

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

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

ORDER TO CLOSE
CERTAIN PROCEEDINGS

DATED: 21 May 2013

1. The Government moves the Court to order trial proceedings closed to the public when certain classified information is being introduced or is the subject of examination or argument to ensure that the classified information specified in the Government's motion is not disclosed to the public. Appellate Exhibit (AE) 479. On 1 March 2013, the Court required the Government to resubmit its request with more specificity. AE 503. On 15 March 2013, the Government resubmitted its request with more specificity. AE 505. The Defense opposes, arguing that the proposed closure is not narrowly tailored and that the classified information can be protected by a reasonable alternative procedure called "the silent witness rule". Defense moved the Court to order a Government merits witness be produced for a closed Article 39(a) session to determine whether reasonable alternatives to closure exist. AE 513. The Court granted the portion of the Defense motion to hold a closed Article 39(a) session with a merits "dry run" witness who would discuss classified information to determine whether reasonable alternatives to closure exist. AE 513. That closed Article 39(a) session was held on 8 May 2013. The witness discussing classified information was Ambassador (AMB) Don Yamomoto, Acting Assistant Secretary for African Affairs, U.S. Department of State. Having considered the classified and unclassified filings by the parties, evidence presented, oral argument, and the closed Article 39(a) session of 8 May 2013, the Court finds and rules as follows:

Findings of Fact:

1. The Government moves to close the Court for portions of testimony that discuss the substance of classified information for the following twenty-four witnesses (10 merits witnesses; 13 sentencing witnesses; 1 witness for merits and sentencing);

- a. BG (Ret) Robert Carr will provide classified testimony relevant to the pre-sentencing phase of trial;
- b. Col Julian Chestnut will provide classified testimony relevant to the pre-sentencing phase of trial;
- c. Ms. Elizabeth Dibble will provide classified testimony relevant to the pre-sentencing phase of trial;
- d. RADM Kevin Donegan will provide classified testimony relevant to the pre-sentencing phase of trial;
- e. Mr. John Feeley will provide classified testimony relevant to the pre-sentencing phase of trial;
- f. AMB Patrick F. Kennedy will provide classified testimony relevant to the pre-sentencing phase of trial;

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- g. Mr. John Kirchhofer will provide classified testimony relevant to the pre-sentencing phase of trial;
- h. AMB Michael Kozak will provide classified testimony relevant to the pre-sentencing phase of trial;
- i. Mr. Danny Lewis will provide classified testimony relevant to Specifications 4, 6, 8, 12, and 16 of Charge II;
- j. Mr. Randall MacRobbie will provide classified testimony relevant to the pre-sentencing phase of trial;
- k. Mr. James McCarl will provide classified testimony relevant to the pre-sentencing phase of trial;
- l. MajGen Kenneth McKenzie will provide classified testimony relevant to the pre-sentencing phase of trial;
- m. Mr. James Moore will provide classified testimony relevant to the specification of Charge I and Specifications 1, 12, and 13 of Charge II;
- n. MG Michael Nagata will provide classified testimony relevant to the pre-sentencing phase of trial;
- o. SSA Alexander Otte will provide classified testimony relevant to the specification of Charge I and Specification 1 of Charge II;
- p. AMB David Pearce will provide classified testimony relevant to the specification of Charge I and Specifications 1, 12, and 13 of Charge II;
- q. Mr. Adam Pearson will provide classified testimony relevant to the pre-sentencing phase of trial;
- r. Mr. H. Dean Pittman will provide classified testimony relevant to the specification of Charge I and Specifications 1, 12, and 13 of Charge II;
- s. AMB Stephen Seche will provide classified testimony relevant to the specification of Charge I and Specifications 1, 12, and 13 of Charge II;
- t. Mr. David Shaver will provide classified testimony relevant to Specification 3 of Charge II and classified testimony relevant to the pre-sentencing phase of trial;
- u. Ms. Cathryn Strobl will provide classified testimony relevant to Specifications 3 and 15 of Charge II;
- v. AMB Don Yamamoto will provide classified testimony relevant to the specification of Charge I and Specifications 1, 12, and 13 of Charge II;
- w. AMB Marie Yovanovitch will provide classified testimony relevant to the specification of Charge I and Specifications 1, 12, and 13 of Charge II; and
- x. Mr. Joseph Yun will provide classified testimony relevant to the specification of Charge I and Specifications 1, 12, and 13 of Charge II.

2. On 28 March 2013, the Defense moved the Court to order the Government to produce a merits witness and a sentencing witness to go through a “dry run” of the classified testimony in a closed Article 39(a) session to address whether there are reasonable alternatives to closure available. On 10 April 2013, the Court ordered the Government to produce a “dry run” merits witness to determine whether there are reasonable alternatives to closure available. The Government produced AMB Don Yamamoto as a “dry run” merits witness. On 8 May 2013, AMB Yamamoto testified during a closed Article 39(a) session. The Government examined AMB Yamamoto, both with and without the use of alternatives. The Defense then examined AMB Yamamoto with the

use of alternatives. During the testimony using alternatives, there was at least one incident where spillage of classified information would have resulted had the testimony been given in open court.

3. On 10 April 2013, the Court ruled that the Government had not provided the Court with evidence of the classified nature for all of the classified information at issue to allow the Court to properly apply the test for closure set forth in RCM 806(b)(2) and make appropriate case-specific findings. AE 517. The Court ordered the Government to provide the Court with evidence of the classified nature of each specific piece of classified information the Government seeks to assert as an overriding interest justifying closure by 7 May 2013. On 7 May 2013, the Government requested leave until 10 May 2013, to which the Defense did not object. The Court granted the Government's motion.

4. On 10 May 2013, the Government *ex parte* presented the following evidence relating to the national security interest for the classified information for which the Government seeks trial closure: (1) a letter from the Department of Defense with references to six security classification guides; (2) a letter from the Defense Intelligence Agency with references to two security classification guides; (3) a letter from the Department of State with references to one security classification guide; (4) classification reviews for the charged documents; (5) classification reviews for evidence the Government intends to use at trial; and (6) the classification reviews enclosed to the Government's Military Rule of Evidence (MRE) 505(i)(2) filing dated 31 January 2013. AE 477.

5. No evidence has been presented that the classified information at issue is lawfully in the public domain or has been officially acknowledged by the Government.

6. The Court reviewed *in camera* the letters from the three above government organizations and the relevant classification reviews which cite the reasons that the information is classified (Enclosures 1-6 of the Government's Evidence of the Classified Nature of the Information Asserted as an Overriding Interest Justifying Closure dated 10 May 2013).

7. The proffered testimony and accompanying letters and classification reviews demonstrate by a preponderance of the evidence that the testimony sought to be introduced was properly classified by an authorized original classification authority applying the standards of Executive Order 13526.

8. Public disclosure of the classified information reasonably could be expected to cause serious harm to the national security of the United States as described in the classification reviews as it pertains to intelligence activities, intelligence sources and methods, and the foreign relations and foreign activities of the United States, the unauthorized disclosure of which reasonably could be expected to harm the national defense and foreign relations of the United States. Enclosures 1-6 of the Government's Evidence of the Classified Nature of the Information Asserted as an Overriding Interest Justifying Closure dated 10 May 2013.

The Law:

1. The Court's 13 April 2013 Ruling and Order: Interplay Between MRE 505, RCM 806, and *U.S. v. Grunden*; Specificity of Classified Information; and John Doe sets forth the Court's view of

the law regarding closure of trial proceedings under the First and Sixth Amendments, RCM 806(b)(2), and MRE 505(j)(5). The Court notes that the President has implemented by executive order amendments to MRE 505 effective 15 May 2013. The amendments do not change the Court's substantive view of the interplay between MRE 505, RCM 806, and *U.S. v. Grunden*.

2. When the Government seeks closure of court proceedings, the Constitutional test incorporated by RCM 806(b)(2) requires the Government to demonstrate that (1) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (2) closure is no broader than necessary to protect the overriding interest; and (3) reasonable alternatives to closure were considered and found inadequate. The evidence presented must be sufficient to allow the Court to make case-specific findings on the record justifying closure.

3. Where the basis for a proposed closure of portions of the trial is to protect against disclosure of classified information, the Government must demonstrate that the information is properly classified, that closure of the proceedings during the presentation of the classified information is necessary to protect the national security of the United States, and that the proposed closing is narrowly tailored so that proceedings are closed to the absolute minimum necessary to protect the national security information. *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

4. The Court of Appeals for the Armed Forces (CAAF) has recognized that the protection of classified information can be an overriding interest that will be prejudiced if the proceedings remain open. When closing proceedings to protect the national security of the United States by preventing disclosure of classified information, the Court must make individualized findings with respect to the specific information the Government asserts requires protection from public disclosure, identify each witness who will testify regarding the classified information, and close the Court only during the portions of the presentation of evidence that actually divulge the classified information. *United States v. Lonetree*, 31 M.J. 849, 853 (N-M.C. M. R. 1990), *aff'd and rem'd*, 35 M.J. 396 (C.M.A. 1992).

Case Specific Findings Regarding Closure:

1. Overriding Interest: The testimony sought to be introduced by the twenty-four witnesses has been classified at the SECRET or CONFIDENTIAL level and was properly classified by an authorized original classification authority applying the standards of Executive Order 13526. The Government has demonstrated that there is a reasonable danger that presentation of the classified information before the public will expose interests relating to the national security of the United States that should not be divulged. Public disclosure of the classified information in this case reasonably could be expected to cause serious harm to the national security of the United States as described in Enclosures 1-6 of the Government's Evidence of the Classified Nature of the Information Asserted as an Overriding Interest Justifying Closure dated 10 May 2013. The Government demonstrated that closure of the trial during those portions of testimony of the twenty-four witnesses is necessary to protect the overriding interest of national security. The Court finds that the Government's interest in protecting the national security and preventing the dissemination of classified information outweighs the accused's and/or the public's right to a public trial for the portion of the trial that involves disclosure of the classified information at issue.

2. Narrowly Tailored Closure: The Court conducted a test to determine whether reasonable alternatives exist in lieu of closure. On 8 May 2013, the Court observed AMB Yamamoto testify during a closed Article 39(a) session. The Government examined AMB Yamamoto, both with and without the use of alternatives. The Defense then examined AMB Yamamoto with the use of alternatives. The Court finds that it is not possible for the Government to elicit coherently in open court nuanced and narrative testimony about the substance of the classified information using "the silent witness rule" or any other code or legend not available to the public. It is also not possible for the Court to understand that testimony using "the silent witness rule", code, or legend. The use of such alternatives for nuanced narrative testimony in open court creates complexities for the witnesses that result in an unreasonable risk of spillage of classified information. Finally, presentation of narrative nuanced testimony in open court using such alternatives creates an unreasonable risk of classification by compilation with members of the public able to "connect the dots" from particular pieces of information and combine that with other information to identify classified information. The Court recognizes that it is possible that certain unclassified testimony of the above twenty-four witnesses may be elicited intermixed with the classified information. In order to narrowly tailor the closure, the Court has ordered the Government to present a plan to expeditiously prepare a transcript and to conduct appropriate classification review(s) of the transcript of any testimony presented in closed session, to include that of the twenty-four witnesses. Unclassified portions of the testimony will be released to the public. The closure ordered by the Court is as narrowly tailored as possible to protect the accused's and public's right to a public trial while protecting the classified information from inadvertent public disclosure and the right of the parties to present classified evidence in a coherent manner to the fact-finder.

3. Reasonable Alternatives to Closure: The Court considered alternatives to receiving classified testimony including: the use of redactions, "the silent witness rule", projected electronic displays, unclassified summaries or alternatives of testimony, and code words/names. The Court also considered the alternatives presented by the parties during AMB Yamamoto's testimony. There are no alternatives to closure for the presentation of classified testimony from the 24 witnesses that are reasonable or adequate. The Court has imposed the classification review requirement as an alternative to closure.

4. The Court has carefully balanced the accused's Sixth Amendment right to a public trial and the public's First Amendment right to a public trial against the potential serious damage to the national security of the United States that would result from the public disclosure or spillage of this information in an open session of this court-martial.

5. The overriding interest in protecting the national security information from disclosure outweighs any danger of a miscarriage of justice that could arise from the taking of the portions of testimony from the twenty-four witnesses in closed sessions of this court-martial.

ORDER:

1. The court-martial will be closed to the public during portions of testimony of the above twenty-four witnesses discussing the substance of classified information.

2. After each of the twenty-four witnesses has testified, the Government will expeditiously prepare a transcript of the testimony and conduct appropriate classification review(s) of the transcript. A redacted copy containing any unclassified testimony will be released to the public. The Court is currently evaluating the proposed transcription/classification review plan submitted by the Government on 20 May 2013. AE 548.

So **ORDERED** this 21st day of May 2013.

A handwritten signature in black ink, appearing to read 'D. R. Lind', is written over the printed name.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit