

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID  
 MUHAMMAD SALIH MUBARAK BIN  
 ‘ATTASH, RAMZI BIN AL SHIBH, ALI  
 ABDUL-AZIZ ALI, MUSTAFA AHMED  
 ADAM AL HAWSAWI

AE 396(AAA)

**Mr. al Baluchi’s Notice of Position**  
 On “Pending Classification Review”

23 December 2015

1. **Timeliness:** This pleading is timely filed, per the direction of the military commission.

2. **Overview:**

At the December 2015 hearing, the military commission directed the parties to file their position on the use of the marking “pending classification review”: specifically, whether a person marking a document “pending classification review” has an obligation to submit it for classification review. Relevant regulations permit a holder of potentially classified information to tentatively classify information, but the marking person must submit it for classification review by an Original Classification Authority (OCA). While the information is tentatively classified, no other person may use the tentatively classified information for derivative classification, including for litigation purposes. Furthermore, given the government’s superior access to OCA review, it is most efficient for the government to seek classification review of information it tentatively classifies, rather than shifting that burden to the defense.

3. **Law and Argument:**

Executive Order 13526 and implementing regulations recognize three types of classification: original classification, derivative classification, and tentative classification.<sup>1</sup> By

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<sup>1</sup> In 2012, the government initially proposed a fourth, illegal form of classification colloquially known as “presumptive classification,” AE013 Government Motion to Protect Against Disclosure of National Security Information, but wisely abandoned this approach. *See* AE013L Government’s Supplemental Motion for a Modified Order to Protect Against Disclosure of

marking information “Pending Classification Review” without submitting it for classification review, the government undermines the structure of the classification system and defeats the President’s articulated goal of avoiding overclassification. This government approach also slows the process of litigation, because no person can use the tentatively classified information for derivative classification until a classification review is complete.

Original classification is an official act of a designated Executive authority.<sup>2</sup> The act of original classification represents a judgment by the delegee that “the dangers of disclosure outweigh the costs of classification.”<sup>3</sup> By definition, information only becomes classified after it “has been determined pursuant to [E.O. 13526] or any predecessor order to require protection

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National Security Information. Mr. al Baluchi does not understand the government to be advocating a return to its earlier proposal for presumptive classification. Rather, the dispute is over the proper handling of tentatively classified information.

<sup>2</sup> See E.O. 13526 § 6.1(f) (defining “classification” as “the act or process by which information is determined to be classified information.”); DoDM 5200.01-V1 § 4(4)(a), at 34 (“Original classification is the initial decision that an item of information could reasonably be expected to cause identifiable or describable damage to the national security if subjected to unauthorized disclosure and requires protection in the interest of national security.”).

<sup>3</sup> *Milner v. Dep’t of the Navy*, 562 U.S. 562, 581 (2011). Specifically, E.O. 13526 § 1.1(a) provides,

Information may be originally classified under the terms of this order only if all of the following conditions are met:

- (1) an original classification authority is classifying the information;
- (2) the information is owned by, produced by or for, or is under the control of the United States Government;
- (3) the information falls within one or more of the categories of information listed within section 1.4 of this order; and
- (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

against unauthorized disclosure.”<sup>4</sup> Otherwise, “If there is significant doubt about the need to classify information, it shall not be classified.”<sup>5</sup>

None of the participants in the military commissions possess original classification authority; rather, each participant performs derivative classification by “apply[ing] classification markings derived from source material or as directed by a classification guide.”<sup>6</sup> Derivative classification includes extracting and summarizing classified information, but not the initial decision to classify information.

Occasionally, a derivative classifier will originate information he or she believes should be classified. In this situation, regulations permit a non-OCA to tentatively classify information “pending classification review” and submit it for classification review.

Section 1.3(e) of E.O. 13526 provides, “When an employee [or] government contractor . . . who does not have original classification authority originates information believed by that person to require classification, the information shall be protected in a manner consistent with this order and its implementing directives. *The information shall be transmitted promptly as provided under this order or its implementing directives to the agency that has appropriate subject matter interest and classification authority* with respect to this information. That agency shall decide within 30 days whether to classify this information.” (Emphasis added.)

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<sup>4</sup> E.O. 13526 § 6.1(i) (defining “classified information”).

<sup>5</sup> E.O. 13526 § 1.1(b); *see also* DoDM § 4(1)(a), at 33 (“If there is significant doubt about the appropriate level of classification, it shall be classified at the lower level.”).

<sup>6</sup> E.O. 13526 § 2.1(a); *see also* 32 C.F.R. § 2001.22(a). The failure of the government to provide the required security classification guide aggravates the problem of marking, among others. *See* AE118(WBA, AAA) Motion to Abate Proceedings Pending Compliance with Protective Order #1; AE054(AAA) Mr. al Baluchi’s Motion to Compel the Production of Discovery. *But see* AE054C Order (denying AE054 without specifically addressing the motion to produce a security classification guide). In AE054C, the military commission assumed the government would produce the delegations of authority it promised in AE054A Government’s Response to Mr. Ali’s Motion to Compel the Production of Discovery. The government has not produced the delegations of authority.

To implement E.O. 13526 § 1.3(e), DoDM 5200.01-V1 § 4(9) permits individuals to submit information to OCAs and, “as necessary, tentatively classify information or documents as working papers, pending approval by the OCA.” This process incorporates both the presumption of non-classification and interim protection procedures: if an individual believes information should be classified, he or she has the option to submit it and tentatively classify it pending review. This tentative classification has a high transaction cost: not only must the individual treat the tentatively classified information as classified, but “it shall not be used as a source for derivative classification.”<sup>7</sup>

Any proposal to mark information “pending classification review” without actually submitting it for classification review violates this framework, which clearly places the responsibility for prompt transmittal to the agency with classification authority on the originator. When the originator is the government, the government must submit the information for classification review. Otherwise, information would persist forever with indeterminate classification and no date for declassification, violating the clear directive of E.O. 13526 § 1.5(d) that, “No information may remain classified indefinitely.”<sup>8</sup>

Separate from regulatory considerations, this allocation of responsibility makes sense from a resource perspective. The defense classification review process, while appreciated, is indirect,<sup>9</sup> opaque,<sup>10</sup> slow,<sup>11</sup> and uncertain.<sup>12</sup> On the other hand, the government has direct access

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<sup>7</sup> DoDM 5200.01-V1 § 4(9).

<sup>8</sup> E.O. § 13526 § 1.5(a) requires that, “At the time of original classification, the original classification authority shall establish a specific date or event for declassification based on the duration of the national security sensitivity of the information.” At least in the DoD, the OCA must choose the duration option which results in the shortest duration of classification that protects national security. DoDM 5200.01-V1 § 13(a).

<sup>9</sup> The defense has no access to OCAs, but rather must submit information through the Office of Special Security.

to OCAs which results in a timely, transparent, and enforceable classification review process. In a Guantanamo *habeas* case, for example, the D.C. Circuit recognized the proper allocation of responsibility and required the government to secure classification review even for information marked “pending classification review” by petitioner’s counsel.<sup>13</sup> Shifting the classification review burden to the defense would only make the classification process slower by introducing additional points of failure.

The military commission should decline any discovery or other proposal which permits a party to mark information as classified “pending classification review” without actually submitting the information for classification review.

4. **Request for Oral Argument:** Oral argument is requested.
5. **Request for Witnesses:** A representative of the Office of Special Security.
6. **Conference with Opposing Counsel:** None required.
7. **Additional Information:** None.
8. **Attachments:**
  - A. Certificate of Service.

Very respectfully,

//s//  
JAMES G. CONNELL, III  
Detailed Learned Counsel

Counsel for Mr. al Baluchi

//s//  
STERLING R. THOMAS  
Lt Col, USAF  
Detailed Military Defense Counsel

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<sup>10</sup> The defense has no ability to gauge the progress of classification review requests through the system or estimate the timeline.

<sup>11</sup> Some classification review requests have been pending for more than two years.

<sup>12</sup> On some occasions, OCAs have simply refused to review defense-submitted information for its classification.

<sup>13</sup> *Bismullah v. Gates*, 501 F.3d 178, 202 (D.C. Cir. 2007).

# Attachment A

**CERTIFICATE OF SERVICE**

I certify that on the 23rd day of December, 2015, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//

JAMES G. CONNELL, III

*Learned Counsel*