

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 5

29 March 2013

Encl 5 to
APPELLATE EXHIBIT 511
PAGE REFERENCED: _____
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UNITED STATES ARMY TRIAL JUDICIARY FOURTH JUDICIAL CIRCUIT FORT LEWIS, WASHINGTON

UNITED STATES

v.

SPC RYAN G. ANDERSON
US Army National Guard, (b) (6)
A Co., 1/303 AR Reg
Fort Lewis, WA 98433

ORDER TO CLOSE CERTAIN
PROCEEDINGS

1. By written motion filed on 3 August 2004, the government requests that the court order the trial proceedings closed to the public only while certain sensitive information is being introduced or is the subject of examination or argument to ensure that the information specified in the government's motion is not disclosed to the public (Appellate Exhibit XIII). The defense filed a brief in opposition on 6 August 2004 (Appellate Exhibit XIV), arguing that the government failed to meet its heavy burden under the Sixth Amendment. Also, the government made an oral request for a similar order to close the proceedings during the introduction of classified evidence, the examination of witnesses regarding classified evidence, and if counsel use classified evidence or describe it during argument. The defense does not object to closure on a limited basis as necessary to protect classified information. A session under Article 39(a) UCMJ was held on this matter on 9 August 2004. The parties were given an opportunity to present evidence and make argument.

2. Findings of Fact:

a. The government intends to introduce into evidence certain items of evidence that have been deemed classified. This information is not within the public domain.

b. As the detailed military judge, the undersigned reviewed the evidence *in camera* in the presence of the Court Security Officer, as well as the classification certification for the evidence.

c. My review of the evidence and the accompanying security classification declarations by Major General Kimmons and Brigadier General Nadeau show that the government proved by a preponderance that the evidence in the form of documents, photographs, and testimony sought to be introduced which has been marked as classified at the "Secret" level was properly classified by an authorized original classification authority applying the standards of Executive Order 12958, as amended by Executive Order 13292, and departmental regulations.

d. Public disclosure of the classified evidence in this case would harm the national security of the United States in the manner described in the declarations by Major General Kimmons and Brigadier General Nadeau. Specifically, disclosure of this information would enable an enemy or any other group or person to learn of specific vulnerabilities of critical US weapons systems that have not been made public, and would provide a means of defeating these US weapons systems now in use on the battlefield in Iraq and Afghanistan. Those

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APPELLATE EXHIBIT XXXIX

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weapons systems are manned by soldiers now in combat, whose lives would be at great risk should the information be disclosed to the public.

e. The classified information sought to be introduced is critical to the government's prosecution of this case. The purpose of the evidence is to prove that the means allegedly described by the accused to defeat US weapons systems to those he allegedly believed were agents of al Qaida were true.

f. Mr. Rene Gonzalez, a Department of Army expert on tactical wheeled vehicle survivability, testified on 9 August as to the sensitive information in the form of documents, photographs, and testimony for which the government seeks the closure order. This information was subjected to a classification review but was not classified. It is highly sensitive information about current vulnerabilities of the weapon system identified by Mr. Gonzalez during his testimony. This weapon system is a critical one on the battlefield in Iraq. Mr. Gonzalez described the Army's current efforts to resolve the vulnerabilities of this system to minimize future losses of US lives in combat theaters. While Mr. Gonzalez testified that some of the vulnerabilities are known by defense contractors who work in this area, the vulnerabilities have not been disclosed to the public.

g. As with the classified evidence, the sensitive information is critical to the government's prosecution of the case, and will serve the same purpose as that described in subparagraph e, above.

h. On 19 August 2004, the Acting Secretary of the Army invoked a claim of privilege under Military Rule of Evidence 506 with respect to the sensitive documents, photographs, and testimony described by Mr. Gonzalez and which the government intends to introduce at trial. The declaration of privilege covers the same evidence the government described as sensitive in its brief. The Acting Secretary of the Army is authorized as the agency head to invoke the privilege. Secretary Brownlee determined that public disclosure of the information would imperil the lives of soldiers and be detrimental to the public interest. His determination was based upon personal review of the sensitive evidence, legal advice from The Judge Advocate General, and a declaration of the risks of disclosure from the Deputy Commanding General, I Corps and Fort Lewis (App Ex XXV through XXVII). The invocation of the privilege satisfies the requirements for such an invocation under Military Rule of Evidence 506.

3. Discussion: Military Rule of Evidence 505 discusses the rule of privilege for government classified information. Military Rule of Evidence 506 is the rule of privilege for government information other than classified information. The category of evidence often described as "sensitive" is not covered by either rule, but is recognized as subject to protection in certain circumstances by case law (e.g., United States v. Hershey, 20M.J. 433 (C.M.A.1985)).

The accused enjoys the right to a public trial under the Sixth Amendment. The general public, including the media, has a qualified right under the First Amendment to attend criminal trials (Richmond Newspapers v. Virginia, 448 U.S. 555 (1980)). The right to a public trial is included in the Manual for Courts-Martial at Rule for Courts-Martial (RCM) 806. Case law interpreting the First and Sixth Amendments, and RCM 806, show that neither the accused's nor the public's right is absolute. A military judge may, if necessary, close portions of the trial proceedings to the public provided the government makes an adequate showing of necessity and the closing is tailored to minimize the closed sessions to the absolute minimum necessary (United States v. Grunden, 2 M.J.116 (C.M.A. 1977), and Rule for Courts-Martial 801).

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To support a closed proceeding, the government must first make a compelling showing that closure is necessary to prevent disclosure of information which must be protected from public disclosure. Closure is only necessary when alternative means of presenting evidence are not available. The government discusses possible alternative means in its brief and makes a compelling argument why they would not work. For example, if the government is limited to showing a witness a classified or privileged exhibit but not able to discuss its contents in open court because spectators were present, that would deprive the trial counsel of a critical means of proof, and deprive the defense counsel, the members, and the military judge the opportunity to ask the witness questions about the exhibit. None of the matters for which protection has been claimed by the government can be used by the government without testimony. They are not self-explanatory or self-authenticating. There are no alternatives to protecting the classified and privileged information from public disclosure during trial except by excluding the public for very limited periods during the trial.

The court has carefully applied the balancing test described in Grunden and later military and federal cases in analyzing the government's request. Even though the defense did not object to closure of the trial during receipt of classified information, I have applied the balancing test nonetheless in analyzing whether the proceedings may be closed during receipt of classified and the sensitive information for which the privilege under MRE 506 has been invoked in order to protect the public's First Amendment right of access to courts-martial.

4. Conclusions of Law: Based upon the foregoing, I hereby conclude:

- a. The government has met its burden of proving that evidence in the form of documents, photographs, and testimony that has been properly classified and similar evidence that is the subject of a properly-invoked privilege under MRE 506, and which is also sensitive information, will be introduced at trial as evidence critical to the government's case-in-chief.
- b. The government has proven by a preponderance that there is a reasonable danger that presentation of these materials before the public will expose military matters which in the interest of national security should not be divulged (Grunden, 2 M.J. at 122).
- c. The government has delineated those portions of its case that involve these materials.

5. Order of the Court: The trial proceedings in the above-captioned case will be closed to spectators during the introduction of classified evidence, and evidence which was described as sensitive in the government's motion and for which the privilege under MRE 506 has been invoked. Closure will occur only during the portions of a witness's testimony in which it is reasonably expected that the protected exhibit or testimony will be displayed or discussed, when counsel will make direct reference to the contents of a protected exhibit or testimony during argument or in questioning any witness and cannot do so without discussing the testimony or evidence in open court, or when the military judge must discuss the exhibit or testimony on the record and cannot do so without disclosing the protected contents in open court. The proceedings will be reopened to the public at the earliest opportunity. Therefore, if a witness is to testify on both matters in which the public must be excluded and matters during which the public may be present,

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trial counsel will conduct direct examination in a closed session on only the matters in which the public must be excluded, followed by cross-examination on those matters only in the closed session. Trial counsel will then conduct direct examination in open court of that witness on matters that are not subject to closure, followed by cross-examination in open court on the same matters. While this procedure may require counsel to depart from normal practice of complete direct examination of a witness prior to cross-examination, the manner directed in this order will not impede the fair administration of justice and will ensure that the proceedings are closed only as absolutely required. Counsel are further directed to notify the judge in advance before eliciting classified or privileged evidence in open court, or discussing same. Finally, trial and defense counsel will advise the military judge before arraignment as to which parts of the record and exhibits, including allied papers, should be the subject of a protective order in the record of trial.

DONE THIS 26TH DAY OF AUGUST 2004 AT THE FOURTH JUDICIAL CIRCUIT, FORT LEWIS, WA.

Debra L. Boudreau
DEBRA L. BOUDREAU
Colonel, JA
Chief Circuit Judge

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