UNITED STATES OF AMERICA	)	
	)	
v.	)	**Prosecution's Proposed Plan:**
	)	**Storage of Appellate Exhibits**
Manning, Bradley E.	)	**Not Accompanying the Record of Trial**
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	**CORRECTED COPY**
Joint Base Myer-Henderson Hall	)	
Fort Myer, Virginia 22211	)	**20 February 2013**

On 5 October 2012, the Court ordered the United States 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 United States to ensure accountability of such documents through any appellate review. Since then, the United States has been diligently working with each of the applicable government organizations and the Office of the Clerk of the Court for the United States Army Court of Criminal Appeals ("Office of the Clerk of the Court") to develop such a plan. With that being said, all such government organizations and the Office of the Clerk of the Court agree to the storage plan as outlined herein.

I: FACTS

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.

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" and "Sensitive Compartmented Information," and strict control measures (hereinafter, those documents reviewed at other locations are referred to as "Documents Off-Site"). The prosecution estimates that "Documents Off-Site" total no more than 2,000 pages.

II: LAW

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).

APPELLATE EXHIBIT 486
PAGE REFERENCED:_____
PAGE___OF___PAGES

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 1103A(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).

III: PROPOSED STORAGE PLAN

The United States proposes that all Appellate Exhibits, except for "Documents Off-Site," accompany the ROT when forwarded to the Office of the Clerk of the Court. *See* AR 27-10, para. 5-46(a). The United States proposes that the Office of the Clerk of the Court 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 (2009).

The United States proposes that the ROT consist of two placeholders: (1) a placeholder in the unclassified ROT; and (2) a placeholder in the classified ROT, if needed. It is proposed that an unclassified placeholder be included in the unclassified ROT for <u>all</u> classified Appellate Exhibits. The unclassified placeholder will include an unclassified description of where the classified ROT is located. *See* Enclosure 1. It is proposed that a classified placeholder be included in the classified ROT for only those Exhibits whose storage is governed by this proposed storage plan (i.e., "Documents Off-Site"). The classified placeholder will include where the particular Exhibit is being stored and the level of classification, to include any read-on requirements, of the particular Exhibit. *See* Enclosure 2.

The United States proposes that "Documents Off-Site" not accompany the ROT based upon the particular classification level or strict control measures of the information contained therein. <u>This proposed plan only applies to the storage of "Documents Off-Site."</u> The United States proposes the following plan, consistent with the Court's Order dated 5 October 2012 and as memorialized in the enclosed draft Order, for the storage of "Documents Off-Site:"

1. The United States proposes that the Exhibits not accompanying the ROT, specifically "Documents Off-Site," 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." The United States proposes that "Documents Off-Site" be separated by Exhibit number and sealed by the military judge separately. It is proposed that the

sealing order include the contact information for the applicable equity holder whose information is contained within the given Exhibit. *See* Enclosure 4.

2. The United States proposes that the safe combination 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.

3. In addition to those billets set forth in paragraph 2, the United States proposes that the following controlled billets have access to the contents of the safe, pending obtaining the proper security clearance and read-on requirements detailed in paragraph 4: (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, will be given such access for continuity purposes.

4. The United States proposes that MDW, the Office of the Clerk of the Court, and the Central Intelligence Agency be responsible for ensuring persons occupying those billets set forth in paragraphs 2-3 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.

5. The United States proposes that persons occupying the above billets at MDW and the Office of the Clerk of the Court be required to conduct a periodic review of the envelopes containing the sealed Exhibits for the sole purpose of confirming their continued proper storage. The United States proposes that persons conducting this review account for each Exhibit and memorialize their review with the enclosed memorandum for record, which will 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. *See* Enclosure 5. Persons conducting this periodic review will not unseal the envelopes. Before the ROT is forwarded to the Office of the Clerk of the Court, MDW will 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 will be primarily responsible for conducting this review. The United States proposes that the Clerk of the Court may delegate this responsibility to MDW, and if delegated MDW will be responsible. This review will be conducted at the Central Intelligence Agency and will occur, at a minimum, <u>once every three months</u>.

6. Should the appellate court judges request access to any such Exhibits under RCM 1103A(b)(4), the United States proposes that the Office of the Clerk of the Court 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. The United States proposes that no member of Government Appellate Division or Defense Appellate Division have access to any such Exhibits under this storage plan. The United States proposes that the Office of the Clerk of the Court be responsible for ensuring the appellate court judges have and maintain proper security clearances, and are properly read-on.

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

8. The United States proposes that this storage plan, if adopted by the Court, be marked "For Official Use Only" based on the sensitive involvement of certain government organizations. Although not classified, the United States requests the Court not publically identify the Central Intelligence Agency as the organization who will store these records.

ASHDEN FEIN
MAJ, JA
Trial Counsel

5 Encls
1. Sample Unclassified Placeholder
2. Sample Classified Placeholder
3. Draft Order
4. Sample Classified Information Sealing Order for "Documents Off-Site"
5. Sample Memorandum for Record

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 20 February 2013.

ASHDEN FEIN
MAJ, JA
Trial Counsel