

UNITED STATES OF AMERICA)

v.)

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**Government Targeted Brief
on Courtroom Closures**

29 March 2013

On 1 March 2013, the United States offered to submit a targeted brief on courtroom closures in the military and federal systems, to include analyses on whether recent case law relating to the right to a public trial affects the requirements under *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977), and to what extent military and federal courts have closed proceedings.

In the first section of this targeted brief, the United States explains whether recent case law relating to the right to a public trial affects the requirements under *Grunden*. Case law is clear that the requirements of *Grunden* still apply, yet must be read in concert with Rule for Courts-Martial (RCM) 806.

In the second section of this targeted brief, the United States explains the details underpinning various courtroom closures, particularly upon what courts have relied to close the courtroom, to what extent the courts have closed the courtroom, and what, if any, measures the Court may adopt, both during and after court closure, to further control that which is closed to the public. Ultimately, government counsel in military and federal cases have employed various methods, based on the facts of the case and nature of the materials in question, to demonstrate the classified nature of the material and to identify those portions of its case which will involve this material to justify courtroom closure, consistent with the balancing test under RCM 806.

FACTS

On 31 January 2013, the United States requested courtroom closure, in whole or in part, for the testimony of 37 of the 141 government witnesses and provided the particular subject matter to which each witness would testify in a closed session. *See* Appellate Exhibit (AE) 479. The United States estimated that the requested closures comprised approximately 30% of its case.

On 1 March 2013, the Court ordered the United States to provide more specificity with respect to which portions of testimony closure was sought. *See* AE 503. In its supplemental response, the United States provided a greater degree of specificity. *See* AE 505. Further, in light of reasonable alternatives available short of closure, the United States narrowed its list of witnesses for whose testimony closure was sought to 28. The United States currently estimates that the requested closures compromise approximately 25% of its case. *See id.*

APPELLATE EXHIBIT 511
PAGE REFERENCED: _____
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WITNESSES/EVIDENCE

The United States requests the Court consider the enclosures to this filing and the Appellate Exhibits cited herein.

DISCUSSION

I. *Grunden* is Still Good Law Yet Must be Read in Concert with RCM 806

The right to a public trial derives from two sources: first, the Sixth Amendment, in so far as it attaches to the accused, *see* Manual for Courts-Martial, United States, R.C.M. 806(a) analysis, at A21-48 (2012); *see also* *Waller v. Georgia*, 467 U.S. 39, 46 (1984); and second, the First Amendment, in so far as it applies to the public, *see* RCM 806(a) analysis, at A21-48; *see also* *Richmond Newspapers, Inc., et al. v. Virginia et al.*, 448 U.S. 555, 580 (1980). The right to a public trial is not absolute. *See ABC Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997). Both the military and federal systems adopt a balancing test to curtail this right. *See* RCM 806(b)(2); *see also* *Press-Enterprise Co. v. Superior Ct. of California*, 464 U.S. 501, 509 (1984); *Waller*, 467 U.S. at 48.

In the military system, the seminal case on courtroom closures remains *Grunden*. *See Denver Post Corp. v. United States*, 2005 WL 6519929, at 2 (A.C.C.A. 2005) (encouraging practitioners to apply the “valuable, practicable guidance in the context of excluding the public and press from court-martial trial proceedings” set out in *Grunden*); *see also* *Stars and Stripes v. United States*, 2005 WL 3591156 (N-M. Ct. Crim. App. 2005) (following *Grunden* when addressing issues of potential release of classified information during public court-martial proceedings). The guidance provided in *Grunden* is as follows:

It is our decision that the balancing test employed by a trial judge in instances involving the possible divulgence of classified material should be as follows. His initial task is to determine whether the perceived need urged as grounds for the exclusion of the public is of sufficient magnitude so as to outweigh “the danger of a miscarriage of justice which may attend judicial proceedings carried out in even partial secrecy.” *Stamiecarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532, 539 (2d Cir. 1974). This may be best achieved by conducting a preliminary hearing which is closed to the public at which time the government must demonstrate that it has met the heavy burden of justifying the imposition of restraints on this constitutional right. The prosecution to meet this heavy burden must demonstrate the classified nature, if any, of the materials in question.

Grunden, 2 M.J. at 121-122. During this initial step, “[a]ll that must be determined is that the material in question has been classified by the proper authorities in accordance with the appropriate regulations.” *Grunden*, 2 M.J. at 122. The Court of Military Appeals (CMA) continued that the trial judge “must further decide the scope of the exclusion of the public”

which will require the prosecution to “delineate which witnesses will testify on classified matters, and what portion of each witness’ testimony will actually be devoted to this area.” *Id.*, at 123. To this day, this process outlined in *Grunden* serves as the backbone underlying the necessary balancing test for courtroom closure. *See Denver Post Corp.*, 2005 WL 6519929, at 2 (encouraging practitioners to apply the *Grunden* guidance).

In *Waller*, 467 U.S. 39, the Supreme Court first articulated this balancing test. To close proceedings and thereby limit the right to a public trial, the trial judge must 1) decide that the party seeking closure has advanced an overriding interest likely to be prejudiced, 2) find that closure is no broader than necessary to protect that interest, 3) consider alternatives to closure, and 4) make findings adequate to support the closure. *See Waller*, 467 U.S. at 48 (adopting the *Press-Enterprise* approach articulating a four-part test for balancing interests at stake in closure). In 2004, RCM 806 was amended to reflect the Supreme Court’s balancing test in light of military case law set forth in *ABC Inc.*, 47 M.J. at 363 and *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985), which interpreted *Grunden* and applied the Constitutional standard enunciated by the Supreme Court. *See* RCM 806(b) analysis, at A21-49. And so, *Grunden* is not at odds with the later Supreme Court cases, provided it is read in concert with RCM 806 which imports them to military jurisprudence.

Though both the military and federal systems apply substantively the same balancing test when considering closure, closure to protect classified information is only available in the military system. Military courts follow RCM 806 when closing the courtroom and are explicitly authorized by MRE 505(j) to close proceedings to protect classified information. *Cf. United States v. Anderson*, 46 M.J. 728, 729 (A.C.C.A. 1997) (stating that “absent national security concerns or other adequate justification clearly set forth on the record, trials in the United States military justice system are to be open to the public.”); *see also* RCM 806(b) analysis, at A21-48 (stating that “the only time trial proceedings may be closed without the consent of the accused is when classified information is to be introduced”). In the federal system, protection of classified information does not amount to the many reasons that federal trial courts may close proceedings. *See e.g. United States v. Zimmerman*, 19 C.M.R. 806, 814 (A.F.B.R. 1955); *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596 (1982); *United States v. Short*, 41 M.J. 42 (C.M.A. 1994)); *United States v. Thunder*, 438 F.3d 866, 868 (8th Cir. 2006); *United States v. Farmer*, 32 F.3d 369 (8th Cir. 1994); *Bobb v. Senkowsk*, 196 F.3d 350 (2nd Cir. 1999); *LaPlante v. Crosby*, 133 Fed. Appx. 723 (11th Cir. 2005). Instead, federal law has procedures in place to protect classified information via the Classified Information Procedures Act (CIPA). *See United States v. Abu Ali*, 528 F.3d 210, 246-49 (4th Cir. 2008); *see also In re Terrorist Bombings of U.S. Embassies in East Africa v. Odeh*, 552 U.S. 93, 120-23 (2nd Cir. 2008); *United States v. Aref*, 533 F.3d 72, 78-81 (2nd Cir. 2008).

II. Extent of Closure

The Rules pursuant to which military courts evaluate closure requests are RCM 806(b)(2) and Military Rule of Evidence (MRE) 505(j). As discussed above and through recent filings, these rules must be read together with *Grunden*. *See* AE 507. As instructed by the Army Court of Criminal Appeals (ACCA) in *Denver Post Corp.*, *Grunden* can provide focus on how to apply and make the closure decision provided for in RCM 806 and MRE 505(j). Below, the United

States highlights the details underpinning various courtroom closures, focusing particularly on what courts have relied upon to close the courtroom, to what extent the courts have closed the courtroom, and what, if any, measures the Court may adopt, both during and after court closure, to further control that which is closed to the public. The United States has included a more expansive and thorough case-by-case explanation of courtroom closures, both in military and federal courts, in the subsequent section.

A. Demonstration of Need for Closure.

Grunden makes it clear that the Court's "task is to determine whether the perceived need urged as grounds for the exclusion of the public is of sufficient magnitude so as to outweigh 'the danger of a miscarriage of justice which may attend judicial proceedings carried out in even partial secrecy'." *Grunden*, 2 M.J. at 122 (citing *Stamincarbone, N.V. V. American Cyanamid Co.*, 506 F.2d 532, 539 (2d Cir. 1974)). *Grunden* continues that "the prosecution to meet this heavy burden must demonstrate the classified nature, if any, of the materials in question." *Id.* at 122. As the following cases and enclosed material prove, the "method used by the prosecution to satisfy this burden...will vary depending upon the nature of the materials in question and the information offered." *Id.*

In *United States v. Lonetree*, 31 M.J. 849 (N-M. C.M.R. 1990, *aff'd and rem'd*, 35 M.J. 396 (C.M.A. 1992), government counsel met its burden by demonstrating the need for closure during witness testimony consisting of classified information with sworn affidavits which set forth "[a] list of these officers [who will provide testimony on classified matters] and the government's rationale for requesting that they testify in closed session." *Id.*, at 853. The Court interpreted *Grunden* to require "individualized decision-making as to specific information which the Government asserts must be exempted from disclosure at a public trial" – not judicial findings for each closed session. See *Lonetree*, 31 M.J. at 854 (emphasis added). Here, the United States submitted its list of witnesses and a detailed description of the testimony for which closure is sought, and the applicable classification guides confirming the classification level of that information. See AE 505. The United States has demonstrated the need for closure under *Lonetree*.

B. Extent of Closure.

Pursuant to *Grunden* and consistent with RCM 806, the prosecution must then justify closure by specifying "which witnesses will testify on the [matter at issue as well as] what portion of each witness' testimony will actually be devoted to this area" and the Court must "decide [on] the scope of the exclusion of the public." *Id.* at 123 (finding that, "even assuming a valid underlying basis for the exclusion of the public, it is error of 'constitutional magnitude' to exclude the public from all of a given witness' testimony when only a portion is devoted to classified material"). This Court must "engage in the necessary analysis as to each witness' expected testimony and to understand in advance how and why it could touch on a classified matter before excluding the public." *Denver Post Corp.*, 2005 WL 6519929, at 3; see also *Grunden*, 2 M.J. at 121-22. To do so, the Court noted that it may "require counsel for both sides to disclose the subjects of their questions for a witness in advance in a closed session." *Denver Post*, 2005 WL 6519929, at 3. On 15 March 2013, the United States did just that by providing

this Court with the detailed subjects of its questions for each witness whose testimony it requests courtroom closure. *See* AE 505. The United States is aware of no case law requiring more than the subject of that which will be elicited during the closed proceeding to justify closure. The issue, therefore, is to what extent the courtroom may be closed.

Generally, the extent of closure depends entirely upon the facts and circumstances of each case. *See ABC Inc.*, 47 M.J. at 365 (“every case that involves limiting access to the public must be decided on its own merits . . . and the scope of closure . . . tailored to achieve the stated purposes”) (referencing *San Antonio Express–News v. Morrow*, 44 M.J. 706, 710 (A.F.C.M.R. 1996) and *Hershey* 20 M.J. at 436); *see also Grunden*, 2 M.J. at 121 (emphasizing the importance of a balancing test employed to examine and analyze the need for and scope of any suggested exclusion). In *United States v. Terry*, 52 M.J. 574 (N.M.C.C.A. 1999), the Court cited *Grunden* saying:

While we did note in *Anzalone* that the closed portion of the trial was limited to 79 pages of the 479-page record of trial, our superior court expressed quite clearly in *Grunden* that “*the propriety or impropriety of the exclusion of the public from all or part of a trial cannot, as attempted by the Government in this case, be reduced to solution by mathematical formulas. The logic and rationale governing the exclusion, not mere percentages of the total pages of the record, must be dispositive.*”

Terry, 52 M.J. at 578 (citing *Grunden*, 2 M.J. at 120 fn 2) (emphasis added). This position is consistent with the Supreme Court’s decision in *Globe Newspaper Co.* and numerous federal circuit court cases. *See Globe Newspaper Co.*, 457 U.S. at 605 (finding that the interest supporting the exclusion is what should drive closure inquiry); *In Re Washington Post Co. v. Soussoudisi*, 807 F.2d 383, 392 (4th Cir. 1986) (the trial court is required to execute the closure analysis by evaluating the principles and interests at stake, considering possible alternatives, and articulating findings adequately supporting their closure decision); *Judd v. Haley*, 250 F.3d 1308, 1319 (11th Cir. 2001); *Thunder*, 438 F.3d at 868; *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004); *see also Ayala v. Speckard*, 131 F.3d 62, 70 (2nd Cir. 1997) (the greater the closure sought, the more “must be the gravity of the required interest and the likelihood of risk to that interest”).

For courtroom closures based on the disclosure of classified information, the courts in *Lonetree* and *Denver Post* are again instructive. The Court in *Lonetree* made it clear that the extent of closure for purposes of divulging classified information should be focused on the particular information for which closure is sought. *See Lonetree*, 31 M.J. at 853 (stating that “MRE 505 is directed towards the *information* sought to be exempted from disclosure at public trial” and thus when “the information may be divulged by a number of witnesses or documents, or both, the focus of exclusion is upon that specific information”). The Court explained that “the specificity required [in the military judge’s decision] addresses the information to be protected, not through what method it is disclosed.” *Id.* Here, as in *Lonetree*, the scope of exclusion should be focused on the specific classified information that may be divulged.

In *Lonetree*, the appellate court applauded the extent of closure employed as “the fairest and most practical that could be devised” and one that “allowed both parties a reasonably normal context within which to pursue their respective positions.” See *Lonetree*, 31 M.J. at 853. The extent of closure in *Lonetree* was follows:

The extent of the closures was determined by *either* Government or defense. The military judge had already determined which information, because of its classified status, would be presented in closed sessions. The fact that certain unclassified information was disclosed by individuals whose duties and identities could not be publicly matched-up was necessary to protect classified information. Further bifurcation of other witnesses' testimony, other than as occurred, was impracticable and would have created unnecessary chaos.

Lonetree, 31 M.J. at 854. Other military courts also recognize that, in some circumstances, bifurcating testimony may be impractical. In *Denver Post Corp.*, for example, the ACCA contemplated that “in a few instances, the witnesses' testimony could be fairly characterized as so inextricably linked to classified matters as to make it all properly received in a closed session.” *Denver Post Corp.*, 2005 WL 6519929, at 3. The Court agreed that it could be difficult if not impossible to separate the classified information from the unclassified information for several witnesses who dealt directly and solely with the investigative and initial reporting of the events under review. See *id.*

C. Control or Curative Measures.

Even after the public is excluded from the court, the Court has available control or curative measures to further maximize the openness of the proceeding. In *Press Enterprise*, the Supreme Court noted that “[w]hen limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the [interest requiring protection].” *Press-Enterprise Co.*, 464 U.S. at 512. This guidance has been echoed by federal cases in numerous circuits. See *Hearst Newspapers v. Cardenas-Guillen*, 641 F.3d 168 (5th Cir. 2011); *Smillie v. Greiner*, 99 Fed. Appx. 324 (2nd Cir. 2004) unpub. Therefore, at trial, should this Court determine that disclosure of some testimony elicited during the closed proceeding is not “necessary to permit a contextual and complete understanding of the classified testimony” and would not jeopardize the protection of classified information, the Court may order an unclassified portion of the transcript of the closed proceeding to be made available. See Enclosure 1. Another possibility under this scenario is for the witness, whose testimony during a portion of the closed proceeding may be disclosed to the public without risking disclosure of classified information, to provide an unclassified summary of those portions of testimony which can be disclosed to the public.

D. Digest of Courtroom Closures.

The below cases and enclosed trial materials may be helpful in understanding what other judges have considered, but also do not articulate clear thresholds. The United States has found no federal authority explaining how much material the Government must put before a Federal trial judge in order to meet *Waller* balancing test requirements. Instead, both military and federal case law suggest that facts and not a particular percentage or a specific asserted interest are controlling.

The below cases are consolidated into the following sections: (1) federal cases closed on the merits but not for classified information; and (2) military cases closed for classified information. In the first section, each paragraph details the extent to which the proceedings were closed as well as why the appellate authority found the closure in constitutional accordance. In the second sections, paragraphs include information on the stage of proceeding closed, the extent of the closure, and information on justification for that closure.

The United States has provided as enclosures abbreviated versions of many of the sources cited because they are not available on Westlaw or LexisNexis. These enclosures will be additionally referenced parenthetically in the respective citations. Additionally, one of the enclosures is provided to the Court *ex parte*. The United States will provide a redacted version of this enclosure to the defense.

i. Federal Case Examples: Closed on Merits but not for Classified Information

Johnson v. Sherry, 586 F.3d 439 (6th Cir. 2009) – Closed for Witness Protection

- **Misconduct and Outcome:** The defendant was convicted of (intent to commit) murder and possession of a firearm during commission of a felony in Michigan state court.
- **Extent of Closure:** At the start of the initial trial, the prosecutor moved to close the courtroom to spectators during the testimony of three prosecution witnesses (two of whom claimed to have seen the shooter). The three individuals were afraid to testify publically given that two other prosecution witnesses had been killed under suspicious circumstances. The prosecution requested total closure; the defense acquiesced but requested closure not be ordered in presence of jury. The trial court did not remove anyone from the courtroom, but instead instructed in the absence of the defendant's relatives.
- **Justification:** The appellate authority noted the absence of trial court findings to facilitate its decision and expressed concerns about the breadth of the closure ordered – saying, the “prosecution offered no proof that Johnson or any member of Johnson's family was involved in the death of those individuals” and “did not point to any incidents in which the witnesses at issue had been threatened or otherwise contacted by any member of Johnson's family.” (emphasis added) The court also mentioned that the record contained no evidence the defense's failure to object was strategic.

- **Disposition:** The Federal district court granted partial appeal to consider whether the defendant was denied his right to a public trial. After considering the above, the Court ordered an evidentiary hearing “to determine [among other things] whether closure of the trial was justified.”

Smillie v. Greiner, 99 Fed. Appx. 324 (2nd Cir. 2004) unpub. – Closed for the protection of informants and officers

- **Misconduct and Outcome:** Co-defendants (convicted of various crimes) alleged abridgement of their Sixth Amendment right to a public trial.
- **Extent of Closure:** The courtroom was fully closed during the testimony of a confidential informant and an undercover police officer.
- **Justification:** With regards to the confidential information. The court stated the safety of the witness was an “overriding interest” and that the closure occurred solely during the CI’s testimony meant the closure was “no broader than necessary.” Additionally, holding that where neither party suggested alternatives, trial judges are not obliged to consider them *sua sponte*, and so, the alternatives prong was satisfied. And finally, since the trial court’s findings were explicit that there were threats to the informant’s life and family, the findings prong was likewise satisfied. These same reasons applied to the officer. Yet the appellate court expanded its mention of the interests at issue to include protecting his usefulness as an undercover officer. Moreover, the Second Circuit concluded that by making the transcript available to the public and not sealing the courtroom for other law enforcement officers, the trial court demonstrated that it used discretion in closure.
- **Disposition:** The Second Circuit held both closures comported with the requirements of the *Waller* balancing analysis.
- **Note:** *Bowden v. Keane*, 237 F.3d 125 (2nd Cir. 2001), *Bobb v. Senkowski*, 196 F.3d 350 (2nd Cir. 1999), and *Ayala v. Speckard*, 131 F.3d 62 (2nd Cir. 1997) also uphold the trial court’s decision to fully close the courtroom to hear the testimony of an undercover police officer for very similar reasons as *Smillie*.¹ Though earlier than the two cases described above, all three are published.

Application: The above cases are consistent with the proposition that what matters most to appellate courts considering whether the public trial right has been abridged is not a particular interest or amount of closure, but rather that the trial judge has: taken the time to gather the case-specific information, weighed the interests at stake, considered proposed alternatives, and ordered closure targeted only at those interests through findings. In conducting that evaluation, the cases highlight that closure for the entire testimony of a single witness can be “no broader than necessary” if the interest warranting closure attaches to that witness, and that by keeping the

¹ The Federal circuit courts have also approved total closure to protect victims and minor children. These cases are not relayed here because the subject matter differs more from the interests driving the Government’s pursuance of closure in the case at hand. However, information on these courts and their application of the balancing tests used can be provided to the Court should the Court desire.

court open for other witnesses of a similar type that trial court can demonstrate discretion. Finally, the cases highlight that ability to produce a transcript can alleviate some of the public trial concerns. This last proposition is also supported by Supreme Court case *Press-Enterprise* and Fifth Circuit case *Hearst Newspapers v. Cardenas-Guillen*, 641 F.3d 168 (5th Cir. 2011) (hereinafter *Hearst*). The *Hearst* court wrote: “When . . . closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding’ the interest that gave rise to the need for closure.” *Hearst* at 181 citing *Press-Enterprise* at 512. In the case of classified information, perhaps any unclassified information which surfaces during the closed testimony could be produced as a redacted transcript as soon as practicable.

ii. Persuasive Military Case Examples: Closure for Classified Information

United States v. Steele, 2011 WL 414992 (A.C.C.A. 2011) unpub.²

- **Misconduct and Outcome:** Defendant pled guilty to and was convicted of wrongfully making and storing classified information in violation of a regulation and possessing pornography in violation of a general order. He was further found guilty of failing to obey a lawful order, conduct unbecoming, and retaining national defense information.
- **Extent of Closure:** According to the record of trial, the case involved seventeen courtroom closures to hear the classified portions of some sixteen of the total forty-two witnesses. These portions include both classified and unclassified material. There were also two additional closures – one for a *Grunden* hearing and one to consider closure under RCM 506 (unclassified Government information).
- **Justification:** While the record does not contain a written closure order or written findings on closure, the Court did have a *Grunden* hearing – a transcript of which is enclosed with this filing. See Enclosure 2.³ In the hearing the Court considered the classified information in three sections – a group of documents already specified as appellate exhibits, a group of redacted documents from which defense requested use of information behind redactions, and a third smaller group of documents having been reviewed later than the others. Notwithstanding the separate groupings, the Court undertook virtually the same inquiry.

The prosecution began by referencing the documents’ classification and the OCA declaration and affidavits related to it. Eventually, the prosecution specified which witnesses it anticipated testifying about those documents. When presenting this information to the court, the Government specified only that the witness would cover

² As courtroom closure issues were not raised on appeal, the citation offered here is provided so the Court may reference background information for and appellate consideration of the case. It is not intended as a citation for the closure employed in the original trial.

³ The Court also had a hearing on closure under 506. As that hearing focused on closure for non-classified information pursuant to a Rule not at issue here, neither is the transcript of any 506 proceeding enclosed nor does the above closure description describe any potential findings on that issue.

how the document related to national defense, how the information could be used to the injury of the United States, and how it related to the elements of the charged offenses. The prosecution did not address what exactly the witness would say. Then, the military judge would announce either the document and general description thereof (“defense plan for X”) or the piece of information the defense wanted to use (“information about Y-procedures” or “Z-kind of people”) and its classification marking. The judge would mention he had considered the relevant OCA declarations and document markings and was satisfied that 1) the documents were properly classified in accordance with relevant Executive Order provisions and 2) their public disclosure posed reasonable risk of harm or danger to national security interests. After the inquiry about the information in each section, the Judge would ask the trial counsel about the method of its intended expression (testimony). He explained that this inquiry matters so that he can determine how the sessions would flow in the interests of judicial economy and public movement. He specified in most circumstances that the counsel should call a witness, have that witness testify to the greatest extent possible about unclassified matters such as biographical information and then proceed into a classified session. However, the judge recognized that some identity information may itself be classified and therefore warrant greater closure.

During the hearing, the judge also commented that impact witnesses could announce an unclassified general opinion in open court yet discuss specific opinions and the examples on which they are based in closed court. Moreover, he suggested that the findings about harm and classification on which the courtroom closure order is based could be applied to any witness who would testify about classified information addressed not just those witnesses specified during the session.⁴ Finally, he also noted that counsel should construct direct examination questions bearing in mind that classified information should be elicited together so as to minimize the opening and closing of the proceedings.

- **Disposition:** Public trial rights were neither raised by the accused nor addressed by the appellate authority on appeal. Apart from one specification on other grounds, the guilty findings were affirmed.
- **Proposition:** This case is highly instructive for five main reasons. First, the judge indicates that courtroom closure is appropriate wherever the content of the classified document must be discussed. Second, that the judge had to hold a *Grunden* hearing to specify those bits of information the defense wished to use but which otherwise required redactions, highlights the limitation of redactions as an alternative to closure. This is consistent with the Government’s discussion of redaction as an alternative in its initial *Grunden* filing. See AE 480. Third, that the judge considered the information first before inquiring about the method of its introduction is consistent with the instruction in *Lonetree* that it is the information and not the method of its delivery which requires specificity. This proposition is further respected by this judge’s willingness to decide a topic of information warrants closure and then apply that closure requirement to any witness who may testify about it – only asking the counsel which witnesses will discuss

⁴ This comes from Page 285, Line 18- 286, Line 14 in the classified *ex parte* filing provided to the Court. See Enclosure 3. Other descriptions provided are evidenced primarily in the unclassified portions.

the information in order to establish its relevance and get a projection of proceeding flow. Fourth, the judge recognizes that just because a witness may be able to give an unclassified general opinion of impact, it should not prevent counsel from eliciting a more specific opinion including classified examples during closed session. And finally, the judge mentioned how the counsel should construct a direct examination by grouping all classified information together but never asked them to provide a copy of those questions.

United States v. Anderson, 68 M.J. 378 (C.A.A.F. 2010)⁵

- **Misconduct and Outcome:** The accused was convicted of conduct prejudicial to good order and discipline as well as attempting to give intelligence to the enemy, to communicate with the enemy, and to aid the enemy.
- **Closure:** During the lower court proceedings, the military judge ordered courtroom closure for two witnesses.
- **Justification:** One witness would testify to unclassified but sensitive and not publically disclosed information about weapons systems. The Government sought MRE 506 closure.⁶ The other witness would testify to classified weapons system information.⁷ Before making the closure decision, the judge held an Article 39(a) session for the presentation of evidence and argument. Although the United States is not in possession of the classified record of trial, the closure order reveals that the judge in *Anderson* applied the balancing test after having reviewed the evidence and the relevant classification declaration or privilege assertion with the Court Security Officer. The judge found proper classification and the risk of harm. The conclusions of law mirrored these findings, applying the preponderance of the evidence standard to proving reasonable danger of harm. The Court noted too that Government had “delineated those portions of its case that involve” the materials at issue. The judge ultimately ordered closure for any time it was reasonably expected that the classified content of the protected exhibits or testimony must be displayed or discussed, must be directly referenced during argument or testimony, or must be referenced by the court on the record. *See* Enclosure 5.

⁵ As courtroom closure issues were not raised on appeal, the citation offered here is provided so the Court may reference background information for and appellate consideration of the case. It is not intended as a citation for the closure employed in the original trial.

⁶ MRE 506 does not explicitly authorize courtroom closure and MRE 505 does. Therefore, to close pursuant to MRE 506, the Court would have to fully explore the contention that MRE 506 information constituted an overriding interest under RCM 806, whereas, to close the courtroom pursuant to MRE 505, the court just has to be convinced, by a preponderance of the evidence, that the evidence is properly classified and thus deserves MRE 505(j) protection. In the face of that burden, the United States acknowledges that just like in *Anderson*, a Court considering closure may wish to consider witness testimony for MRE 506 information because it is not self-evident or easily understood as warranting protection, yet can rely on classification markings and substantiating documentation such as classification reviews and classification guides for MRE 505 information.

⁷ This request to close the court to hear classified information appears from the closure order to have been made orally before the court. The United States has been unable to find reference to this oral request in the unclassified record of trial in its possession. A written request was found as an appellate exhibit however. *See* Enclosure 4.

- **Disposition:** Although the case was considered by an appellate court, neither did the accused raise nor did the appellate courts consider public trial issues during their review of the case record. CAAF affirmed.
- **Proposition:** Like the other closure cases, *Anderson* suggests that when the content of classified information is put forward closure is warranted. Further, it highlights *preponderance of the evidence* as the standard to which the Government must prove that the information at issue was properly classified and can reasonably be expected to result in harm if improperly disclosed. Finally, the closure order notes the Government had delineated where it expected the information to be involved in its case. In this case, the United States has done more – delineating not only where the information will be elicited witness by witness, but at what stage of the case, to what level of detail, and to what relevant end. See AE 505.

United States v. Diaz, 69 M.J. 127 (C.A.A.F. 2010) and *United States v. Diaz*, 2009 WL 690614 (N.M.C.C.A. 2009)⁸

- **Misconduct and Outcome:** The accused plead guilty to violating a lawful general regulation, conduct unbecoming an officer, as well as unauthorized removal and wrongful communication of classified information.
- **Closure:** The trial judge closed the courtroom to hear the classified testimony of two witnesses regarding the same classified document.
- **Justification:** In considering the overriding national security interest proffered to warrant courtroom closure, the judge considered: the assertion of classified information privilege by the Deputy Secretary of Defense, a memorandum by the Original Classification Authority (OCA), the declaration of the person (also one of the witnesses) who determined the document at issue was properly classified, as well as the relevant classification guide and associated instructions. The judge articulated findings which: identified the classified document to be discussed, supported the conclusion that the document had been properly classified, stated that serious national security damage could be reasonably expected based on the document's classification designation, explained that closure would occur for each of two witnesses, noted no defense objections to courtroom closure to protect classified information, and inferred that defense cross-examination would likely also elicit classified information. His conclusions mirrored these findings – articulating too that the document had been classified, was relevant to the case, and required courtroom closure for classified discussion. The conclusions also stated that the Judge had conducted the proper balancing analysis and found the interest to be overriding. Lastly, the conclusions explained that alternatives would be used to the extent possible but also that they would not allow for the classified content to be adequately presented and explored. Court closure was “necessary to permit a contextual and complete understanding of the classified testimony”, allow for effective cross-

⁸ As courtroom closure issues were not raised on appeal, these citations are provided so the Court may reference background information for and appellate consideration of the case. They are not intended as citations for the closure employed in the original trial.

examination, and permit clarification if necessary. Moreover, the judge highlighted that the testimony would be bifurcated - presenting classified information during closed sessions and unclassified information during open session. During the open session, the witness could explain unclassified details such as background, biographical information, and an unclassified summary of his testimony. The closed session, he concluded, could include only so much unclassified information as necessary to preserve the coherence of the classified testimony. Finally, in addition to ordering closure for the Government's case-in-chief, the judge preserved the opportunity to do so again should the defense's case necessitate it. *See* Enclosure 1.⁹

- **Disposition:** Though considered twice by appellate authorities (one in a published opinion), neither did the accused raise nor did the appellate courts consider public trial issues during their review of the case record.
- **Proposition:** This closure order helps showcase four things. First, in it, the judge discusses the limitations of affidavits, unclassified summaries, and unclassified testimony as alternatives to classified testimony in closed session. This is similar to the judge's discussion of redactions in *Steele* and *Ledford*. And, it is consistent with the Government's explanation of alternatives in its original *Grunden* filing. *See* AE 480. Second, and relatedly, this closure order anticipates that the closed classified sessions may include such unclassified material as necessary to preserve the coherence of and ensure context for the classified information. This is consistent with the actions in *Lonetree*. It demonstrates that a closed classified session can include unclassified information without ceasing to be narrowly tailored. Third, in a way also consistent with *Lonetree*, this closure order identifies bifurcation as an important tool for courts to demonstrate discretion and their use of the *Grunden* "scalpel." In fact, in *Grunden*, the court writes "bifurcated presentation of a given witness' testimony is the most satisfactory resolution of the competing needs for secrecy by the government, and for a public trial by the accused." *Grunden* at 123. In its original *Grunden* filings, the United States specified closure was only sought for those portions of the testimony which are classified. *See* AE 480 and 506. In so doing, the United States is recognizing and requesting bifurcation as an important "scalpel." Fourth, like *Steele*, this closure order is instructive as it emphasizes open applicability of these findings to whatever witnesses may need to testify about the classified information considered. Consistent with *Lonetree*'s explanation that specific findings are not required witness-by-witness or method-by-method, the order recognizes that witnesses other than those specified in the motion at issue may require protection. The judge notes that a party should notify the court of information "which might necessitate additional closed sessions."

United States v. Ledford, US Navy Southwest Judicial Circuit (2005)

- **Misconduct and Outcome:** The only material in the prosecution's possession regarding this case is the judge's closure order. As no appellate information is available nor is the record of trial in the Government's possession, it cannot provide further background information on this case.

⁹ The *Diaz* Court's protective order, Enclosure 6, and the Prosecution's motion, Enclosure 7, are also included for the Court's reference

- **Closure:** The judge ordered closure for the introduction of classified evidence – occurring only during the portions of a witness’ testimony in which it was reasonably expected that the classified content of the protected exhibit or testimony must be displayed or discussed. The court specified closure for identity-protected witnesses, classified linkages between persons and missions, classified video footage, and classified document contents.
- **Justification:** In this case, two Article 39(a) sessions were held for the parties to make argument and present evidence on courtroom closure. The judge’s findings articulated the general type of information being protected (i.e. “discussions or viewings of tactics/rolls/locations”), how that information would be protected, and what general harm was risked if the information was revealed (i.e. “would reveal foreign government information [and] intelligence sources and methods”). The findings demonstrated their considered nature by specifying that alternatives would be used until the classified content needed to be discussed. Finally, the findings explained that the judge’s review of the evidence with the accompanying classification declarations reveal that the Government had established by a preponderance of the evidence that classification was proper. The judge’s conclusions explained: the rights at stake; the burden on the Government to show the classification and reasonable danger posed by disclosure of the information at issue; that the judge had conducted the required analysis; and that the evidence was relevant, necessary, and otherwise admissible. The actual closure “order” section stated alternatives would be used according to the purpose they serve but that courtroom closure would be used whenever the classified content required exploration. Additionally, this section explained generally the order in which the classified and unclassified sections would occur. Finally, the judge required only that the counsel notify the court prior to opening statements which witnesses they anticipated required court closure and then notify the court prior to eliciting the information that that discussion was coming. *See* Enclosure 8.
- **Disposition:** The United States has found no evidence that this case has been appealed.
- **Proposition:** This closure order is helpful in that it demonstrates how a judge can really focus his or her ruling on the information warranting protection. Doing so is consistent with the information-centric emphasis explained in *Lonetree* and exemplified by *Steele*. Further, in providing information-centered findings, the order also demonstrates the extent to which alternatives such as screens and shields are limited. It shows they are useful if what needs hiding is visual, but not if the information to be protected is oral content warranting exploration. This is consistent with the Government’s discussion of alternatives in its initial *Grunden* filing. *See* AE 480. Also, this closure order highlights that the Government need only convince the Court of proper classification and of reasonably expected harm by a *preponderance of the evidence*. That the judge relied on a review of the evidence and OCA declarations, suggests he did not feel the need to call witnesses to testify during the closure hearing. Finally, this order is useful as it explains the Court only expected information on anticipated witnesses affected before opening statement and an alert when closure was imminent during testimony. Consistent with the

above-described *Steele* case, there is no requirement that the Court nail down exactly and finally which witnesses require closure and know exactly where in the examination that will occur. Such an approach is also consistent with an information-centric and not a witness- or method-centric approach as advocated in *Lonetree*.

United States v. Anzalone, 40 M.J. 658 (N.M.C.M.R. 1994)

- **Misconduct and Outcome:** In this espionage case, the accused was a Marine charged with a variety of offenses arising, primarily, out of his contact with an FBI agent whom appellant believed was a Soviet Union intelligence officer.
- **Closure:** The proceedings were periodically closed to the public. The closure ultimately amounted to 79 pages of the 479 page record, or approximately 16%.
- **Justification:** The Court held the closure requirements had been met. It focused on the probability of the prejudice and the limited nature of the closure. It stated that likelihood of prejudice was established through descriptions of the classified information (in this case, affidavits). As the trial was closed only when the defense or trial counsel anticipated discussing classified matters, the closure was appropriately limited. The United States has been unable to locate any further information showing what the affidavits contained or how the lower court judge actually ordered the closure.
- **Disposition:** The closure findings of the lower court were affirmed.
- **Proposition:** This case shows that like those described above the trial court need not hear testimony about the information before ordering courtroom closure, but rather can rely on affidavits. Moreover, it suggests that by closing only where counsel anticipated classified information to surface, the trial court made an acceptable effort to close no more broadly than necessary.

United States v. Martin, 2012 CCA LEXIS 848 (N.M.C.C.A. 2012) and *United States v. Martin* 2012 CAAF LEXIS 427 (C.A.A.F. 2012)¹⁰

- **Misconduct and Outcome:** Intending to use his lawful access to classified national defense information to reap personal monetary benefit, the accused was apprehended surrendering state secrets to a “Chinese government official” (in fact an undercover FBI agent). The defendant pled guilty to multiple specifications of espionage and gathering defense information in violation of UCMJ Articles 106(a) and 134.
- **Extent of Closure:** According to the prosecuting trial counsel in this case, the Government’s entire sentencing argument occurred in a SCIF based on the highest classified nature of the information.

¹⁰ As courtroom closure issues were not raised on appeal, the citation offered here is provided so the Court may reference background information for and appellate consideration of the case. It is not intended as a citation for the closure employed in the original trial.

- **Justification:** As neither the accused raised his Sixth Amendment right nor did the media or general public attempt to attend, public trial issues did not arise for consideration by the military trial judge.
- **Disposition:** The accused did appeal to the Navy Marine Court of Criminal Appeals (see above citation) on the severity of his sentence. The NMCCA considered the record and was convinced the punishment received was deserved. Accordingly, the appellate court affirmed the lower court's findings. The Court of Appeals for the Armed Forces denied review.
- **Proposition:** While public trial issues in this case were not litigated, it is worth noting that the appellate authority also declined to raise them. According to Federal case law, as a Constitutional question, whether public trial rights have been violated is reviewed *de novo*, and the specific findings of the Court regarding the closure are reviewed for abuse of discretion. See *Hearst* at 174-75; see also *Short* at 44; *United States v. Smith*, 426 F.3d 567, 571 (2nd Cir. 2005); *United States v. Shyrook*, 342 F.3d 948, 974 (9th Cir. 2003); *United States v. Hitt*, 473 F.3d 146, 156 (5th Cir. 2006). And so, it stands to reason, that had the appellate court, in reviewing the record, considered the closed-off nature of the facility to have implicated the public or the accused's constitutional rights, it could have elected to have evaluated those circumstances against the constitutional requirement for a public trial. They did not.

United States v. Lonetree, 31 M.J. 849 (N.M.C.M.R. 1990) *aff'd* *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992), and *cert. denied*, 507 U.S. 1017 (1993).

- **Misconduct and Outcome:** The accused was a Marine convicted by general court-martial of identifying United States intelligence personnel to Soviet agents, providing plans and assignments of US embassy personnel, and failing to report contacts with communist citizens.
- **Closure:** The Military Judge excluded the public from the complete testimony of some witnesses and portions of others. The accused alleged this amounted to 25% of the testimony.
- **Justification:** During the original case, the Government presented two affidavits in support of its request for closure. The first, classified "SECRET," explained that witnesses to be called by the government were professional intelligence officers who would provide testimony on classified matters. It also listed the government's rationale for requesting that they testify in closed session. The United States could find no information on how that rationale was articulated. The Government also sought to protect certain specified intelligence sources and methods. The judge in the lower court case conducted his own analysis of these materials. In reviewing that court's closure, the NCMCMR ruled in favor of the Government – finding that the military judge properly analyzed and balanced the competing interests before ordering the closing of the court to the public when specified classified information was to be presented. The NCMCMR wrote:

We do not believe *Grunden* mandated judicial findings for each closed session when the Court of Military Appeals stated that “limited portions” of a court-martial may be partially closed despite defense objection . . . [but rather for] individualized decision-making as to specific information which the Government asserts must be exempted from disclosure at a public trial whenever that information is presented during the course of the trial.

It explained that, because MRE 505 focuses on the information at issue, specificity must occur with respect to the information and not necessarily the method of its disclosure. This stands in contrast to closure for something like an individuals’ privacy rights where the interest being protected will vary according to the personal situation of each witness. And so, after classification of a witness’ response had already been determined, to make “specific findings each time a series of questions is to be asked of a witness . . . would be to create unnecessary and disruptive bifurcation of the trial and constitute an exercise in redundancy.” The resulting confusion, the Court stated, “would make a difficult trial an incomprehensible one and would be the antithesis of a fair and orderly proceeding”. In the case of *Lonetree*, the appellate court also found that the procedure the lower court followed was “the fairest and most practical that could be devised.” Namely:

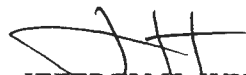
The extent of the closures was determined by either Government or defense. (sic) The military judge had already determined which information, because of its classified status, would be presented in closed sessions. The fact that certain unclassified information was disclosed by individuals whose duties and identities could not be publicly matched-up was necessary to protect classified information. Further bifurcation of other witnesses’ testimony, other than as occurred, was impracticable and would have created unnecessary chaos. In fact, the apparent inadvertent disclosure of classified information by both parties in public sessions occurred rather frequently despite the efforts of the court to ensure nondisclosure. The procedure utilized allowed both parties a reasonably normal context within which to pursue their respective position.

- **Disposition:** The accused appealed the trial court’s closure decision to the NMCMR claiming, among other things, that the judge erred in failing to find specific overriding national security interests for each closure and in failing to narrowly tailor each closure. This NMCMR held that each closure did not require findings and that the closures were adequately tailored. The case was then reviewed by the Court of Military Appeals on other grounds. Its review did not disturb the public trial portions of the NMCMR’s ruling. The United States Supreme Court denied certiorari.
- **Proposition:** This case is highly instructive. It emphasizes the need to consider cases on an individual basis. It explains that specific findings aren’t necessary for every closure

and goes on to explain that what matters is whether the information warrants protections. It demonstrates the persuasiveness of affidavits. And finally, it highlights bifurcation as an important scalpel tool.

CONCLUSION

The foregoing digest of cases provides a snapshot of how previous judges have handled courtroom closure. They highlight that courts have endeavored to use alternatives and bifurcation to balance the public trial rights against, but have nonetheless closed proceedings to allow witnesses to contextualize, discuss, and clarify classified information at stake. These sessions have included unclassified information to the extent necessary to preserve the coherence of the classified testimony. The United States has found no indication that the parties have ever had to present examination questions in advance. Neither does there appear to be any authority behind having a witness testify during a *Grunden* hearing to test the viability of alternatives. Doing so would, the United States maintains, offend the need to consider information more than method of elicitation or source when deciding whether protection is warranted in the first place. Moreover, it would hardly promote judicial economy because the degree to which alternatives may or may not work for one witness' testimony cannot inform the degree to which they will work for another testifying to separate information and in a different manner. Military appellate authorities trust trial judges to make these decisions – requiring primarily that the courts simply engage in the appropriate analysis. Courts must evaluate the principles and interests at stake, consider possible alternatives, and articulate findings adequately supporting their decision on closure. Yet they need not note specific findings each time the closure actually occurs. It is the United States' position that the evidence and classification reviews coupled with the proffered testimony provides more than enough information for the Court to safely rule to close the courtroom.



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8 Enclosures

1. *Diaz* Closure Order
2. *Steele* Redacted Transcript Excerpt
3. *Steele* Unredacted Transcript Excerpt *ex parte* ["SECRET//REL TO USA, MCFI"]

4. *Anderson* Government Motion
5. *Anderson* Closure Order
6. *Diaz* Courtroom Protective Order
7. *Diaz* Government Motion
8. *Ledford* Closure Order

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 29 March 2013.

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a series of connected loops and a trailing line.

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