CHAPTER 10

Courtroom Closures

The ability to present classified evidence to members at trial in a session closed to the public is unique to courts-martial. Closing the courtroom to present evidence to the jury is not an option under the Classified Information Procedures Act (CIPA) in federal court. With this authority to close the courtroom, however, comes the responsibility to ensure that closures are narrowly used in order to best uphold the right to a public trial that adheres not only to the accused, but also to the general public. Closed proceedings are drawing increased scrutiny from the news media.[1] The following sections discuss the history of closing courts-martial and the current procedures for doing so.

A. History. The genesis of the modern classified information privilege is the Supreme Court case of *United States v. Reynolds*, 345 U.S. 1 (1953). In *Reynolds*, an Air Force B-29 exploded in mid-air in October, 1948, in the vicinity of Waycross, Georgia. The plane was carrying a number of pieces of classified equipment and, along with its military crew, civilian scientists and technicians. The widows of the civilians sued the Air Force for damages, claiming that the plane was negligently maintained. In discovery, the widows of the civilians asked for the accident report and the statements of the surviving crew members taken as part of the investigation. The Air Force refused to produce the documents, even to the Federal District Court judge, based on Air Force regulations regarding release of accident reports and a formal claim of privilege over the information filed by the Secretary of the Air Force on national security grounds.[2] After the trial judge entered a finding of negligence against the government based on the refusal to disclose the documents to the court, the government appealed.

The Supreme Court held that a privilege against revealing "military secrets" does exist in the law and was validly invoked in *Reynolds*. The privilege must be invoked by the "head of the department which has control over the matter," *id.* at 8, and the court must determine whether the claim of privilege is appropriate in the circumstances, yet do so without forcing disclosure of the information to be protected. The Supreme Court went on to hold that there is no requirement for the information to be automatically disclosed to the court for review, especially in a case where witnesses were made available to testify about the non-classified events that presumably caused or led to the plane's crash. *Id.* at 11.[3]

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[1] The Ariel Weinmann espionage case provides an excellent case in point. In that case, the Article 32 proceeding was held without local media in attendance. Although the proceeding was never closed, there were various military personnel coming and going throughout the proceedings. When the media learned about the Article 32 hearing, the Navy was accused of holding "secret" trials. Tim McGlone, *Silence Surrounds Navy's Local Court System*, Virginian Pilot, August 4, 2006, at A1. Although the media was provided a transcript of the Article 32 proceeding, subsequent reporting contained an air of skepticism through repeated references to the earlier, "secret" proceeding.

[2] The Air Force did offer to make the surviving crew members available for examination by the plaintiffs with the ability to refresh their recollection from their previous statements to the Air Force, though they could not discuss classified matters. *Reynolds*, 345 U.S. at 5.

[3] For a recent detailed examination of the Reynolds case, including a discussion of the facts contained in the accident report, which was found on the Internet by the daughter of one of the deceased civilians, see Louis Fisher, "In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case (2006)."

Significantly for court-martial practice, the Court distinguished the civil, tort case at issue in *Reynolds* from criminal cases stating that "it is unconscionable to allow [the government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *Id.* at 12. Thus, as discussed in the previous chapter, the remedies available under M.R.E. 505 for failure to disclose relevant and necessary classified information are much more favorable to the accused than to a plaintiff in a civil case.

1. *United States v. Grunden*. In court-martial practice, the seminal case for closing the courtroom to the public is *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977). At the time *Grunden* was decided, the controlling provision from the Manual for Courts-Martial stated "all spectators may be excluded from an entire trial, over the accused's objection, only to prevent the disclosure of classified information." M.C.M. para. 53e (1969 Rev.) (emphasis added). That provision went on to state that such authority must be "cautiously exercised" and the right to public trial is to be balanced with the public policy considerations justifying exclusion. *Id.* The trial judge proceeded to exclude the public "from virtually the entire trial as to the espionage charges." *Grunden*, 2 M.J. at 120. Although the court's actions were ostensibly within the plain language of the rule, the Court of Military Appeals found that the trial judge erred by "employ[ing] an ax in place of the constitutionally required scalpel." *Id.*

The court then went on to establish a balancing test designed to ensure that the exclusion of the public is "narrowly and carefully drawn." *Id.* at 121. The trial court is to weigh the reason for excluding the public against the possibility of a miscarriage of justice that might occur from such an exclusion. *Id.* at 121-22. In a case involving classified information, the prosecutor meets this "heavy burden" by demonstrating that the material in question has been properly classified.[4] *Id.* at 122-23. To limit the danger of a miscarriage of justice, under *Grunden*, the military judge must carefully consider the scope of the public's exclusion, ensuring that the exclusions are limited only to those portions of testimony involving classified information. *Id.* at 123.

In order to properly balance the competing interests in such a case, the *Grunden* court recognized that discussion of the classified information at issue may have to take place between the military judge and the parties in a preliminary hearing closed to the public. Note that the court did not impose a predicate requirement to demonstrate the classified nature of the material prior to closing the preliminary hearing. In its analysis of the error committed in *Grunden* at the trial level, the appellate court is focused on the exclusion of the public from the presentation of testimony and evidence to the members. In fact, the

[4] The *Grunden* court makes a number of statements that appear to leave a great deal of discretion to the prosecutor as to how to prove the classified nature of the material. For instance, the court first says the trial judge must be "satisfied from all the evidence and circumstances that there is a reasonable danger" of exposing national security matters. The court then says the method used by the prosecution to carry its burden will "vary depending on the nature of materials in question and the information offered." *Grunden*, 2 M.J. at 122. The court's most definite statement of how to prove the reason for excluding the public is "that the material in question has been classified by the proper authorities in accordance with the appropriate regulations." *Id.* at 123. As discussed in Chapter Seven, a properly prepared classification review will satisfy this requirement. However, it is not the only way to reach the first prong of the balancing test. The markings, content and originator of the document could be sufficient to meet the various formulations of what needs to be demonstrated to the military judge.

majority rejects the dissent's call to take into account all of the pre-trial hearings, final instructions, and sentencing phase of the trial and find no violation because over 60% of the trial was conducted in open session. *Id.* at 120, n.2. Thus, there is less concern about a miscarriage of justice due to the closed proceeding when it is a preliminary hearing outside the presence of the members and controlled by the military judge.

At the hearing, often called a *Grunden* hearing, after demonstrating the classified nature of the material at issue, the government then must delineate which portions of its case-in-chief will involve these materials. The military judge must decide on the scope of the exclusion in order to ensure that only those portions of testimony that actually involve classified information will be closed to the public. It is not sufficient that there is a fear or mere probability that there will be an unplanned spontaneous disclosure of classified information. Such speculation does not justify excluding the public from that portion of the testimony. *Id.* at 123, n.20.

2. Military Rule of Evidence 505. Three years after the *Grunden* decision, the Military Rules of Evidence (M.R.E) were promulgated. As discussed in Chapter Nine, M.R.E. 505 was derived from the House of Representatives version of CIPA (H.R. 4745). The Analysis of the Military Rules of Evidence, contained in Appendix 22 of the Manual for Courts-Martial provides a breakdown of which section of H.R. 4745 each section of M.R.E. 505 was drawn from and how the language was modified to comport with military justice practices.

With all the procedures imbedded in M.R.E. 505, there is, surprisingly, a dearth of any specific procedures on closing the courtroom. The sole reference to taking such action is contained in subsection (j)(5), which states "[t]he military judge may exclude the public during that portion of the presentation of evidence that discloses classified information." The Analysis simply refers to the fact that subsection (j) comes from section 8 of H.R. 4745 and *Grunden*. Neither (j)(5) nor the Analysis refers to any other section of the rule that applies to the hearing required by *Grunden*.

Specifically, there is nothing to indicate that subsection (i) of M.R.E. 505 is required to be used for the *Grunden* hearing.[5] Had the drafters intended for that to be the case, there surely would have been a cross-reference to subsection (i) in either (j)(5) or the Analysis, as there are in other sections of the Rule that point specifically to (i). While some have suggested that the in camera procedure of subsection (i) should be the *Grunden* hearing procedure, subsection (i) is actually much more than that. Subsection (i) is an evidentiary procedure related to what evidence must be disclosed in discovery and in what form that disclosure must take. Prior to 2004, it is not surprising that the differences between Grunden's relatively limited closure hearing and subsection (i) were less than fully appreciated. However, the promulgation of Rule for Courts-Martial 806(b)(2), as discussed below, clarifies the distinction.

The *Grunden* hearing is used to determine what portions of the classified information disclosed under subsection (i) will actually need to be discussed in testimony during the

[5] See Chapter Nine for a complete discussion of the operation of M.R.E. 505(i).

court-martial, requiring the exclusion of the public. The subsection (i) procedure is usually done well in advance of trial so that the parties have adequate time to prepare for trial based on the material the military judge finds to be relevant and necessary. The *Grunden* hearing should occur much closer to trial because it is concerned with the presentation of evidence, which the parties may not have planned out until close to the time of trial. As discussed below, there are ways to present classified information at trial that do not involve oral testimony or other discussion of the information, which would not require exclusion of the public from the court-martial. In summary, *Grunden's* closure hearing and, as discussed below, the R.C.M. 806(b)(2) hearing pertain to the courtroom closure process while M.R.E. 505 subsection (i) is an evidentiary procedure that focuses on what classified evidence is relevant and necessary, and, if relevant and necessary, what form of discovery is most appropriate.

3. Rule for Courts-Martial 806(b)(2). In 2004, the standards for excluding the public from a court-martial were clarified and codified in a change to Rule for Courts-Martial (R.C.M.) 806(b). Prior to the change, R.C.M. 806(b) simply said that the public could only be excluded over the accused's objection "only when expressly authorized by another provision of this Manual." R.C.M. 806(b), M.C.M. (2002). As pointed out by the Analysis of R.C.M. 806(b), this language essentially referred back to the closure language of M.R.E. 505(j)(5). The 2004 change eliminated this limiting language and broadened the circumstances under which the military judge can close the proceedings, provided that the standard contained in R.C.M. 806(b)(2) is met.

R.C.M. 806(b)(2) codified the standard of the *Grunden* line of cases as advanced by *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985) and *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997). These cases, as well as R.C.M. 806(b)(2) are discussed more extensively in the next section, which covers the hearing used to close the courtroom or Article 32 proceeding.

B. <u>The Closure Hearing</u>. R.C.M. 806(b)(2) effectively supplanted *Grunden* as the standard for closing courts-martial, no matter the reason. *See* R.C.M. 806(b)(2) Discussion (stating that the Rule sets forth "the constitutional standard"). The Rule places a great deal of discretion in the hands of the military judge, particularly because it does not dictate the method of demonstrating the government's overriding interest.

The Rule's operation is relatively straightforward. The military judge can order the proceedings closed if he first finds a substantial probability that an overriding interest will be prejudiced by keeping the proceedings open. M.R.E. 806(b)(2)(1). In the case of classified information, the overriding interest is the prevention of harm to the national security. The Rule also requires that the military judge use the *Grunden* scalpel by ensuring that the "closure is no broader than necessary to protect the overriding interest." *Id.* at (b)(2)(2).

The final substantive requirement is that the military judge must consider reasonable alternatives to closure and find that they are inadequate**.** Certainly, the alternatives that are available under M.R.E. 505(i) would be viable alternatives to closing the courtroom. However, they are not the only alternatives available to closing the courtroom in the event that the M.R.E. 505(i)

evidentiary hearing determines there is no adequate redaction, summary, or substitution for the actual classified information being presented to the members. There are a number of alternatives to testimony for introducing the actual classified information at trial that should be considered before the military judge decides to close the courtroom. These alternatives, which are commonly used in federal court prosecutions under the Classified Information Procedures Act, are discussed in more detail below. Finally, R.C.M. 806(b)(2) requires the military judge to place his case-specific findings justifying closure on the record for later review on appeal.

1. Demonstrating the "Overriding Interest." As stated earlier, the military judge is vested with broad discretion with respect to how the overriding interest is demonstrated. This accords with some of the broader language contained in *Grunden* as discussed in the section on that case above.

(a) Classification Review. By far the easiest method of demonstrating the government's overriding interest where classified information is concerned is to submit a classification review. The potential harm to national security from disclosure of the information is the government's overriding interest in the classified information. For purposes of demonstrating this interest, only the classification review itself (the Original Classification Authority (OCA) affidavit, or the subject matter expert affidavit accompanied by the OCA letter) is needed, not the assertion of privilege by the head of the military department. Classification reviews are covered extensively in Chapter Seven of this Handbook.

 **Practice Pointer.** Again the need to consult with the originator of the classified information prior to its use is paramount. They must be consulted to determine if they want their information used in litigation before any charges are preferred and before any classified information is disclosed to the defense.

(b) No Classification Review. It is possible to demonstrate the overriding interest in the classified information without a formal classification review prepared by the OCA. This can be done, for instance, through testimony of a witness with sufficient knowledge and experience of the material that he can accurately describe to the military judge the harm to national security that would result from disclosure.[6] As this is a pretrial matter, the witness could be a user or derivative classifier of the evidence, as long as they are familiar with the information and understand the ramifications of its disclosure. As a military judge can take hearsay evidence at pretrial proceedings, *see* M.R.E. 104(a) (stating that the

[6] For instance, a Navy or Marine Corps intelligence officer can testify as to whether or not the document is properly marked and can testify, based on his level of knowledge, experience and training (all of which should be presented to the court) that the material fits within the categories of the executive order and describe the damage to national security that would result from disclosure. This was done for preliminary hearings in the USMC Hamdania cases arising from the war in Iraq when a classification review was not completed on a document that was the subject of a *motion in limine* to exclude the document based on M.R.E. 401.

military judge is not bound by the rules of evidence when determining preliminary questions such as the admissibility of evidence or the existence of a privilege), there is no need to have someone from the originating agency testify to demonstrate the overriding interest. This will make it easier to find local witnesses near the court-martial venue. Or the government can submit the hearsay testimony or affidavit from someone who has discussed the potential damage to national security with the originating organization in order to prove the overriding interest. Such an affidavit, of course, could not substitute for a formal classification review in support of the assertion of the classified information privilege.

2. "Reasonable Alternatives" to Closure. The military judge next must consider whether there are any alternatives that would satisfy the need for the actual classified information. It is not enough to review the classified information alone and determine that it needs to be protected. Closing the courtroom on that basis alone would be error. There must be a consideration of either alternatives to the information or alternative methods of presentation in an open session that would not disclose the classified information. Only by considering alternatives can the military judge make findings about why the proposed alternatives are inadequate for use at trial. Alternatives to the actual classified information, such as redacted versions, summaries, substitutions and stipulations were covered extensively in Chapter Nine. Those options should be reviewed early in the court-martial process with the OCA. The parties, especially the government, should also be prepared to discuss with the military judge other alternative methods of presenting the evidence without disclosing its classified substance. These alternatives are only limited by the bounds of one's imagination. The most commonly seen alternatives for presenting classified information in open court are:

(a) <u>"Silent Witness" Rule</u>. The most commonly used method of presentation is the "silent witness" rule. Under this scenario, a classified document is introduced into evidence via a witness who testifies about all the facts, usually unclassified, needed to determine the documents relevance and hearsay exception, without discussing the substance of the document itself. After it is introduced into evidence, it is then published to the properly-cleared members to review. In many cases, the legal impact or effect of the document can then be discussed in open court without reference to any of the classified material contained in the document. With specific portions tabbed and marked, counsel can then use those references as part of their unclassified direct and cross-examinations about the damage to national security or other relevant legal arguments. Introduction of evidence via the "silent witness" rule will involve a certain amount of "talking around" the subject, so it may be necessary to have certain terms or concepts reviewed by the OCA to ensure that they may be used in an unclassified setting. It is important to understand that generally the most sensitive portion of any intelligence information is the source and method from which the information was derived. If there is need to discuss this aspect of the information, there should always be a review by the OCA of the proposed unclassified terms and phrasing.

Counsel should review current case law on the use of this method based on the facts and circumstances of the proposed use in any particular case.

(b) Use of Code Words or Special Terms. When the classified information is a discreet piece of information, such as the name of a country involved in an espionage case, code words or terms may be used in place of the actual information to prevent unnecessary closure of the courtroom. For instance, Country A and Country X, could represent two countries in a case where A is the country that received the classified information from the service member and X is the country where the transfer occurred. The substitution of terms could be used for a whole host of information such as classified program names or compartmented information. When such code words or terms are used, all those who need to know the correlation between the term and the classified information would have a key to use during questioning, testimony, and argument. The key, of course, is going to be classified at the highest level of information contained on the sheet and will always be an appellate exhibit.

(c) Use of Screens and Other Methods of Disguise. If the identity of a witness is classified, but the substance of his testimony is not, then it is possible for the witness to testify from behind a screen or in light disguise. When using a screen, it is normally arrayed so that the military judge, members and the parties can see the face of the witness, but his visage is blocked from public viewing. This issue has come up in at least one case arising from the Global War on Terror in the case of a Navy SEAL charged with abusing a detainee.

(d) Imagery. Classified imagery can be presented in open court in a number of different ways. One option is to place the poster board of the image in such a manner that only those with clearances are able to see the image, with those in the public gallery unable to see the image depicted. Then, if the details that are being described are unclassified, the public may hear the description of what occurred without seeing the graphic depiction. This method is especially effective for the photo used as a demonstrative exhibit, but would also work for a classified photograph introduced into evidence. If introduced into evidence, similar to documents, a classified photograph could be simply printed and distributed to the members and treated as any other piece of classified information. Another option to present classified imagery, or other classified information for that matter, is the use of courtroom monitors in those locations so equipped. Again, use of such technology needs to be carefully monitored and understood, especially the need for classified computer equipment rather than the standard equipment used. The screens also must not be visible to the public gallery. Finally, apart from the computer/drive combination, there must be a review to ensure that the other components of the system do not have nonvolatile memory chips, i.e., memory that retains the information temporarily stored there until the next information replaces it. Volatile memory dumps the data as soon as the component has completed using the memory.

3. Building the Record. Finally, R.C.M. 806(b)(2) requires the military judge to place his findings as to why the alternatives are not adequate on the record for review on appeal. This is especially important in any case in which the accused has consistently maintained his right to a public trial and objected to some or all closures of the proceedings.

C. Special Considerations for the Article 32 Hearing. In *ABC, Inc. v. Powell*, 43 M.J. 363 (C.A.A.F. 1997), the U.S. Court of Appeals for the Armed Forces ruled: "Today we make it clear that, absent 'cause shown that outweighs the value of openness,' the military accused is . . . entitled to a public Article 32 investigative hearing." *Powell's* holding means that the Article 32 appointing authority and pretrial investigating officer no longer have unbounded discretion to order Article 32 investigations closed to the public. It also means that the parties cannot stipulate or otherwise agree to close proceedings. The process for closing an Article 32 investigation and a court-martial is identical. There are no "shortcuts" or other means of closing an Article 32 other than the process described above under R.C.M. 806(b)(2). The investigating officer must be sure to consider reasonable alternatives to closing the hearing. He should also consider bifurcating witnesses testimony into open and closed portions, closing only that portion of a witness's testimony that contains classified information. Finally, the investigating officer, like the military judge, must be sure to put the reasons for any closure on the record. A recent case that illustrates the pitfalls of closing an Article 32 investigation improperly is *Denver Post v. U.S. and Captain Robert Ayers*, ARMY MISC 20041215 (A.C.C.A., 23 February 2005).

As discussed in Chapter Nine, it is also very problematic for a convening authority to attempt to order an Article 32 to be entirely open. Instead, the accused must be allowed to present evidence to the investigating officer. The better course is to direct the investigating officer to bring requests for classified information to the attention of the convening authority for resolution.

D. Closing the Courtroom: The Logistics. Once the military judge has determined the need for a closed session, precautions need to be taken to ensure the security of the information to be discussed in the courtroom, including the proper handling of the record of the proceeding.

Prior to entering the closed session at trial, the military judge must work closely with the courtroom security officer to ensure that the hearing room is properly secured and that all persons present have the requisite clearance and "need to know." The military judge should address these issues on the record. The military judge and courtroom security officer need to consider the circumstance of each courtroom setting in determining what measures need to be taken. Some of the most common measures that should be considered are:

1. Posting guards with proper clearance level near entrances to the courtroom if there is a possibility that the proceedings may be heard near the doors.
2. Post signs outside the courtroom stating that the court is in closed session.
3. Ensure that any security cameras or video feeds to locations outside the courtroom are shut down if classified information is visible to the cameras. Even if classified information cannot be seen on the video feed, any accompanying audio feed should always be secured because the reason for holding a closed session is to present oral testimony in court.

4. Switching the system used to record court proceedings so that there is no mixture of open and closed sessions on the same media.

At the start of the closed session, the military judge should state, or have whichever side is the proponent of the information state, the classification level for the record. Before adjourning from the closed session the military judge shall again have counsel who has introduced the classified information confirm the appropriate classification level for the record. When shifting from a closed session, the military judge should take a recess of sufficient length to permit the previously implemented security measure to be removed. Specifically, the courtroom security officer and military judge should ensure that:

1. The court reporter properly marks and secures the classified tapes or other media used to record the proceedings and any notes taken by the court reporter during the closed session.
2. Counsel or the court security officer secures any classified information, including exhibits published to the members or member notes.
3. The bailiff removes any signs placed outside the courtroom and ensures that the guards know that the courtroom has reopened.

E. Planned v. Unplanned Closures. To this point, the discussion has concerned planning for known closures where the classified information at issue has been vetted and the findings required by R.C.M. 806(b)(2) have been made in advance of the court-martial. But it may be the case that a line of questioning inadvertently contains or might cause classified information to be disclosed in open sessions. If this should occur, procedures need to be in place to prevent the accidental disclosure of classified information and to apply the standard of R.C.M. 806(b)(2). The military judge[7] should consider spelling out the procedures to be used in a particular case in a protective order and the parties should be familiar with the order's contents and the military judge's expectations with respect to unplanned closures.

An **"unplanned closure"** will occur when counsel, the court security officer, equity owner subject matter expert, witness, or other individual informs the military judge of the need for a closed session if testimony "strays toward disclosure of classified information when testimony is given in open session." *Denver Post Corp. v. U.S.*, Army Misc. 20041215 (23 February 2005)(Unpub. op. at 4). This may result from the person recognizing that a question contains classified information or calls for a classified answer. Often the security officer will have a pre-arranged signal or device that can be used to indicate to the judge that this danger is present. Witnesses should be advised that if they believe that an answer to a question, or the question itself, may involve classified information, to notify the military judge immediately in a discreet manner.

The military judge should then immediately halt the testimony, questioning or argument. No reason should be given on the record at that time as to the reason for halting the proceedings. The military judge should proceed to hold a conference under R.C.M. 802 with the security officer and the parties in order to determine whether there is, in fact, suspected classified

[7] Although "military judge" is used throughout this section, it should be understood that the same procedures would apply at an Article 32 proceeding, where there is an investigating officer instead of a military judge.

information at issue. As counsel often do not have experience with the classified information at issue, it may well be that they did not intend for the question to evoke a classified answer. In such a case, a simple reminder instruction to the witness to keep his answer unclassified will usually be sufficient.

If there is, indeed, a desire on the part of one of the parties to discuss classified information that has not previously been the subject of a closure hearing under R.C.M 806(b)(2), the military judge should proceed with a 39(a) session outside the presence of the members in order to make the determinations required by R.C.M. 806(b)(2). If the 39(a) session itself is closed, the military judge should be sure to include an unclassified summary of his findings on the unclassified record. Even in the middle of trial, it is necessary to consider reasonable alternatives to the use of the classified information. Generally, it is normally possible for the witness to raise the factual level of his testimony so that the information is more generic and the source is obscured, i.e., provide unclassified testimony.

Finally, all parties at the trial should be aware of the possibility that when members pose questions during a trial that involves classified matters, a question could prompt an answer that is classified. The better practice is to have all written members questions reviewed by the court security officer before they are provided to the judge so that the court security officer can alert the judge of whether the question poses a risk in open court. This allows the judge to remind the witness to answer in an unclassified manner, and to instruct the witness to simply alert the judge if the witness needs to answer with classified information. The court security officer may be able to assist the judge in slight rewording of questions to avoid these issues all together.