is the impact that it had? So, he's going  
7 to talk about the contents of the documents, themselves?

8 (U) ATCl: Yes, Your Honor.

9 (U) MJ: So, defense counsel, just to expedite matters, I'm  
10 inclined to close the portions when he's talking about these 20  
11 documents specifically, what was in them and then the specific impact  
12 from those. Do you want to be heard on that?

13 (U) ADC: No, sir, I'll likely handle General Gardner's  
14 testimony. I agree with your earlier comment about if he's talking  
15 impact. I think much of his testimony to be, "This sort of impact on  
16 the vulnerabilities was damaging." Maybe there's one or two facts in  
17 those documents, but I think it would be fairly limited. You know,  
18 "This one slide," you know, "This one particular..." but even that, I  
19 think he can say, "One of the slides in there talks about  
20 vulnerabilities." So I think as much as possible, we can have that  
21 in public forum, limited to the very few facts that he might point to

[REDACTED]

1 in the documents. I mean, I could see where the government might  
2 point out one or two things, but the overall impact, I don't believe  
3 that would be classified.

4 (U) MJ: Okay, so....

5 (U) ADC: Only when he ties it to a specific fact.

6 (U) MJ: Right, and I think what they're going to do is,  
7 that's what I was talking about earlier, it sounds like they're going  
8 to be tying it to specific facts. But what you're saying is, when  
9 he's all done, and he might be covering more than the 20 documents, I  
10 don't know if he's talking about anything else. But when he's all  
11 done, he's ready to give an opinion, overall opinion, on what the  
12 impact of those documents, disclosure of those documents were, then  
13 that could be done in open court. I'm open to that. Like I said, I  
14 am wanting to chisel away at the closed portion of this trial as much  
15 as possible. So if I can chisel out a single question and answer,  
16 then I'm going to do that. And it sounds like the defense counsel is  
17 correct in that the overall impact, if you're going to ask a question  
18 about what the overall impact was either of these 20 documents, or if  
19 you're not doing it just for the 20 but if he's talking about other  
20 things and he's going to say the 20 documents plus "X," what's the

[REDACTED]

1 overall impact, and you're going to summarize his testimony that way  
2 at the end, then that would be able to be accomplished in open court.

3 (U) Trial counsel, do you intend to do that? Do you intend to  
4 give an overall impact based on----

5 (U) ATC1: Yes, Your Honor, it probably will be two portions.  
6 It would probably be an--I'm sorry, I shouldn't say "would," it will  
7 be an overall impact testimony but he will also testify about  
8 specific vulnerabilities.

9 (U) MJ: Sure.

10 (U) ATC1: And I understand your ruling, Your Honor, that for  
11 the overall arching as it doesn't relate to the details, that that  
12 would be in open court.

13 (U) MJ: Right.

14 (U) ATC1: As it relates to the specifics, details within those  
15 documents, it would be closed.

16 (U) MJ: Exactly. Okay, that's the ruling of the court. When  
17 it's talking about impact from disclosure of these specific documents  
18 and he's talking about what's in the documents, that will be  
19 conducted in closed court. I find that it's required for the  
20 interest of national security. However, when he does give an overall

[REDACTED]

[REDACTED]

1 opinion, what type of impact this caused, then that is able to be  
2 elicited in open court and that's how it will be elicited.

3 (U) Okay, I think we've discussed these 20 documents  
4 sufficiently so I think counsel for both sides understand what can be  
5 discussed in open court, what can be discussed in closed court. Do  
6 counsel for either side have any questions on the court's ruling just  
7 for this round?

8 (U) ATCl: No questions, Your Honor.

9 (U) DC: No, sir.

10 (U) MJ: All right, now we're ready to move into round two.

11 And to do that, as I mentioned earlier, that defense counsel, you are  
12 going to have to compare the redacted and unredacted volumes of the  
13 evidence that you gave notice that you intended to offer. And I  
14 think you understand the goal there is, if you're able to use  
15 unredacted versions of emails or memos or letters, then what happens,  
16 if that gets across the point you're trying to get across, then we're  
17 able to accomplish that in open court and that's the goal of the  
18 court is to do that. As long as we still have a fair trial, that's  
19 what I want to do as much as possible is to conduct this in open  
20 court.

[REDACTED]

[REDACTED]

1 (U) So as you're going through, do that. However, if you find  
2 portions that have been redacted that's really what you were wanting  
3 to get at with that document, just make a list and we can focus in on  
4 those specific things and perhaps we can, for certain reasons, go  
5 into closed court for some of those and we might have some unredacted  
6 documents that were within that bigger binder. I just want to focus  
7 you in on what I want you to look at during the recess so that when  
8 we come back in we can talk in detail about that.

9 (U) I'm going to take a recess. Defense counsel, do you think  
10 30 minutes is sufficient?

11 (U) DC: [No verbal response.]

12 (U) MJ: We're going to plan on that now. If you need more  
13 time, then just let me know before the 30 minutes is up, does that  
14 work?

15 (U) DC: Yes, sir.

16 (U) MJ: The court is in recess.

17 (U) [The session recessed at 0954, 12 October 2007.]

18 (U) [Court reconvened at 1305, 12 October 2007.]

19 (U) MJ: Court is called to order. All parties present before  
20 the court recessed are again present. The court is still in a closed  
21 session discussing Military Rule of Evidence 505. And as I stated,

[REDACTED]

[REDACTED]

1 all the parties that were present previously are again present; no  
2 one else is present at this time.

3 (U) During the recess, I conducted an R.C.M. 802 conference.  
4 Present were all seven counsel, all three security officers and  
5 myself. We discussed the defense counsels' comparison of the  
6 redacted information they had submitted under Military Rule of  
7 Evidence 505(h) with the unredacted version. And those had been  
8 marked as Appellate Exhibits XXX and XXXI; XXX is unredacted, XXXI is  
9 redacted. And also what we're going to be discussing now is  
10 Appellate Exhibit XXIX as well as Appellate Exhibits XXXIII and XXXIV  
11 because these all relate to information that was processed together,  
12 some of them to different original classification authorities. So  
13 during the R.C.M. 802 conference, defense counsel articulated what  
14 exactly they were going to go into during the trial and that assisted  
15 in focusing the parties where we need to go during this Article 39(a)  
16 session, and we'll go into that in more detail.

17 (U) And then also, we discussed a couple of other issues. One  
18 was privilege under Military Rule of Evidence 506. And the  
19 government had provided the court with a memorandum from the Deputy  
20 Secretary of Defense, dated 16 February 2006; that's been marked as  
21 Appellate Exhibit XXXV. And what we'll do is we'll discuss that at a

[REDACTED]

[REDACTED]

1 later time. Specifically, it's talking about, apparently it's an  
2 exercise of privilege in all cases involving specific information,  
3 specifically ICRC communications. So the way it's addressed and what  
4 it addresses within the memorandum indicates it may be broader than  
5 just the one case that's mentioned on the document.

6 (U) Also, we discussed witness issues, specifically there are  
7 three witnesses that are currently detainees at Camp Cropper. And,  
8 according to the defense counsel, those witnesses, they're going to  
9 be produced, but if they're produced, they're not going to say  
10 anything. And so we discussed that, and the counsel were talking  
11 about having them declared as unavailable. But on further thought,  
12 what we're going to need to do, for the court to find them  
13 unavailable, the court's going to need some evidence before it to  
14 find them unavailable. And if the parties enter into a stipulation  
15 about the facts that the court could rely on, but the court is not  
16 going to be able to rely on assertions by counsel to make a  
17 determination that witnesses are not available. So, the counsel can  
18 talk during breaks today and determine if they wanted to enter into a  
19 stipulation or if they bring in other evidence to support that if the  
20 defense is still wanting to call those witnesses. Or, if there's  
21 alternative means that the defense is going to use, they can do that,

[REDACTED]

1 also. But the court, to make a determination of nonavailability, the  
2 court does have to have evidence in front of it to make that fact  
3 specific ruling.

4 (U) Okay counsel, what we're going to do now is we're going  
5 to...well, first of all, does anyone have any objections, corrections  
6 or additions to my characterization of the R.C.M. 802 conference?  
7 Trial counsel?

8 (U) ATC1: No, sir.

9 (U) MJ: Defense counsel?

10 (U) DC: No, sir.

11 (U) MJ: Okay, and we'll go in more detail as I said  
12 about...the bulk of the time that we were in there we were going down  
13 pretty studiously specific information in Appellate Exhibits XXX and  
14 XXXI. But I just want to mention, we had already covered Appellate  
15 Exhibit XXI and I just want to say for the record that I did find  
16 that the need for excluding the public from portions of the trial  
17 that I delineated is of sufficient magnitude so as to outweigh the  
18 danger of any miscarriage of justice which may result from judicial  
19 proceedings being carried out in even partial secrecy.

20 (U) Also, the 20 documents that were discussed within Appellate  
21 Exhibit XXI along with all other classified exhibits that the court

[REDACTED]

[REDACTED]

1 already has will be placed in a separate volume or volumes of the  
2 record of trial that will be appropriately marked and handled as  
3 classified in accordance with DoD and Army regulations.

4 (U) Also, one thing that I want to ask trial counsel to focus a  
5 little bit more on a couple of the witnesses. As far as Captain  
6 Gawlik and Gunnery Sergeant Whalen, you said that all their testimony  
7 was going to be about the classified documents and the impact. Well,  
8 actually, they're not going to talk about impact, right, because  
9 they're just going to be testifying on the merits, is that right?

10 (U) ATCl: Yes, sir.

11 (U) MJ: Okay, and that answers the question.

12 (U) As far as Appellate Exhibits XXX and XXXI, which was the  
13 submission by a defense counsel under M.R.E. 505(h), does either side  
14 have any additional evidence to present on this at this point? Trial  
15 counsel?

16 (U) ATCl: No, Your Honor.

17 (U) MJ: Defense?

18 (U) DC: No, sir.

19 (U) MJ: Okay, I'll hear arguments then. Trial counsel, do  
20 you need to be heard?

[REDACTED]

1 (U) ATC1: No, Your Honor. I believe that you have all the  
2 evidence you need before you with the affidavit and the OCA  
3 determination and Chief Gendron's determination that they're  
4 classified, Your Honor, to close those portions that specifically  
5 relate to that part of the trial.

6 (U) MJ: Okay, thank you. Defense counsel?

7 (U) DC: Yes, sir. And sir, do you want me to go through  
8 individually each of the----

9 (U) MJ: No, I'll do that, and just track along and make sure  
10 I cover it adequately when I go through it.

11 (U) DC: Yes, sir. With regards to the matters that were  
12 presented in the 505 notice, we would argue that we don't have any  
13 objection, there were certain portions that we went through during  
14 the 802 conference between the redacted and the unredacted portions  
15 of Appellate Exhibit XXX and XXXI. We believe that for the majority  
16 of the issues that we want to get across to the court, the unredacted  
17 version of the 317 pages of emails is sufficient with the exception  
18 of the specific emails that were pulled out and discussed during the  
19 802 session. And we are amenable to having those things and we agree  
20 that those things should be covered in a closed session because of

[REDACTED]

1 the nature of the materials that are contained within those emails  
2 and the things that will be discussed.

3 (U) MJ: Okay.

4 (U) DC: Sir, with regards to some of the other matters that  
5 were listed in our 505 notice in regards to the ICRC reports and  
6 those other things, those are still pending. I believe we're going  
7 to do those on Monday. So, I'm just focusing this specifically on  
8 the emails that were in the redacted and unredacted portions.  
9 Specifically, Your Honor, we don't intend to introduce into evidence  
10 those specific emails subject to the need for cross-examination or  
11 impeachment or things of that nature, but those are emails that the  
12 witnesses that we're going to present on direct examination and also  
13 through cross-examination, that's information that will be touched  
14 through cross-examination and direct examination. And so, those  
15 emails are a representative sample of the nature of the information  
16 that we want to get into. And so, those portions specifically  
17 delineated for a closed session are those topics of information that  
18 we believe should be closed to the public based on the nature of the  
19 information.

20 (U) MJ: All right, thank you.

[REDACTED]



1 (U) Appellate Exhibits XXX and XXXI contain numerous emails,  
2 attachments, memoranda, letters and similar documents. As the  
3 defense counsel just stated, the defense does not intend to offer all  
4 those documents during the trial but it was an intent to reduce to  
5 writing the information they intended to elicit, either during cross-  
6 examination or direct examination of witnesses. And I think it was  
7 helpful in that regard; it was easier to see it in context with  
8 everything else and it enabled the government to process that up  
9 through the original classification authority who went through it in  
10 great detail and delineated which parts were classified and which  
11 were not. So I think that was helpful in getting that accomplished.

12 (U) I find that certain information within those exhibits,  
13 specifically in four general areas, and they've been redacted out of  
14 Appellate Exhibit XXXI, are classified as "secret" by the proper  
15 original classification authority which is the Commander of the  
16 Multi-National Force, Iraq, which is currently General Petraeus, in  
17 accordance with Executive Order 12958 as currently amended. The four  
18 general topics are JIDC incentives, detainee and family names,  
19 manning issues and weaknesses and the intelligence collection,  
20 including methods and procedures. Those four very broad subjects



[REDACTED]

1 fall within the categories in sections 1.4 Alpha, Charlie and Delta  
2 of Executive Order 12958.

3 (U) Also, and more specifically, upon comparing the redacted and  
4 unredacted copies of the materials that the defense had submitted  
5 under Military Rule of Evidence 505(h) notice, the defense pinpointed  
6 specific facts that were redacted that it wants to elicit in a closed  
7 session. Those facts are...and I boiled it down to 15 that I think  
8 adequately covers what the defense wants to cover.

9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 (U) Second, details on detainee privileges covering phone calls  
13 and visits.

14 [REDACTED]  
15 [REDACTED]  
16 (U) Fourth, ICRC issues; and we'll address that later as far as  
17 ICRC issues.

18 [REDACTED]  
19 [REDACTED]

[REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 (U) Seventh, more information about the release procedures.

5 (U) Eighth, the fact that third country nationals are detained  
6 at Camp Cropper.

7 (U) Ninth, a specific 510 request for Detainee Number 184.

8 (U) Tenth, an increase in the number of family visits and phone  
9 calls over a certain period of time as shown with the chart.

10 (U) Eleventh, more information concerning the ICRC, specifically  
11 their reports.

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 (U) And fifteenth, information on the mission of Camp Cropper,  
19 why it was designed and what its current mission is now.

20 (U) Defense counsel, have I adequately covered the points that  
21 you brought up?

[REDACTED]

[REDACTED]

1 (U) DC: Yes, sir.

2 (U) MJ: I think you had it down to 19 or so, but I think some  
3 of them were redundant.

4 (U) DC: Yes, sir.

5 (U) MJ: I find that this specific information is classified  
6 "secret" by the proper original classification authority in  
7 accordance with Executive Order 12958 as currently amended. And this  
8 specific information does fall within the categories and sections  
9 1.4(a), (c) and (d) of Executive Order 12958. From all the evidence  
10 and from the circumstances in this particular case...now, before I  
11 state this, let me clarify. I said earlier we were going to handle  
12 the ICRC information separately. So, there were two of the 15 items  
13 that mentioned the ICRC, so this ruling does not apply to those.  
14 Those will be handled separately. For the other 13 items and also  
15 for the four general categories mentioned in the affidavit, I am  
16 satisfied that there is a reasonable danger that presentation of  
17 these materials before the public in open court will expose military  
18 matters which in the interest of national security should not be  
19 divulged. Also, the danger is of significant--well, correction, is  
20 of sufficient magnitude to outweigh the interest in having all trials  
21 open to the public.

[REDACTED]

[REDACTED]

1 (U) Now defense counsel, are you able to delineate which witness  
2 is going to talk about any of these specific matters, or is it going  
3 to depend on the direct examination?

4 (U) DC: Sir, a majority of it will depend on the direct  
5 examination because both defense witnesses and government witnesses  
6 in a lot of circumstances will cross. And so, the information we  
7 need to get out from those witnesses we put on our witness list will  
8 likely come through cross-examination as opposed to calling them  
9 again during the defense's case.

10 (U) MJ: Understood. Trial counsel, does the government  
11 intend to go into any of these areas on direct examination?

12 (U) ATC1: One moment, Your Honor. [Pause.] Sir?

13 (U) MJ: Yes.

14 (U) ATC1: I think there's a little bit of clarification--I'd  
15 ask for a little clarification on your ruling on detainee privileges.

16 (U) MJ: Yeah, I said details on detainee privileges. So  
17 there, it would be...and it's hard to articulate. What's clear in

---

18 Appellate Exhibits XXX and XXXI is the general nature of detainee  
19 privileges is not classified. But when you get into the specific  
20 details of how many calls are allowed, how long someone has to be  
21 there before they're authorized to call. So really when I say that,

[REDACTED]

[REDACTED]

1 I'm talking about the redacted portions within Appellate Exhibits XXX  
2 and XXXI. That's what's classified "secret," so that's what I'm  
3 wondering is whether you're going to go into any of those details  
4 with any of your witnesses. Is it unclear at this point?

5 (U) ATC1: No, sir, I believe we will on several witnesses get  
6 into the specific phone calls that detainees are allowed and how  
7 we're alleging that Colonel Steele deviated from that when he  
8 provided an unmonitored phone call. So, to the extent--I believe,  
9 Your Honor, that it's either going to be covered by 506 as we made  
10 that request when that comes in, and depending on--I think the  
11 specificity is if it's tied to a specific detainee, that's when it  
12 becomes classified. If it's not tied to a specific detainee....

13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

[REDACTED]

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[REDACTED]

12 (U) ATCl: Yes, sir, I can give you a list of government  
13 witnesses that are going to touch on that area, sir?

14 (U) MJ: Sure, please.

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]

20 (U) MJ: And defense counsel, are you able to add any to that  
21 list?

[REDACTED]

[REDACTED]

1 (U) DC: Yes, sir. Sir, Sergeant Major Winkleman, who was  
2 Colonel Steele's sergeant major in that time. He'll probably touch  
3 on issues like the mission of Camp Cropper, the persons at Camp  
4 Cropper...oh, I'm sorry, did you just want the names, sir?

5 (U) MJ: Yes, just the names.

6 (U) DC: Sergeant Major Winkelman, probably Lieutenant Colonel  
7 Vartanian, Staff Sergeant Findley and Captain Merritt. And then,  
8 sir, from the government's list, we believe that those soldiers that  
9 served as guards or Sally Port guards or things of that nature that  
10 may be testifying about specifics will also get into some of those  
11 things during cross-examination or it may come out through direct.

12 (U) MJ: Okay, all right, that's sufficient. Okay, so for  
13 those witnesses...and counsel, I'll be tracking, if you're not  
14 following, be sure I'll correct you on the spot. But what I need you  
15 to do is like I said, package your classified and unclassified. And  
16 the reason why that's important, twofold; one, is I don't want to  
17 close the court and then have a lot of unclassified information  
18 coming out when I could have had the public sitting in here listening  
19 to all that. I don't want that. And then second, for judicial  
20 economy, I don't want this to be a parade in and out of the courtroom  
21 all day long during one witness' testimony. So those are my two

[REDACTED]

[REDACTED]

1 purposes for having you package it. So I think everyone's clear on  
2 that and if I think you're not doing that, I'll just correct you on  
3 the spot.

4 (U) Okay, next, we're going to talk about two specific areas  
5 that were within those same two appellate exhibits, XXX and XXXI.  
6 They went up to different original classification authorities and the  
7 two issues are, one is a letter from Ambassador Khalilzad to the  
8 Prime Minister of Iraq, and also I think there was a memo to the  
9 Ambassador from one of his employees concerning the same letter. And  
10 then also, there's a request from the Commander of Task Force 515 to  
11 the Commander of Task Force 134 concerning incentive approach  
12 techniques. I just want to approach those separately because they  
13 did go up to a different OCA.

14 (U) Do counsel for either side need to be heard on either of  
15 these two separate documents?

16 (U) ATCl: No, Your Honor.

17 (U) DC: No, sir.

18 (U) MJ: Okay, and first of all, I think I had mentioned  
19 earlier that at the back of Appellate Exhibit XXXIV was added a  
20 department notice from the Department of State. It concerns whether  
21 or not a certain position was authorized or delegated the authority

[REDACTED]

[REDACTED]

1 of original classification authority. And looking at that document,  
2 it does address the issue I had. On the bottom of the third page,  
3 top of the fourth page, it specifically addresses that. And the  
4 document this appellate exhibit is talking about is a letter from the  
5 Ambassador to the Prime Minister of Iraq; it's dated 5 January 2006  
6 and it's also an action memo to the Ambassador from his employee, Mr.  
7 David Litt, and that's dated 11 October 2005. There's a letter and  
8 memo that discusses the international and coalition implications of  
9 the release of two HVDs in January of 2006. The HVDs are mentioned  
10 by name and discuss the quantum of evidence in their criminal cases.

11 (U) This document has been classified as "secret" by the proper  
12 original classification authority, which is the section head of the  
13 Political Military Affairs at the U.S. Embassy in Iraq, who at the  
14 time was Ms. Karen Sassahara, in accordance with Executive Order  
15 12958 as currently amended. And the information within that letter  
16 does fall within the categories in sections 1.4(b) and 1.4(d). From  
17 the evidence and the circumstances in this case, I am satisfied there  
18 is a reasonable danger that presentation of these materials before  
19 the public in open court will expose military matters which in the  
20 interest of national security should not be divulged and that danger  
21 is of sufficient magnitude to warrant closing the court.

[REDACTED]

[REDACTED]

1 (U) Now defense counsel, what's the means by which you're going  
2 to elicit that information, the actual letter or just through  
3 testimony?

4 (U) DC: Sir, just testimony.

5 (U) MJ: Okay, and then just handle that testimony the same  
6 way as the other areas that we just discussed.

7 (U) DC: Yes, sir.

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6 (U) Defense counsel, again, the same question, do you intend to  
7 offer that document or is it through a testimony of witnesses?

8 (U) DC: It's just through the testimony of witnesses, Your  
9 Honor.

10 (U) MJ: Okay, handle that the same way I directed the other  
11 information.

12 (U) Counsel, now what we're going to do is we're going to  
13 address the information that's contained in Appellate Exhibit XXIX.  
14 The information that I just covered also was covered by Appellate  
15 Exhibit XXIX but we're going to cover the rest of the information  
16 within there. Do counsel for either side have any evidence to offer  
17 or arguments? Trial counsel?

18 (U) ATCl: Sir, just on the series of rules of engagement, both  
19 MNF-I and MNC-I that are in that, that will likely...depending on how  
20 you rule on the judicial notice, be documentary evidence. Otherwise,

[REDACTED]

1 we'll have to call a witness that will come in through testimony and  
2 then as a document. So I just wanted to----

3 (U) MJ: I understand, sure. Fair enough; okay, that's  
4 helpful.

5 Defense counsel?

6 (U) DC: Sir, can I briefly look at it?

7 (U) MJ: Sure. [DC reviews exhibit.]

8 (U) DC: Sir, are we talking to Binder 1, those documents in  
9 Binder 1?

10 (U) MJ: Yes, all the documents in Appellate Exhibit XXIX,  
11 there should be 11. Have you had a chance to look at hat?

12 (U) DC: Yes, sir, with the exception of tab 1, but the other  
13 ten tabs, we have.

14 (U) MJ: Go ahead and look at tab 1, then. And apparently,  
15 trial counsel, you can correct me if I'm wrong, but it will help the  
16 defense counsel, it appears that tab 1 was evidence you intend to  
17 elicit from witnesses through witness testimony. And apparently, it

---

18 appears that someone went through and put in red all the testimony  
19 that would be "secret," classified as "secret". And then when it  
20 went up for the OCA determination, it was determined that that red  
21 testimony is "secret," is that correct?

[REDACTED]

[REDACTED]

1 (U) ATC1: One moment, Your Honor.

2 (U) MJ: Sure.

3 (U) DC: Sir, with regards to some of the documents that are  
4 in binder 1, I believe some of those SOPs are still pending review.  
5 So, we may have more argument on those SOPs when we do that on  
6 Monday.

7 (U) MJ: That's a good point. And we can talk about that now,  
8 is I'm inclined at this point to find that tabs 2 through 5 have not  
9 been classified by any authority, so they would not fall within  
10 Military Rule of Evidence 505. So I'd either make that ruling or  
11 what we could do is put that off. I think the trial counsel was  
12 still working on that issue, whether they would fall under 506 or  
13 some other rule.

14 (U) ATC1: Yes, Your Honor.

15 (U) MJ: So what I'll do is for tabs 2 through 5, I'll just  
16 defer on those documents. So we're looking at 1 and 6 through 11;  
17 that's a good point, defense counsel.

---

18 (U) DC: And sir, we're just specifically talking about the  
19 closing of the hearing for discussion on those materials?

20 (U) MJ: Yes.

[REDACTED]

[REDACTED]

1 (U) DC: Yes, sir. Other than that, we don't have any other  
2 argument for purposes of those enclosures or those tabs.

3 (U) MJ: First of all, I'm going to cover tabs 6 through 10;  
4 I'm going to address them together. Those five tabs, the information  
5 in those five tabs has been classified as "secret" by the proper  
6 original classification authority, which is the Commander of the  
7 Multi-National Force, Iraq, General Petraeus, and in accordance with  
8 Executive Order 12958 as amended most recently on 25 March 2003.  
9 Specifically, what's contained in those tabs is Multi-National Force,  
10 Iraq, Framework Operations Order, dated 1 May 2006, marked as  
11 "secret" overall with most portions marked "secret" and some marked  
12 "unclassified". It contains the situation, mission, execution,  
13 service support and command and signal. Tab 7 has Appendix 7 to  
14 Annex C to MNC-I Operations Order 06-01, dated 21 April 2006. Also  
15 marked as "secret" overall with most portions marked "secret" and  
16 some marked "unclassified". This appendix contains the rules of  
17 engagement for U.S. forces for OPORD 06-01. Tab 8 contains Appendix  
18 4 to Annex C to Multi-National Corps, Iraq, Operations Order 05-02,  
19 dated 27 July 2005, also marked as "secret" overall with most  
20 portions as "secret" and some marked as "unclassified". This  
21 appendix contains rules of engagement for U.S. forces. Tab 9

[REDACTED]

[REDACTED]

1 contains Appendix 5 to Annex C to Multi-National Force Framework,  
2 Operations Order dated 1 May 2006, marked as "secret" with most  
3 portions marked "secret" and some portions marked "unclassified".  
4 This appendix contains rules of engagement for U.S. forces. And tab  
5 10 contains tab Bravo to Appendix 5 to Annex C to Multi-National  
6 Force, Iraq, Framework Operations Order dated 1 May 2006, marked as  
7 "secret" overall with most portions marked "secret" and some marked  
8 "unclassified". This annex contains definitions for rules of  
9 engagement.

10 (U) From all the evidence and from the circumstances in this  
11 case, I am satisfied that there is a reasonable danger that  
12 presentation of these materials before the public will expose  
13 military matters which, in the interest of national security, should  
14 not be divulged.

15 (U) Next, I want to address tab 11, and that was a Military Rule  
16 of Evidence 505 notice from the defense, dated 3 September 2007. It  
17 was not marked as classified and the memo goes through in the  
18 subparagraphs, in subparagraphs A through R talks about evidence that  
19 may be offered at trial that could fall within Military Rule of  
20 Evidence 505. I find that the information mentioned in subparagraphs  
21 3e, 3f, 3g, 3h, 3i, 3k, 3l, 3n and 3r is classified as "secret" by

[REDACTED]

[REDACTED]

1 the proper original classification authority, which is the Commander  
2 of Multi-National Force, Iraq, in accordance with Executive Order  
3 12958 as amended. Now, as far as which categories within the  
4 executive order it falls, I'll cover those separately. Subparagraphs  
5 3d and 3f is classified "secret" as far as detainee names. And that  
6 would fall within section 1.4(a) for military operations.  
7 Subparagraph 3g talks about a roster of released detainees, and that  
8 would fall within categories 1.4(a) for military operations and  
9 1.7(e). And the reason for it falling within category 1.7(e) is  
10 although individual facts within there might not be classified, the  
11 compilation of the individual unclassified information meets the  
12 requirement for a classification level of "secret".

13 [REDACTED]

14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

[REDACTED]

1

2

3

4

5 (U) DC: Yes, sir.

6 (U) MJ: I'll still address it in hopes that they do testify.

7 But that information would fall within categories 1.4(a) and 1.4(c).

8 From the evidence, I find that the information in the subparagraphs I  
9 just mentioned does create a reasonable danger that presentation of  
10 these materials before the public in open court would expose military  
11 matters which in the interest of national security should not be  
12 divulged.

13 (U) Now, as far as the other subparagraphs, just so we're clear  
14 on this, trial counsel, subparagraphs 3a through 3d, it doesn't fall  
15 within Military Rule of Evidence 505, is the government pursuing a  
16 different avenue of approach for those?

17 (U) ATC2: Yes, Your Honor, we're pursuing M.R.E. 506. We  
18 believe, and I believe we marked it previously, but the memo signed  
19 by the Secretary of Defense should be sufficient for that invocation,  
20 because it does not apply to that specific case but to ICRC  
21 communications generally, Your Honor.

[REDACTED]

1 (U) MJ: What we're going to do, what I intend to do is,  
2 defense counsel, you haven't had a chance to look at that memo at  
3 length, have you?

4 (U) DC: No, sir.

5 (U) MJ: And so obviously we're not doing trial by ambush, so  
6 I'm going to give the defense counsel enough time to look at that and  
7 then we'll litigate it when they've had ample opportunity to prepare.  
8 Okay, so that's your approach with that one.

9 (U) And subparagraph 3j and 3m?

10 (U) ATC1: With regards to 3j, Your Honor, I believe that Chief  
11 Gendron recommended that it be unclassified as stated. And now  
12 specifics in specific cases will probably have to be treated  
13 differently, Your Honor.

14 (U) MJ: So you're talking about specific detainee records, is  
15 that it?

16 (U) ATC2: Yes, Your Honor, on j there. I think as stated, as  
17 they stated, it's unclassified; however, I think it would be a  
18 different case with more specific information.

19 (U) MJ: Okay, right, I'm looking at it. Defense counsel, do  
20 you intend to get into specific detainee records or just the general  
21 nature of the conversation that took place in the emails?

[REDACTED]

[REDACTED]

1 (U) DC: Sir, for j, that was the general nature. However,  
2 it's also covered by subparagraph 3e, and those are the specific  
3 records dealing with certain determinations of detainees. So 3e was  
4 determined to be "secret," but in terms of the general information  
5 and the classification level in general, that's testimony that would  
6 be elicited but not necessarily specific to a specific detainee.

7 (U) MJ: Okay, you're right, yeah, because "e" was secret if  
8 it got into a specific detainee with the name.

9 (U) DC: Yes, sir.

10 (U) MJ: Okay, understood, all right.

11 (U) ATC1: Sir, Your Honor, to the extent that "e" and "j" are  
12 redundant, if they don't get into any specifics, the government won't  
13 have any issues with that.

14 (U) MJ: And, 3m?

15 (U) ATC1: Your Honor, again, this is a 506 request that's with  
16 the Secretary of the Army that we hope to have signed before Monday,  
17 Your Honor. You also did make a specific ruling a moment ago about  
18 specific privileges as contained in those emails, Your Honor. So, a  
19 portion of that obviously will be classified as you previously  
20 determined and then a portion will hopefully as--on Monday, the 506  
21 material.

[REDACTED]

[REDACTED]

1 (U) MJ: Is there any ambiguity as far as, what do I mean by  
2 specifics concerning privileges or what's not specifics, it's easy.  
3 All you have to do is if you look in and compare the redacted and  
4 unredacted versions of Appellate Exhibits XXX and XXXI, you can see  
5 the level of detail that's classified and the level of detail that's  
6 not classified. So in my mind, there's a clear line there of what's  
7 classified and what's not classified. All right, so you're saying  
8 you hope to have a document from Washington concerning M.R.E. 506 by  
9 Monday?

10 (U) ATC1: Yes, Your Honor.

11 (U) MJ: And subparagraph 3c does not appear to be classified  
12 and it doesn't appear that there's any...it can be discussed in open  
13 court. Is that right, trial counsel?

14 (U) ATC2: Well, again, Your Honor, I think there's a  
15 distinction that the fact that we do segregate people, in general, is  
16 not classified, Your Honor, but a specific case, again, you know, for  
17 instance, "We segregated high value detainee number such and such  
18 over here because of this specific reason," we probably crossed that  
19 line. But again, as written here, that is not classified. The fact  
20 that we do segregate people, itself, is not classified, Your Honor.

[REDACTED]

1 (U) MJ: Is that where you're going, defense counsel, is just  
2 in general terms?

3 (U) DC: Just in general terms, yes, sir.

4 (U) MJ: Okay, all right, that's fine. Then that one should  
5 be clear to discuss in the open then.

6 (U) Okay, 3p has already been covered by some of the other  
7 rulings, I think, is that right, defense counsel? There's a couple  
8 of things in there as far as....

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 (U) MJ: Exactly.

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 (U) MJ: Okay, that's the way I interpret it, too.

17 (U) 3q covers ICRC evaluations; that's going to be covered

---

18 separately when we discuss ICRC, and that will be Monday just because  
19 defense needs time to prepare for that. And I think that covers all  
20 of tab 11.

[REDACTED]

1 (U) Next, the only other tab we have left in the book, remember,  
2 we're going to push tabs 2 through 5 off, is tab 1. Now, what that  
3 is is the witness expected testimony. It's undated and what's  
4 happened is someone has gone in there and put in red font specific  
5 testimony. And then what's happened is when it went up to the OCA,  
6 the OCA classified that testimony as "secret," which actually is the  
7 way it works so it's clear as far as that testimony that the  
8 government intends to elicit from those witnesses and those areas  
9 would be classified as "secret".

10 (U) Does counsel for either side want to be heard on that tab,  
11 tab 1?

12 (U) ATC1: No, Your Honor.

13 (U) MJ: Defense?

14 (U) DC: No, sir.

15 (U) MJ: I find that the synopsis of those 18 witnesses'  
16 testimony, which is highlighted in red font, has been classified as  
17 "secret" by the proper original classification authority, which is  
18 the Commander of the Multi-National Force, Iraq, currently General  
19 Petraeus, in accordance with Executive Order 12958 as amended. From  
20 all the evidence and all the circumstances, I'm satisfied there's a  
21 reasonable danger that the presentation of these materials before the

[REDACTED]

[REDACTED]

1 public will expose military matters, which in the interest of  
2 national security, should not be divulged.

3 (U) I think we're almost there. We're going to next address  
4 Prosecution Exhibit 1 for identification, which apparently contains  
5 detainee records. Do counsel for either side have any evidence or  
6 argument on this issue? Trial counsel?

7 (U) ATCl: Your Honor, I'm sorry, what binder are we talking  
8 about again?

9 (U) MJ: It's PE 1 for ID; it's the detainee records, 15  
10 detainees, computer printouts.

11 (U) ATCl: No, nothing from the government, Your Honor.

12 (U) MJ: Defense counsel?

13 (U) DC: Sir, not with regards to, I guess, the classification  
14 levels. We're still reserving the same objection as before as to how  
15 this evidence would actually come in during the court-martial.

16 (U) MJ: Understood, okay, yes, and we're just covering  
17 Military Rule of Evidence 505 issues now.

18 (U) DC: Yes, sir.

19 (U) MJ: So I won't be admitting this document at this point.  
20 So all normal evidentiary objections are still available to you.  
21 Prosecution Exhibit 1 for identification contains Task Force 134

[REDACTED]

1 detainee records. It's undated; it's marked as "secret" and it has  
2 printouts from a computer database that lists 15 detainee by ISN,  
3 name, gender, nationality and current disposition. It has been  
4 classified as "secret" by the proper original classification  
5 authority, which is the Commander of Multi-National Force, Iraq,  
6 General Petraeus and in accordance with Executive Order 12958 as  
7 amended on 25 March 2003. This evidence does fall within the  
8 categories in sections 1.4(a) and 1.4(c). From all the evidence and  
9 from the circumstances in this case, there is a reasonable danger  
10 that the presentation of these materials before the public will  
11 expose military matters, which in the interest of national security,  
12 should not be divulged. It would hinder current military operations  
13 by providing anti-Coalition members with a comprehensive list of  
14 detainees which could also limit their value as sources. Also, it  
15 provides details on the procedures of detainee operations, which  
16 would hinder intelligence collection from future detainees. I find  
17 that the need to exclude the public is of sufficient magnitude such  
18 as to outweigh the danger of a miscarriage of justice which might  
19 attend judicial proceedings carried out even in partial secrecy.

20 (U) Now trial counsel, how are you going to offer this? It's  
21 going to be offered as a document, is that correct?

[REDACTED]

[REDACTED]

1 (U) ATC1: 902(11) notice, we provided that to the defense, yes,  
2 803(6), Your Honor. Not through witness testimony, I guess is the  
3 answer, Your Honor.

4 (U) MJ: Not through witness testimony. Well, I was just  
5 looking at as far as how we're going to bifurcate the trial, but  
6 we'll leave that up to just normal evidentiary objections.

7 (U) All right, so to summarize, I think we're done with the  
8 Military Rule of Evidence 505 issues that we're going to address  
9 today. The issues that are still open are there were some...well,  
10 the issue about ICRC records and evaluations. Defense counsel is  
11 going to get a chance to look at the memo from the Department of  
12 Defense concerning that and then we'll discuss that Monday morning.  
13 Also, there's some information that was covered today that has not  
14 been classified as "secret". The defense counsel said they may be  
15 getting something from Washington on that and we'll cover that on  
16 Monday. Or, if there's some other argument on why that would be  
17 covered in a closed session, we'll cover that on Monday.

---

18 (U) Counsel, what I want to do now is to litigate motions that  
19 are still pending. Yes, trial counsel, you're standing up?

20 (U) ATC1: Your Honor, there was an additional portion, I guess  
21 it's round three for a lack....

[REDACTED]

[REDACTED]

1 (U) MJ: Round three?

2 (U) ATC2: Round three, there was the database that we just  
3 discussed, but the defense had also submitted detainee records.

4 (U) MJ: And has that been marked as an appellate exhibit?

5 (U) ATC1: I believe so, Your Honor. And Your Honor, the issue  
6 there is that many of those or some of those documents were declared  
7 classified by the OCA, but there are some in there that are not  
8 classified. [Pause.] And Your Honor, not to complicate matters too  
9 much, but...and I wish I'd brought this up at the 802 session, but we  
10 also received the 902(11) notice from the defense yesterday with  
11 documents similar to those but not included in that and have never  
12 received a classification review, and there's I think 19 documents in  
13 the 902(11) notice that have not been sent to the OCA.

14 (U) DC: Sir, if you look at the 505 notice, I believe that  
15 those were actually already reviewed because both of those documents  
16 that you're reviewing fall under 3 Echo and 3 Foxtrot and that 3 Echo  
17 pertains to the various magistrate reviews, the Article 78 board  
18 determinations conducted on the detainees linked to Charge I. And  
19 subparagraph 3 Foxtrot, specifically pertains to...the documents  
20 pertain to the release and approval for release of the detainees from  
21 Camp Cropper from that period of time, and it specifically delineates

[REDACTED]

[REDACTED]

1    which detainees we're referring to. So, those were captured under 3  
2    Echo and 3 Foxtrot which were deemed by the classification review to  
3    be classified "secret". And sir, these documents were all the  
4    documents that--the documents provided back to the government were  
5    documents that were provided to us by the government.

6        (U) MJ:     Yes, but that doesn't accomplish what they need. I  
7    mean, you still have to tell them what you intend to offer so they  
8    know to process it for a classification review in advance.

9        (U) DC:     Roger, sir, and we believe that in 3 Foxtrot we  
10   specifically laid out the specific detainees, the specific release  
11   documents, and same thing with 3 Echo and the specific detainees and  
12   their reviews.

13        (U) ATC1:   Your Honor, in response to that, those were  
14   specifically reviewed by the OCA and determined not to be classified.  
15   And really the problem, the crux of the problem is that we received  
16   these on late notice, these specific documents on late notice. We  
17   got them on I think it was 2 October from the defense, and we just  
18   simply did not have time to get those to the Secretary of the Army or  
19   probably the OCA for 506 material.

20        (U) DC:     Sir, with that, the defense was not aware that the  
21   government needed more specific documents. Between 3 September when

[REDACTED]

[REDACTED]

1 we put notification and 2 October, it wasn't until 2 October that the  
2 government asked us to give them...to parse it down and give them  
3 more specific things because they thought it was too broad or there  
4 were too many documents.

5 (U) MJ: Now, you intend to use those documents or just  
6 testimony about the information in the documents?

7 (U) DC: Those documents, sir.

8 (U) MJ: Those documents, okay.

9 (U) DC: And sir, it's not testimony, it would be documentary  
10 evidence that would go into evidence. And I thought that  
11 the...unless I'm mistaken, but the determination was made that those  
12 would be classified documents or classified "secret" if they  
13 were...by the initial classification review that was done on the 505  
14 notice and when they went through the various subparagraphs.

15 (U) MJ: All right, well, I'll look at that. Now, as far as  
16 Appellate Exhibit XXXII, trial counsel, and it's good you caught  
17 that, there was a binder that I had overlooked. And I had seen these  
18 materials before though. Now, as far as the information here that  
19 hasn't been classified as "secret," I understand this is material  
20 that the defense is wanting to offer, is that right?

21 (U) ATCl: Yes, Your Honor.

[REDACTED]

[REDACTED]

1 (U) MJ: And so if there's information here that's not secret,  
2 it comes out in open court. Or are you pursuing an argument that it  
3 falls within 506?

4 (U) ATC1: We believe it falls within 506, Your Honor. We sent  
5 them to OTJAG; however, the likelihood of getting that to the  
6 Secretary of the Army before Monday is extremely low.

7 (U) MJ: But did they go up with the other stuff that they  
8 were going to the Secretary of the Army with?

9 (U) ATC1: No, Your Honor. I think there was over a thousand  
10 documents within these detainee packets, 1,400 to be exact, and we  
11 asked the defense to identify the specific documents and they did.  
12 They gave it to us on 2 October. We got them up to OTJAG. The other  
13 stuff that went to OTJAG, I can give you the exact date if you give  
14 me a moment, Your Honor.

15 (U) MJ: Was it some time in September?

16 (U) ATC1: Yes, Your Honor.

17 (U) MJ: Well, what increases your chances of speed up there  
18 is if they were already moving to get in front of the Secretary with  
19 some other related documents, the chances that they might be able to  
20 whip all that stuff together and bring it in at the same time is a  
21 little better. So they may be able to get that in. This issue

[REDACTED]

[REDACTED]

1 appears to fall within the same issues that we're going to be  
2 covering Monday. So we're just going to cover this area on Monday  
3 when we address similar issues.

4 (U) But trial counsel, thank you for bringing that up. I had  
5 overlooked that one binder.

6 (U) Counsel, what I want to do now is litigate two motions that  
7 are pending. The first motion concerns a motion to dismiss by the  
8 defense. Let me just ask before we go into an open session, does  
9 anyone intend to present any, on this motion, any evidence in open  
10 court? If it's a document, you can submit a document and it may be  
11 classified and it will be handled appropriately. Does anybody intend  
12 to present any testimonial evidence or argue concerning classified  
13 information during this motion?

14 (U) ATC3: The government, sir, has classified information to  
15 offer on behalf of the motion. There's a lot of unclassified  
16 information, too, that the government is prepared to offer that will  
17 confirm what the OCA declared as...the database printout that's been  
18 marked "secret" and properly classified "secret". A lot of the  
19 classified information will be presented based on the fact that we're  
20 going to be talking about these allegations being at Camp Cropper,  
21 these enemies being at Camp Cropper, which we'll verify that these

[REDACTED]

[REDACTED]

1 individuals were all at Camp Cropper at that time. So, the  
2 government believes that most of its argument is going to be in a  
3 classified setting, although some of the documents are mixed as  
4 unclassified and classified.

5 (U) MJ: Sure, no, that's fine. But is part of your argument  
6 you're going to have to talk about classified information?

7 (U) ATC3: About classified information, yes, sir.

8 (U) MJ: And defense counsel, you'll probably have to do the  
9 same if they do that. So what we'll do then is we're going to open  
10 up the court and when we get into that portion, we're just going  
11 to...it's good practice for how the trial is going to run, is I'll  
12 take the first argument by the proponent of the motion, whoever has  
13 the burden of proof, and then go unclassified. And then when you're  
14 ready to go into classified information, just ask for the court to be  
15 closed. We'll go into closed session. And then when you're done,  
16 we'll go to the opponent's argument, start with the classified since  
17 it's already closed and when you're done with the classified  
18 argument, then we'll open the court and then we'll go unclassified.  
19 Is everyone clear on that?

[REDACTED]

1 (U) DC: Sir, I don't believe that the argument that we're  
2 going to present is going to cover any classified materials. We're  
3 just going to rely on the documents for review of the court.

4 (U) MJ: Okay, fair enough then. We're going to go into an  
5 open session now. So, if someone could just let the bailiff know and  
6 the bailiff can come in.

7 (U) We're going to take a recess in place. The court is in  
8 recess.

9 (U) [The Article 39(a) session recessed at 1425, 12 October 2007.]

10

[END OF PAGE.]