

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

CORRECTED COPY

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 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. Regarding the witness, John Doe, the Government offers the threat to his safety as an additional overriding interest to close the proceedings during his testimony. AE 477.

2. This ruling sets forth the Court's findings with respect to the portion of the Government motion to close the proceedings for the entire testimony of John Doe. The Defense does not object to the Government's motion to close the proceedings for the entire testimony of John Doe.

Findings of Fact:

1. The Government intends to introduce classified evidence from the testimony of John Doe. 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.

2. The Government presented evidence demonstrating that John Doe's identity is classified and that the classified information at issue is national security information requiring protection from public disclosure. Enclosures 1, 4, 5, 6, 7, and 8 to AE 477. The Government also presented evidence in AE 477 and its enclosures that public disclosure of the identity of John Doe poses a legitimate threat to his safety. The Court reviewed AE 477 and its enclosures *in camera*.

3. The Government proffers that this classified information is relevant to the specification of Charge I and specification 1 of Charge II.

4. The Court finds that the evidence in AE 477 and its enclosures demonstrates that the Government has proved by a preponderance of the evidence that the testimony sought to be introduced is classified and was properly classified by an authorized original classification authority applying the standards of Executive Order 13526.

5. 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. The classified information at issue pertains to military plans and operations, intelligence activities,

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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, 4, 5, 6, 7 and 8 to AE 477.

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).
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. 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).
5. 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. CAAF has also recognized that witness safety can also be an overriding interest that can be prejudiced if the proceedings remain open. *U.S. 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); *U.S. v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

Case Specific Findings Regarding Closure:

1. Overriding Interest: The testimony sought to be introduced by John Doe has been classified at the SECRET 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 AE 477 and its enclosures. The Government has met its burden of persuasion that closure of the trial during the entire testimony of John Doe is necessary to protect the overriding interest of national security. The Government has also demonstrated that the safety of John Doe is at legitimate risk if his identity is disclosed. The safety of John Doe is an additional overriding interest that will be prejudiced if the proceedings remain open during his testimony.

2. Narrowly Tailored Closure: With this unique witness, the bifurcation of testimony into unclassified and classified information is not possible because the entirety of the testimony for John Doe is classified. Closure is also necessary to ensure the true identity of John Doe is not revealed to protect John Doe's safety. It is possible that certain unclassified testimony 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 John Doe. Unclassified portions of the testimony will be released to the public.

3. Reasonable Alternatives to Closure: The Court considered alternatives to receiving classified testimony in closed session to include: the use of redactions, the Silent Witness Rule, projected electronic displays, unclassified summaries or alternatives of testimony, and code words/names. The alternatives to classified testimony are neither reasonable nor adequate for this witness. The Court has imposed the classification review requirement as an alternative to total 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 of this information in an open session of this court-martial and the legitimate risk to John Doe's safety if he testified publicly. The accused has not objected to the closed session.

5. The need to protect the national security information from disclosure and to protect the safety of John Doe outweighs any danger of a miscarriage of justice that could arise from the taking of John Doe's testimony in closed sessions of this court-martial.

6. In addition to closure, to protect the safety of John Doe, the Government may arrange for an alternate secure location to elicit the testimony of John Doe. To ensure the identity of John Doe is not revealed to trial participants, the Court will permit light disguise to include: colored contacts, real or false facial hair, a wig, makeup, and/or facial prosthetics. The light disguise shall be narrowly tailored because it cannot obscure John Doe's emotive expressions and reactions while testifying. John Doe's demeanor, body language, nervousness, and facial reactions shall be visible to the parties and the Court to enable full assessment of John Doe's credibility.

ORDER:

1. The court-martial will be closed to the public during the testimony of John Doe.

2. The Government may provide for John Doe to testify in an alternate undisclosed secure location and in light disguise to protect his classified identity and his safety.

3. After John Doe 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 Government's plan to accomplish this is due to the Court on 20 May 2013.

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

A handwritten signature in black ink, appearing to read 'DRL', is positioned above the printed name.

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