[The R.M.C. 803 session was called to order at 1030, 1 June 2016.]

MJ [COL POHL]: Commission is called to order. All parties are again present. The detainees remain absent.

Mr. Connell, just to let you know, is I think today or yesterday we put out the proposed CY '17 schedule.

LDC [MR. CONNELL]: I saw it, sir. Thank you very much.

MJ [COL POHL]: And I think we do have some July dates on it.

LDC [MR. CONNELL]: I'm working on my brief.

MJ [COL POHL]: Okay. That brings us to 390.

Mr. Ryan.

TC [MR. RYAN]: Good morning, Your Honor.

MJ [COL POHL]: Good morning.

TC [MR. RYAN]: Your Honor, there's something called a cockpit voice recorder, which is, I believe, required on every certainly commercial airliner in America, probably across the world. On September 11, the different planes that crashed had them, of course, on while they were traveling, that is United -- I'm sorry, American 111, United 175, American 77, and United 93. Following the crashes, the only one that was recovered and usable was United 93. It was fortuitous to some extent that that was the one that survived just because it

probably picked up a larger range of activities. The recorder covers what seems to be in a loop, where it covers about 30 minutes worth of time back from the last moment of recording.

In the case of 93, it begins the -- the loop begins at the point where the hijacking is actually taking place and then goes through the period of time that the plane is being flown by the hijackers and then ends -- towards the end contains sounds of the struggle as the passengers rush the cockpit in an attempt to take back the plane.

So the full 30 minutes has significant events for purposes of the government's case in chief; that is, that it proves hijacking in the first place. It proves -- will tend to prove the initial murders of the crew in the cockpit, sounds of which can be heard. And at the end, it contains the sounds, as I explained, of the attempts to retake the airliner, which is relevant in explaining why it is that this particular plane did not crash into something as the other three did but, in fact, crashed into an open field in Pennsylvania. So it fits the government's theories about the case very well.

The sounds on the recording are very raw, as you can imagine. There's a good deal of voices being heard, many of

them the hijackers, because a good chunk of the recording is just the hijackers while flying the plane. But as I said, there's enough of it where other voices can be heard. And that's relevant to this discussion because protection of those other -- of that data, those other voices, of it being disseminated and used for not respectful purposes I think is the purpose of the statute that we've cited. And for that reason, Congress enacted the statute that is contained in the government's brief 49 U.S.C. Section 1154.

The government wants to produce the voice recording in discovery, and ultimately use it in the course of the case itself. Because we want to do that, we first have to request of the military commission the protective order as spelled out specifically in the statute. We -- it's a -- it's a laid-out process. We can't turn it over until we have the protective order in place, and the protective order in place will keep it in a safeguarded position through the course of using it in the courtroom and purposes at trial.

MJ [COL POHL]: So you're just requesting that I issue that protective order that would permit that you say it's required by statute to permit you to give it to the defense?

TC [MR. RYAN]: The protective order has to be in place first and then it can be provided to the defense.

MJ [COL POHL]: Got it.

TC [MR. RYAN]: This recording, I should note, was used in the Moussaoui case and there was a protective order in place in regard to that as well.

So, Judge, it's a fairly straightforward matter. Unless you have any questions, that's all I have.

MJ [COL POHL]: I don't. Thank you.

Mr. Connell.

LDC [MR. CONNELL]: Thank you, Your Honor. Clearly we're not debating admissibility at this time and we don't have any problem with the protective order as we laid out in our brief.

The one place that we do differ with the government is whether it has to be a new protective order or not. The government has many times railed against my attempts to modify protective orders to bring them more in line with executive orders and controlling law, but seems to not want to rely on Protective Order No. 2, AE 014H, which already has a procedure in place to deal with this type of sensitive evidence, which is that evidence can be determined to be -- to fall under the special discovery category which is outlined in AE 014H and then it would give all of the protections which would satisfy the statute if the statute needs to be satisfied, but would also prevent any further disclosure except according to the

terms of that.

MJ [COL POHL]: So you would say the government proposed protective order is redundant with something already in place?

LDC [MR. CONNELL]: No, sir. Unfortunately, it's not redundant, it's overbroad in that the military commission's question earlier was are you just saying to the government that the -- you should put in a protective order over the discovery process.

The government's proposed protective order, it's not mentioned in their brief but it's in the wording of their order, goes ahead and reaches into closure of the trial process, which I think requires an 806 and Press Enterprise analysis, which is the reason why we didn't just consent to this. I think that the proposed protective order from the government is overbroad. It should protect the discovery process, but the question of how this would be handled at trial should be left for appropriate analysis under the constitutional and military commissions authorities.

MJ [COL POHL]: Okay. Got it. Thank you.

TC [MR. RYAN]: Just to say -- I'm sorry, Your Honor. Just to say that if the commission wishes to reword the protective order just to protect it for purposes of discovery at this point, we get to other issues later, we have no

objection to that. Okay.

MJ [COL POHL]: Okay. Thank you.

TC [MR. RYAN]: Thank you, sir.

MJ [COL POHL]: Thank you.

LDC [MS. BORMANN]: Judge, we have argument on this.

MJ [COL POHL]: Okay. I'm sorry. We got a little ----

DDC [MAJ SEEGER]: Good morning, Your Honor.

MJ [COL POHL]: Good morning.

DDC [MAJ SEEGER]: Your Honor, Mr. Bin'Attash joins Mr. al Baluchi's response, AE 390A. And with him we would not object to designating cockpit voice recorder recordings as sensitive discovery. Furthermore, we ask that the commission remain at all times cognizant of the extensive and often excessive levels of secrecy that exist already in this case, the level of public interest and the historical value of all materials relevant to these proceedings.

To that we would add two observations: First, that the Flight 93 cockpit voice recorder and recording have thus far been subjected to very little forensic and judicial scrutiny. And secondly, that with respect to the cockpit voice recorder transcript, the cat is already, to a very large extent, out of the bag. There may be very little written material left to protect and a blanket protective order as to

the transcript may serve little purpose.

First, we would observe that the Moussaoui case, to which much reference has been made this week, subjected the Flight 93 CVR, its chain of custody, and its post-recovery processing to very little scrutiny, inasmuch as both the audio and the transcript were ultimately admitted pursuant to a stipulation. See Moussaoui trial transcript April 11, 2006, Volume 17A, at pages 3455 through 3457.

As counsel for Mr. al Baluchi noted in AE 390A at page 3, footnote 9, quote, it is worth noting that the legal implications of the sealing order in the Moussaoui case may not have been fully explored due to the fact that Mr. Moussaoui was representing himself, unquote.

This is perhaps a small point to be noted only in passing, but it is notable that no government record thus far released, at least to my knowledge, contains the unique serial number pertaining to the Flight 93 CVR. This is contrary to the otherwise nearly invariable practice of the United States Government in air disaster cases involving recovered CVRs.

MJ [COL POHL]: Are you arguing admissibility now or are you arguing just simply -- I mean, all we're talking about here is a protective order for discovery.

DC [MAJ SEEGER]: Your Honor, I'm suggesting that a

protective order of the kind originally requested, at any rate, would be premature because it would be limit our ability to assess the ultimate admissibility, but I'm not arguing against admissibility at this point.

MJ [COL POHL]: Okay. Go ahead.

DC [MAJ SEEGER]: Why the government has not released this serial number in this case is a mystery, a mystery that is inappropriate in a case of such historic and civic interest and, of course, for many people watching today, intense personal interest. Secondly, we would observe that various versions of the CVR transcript have been publicly available for years. And we're about to have these available for marking and distribution to all parties. I apologize that they're not quite yet.

According to news reports, and probably according to the memories of many persons now in this building, Judge Brinkema in the Moussaoui case permitted the CVR audio to be played in court on April 12, 2006. The actual recording was protected from further release out of respect for the families of the victims. At about that same time, she authorized the public release of the transcript, marked government Exhibit P200056T for identification, which was then posted on the websites of major news outlets where it remains to this day.

That nine-page transcript contains no marked redactions.

There is at least one other version of the transcript available in the public domain, a 9/11 copy that appears to have been released pursuant to a FOIA request. It is available on the digital library website, Scribd spelled S-C-R-I-B-D, for anyone who wishes to view it.

This transcript is also of nine pages, plus a prefatory page added to the front explaining how it was put together and giving a key to audio channel sources and typeface conventions. The additional prefatory page makes it a ten-page document, with the transcript itself starting on a page marked 2 of 10. A note at the bottom of each page indicates that it is based on an original dated 1 March 2002, and that it went through a major review on 4 December 2003. In addition to English-language translations of non-English portions, it has Arabic letters representing the words that were translated.

Unlike the version released at the Moussaoui trial, this transcript has some few redactions. There are four short redactions at the bottom of the second page marked 3 of 10, and there are two short redactions at the top of the third page marked 4 of 10. The 9/11 commission copy to which I refer appears to contain no other redacted passages.

The existence of these transcripts in the public domain, Your Honor, raises a number of questions about the protective order the government now proposes, questions which should be considered and answered before you rule. One, was the transcript released in the Moussaoui trial which contains no marked redactions fully accurate? Two, is there now a new version of the transcript that is more complete or accurate than any that has been released before? Three, are there other unreleased versions of the transcript?

MJ [COL POHL]: And how would I explore unreleased versions of a transcript?

DC [MAJ SEEGER]: By asking the government whether they exist, Your Honor.

MJ [COL POHL]: Okay. Go ahead.

DC [MAJ SEEGER]: Four, in sealing the transcript now, is the government seeking to restrict defense use of any information to which we already have access? Five, is the protection of the National Transportation Safety Board against premature public speculation regarding the cause of any airline crash so that it may conduct a full and fair investigation really implicated in this proceeding? Six, in the Moussaoui case, the government made certain representations about the CVR and its transcript. One was in

a document entitled government's Submission Regarding Relevance of Cockpit Voice Recorders, dated September 24, 2002, at the bottom of the first page.

In that submission, the government in the Moussaoui case stated as follows, quote, although the government -- pardon me. Quote, Also, the government wishes to make clear that it filed its motion for protective order solely to ensure compliance with the statute. There are no national security concerns or other policy reasons why the tapes and transcripts should be sealed. Indeed, if 49 U.S.C. Section 1154 did not exist, the government would have no qualms about complete public dissemination, unquote.

MJ [COL POHL]: So I don't understand. What are you saying?

DC [MAJ SEEGER]: I'm seeking to establish, Your Honor, whether the government in this case now stands by that averment made ----

MJ [COL POHL]: No, what I'm saying is ----

DC [MAJ SEEGER]: ---- in 2002.

MJ [COL POHL]: Are you saying there should be no protective order?

DC [MAJ SEEGER]: Your Honor, as I said, we have no objection, as I understand Mr. al Baluchi has no objection to

treating this as sensitive discovery and protecting it appropriately ----

MJ [COL POHL]: Okay.

DC [MAJ SEEGER]: ---- but protecting it in the way that Mr. Connell suggested.

MJ [COL POHL]: Okay. I just didn't quite follow the idea that -- it seemed like you were also arguing that there's no need for a protective order altogether because it's already out there.

DC [MAJ SEEGER]: In this section, Your Honor, I'm addressing the transcript only ----

MJ [COL POHL]: Okay. Got it.

DC [MAJ SEEGER]: ---- and not the audio.

So this averment by the government in 2002 raises these questions. Does the government now seek the protective order solely to ensure compliance with the statute? Is it now the case that there are no national security concerns or other policy reasons why the tapes and transcripts should be sealed? And is it now the case that if 49 U.S.C. Section 1154 did not exist, the government would have no qualms about complete public dissemination?

MJ [COL POHL]: Would you have qualms about complete public dissemination of the transcript?

DC [MAJ SEEGER]: Your Honor, I don't know. I haven't seen those four or eight small portions that are redacted in the version of the transcript released by the 9/11 commission.

MJ [COL POHL]: No, I mean, isn't one of the -- there's two concerns here. There's a statutory concern, I got that. There's also the idea of evidence appearing in public before the trial itself begins and the possible impact it could have on potential members.

DC [MAJ SEEGER]: Yes, Your Honor.

MJ [COL POHL]: We've mentioned that earlier on some other occasions and on this also. So would that be a concern for you from a defense perspective if this were publicly disseminated?

DC [MAJ SEEGER]: Your Honor, I don't believe the -- any of the defense teams would intend to make a public dissemination of ----

MJ [COL POHL]: I didn't say that. What I'm saying is you seem to be saying that if the government didn't have to do this by statute, they'd put it out and they wouldn't have any qualms about putting it out. My question is, would you have qualms about -- in the form of objecting to them, putting it out for the potential impact on the potential members when the case is tried?

DC [MAJ SEEGER]: Based on what I've seen so far, sir, no. And the government itself has said that it would have no such qualms.

MJ [COL POHL]: Okay.

DC [MAJ SEEGER]: At least in the Moussaoui case.

MJ [COL POHL]: Got it.

DC [MAJ SEEGER]: And so ----

MJ [COL POHL]: Go ahead.

DC [MAJ SEEGER]: And so, Your Honor, to conclude, I would say that any ruling on the issuance of the requested protective order should be informed by a consideration of these questions and their answers and such a ruling is therefore premature.

Finally, Your Honor, if the government would now release the serial number of the cockpit voice recorder in question, we would welcome that information.

MJ [COL POHL]: Okay. Thank you.

I'll note for the record that the defense introduced a 390C (WBA) and 390D (WBA) which are the two transcripts that Major Seeger referred to.

LDC [MS. BORMANN]: And, Judge, we're we've distributed them to the parties.

MJ [COL POHL]: And I also put it on the record.

LDC [MR. CONNELL]: Excuse me, Your Honor. Which one is C and which one is D?

MJ [COL POHL]: D is the ten-page version with the extra cover sheet and C would be the nine-page version of the transcript.

Any other defense counsel want to be heard on this?

Mr. Ryan, you've already had your two shots.

TC [MR. RYAN]: Yes, sir.

MJ [COL POHL]: That brings us to, since we've already talked about this earlier, 399. Mr. Connell.

LDC [MR. CONNELL]: 321 is intimately related. Basically my comments will apply to both 321 and 399. They're almost ----

MJ [COL POHL]: Okay.

LDC [MR. CONNELL]: Where there is a difference, I will discuss them.

MJ [COL POHL]: Okay. Go ahead.

LDC [MR. CONNELL]: Thank you, sir. Just one moment.

Sir, I need to begin by noting that there is a 505(f) notice related to 321. With that 505 notice is 321A. About 95 percent of the argument is unclassified and I'm perfectly happy to proceed, but I would like to add 321A to our list of -- our ever-growing list of 505 considerations for our

505(h) hearing.

MJ [COL POHL]: Okay.

LDC [MR. CONNELL]: So 321 and 399 raise a lot of fundamental questions that this military commission has touched on, sometimes correctly, sometimes I think with a lack of nuance, but are squarely presented here.

So I want to begin with the proposition that we are in a law of war tribunal. The definition of war crimes, no matter how al Bahlul comes out on its many possible outcomes, no matter how al Bahlul comes out, the war crimes definitions are informed by the law of war in 2001.

And more precisely important for AE 321 and 399 is that the detention that the defendants in this case are held in is pure law of war detention. And the reason why I make that -- I want to make that point, in almost every other situation, a person who is deprived of their liberty in the United States is done so on the order of a judicial or quasi-judicial officer.

It so happened that once I was on the tuberculosis panel in Fairfax County, Virginia, and my responsibility there was to defend people who were ordered to be deprived of their liberty because they had an uncontrolled disease. Even in that situation, a person was deprived of their liberty not for

criminal wrongdoing but for public policy reasons, like the law of war, by order of a judge.

In this situation -- and that's usually not true in the UCMJ situation, of course, because it's a commander who deprives their Soldier, Sailor, Airman or Marine of liberty. But here the defendants are deprived of liberty only through operation of the law of war. The military commission didn't order them to be detained and arguably the military commission could not order their release.

That law of war detention, however, is a package deal. The same principles which permit that law of war detention in international humanitarian law are the principles which limit that detention in international humanitarian law. It is not possible to pick and choose in a law of war detention situation because the authority to detain comes with its built-in principles, it comes with built-in limitations. And this is not some radical idea that I've come up with, this is actually the official position of the United States Government on this topic.

When the Obama administration took office in 2009, the District of D.C. asked the administration, the Department of Justice, for an official -- for a statement of what principles the United States Government felt governed law of

war detention. And on, I believe it was, 23 March 2009, the -- in the habeas cases, the United States Government filed its official position. And boiled down that position is, and I quote here, "The detention authority conferred by the authorization for use of military force is necessarily informed by the principles of the law of war."

So that raises the question, what is the relationship -- what are those principles of the law of war and what is their relationship to other aspects of domestic law, because I submit to you in many ways the law of war is the law of the United States, and what is its relationship to International Human Rights Law or IHRL?

The government got this fundamentally wrong in 321B. And the reason why I spent so much time trying to construct this issue in 321C is that the government's argument was wrong in many, many ways, and that's what I'm talking about today.

But their fundamental claim, their fundamental opposition to our argument for family contact is found in 321B, and I'm going to quote here -- or excuse me, their claim is that our -- the principles that we rely on govern, and here I begin to quote, "prisoners in the United States, not detainees being detained under the authorization for use of military force, the AUMF, as informed by the principles of war

as enemy belligerents."

That argument from the government has the situation exactly wrong. The government has continuously relied on principles like Turner v. Safley which govern civilian prisoners in civilian prisons. These are not civilian -- they are civilian prisoners, but they're certainly not in a civilian system. The -- and, in fact, all of the principles that we articulate in 321 and later in 399 are the law of war principles that are baked into law of war detention.

I think that on a couple of occasions, the military commissions has, in glancing blows, made comments about this that I think would bear correction. I'm going to mention those as we go by.

I also want to observe that we did have a slightly different position from Mr. Bin'Attash in AE 321 pleadings, but I think that our positions converged in the AE 399 pleadings.

So what is the relationship of the law of war to a military commission? As a learned colleague of mine explained, there is -- the United States has a hybrid system of dealing with international law, including the law of war. It is governed by four main principles. The first of those principles is the supremacy clause, the idea articulated by

the founders in the Constitution, that the international law, the law of nations as they would have said, is -- and treaties are the law of the land.

The second is the self-execution doctrine. This came up in the AE 200 series. Certain treaties are self-executing, certain other treaties are not self-executing. Some treaties may have been self-executing in 1955, like the Geneva Conventions, but had limits on their abilities to be self-executed in 2006 in the Military Commissions Act of 2006.

The third principle that governs this hybrid system is the second in time rule, that a subsequent explanation of the law governs an earlier explanation of the law. That is why, for example, that in 2006 Congress was able to change the scope of ability to claim redress under the Geneva Conventions.

And the fourth element of this hybrid system is the Charming Betsy Doctrine. The Charming Betsy Doctrine says that -- is a principle of avoidance in the same way as the more familiar principle of constitutional avoidance, that, when possible, a construing authority should construe the relevant law to be consistent with international law as opposed to inconsistent with international law.

All right. So with that background, we begin with

the question of the relationship between International Humanitarian Law and International Human Rights Law here in the military commission.

The overall position of international scholars in the international courts is that International Humanitarian Law is complemented by International Human Rights Law when those two bodies are not inconsistent. The number of cases out of the International Court of Justice, most prominently occupied Palestinian territory and similar cases out of the Inter-American Court of Human Rights, including Bamaca, B-A-M-A-C-A, Velasquez versus Guatemala.

The reason why I explain those principles is that until 2009, or arguably even 2014, the United States had a position that international humanitarian law was lex specialis, that it was the only law that governed detention of detainees, but ex -- I would say implicitly in 2009 and explicitly in 2014, the United States abandoned that position.

So, Your Honor, may I have access to the document camera? I would like to show a document which is already in the record as AE 321C, Attachment B.

MJ [COL POHL]: Sure. Go ahead.

LDC [MR. CONNELL]: Thank you.

May I have permission to display it to the gallery?

Let me just show counsel first. Your Honor, may I have permission to display the document camera to the gallery?

MJ [COL POHL]: Have you seen this? I'm not sure which document it is yet.

LDC [MR. CONNELL]: Okay. I can hand up a copy. It's already in the record. It's already been processed.

MJ [COL POHL]: If it's already been processed, yeah, go ahead.

LDC [MR. CONNELL]: Could we bring it up on the overhead, Your Honor?

MJ [COL POHL]: Sure.

LDC [MR. CONNELL]: It's coming.

MJ [COL POHL]: This is on your -- this is attachment to 321C?

LDC [MR. CONNELL]: This is Attachment B to AE 321C.

In -- at the review by the Committee Against Torture of the United States in November of 2014, the acting legal advisor to the United States Department of State made an explanation of the United States' position on the role of the law of war in detention operations. It did so specifically by -- in the context of the Committee Against Torture, but went broader than that, so let me refer you to the specific information.

I wouldn't normally go to such efforts for a quote, but the -- this is such a -- an important explanation of the U.S. position that I don't think has been previously analyzed here in the military commission, but the green bracketed information says that, "Although the law of armed conflict is the controlling body of law with respect to the conduct of hostilities and the protection of war victims, a time of war does not suspend operation of the Convention Against Torture, which continues to apply even when a state is engaged in armed conflict. The obligations to prevent torture and cruel, inhumane, and degrading treatment and punishment in the convention remain applicable in our times of armed conflict and are reinforced by the complementary prohibitions in the time of armed conflict."

The significance of this position is not lost on -- we can let go of the document camera, please. The significance of this position was not lost on commentators who in many ways applauded the United States for abandoning lex specialis, that is, the idea that the law of war occupied the field and excluded all human rights law and the law of war is essentially binary. A person who is being dealt with under the law of war is either a combatant, a limited set of people who have a chain of command, wear a badge of authority, and

are subject to the laws of war, or a civilian, a person who is not a combatant.

There is confusion on this topic because of the language of the Bush Administration of unlawful combatants. But strangely enough, unlawful combatants are not a subset of lawful combatants, unlawful combatants are a subset of civilians. An unlawful combatant is a civilian who takes up arms and is thus argued to be targetable by the military for such time as they take a direct part in hostilities.

So that brings us to the question of what is the status of these defendants. Now, even after the Military Commissions Act of 2006 greatly limited the application of the Geneva Conventions, and then rolled back by the Military Commissions Act of 2009 prohibited the use of Geneva Conventions as a basis for a private right of action. In Yahia, Y-A-H-I-A v. Obama at 716 F.3d 627, a 2013 D.C. Circuit case, the D.C. Circuit explained even after those times in a Guantanamo context the Geneva Convention remain a roadmap for the establishment of protected status.

So the question is what is that status? Well, we -- we have very clear guidance, both in the Geneva Conventions and in Army regulation 190-8, which domesticates most of the provisions of the Geneva Convention and translates them into a

specifically American context.

Both of those -- both Article 5 of the -- of -- Common Article 5 of the Geneva Conventions and Army Regulation 190-8, Section 1-6.a, say that, "Until a competent tribunal has determined a person's status to be otherwise, a law of war detainee status to be otherwise, they are to be considered a prisoner of war under Geneva Convention 3." It's equally true because of the operation of the burden of proof, that under 94 -- 10 U.S.C. 948b(e), until a competent tribunal determines that a person is an alien unlawful enemy belligerent, then they are not presumed to have that status.

That question -- both of those questions, are presented in AE 119. As we stand here on 1 June 2016, the defendants are in the status of protection under Geneva Convention 3 because there has been no competent tribunal which has determined that they are not -- that they fall into some other category.

Now, our position -- and so truthfully, that means that whatever 10 U.S.C. 948b(a), the prohibition on citing the Geneva Conventions as a basis for private right of action, whatever that means, whether that applies in military commissions cases or only as truly a private right of action, the military commissions conclusion that it governs right now

in AE 303D was wrong because the 10 U.S.C. 948b(e) only applies, only inserts a barrier against reliance on the Geneva Conventions as a private right of action for a person who is an AUEB, that is a person who has been determined to be an AUEB, which has not happened yet in this case. It may never happen. But it certainly has not happened yet.

Now, our position as articulated in 321 (AAA) Sup, is that at that Article 5 hearing, the military commission or whatever other tribunal, Army regulation 190-8 allows other tribunals, it allows, it specifically reflects the requirements of Geneva Convention III, that there be a three-judge tribunal, should determine that Mr. al Baluchi specifically is a protected person, a civilian under Geneva Convention Article 4 -- excuse me, under Geneva Convention IV. That is true no matter what the nature of this conflict is.

Now, up to now, we have been talking about people. Now, I want to switch for a moment and talk about conflicts because it's important to the application of the Geneva Convention what kind of conflict there is.

Now in reality, Mr. al Baluchi may not have been arrested in connection with -- or detained in connection with any conflict whatsoever. The only body who has assessed sort of a global war on terror with all of its many aspects has

concluded that it does not qualify as an armed conflict at all. That would be the United Nations in its 2004 exploration of the status of persons at Guantanamo Bay because -- and there's a reason for that, right? You think about the War on Terror and the vast number of things which are dealt with under the War of Terror, that would include targeted killing, it would include ordinary military operations.

But on the other hand, the War on Terror could include things like surveillance. It could include things like avoiding, you know, financial transactions. So not all of that is armed conflict. So the idea of the War on Terror as armed conflict is too broad.

Now, we also know, however, that there are aspects of the War on Terror which have constituted an international armed conflict, that would be the conflict in Afghanistan from 2001 to 2003, and we also know that there are aspects that constitute a noninternational armed conflict.

The charge sheet is silent on the question of whether this is an international armed conflict, an IAC, or an NIAC, a noninternational armed conflict, but the prosecution has taken the position that at least parts of it are a noninternational armed conflict. The United States Supreme Court certainly treated it that way in Hamdan, and so I'm going to proceed now

under the presumption that we're dealing with a noninternational armed conflict for purposes of the Geneva Conventions.

Now, switching back, why is it our position that the -- switching back to the status of the person, why is it that Mr. al Baluchi is a protected person under Geneva Convention IV. The first reason, of course, is that the Law of War is binary. There are only two categories of persons, there is the category of civilians and there's the category of combatants. And an unlawful combatant, an unlawful enemy combatant, an unlawful alien enemy combatant, all of those fall into the civilian category which is the subject of Geneva IV.

Now, our specific -- ordinarily a noninternational armed conflict would only achieve the protection of Common Article 3, because other than Common Article 3, the vast majority of both Geneva III and Geneva IV deal only with the international armed conflicts, whereas Common Article 3, of course, deals with noninternational armed conflicts.

But there's a much-overlooked provision of Common Article 2 within the Geneva Conventions which provides that the Geneva Conventions apply when there is, quote, partial or total occupation of territory of a high-contracting party,

even if it meets with no armed resistance.

That situation describes Guantanamo. And I know that my position on this may be fairly rare, but it has a great deal of support in United States case law. It is obviously the position of the high-contracting party on whose territory we sit, that is Cuba, but it is -- there is a great deal of support for it in American domestic law as well.

The first source of that law comes from a case called Adula, A-D-U-L-A, at 176 U.S. 361, a 1900 case. It was a Supreme Court case still during the Spanish American War which was dealing with the status of Guantanamo Bay, and it describes the occupation of Guantanamo Bay in a technical legal sense of occupation by the United States Marines in 1898. That occupation has never been relinquished. It was regularized in 1903 by a treaty between the United States and Cuba, which the treaty itself uses the word occupy.

Now, there is debate, I admit, over whether the use of the word occupy in the 1903 treaty is the same use of the word occupy in Common Article 2, but it certainly does not push against the idea that they -- that the United States continued to occupy.

Now, in modern times, we've had much more analysis along the same lines. We have spent at various times a fair

amount of time talking about Boumediene v. Bush, found at 553 U.S. 723, 2018. And principally we talk about its extension of constitutional rights to the de facto occupation, the de facto sovereignty of the United States at Guantanamo Bay. It has other aspects as well that don't get as much attention. One of those that is that the -- in determining the de facto sovereignty of the United States over Guantanamo, the United States Supreme Court compared the occupation of Cuba at Guantanamo Bay with the occupation of Germany following World War II. And, in fact, the United States Supreme Court reasoned that the occupation -- the occupation of Cuba is more complete -- is -- excuse me, not complete, absolute, is more absolute than the occupation of the allies of post World War II Germany.

Finally, there is a D.C. Circuit case also bears on the question and that is Maqaleh, M-A-Q-U-L-E-H, v. Gates at 605 F.3d 84, a D.C. case from 2010 which compares the occupation of Cuba by the United States with the occupation of Afghan territory in Bagram. And like Boumediene, it reasons that the occupation at Guantanamo is much more complete than the relationship that the United States bears to Afghanistan in Bagram.

So if that were true, if my position is correct, that

Common Article 2, Geneva IV applies, then what's the answer to this actual question which is before the military commission, which is what about family contacts?

Well, if that is true, if Geneva IV applies, then Article 116 provides the clear answer, there's no more debate. Article 116 of Geneva IV provides that every internee, which is a subset of detainees, every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as much as possible. Geneva IV also talks about telegrams. It's no longer possible to talk about telegrams, but I think that's a good analogy between modern communication and the telegram.

One of the aspects of military writing that I like is that sometimes in e-mails I see members of the military put the word break, and by -- what I take that to mean is I'm done talking about the thing that I was talking about before. Now I want to talk about something else. So I'm putting the word break here.

MJ [COL POHL]: Okay.

LDC [MR. CONNELL]: Because what I have been talking about recently is the direct application of Geneva IV to Mr. al Baluchi in Article 116. I'm not going to talk about that anymore. Everything that I just said about the

occupation of Cuba by the United States does not matter for everything else that I say now.

What I am trying to say is if you think, Mr. Connell, you're crazy if you think that I'm going to rule that the United States is occupying Cuba, then you can still rule in my favor based on all of the material that I'm about to cover, because that's -- that's strict Geneva that we just talked about and now we're going to talk about the U.S. domestication of international law through executive orders, congressional statutes, DoD policy.

MJ [COL POHL]: And at some point you're going to get to why this is in my lane?

LDC [MR. CONNELL]: Yes. Absolutely. Absolutely.

The -- because it's very much in your lane and so I will definitely get there. Now, so ----

MJ [COL POHL]: Just so I'm clear, this long dissertation on international law, and given the nature of the motion and reading your pleadings, is you seem to be going down that I am to ensure that the confinement facility complies with international law in these other aspects, communication with family and things like that?

LDC [MR. CONNELL]: I'm glad you asked because here's what your responsibility is. Your responsibility is also binary.

Your responsibility is to ensure humane treatment of detainees. All right. There are multiple reasons why you have to do that, largely for -- and they fall into two categories, which the military commission actually articulated in AE 018T. One of those is the ability of the military commission to proceed and the other one is the effect on the defendants' rights.

So yes, it is absolutely true that your responsibility to ensure humane treatment and the binary flip of that is to avoid cruel, inhumane, and degrading treatment, is absolutely within the lane of the military commission.

MJ [COL POHL]: Then is there any limit on, in view of my authority to -- to regulate the conditions of confinement of these five accused?

LDC [MR. CONNELL]: My goodness, there are tons of limits. In fact, there are -- there was a bill in Congress last month to move these detainees out of Guantanamo Bay, in which case geographically you would have no limit whatsoever.

MJ [COL POHL]: Well, but I'm -- what I'm saying is -- I understand there's a statutory -- it's an Article 1 court, I got it. It's limited jurisdiction, I've got that part.

LDC [MR. CONNELL]: Lots of limits.

MJ [COL POHL]: But what you just said seems to say that

any condition of confinement that may violate international law ----

LDC [MR. CONNELL]: I'm not talking about international law. In fact, that's kind of the point that I'm trying to make is I'm talking about domesticated U.S. law. The whole reason for the dissertation about the four principles of the hybrid system is to explain that.

Your ruling in AE 200 took a very limited view of what our argument was, I don't mean a limited view of the law. You took our argument to be that we were arguing that the Commission Against Torture -- excuse me, the jus cogens against torture for Mr. Al Hawsawi and the Convention Against Torture for Mr. al Baluchi gave the military commission authority to act on its own. And while that's a fair argument and I think that we were right about that, there was a lot more nuance to that because -- and what I'm talking to you today about is not, you know, please act to enforce the Copenhagen process on detention authorities in a noninternational armed conflict.

Instead what I'm asking you to do is to follow DoD policy, executive orders, and the Detainee Treatment Act of 2005, U.S. policy on what is humane treatment.

So, yes, there is absolutely a limit. Those limits

are, number one, you have -- you have a duty to ensure humane treatment, but not beyond that, unless, two, there is a direct impact on the military commissions.

So direct impact on the military commissions and the fundamental responsibility of all U.S. servicemembers and all U.S. authorities to provide humane treatment are the two limits.

So does that mean ----

MJ [COL POHL]: Does the first part -- is the first one really a limit? I've got the second one because we've talked about that, we've talked about impact on the commissions. Okay.

But the humane treatment component, and help me here, would seem to be awfully broad. That what basically you're saying, so there's something that has no nexus with this by definition it doesn't fit the subset of nexus to the commission, okay, but somehow ----

LDC [MR. CONNELL]: Let me explain.

MJ [COL POHL]: Do you see where I have trouble here?

LDC [MR. CONNELL]: I see where you are going, yeah. It's the same situation that you have in the UCMJ court. So in the -- if this were a court-martial, the -- a commander would order their Soldier, Sailor, Airman, or Marine to be confined.

You're not in their chain of command. You're not responsible for what they do. But nevertheless, it is clearly within the jurisdiction of the court-martial, because they have responsibility for the body of the defendant, it is the -- it is within the authority of the court-martial to deal with conditions of confinement. In fact, not only is it within the authority of the -- of the court-martial, it is a duty of a court-martial.

MJ [COL POHL]: That's encapsulating a specific statutory provision.

LDC [MR. CONNELL]: Not correct, sir. It is not.

MJ [COL POHL]: Oh, really?

LDC [MR. CONNELL]: Yes. That is right.

Neither the UCMJ nor the Military Commissions Act include a specific due process -- include a specific requirement for -- to supervise conditions of confinement.

MJ [COL POHL]: No, but doesn't Article 13 prohibit ----

LDC [MR. CONNELL]: Illegal pretrial punishment, of course.

MJ [COL POHL]: ---- illegal pretrial punishment and, therefore, there's a specific provision that necessarily implies there's a judicial role in that? I mean, you say you disagree there's a statute. That's the statutory reference I

was referring to.

LDC [MR. CONNELL]: I see.

MJ [COL POHL]: Is there a comparable one here?

LDC [MR. CONNELL]: Okay. Three thoughts about that.

The first one is Article 13 as has been repeatedly explained by all of the military courts is simply a -- is simply a crystallization of the due process right against pretrial punishment. Okay.

If the -- if there's a Fifth Amendment right against pretrial punishment, which there clearly is, right, and lots of cases have held against that, and the Detainee Treatment Act of 2005 requires this military commission to enforce the Fifth Amendment requirement, then the same principles which come under Article 13 are present through the Detainee Treatment Act of 2005. That's the first thing.

The second thing is ----

MJ [COL POHL]: But do you understand Article 13, when it's talking about pretrial punishment, unduly harsh conditions of pretrial confinement, okay, it's talking about -- it's not talking about all conditions of confinement that may -- that a detainee or in this case a soldier is talking about. We're talking about, you know, improperly treating the soldier where ----

LDC [MR. CONNELL]: You might say inhumane treatment.

MJ [COL POHL]: You might, but it doesn't go into whether or not he doesn't get rec period of time or things like that.

LDC [MR. CONNELL]: Okay. Well ----

MJ [COL POHL]: Well, let me just put it this way: Different judges interpret it differently, I've got that; but there's a limit ----

LDC [MR. CONNELL]: No, I understand.

MJ [COL POHL]: ---- but there's a limit of where you go down that road. And what I'm saying is when you talk about it doesn't have to have a nexus to the trial, there's another category of inhumane treatment. Under your analysis of the Article 13 analogy, that is the nexus to the trial.

LDC [MR. CONNELL]: Sure. That's a perfectly good way to say it. There are a couple of things -- that's a fine way to say it.

The -- you know, a court-martial has a nexus to the conditions of confinement in the disciplinary barracks because the defendant who is between -- in front of the court-martial is living in the disciplinary barracks. Yes, that in a way, that is the connection. The due process analysis under the Detainee Detention Act of 2005 is a connection. There are other connections.

I think that it is -- we have yet to determine the status of Article 3 -- excuse me, of Article 13 itself in the military commission. 948, 10 U.S.C. 948b lists a set of requirements from the UCMJ which are absolutely not imported into the MCA. Speedy trial, for example, is one of those. But Article 13 is not one of those. Article 13 is one of those which falls under the provision of 948b, which is, all other aspects of the UCMJ are applicable to the extent they are consistent with military commissions practice. So, you know, there is -- the status of Article 13 falls into a gray area in the Military Commissions Act of 2009 which has yet to be resolved.

So the third principle, the third connection is that there is a duty to ensure humane treatment, which is not entirely the same as avoiding pretrial punishment. Right. There will be a separate motion about pretrial punishment. In fact, what the Court of Appeals for the Armed Forces say as I read them, one of the requirements before bringing a claim of illegal pretrial punishment is to give the military commission, or the court-martial in that situation, a chance to remedy the problem.

So before we can really even come to you about the problem of illegal pretrial punishment, we have to come to you

and give you an opportunity to remedy the problem. That's only fair as a matter of judicial economy and comity, C-O-M-I-T-Y, not C-O-M-E-D-Y, the -- because if we're going to claim that there is something wrong, it's only fair to give the person who is closest in time and place and culture to the detention facility the opportunity to do something about it.

So having dealt with all of that, I would like to place on the -- I would like to show the military commission what is already in the record at 254WWWW (AAA) which is a diagram. And now if I could have the feed from Table 4, I would request permission to display it to the gallery. It's already in the record. It's already marked for public release.

MJ [COL POHL]: Sure. Go ahead. You can put it on the overhead.

LDC [MR. CONNELL]: So this diagram is my attempt to articulate graphically the protections which govern an alien unlawful enemy belligerent who is charged with a crime, capital or otherwise, in the military commissions.

So different triggers bring into effect different protections. And this is why I am talking about the domestication of U.S. law, because the -- in domesticating some international principles. Right, this is a law of war

court, that's where I began, and these men are held on the basis of the law of war. In bringing those principles into the United States, there are different triggering events.

Triggering event number one is when a person is detained by the United States. When a person is detained by the United States, there are four principles which come into effect, some of which are legally enforceable by an individual, some of which may not be.

The first of those is the Convention Against Torture. In November of 2014, the United States changed its position from what it was when the military commission ruled in AE 200LL about the status of the Convention Against Torture. Legal advisor McLeod at that time said that, we, meaning the United States, on whom she was officially speaking for, understand that where the text of the convention provides that obligations apply to a state party, in quote, any territory under its jurisdiction, comma, quote, such obligations including the obligations in Article 2 and 16 to prevent torture and cruel, inhumane, degrading treatment or punishment extend to certain areas beyond the sovereign territory of the state party and more specifically to, quote, all places that the state party controls as the governmental authority, period, quote.

We have determined that the United States currently exercises such control at the U.S. Naval Station at Guantanamo Bay, Cuba, in respect to U.S. registered ships and aircraft. In November of 2014, the United States specifically extended the protections of the Convention Against Torture, including its prohibition on CIDT to Guantanamo Bay.

The second element that applies has also changed, and that is the U.N. standard minimum rules for the treatment of prisoners. In 2015, there was a new version of those that came out. They had not been updated since the '50s and now they're known as the Mandela Rules, a reference to Nelson Mandela's 30 years in prison. The Mandela specifically which -- I am not saying -- and I want to be clear on this, I am not saying, Your Honor, that the United Nations standard minimum rules, although they govern the United States, are enforceable as a matter of right in this court. What I am saying instead is that the United States has subscribed to a number of principles which explain what treatment is humane and what treatment is inhumane.

Under the Mandela Rules, visits from family and -- and reputable friends are required, as well as reasonable facilities for communicating with family and friends, and personal visits.

The third principle is the body of principles for the protection of all persons under any form of detention or imprisonment as subscribed to by the United States over 50 years ago. And that requires visits from and the ability to correspond with the outside world.

And finally, the -- this principle, these principles are -- specifically the Convention Against Torture, but these other principles are domesticated by the Detainee Treatment Act of 2005. The Detainee Treatment Act of 2005 provides -- was specifically intended to adopt the trigger of United States detention. Because the United States Department of Defense, whether it has always lived up to them or not, has always had standards of humane treatment. So when -- Army Regulation 190-8, for example, which governs detention facilities, was put into place in its current form in 1998. The abuses which took place here at Guantanamo in 2003 and 2004 I would suggest were a violation of Army Regulation 190-8. I don't want to digress onto that, but what was clear was in the period in which Mr. al Baluchi and the other defendants were in CIA custody, it was not always clear what the authorities governing their detention were. And that is why the Office of Legal Counsel issued such -- issued the torture memoranda, interpreting things like the Convention

Against Torture to allow the treatment.

But Senator McCain in 2005 -- excuse me, in 2005 wanted to put an end to that sort of detainee treatment, and the United States adopted a law -- Congress adopted a law, which is the Detainee Treatment Act of 2005, which is memorialized at 42 U.S.C. Section 2000d(d), the prohibition on cruel, inhumane, degrading treatment or punishment of persons under the custody or control of the United States Government.

And it provides in subsection A that no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhumane, degrading treatment or punishment. That is not international law. That is instead a domestication of principles of international law by Congress. And you do not have to reach out to international law except as it informs what Congress meant, right.

Later in the Detainee Treatment Act there is a reference to the Convention Against Torture and the U.S. reservations and understandings on it. So it is clear domestication of U.S. law principles. That's the trigger. Those principles apply when the United States holds a person anywhere in the United States -- in the world.

Now, what about the fact that we're on a Department

of Defense base? That is the second trigger. That brings into effect Department of Defense policy, including specifically DoD Directive 2310.01E, the detainee treatment program, and Army Regulation 190-8. I do want to digress and I'm pretty sure the military commission knows all about this, but I keep referring to it as AR 190-8. Each branch has its own equivalent to it and the Navy name for it is so long that I can barely even pronounce it.

MJ [COL POHL]: Just use the Army shorthand.

LDC [MR. CONNELL]: Right. We'll just use the Army shorthand. The DoD Directive 2310.01E is important because it adopts the requirement of humane treatment -- it reinforces, I should say, the requirement of humane treatment on all Department of Defense-held prisoners. And it incorporates three specific parts of international law.

So even if you don't agree that -- even if you were to adopt the 2002 Bush interpretation that Common Article 3 of the Geneva Conventions does not apply to members of al Qaeda, for example, I think which has been repudiated, but even if it we were looking at that, DoD 2310.01E specifically incorporates three parts of international law.

The first is Common Article 3, which includes the prohibition against ill treatment. The second is Additional

Protocol I, Article 75, which sets forth trial rights, and Additional Protocol II, Articles 4 through 6. Now, it's Additional Protocol II that we had our slight disagreement with the Bin'Attash team on what effect -- whether Additional Protocol II applied organically, but ultimately, it doesn't really matter because it applies by -- it's been domesticated by DoD policy.

Now, paragraph 3(b)(1)(B), of -- excuse me, 3(b)(1) of DoD Directive 2310.01E sets out a precise definition for the Department of Defense of what humane treatment includes. And if the military commission is looking for a limit beyond which it cannot go, I would suggest that the DoD policy requiring humane treatment is an awfully good limit. You know, the standards for humane treatment are low. They are not lemonade on Tuesdays. They are not, you know, an extra soccer ball at the rec. What they are are the fundamental requirements that are needed when one institution holds a human being as a prisoner.

And 3(b)(1)(B) provides that humane treatment includes appropriate contacts with the outside world, whether, where practical, exchange of letters, phone calls, and video telephone conferences with immediate family or next of kin as well as family visits.

Now, the same principle is expressed in Army Regulation 190-8 which requires humanitarian care and treatment of prisoners under Army custody. And it says, I quote, Here relatives and other persons authorized by theater commander will be permitted to visit as frequently -- the person as frequently as possible, in accordance with theater regulations.

Now, these principles are not foreign to Guantanamo. When Commander Heath -- excuse me, when Colonel Heath testified, he testified that he follows 190-8, that he considers AR 190-8, he considers to it to be an important source of law. But more than that, we have seen Guantanamo implement these procedures for so-called non-high-value detainees meaning people who were not held by the CIA.

The ICRC has reported that -- in February 2014 reported that it has facilitated over 3,100 phone calls and video teleconferences between family members between 2018 and February of 2014. And, in fact, this is just -- this is part of our brief that's already been submitted to -- already been cleared, but if you could -- if I could have the document camera, please.

With DoD permission, the ICRC has released a photograph of the facility that it has for making telephone

calls -- for telephone calls by detainees and for video teleconference material -- excuse me -- processes. You see the camera on top of the video.

Thank you. If we could return to the feed from Table 4.

The third trigger for protections of the -- of a prisoner is detention at Guantanamo specifically. Because as we talked about in the Maqueleh case from the D.C. Circuit, detention at Guantanamo is detention -- is different from detention at other places such as Bagram.

At Guantanamo, the constitutional amendments apply -- provisions of the Constitution will apply unless they are impracticable and anomalous, that's the language of Boumediene. And we know specifically, because that's generally, but specifically we know that the ex post facto clause applies from the D.C. Circuit, we know the appointments clause applies from the D.C. Circuit, we know the define and punish clause applies from the D.C. Circuit, and we know that the suspension clause applies from the United States Supreme Court.

So that brings us to that -- we're done with the blue circle now and we're moving to the yellow circle, which is when a person is -- a person can be detained at Guantanamo on

something other than the law of war. There have been many migrants detained at Guantanamo, for example. But when a person is detained by the United States on its DoD base at Guantanamo under the law of war, it brings into effect additional protections.

One of those is customary International Humanitarian Law, or more simply put, the law of war. We've already talked -- and we've already talked about the Geneva Conventions, we have already talked about Common Article 3, but we have not talked much about the other two major sources of customary international law. The Customary International Law itself -- this is for a noninternational armed conflicts. The Customary International Law itself is summarized by the ICRC in its occasionally updated rulebook, if you will, and the customary -- the principle of Customary International Law that applies here is Rule 126, which says that persons deprived of their liberty in connection with a noninternational armed conflict must be allowed to receive visitors, especially near-relatives, to the degree practicable.

This principle is reflected in an awful lot of treaties, including the Cairo Declaration on Human Rights in Islam and the Council on European Prison Rules. The United

States is not signatory to those.

One of those processes that the United States has participated in, however, is the Copenhagen process on the handling of detainees in international military operations. The reason for the Copenhagen process, which the United States participated in its development from 2007 to 2012, is to fill the gap in international law about, well, how do we handle prisoners in noninternational armed conflicts? And the United States officially welcomed that process in 2012, and its black letter principle 10 is that persons detained are to be permitted to have appropriate contact with the outside world, including family members, as soon as reasonably practicable. The comment to that black letter principle specifically includes visits from family.

Now, what about domestication of this? We have seen domestication of these principles by the President of the United States in Executive Order 13491, which requires humane treatment, specifically at Guantanamo. It is known as ensuring lawful interrogations. It references provisions of the Convention Against Torture and the principles of International Humanitarian Law.

Article 14, of course, of the military convention -- excuse me -- of the Convention Against Torture includes the

idea of rehabilitation from torture. And we have talked in our brief to a good extent, and we're going to come back to this when we get to the what do I want you to do about it question, about the importance of a family connection and a support system in rehabilitation from torture. Because treatment of torture, the family connection, involves four different aspects: Detecting trauma, when is a person acting out of trauma, confronting that trauma, urging recapitulation of the trauma, meaning trying to reduce it to a way that the torture survivor can understand, and facilitating resolution of conflicts related to the trauma.

Now, every other detention facility for alleged war criminals in the world allows phone calls and family visits under its definition of humane treatment. Am I saying that you have to do something because -- this military facility has to do something because some other facility does it? No, I am not. What I am saying instead is that there is a baseline which is -- begins at the Department of Defense but is shared and, in fact, promulgated by the United States to the rest of the world about what constitutes humane treatment.

MJ [COL POHL]: Mr. Connell, let me ask you a question.

LDC [MR. CONNELL]: Certainly, sir.

MJ [COL POHL]: Maybe we're talking about two separate

things here. Reading the 183 pleading, it seemed to say that there is phone calls to the families.

LDC [MR. CONNELL]: So there are not phone calls to families. The -- I can tell you exactly what the situation is. Sometimes the vocabulary gets messed up.

In -- last year after the filing of this brief, the military commission -- excuse me, the JTF-GTMO has never allowed a phone call between Mr. al Baluchi and anywhere.

But beginning last year ----

MJ [COL POHL]: Oh, okay. So -- I just read what I'm given.

LDC [MR. CONNELL]: Of course.

MJ [COL POHL]: And it says in here -- doesn't talk about Mr. al Baluchi, it says that the commander permitted the transfer of Mr. Mohammad to camp Echo II in order to allow him to participate in Internet-supported delayed video telephonic transmission with his family.

LDC [MR. CONNELL]: Right. Which is not the same as phone calls.

MJ [COL POHL]: Okay.

LDC [MR. CONNELL]: It's not simultaneous communication at all.

MJ [COL POHL]: I didn't say that. I'm simply ----

LDC [MR. CONNELL]: I thought you asked didn't they have phone calls.

MJ [COL POHL]: Well, okay. Video phone calls.

LDC [MR. CONNELL]: They're not video phone calls, either.

MJ [COL POHL]: It's a video telephonic transmission, that's the term you used.

LDC [MR. CONNELL]: But you're missing the -- I don't know how they called it, the nonsimultaneous consecutive order.

MJ [COL POHL]: That's all in there. I got that. But I'm saying that -- well, I'm just trying to figure out is you're asking for communication with the family.

LDC [MR. CONNELL]: Yes.

MJ [COL POHL]: And we're quibbling over the word phone call and to the exact, precise thing.

LDC [MR. CONNELL]: I don't mean to quibble.

MJ [COL POHL]: But you are, but go ahead.

LDC [MR. CONNELL]: Okay. Fair enough.

MJ [COL POHL]: But what I'm just saying is do they get currently video telephonic transmissions with the family?

LDC [MR. CONNELL]: So I want to tell you exactly what they get, is they get -- once per quarter, they're authorized to have a recording of themselves, which is then -- there's then a 10- to 15-minute gap while that is translated and

reviewed for classification. And then that video gets played for a person on the other end. Right? Then that person has the opportunity to record a video, two to three minutes in length, which is screened, however they want to screen it, and then is played for the detainee. Sometimes it goes back and forth twice, sometimes it goes back and forth three times. That is what they have access to.

MJ [COL POHL]: And that's -- okay. They have that communication, and you don't like that? You want something more that that?

LDC [MR. CONNELL]: I do like it. I think it is better than what we had when we filed this position, which is nothing ----

MJ [COL POHL]: Okay.

LDC [MR. CONNELL]: ---- but it is not simultaneous communication, which is what is required.

MJ [COL POHL]: Okay. Okay. I just wanted to clarify that there is some ----

LDC [MR. CONNELL]: Yes.

MJ [COL POHL]: ---- just so we're precise here ----

LDC [MR. CONNELL]: Yes.

MJ [COL POHL]: ---- video telephonic transmission between the detainees and their family.

LDC [MR. CONNELL]: I don't know why the word "telephonic" is in there.

MJ [COL POHL]: Excuse me. I just read what's on the ----

LDC [MR. CONNELL]: Well, I can't speak for ----

MJ [COL POHL]: I read what Mr. Nevin wrote. Regardless, it's a delayed procedure as you described.

LDC [MR. CONNELL]: Yes. The procedure.

MJ [COL POHL]: Go ahead.

LDC [MR. CONNELL]: You know, I listed a witness to tell us about -- about this procedure, and so I'm happy to -- we're happy to take evidence on it. But yes, what I just described is my understanding of the current state of affairs.

MJ [COL POHL]: Okay. So each detainee has an opportunity to do that once a quarter.

LDC [MR. CONNELL]: That's my understanding, yes.

MJ [COL POHL]: You always qualify that. When you say it's your understanding, because you're not there at the time?

LDC [MR. CONNELL]: Your Honor, the rules have probably changed at Guantanamo while we have been arguing this morning. So I can only keep up so fast, right?

MJ [COL POHL]: Right. Okay. Go ahead.

LDC [MR. CONNELL]: So the -- let's move to the last part, which is what's the military commission's jurisdiction

specifically, right? We know that only a small number of the men who are held by the United States under the law of war in Guantanamo are charged in a military commission, and that attaches additional certain provisions to them.

Most of the provisions of the Military Commissions Act of 2009 only applied to charged individuals. The Sixth Amendment of the United States is -- of the United States Constitution is triggered only by a charging document, and the -- most of the provisions of the Sixth Amendment are triggered only by a charging document and orders of the military commission obviously apply only to the people before it.

So what order can the military commission -- what is the authority of the military commission to order this? Now, the -- clearly conditions of confinement are properly within a military court's jurisdiction. The -- we talked earlier about that Article 13 is not an affirmative grant of power, it's a reflection of the due process right against cruel, inhumane, and degrading treatment as defined in the Detainee Treatment Act of 2005. So you don't even have to decide that the Fifth Amendment applies of its own organic power to these military commissions in order to obey your statutory commandment to ensure that no one is receiving cruel, inhumane, or degrading

treatment as defined in the Detainee Treatment Act of 2005.

In fact, one of the things that -- the military courts are so clear on this topic that there's actually a sort of additional procedural default rule. We are required to raise conditions of confinement arguments contemporaneously to our military tribunal or risk waiving them. One example of that is United States v. White, 54 MJ 469, a Court of Appeals of Armed Forces case from 2001.

Now, at this point, I'm not going to show this document, but specifically with the question of what effect does the -- is had on the military commissions, I want to refer to a document which was referred -- which was filed yesterday, has not yet been reviewed so I'm not going to say any specific content of it, I'm just going to say what it's about.

But the 425 -- AE 425E Attachment I includes a declaration from a physician about -- which describes his inspection of the conditions of confinement at Camp VII and their effect on Mr. al Baluchi's state. So the -- that's all I'm going to describe about it. Everybody has it in the record. I think it's unclassified, but once it's reviewed, then we can talk about it more.

But the -- that Sixth Amendment interest and the

effect on Mr. al Baluchi is reflected in two ways. The -- but mainly, it's there's a direct effect on his health, which we've talked about, but a direct effect on Mr. al Baluchi's ability to participate meaningfully in his defense.

Now, there are sort of three categories, right? There's a -- there's a person who's fully competent, there's a person who is incompetent to assist in their defense, and until you get to that level of a person being incompetent to assist in their defense, they no longer -- the military commission is not all that involved in their treatment. But there is in the middle something of a sliding scale of a person's ability to participate meaningfully in their defense. And we've seen it reflected in other military commissions actions, protecting the space at Echo II, protecting the ability to move back and forth to legal visits. And the ability of Mr. al Baluchi to function as a normal human being and as a prisoner who is a normal human being is directly relevant to his ability to participate meaningfully in these events. The -- and the Attachment I that I just referred to I think will shed some light on that.

So that brings us to -- there is actually a second part of the AE 321 series, and that is the government's filing in AE 321D.

LDC [MS. BORMANN]: Judge, I hate to interrupt, but we -- I am in desperate need of a comfort break, so I don't know if ----

MJ [COL POHL]: We're going to recess for lunch in eight minutes. Is that enough time?

LDC [MS. BORMANN]: No, that's fine.

MJ [COL POHL]: Okay.

LDC [MR. CONNELL]: Eight minutes. I hear it. Eight minutes happens to be the amount of time one gets in an intercollegiate debate.

So stenos, get ready.

The AE 321D is a motion by its caption of 505(f)(2) motion under seal filed by the government on 28 April of 2016. Our objection to that is found at AE 321E (AAA), and this is at -- I have filed some version of this objection maybe 40 times. This is the first motion that has come up that I have ever had the actual opportunity to argue it, and this is an example of years after the briefing is completed, the government injects an under seal ex parte pleading into the series which unilateralizes an otherwise adversarial motion.

The government takes a -- and they have done it now in 308 and they have done it in a series of motions now where they take -- we're having an adversarial conversation. The

military commission has the authority to rule and regulate the conversation between the parties, but instead, the government goes ex parte instead.

Now, their procedure for doing so in 321D, like on so many other occasions, is improper. In order to file an ex parte pleading under 505(f)(2), the -- there must be two invocations of the classified information privilege. The first is under 505(c), which is a general invocation, and the second is under 505(f)(1)(A), which is a specific invocation.

And we know both from the text of 505 itself and from the text of 10 U.S.C. 949p-4 and from Ellsberg v. Mitchell at 709 F.2d 51, D.C. Circuit case from 1983, that that invocation of classified information privilege must itself either be public or have a public explanation of why a public explanation would endanger national security.

The 505(f)(2)(B) does not permit an ex parte invocation of privilege. It only permits an ex parte request for authorization. It excludes the 505(c) invocation of privilege which is required under United States v. Reynolds 345 U.S. 1, 1953, and it -- 505 treats the invocation of privilege separate from the request for authorization. I am not making an argument that the government cannot make an ex parte request for authorization. In fact, it surely can.

Under CIPA -- this one of the differences between 505 and CIPA. Under CIPA Section 4, the ex parte hearing is permissive, but under 949p-4 and 505(f)(2)(B), the ex parte procedure on the request for authorization is mandatory if it is necessary to protect classified information. That is why you have to have a public invocation of classified information privilege so that we can have a meaningful debate over whether it is necessary -- quote, in the language of the rule, necessary to protect classified information.

This -- I just want to point out that in United States v. Rezaq, R-E-Z-A-Q, 899 F.2d 697, D.C. District case from 1995, the district court explained why the permission to file ex parte must be adversarial. The D.C. District took a different approach in the United States v. Libby. At that time, 429 F.2d 46, they took a -- they did it the opposite way. They said that the government in its pleading must explain why the defense does not have a need to know and why this classified information is different from all that other classified information that they provided.

Bottom line on this ----

MJ [COL POHL]: Who do they provide that explanation to?

LDC [MR. CONNELL]: You.

MJ [COL POHL]: Got it.

LDC [MR. CONNELL]: The idea that both the request for authorization and the invocation of classified information privilege are both ex parte violates not only the D.C. Circuit law but also 949p-4 and 505(f). Thank you very much.

MJ [COL POHL]: Thank you. We'll recess until tomorrow at 1000 hours. Today at 1330, we'll conduct a discussion of classified information under Commission Rule of Evidence 505(h). So the commission is in recess for the public session until tomorrow at 1000 hours.

[The R.M.C. 803 session recessed at 1159, 1 June 2016.]

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