[The R.M.C. 803 session was called to order at 1550, 23 February 2016.]

MJ [COL POHL]: The commission is called to order. All parties are again present that were present when the commission recessed.

Okay. 018 series, and there is -- like I said, there are four subparts to this. Who wants to be heard first and on which one?

LDC [MR. NEVIN]: Well, I don't know if "want" is the right word, but I just realized you listed 018EE as the first one on the sheet, and so -- and I don't know how you have it broken up into four blocks, but I could speak to 018EE if ----

MJ [COL POHL]: Okay. Why don't we start with that one, then.

LDC [MR. CONNELL]: Before Mr. Nevin starts, would you mind telling us what your four areas are? Because we might have broken them up ourselves a little differently.

MJ [COL POHL]: 018W, 018Y, and there is a lot of subcategories to these things, 018BB. Actually 018KK, 018MM, 018PP, and I believe 018FFF, so actually there are seven categories. But, again, I just got a whole stack of them here, so they may intertwine. So pick whatever starting point you like and then we will address them as they go through.

1 LDC [MR. NEVIN]: And maybe we should -- I'm sorry.
2 MJ [COL POHL]: Mr. Schwartz.
3 DDC [MR. SCHWARTZ]: Your Honor, you don't have on the
4 docketing order HH. I think the reason for that is that
5 filing inventory shows it as granted on the record. It was
6 only granted in part on the record, so I think it would be
7 appropriate to take it up in this context.
8 MJ [COL POHL]: All right. Remind me. Okay. You wanted
9 to start with EE, Mr. Nevin?
10 LDC [MR. NEVIN]: Well, not -- that's why I ----
11 MJ [COL POHL]: Okay.
12 LDC [MR. NEVIN]: I didn't say want to.
13 MJ [COL POHL]: I put ten or so on here. Pick which one
14 you want to start with.
15 LDC [MR. NEVIN]: Okay. 018EE is part of 018Y, and so I
16 don't know if starting with EE means we are going to have to
17 go right after YY. I didn't really look at them. Maybe the
18 parties should put their heads together for a minute and
19 propose a way forward, if that would be useful. I can argue
20 018EE, though, if you want me to.
21 MJ [COL POHL]: Okay. Let's do this, because I'm going to
22 give you guys some time to work on both sides and figure out
23 the order of march you want to do on this because there are

1 other things we could address.
2 I know I had mentioned this one before, but this may
3 be a good one point to do which we could at least start today.
4 Then what I want to do is, there are so many parts of the 018
5 series, when we get done today, think about how you want to
6 group them. My grouping isn't necessarily your grouping, and
7 then we'll start with them tomorrow.
8 But would both sides be prepared to address 183,
9 telephonic access?
10 ATC [MS. TARIN]: No, Your Honor. The government will be
11 submitting an additional pleading on this matter and request
12 that we defer oral argument.
13 MJ [COL POHL]: I would say 371, but I think that's kind
14 of part of 018.
15 LDC [MR. CONNELL]: Your Honor, I know the government
16 wanted to do 391.
17 MJ [COL POHL]: Okay. Let's start with 391, then.
18 TC [MR. RYAN]: Actually, Judge, with the 018s coming,
19 that was where we were. I would ask 391 not come yet.
20 MJ [COL POHL]: Okay.
21 TC [MR. RYAN]: I'm sorry, sir.
22 MJ [COL POHL]: That's okay. Okay. Then we are going to
23 start with 018Y. It's the government motion for an interim

1 order.
2 CP [BG MARTINS]: Your Honor, if you will just give me
3 just a moment.
4 MJ [COL POHL]: Sure, sure. Go ahead. And just to put
5 you on notice, unless there is an issue, I will take 018W
6 next.
7 Okay. General Martins.
8 CP [BG MARTINS]: Your Honor, this is intertwined with
9 Appellate Exhibit 371, we believe, because it impacts on
10 similar pieces of your communications management order, but
11 understand that a lot of the 018 series is -- is overlapping.
12 The government simply seeks clarification that your
13 order protecting privileged written communication is not to be
14 used to circumvent the Joint Task Force nonlegal mail system.
15 This refers to Appellate Exhibit 018U of November 6, 2013.
16 The essential facts are all undisputed. The accused
17 is detained under the Law of Armed Conflict in a Department of
18 Defense detention facility. The United States is in a state
19 of hostilities with al Qaeda and associated forces. The
20 accused has a right to challenge the lawfulness of his
21 detention under the Law of Armed Conflict. He also has the
22 right in these proceedings, through an up-front evidentiary
23 pretrial hearing, to challenge his status as an unprivileged

1 enemy belligerent.
2 He is charged, and presumed innocent until trial,
3 with crimes codified in the Military Commissions Act. You, as
4 presiding judge of the commission convened to try those
5 charges, have issued an order relative to privileged written
6 communications applicable to the cases against the five
7 co-accused.
8 In your ruling accompanying that privileged written
9 communications order, you note that it is intended, quote, "to
10 strike an appropriate balance between JTF-GTMO's security
11 concerns and the necessary protection of privileged
12 communication critical to the attorney-client relationship."
13 That's your ruling in Appellate Exhibit 018T of
14 6 November 2013 at paragraph 11.
15 The commission's privileged communications order
16 itself draws a line between lawyer-client privileged
17 communications and other case-related material on the one hand
18 and nonlegal mail and material on the other. It further
19 defines the former lawyer-client privileged communications and
20 other case-related material as information that is, quote,
21 "directly related to the military commission proceeding
22 involving the accused," and that is paragraph 2.1.4 of your
23 order, and it thus protects such privileged or directly

1 case-related information from being treated as prohibited
2 coming into or going out of the camp or from being freely
3 subject to search or inspection by government personnel,
4 communications or information.
5 No further fact-finding concerning the four incidents
6 in question in Appellate Exhibit 018Y, and I would submit 371,
7 is necessary, as defense counsel's averments in their
8 responsive pleadings fully acknowledge precisely the point of
9 the government's requested relief. It is undisputed that an
10 International Committee of the Red Cross message dated
11 11 October 2013 from Khalid Shaikh Mohammad's wife to the
12 accused included the statement, "The letters you sent through
13 the attorneys as an experiment have reached us." That's
14 Appellate Exhibit 018Y, Attachment C.
15 Defense counsel have not stated in so many words that
16 they formed part of the chain through which non-case-related
17 letters addressed to the accused's wife and others were
18 conveyed to the recipients overseas in 2013, nor have they
19 denied it. Rather, they explain a need to, quote, "pursue an
20 alternative to the normal process of submitting ICRC letters"
21 that are conveyed through JTF-GTMO and that such an
22 alternative was pursued, quote, "so the defense could deliver
23 the letters to the family members to whom the respective

1 letters were addressed." That's Appellate Exhibit 018FF.
2 We do not dispute that the defense were aided in
3 these transmissions at some points by government personnel who
4 also were confused by the military judge's order, hence
5 requiring the clarification we seek.
6 MJ [COL POHL]: What's the source of confusion?
7 CP [BG MARTINS]: If I could continue, I could explain.
8 MJ [COL POHL]: Go ahead.
9 CP [BG MARTINS]: It is undisputed that a nonlegal letter
10 from the accused reached United Kingdom citizen and resident
11 Rory Green, as reported in the media in January 2014,
12 Appellate Exhibit 018Y, Attachment K, and Appellate
13 Exhibit 018FF, Attachment G.
14 Again, defense counsel have not stated in so many
15 words that they formed part of the chain through which this
16 non-case-related letter was conveyed to the recipient, nor
17 have they denied it. Rather, they include what is presumably
18 the 29-page typed document in their response to the
19 prosecution's motion explaining that their client's, quote,
20 "letter to Mr. Green was submitted for review to the Chief
21 Security Officer, Office of Special Security, Washington
22 Headquarters Service, who in turn submitted it for review to
23 an appropriate original classification authority," a process

1 followed by defense counsel to declassify communications from
2 their clients so they no longer need to treat those
3 communications as classified.
4 It is also undisputed that a few days later, in
5 January 2014, a 36-page unprivileged statement to the
6 Crusaders of the Military Commissions in Guantanamo was
7 published by the Huffington Post. Copies of the same document
8 had been delivered about four weeks earlier by defense counsel
9 for the accused to, as defense counsel described it, quote,
10 "various persons -- personnel," excuse me, "within the
11 military commissions including prosecutors, personnel
12 representing other defendants and personnel associated with
13 the Office of Military Commissions."
14 The two copies given to the prosecution on
15 20 December were not distributed and have been stored as
16 evidence, and it is undisputed that on 3 September 2015 a
17 so-called letter to the President from the accused consisting
18 of 71 pages was attached to a motion, Appellate Exhibit 371,
19 filed by defense counsel for the accused in an e-mail
20 addressed to at least 97 recipients, including all the members
21 of all defense teams.
22 Defense freely acknowledged that months earlier they,
23 quote, "attempted to deliver the letter to the Joint Task

1 Force Guantanamo for review and transmittal," and, quote, "at
2 that time a J2 representative accompanied by an assistant
3 Staff Judge Advocate refused to accept the letter."
4 They also acknowledged that the Defense Information
5 Security Officer for the accused submitted the letter to
6 classification authorities for review and that while certain
7 original classification authorities found, quote, "they had no
8 equities in the information," this is from the defense
9 pleading, the Department of Defense had determined that the
10 letter was nonlegal mail and that it needed to be screened by
11 JTF-GTMO in accordance with JTF-GTMO SOP, a classification
12 review not replacing this requirement.
13 So this is the document the military commission has
14 sealed. So those are the undisputed facts, Your Honor.
15 You also identify in your ruling accompanying your
16 privileged communications order what we believe to be the
17 correct standard. Is there a valid rational connection
18 between the order and the legitimate government interest of
19 protesting both national security and the safety of guards and
20 other personnel who are assigned to work in the detention
21 facility?
22 You applied that standard to your own order. It also
23 applies to the nonlegal mail policy of the JTF. There is

1 clearly such a valid rational connection between the nonlegal
2 mail policy of the Joint Task Force and a legitimate
3 government interest. There is a legitimate government
4 interest in restricting the dissemination or delivery of
5 messages not directly related to a legal case by someone who
6 is properly detained as an enemy belligerent; that al Qaeda
7 cloaks its membership by renouncing distinctions in the Law of
8 Armed Conflict between combatants and noncombatants and by
9 wearing civilian clothing only heightens that legitimate
10 interest.
11 The Joint Task Force policy reasonably protects this
12 legitimate interest, limiting nonlegal mail to two letters to
13 detainees' immediate family per month, transmitted by the Red
14 Cross. It is a valid and rational thing to screen the mail of
15 enemy captives, and this court should defer to the camp
16 commander using the standard announced again and again by
17 courts in analogous domestic correctional situations which
18 are, I submit, less compelling than this one.
19 Courts have long recognized that, quote, "Once the
20 government has exercised its conceded authority to detain a
21 person pending trial, it obviously is entitled to employ
22 devices that are calculated to effectuate this detention."
23 Bell v. Wolfish, 441 U.S. 520, point cite 537, the 1979

1 Supreme Court case.
2 Since the government has legitimate interests that
3 stem from its need to manage the facility in which the
4 individual is detained, such as maintaining security and order
5 at the institution, restraints that are reasonably related to
6 the institution's interest in maintaining jail security do
7 not, without more, constitute unconstitutional punishment.
8 That's also Bell v. Wolfish.
9 The Supreme Court has recognized that running a
10 prison is an inord- -- I'm sorry, inordinately difficult
11 undertaking that requires expertise, planning and the
12 commitment of resources, all of which are peculiarly within
13 the province of the Legislative and Executive branches of
14 government. That's the Turner v. Safley language, 482 U.S.
15 78, 1987 case.
16 As such, the inquiry of federal courts into prison
17 management must be limited to the issue of whether a
18 particular system violates any prohibition of the Constitution
19 or, in the case of a federal prison, a statute. A wide range
20 of judgment calls that meet constitutional and statutory
21 requirements are confided to officials outside of the
22 judiciary, and again that's Bell v. Wolfish.
23 Not only does Supreme Court precedent in this area

1 demand judicial deference, Your Honor, it discourages a
2 standard of heightened scrutiny for detention operations for
3 fear that every administrative judgment would be subject to
4 the possibility that some court somewhere would conclude that
5 it had a less restrictive way of solving the problem at hand,
6 and therefore courts have routinely deferred to the judgment
7 of corrections officials and wardens unless the record
8 contains substantial evidence showing their policies are
9 unnecessary or an unjustified response to the problems of
10 security.
11 So your inquiry on the defense motion in this
12 instance, you know, is simple: Is it nonlegal mail or
13 material, and if so, has the JTF cleared its release. We
14 would request that in light of that factual record, that
15 clarifying the order as it pertains to nonlegal mail is in
16 order, Your Honor.
17 MJ [COL POHL]: Okay. Thank you.
18 Defense? I think Mr. Connell wants to talk first,
19 Mr. Nevin.
20 LDC [MR. CONNELL]: Do you mind?
21 LDC [MR. NEVIN]: No.
22 LDC [MR. CONNELL]: Your Honor, may I approach?
23 MJ [COL POHL]: Sure.

1 **[Pause.]**

2 LDC [MR. CONNELL]: Your Honor, for some security
3 technical reasons, I am going to defer to Mr. Nevin.

4 MJ [COL POHL]: Okay.

5 LDC [MR. CONNELL]: And with that understanding you are
6 going to circle back to me.

7 MJ [COL POHL]: Mr. Nevin.

8 LDC [MR. NEVIN]: Your Honor, thank you. My treatment of
9 018 or response to 018Y is, of course, contained in our
10 responsive pleadings, and I know the military commission has
11 reviewed that.

12 I have also asked for discovery from the government.
13 It was refused and I filed a motion to compel. We've filed a
14 motion to compel discovery, which was 018EE, and does the
15 military commission want me to address 018EE in the course of
16 talking about 018Y?

17 MJ [COL POHL]: Let's just talk about the issue before me.
18 What I'm hearing from the government is nonlegal mail is being
19 processed not through the JDG, and that a classification
20 review is somehow sufficient for an attorney to take nonlegal
21 mail and disseminate it to third parties without going through
22 the JDG. That's what I thought I heard them say.

23 Now, so maybe if we just come back to what the issue

1 is. If it's nonlegal mail, does it have to be -- do you
2 believe it has to be processed through the JDG?
3 LDC [MR. NEVIN]: Your Honor, if I could ----
4 MJ [COL POHL]: Sure.
5 LDC [MR. NEVIN]: ---- counsel has misrepresented the
6 state of affairs about the materials that are at issue in this
7 motion. We filed a detailed response to this, and I will say
8 the government made a variety of allegations in 018Y,
9 characterized the matter as an emergency, and filed its
10 motion, which was released on the website, and as a result of
11 that, one member of my team was held up to a fair amount of
12 embarrassing ridicule on national television.
13 So we -- to begin with, the factual premise that is
14 presented to you is one that's incorrect, and there are enough
15 layers on the cake that I kind of have to step -- go through
16 them stepwise. Because first of all, what the government
17 alleged to you was -- in 018Y was incorrect, and they have
18 never gone back and acknowledged that or conceded that what
19 they alleged was incorrect and that they didn't conduct an
20 investigation of any kind, apparently, to determine whether or
21 not they were correct or false. They just willy-nilly made
22 these allegations, serious allegations, against the members of
23 my team, including me.

1 And in some ways I want to say it's not fair to
2 simply jump over that and go to a discussion of the underlying
3 question that's presented by 018Y.
4 MJ [COL POHL]: No, I wasn't -- you looked like you were
5 struggling for a starting point and I just gave you that as a
6 starting point. If you want to start with that, you can.
7 LDC [MR. NEVIN]: Okay. Yes, I would appreciate being
8 able to start with that, because I think it's important. And
9 we've filed responsive pleadings, you know, and counsel begins
10 by talking about the letter from Mr. Mohammad's wife
11 indicating that a letter had been sent to her from us and
12 saying that we've never acknowledged that we were part of the
13 process of delivering that letter to her, and counsel stood
14 here and said that, even though we stated in our responsive
15 pleadings that we took that letter to the SJA, along with some
16 other letters, to the assistant SJA who was our interface for
17 Camp VII, and we gave those letters to him. That's the man
18 who testified before you on a number of occasions and who is
19 not here anymore, but I know that the military commission is
20 familiar with this man.
21 We gave those letters to him and we said we would
22 like to send these to Mr. Mohammad's wife, the nonlegal mail
23 process. Assuming that this is -- for the sake of discussion

1 that this is nonlegal mail, which it is not, and I will get to
2 that in a while, but assuming that this is nonlegal mail, and
3 in an excess of caution, and having to do with the allegations
4 that have been made in the case and the pendency of
5 investigation and the occasional references to Lynne Stewart,
6 we took the extremely conservative route of taking this letter
7 to the SJA. The SJA puts it through a process, which was
8 opaque to me, but he said involved taking it to J2 screeners,
9 and then he gave us the letter back and he said it's good to
10 go and so we delivered it.
11 And after that, Mr. Mohammad's wife wrote back and
12 said the letter that you delivered to me through the lawyers
13 has been received, and it gave us some indication of how long
14 the process took for letters to come back through.
15 Then there was a letter from a young man who is a
16 British citizen, who wrote to Mr. Mohammad. Plainly, from the
17 face of the letter, you can see he is Christian, and intensely
18 Christian, and he wrote to Mr. Mohammad saying -- he wrote to
19 Mr. Mohammad saying, "You should repent, you should find Jesus
20 as your savior," and encouraging him along those lines.
21 The government wrote that this letter had gotten to
22 Mr. Mohammad, that it had been received by JTF-GTMO, but it
23 had never been delivered to Mr. Mohammad by JTF-GTMO, and they

1 concluded or it was implicit in what they argued that we had
2 taken the letter from this citizen and we had sneaked it in to
3 Mr. Mohammad without it going through this process somehow.
4 In fact, what happened when we finally were unable
5 to lay our hands on the letter is that it has the GUAN number
6 at the top of it, the G-U-A-N number, which JTF-GTMO puts on
7 incoming letters, it had a GUAN number on it so that the
8 allegation that the government made was patently false, and
9 obviously made without them having made the slightest effort
10 to determine -- determine the actual sequence of events.
11 And then with respect to both those letters, the
12 allegation was that the next thing that happens is that they
13 show one in a Huffington Post article and the other in another
14 publication, the implication being that we had done those,
15 that we had delivered those things to the media in that way,
16 and there is -- without any reference to the fact that we had
17 put this through classification review, that we indicated in
18 the classification review that we were going to -- that we
19 were going to release these materials publicly, and we were
20 told by the classification authorities that the letters
21 were -- that the letters were cleared
22 MJ [COL POHL]: Okay. And I guess that's where perhaps
23 the dispute kind of arises. If it is nonlegal mail, by going

1 through classification review, that permits you to then
2 release it after that, is that your position?
3 LDC [MR. NEVIN]: Well, we ----
4 MJ [COL POHL]: I am just trying -- because it seems to
5 me -- we get to definitions in a second. From reading these
6 motions, the dispute is there is no classification issues in
7 it, does that permit you to not -- to send nonlegal mail
8 without going through the confinement facility?
9 LDC [MR. NEVIN]: Well, I have a number of objections to
10 the -- or a number of, I guess you would say, bones to pick
11 with the question, because maybe I should back up.
12 I can't help standing up here before you in 018Y not
13 to begin by articulating the frustration we feel, just as we
14 did with, for example, 350B, which makes all manner of
15 accusations against us and then 15 months later is just
16 withdrawn because we don't really -- because cooler heads
17 prevailed.
18 MJ [COL POHL]: Okay. I didn't mean to interrupt you,
19 it's just as you raised that point and that seems to be -- I
20 understand the eaches you want to talk about, and I'm
21 certainly going to permit you, Mr. Nevin, because the
22 government raised them. If you want to rebut on that, that's
23 fine, but sometimes my train of thought is such that you

1 raised the issue that it went through classification review
2 and my only question is if it goes -- does that then mean it
3 doesn't need to go through the Joint Task Force nonlegal mail
4 procedures? I guess that's my question. You can come back to
5 it if you want to, but that's ----
6 LDC [MR. NEVIN]: No, I understand the military
7 commission's question and my -- my thought and -- my thought
8 for arguing -- and here's the answer to your question or the
9 way it works is this. Whether this is nonlegal mail or not is
10 not something -- I think it is not something that's been
11 determined.
12 The fact that it is nonlegal mail is not something we
13 concede. So you have to start by -- by deciding what kind of
14 material you're talking about, and analyzing the question of
15 outbound communications and what they are is a matter that I
16 believe several of the parties have taken different positions
17 on, and I think some of the parties have withdrawn from some
18 of the positions that some of the other parties took, and it's
19 a complicated question. And that is one -- that is the issue
20 that I had felt it would be advantageous to proceed in a
21 different order and probably correct to let Mr. Connell go
22 first on that occasion and for others of us to fill in the
23 areas where we disagree, because I think he has the

1 comprehensive -- and it looks to me, just quickly looking at
2 his slides, as if he has a comprehensive approach to it, that
3 it would be a good starting place.
4 MJ [COL POHL]: Okay. And we reviewed his slides. That
5 was the delay, Mr. Connell, and they are good to go, so I will
6 start with Mr. Connell.
7 LDC [MR. CONNELL]: Your Honor, I have provided a copy of
8 my slides to the government and each of the defense, parties
9 for the defense. I provided copies to the military
10 commission. They have previously been reviewed by the court
11 security officer. I would request permission that they be
12 marked as an exhibit and entered into the record.
13 MJ [COL POHL]: Okay. The next one in the 018 series?
14 018PPP. Okay. Go ahead.
15 LDC [MR. CONNELL]: Your Honor, I would request permission
16 to display the slides to the gallery and request permission of
17 the feed from Table 4.
18 MJ [COL POHL]: Go ahead.
19 LDC [MR. CONNELL]: I am going to answer your question
20 unambiguously. There are no restrictions contained in
21 Protective Order #1, Protective Order #2 or AE 018U on
22 outgoing mail from detainees when that mail has been
23 conclusively determined to be unclassified.

1 Our position, which as Mr. Nevin noticed may be
2 somewhat different from other counsel's position, is that
3 AE 018U means what it says and that Protective Order #1,
4 Protective Order #2 and AE 018U together adequately protect
5 national security interests and do not limit outgoing
6 communications of unclassified information.
7 MJ [COL POHL]: Let me ask you this. Nonlegal mail.
8 Okay?
9 LDC [MR. CONNELL]: Okay.
10 MJ [COL POHL]: Okay. Nonlegal mail is not addressed by
11 018U, correct?
12 LDC [MR. CONNELL]: Yes, sir.
13 MJ [COL POHL]: Is it addressed by the facility itself?
14 LDC [MR. CONNELL]: I don't know. I don't get involved
15 with the internal workings of the facility.
16 MJ [COL POHL]: If your client wants to send a letter to
17 somebody, not through his attorneys, is there a procedure he
18 has to follow?
19 LDC [MR. CONNELL]: No, he cannot send letters to anyone
20 not through his attorneys other than the ICRC mail. We have
21 actually covered this several times in the military
22 commissions. There is no outgoing nonlegal mail from Camp VII
23 other than the ICRC process.

1 MJ [COL POHL]: So the only -- so the outgoing legal mail
2 is, is what's -- I guess this is Mr. Nevin's point.
3 LDC [MR. CONNELL]: Let me make your ----
4 MJ [COL POHL]: What's nonlegal mail?
5 LDC [MR. CONNELL]: So for mail that is sent to -- so
6 nonlegal mail is defined in Section 3.f of AE 018U. I'm going
7 to go ahead and answer the question now, but I have a longer
8 answer that I am going to skip ahead to, though.
9 And it is essentially talking about incoming mail in
10 paragraph 1, which describes incoming material; paragraph 2,
11 which tells us how we get nonlegal mail; and the paragraph 3
12 offers an optional protocol for a way that we can get
13 expedited review by Joint Task Force Guantanamo. There is
14 another way we can get review and that's to send it through
15 the classification review process in which every concerned OCA
16 from, including DoD, SOUTHCOM if they want it, JTF if they
17 want it, CIA if they want it, get a chop on the classification
18 review. So there is an option, which is in AE 018U, but there
19 is nothing mandatory in it.
20 But let's move to the question of what it is that the
21 government is actually asking for in AE 018Y, because we have
22 never had a good answer to that question. They say
23 "clarification" because there is confusion among government

1 employees. What that confusion among government employees is
2 is that essentially everyone who has read AE 018U and acted in
3 compliance with it has believed that the classification review
4 procedure provided in Protective Order #1 is sufficient to
5 protect against dissemination of classified information.
6 The government personnel that the government refers
7 to include the Joint Task Force Guantanamo staff itself at the
8 SJA level and all the many people who are involved in the
9 classification review process.
10 So I want our position to be clear, and then I am
11 going to move to the specific details. We oppose whatever
12 government modification they are asking for, and they have
13 never been clear on that, in AE 018Y. For that matter, we, on
14 behalf of Mr. al Baluchi, oppose the defense modifications in
15 AE 018KK and AE 018VV because we think they are unnecessary,
16 and we also think that AE 371 is unnecessary. I understand
17 why, given the attacks launched against them, they would file
18 AE 371, but there is nothing in AE 018 that restricts mail
19 that travels through the attorneys.
20 So if I may have the second slide.
21 Let's talk for a moment about what kind of
22 unclassified communications that we are talking about. So
23 there are three kinds of communications that are defined in

1 AE 018U. One of those is LCPC or lawyer-client privileged
2 communication. That is defined as all privileged
3 communications within the scope of Rule M.C.R.E. 502 plus
4 attorney work product, which essentially means all
5 communications prepared because of the military commissions.
6 There is that possibility -- the relationship was in
7 fact recognized in AE 018U in paragraph 1 [sic] .g(2), which
8 states that OCRM, other case-related material, may become
9 LCPC, lawyer-client privileged communication, if it is
10 incorporated by the accused into work product. And the
11 D.C. Circuit cases are completely clear that that includes
12 information for delivery to another until it's actually
13 delivered and includes information delivered to another if it
14 is for the purpose of providing professional legal services.
15 OCRM, on the other hand, is communication between the
16 attorneys and the defendants relating to the military
17 commission, but not falling within work product or 502. So
18 let me give you the classic example of each -- nonlegal mail
19 and material is everything that's left. Here is the classic
20 example. The government marks discovery releasable to us and
21 we send it to Mr. al Baluchi as OCRM because it is not
22 privileged, the government has released the discovery to us.
23 It says "releasable to 10018" on the bottom of it, it goes to

1 Mr. al Baluchi.
2 Mr. al Baluchi writes on it, "Hey, I have a question
3 about this part, can we talk about it at our next meeting?"
4 He sends it back to us through the secure facility. That
5 communication back to us is LCPC, lawyer-client professional
6 communication. Nonlegal mail material is if I want to send
7 Mr. al Baluchi a commercial product, like a copy of -- when I
8 send a copy of Zero Dark Thirty to him. That's nonlegal mail
9 and material because it is not case-related material the way
10 the Privilege Team interprets it. It is instead -- and it is
11 not a lawyer-client communication.
12 MJ [COL POHL]: You are talking about incoming mail now?
13 LDC [MR. CONNELL]: Incoming mail.
14 MJ [COL POHL]: Okay.
15 LDC [MR. CONNELL]: But the example is there is very
16 little outgoing mail, but let's talk about that for a second.
17 Let's move there.
18 MJ [COL POHL]: It appears to me, what I am hearing is the
19 concern isn't incoming mail?
20 LDC [MR. CONNELL]: Right.
21 MJ [COL POHL]: The concern is outgoing mail?
22 LDC [MR. CONNELL]: One of the things about AE 018U that
23 was part of its beauty was that it was designed to make

1 everyone equally unhappy, and essentially what we have here is
2 the government is unhappy with the parts that it lost and the
3 defense is sometimes unhappy with the parts it lost. But
4 AE 018U was a carefully crafted compromise and nobody got
5 everything that they wanted. There is no restriction
6 contained in AE 018U or even a restriction proposed by the
7 government way back in the pleadings on outgoing mail.
8 So let's look at the protective orders for a moment.
9 Protective Order #1 obviously restricts the communication of
10 privileged -- of classified information in any context,
11 whether it comes from a client or in any other way. It also
12 imposes a doubt standard, that if counsel are not sure or have
13 reason to believe or simply want to act out of an abundance of
14 caution, they can pursue the classification review process,
15 which is provided in Protective Order #1, paragraph 4(d),
16 which allows us to get a read by all the parties involved,
17 DoD, CIA, everybody who has equities on the process.
18 And in fact, one of the things that we often do is
19 tell them the purpose that we want to use the information for,
20 because that could make a difference, and so if we want to
21 release something publicly, we generally write in the cover
22 letter, "We wish to release this publicly." And it sounds --
23 I don't have any personal information on it, but it sounds

1 like that's what happened with Mr. Mohammad's letter.
2 So AE 018U itself sets up a process for how mail
3 travels. So I have a -- you know, a -- perhaps it's a
4 complicated slide here, but I want to walk you through the way
5 that things actually work under AE 018U.
6 So Mr. al Baluchi sends me a letter or I send him a
7 letter, but this is outgoing mail, so let's talk about ----
8 MJ [COL POHL]: It seems to me that's the point of
9 contention.
10 LDC [MR. CONNELL]: That's where we are, right. So he
11 sends me a letter. That letter could be anything. It could
12 be asking when I am coming to visit next for a legal issue,
13 but on the other hand it could be, "I have the following
14 complaint which I would like you to send to the United
15 Nations." It could be "I have an answer to a question that
16 was forwarded to me by the media." It could be just about
17 anything.
18 He forwards that information to me. Now, if I want
19 to -- if I am not 100 percent sure that that information is
20 unclassified, because AE 018U gives the defense attorney, when
21 things are clearly unclassified, the right to handle them in
22 an unclassified way. But if it is not clearly unclassified,
23 if I am not 100 percent sure or I run it past the other people

1 on the team and they're not sure or I simply want to act out
2 of an abundance of caution, under the provisions of Protective
3 Order #1, I provide that letter to the Defense Security
4 Officer, now called the Defense Information Security Officer,
5 but the same person.
6 That person takes it and now we are moving up the
7 center of the slide, takes it to the Department of Defense
8 Washington Headquarters Services, Office of Special Security.
9 That Office of Special Security takes that document and shops
10 it to each OCA who has an interest, has any kind of equity in
11 this document, whether that is -- as I have said before,
12 clearly includes the DoD, SOUTHCOM if they want it, JTF if
13 they want it, and everybody who has an interest can -- goes
14 through this process.
15 We then get back that document from them. It goes
16 from the OCAs, who we don't know who they are exactly, to
17 Washington Headquarters Services, OSS, back to the security
18 officer and then to me.
19 Then at that point, what I do is I can take that
20 information and use it, and some of the ways that I can use
21 it, it remains a level of privilege, and the level of
22 privilege is important because the definitions of
23 lawyer-client privileged communication and OCRM in 018U. So I

1 can provide it to another court if I wish, if it is
2 unclassified, not if it is classified, under Protective
3 Order #1, but if it is unclassified I could. I could provide
4 it to the United Nations if I was seeking redress from them,
5 or -- and because both of those are for the purpose of
6 providing professional legal services, it would remain
7 privileged because it is not for third parties other than
8 rendition of professional legal services to the client. For
9 that matter, I could provide it to the media. At that point,
10 of course, it doesn't retain any kind of privilege.
11 So let's look at the definitions involved. I
12 mentioned first that AE 018U defines lawyer-client privileged
13 communication as anything covered by M.C.R.E. 505 or anything
14 attorney work product. M.C.R.E. 505(b)(2) defines or states
15 that a communication is, quote "confidential if not intended
16 to be disclosed to third persons other than those to whom the
17 disclosure is in furtherance of the rendition of the
18 professional legal services to the client." That's fairly
19 wide scope. I can provide it to an expert, I can provide it
20 to a forum who could provide relief, I could provide it to
21 someone that -- a witness that I am trying to interview. As
22 long as it involves the renditions of professional legal
23 services it remains confidential within the meaning of 502.

1 Attorney work product, however, on the other hand, is
2 clearly covered by extensive and well-defined case law in the
3 D.C. Circuit, most prominently in the United States
4 v. Deloitte case, where an attorney work product, in the
5 attorney work product situation, which includes client work
6 product, it is really all client work product, but a
7 disclosure made in the pursuit of trial preparation and not
8 inconsistent with maintaining secrecy against opponents should
9 be allowed without waiver of the privilege.
10 That is why, for example, I could send a document
11 which has been properly determined to be unclassified to the
12 UN while maintaining its privilege under its confidentiality
13 procedures, but could not release it to the media without
14 waiving the privilege.
15 But at the outgoing stage from JTF, that part of the
16 pipeline is clearly privileged. Would you go back one slide,
17 please?
18 The -- when the privilege pipeline covers
19 communications between Mr. al Baluchi and me, clearly, and so
20 if Mr. al Baluchi sends me something and says, "Please, I
21 would like to file a complaint with the United Nations working
22 group on arbitrary detention," at that point clearly, under
23 the case law, it is still privileged. Even if it is intended

1 for -- ultimately to be provided to some person that doesn't
2 strip it of its privilege because it is consistent with the
3 provision of professional legal services.
4 I have struggled to think under these -- and OCRM is
5 basically everything else related to the military commissions
6 and one of my duties of course in the military commissions is
7 to do mitigation investigation, that is, establishing
8 relationships between me and people who have known
9 Mr. al Baluchi before his arrest.
10 So I have really struggled to come up with an example
11 of non-outgoing nonlegal mail for anything that Mr. al Baluchi
12 could send me, and the reason I believe that Mr. Nevin pushed
13 back on nonlegal mail is that essentially every communication
14 from Mr. al Baluchi to me for whatever purpose is either
15 lawyer-client privileged communication or other case-related
16 material.
17 Now, I want to talk instead about what -- the
18 government's proposed architecture. If you accepted -- I
19 mean, we don't have proposed language from them -- I'm slowing
20 down -- but under the idea that they have proposed, then
21 information would be privileged from -- when it goes from
22 Mr. al Baluchi to me, but then it would lose all privilege
23 whatsoever, in total violation of M.C.R.E. 502 and the

1 controlling D.C. Circuit case law. If I provided it, there
2 would be no role for the defense security officer as provided.
3 In Protective Order #1. There would be no role for
4 the Office of Special Security as provided not only in
5 Protective Order #1, but also in the governing policy by the
6 Convening Authority. If I provided it to anybody, including
7 the -- for classification review, that would strip it of its
8 privilege. If I provided it to any other person to whom I was
9 trying to send information in the course of my professional
10 legal services, that would strip it of its privilege.
11 The government's view here is totally inconsistent
12 with the text of AE 018U, which is, I believe, why they are
13 asking for a, quote, "clarification," but it is also
14 inconsistent with the way that lawyers practice and it's
15 inconsistent with the controlling D.C. Circuit law.
16 MJ [COL POHL]: Your view is when you send something to
17 these third parties and the fact that there are multiple
18 third -- multiple people in these, NGOs or whatever, and they
19 are going to use it for their own purposes -- for example, you
20 said the Working Group on Unlawful Detention -- and the fact
21 that the reasonable thing that therefore it's going to be
22 disclosed outside that group, that's still -- you maintain
23 that's a privileged way to communicate?

1 LDC [MR. CONNELL]: So, for example, with the Working
2 Group on Arbitrary Detention, they have a confidentiality
3 policy where information is not disclosed further by them
4 unless specifically authorized by the -- by the person who is
5 making the complaint.
6 MJ [COL POHL]: Do all these places you send it have such
7 a policy?
8 LDC [MR. CONNELL]: No. And so, for example, if we can go
9 back two slides, please -- back one more slide, please. If I
10 were to send it to just -- I use news here as an example of
11 the general public. If I were to release something to the
12 general public or send it to the media, no, that would strip
13 it of its privilege. But that doesn't mean that it's not
14 privileged in the communication between Mr. al Baluchi and I,
15 and it doesn't mean that it's not lawyer-client communication
16 or OCRM under -- as defined by AE 018U. So yes, it is
17 possible to surrender the privilege by acting inconsistent
18 with secrecy from one's opponents.
19 MJ [COL POHL]: And your position is that anything from a
20 client -- virtually anything from a client would constitute
21 legal mail?
22 LDC [MR. CONNELL]: Your Honor, yes. Not legal mail,
23 either LCPC or OCRM. Remember, we lost 018, but nothing in

1 AE 018U states that -- that there is any restriction
2 whatsoever on outgoing mail or what I can do with mail other
3 than in a classified information situation.
4 MJ [COL POHL]: Okay. Is there any -- okay. Just -- and
5 I may be using the terms imprecisely, but just help me here,
6 Mr. Connell.
7 LDC [MR. CONNELL]: Sure. Yes, sir.
8 MJ [COL POHL]: Okay. You said earlier that there is no
9 provision for the detainees to send out mail exempt through
10 the ICRC.
11 LDC [MR. CONNELL]: Or receive it, yes, sir.
12 MJ [COL POHL]: Or receive mail. So the 91 detainees,
13 which I think is the current figure ----
14 LDC [MR. CONNELL]: I can only speak for Camp VII.
15 MJ [COL POHL]: For Camp VII. So the number at Camp VII
16 for all those without attorneys, the commission, are they
17 under that same prohibition?
18 LDC [MR. CONNELL]: As far as I know, yes.
19 MJ [COL POHL]: Okay. So it's your view that anything
20 they give you ----
21 LDC [MR. CONNELL]: Who is "they"?
22 MJ [COL POHL]: Your client.
23 LDC [MR. CONNELL]: Oh. I thought maybe you meant the

1 other people.
2 MJ [COL POHL]: No, not that. Anything they give you,
3 there is no restrictions on who you disseminate that to other
4 than the classification review?
5 LDC [MR. CONNELL]: Yes, sir, that's right. You say
6 classification review ----
7 MJ [COL POHL]: You make sure it's unclassified, you have
8 that restriction always.
9 LDC [MR. CONNELL]: That's Protective Order #1.
10 MJ [COL POHL]: If any detainee wanted to send out
11 anything of any ilk that's not classified, there is no
12 restrictions on that because it comes through you?
13 LDC [MR. CONNELL]: There are other laws, for example, if
14 someone wanted to send a threat to the President, they
15 couldn't send a threat to the President because ----
16 MJ [COL POHL]: What if somebody wanted to hypothetically
17 send something to an organization encouraging illegal
18 activity?
19 LDC [MR. CONNELL]: Well, that would be illegal separately
20 and I couldn't participate in that.
21 MJ [COL POHL]: And you screen for that type of activity?
22 LDC [MR. CONNELL]: Of course. I screen everything. No
23 one is acting recklessly here, Your Honor. Everyone is acting

1 with a great deal of deliberation, with consultation, with the
2 ability that we have to obtain classification review, and the
3 situations ----
4 MJ [COL POHL]: When I said that, I was thinking of the
5 crime fraud exceptions to the privilege.
6 LDC [MR. CONNELL]: Sure.
7 MJ [COL POHL]: That's what we are talking about. So all
8 that stuff, you would agree there was some encouragement of an
9 illegal organization to do something or something along that
10 lines ----
11 LDC [MR. CONNELL]: Sure.
12 MJ [COL POHL]: ---- is there an easy line to draw there
13 if the information is going to individuals -- and understand,
14 except for Mr. Mohammad's two letters I think he sent, are the
15 only ones I have seen, and you know the government concern
16 here is there is going to be encouragement of activity ----
17 LDC [MR. CONNELL]: Sure.
18 MJ [COL POHL]: ---- of things, but you believe you are in
19 the position to make -- whether or not a writing to an NGO,
20 what if the NGO's listed as a terrorist organization but there
21 is nothing in it -- there is nothing in it that encourages it,
22 is that okay?
23 LDC [MR. CONNELL]: It would be illegal for me to provide

1 support to a listed terrorist organization.
2 MJ [COL POHL]: If you provide somebody, if you provided
3 something, these are all hypotheticals.
4 LDC [MR. CONNELL]: Sure.
5 MJ [COL POHL]: Something in a message that goes to
6 somebody in the Middle East that's not part of an identified
7 terrorist organization and there is a classification review
8 and that's sufficient protection to make sure there I want
9 something being conveyed to them that should not be?
10 LDC [MR. CONNELL]: Let me give you an example. Go back
11 go more slides, ma'am. So one example is that I just made up,
12 I wrote this myself, it is not Mr. al Baluchi, it is "Dear
13 Mom, how are you? This man is my lawyer. I would appreciate
14 if you would talk to him." All right? That's to an un -- you
15 know, that's an example of a letter to a person in the Middle
16 East, it's clearly within the provision of my professional
17 legal services. I have a duty to develop mitigation evidence
18 and the -- and this, there is nothing, there is nothing
19 improper about that. I wouldn't -- see, in that situation I
20 probably wouldn't put that through classification review. If
21 there was any doubt, I would, but there is not.
22 MJ [COL POHL]: I want to make sure. When I am asking
23 these questions, I am going to ask the same thing of the

1 government because what I am hearing me being asked here is
2 somehow to determine the limits on outgoing mail.
3 LDC [MR. CONNELL]: Right.
4 MJ [COL POHL]: And so I have got your position that
5 virtually everything that's legal mail ----
6 LDC [MR. CONNELL]: Everything from ----
7 MJ [COL POHL]: Everything going out from your client and
8 therefore absent the normal exceptions just talked about, the
9 crime fraud exceptions and things like that ----
10 LDC [MR. CONNELL]: Sure.
11 MJ [COL POHL]: ---- but on the face of it it only
12 requires a classification review to make sure no
13 classification material is being done, and after that if you
14 want to send a letter to the accused -- from the accused to
15 his mother or a letter from your accused to the
16 Huffington Post or whomever, that's all permitted by ----
17 LDC [MR. CONNELL]: By AE 018U, yes.
18 MJ [COL POHL]: You said 018U is basically silent on that?
19 LDC [MR. CONNELL]: Okay. It is not prohibited by
20 AE 018U. How about that?
21 MJ [COL POHL]: Okay.
22 LDC [MR. CONNELL]: Let me talk about the one place where
23 there is a little bit of ambiguity and this is the only hook

1 that the government has, which is 3.f(3) in AE 018U creates an
2 optional system that this language was written prior to the
3 establishment of the privilege -- I mean the classification
4 review process in Protective Order #1, but it says, "During
5 some meetings with the Accused, a Defense Counsel may receive
6 Non-Legal Mail or Material from the Accused which requires
7 expedited processing for reasons related to the military
8 commission proceedings. For example, the Accused may provide
9 the Defense Counsel with a letter of introduction for the
10 Defense Counsel to use when meeting with a witness," kind of
11 like my "Dear Mom" example.
12 "In such instances, the defense counsel can submit a
13 request for expedited process to JTF-GTMO via the Privilege
14 Team," and then it goes on to the logistics of how that would
15 happen.
16 I suspect from the description that I heard that
17 that's what happened with -- you know, it would probably go
18 through the SJA, but there is nothing about that that requires
19 us to use that process as opposed to the classification review
20 process, which has at least some layers of privilege to it.
21 Because what this really comes down to is -- keep going --
22 what this really comes down to is DOCEX, because the
23 fundamental -- you described the concern of the government as,

1 you know, encouragement of illegal activity and that is a
2 concern, no doubt, but the real articulated concern in
3 AE 018Y ----
4 MJ [COL POHL]: Understand this is hypotheticals. And I'm
5 not making any value judgment on what's been set up. Go
6 ahead.
7 LDC [MR. CONNELL]: The real concern which is actually
8 expressed in AE 018Y is substantive review of nonlegal mail,
9 and that may be a real, you know, concern at some parts of the
10 camp where there is a lot of nonlegal mail. I don't know if
11 there is nonlegal mail over there or not; I only know about
12 Camp VII. But the ability to read the mail is really what the
13 concern seems to be here, the substantive review, whatever
14 that may involve. But the pipeline goes past that. The
15 pipeline -- so that seems to me to be what the government's
16 concern is.
17 Now, because the government, whenever there is any
18 question about classification, gets to weigh in, and by that I
19 mean the big Government, you know, that every other agency who
20 chooses to comment has the opportunity to comment, and often
21 they come back and say that's classified, you can't use that.
22 Sometimes they come back and say that's not classified, you
23 can use that. And that's the way that the system is set up in

1 AE 018U. It's quite unambiguous, and, you know, truthfully,
2 we rely on that process. For years now we have been relying
3 on that process and been relying on the fact that AE 018U and
4 Protective Order #1 and Protective Order #2 mean what they
5 say.
6 So if you are trying to put additional limits on it,
7 I think those limits would involve things like -- I mean,
8 there is also a classification limit, Protective Order #1, but
9 crime fraud exceptions is a good example. You know, there are
10 other criminal laws in the United States, material support for
11 terrorism, you know, laws against threats, anything like that
12 would be limitations. But past that, if Mr. al Baluchi wants
13 to provide information for me to send to the Working Group, he
14 can do that as long as we send it through the classification
15 review process, get it approved and it's not -- you know, it
16 doesn't violate some other law.
17 MJ [COL POHL]: Okay. Thank you.
18 This seems to be a good place to stop at this time.
19 Just so the way ahead, so everybody understands, tomorrow
20 morning we are going to delay this and pick up with
21 Mr. Binalshibh's testimony. There is a question about where
22 he is going to testify from, at least that was proposed to me.
23 Just so it's clear, everybody who is a witness --

1 this goes for the detainees as well as any other witness who
2 testifies from the witness stand, there will be no additional
3 security measures unless and until they are required. And so
4 for Mr. Binalshibh, as he has been in this courtroom as all
5 the detainees in this courtroom have not been in any type of
6 restraint in the courtroom and because there has been no
7 requirement for that. I don't control what happens outside
8 the courtroom. I do control what happens inside the
9 courtroom. So tomorrow, whether it is Mr. Binalshibh or any
10 other witness who wants to testify, they will be testifying,
11 they will sit over here. Obviously there will be some
12 movement of the guard force, but every witness will be treated
13 the same until there is reason to treat them differently.
14 We will start tomorrow with that and then we will
15 pick this back up.
16 Mr. Harrington, you're standing.
17 LDC [MR. HARRINGTON]: Judge, we had discussed it earlier,
18 Mr. Trivett and I and General Martins. Is it possible that my
19 client can testify from where he is sitting right now? He
20 would be more comfortable.
21 MJ [COL POHL]: No. It is just impractical for witnesses
22 to sit there and then be cross-examined. It's not how a
23 court -- if he wants to be a witness, he is going to be like

1 any other witness.
2 Mr. Ruiz.
3 LDC [MR. RUIZ]: Judge, I just want to make a record here.
4 On behalf of Mr. Hawsawi and the arguments we have heard
5 today, we specifically join Mr. Connell's position and his
6 argument. I specifically reference motions that we've filed
7 in AE 018CCC (MAH). In that supplement we affirmatively
8 join ----
9 MJ [COL POHL]: We are not done with this.
10 LDC [MR. RUIZ]: I understand, but there is going to be a
11 natural breaking point in the transcript so I want to make
12 sure it is in this portion of the transcript.
13 MJ [COL POHL]: Okay.
14 LDC [MR. RUIZ]: So we affirmatively joined it in
15 AE 018CCC and affirmative withdrew from 018VV. With regards
16 to AE 371 there was also reference today on behalf of
17 Mr. al Hawsawi. We also withdrew from that motion and that
18 was done in AE 371M (MAH).
19 MJ [COL POHL]: Okay. So tomorrow we will begin with
20 Mr. Binalshibh testimony and then come back and pick up with
21 018.
22 On Thursday will be the closed session pursuant to
23 Rule of Military Commission 806. At that time, depending upon

1 the time we have, there is -- it would seem like we may
2 conduct a 505(h) hearing on AE 400 and 386, and again this
3 is -- we are going to be time driven now, and if necessary,
4 there will be a closed session on those issues on the
5 classified part of those issues also on Thursday. Right now
6 there is a lot on the docket on Thursday, so I can't guarantee
7 we will get to all of them, but I just want to put everybody
8 on notice that we may do the 505(h) hearings on those two
9 issues and so we can resolve them, and then we will pick up --
10 after Mr. Binalshibh, we will pick up with the 018 series. I
11 want to do 018Y and 018W.
12 And, General Martins, you are standing.
13 CP [BG MARTINS]: Your Honor, on the Thursday we are
14 interested in being able to instruct the witnesses to be here
15 at 0-9.
16 MJ [COL POHL]: Okay. Have the witnesses here at 0-9. We
17 can always adjust the schedule and other things, and once we
18 get done we will figure out what we are going to do on Friday.
19 Understand Friday we have some 254 issues that are still
20 outstanding.
21 That being said, the commission is in recess until
22 tomorrow morning.
23 **[The R.M.C. 803 session recessed at 1655, 23 February 2016.]**

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