

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

AE 280  
1 / 22

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED  
ABDU AL-NASHIRI

AE 280

**DEFENSE MOTION FOR APPROPRIATE  
RELIEF: PRODUCTION OF CLASSIFIED  
SUMMARIES MARKED IN  
ACCORDANCE WITH CLASSIFICATION  
REQUIREMENTS**

11 June 2014

- 1. Timeliness:** This request is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and is timely pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.b.(1).
- 2. Relief Requested:** The defense moves this Commission to compel the prosecution to produce classified summaries that are marked in accordance with derivative classification requirements required under Executive Order 13526 (E.O. 13526), "Classified National Security Information" and under Department of Defense Manual (DoDM) 5200.01, volume 2, "DoD Information Security Program: Marking of Classified Information." In the alternative, the defense requests the Commission to compel the government to identify and produce the classification guidelines and regulations the prosecution has relied on in the creation of classified summaries.
- 3. Overview:** The government has provided classified summaries to the defense throughout the progression of this case pursuant to Military Commission Rule of Evidence 505 (Mil. Comm. R. Evid.) and 10 U.S.C. § 949p-4. These classified summaries, which are granted *ex parte* by the Commission under 10 U.S.C. §949p-4(b)(2-3), consist of three parts: 1.) the overall classification level of the summary at the top of each page; 2.) the content of the summary derived from the original classified source(s); and 3.) the overall classification level of the summary at the bottom of each page. The simple nature of these classified summaries lack basic requirements for

marking classified information. The defense attempted to address these concerns and correct these deficiencies with the prosecution as early as 29 November 2012. (Attachment A). The prosecution disagreed and refused to make any changes to the manner in which it produced summaries on 30 September 2013. (Attachment B).

Specifically, the classified summaries do not include the information required under E.O. 13526, section 2.1 and required under DoDM 5200.01, volume 2, enclosure 3, section 6 “Portion Markings,” and section 8(c) “Classification Authority Block, Derivative Classification.” The summaries do not contain portion markings, noting the classification level of each paragraph within the document.<sup>1</sup> The absence of portion markings has recurred with each of the classified production summaries provided to the defense to date. Nor do the summaries provide a classification authority block.<sup>2</sup> In addition, at least two productions, Production 17, Disk 1 from 9 September 2012 and Production 27, Disk 3 from 8 January 2013, contain classification markings on the CD/DVD provided that do not match, and are of a higher classification level than the classification markings on the documents contained on the CD/DVD.

The defense and all parties to this Commission are obligated to generate documents or notes in accordance with current regulations based on these summaries as provided—e.g., court pleadings, internal documents, working notes or reports.<sup>3</sup> This includes the recently assigned defense security officer, as a government contractor.<sup>4</sup> Until the prosecution has placed the appropriate derivative markings on the classified summaries, this obligation is unattainable.

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<sup>1</sup> See DoDM 5200.01, V.2, Enclosure 3, section 6 (“Derivatively classified documents shall be portion marked in accordance with their source.”)

<sup>2</sup> See DoDM 5200.01, V.2, Enclosure 3, section 8c (1) (The face of each derivatively classified document shall include a classification authority block consisting of these elements (see Figure 4): “Classified By,” “Derived From,” and “Declassify On.”)

<sup>3</sup> See DoDM 5200.01, V.1, Enclosure 4, section 10b (“Within the Department of Defense all cleared personnel, who generate or create material that is to be derivatively classified, shall ensure that the derivative classification is accomplished in accordance with this enclosure.”).

<sup>4</sup> See DoD 5220.22-M, Chapter 4, section 1, 4-102(d)

Portion markings are required to ensure the appropriate classification levels are applied to each section of the documents as well. Given the statutory emphasis to reduce over-classification, the defense cannot use the blanket classification of the document to appropriately derivatively classify information.<sup>5</sup> Absent the above, the parties to this Commission are subject to DoD legal or administrative sanction when using these classified summaries in this case.<sup>6</sup>

The defense, therefore, requests the Commission to compel the prosecution to produce all classified summaries with appropriate classification markings. In the alternative, the defense requests the Commission to compel the prosecution to identify and produce the regulations governing the production and use of classified summaries created for this Commission.

**4. Burden of Proof and Persuasion:** As the moving party, the defense bears the burden of persuasion as to any factual issues relevant to the disposition of this motion, which it must demonstrate by a preponderance of the evidence. R.M.C. 905(c). Denial of this motion will violate the defendant's rights guaranteed by the Fifth, Sixth and Eighth Amendments to the Constitution of the United States of America, the Military Commissions Act (MCA) of 2009, the Detainee Treatment Act (DTA) of 2005, treaty obligations of the United States and fundamental fairness.

**5. Statement of Facts:**

a. Since arraignment on 9 November 2011, the prosecution has provided the defense with approximately 776 classified summaries at either a Top Secret or Secret classification level. The

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<sup>5</sup> See e.g, E.O. 13526, section 2.1(d); DoDM 5200.01, V.3, Enclosure 5, p. 75 & p. 81; and the Reducing Overclassification Act, Public Law 111-258-Oct. 7, 2010.

<sup>6</sup>“DoD military and civilian personnel may be subject to criminal or administrative sanctions if they knowingly, willfully, or negligently... classify or continue the classification of information in violation of this Volume. See DoDM 5200.01, V.1, Enclosure 3, Section 17b(1).

prosecution began producing these classified summaries to the defense as early as 9 September 2012 and has continually provided them through September 2013.

b. These classified summaries serve as a substitute for information derived from other classified sources and are created specifically for this Military Commission. 10 U.S.C. § 949p-4(b)(1)(B). They have consisted, as produced, of three parts: 1.) the overall classification marking at the top of the document, 2.) the content of the summary derived from the original classified source(s), and 3.) the overall classification marking at the bottom of the document.

c. Early on in the production of these classified summaries, the defense noted deficiencies and concerns in the way in which they were marked. On 29 November 2012, the defense notified the prosecution of its concerns and requested it to provide classified summaries with appropriate markings required. Specifically, the defense sought compliance with Executive Order 13526 and Department of Defense Manual 5200.01, volume 2. (Attachment A)

d. On 30 September 2013, the prosecution responded to the November 2012 concerns raised by the defense. The prosecution, citing no authority or controlling regulation, noted that it disagrees with the application of Executive Order 13526 and Department of Defense Manual 5200.01, volume 2 to the classified material at issue. The defense request was denied and the concerns raised were not addressed by the prosecution. (Attachment B).

e. In at least two productions of classified summaries, Production 17 Disk 1 from 9 September 2012 and Production 27 Disk 3 from 8 January 2013, the classification markings on the CD/DVD provided to the defense do not match, and are of a higher classification level than, the classification markings on the documents contained on the CD/DVD. This puts the defense in an untenable position.

## **6. Argument:**

Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information both within the Government and to the American people. Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation's security and demonstrating our commitment to open Government through accurate and accountable application of classification standards and routine, secure and effective declassification are equally important priorities.

President Barack Obama, (Exec. Order No. 13526 75 Fed. Reg. 707) (Dec. 29, 2009)

**A. All Parties to this Commission Should be Aware of Regulations Governing the Classified Information at Issue**

The President's call to create an "accurate and accountable application of classification standards" noted above should not be lost on the Commission. The President's resolve to declassify some information pertaining to the CIA's rendition program, to facilitate the flow of information within the Government and to the American people, has previously been presented to the Commission. (AE120D, ¶6(I), Attachments B and C). However, the declassification issue previously argued to the Commission is separate and apart from the issue presented here regarding which guidelines and regulations are applicable to the parties to this Commission in creating and handling the classified information produced for this case. The latter concern falls under the call for the accurate and accountable application of classification standards under the President's 2009 Executive Order. It has also been a previous topic of concern identified by the defense and brought to the attention of the prosecution.

Working with classified information, especially given the amount of classified information in this Commission, requires an exhausting effort from all parties. "Generally speaking, CIPA processes are tedious, time consuming..., and require significant dedication of resources by all involved." *United States v. Brown*, No. 5:14-CR-58, 2014 WL 1572553 \* 5

(E.D.N.C. Apr. 18, 2014). The process must be an iterative, “interactive” one among the parties and the Commission, whereby the Commission, exercising its supervisory authority to regulate discovery, works with the government and the accused to “fashion creative solutions in the interests of justice for classified information problems.” *United States v. Libby*, 429 F. Supp. 2d 17, 22 (D.D.C. 2006); see *In re Terrorist Bombings of U.S. Emb. In E. Afr.*, 552 F.3d 93, 122 (2d Cir. 2008) (reasoning that CIPA leaves the precise conditions under which the defense may obtain access to discoverable information to the informed discretion of the district court).

As part of this interactive process, the defense noted its early concerns with the marking system the prosecution used in the production of its classified summaries. (Attachment A) Specifically absent from these summaries, and noted as a concern from the defense, were portion markings, delineating the classification level of individual paragraphs within the summaries. These concerns were brought not only because the absence of portion markings was contrary to classified marking regulations as known to the defense, but also because of the duties and responsibilities placed on the defense by these regulations as a party handling classified information. See Exec. Order No. 13526 75 Fed. Reg. 707, 711 (Setting an expectation of authorized classification holders to make good faith challenges where they believe that a classification status is improper); DoDM 5200.01, V.1, Enclosure 3, Section 17b(1) (“DoD military and civilian personnel may be subject to criminal or administrative sanctions if they knowingly, willfully, or negligently... classify or continue the classification of information in violation of this Volume”); DoDM 5200.01, V.1, Enclosure 4, Section 10b (“Within the Department of Defense all cleared personnel, who generate or create material that is to be derivatively classified, shall ensure that the derivative classification is accomplished in accordance with this enclosure.”)

The prosecution responded by denying the defense request and dismissing the defense concerns. Although the prosecution neither cited any controlling authority, nor offered any alternative governing rules or regulations, the prosecution disagreed with the defense interpretation of the Executive Order and DoDM as it related to the classified information the prosecution had produced. (Attachment B). This left open the question of what, if any, regulations are the prosecution and parties expected to adhere to in utilizing these classified summaries for this Commission. Instead, it offered “[i]f the defense has any specific questions about paragraph classifications beyond the accused’s statements, the defense can seek guidance from the government.” The proposed process is a wholly unorthodox and inefficient way of addressing this deficiency which was created by the government. In order to adequately investigate and defend this case, the defense should be able to rely on the fact that the classified documents produced by the government are appropriately marked, without the worries of over-classification or creating additional, unnecessary steps in the process. The inefficiency of this process has already reared its head in motion practice<sup>7</sup>.

The absence of any clear guidance or regulations has been a possible source of problems in other areas of production as well. At least two productions to date, Production 17, Disk 1 from 9 September 2012 and Production 27, Disk 3 from 8 January 2013, contain classification markings on the CD/DVD provided that do not match, and are of a higher classification level than the classification markings on the documents contained on the CD/DVD. This has created handling issues for the defense. The defense had to treat this production of discovery at the

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<sup>7</sup> The defense submitted a classified filing in AE 168 to which the government then provided an unclassified version of the documents previously produced in discovery. Had the government previously provided a document with the appropriate portion-markings, this ambiguity could have been avoided without the additional use of time and resources.

highest level, despite the fact that the actual content of the discovery possibly should have been handled at a lower, more accessible classification level.

The defense here merely asks the Commission to either assure adherence to governing Executive Orders and DoD manuals in the production and use of classified summaries for this Commission, or, alternatively, if the Executive Order and DoD manuals do not apply to the information in this Commission, then the defense seeks the identification of classification regulations that do apply so that it may condition its future actions accordingly.

**B. Executive Order 13526 Requires Identifiers, Declassification Information and the Use of a Classified Addendum**

Any individual who summarizes classified information, must do so in accordance with the provisions set out in Section 2.1 of Executive Order 13526. This section requires specifically that, in creating summaries of classified information, the individual shall:

(1) be identified by name and position, or by personal identifier, in a manner that is immediately apparent for each derivative classification action;...

(3) carry forward to any newly created documents the pertinent classification markings. [Including]...

(A) the date or event for declassification that corresponds to the longest period of classification among the sources...; and

(B) a listing of the source materials.

(c) Derivative classifiers shall, wherever practicable, use a classified addendum whenever classified information constitutes a small portion of an otherwise unclassified document or prepare a product to allow for dissemination at the lowest level of classification possible.

Exec. Order No. 13526 75 Fed. Reg. 707, 712) (Dec. 29, 2009).

The explicit terms of this Executive Order require five components for creating a summary of classified information. These include: (1) the identification of the individual using classified information to make classified summaries, (2) the pertinent classification markings from original sources, (3) the date of declassification for the material, (4) a listing of the source

materials and (5) an addendum identifying the classified information contra the unclassified information to facilitate dissemination.

The intent of these requirements is to facilitate the proper handling and safeguarding of classified information while preventing concerns of over-classification. The regulation of classified national security information is an executive function and Executive Order 13526 seeks to maintain a balance between the right of the American people to be informed about the actions of their government and the protection of information that is critical to national security. Exec. Order No. 13526 75 Fed. Reg. 707 (Dec. 29, 2009). This same balance is sought after by Congress in the 2009 Military Commissions Act where “[t]rial counsel shall work with the original classification authorities...to ensure that [] evidence is declassified to the maximum extent possible.” 10 U.S.C. § 949p-1(c). However, the prosecution in this case is not using any of the requirements in the cited section in creating summaries for this Commission, aside from the header and footer noting the highest classification of the document.

**C. DoDM 5200.01, volume 2 Further Defines and Provides Guidance for Compliance with E.O. 13526**

After the President issued E.O. 13526, the Department of Defense produced its manual regulating the marking of classified information. Initially published in February 2012, and revised in March 2013, the manual implements policy and provides procedures for the marking of classified information in accordance with E.O. 13526. (DoDM 5200.01, V. 2, section 1.a). This manual applies to the Office of the Secretary of Defense, Military Departments and all other DoD Components. (DoDM 5200.01, V. 2, section 1.a). The summaries the prosecution has produced fall under the DoDM’s definition of “derivative classification” where they “incorporate[e], paraphras[e], restat[e], or generat[e] in new form information that is already classified.” (DoDM 5200.01, V. 2, Part II Definitions).

The DoD manual establishes the following basic requirements for creating derivatively classified information:

**Enclosure 3, Section 8(c) Derivative Classification**

(1) The face of each derivatively classified document shall include a classification authority block consisting of these elements (see Figure 4): “Classified By,” “Derived From,” and “Declassify On.” Declassification and downgrading instructions, which may be added to the classification authority block when applicable, shall be carried forward by the derivative classifier from the source documents(s), from instructions in the appropriate security classification guide(s), or from other classification guidance issued by the OCA.

In order to combat over-classification and facilitate the declassification of information, derivatively classified information, such as the classified summaries produced for this case, requires the minimum identification markings.

Further, the DoD manual sets out the following basic requirements for portion markings:

**DoDM 5200.01, V.2, Enclosure 3, Section 6 Portion Marks**

Every classified document shall show, as clearly as is possible, which information in it is classified and at what level. Derivatively classified documents shall be portion marked in accordance with their source.

a. Every portion (e.g., subject, title, paragraphs, sections, tabs, attachments, classified signature blocks, bullets, tables and pictures) in every classified document shall be marked to show the highest level of classification that it contains.

b. Portion markings shall be included at the beginning of the respective portion as this position affords maximum visibility to the reader. Thus, the classification level shown always applies to the text immediately to the right of the portion marking.

c. To indicate the appropriate classification level, the symbols “(TS)” for Top Secret, “(S)” for Secret, and “(C)” for Confidential shall be used...Portions which do not meet the standards for classification shall be marked with “(U)” for Unclassified.

d. Portion marks shall include any control markings applicable to the portion...Within the portion marking, double forward slashes (//) shall separate classification and control markings. Single forward slashes (/) shall separate multiple control markings and their sub-controls.

This minimum requirement allows the person handling the classified information to easily identify the portions which are classified and those which are unclassified. This was the initial

concern brought by the defense in its 29 November 2012 letter to the prosecution. In response, the prosecution stated “[g]enerally, if a document is marked at an overall classification level, each paragraph is considered classified at that level.” (Attachment B). This “general rule” offered by the prosecution is not further substantiated and is contrary to the standing Executive Order and DoDM identified by the defense. The “general rule” also seems, within the same paragraph, to be subject to an exception for statements made by the accused. (Attachment B, “[T]he government is producing FOUO statements of the accused to the defense.”) Although the prosecution offers to answer specific questions about paragraph classifications if they are subsequently brought by the defense, the sheer volume of summaries produced and the time it takes to receive a response to its requests (this particular response to the defense’s 29 November 2012 request came ten months later on 30 September 2013) makes this back and forth impractical. Certainly, the more efficient and practical approach would be the employment of, in accordance with the 2009 Executive Order, an accurate and accountable application of classification standards. In fact, Figure 4 on page 27 of DoDM 5200.01, V.2, Enclosure 3 provides an easy to follow example of how to create classified summaries derived from other classified sources with appropriate classification markings.

**D. DoD 5220.22-M, Defines and Provides Guidance for Compliance with E.O. 13526 for the Assigned Defense Security Officer**

The recently assigned defense security officer (AE013M, Amended Protective Order #1), as a government contractor, is obligated and bound by DoD 5220.22-M, “National Industrial Security Program,” dated February 2006, Incorporating Change 1 on March 28, 2013. (DoD 5220.22M, Chapter 1, section 1, 1-100; 1-102(a-b)). This program manual, like DoDM 5200.01, is established and modified pursuant to Executive Order, most recently Executive Order 13526. (DoD 5220.22M, Chapter 1, section 1, 1-100).

Also, similar to both DoDM 5200.01, V.2 and Executive Order 13526, DoD 5220.22-M requires the following markings, where available, for derivatively classified documents (1) individual portion markings;<sup>8</sup> (2) a “CLASSIFIED BY” line;<sup>9</sup> (3) a “DERIVED FROM” line;<sup>10</sup> (4) a “DECLASSIFY ON” line;<sup>11</sup> (5) “DOWNGRADE TO” line;<sup>12</sup> and (6) a “REASON CLASSIFIED” line.<sup>13</sup> The manual creates a duty for the contractor to ensure that derivatively classified information is properly marked. (DoD 5220.22M, Chapter 4, section 1, 4-102(d)). Though there are exceptions to marking requirements under this manual, the prosecution in its response to the defense has cited no separate Executive Order or other regulation governing these classified summaries. (DoD 5220.22M, Chapter 4, section 2, 4-209).

## 7. Conclusion

The government has provided classified summaries to the defense that are lacking required classification markings. Specifically, the classified summaries do not include the information required under E.O. 13526, section 2.1 and required under DoDM 5200.01, volume 2, enclosure 3, section 6 “Portion Markings,” and section 8(c) “Classification Authority Block, Derivative Classification.” These summaries do not contain portion markings, noting the classification level of each paragraph within the document. The absence of portion markings has recurred with each of the classified production summaries provided to the defense to date. Further, they lack information that is required in order to facilitate future declassification and deter over-classification of the summaries.

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<sup>8</sup> DoD 5220.22M, Chapter 4, section 2, 4-206

<sup>9</sup> DoD 5220.22M, Chapter 4, section 2, 4-208(a)

<sup>10</sup> DoD 5220.22M, Chapter 4, section 2, 4-208(b)

<sup>11</sup> DoD 5220.22M, Chapter 4, section 2, 4-208(c)

<sup>12</sup> DoD 5220.22M, Chapter 4, section 2, 4-208(d)

<sup>13</sup> DoD 5220.22M, Chapter 4, section 2, 4-208(e)

In addition, at least two productions, Production 17 Disk 1 from 9 September 2012 and Production 27 Disk 3 from 8 January 2013, contain classification markings on the CD/DVD provided that do not match, and are of a higher classification level than, the classification markings on the documents contained on the CD/DVD.

The defense cannot lawfully generate documents or notes in accordance with governing regulations based on these summaries—e.g., court pleadings, internal documents, working notes or reports—until the prosecution has placed the appropriate derivative markings on the classified summaries.<sup>14</sup> Portion markings are required to ensure the appropriate classification levels are applied to each section of the documents. Given the statutory emphasis to reduce overclassification, the parties to this Commission should not use the blanket classification of the document to appropriately derivatively classify information.<sup>15</sup>

The defense has not been, for the vast majority, provided with the underlying documents used in the creation of these classified summaries. This is despite the fact that defense counsel possess security clearances at the level of classification used in this case. The defense therefore has had to rely solely on the classification markings the prosecution has placed on these summaries. The prosecution has stated a general rule, without citation to authority, that if a document is marked at an overall classification level, one can assume that all the individual portions are classified at that overall level. This unsubstantiated general rule stands in stark contrast to existing specific regulations and the force of Executive Order 13526 to balance the

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<sup>14</sup> See DoDM 5200.01, V.1, enclosure 4, section 10b (“Within the Department of Defense all cleared personnel, who generate or create material that is to be derivatively classified, shall ensure that the derivative classification is accomplished in accordance with this enclosure.”).

<sup>15</sup> See e.g., E.O. 13526, section 2.1(d); DoDM 5200.01, V.3, Enclosure 5, p. 75 & p. 81; and the Reducing Overclassification Act, Public Law 111-258-Oct. 7, 2010.

protection of classified information with concerns of over-classification and a commitment to a more open government.

The defense requests this Commission order classified summaries produced in accordance with Executive Order 13526 and DoDM 5200.01, V.2. In the alternative, if these regulations are not found to be applicable, the defense requests the Commission compel the prosecution to identify and produce which regulations do apply to the production and use of classified summaries.

8. **Oral Argument:** The defense requests oral argument on this motion.
9. **Witnesses:** Stephanie Flannery
10. **Conference with Opposing Counsel:** The defense has conferred with the government and they oppose this motion.
11. **List of Attachments:**
  - A. Defense Request for Discovery, dated 29 November 2012 (2 pages)
  - B. Government Response to Defense Request for Discovery, dated 30 September 2013 (2 pages)

/s/ Brian Mizer  
BRIAN L. MIZER  
CDR, JAGC, USN  
*Assistant Detailed Defense Counsel*

/s/Allison Danels  
ALLISON C. DANELS, Maj, USAF  
*Assistant Detailed Defense Counsel*

/s/ Thomas Hurley  
THOMAS F. HURLEY, Maj, US-A  
*Assistant Detailed Defense Counsel*

/s/ Daphne Jackson  
DAPHNE L. JACKSON, Capt, USAF  
*Assistant Detailed Defense Counsel*

/s/ Richard Kammen  
RICHARD KAMMEN  
*DOD Appointed Learned Counsel*

**CERTIFICATE OF SERVICE**

I certify that on 11 June 2014, I electronically filed the forgoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

/s/ Brian Mizer  
BRIAN L. MIZER  
CDR, JAGC, USN  
*Assistant Detailed Defense Counsel*

# ATTACHMENT

A

Filed with TJ  
11 June 2014

Appellate Exhibit 280 (Al-Nashiri)  
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DEPARTMENT OF DEFENSE  
OFFICE OF THE CHIEF DEFENSE COUNSEL  
1620 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1620

29 November 2012

MEMORANDUM FOR Trial Counsel

FROM: Maj Allison C. Danels, Assistant Detailed Defense Counsel

SUBJ: DEFENSE REQUEST FOR CLASSIFIED SUMMARIES MARKED IN  
ACCORDANCE WITH EXECUTIVE ORDER 13526 AND DOD REGULATION  
5200.01 (DERIVATIVE CLASSIFICATION)Ref: (a) Executive Order 13526  
(b) DoDM 5200.01

1. The classified summaries you have delivered to the defense on multiple occasions do not comply with the derivative classification requirements set out in references (a) and (b). Specifically, they do not include the information required under E.O. 13526, section 2.1 and under DoDM 5200.01, volume 2, enclosure 3 and volume 4, section 10. Furthermore, the summaries are not appropriately portion marked in accordance with DoDM 5200.01, volume 2, enclosure 3, section 6.<sup>1</sup> Under the law, the government is obligated to provide the classified summaries with the appropriate derivative classification markings and portion markings.
2. Per reference (a) and (b), the defense cannot generate documents or notes based on these summaries—e.g., court pleadings, internal documents, working notes or reports—until the prosecution has placed the appropriate derivative markings on the classified summaries.<sup>2</sup> Portion markings are required to ensure the appropriate classification levels are applied to each section of the documents as well. Given the statutory emphasis to reduce overclassification, the defense cannot use the blanket classification of the document to appropriately derivatively classify information.<sup>3</sup> Absent the above, the defense is prohibited from using these classified summaries in preparation of its case.<sup>4</sup>
3. Accordingly, the defense requests that the prosecution reproduce all of the classified summaries delivered in the batches below with the appropriate derivative classification markings.

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<sup>1</sup> See DoDM 5200.01-V2, Enclosure 3, section 6 (“Derivatively classified documents **shall** be portion marked in accordance with their source.”)

<sup>2</sup> See DoDM 5200.01 V1, section 10 (“Within the Department of Defense all cleared personnel, who generate or create material that is to be derivatively classified, **shall** ensure that the derivative classification is accomplished in accordance with this enclosure.”).

<sup>3</sup> See e.g., E.O. 13526, section 2.1(d); DoDM 5200.01-V3, Enclosure 5, p. 75 & p. 81; and the Reducing Overclassification Act, Public Law 111-258-Oct. 7, 2010.

<sup>4</sup> “DoD military and civilian personnel may be subject to criminal or administrative sanctions if they knowingly, willfully, or negligently... classify or continue the classification of information in violation of this Volume. See DoDM 5200.01-V1, Enclosure 3, Section 17.

- PROD 14 (2 Disks)(delivered 30 Aug 12)
- PROD 15 (1 Disk)(delivered 19 Sep 12)
- PROD 16 (2 Disks)(delivered 19 Sep 12)

4. Given the significance these classified summaries have to the defense's preparation of this capital case,<sup>5</sup> the defense requests that the prosecution fulfill this request as soon as possible. Please notify the Defense in writing by **10 December 2012** if you do not intend to comply with any part of this request. Thank you for your prompt attention in this matter. If you have any questions about this request or would like to discuss further, please feel free to contact me.

Very Respectfully Submitted,

//s//

ALLISON C. DANELS, Maj, USAF  
Assistant Detailed Defense Counsel

The above request was delivered to trial counsel via email on 29 November 2012.

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<sup>5</sup> Further, the E.O. encourages and authorizes classification challenges of information that may not be properly classified. See E.O. 13526, sec. 1.8. Thus, notwithstanding the specific requirements for derivative markings, the derivative markings of the classified summaries are necessary in order to facilitate this process.

# ATTACHMENT

# B

Filed with TJ  
11 June 2014

Appellate Exhibit 280 (Al-Nashiri)  
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**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN  
MUHAMMAD AL NASHIRI**Government Response  
To Defense Request For  
Classified Summaries**

30 September 2013

On 29 November 2012, the government received the defense request for the government to reproduce all of the classified summaries delivered to the defense in productions 14 through 16 because, according to the defense, the government-produced summaries “do not comply with the derivative classification requirements . . . required under E.O. 13526, section 2.1 and under DoDM 5200.01, volume 2, enclosure 3, and volume 4, section 10.” The defense also stated, “the summaries are not appropriately portion marked in accordance with DoDM 5200.01, volume 2, enclosure 3, section 6.” The government denies the defense request and disagrees with the defense interpretation of the Executive Order and the Department of Defense Manual relating to this classified information.

The government produced the classified summaries in productions 14 through 16 having the overall classification level of each classified summary displayed at the top and bottom of each page of each summary. The government also provided the defense with a spreadsheet identifying the classification level for each summary.

In addition, the government is producing FOUO statements of the accused to the defense. If the defense has any specific questions about paragraph classifications beyond the accused’s statements, the defense can seek guidance from the government. Generally, if a document is marked at an overall classification level, each paragraph is considered classified at that classification level.

Please let us know if you have any additional questions or need further guidance.

Respectfully submitted,

*//s//*

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Anthony W. Mattivi  
CDR Andrea Lockhart, JAGC, USN  
Justin T. Sher  
Joanna Baltes  
Maj Chris Ruge, USMC  
LT Bryan M. Davis, JAGC, USN  
Trial Counsel  
  
Mark Martins  
Chief Prosecutor  
  
Military Commissions