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28 MARCH 2013

alternatives to closure. MRE 505(i)(4)(A) provides the framework for those considerations. MRE 505(i)(4)(A) establishes, "[p]rior to the in camera proceeding, the Government shall provide the accused with notice of the information that will be at issue. This notice shall identify the classified information that will be at issue whenever that information previously has been made available to the accused in connection with the proceeding in the same case." Here, the information in question has either been provided to PFC Manning or the Defense team has had access to the information. Thus, the Government must identify the specific classified information for which they are requesting closure. It is only through this specific identification that all parties can engage in the meaningful consideration of alternatives as required by RCM 806(b)(2)(3).


6. In light of the Government's latest closure filing, the parties should conduct a hearing in accordance with MRE 505(i) to discuss alternatives to the identifications made by the Government. Further, the Defense believes that the Court's previous recommendation of a trial run with a witness is one that would benefit all parties and should be heeded. A trial run would give the Court and the parties the ability to appreciate the practical realities of both closure and the implementation of alternatives.

7. The Defense believes that the only way to achieve the necessary level of specification is to actually hear the testimony of a witness delivered in a closed court session. Thereafter, while the Court remains closed, either party or the Court may attempt to elicit the same information through the use of alternatives. Then, the Court will be in a better position to determine whether closure or use of an alternative is appropriate.

8. The Government's main concern with this course of action appears to be a belief that this would provide the Defense with a preview of its case. The Defense believes that this concern is not a justified one given the fact the "preview" would only deal with the witnesses' classified testimony in order to determine if any alternatives to closing the Court with respect to that witnesses' classified testimony is appropriate. If the Government is still concerned about a preview of its case, an alternative approach could involve calling multiple witnesses and limiting their testimony to a specific suite of classified facts. This approach would give the Court some variety in making its closure decisions and deny the defense a complete "preview" of a specific witnesses' classified testimony.

CONCLUSION

9. As indicated above, the Defense respectfully requests the Court to direct the Government to produce a witness to conduct a closed session examination in order to test the possible alternatives to closure under Rule for Courts Martial (RCM) 806(b)(2).



JOSHUA J. TOOMAN
CPT, JA
Defense Counsel

I certify that I served or caused to be served a true copy of the above on MAJ Ashden
Fein, via electronic mail, on 28 March 2013.

A handwritten signature in black ink, appearing to read 'Joshua J. Tooman', with a long horizontal flourish extending to the right.

JOSHUA J. TOOMAN
CPT, JA
Defense Counsel