

Office of the Presiding Officer  
Military Commission

12 August 2004

**SUBJECT: Presiding Officers Memorandum (POM) # 8 - Trial Exhibits**

1. This POM establishes guidelines for marking, handling, and accounting for trial exhibits in Military Commission Trials. This POM is issued under the provisions of MCO No. 1, paragraphs 4A(5)(a) and (c).

2. Definitions:

a. Exhibit:

(1). A document or object, appropriately marked, that is presented, given, or shown to the Presiding Officer, other Commission Members, or a witness during a session of the Commission.

(2). A document or object, appropriately marked, that is offered or received into evidence during a session of the Commission, or referred to during a Commission session as an exhibit.

(3). Other documents or objects that the Presiding Officer directs be marked as an exhibit.

b. Prosecution or Defense Exhibits for identification are exhibits sponsored by a party and (1) intended to be considered on the merits or sentencing, if sentencing proceedings are required, but either not yet offered into evidence, or offered into evidence and not received, or (2) not intended to be considered on the merits or sentencing, but used in some other manner during the trial such as in the case of a statement used to refresh the recollection of a witness with no intent to offer the statement.

c. Prosecution or Defense Exhibits are exhibits that have been offered and received into evidence on the merits or sentencing if sentencing proceedings are required.

d. Review Exhibits are those exhibits:

(1). Presented to the Presiding Officer or other Commission members for consideration on a matter other than the issue of guilt or innocence, or a sentence if there are sentencing proceedings. Motions, briefs, responses, replies, checklists, and other writings used during motions practice are among the most common form of Review Exhibits.

(2). The Presiding Officer may decline, in the interests of economy, to have lengthy publications or documents marked as Review Exhibits when the precise nature of the document can be readily identified at the session and later on Review. Examples would be well-known directives, rules, cases, regulations, and the like.

e. Attachments are documents referred in, and attached to, a Review Exhibit. Prosecution and Defense exhibits shall not have pages marked as attachments unless so marked in the original form of the exhibit.

f. Dual use exhibits. An exhibit identified on the record that is needed for a purpose other than the reason for which it was originally marked. A dual purpose exhibit allows an exhibit to be used for more than one purpose without having to make additional copies for the record. Example 1: A Review Exhibit that a counsel wants the Commission to consider on the merits. Example 2: A counsel marks an exhibit for identification but does not offer it, and opposing counsel desires to offer that exhibit.

### 3. Rules pertaining to the marking, handling, and referring to exhibits.

a. Any exhibit provided to the Presiding Officer, a Commission member, or a witness during a session of the Commission shall be properly marked.

b. Any exhibit referred to in a session before the Commission as an exhibit shall be properly marked.

c. Any exhibit that is displayed during an open session for viewing by a witness, the Presiding Officer, or a Commission member during a session of the Commission shall be properly marked. In the case of an electronic presentation (slides, PowerPoint, video, audio or the like,) the Presiding Officer shall direct the form of the exhibit to be marked for inclusion into the record.

e. Parties that mark or offer exhibits that cannot be included into the record or photocopied - such as an item of physical evidence - shall inquire of the Presiding Officer the form in which the exhibit shall be included in the record.

d. Before an exhibit is referred to by a counsel for the first time, or handed to a witness, the Presiding Officer, or a member of the Commission, during a session of the Commission, it shall be first shown to the opposing counsel so opposing counsel knows the item and its marking.

### 4. How exhibits are to be marked. See attachment B.

### 5. Marking the exhibits - when and whom.

a. Before trial. Counsel are encouraged to mark exhibits they intend to use at a session of the Commission in advance of that session. Pre-marking of Prosecution or Defense Exhibits may also include the appropriate numbers or letters. Numbers shall not be applied to Review Exhibits in advance of any session.

b. At trial. Counsel, the reporter, or the Presiding Officer may mark exhibits during trial, or may add numbers or letters to exhibits already marked.

6. Marked exhibits not offered at trial and out of order exhibits.

a. Counsel are not required to mark, offer, or refer to exhibits in the numerical or alphabetical order in which they have been marked. Example: The Defense pre-marked Defense Exhibits A, B, and C all for identification. At trial, the Defense wishes to refer to or offer Defense Exhibit C for identification before Defense Exhibit A or B for identification has been offered or mentioned. That *IS* permissible.

b. If an exhibit is pre-marked but not mentioned on the record or offered, counsel are responsible for ensuring that the record properly reflects exhibits by letter or number that were marked but not mentioned or offered. This is ordinarily done at the close of the trial. Example: “Let the record reflect that the Prosecution marked, but did not offer or mention, the following Prosecution Exhibits: 3, 6, and 11.”

c. Exhibit for identification marking as compared to the exhibit received. If an exhibit for identification is received into evidence, the received exhibit shall carry the same letter or number. Example: Offered into evidence are Prosecution exhibits 1, 2, and 3 for identification. PE 1 and 3 for ID are not received. PE 2 for ID is received. Once received, what was PE 2 for ID is PE 2.

7. How exhibits are offered.

a. Prosecution and defense exhibits. In the interests of economy, to offer an exhibit, it is only necessary for counsel to say, “[We] (The Defense) (The Prosecution)] offers into evidence what has been marked as [(Prosecution Exhibit 2 for identification) (Defense Exhibit D for identification).]

b. Review exhibits. Review exhibits are not offered. They become part of the record once properly marked.

8. Confirming the status of an exhibit. The reporter and Presiding Officer together shall keep the official log of whether an exhibit has been offered or received. Counsel may, and are encouraged to, confirm with the reporter and the Presiding Officer of the status of an exhibit.

9. Control of exhibits. During trial, and unless being used by counsel, a witness, or the Commission, all exhibits that have been mentioned on the record, offered, or received, and all Review Exhibits, shall be placed on the evidence table in the courtroom consistent with regulations concerning the control of classified and Protected Information. After trial, the court reporter and the Security Officer shall secure all exhibits until the next session.

8. Sample form. Counsel are welcome to use the form at attachment A to assist in marking and managing their exhibits.

Original signed by:

Peter E. Brownback III  
COL, JA, USA  
Presiding Officer

#	Description	Ref'd to on record	Offered	Received	Confirm with reporter
Ltr					

## Attachment B, Presiding Officers Memorandum # 8, Trial Exhibits

### I. Unclassified Exhibits and Exhibits that are not Protected Information

Type of Exhibit	Examples	
	First Page - Single Page Exhibit	Multiple Page Exhibits
<b>Prosecution Exhibits for Identification.</b> Use Arabic numerals	Prosecution Exhibit 1 for Identification <i>OR</i> PE 1 for identification <i>OR</i> PE 1 for ID	<i>First page:</i> PE 1 for ID Page 1 of 24 <i>Subsequent pages:</i> 2 of 24, 3 of 24 etc.
<b>Defense Exhibits for Identification.</b> Use letters. After the letter Z is used, the next exhibit shall be AA.	Defense Exhibit A for Identification <i>OR</i> DE A for identification <i>OR</i> DE A for ID	<i>First page:</i> DE A for ID Page 1 of 24 <i>Subsequent pages:</i> 2 of 24, 3 of 24 etc.
<b>Prosecution Exhibits and Defense Exhibits</b>	Presiding Officer or Reporter will mark through <del>for Identification</del> <i>OR</i> <del>for ID.</del>	<i>First page:</i> Mark through on first page. <i>Subsequent pages:</i> No markings necessary if properly marked as above.
<b>Review Exhibits</b> Use Arabic numbers	Review Exhibit 1 <i>OR</i> RE 1	<i>First page:</i> RE 1, Page 1 of 24 <i>Subsequent pages:</i> 2 of 24, 3 of 24 etc.
<b>Attachments</b> Letters or numbers depending on how indexed in the Review Exhibits	Attachment 1 to RE 3 <i>OR</i> Attachment A to RE 3	<i>First page:</i> Attachment 1 to RE 3, page 1 of 3 <i>Subsequent pages:</i> 2 of 3, 3 of 3.

### II. Classified Exhibits

Mark the same as I, and in addition, adhere to directives regarding the proper markings and cover sheets.

### III. Protected Information

Mark the same as I, adding the words on the first page or cover sheet "Protected Information."