UNITED STATES OF AMERICA	)	
	)	**Prosecution's Proposed Plan:**
v.	)	**Storage of Appellate Exhibits**
	)	**Not Accompanying the Record of Trial**
Manning, Bradley E.	)	
PFC, U.S. Army,	)	**<u>Enclosure 3</u>**
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**8 February 2013**
Fort Myer, Virginia 22211	)	

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
v.	)	**ORDER: STORAGE OF**
	)	**APPELLATE EXHIBITS NOT**
Manning, Bradley E.	)	**ACCOMPANYING THE**
PFC, U.S. Army,	)	**THE RECORD OF TRIAL**
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**DATED: _____**
Fort Myer, Virginia 22211	)	

On 5 October 2012, the Court ordered the Government to develop a plan to store any Appellate Exhibits not accompanying the Record of Trial ("ROT") in one place under one custodian with a procedure for systematic reviews by the Government to ensure accountability of such documents through any appellate review. On 8 February 2013, the Government submitted its proposed plan and notified the Court that all applicable government organizations and the Office of the Clerk of the Court agree to the storage plan as stated.

Findings of Fact:

1. The ROT in the above-captioned court-martial will consist of both classified and unclassified Appellate Exhibits. Several of those Appellate Exhibits, both classified and unclassified, are motions for limited disclosure of classified information under Military Rule of Evidence (MRE) 505(g)(2). The classified documents for which limited disclosure was sought were enclosed to those motions. The Court subsequently conducted *in camera* and *ex parte* reviews of those classified documents and issued several Orders governing the disclosure of such documents.

2. For a majority of those documents, the Court conducted an *in camera* and *ex parte* review in chambers (hereinafter, those documents reviewed in chambers are referred to as "Documents In-Chambers"). For a smaller portion of those documents, the Court traveled to multiple locations within Virginia, Maryland, and the District of Columbia to conduct an *in camera* and *ex parte* review based on the information's classification level, which includes "Top Secret" (TS) and "Sensitive Compartmented Information" (SCI), and strict control measures (hereinafter, those documents reviewed at other government facilities are referred to as "Documents Off-Site"). The prosecution estimates that "Documents Off-Site" total no more than 2,000 pages.

The Law:

1. A separate record shall be kept for each general court-martial proceeding. *See* Rules for Courts-Martial (RCM) 1103(a); UCMJ art. 54(a) (2012). The prosecution, under the direction of the military judge, shall prepare the ROT as prescribed in RCM 1103 and RCM 1305. *See* RCM 1103(b); Army Regulation (AR) 27-10, para. 5-41(a). Following initial action, the ROT for general court-martial proceedings shall be forwarded to the Office of the Clerk of the Court. *See* AR 27-10, para. 5-46(a).

2. If classified information is withheld from the defense under Military Rule of Evidence 505, "the entire unaltered text of the relevant documents as well as the Government's motion and any materials submitted in support thereof shall be sealed and attached to the record of trial as an appellate exhibit." MRE 505(g)(4); RCM 1103A; *see also United States v. Kyle*, 32 M.J. 724, 726 (A.F.C.M.R. 1991) (ruling that "a military judge must make a record of every significant *in camera* activity (other than his legal research) adequate to assure that his decisions are reviewable on appeal"). Sealed exhibits may only be examined under limited circumstances, one of which includes for appellate review. *See* RCM 1003A(b)(4). MRE 505 states that "[s]uch material shall be made available to reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge." MRE 505(g)(4); *see also United States v. Rivers*, 49 M.J. 434, 437 (C.A.A.F. 1998) (ruling that the appellate court correctly reviewed sealed documents withheld from the accused at trial under MRE 506 *in camera* and did not abuse its discretion by withholding those sealed documents from appellate defense counsel).

ORDER:

1. All Appellate Exhibits, except for "Documents Off-Site," shall accompany the ROT when forwarded to the Office of the Clerk of the Court. *See* AR 27-10, para. 5-46(a). The Office of the Clerk of the Court shall be responsible for storing those Appellate Exhibits accompanying the ROT. *See id; see also* United States Army Court of Criminal Appeals, Internal Rules of Practice and Procedure, Rules 30.1 and 30.5.

2. The ROT shall consist of two placeholders: (1) a placeholder in the unclassified ROT; and (2) a placeholder in the classified ROT, if needed. An unclassified placeholder shall be included in the unclassified ROT for <u>all</u> classified Exhibits. The unclassified placeholder shall include an unclassified description of where the classified ROT is located. A classified placeholder shall be included in the classified ROT for only those Appellate Exhibits whose storage is governed by this Order (i.e., "Documents Off-Site"). The classified placeholder shall include where the particular Appellate Exhibit is being stored and the level of classification, to include any read-on requirements, of the particular Appellate Exhibit. Sample classified and unclassified placeholders are enclosed to the Government's proposed storage plan.

3. "Documents Off-Site" shall not accompany the ROT based upon the particular classification level or strict control measures of the information contained therein.

4. "Documents Off-Site" shall be stored in a dedicated two-drawer safe located in the Litigation Division of the Central Intelligence Agency. The office which will store the safe is a Sensitive Compartmented Information Facility. The safe will have one combination for both drawers and will only store "Documents Off-Site." "Documents Off-Site" will be separated by Exhibit number and sealed separately. Each separate sealing order will include the contact information for the applicable equity holder whose information is contained within the given Appellate Exhibit. A sample Sealing Order is enclosed to the Government's proposed storage plan.

4. The safe combination shall be stored by the following controlled billets: (1) the Deputy Chief in the Litigation Division of the Central Intelligence Agency; (2) the Special Assistant in the Litigation Division of the Central Intelligence Agency; and (3) the Area Security Officer within the Office of the General Counsel of the Central Intelligence Agency.

5. In addition to those billets set forth in paragraph 4, the following controlled billets shall have access to the contents of the safe, pending obtaining the proper security clearance and read-on requirements detailed in paragraph 6: (1) Chief of Justice, the Office of the Staff Judge Advocate ("OSJA"), Military District of Washington ("MDW"); (2) senior paralegal, OSJA, MDW; (3) the Clerk of the Court, United States Army Court of Criminal Appeals (ACCA); (4) the Deputy Clerk of the Court, ACCA; and (5) the military judges of ACCA detailed to this case, should this case appear before the appellate court (the "appellate court judges"), to include a delegated commissioner assisting the appellate court. Additionally, the lead trial counsel in the above-captioned court-martial, MAJ Ashden Fein, shall be given such access for continuity purposes.

6. MDW, the Office of the Clerk of the Court, and the Central Intelligence Agency shall be responsible for ensuring persons occupying those billets set forth in paragraphs 4-5 have and maintain proper security clearances, and are properly read-on. The requisite security clearance is TS-SCI and the necessary read-on requirements are SI, TK, G, and HCS. Some of the sealed Appellate Exhibits contain Alternative Compensatory Control Measures (ACCM) and Special Access Programs (SAP) material that will require additional read-on requirements, if and when those exhibits are unsealed.

7. Persons occupying the above billets at MDW and the Office of the Clerk of the Court shall be responsible for conducting a periodic review of the envelopes containing the sealed Appellate Exhibits for the sole purpose of confirming their continued proper storage. Persons conducting this review shall account for each Exhibit and memorialize their review with the memorandum for record enclosed to the Government's proposed storage plan, which shall then become part of the ROT, and by marking his/her initials with the date of his/her review on the envelope of each sealed Exhibit whose proper storage was confirmed. Persons conducting this periodic review shall not unseal the envelopes. Before the ROT is forwarded to the Office of the Clerk of the Court, MDW shall be primarily responsible for conducting this review. After the ROT is forwarded to the Office of the Clerk of the Court, the Office of the Clerk of the Court shall be primarily responsible for conducting this review. The Clerk of the Court may delegate this responsibility to MDW, and if delegated MDW will be responsible. <u>This review shall be conducted at the Central Intelligence Agency and shall occur, at a minimum, once every three months</u>.

8. Should the appellate court judges request access to any such Exhibits under RCM 1103A(b)(4), the Office of the Clerk of the Court shall notify the applicable government organization(s), and provide a by-name list, including clearance status, of those who will be reviewing the records. Only properly cleared appellate court judges may review the records, and any such review may only take place at the Central Intelligence Agency. No member of Government Appellate Division or Defense Appellate Division shall have access to any such Exhibits under this storage plan. The Office of the Clerk of the Court is responsible for ensuring

the appellate court judges have and maintain proper security clearances, and are properly read-on.

9. The Exhibits are being stored solely for the appellate record. Once the appellate process, if any, concludes, the Office of the Clerk of the Court shall notify the Office of the General Counsel for each government organization and coordinate with those organizations to ensure such material is properly discarded.

So **ORDERED** this _____ day of February 2013.

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