

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

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 118M RULING Defense Motion to Abate Proceedings Pending Compliance With Protective Order #1 25 April 2019
--	---

1. Procedural History.

a. On 9 January 2013, Mr. Ali (a.k.a. al Baluchi) and Mr. bin ‘Attash, moved¹ the Commission to abate the proceedings until the Government addressed four specific information security process issues.² The Defense argued these issues must be resolved for them to comply with the Commission’s Protective Order (PO) #1,³ which addresses the handling of classified information.

b. The parties argued the matter before the Commission in open session on 20 and 21 March 2017,⁴ closed session on 23 March 2017,⁵ and again in open session on 25 March

¹ AE 118 (WBA, AAA), Motion to Abate Proceedings Pending Compliance with Protective Order #1, paras. 3.a-d, filed 9 January 2013.

² The remaining Accused later joined the motion in whole or in part. *See* 118 (Mohammad), Mr. Mohammad’s Notice of Joinder To Join and Adopt AE 118 (WBA, AAA), Motion to Abate Proceedings Pending Compliance with Protective Order #1, filed 17 January 2013; AE 118 (RBS), Defense Notice of Joinder To Join and Adopt AE 118 (WBA, AAA), Defense Motion to Abate Proceedings Pending Compliance with Protective Order #1, filed 18 January 2013; AE 118 (MAH Joinder), Motion of Mr. Hawsawi to Partially Join and Supplement Mr. bin ‘Attash and al Baluchi’s Motion to Abate Proceedings Pending Compliance with Protective Order #1, filed 23 January 2013 (joining fully as to the base motion’s requested relief, statement of law, and argument; and joining in part as to its facts and providing supplemental facts and attachments).

³ AE 013BBBB *Third Amended* Protective Order #1, To Protect Against Disclosure of National Security Information, dated 6 July 2015.

⁴ Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing, Dated 20 March 2017 from 3:47 P.M. to 4:28 P.M., at pp. 14787–14816, and 21 March 2017 from 8:58 A.M. to 10:14 A.M. at pp. 14820-25.

⁵ Transcript Dated 23 March 2017 from 9:34 A.M. to 11:37 A.M. at pp.15314-16.

2019,⁶ and closed session on 26 March 2019. During the latest oral argument, the Defense represented that only one of the four original issues specified in AE 118 remain unresolved - the lack of Defense access to current, relevant security classification guides (SCG).⁷ The Defense stated that the lack of SCGs leads to three problems: (1) results in ambiguity and a lack of uniform guidance as envisioned by Executive Order (“EO”) 13526; (2) generates inadvertent spills of classified material; and (3) has a chilling effect upon the Defense teams caused by self-censorship. The Government, in turn, argued that the Defense has already been given adequate classification guidance, the issue was previously litigated and decided in AE 054C (at least with respect to the Central Intelligence Agency’s (CIA) SCG,⁸ and security reviews necessarily require significant time given the amount of administrative resources available and the volume of information requiring review.⁹

c. During oral argument, and in response to questions from the Commission, the Defense indicated that they typically use source material when derivatively classifying Defense work product. According to the Defense, the primary difficulty arises when they combine material, and in doing so, unknowingly change the overall classification. The Defense stated that this issue primarily arises in the context of the CIA Rendition, Detention, and Interrogation (RDI) program, and to a lesser extent, with respect to issues related to conditions of confinement. Finally, the Defense stressed that the security classification review process takes far too long, sometimes upwards of one year to get material reviewed.

⁶ Transcript Dated 25 March 2018 from 9:01 A.M. to 10:18 P.M. at pp. 22286-22307

⁷ Transcript at p. 22287.

⁸ AE 054C Order, Mr. al Baluchi’s Motion to Compel the Production of Discovery, dated 31 May 2013.

⁹ Transcript at p. 14806.

2. Findings of Fact.

a. The Defense Teams, which fall administratively under the Department of Defense (DoD), include cleared personnel who routinely and in accordance with applicable law receive, possess, derivatively classify, and/or disseminate classified information as part of their official duties. Additionally, each Defense Team has an assigned Defense Information Security Officer (DISO) whose assigned duties include, “[a]ssist[ing] the Defense with applying classification guides,” and “[a]ssist[ing] the Defense in performing their duty to apply derivative classification markings pursuant to E.O. 13526 § 2.1(b).”¹⁰

b. In litigating the AE 396 series, this Commission previously recognized “the classification review process envisioned by [PO#1] is not functioning in a timely manner.”¹¹ From this, the Commission ordered the Government to “obtain classification review for all discovery for which they were unsure of the classification.”¹² Nevertheless, the process of security classification review for Defense work product remains protracted; now including issues with the Government failing to include required instruction for information it produces as Originator Controlled (ORCON) to the Defense.¹³

c. On 6 June 2013, in response to the Commission’s protective order for classified information in effect at the time,¹⁴ the Convening Authority (CA) issued a memorandum¹⁵ to

¹⁰ See AE 013BBBB at 8.

¹¹ AE 396G Trial Conduct Order Pending Classification Review, dated 5 June 2017 at 8.

¹² *Id.*

¹³ The DoD Manual (DoDM) 5200.01-V2 states, “[t]he originator [of information marked ORCON] shall include a point of contact who can make ORCON release determinations on all information marked ORCON. Include, at a minimum, name or position title of the contact and a current telephone number.” See DoDM 5200.01-V2 (2012), 1-117 at 89.

¹⁴ See AE 013AA Amended Protective Order #1, To Protect Against disclosure of National Security Information, dated 9 February 2013, para. 6.h “To the extent the Defense is not certain of the classification of information it wishes to disclose, the Defense shall follow procedures established by the Office of Military Commissions for a determination as to its classification.”

¹⁵ See Memorandum from CA to Defense Counsel, Subject: Clarification of Defense Classification Review Request Procedure, dated 6 June 2013 (CA Memorandum) found at AE 013HH (AAA Sup), Mr. al Baluchi’s Supplement to Motion to Amend AE 013AA Protective Order #1 to Secure Privileged Classification Review, filed 7 June 2013,

Defense Counsel setting forth the procedure for Defense Teams to obtain classification reviews of Defense work product when they were uncertain of the classification level. Specifically, the CA directed Defense teams to forward the work product to the Director, Office of Special Security, Washington Headquarters Service (OSS-WHS) (or a representative of that office) and consider the information classified until notified it is not classified. OSS-WHS would then coordinate with the relevant Original Classification Authorities (OCA) “or other appropriate agency, as necessary, regarding appropriate classification.”¹⁶ This procedure remains in effect to date.

d. AE 013BBBB¹⁷ is the protective order currently in effect to protect against the disclosure of classified information (PO #1). Paragraph 4.d of PO # 1 incorporates the CA’s procedure and provides protections for the attorney-client and other Defense privileges when the Defense seeks classification review through OSS-WHS:

d. To the fullest extent possible, the classification review procedure must preserve the lawyer-client and other related legally-recognized privileges.

(1) The Defense may submit documents to the Chief Security Officer, Office of Special Security with a request for classification review. If the Defense claims privilege for a document submitted for classification review, the [D]efense shall banner-mark the document “PRIVILEGED.”

(2) The Chief Security Officer, Office of Special Security, shall consult with the appropriate OCA to obtain classification review of documents submitted for that purpose. The Chief Security Officer, Office of Special Security, shall not disclose to any other entity any information provided by a DISO, including any component of the Office of Military Commissions, except that the entity may inform the military judge of any information that presents a current threat to loss of life or presents an immediate safety issue in the detention

Attach. C. This memorandum was a modification of an earlier CA memorandum on the subject. *See* Memorandum to Defense Counsel from the CA entitled “Defense Classification Review Request Procedure” dated 20 February 2013 at AE 013HH (AAA), Defense Motion to Amend AE 013AA Protective Order #1 to Secure Privileged Classification Review, filed 2 May 2013, Attach. C.

¹⁶ CA Memorandum.

¹⁷ AE 013BBBB *Third Amended* Protective Order #1, To Protect Against Disclosure of National Security Information, dated 6 July 2015.

facility. This does not include administrative matters necessary for the management of the security responsibilities of the Office of Military Commissions.

(3) Submission of document for classification review shall not be construed to waive, limit, or otherwise render inapplicable the attorney-client privilege or work product protections.¹⁸

e. The procedures for privileged Defense classification reviews established by the CA Memorandum and PO #1 have resulted in excessive delay in the classification review process.

3. Law.

a. **Burden of Persuasion.** As Movants, the Accused bear the burden of proving any facts prerequisite to the relief they seek by a preponderance of the evidence.¹⁹

b. **Security Classification Guides:**

(1) *Executive Order 13526 (2010) (Applicable to all executive branch agencies).*

Executive branch agencies “with original classification authority shall prepare classification guides to facilitate the proper and uniform derivative classification of information.” EO 13526 § 2.2 (2010), 1-37.²⁰ SCGs “shall conform to standards contained in directives issued under this order.” EO 13526 § 2.2. Moreover, “[e]ach guide shall be approved personally and in writing by an official who: (1) has program or supervisory responsibility over the information or is the senior agency official; and (2) is authorized to classify information originally at the highest level of classification prescribed in the guide.” *Id.* Executive branch agencies “shall establish procedures to ensure that classification guides are reviewed and updated as provided in directives issued under this order.” *Id.*

¹⁸ *Id.* at 8.

¹⁹ R.M.C. 905(c)(1)-(2).

²⁰ “‘Derivative classification’ means the incorporating, paraphrasing, restating, or generating in new form information that is already classified, and marking the newly developed material consistent with the classification markings that apply to the source information.” EO 13526 § 6.1.

(2) *32 Code of Federal Regulations (C.F.R.) § 2001.15 (2010) (applicable to all executive branch agencies)*. Classification guides shall at a minimum:

(1) [i]dentify the subject matter of the classification guide; (2) [i]dentify the [original classification authority] by name and position, or personal identifier; (3) [i]dentify an agency point-of-contact or points-of-contact for questions regarding the classification guide; (4) [p]rovide the date of issuance or last review; (5) [s]tate precisely the elements of information to be protected; (6) [s]tate which classification level applies to each element of information, and, when useful, specify the elements of information that are unclassified; [and] (7) [s]tate, when applicable, special handling caveats.

32 C.F.R. § 2001.15 (2010).

(3) *DoDM 5200.45 (2 April 2013 Incorporating Change 1, Effective 6 April 2018 (applicable to Department of Defense Components))*. The Under Secretary of Defense for Intelligence “shall . . . oversee the DoD Information Security Program, which includes the development, distribution, maintenance, revision, and cancellation of security classification guides.” DoDM 5200.45 (2013), para 4.a. Departments under the control of the DoD with original classification authority shall: “(1) [i]ssue and disseminate security classification guidance for each system, plan, program, project, or mission involving classified information under their jurisdiction;²¹ (2) [r]eview security classification guidance issued under their authority once every 5 years to ensure currency and accuracy, or sooner when necessitated by significant changes in policy or in the system, plan, program, project, or mission, and update the guides as required;²² and (3) [r]eview, whenever necessary for effective derivative classification, the security classification guides issued under their authority.”²³

²¹ DoDM 5200.45, para. 4.b(1).

²² *Id.*, para. 4.b(2).

²³ *Id.*, para. 4.b(3).

4. Analysis.

a. During oral argument, the Defense acknowledged that their need for SCGs is largely driven by the inefficiency and delay associated with the current security classification review process for Defense work product. The Commission concurs with this assessment. Given the current construct and practice, DISOs cannot effectively perform their assigned duties because they lack access to either a SCG, or an accessible point-of-contact with whom to discuss security classification review questions. The current practice promulgated by the CA Memorandum and the Commission in PO #1 directs the Defense Teams to forward all work product requiring security classification review to representatives of the OSS-WHS who serve as couriers for distribution of the material among the various intelligence agencies.²⁴ This has resulted in an unpredictable and time-consuming process that inhibits the ability of the Defense teams to file timely pleadings with reasonable assurance of proper classification markings.

b. At this stage, the Commission believes that ordering production of the SCGs may not be the most useful means to address Defense concerns about obtaining timely classification reviews of their work product. Assuming the SCGs do exist, the Commission recognizes that many of the derivative classification decisions at issue are likely not addressed in a single comprehensive guide, but rather require deliberation and reflection by the pertinent OCA. On the other hand, the status quo will continue to impede the smooth progress of this Commission, particularly as the case gets closer to trial. As such, the Commission finds some action is required to make the Defense classification review process more efficient.

²⁴ Neither the CA Memorandum nor the paragraph 4.d of PO #1 make mention of the DoD Security Classification/Declassification Review Team (SC/DRT) who, by its very definition, would seem to warrant a central role in this process.

5. Ruling.

a. The Defense motion to abate the proceedings pending the provision of SCGs is

DENIED.

b. The Defense motion for production of relevant SCGs is **DEFERRED**, pending an assessment of the measures to be implemented pursuant to ¶ 6 below.

6. Order.

a. Effective **14 business days** from the date of this order, the Defense will no longer send Defense work product or seek classification guidance from the OSS-WHS, but instead will use a walled off security review team established by DoD Security Classification/Declassification Review Team (SC/DRT).

b. In order to minimize the administrative burden associated with formal security classification reviews, Defense Teams will make reasonable efforts to informally query appropriate SC/DRT point(s)-of-contact to seek answers to simple questions before going through the formal security review process. In the event that informal resolution is insufficient on a matter, the Defense may submit Defense work product to the SC/DRT walled off security review team for formal security review.

c. **Within 10 business days** from the date of this order, the Government will provide the five (5) Defense Teams and the Commission with contact information for:

(1) SC/DRT point(s)-of-contact with knowledge of relevant equities for the Defense Teams to contact for informal inquiry regarding classification issues; and

(2) contact information for the Defense Teams to use to submit Defense work product to the SC/DRT's walled off security review team for formal security review.

d. Once the Defense submits Defense work product requiring classification review to the SC/DRT walled off security review team, the SC/DRT, in consultation with any appropriate non-DoD federal department or agency, shall complete the required security classification review of Defense work product pursuant to the procedures outlined in paragraph 4.d of *Third Amended Protective Order #1* (AE 013BBBB) **within 60 days** of its submission. The SC/DRT may request additional time from the Commission, via email to the Chief Clerk, on a case-by-case basis for particularly voluminous or complex material.²⁵

So **ORDERED** this 25th day of April, 2019.

//s//
K. A. PARRELLA
Colonel, U.S. Marine Corps
Military Judge

²⁵ Upon completion of the assessment of the measures ordered, the Commission will determine whether it is appropriate to amend paragraph 4.d of PO #1 to implement the new procedures.