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1 [The R.M.C. 803 session was called to order at 1331,  
2 24 February 2016.]

3 MJ [COL POHL]: The commission is called to order. All  
4 parties I believe are again present. If somebody changed, let  
5 me know. Apparently not.

6 All detainees remain present except for  
7 Mr. Bin'Attash.

8 Mr. Binalshibh, please retake the witness chair.

9 [The witness resumed the witness stand.]

10 MJ [COL POHL]: Please be seated. I remind you,  
11 Mr. Binalshibh, that you are still under oath. Do you  
12 understand that?

13 The witness indicated yes. Mr. Harrington.

14 **REDIRECT EXAMINATION**

15 **Questions by the Learned Defense Counsel [MR. HARRINGTON]:**

16 Q. Mr. Binalshibh, Mr. Trivett asked you some questions  
17 about the first psychiatrist that you saw when you came to  
18 Guantanamo in 2006. Do you recall that?

19 A. Yes.

20 Q. And I think you indicated that when you first saw  
21 her, there was some sort of an interview that was done by her;  
22 is that right?

23 A. Yes.

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1 Q. Can you tell me, did she ask you any questions about  
2 anything that had happened to you in the four years before you  
3 came to Guantanamo?

4 A. No.

5 Q. Did she ask you any questions about noises?

6 A. Not at all.

7 Q. Vibrations?

8 A. Nothing.

9 Q. Torture?

10 A. No. She kept his part, Captain, in that discussion  
11 between me and her at some point you can say, okay, and he  
12 talked about this data and she skipped it.

13 Q. Now, you testified about what happened to you before  
14 you came to Guantanamo. Did you know that there were  
15 psychiatrists or psychologists involved in your treatment  
16 before you came here?

17 MTC [MR. TRIVETT]: Objection, relevance.

18 MJ [COL POHL]: Overruled.

19 A. Yes, I know that.

20 Q. And when you met this psychiatrist at Guantanamo when  
21 you first came here, she was the same medical professional; is  
22 that correct?

23 A. Yes.

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1 Q. Now, she is the one that you said prescribed the  
2 medications that they gave you by injections; is that right?

3 A. Yes.

4 Q. Were those injections given to you by force?

5 A. Yes, by force.

6 Q. And there came a time when you switched from the  
7 forced injections to pills; is that right?

8 A. Yes.

9 Q. And tell us what you were -- what option you were  
10 offered in the change from the injection to the pills?

11 A. No other options. Either I take these pills or I go  
12 back to the injections.

13 Q. Now, you were asked some questions about Dr. Homer,  
14 correct?

15 A. Yes.

16 Q. And you did have some discussions with him before he  
17 left Guantanamo the first time, right?

18 A. Yes, I did.

19 Q. Okay. And did he discuss your medical record with  
20 you?

21 A. Yes, he explained it to me, because I was refusing to  
22 meet with any psychiatrist at Camp VII. He told me I am  
23 different from the others, I just wants to go with you, with

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1 your record review because I don't like things that they are  
2 doing here. It's not a very professional -- my way to do this  
3 kind of record, I want to go with you by this report and  
4 review with them. Every time I came with you I am going to  
5 give you some of your records, to go through them and to tell  
6 me if they are okay or not. So that's the purpose of ----

7 Q. And that was the procedure that was started by him  
8 just before he left, correct?

9 A. Yes.

10 Q. He had not completed that; is that right?

11 A. He completed till certain times, maybe until that  
12 time that he was there until 2014 or some times around.

13 Q. Okay. You were asked by Mr. Trivett about the guards  
14 doing the things that you talked about. Is it your testimony  
15 that all of the guards do those things?

16 A. I cannot say all of the guard, but I know some of  
17 them, and because of the system of the rotations for the guard  
18 shift, they go sometimes an hour or two, sometimes the control  
19 room. I know -- let me -- maybe all of them, but I don't know  
20 exactly -- knows who exactly. Sometimes I know who is it from  
21 his voice in the control room because the guys who is watching  
22 you through the camera is the guys -- is guys in the control  
23 room who is responding or reply via the intercom. And then

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1 from that -- from that conversation between me and him, I know  
2 this is the guys who is doing these things.

3 And, for instance, about the females that I complain  
4 about them, when I complain about females, I know that the  
5 females in the control room before I heard them talking from  
6 the act of their -- from their act of doing these things.  
7 They make it very differently, so I keeps telling the  
8 brothers, you know who is in the control room -- control room  
9 now? They said, "Who?"

10 I said, "Females." And try it. You push the button,  
11 female reply to them before anybody even knows.

12 When I say to the watch commander, the current one,  
13 about those females, there are maybe two, one for day shift  
14 and the other one for night shift, they remove her from  
15 answering the intercom, but she is still there. And I know  
16 there are times -- their shift times or rotation time. I  
17 know, for instance, Monday, just an example, Monday night they  
18 going to be a female there. The entire -- the whole entire  
19 night she didn't respond to you and somebody else responding  
20 to you until -- maybe before she leaves he start to answer  
21 you, so you can't complain about her anymore.

22 Q. And have you complained about the responses that some  
23 of the people in the control room have given you?

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1 A. Yes.

2 Q. Now, is it your belief that all or most of the guards  
3 know what's going on, whether they participate or not?

4 A. I believe all the guard force knows about it, and  
5 that's -- part of this belief came from my experience, the  
6 other part comes from my talking with the guards at Camp VII  
7 that started from the Navy guard.

8 Some of them, they said look, I know that some guys  
9 are doing these things, but not me. And I told him, I ask  
10 him, why they doing these things to me? He said he doesn't  
11 want to talk a lot, but at the end he said, "Look, I am just a  
12 guard, Army, low rank, I cannot talk about these things." But  
13 he is not happy at all with the whole circumstances around.

14 Q. You were asked questions by Mr. Trivett about things  
15 that can happen on other places on the base other than  
16 Camp VII, and there are occasions where you leave Camp VII,  
17 such as to come to court, correct?

18 A. Yes.

19 Q. And are you aware of the incident that happened in  
20 this courtroom when the red light went off?

21 A. Yes.

22 Q. Okay. And did you learn in that that somebody other  
23 than the judge or the court security officer did that?

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1 MTC [MR. TRIVETT]: Objection, relevance.

2 MJ [COL POHL]: What's the relevance of that?

3 A. Okay. He confirm it.

4 MJ [COL POHL]: What's the relevance?

5 LDC [MR. HARRINGTON]: Because he went into the issue  
6 about people controlling things in other parts of the base and  
7 I'm trying to show that ----

8 MJ [COL POHL]: So one time a light turned on years ago --  
9 I think that issue has been resolved, hasn't it?

10 LDC [MR. HARRINGTON]: The issue has, but -- but in this  
11 particular case the relevance of it is that some other entity  
12 has access to electronic things here on the base, and he --  
13 Mr. Trivett tried to narrow him down to blaming the guards for  
14 all of this stuff. I just want to establish that we don't  
15 know who else has control of things, whether in the facility  
16 or here.

17 MJ [COL POHL]: Objection as to relevance is sustained.  
18 Move on to something else, Mr. Harrington.

19 **Questions by the Learned Defense Counsel [MR. HARRINGTON]:**

20 Q. You were asked questions about a comment that you  
21 made to one of the female guards where you called her some  
22 names. Do you recall that?

23 A. Yes.

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1 Q. Okay. When you did that, were you angry?

2 A. Yes.

3 Q. Were you being sarcastic to her when you did it?

4 A. Sometimes.

5 Q. When you get angry, a lot of times you are very  
6 sarcastic; is that correct?

7 A. Yes.

8 Q. Just to be clear, Mr. Binalshibh, you are not saying  
9 that all female guards are responsible for this conduct, are  
10 you?

11 A. No, I'm -- the changes of the females that start to  
12 be -- the bad one started to be just with this group that we  
13 have now and the group before that, that unit that just left  
14 the Camp VII in August. Those two groups, they are very bad.

15 Before that I dealt with female with the Navy. As I  
16 told you this morning, they were -- some of them were good,  
17 bad, but they are like other guard. But now the females, we  
18 have just two females in the control room at Camp VII as a  
19 guard and they are very bad. Their treatment is very -- is  
20 changed completely. I don't know somebody told some things  
21 about me, maybe because the government say the rule for  
22 females, make them change their mind. They get very, very,  
23 very bad.

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1 Q. Now, you understand why you are in custody here, do  
2 you not?

3 A. Yes, I understand that.

4 Q. Okay. And you are not complaining about being in  
5 custody, are you?

6 A. I never complain about that.

7 Q. Okay. You are complaining just about this treatment;  
8 is that right?

9 A. Yes.

10 Q. And can you tell us, why is it that you believe that  
11 this is being done by the guards rather than someone else?

12 A. Again, it is my experience. It could be somebody  
13 else. I don't know. If they wants to confirm these things,  
14 because they keep asking me do you believe this is being done  
15 by the guard force, they keep asking me these questions, that  
16 means they are giving me some kind of hint that somebody else  
17 is doing these things and thanks for this information that  
18 comes from the government now. But my belief this is the  
19 guard because I interact with them everydays and I know their  
20 behavior.

21 And I talk with the watch commander right now in  
22 front of my door. I tell him, "Can you stop these things and  
23 follow the judge orders for right now?"

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1           And he goes and he make it worse. Who is them?  
2 Maybe the CIA still at Camp VII. Nobody knows. Because there  
3 is people there, nobody knows who are they. They close our  
4 doors and say maintenance, we have visitors, they close all  
5 cell doors and people come in and out, you don't know who are  
6 they. They could be CIA, they could be somebody else, North  
7 Korean people, nobody knows.

8           LDC [MR. HARRINGTON]: That's all I have, Judge.

9           MJ [COL POHL]: Recross?

10          MTC [MR. TRIVETT]: No, sir.

11          MJ [COL POHL]: Mr. Binalshibh, you may return to your  
12 counsel table, please.

13 [The witness returned to counsel table.]

14          MJ [COL POHL]: Mr. Harrington, I think you indicated that  
15 you have two other camp witnesses you want to call that we  
16 will call at the next session; is that correct?

17          LDC [MR. HARRINGTON]: Yes, Judge.

18          MJ [COL POHL]: Also I see that you have filed a motion to  
19 compel four other witnesses, but it's not fully briefed. I  
20 have got the government response. You will have time to file  
21 your reply and then we will address that in due course of  
22 litigation.

23          LDC [MR. HARRINGTON]: Right. Mr. Trivett and I are

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1 trying to work that out, Judge. I think we may be able  
2 to ----

3 MJ [COL POHL]: Okay.

4 LDC [MR. HARRINGTON]: -- without the need for testimony  
5 of all the people.

6 MJ [COL POHL]: That being said, this brings us back to  
7 018Y, which I believe, Mr. Connell, you completed your  
8 presentation yesterday; is that correct?

9 LDC [MR. CONNELL]: Yes, sir.

10 MJ [COL POHL]: And, Mr. Nevin, you wanted to be heard on  
11 it. Or I mean you have been heard on it, but not completely?

12 LDC [MR. NEVIN]: That was my recollection, right.

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

14 LDC [MR. NEVIN]: Thanks, Your Honor. And I think maybe  
15 after Mr. Connell spoke it became clear what my hesitation  
16 was, because I -- this begins with 018Y, which is -- recites a  
17 bunch of facts about my team and contains allegations of  
18 breaking the rules and doing a number of things, and we  
19 responded in a document which is known as 018FF. I understand  
20 that FF was not available on the web, not available to the  
21 public until only recently because of some -- because of some  
22 redactions that were made to it.

23 But -- so when you asked me do you believe -- what

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1 was my belief about something to do with nonlegal mail, I'm  
2 sort of in the position here of saying I adopt Mr. Connell's  
3 argument, which I do -- or which we do on behalf of  
4 Mr. Mohammad. But at the same time saying we complied with  
5 the rules the way I think the government wishes they were or  
6 seem to think they needed to be. We actually did the things  
7 that -- that the government, you know, refers to loosely in  
8 its motion. And what it amounts to is that the government  
9 made these allegations about us without going and checking to  
10 see what we actually did.

11           So I'm sort of in the position of saying I did these  
12 things, but at the same time saying I don't think we needed to  
13 for the reasons Mr. Connell set out.

14           I think you -- and of course the military commission  
15 will understand that we did this out of an excess of caution  
16 in the environment we were in at the time and in the  
17 environment that we remain in.

18           One additional fact, and I believe Mr. Connell  
19 referred to this, but, you know, I think it's important for  
20 the military commission to understand that -- that nonlegal  
21 mail, as such, does not get out of the camp. Mr. Connell had  
22 the example of a postal historian who wanted to send -- who  
23 wanted to obtain a franked card from Mr. Ali and the document

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1 was not delivered. There are other examples in the pleadings  
2 and materials ----

3 MJ [COL POHL]: Just so I am clear, the USPS delivers  
4 nonlegal mail into the camp -- into the camp?

5 LDC [MR. NEVIN]: No.

6 MJ [COL POHL]: Does nonlegal mail come in ----

7 LDC [MR. NEVIN]: Does it arrive at the camp? I don't  
8 know the answer to that.

9 MJ [COL POHL]: But nonlegal mail is sent into the camp --  
10 again, it's not really the issue before me, but I want to make  
11 sure I understand all the ins and outs here. It goes through  
12 some sort of review by the detention facility commander before  
13 it is turned over to the detainee, if it turned over at all?

14 LDC [MR. NEVIN]: Yes.

15 MJ [COL POHL]: Okay. The legal mail, I think the order  
16 addresses how that gets in and out.

17 LDC [MR. NEVIN]: Right.

18 MJ [COL POHL]: The only outgoing correspondence is the  
19 two ICRC letters, which are only to family?

20 LDC [MR. NEVIN]: Correct.

21 MJ [COL POHL]: And then any legal mail that's necessary  
22 to go out in the course of your representation?

23 LDC [MR. NEVIN]: That's also my understanding.

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1 MJ [COL POHL]: Okay.

2 LDC [MR. NEVIN]: And just to put it ----

3 MJ [COL POHL]: There is no nonlegal mail like in a  
4 federal penitentiary decision, only because I have gotten some  
5 letters from inmates ----

6 LDC [MR. NEVIN]: Right.

7 MJ [COL POHL]: ---- the nonlegal mail is sent out,  
8 although it's, screened I'm assuming, before -- I mean, I  
9 don't get a lot of it, but occasionally I get ----

10 LDC [MR. NEVIN]: I understand.

11 MJ [COL POHL]: ---- occasionally I get some of this, but  
12 in federal prison there is a nonlegal mail procedure.

13 LDC [MR. NEVIN]: When it is talking about mail to a  
14 judge, it's referred to as "special mail" under the BOP  
15 regulations, and BOP staff do not review a letter to a judge  
16 or to the President or to a member of Congress or to a United  
17 States Senator. Those letters are not -- by BOP regulation,  
18 not reviewed for content.

19 MJ [COL POHL]: Sometimes it is not as a judge, it is to  
20 me, I got it, it goes to my official address, but it doesn't  
21 say "judge" on it.

22 LDC [MR. NEVIN]: I see.

23 MJ [COL POHL]: Let me just ask you this. Just real

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1 quickly on this.

2 LDC [MR. NEVIN]: Sure.

3 MJ [COL POHL]: Nonlegal mail from a federal facility that  
4 goes to a family member, whomever, is permitted after being  
5 screened; is that correct?

6 LDC [MR. NEVIN]: Correct.

7 MJ [COL POHL]: Okay. That was my only question.

8 LDC [MR. NEVIN]: Right.

9 MJ [COL POHL]: But that procedure is not available to the  
10 detainees at Camp VII?

11 LDC [MR. NEVIN]: That is my understanding. And then just  
12 to go back to what you asked first about incoming mail, my  
13 understanding is -- and I know as a matter of fact that the  
14 letter from Mr. Green that was directed to Mr. Mohammad did  
15 arrive at Guantanamo, they did place a GUAN number on it and  
16 they did deliver it to Mr. Mohammad, and that was some time  
17 ago. And this is notwithstanding the government's allegation  
18 that they didn't, they did, in fact, do that but my  
19 understanding is that they are no longer doing that, that that  
20 is not happening today as we stand here.

21 Now, that's -- it's hard to acquire information about  
22 this subject that's authoritative, at least it's hard for me,  
23 and so that's my understanding. It may not be correct, but I

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1 believe that to be the case.

2 MJ [COL POHL]: The focus of where we are at now, and I am  
3 going to let you continue, is outgoing mail?

4 LDC [MR. NEVIN]: Correct.

5 MJ [COL POHL]: Okay.

6 LDC [MR. NEVIN]: So, of course, I mean, I'm not talking  
7 about this issue of the letter coming in with -- having -- or  
8 not having the GUAN number on it just out of the blue, this is  
9 an allegation that the government made in 37 -- I'm sorry, in  
10 018Y.

11 So we are in the position in this capital case of  
12 doing at least two things that require us to have  
13 communication from our client to people that we come in  
14 contact with on the outside, and of course this is a written  
15 communications order that we are referring to, 018U. But we  
16 are required to do investigation and we are also required to  
17 do mitigation. And it -- I do want to point out to the  
18 military commission that in Rule 701(e), which we talked about  
19 yesterday, and this was the -- yes, 701(e) is the subsection  
20 of 701 that we discussed that's entitled "Exculpatory  
21 Evidence," and we had some conversation about the fact that  
22 Brady doesn't speak of exculpatory, it speaks of favorable.

23 But it caused me -- the discussion caused me to look

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1 at 701(e) again, and I realized that it goes, it may well go  
2 beyond the scope of Brady itself, because in Subsection 1 of  
3 701(e), there is a requirement for the government to turn over  
4 three categories of information, and those are roughly the  
5 Brady categories.

6 But if you go down to Subsection (e)(3), you find  
7 that there is another reference to material that the  
8 government must turn over even if it is not included within  
9 paragraphs 1 and 2, and that is evidence that reasonably may  
10 be viewed as mitigation evidence at sentencing.

11 I point this out simply to make the observation  
12 that -- well, apart from a capital case, because Rule 701  
13 would apply, notwithstanding, even if it were a noncapital  
14 case, but certainly in the context of a capital case we have a  
15 very broad ability to go out -- an obligation to go out and  
16 pursue mitigation. And we are -- we are doing that, we are  
17 doing our best to do it. And, of course, in a capital case  
18 where we have a heightened requirement for reliability and  
19 where a principled decision to kill someone, the obligation to  
20 do this is even greater. And so I imagine that the military  
21 commission knows that -- knows this already, but I just want  
22 to say it so that we are all on the same page, that it is a  
23 routine obligation in capital cases to maintain contact with

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1 the client's family and to keep the family, to the greatest  
2 extent possible, involved in the defense of the case and to  
3 keep the client to the maximum extent possible embedded in the  
4 fabric of the family.

5           This is important for -- for developing mitigation  
6 evidence, for understanding the client's background,  
7 understanding how the client got to the place where the client  
8 is now for developing potential witnesses, and also for  
9 keeping the client involved in the case, keeping the client,  
10 as we know, that is a -- everybody right up to the present  
11 time, because as I speak here Mr. Bin'Attash is not present in  
12 the courtroom, having raised these issues related to counsel.  
13 And so this is an ongoing problem and obligation that we have  
14 in a capital case.

15           And so for all these reasons, we are obligated to  
16 make contact with the family to keep it up, and we do that in  
17 part by -- by sharing information by and between the client.

18           There was a -- there was a reference to -- in the  
19 discussion yesterday, there was a reference to, I believe it  
20 was in the prosecution's remarks, about these materials that  
21 published and we -- you know, it was interesting to me that at  
22 the -- counsel was saying that these materials ended up with  
23 The Huffington Post. Certainly these materials ended up with

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1 The Huffington Post and counsel was speaking to this. And I  
2 thought it was striking, we all did, that when we were -- that  
3 when the issues in 371 came up related to the letter to  
4 President Obama, the military commission may recall that, that  
5 the government filed an opposition ultimately to that, a  
6 substantive pleading in opposition, a response, and they  
7 attached as an exhibit to that the article in The Huffington  
8 Post that the prosecution was complaining about yesterday as  
9 having been propaganda, and as a result of that now, that  
10 information is available not only on the -- assuming it is  
11 still available on The Huffington Post website, it definitely  
12 is available on the military commission's website now, the  
13 very same evidence that was said to be propaganda, the  
14 publication of which is thought or said to have been harmful.

15 I mention this at this point because we do exactly  
16 the kind of thing that Mr. Connell was talking about yesterday  
17 and that you asked about yesterday, and what if someone says  
18 to you, say something to the outside world that constitutes  
19 the commission of a crime. And I don't know if the military  
20 commission has had occasion to read the letter that was  
21 written to President Obama or the materials in The Huffington  
22 Post or the correspondence with Mr. Green, but if there is  
23 something in it that is sinister or harmful, I would sure like

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1 to see that. It's not, in fact.

2 I believe the headline in The Huffington Post was  
3 something to the effect that Mr. Mohammad wanted to convert  
4 his captors to Islam and made a pitch for peace.

5 Set aside -- set aside that -- the implications of  
6 any of that, but I mentioned it only to point out that we are  
7 exercising -- we exercised discretion in the review of these  
8 materials and in the way we treat them and handle them. And  
9 we are -- we are American lawyers, having been so for a long  
10 time, and we hold Top Secret/SCI security clearances and we  
11 are read on to the SAP, and we do not -- and we understand  
12 those obligations and we take them seriously.

13 So I think it is true that nothing in 018U -- 018U,  
14 I'm sorry, forbids the materials that were described -- that  
15 are described in 018Y, but at the same time -- and while there  
16 is nothing on the table, no specific amendment to 018U is  
17 proposed, at least in the context of 018Y, there doesn't need  
18 to be either because everything is under control.

19 MJ [COL POHL]: Thank you, Mr. Nevin.

20 LDC [MR. NEVIN]: Okay? Thank you, Your Honor.

21 MJ [COL POHL]: Mr. Ruiz.

22 LDC [MR. RUIZ]: Good afternoon, Your Honor.

23 MJ [COL POHL]: Good afternoon.

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1 LDC [MR. RUIZ]: Your Honor, yesterday I think we clearly  
2 articulated our position on behalf of Mr. al Hawsawi prior to  
3 leaving this issue. We stand squarely for the proposition  
4 that has been articulated by Mr. Connell, joined by Mr. Nevin,  
5 which is that there is nothing unclear about the language in  
6 your communications order in this case, and that the  
7 mechanisms that you construed within that order allow the type  
8 of communications that are at issue in this case.

9 As such, there is nothing the commission really needs  
10 to clarify. There is no need to allay any confusion, although  
11 it seems to me there is a lot of confusion going around these  
12 days, but there is no confusion in your order.

13 The point I want to -- the point I want to touch on  
14 briefly is based on a number of questions you asked yesterday,  
15 and I know you understand and you say that it's your position  
16 that your questions aren't meant to mean anything, but we do  
17 in fact sometimes read into them and want to make sure that if  
18 the judge has some concerns, we can address them.

19 In particular, what I want to talk about, Judge ----

20 MJ [COL POHL]: Mr. Ruiz, slow down, please.

21 LDC [MR. RUIZ]: Very well.

22 MJ [COL POHL]: Go ahead.

23 LDC [MR. RUIZ]: In particular what I want to talk about

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1 is you asked a question, and the question was, well, is  
2 classification review essentially all that stands between a  
3 document or a piece of paper going from the person who is  
4 represented and out into the public.

5           The concern I had when you asked that question was  
6 that the impression was left did the classification review  
7 process that these documents were put through was somehow not  
8 adequate to allay some of those concerns, and then there were  
9 questions about whether -- what would happen if those  
10 communications contained coded messages. What would happen if  
11 those communications extortion to terrorism or to extort  
12 people to terrorist acts, what would happen to those people if  
13 they didn't go through a process. Presumably, as the  
14 communication indicates, only JTF would be able to handle.

15           What I wanted to say is that the classification  
16 review is a very robust process for mining through to make  
17 sure there is no national security threat, to make sure that  
18 these types of questions that were asked are answered squarely  
19 in favor of those documents not posing those kinds of threats.  
20 So I didn't want that question left that a classification is a  
21 rubber-stamp-type document where they look at a document and  
22 say the document is classified or not classified.

23           If you recall one of the documents, Mr. Connell's

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1 diagram was the defense information security officer. The  
2 Defense Information Security Officer, that each of the 9/11  
3 teams now has, was brought about, as you remember, through one  
4 of the commission's orders, and it was meant to be a mechanism  
5 and an expert that would provide us with the ability to look  
6 at documents to get expert opinions about what particular  
7 documents may be classified or guidance, in essence.

8           The guidance was necessary because of the  
9 longstanding issues that we have had with respect to proper  
10 guidance for what is classified and what is not. The  
11 important point in that is that the Defense Information  
12 Security Officer is a member of the team who is in the  
13 position of first recourse for us to provide expert opinions  
14 on these issues.

15           And here is what -- here is what they tell us in  
16 terms of what this classification review involves. First, if  
17 you look at the executive order itself that talks about  
18 classified information, there are a number of points to that  
19 that are important.

20           First, that information will be assessed for damage  
21 to national security. So any information that would be  
22 damaging to national security would be classified. As you  
23 have seen in this litigation, that issue comes up over and

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1 over again. The prosecution asserts national security damage  
2 for redactions, for withholding of information, for providing  
3 it in different forms. And I think the point that both  
4 Mr. Nevin and Mr. Connell have made is that these documents  
5 were put through a classification process, not only of a  
6 single stakeholder, but this is a classification process that  
7 involves multiple agencies, Judge.

8           Each of those agencies would look at that piece of  
9 information and based on the executive order will look at  
10 whether that information contained in those documents could  
11 possibly lead to damage the national security.

12           It would also look to see whether any of that  
13 information includes a threat assessment against transnational  
14 terrorism, and would also seek to identify possible damage  
15 from such information that would then result in the  
16 classification of that information.

17           Without any evidence to the contrary, this  
18 information was all deemed to be unclassified by experts  
19 presumably in national security who looked at this  
20 information, not just through one agency's eyes, but through  
21 multiple agencies' eyes, Judge.

22           The other areas that are looked at in classification  
23 review documents includes information on persons that may be

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1 subject to open investigations known to the government. And  
2 these are just some of the areas that are looked at when a  
3 document goes through classification review, not all of them,  
4 because the list would be fairly lengthy, but as to give you  
5 an indication of the type of review that this information goes  
6 through so that it is not left with the impression that  
7 somehow defense teams have been subverting rules that don't  
8 exist and are perfectly clear, but is, in fact, gone through a  
9 very robust and a very detailed process by the people and the  
10 experts in national security matters that are primarily  
11 responsible for making sure that this information doesn't  
12 create a threat, doesn't cause a threat.

13           They also review this information, Judge, for the  
14 presence of code words or coded messages that may be used to  
15 incite terrorism, terrorist operations or terrorist  
16 activities. It makes perfect sense that those documents would  
17 be reviewed for such a process, and that is, in fact, what  
18 happens when a document such as Mr. Nevin's is reviewed, goes  
19 through the classification review process, is then shopped out  
20 to the different stakeholders, which are DoD, DoJ, Department  
21 of Justice, the CIA, the National Security Agency. These are  
22 all the top agencies that are charged with ensuring the health  
23 of national security.

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1           Now, JTF itself and SOUTHCOM are subsumed within the  
2 Department of Defense Security Review Team. As I understand  
3 the composition of that team based on a nonclassified  
4 documents, that also includes the U.S. Southern Command, which  
5 of course as we understand owns JTF-GTMO and owns the  
6 operations here in Guantanamo Bay, the United States Central  
7 Command, the Criminal Investigative Task Force, these are all  
8 subsumed under the Department of Defense, who is one of the  
9 agencies that would have looked at these documents, would have  
10 put them through a review and he would have said that they  
11 were unclassified.

12           So when General Martins stands up and starts laying  
13 down a structure and leaving the inference that these  
14 documents are not being reviewed and that there is potentially  
15 a threat to national security, it belays the imagination as to  
16 how you can get to such an argument when we understand that  
17 these documents have gone through, not just one agency, but  
18 multiple agencies, whose primary mission is to ensure national  
19 security and after looking at those documents they determined  
20 that they were unclassified.

21           So our position remains exactly what it has been and  
22 what it is, Judge, which is your order is clear, and your  
23 order does not prohibit the dissemination of these materials,

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1 particularly in instances such as this case where they have  
2 been put through a very robust system of classification review  
3 and those agencies that are charged with ensuring national  
4 security in fact do that.

5 I would suggest to you, Judge, that what is going on  
6 here is not really a national security or threat assessment  
7 issue, but really what is going on here and what is at the  
8 heart of this issue is the prosecution's and the government's  
9 desire to engage themselves in censoring information. And,  
10 again, the reason I say that and the inescapable conclusion  
11 for why I say that is because these documents have been  
12 through classification review, as I have said multiple times  
13 by multiple agencies who are charged with ensuring national  
14 security.

15 They have looked at that. They said that's an  
16 unclassified document. They presumably did not identify any  
17 threat information within the document. They presumably did  
18 not identify any coded information within the document. We  
19 heard a number of times that there are no ongoing  
20 investigations so we can draw that inference, because  
21 presumably if coded information had been found or coded  
22 messages to terrorist organizations, there would be an ongoing  
23 investigation and they wouldn't be able to make that

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1 representation.

2           But what's really at the heart of this is what is at  
3 the heart of this system, and it is the desire to constrain  
4 and to narrow the scope of information that is available to  
5 the public. That really is ultimately what's going on here,  
6 because your orders are not unclear. The system of  
7 classification review with all these entities involved is very  
8 robust and very well equipped to address any of these issues  
9 or any of these concerns or hypotheticals that have been  
10 thrown out before the court.

11           This is symptomatic simply of the fact they didn't  
12 like whatever the subject matter of the documents were and  
13 where they went.

14           To assume otherwise, Judge, you would have to -- you  
15 would have to conclude that the system of classification  
16 review and all of the different entities, all of the different  
17 classification review agencies who are charged with national  
18 security simply did not do their job, and that somehow, some  
19 way this propaganda or this information could be harmful to  
20 national security.

21           I would say that you should reject General Martins'  
22 argument not because I say you should reject General Martins'  
23 argument, but because all of these agencies have themselves by

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1 their action in determining that these documents were  
2 unclassified rejected the very argument that General Martins  
3 has sought to make here in court today.

4           As I said, this is simply symptomatic of the desire  
5 to censor, it is -- it shows I think a lack of trust in the  
6 American public to read information that has been deemed to be  
7 not a threat to national security, to think for themselves, to  
8 make decisions for themselves, to accept or reject decision  
9 that may be expressed in those opinions. And I would say to  
10 you that it is decidedly un-American, and you should reject  
11 any attempt to continue to censor information that does not at  
12 all contain a threat to national security.

13           MJ [COL POHL]: Thank you. Mr. Harrington or Ms. Bormann,  
14 do you wish to be heard?

15           LDC [MS. BORMANN]: No, Judge. Yes, Judge.

16           MJ [COL POHL]: Mr. Schwartz does.

17           DDC [MR. SCHWARTZ]: I am giving her the afternoon off,  
18 Your Honor, for her birthday.

19           Just to join with co-defense counsel's comments.  
20 There have been a few references to 018VV and a suggestion  
21 that somehow that contradicts the legal position here and we  
22 don't think it does. 018VV is ours, we will get to that later  
23 this afternoon or this week, but we adopt the position of

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1 codefendant's counsel and I would simply add that to the  
2 extent that the commission were to grant the government's  
3 request for relief in this case, as Mr. Nevin mentioned, it  
4 would make it that much more difficult for us to put  
5 Mr. Bin'Attash back in that chair.

6 MJ [COL POHL]: What's your understanding what the  
7 government is asking for?

8 DDC [MR. SCHWARTZ]: Well, in 018Y or in ----

9 MJ [COL POHL]: Talking about 018Y.

10 DDC [MR. SCHWARTZ]: I would have to check exactly the  
11 relief sought, but the objection seems to be over  
12 Mr. Mohammad's use or interpretation of 018U.

13 MJ [COL POHL]: Well, I just read the pleadings I get, and  
14 of course the government has got an opportunity to speak  
15 again. I see attachment E as the government wants me to issue  
16 that order, which I would anticipate means that's the relief  
17 they are requesting.

18 DDC [MR. SCHWARTZ]: I would agree, the relief sought here  
19 isn't very clear at all. It just seems to be a general  
20 objection or a not liking of what Mr. Nevin's team has done in  
21 representing his client, but I think that goes more to  
22 Mr. Nevin's situation. And I just want to note that to the  
23 extent 018VV has been said to separate from this legal

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1 position, we don't think it does.

2 MJ [COL POHL]: Okay. Thank you. Mr. Harrington?

3 DDC [MR. SCHWARTZ]: Your Honor, one other comment. In  
4 the middle of Mr. Nevin's argument, we just received about 30  
5 pages of I don't know what. It has been premarked 018 blank.  
6 I assume it has to do with this argument, so I just would like  
7 to note that we may need a minute to get through this. Thank  
8 you.

9 MJ [COL POHL]: Mr. Harrington, do you wish to be heard?

10 LDC [MR. HARRINGTON]: Judge, I only want to remind you of  
11 the dark cloud that still hangs over all of us, which is 292,  
12 and the investigation that resulted from that. And I think  
13 the court has to bear that in mind, that everybody here on the  
14 defense side is serious about trying to obey whatever the  
15 orders are and that that investigation and what happened from  
16 it has had a significant chilling effect not only on my team,  
17 but also on the rest of the team to the extent that they know  
18 about it, but that hangs in the background here and really  
19 supports the argument that everybody here is conscientiously  
20 trying to follow the letters of whatever the law -- the orders  
21 that are in existence at the time that these events may  
22 happen. That's all.

23 MJ [COL POHL]: Thank you, Mr. Harrington.

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1 Trial Counsel?

2 CP [BG MARTINS]: Your Honor, Mr. Schwartz mentioned a  
3 package I gave to counsel. The arguments of Mr. Connell,  
4 Mr. Nevin and now Mr. Ruiz have caused me to seek judicial  
5 notice of certain facts that I believe very clearly fit within  
6 the rule. They are items from the authenticated record of  
7 trial in the case of United States v. Ali al Bahlul. This is  
8 a case within our jurisdiction that has been relied upon and  
9 reviewed by several courts in several opinions and believe  
10 that if you take judicial notice of that, it will help me  
11 present argument to this court.

12 LDC [MR. RUIZ]: Judge, I am going to object to ruling on  
13 that prior to having the opportunity to review these documents  
14 to formulate an objection, a proper objection.

15 LDC [MS. BORMANN]: Ditto.

16 CP [BG MARTINS]: Your Honor, I have no objection to you  
17 giving them time. These are important facts that I ask you to  
18 take judicial notice of.

19 LDC [MR. RUIZ]: Also I object to argument based on those  
20 documents, Judge.

21 MJ [COL POHL]: Hold the phone, Mr. Ruiz. When either  
22 side drops paper on the other side, the other side will -- the  
23 person receiving the paper, the team that received it will

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1 have an opportunity to review the material before it can be  
2 discussed by the proponent of it. So if you want to come back  
3 to it, you can; but what I am saying is I am not going to have  
4 a procedure for either side at the last minute -- you believe  
5 it's relevant, you may want to mention it, later they are  
6 going to have an opportunity to both review it and then lodge  
7 any objections on the judicial notice part of it or whatever  
8 else they want to do, but they don't know what they don't know  
9 because they haven't had an opportunity to review it.

10 Mr. Ruiz, you are still standing.

11 LDC [MR. RUIZ]: Yes, I just want to be clear that any  
12 reference during General Martin's argument, our objection is  
13 we have no opportunity to formulate proper objection before  
14 reviewing it.

15 MJ [COL POHL]: I think that's what I just said.

16 LDC [MR. RUIZ]: I wanted to make sure.

17 MJ [COL POHL]: General Martins, let me come back to the  
18 question I asked Mr. Schwartz.

19 CP [BG MARTINS]: Your Honor, I believe these are material  
20 facts that have become more material based on the questions  
21 you have been asking.

22 MJ [COL POHL]: I got it. I got it.

23 CP [BG MARTINS]: I don't want to forfeit my ability to

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1 argue based on these adjudicative effects.

2 MJ [COL POHL]: That's fine. They will have an  
3 opportunity to review it and in the due course of business  
4 they will get it.

5 What relief are you asking for? Is it this interim  
6 order which is Attachment E to your initial pleading?

7 CP [BG MARTINS]: It would be a final order in that vein,  
8 Your Honor. In light of the argument from counsel, we have  
9 actually discerned some additional areas in your original  
10 order, a couple of additional paragraphs not cited in that  
11 interim order that is the relief we were initially requesting  
12 months ago when we filed as an interim measure. There are a  
13 couple of other paragraphs that have emerged as probably also  
14 a source of the seam that is enabling them to circumvent the  
15 order.

16 MJ [COL POHL]: So it seems to me is your interim order  
17 addresses processing of nonlegal mail, correct?

18 CP [BG MARTINS]: Your Honor, it purports to -- that's its  
19 title, but in paragraph 3.f(3) and I apologize that our  
20 Attachment E actually left off the 3 there, but  
21 paragraph 3.f(3), paragraph 4(d), paragraph 12 and  
22 paragraphs 20 are apparently being read to create an avenue  
23 for couriering, delivering, under color of authority, things

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1 that they deem later on are not legal or not -- don't need to  
2 be considered privileged.

3 MJ [COL POHL]: Well, the problem we are running into, and  
4 I am going to come back to Mr. Connell's definition when he  
5 comes back, is that if you look at the order itself, it  
6 defines legal mail and basically refers to nonlegal mail as  
7 anything that does not fit the definitions of lawyer-client  
8 privileged communications and other case-related material.  
9 Okay.

10 Your interim order addresses processing of nonlegal  
11 mail. Okay? What I am hearing the defense say is that none  
12 of this is nonlegal mail, that this is all legal mail and,  
13 therefore, it's processed the other way.

14 So isn't the issue not processing nonlegal mail  
15 through the JTF procedures, but to define, as you want to  
16 define it -- I'm just saying that's your position of legal  
17 mail. Because are they not -- is it your view that if it is  
18 legal mail, that their current process somehow violates the  
19 protective order or 018U?

20 CP [BG MARTINS]: Your Honor, I wish I could say yes or no  
21 to that, but the problem is is your order, when considered in  
22 conjunction with the practices of the camp and the orders of  
23 the commander relating to mail has created seam. And if I may

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1 put up Mr. Connell's slide 4, you have seen this one before,  
2 but there is a saying in the military "order plus counterorder  
3 equals disorder." And your order is a countermanding of the  
4 way the mail process in the JTF works. You have done it for  
5 cause, you have done it with pure motives for sure. You are  
6 trying to create a sphere in which these counsel can do their  
7 important job with their clients, but that green arrow that's  
8 going to NGO nonprofit is the real problem.

9           Classification review -- they appear to think that  
10 classification review exhausts the government's interests in  
11 screening that takes place traditionally in law of war  
12 detention facilities and should appropriately take place.  
13 13526, the executive order on national security information,  
14 is about information, national security information, and it's  
15 about security associated with dissemination of information  
16 that could be reasonably expected to cause identifiable or  
17 describable damage to national security. That's not the only  
18 type of security measures certainly that a state may employ.

19           So the transmission of messages to unknown actors are  
20 not the expertise of those who review information and are not  
21 expected to be. Screening of mail of law of armed conflict  
22 captives, no doubt presumed innocent of any alleged war  
23 crimes, but not presumed nonbelligerent, they are belligerent.

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1 They have a belligerency that we have to acknowledge that the  
2 camp has every reason to regulate, and this is creating a  
3 cloaking as the document is with the attorney here on the  
4 camp -- here in the camp. And then it can -- while under the  
5 cloak of privilege and it can get through the Privilege Review  
6 Team, it can make its way out of the facility, is then not  
7 subject to the kind of screening and ability to deal with it  
8 that is the focus of the mail procedures in camps since long  
9 before we had all different kinds of ways of disseminating it.

10 So I just respectfully disagree, Your Honor. Your  
11 order has a coherence, it's got a beginning, middle and end,  
12 it has a definition section, but in practice it has shown to  
13 create a seam that involves circumvention of what I think your  
14 intent is. There is legal and case-related on the one hand  
15 and then there is nonlegal, and it doesn't seem, it didn't  
16 seem to us there was any intent to substitute out for that  
17 nonlegal.

18 MJ [COL POHL]: No, but -- and I don't -- I'm not quite  
19 sure what you meant when you said you disagree with something  
20 I said, so let me just make it clear here. Is the -- and  
21 again, let's go back to remedies here. We have -- I'm not  
22 going to use the example -- clearly attorney-client privileged  
23 e-mail from the detainee to his attorney. Okay? Would

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1 that -- and I'm only talking about from -- that goes through  
2 no -- no review, correct?

3 CP [BG MARTINS]: It doesn't. I mean, it's not going to  
4 be considered contraband, it is given straight to the  
5 attorney.

6 MJ [COL POHL]: Okay. So there would be no review of that  
7 under any regime that you are talking about?

8 CP [BG MARTINS]: Right. The concern -- you see that  
9 green arrow?

10 MJ [COL POHL]: I see a lot of green arrows.

11 CP [BG MARTINS]: When something is -- yes, the one that's  
12 going to the UN/NGO nonprofit ----

13 MJ [COL POHL]: Yes, I am breaking these up. As I said  
14 yesterday, I am a linear guy. From the client to the  
15 attorney, nobody interviews with that, no -- okay.

16 The next step is from the attorney to the other  
17 people, okay, which currently goes through a -- following that  
18 diagram, I don't know how this goes, I'm just taking  
19 Mr. Connell's word for it. According to that, that would go  
20 for a classification review. Okay.

21 Then -- and they may do that or they are just going  
22 to just keep it for themselves without sending it to the far  
23 right, so they go through classification review, now they know

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1 how to handle that thing internally, and up to that point, in  
2 your view, and I am using Mr. Connell because his picture is  
3 on this, is everything is okay. Okay.

4 It's when they move from that, they get it back from  
5 the classification review people and if they move it to the  
6 right, that's when you have problems?

7 CP [BG MARTINS]: Well, I mean, I have problems with the  
8 removal of something from the area here by means of the legal  
9 team as a privileged document and then it's moving where? You  
10 know, it can get anywhere.

11 MJ [COL POHL]: But what I'm saying, that's why I am  
12 asking you -- I am just trying to follow this diagram. If you  
13 go to the left, I'm assuming that's Mr. al Baluchi there. He  
14 wants to give -- writes a letter to Mr. Connell -- and this is  
15 clearly privileged material. Okay. Would you have anybody  
16 review that before he gave it to Mr. Connell?

17 CP [BG MARTINS]: No. And, in fact, I think that's what  
18 can create the issues when we are dealing with different types  
19 of dissemination: Electronic means, other types of media  
20 that -- that's a privileged area where you have properly  
21 exercised authority to make this court function, but what  
22 happens is counsel then come to the United States, leave the  
23 place where the guards have any opportunity to see anything,

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1 make a decision, I'm going to go ahead and waive privilege and  
2 we are going to give it to somebody in a nongovernmental  
3 organization.

4 MJ [COL POHL]: No, no, I understand. I am going to get  
5 to that point, but what I am saying is -- okay. Just -- let's  
6 just walk through this. It's attorney privileged material.

7 CP [BG MARTINS]: Right.

8 MJ [COL POHL]: It goes from Ali to Mr. Connell and  
9 Mr. Connell takes it back, treats it -- because it is has not  
10 been reviewed now, treats it under the protective order and  
11 sticks it back in the appropriate container back in OMC  
12 wherever he keeps his stuff up there with the defense team.  
13 No problem so far.

14 CP [BG MARTINS]: No problem.

15 MJ [COL POHL]: Okay. Then he wants to do a  
16 classification review to see which container he has got to  
17 keep it in. Again he does that, it comes back, no problem.

18 CP [BG MARTINS]: No problem.

19 MJ [COL POHL]: Now, if he wants to, we will use your  
20 example, the NGO, I suspect the news media may also be in  
21 this, but I am not going to discuss them for this example.

22 CP [BG MARTINS]: He has a red mark there and we do see --  
23 we did put a few more marks on there absent a JTF review.

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1 MJ [COL POHL]: I got it. Then if he wants to go to a  
2 third party, and I am not quite sure where the first one is,  
3 unless it's some other court system.

4 LDC [MR. CONNELL]: Your Honor, that's supposed to be a  
5 court system. That's supposed to be a person taking an oath.

6 MJ [COL POHL]: I kind of figured that, but okay. Let's  
7 just use the NGO because I think it's probably the easiest  
8 one.

9 If he wanted to take that information and send it to  
10 the NGO, would -- under your regime there would have to be  
11 another review before he could do that?

12 CP [BG MARTINS]: I believe so. That requires the camp to  
13 be able to -- because this is now an extension of things that  
14 have been created in the camp. It's not good enough to give  
15 it to the classification review system, although they now have  
16 been -- you know, they have presumably understood that that --  
17 they are being relied upon improperly as the whole equity of  
18 the government.

19 MJ [COL POHL]: I understand.

20 CP [BG MARTINS]: So people throughout the system are  
21 presumably more clued in than they were, but yes, there needs  
22 to be -- the camp has to get its review of nonlegal material.

23 MJ [COL POHL]: No, no, but I am saying -- I am talking

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1 about this is legal material, okay?

2 CP [BG MARTINS]: Right. And this is -- Your Honor, this  
3 is where the confusion arises, because magically something can  
4 now leave the cloak of privilege because they decide to waive  
5 it, maybe they have decided on some calculus that, hey, maybe  
6 we ought to give it to somebody else.

7 MJ [COL POHL]: No, but what I am saying is -- in the NGO  
8 example, I think this example is in the order, the  
9 introductory letter to a third party ----

10 CP [BG MARTINS]: Right, and that's one of the points that  
11 we would like you to not make such a wide, gaping hole now  
12 through which things can go. We believe that needs  
13 clarification because that seems to be some of the authority  
14 they are relying on.

15 MJ [COL POHL]: But here is -- okay. So what you say is  
16 if they are going to go down to his far right column here,  
17 okay, and what it amounts to -- no matter who -- we talked  
18 earlier when you give it to the news media, obviously that's  
19 waiving any privilege. The NGO, it depends I guess which one  
20 you give it to, whether or not they have a nondisclosure  
21 agreement or not, which for these purposes, some people like  
22 NDAs and I don't know what happens if you give it to some type  
23 of foreign court. But let's make an assumption that there is

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1 no -- under the regime obviously the default would be there is  
2 no NDA and you are giving it out to somebody who could give it  
3 to somebody else. Under that scenario, if they wanted to do  
4 that and it was legal mail that fits the legal mail  
5 definition, do they have to send it back for a JTF review?

6 CP [BG MARTINS]: It's legal mail, so -- but -- but --  
7 what we would -- the hypothetical leaves some things  
8 unanswered. I mean, the concrete discussion of what is it  
9 that makes it -- are they going to just be determining it as  
10 something that is still legal? What does "legal" mean in that  
11 definition? So it's legal but they are waiving privilege  
12 because they have something that advances the case that's  
13 being done by the NGO or by the United Nations?

14 Your Honor, this is the area that requires  
15 clarification. Our request for clarification is that you make  
16 clear that the JTF should be reviewing those things that are  
17 non -- no longer legal in character, and that the commission  
18 should place some scrutiny on that definition. It can't be  
19 legal just because an attorney is the one carrying it, for  
20 instance.

21 We thought that was the meaning of your letter of  
22 introduction. Not strictly legal in the sense that it  
23 contains legal analysis or certainly privilege, but it's --

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1 you know, you created a means for them to gain introduction.

2 MJ [COL POHL]: But this is -- this appears to be the  
3 initial problem here, and I have spent some time looking at my  
4 order and your brief. And it appears to me on a -- on one  
5 level, I will use Mr. Mohammad's letter to the President for  
6 example, the government says this is clearly not legal mail,  
7 it is nonlegal mail asking the President to do something. It  
8 would be something like asking, you know, so it's clearly  
9 nonlegal mail, therefore, it should have gone through the JTF  
10 procedures and, of course, the JTF doesn't permit nonlegal  
11 mail to go out anyway. So be that as it may.

12 CP [BG MARTINS]: There is two -- there is a requirement  
13 they be able to deliver two pieces of nonlegal mail to family  
14 members once a month, and that's the international community  
15 of Red Cross' approach. That's what we do with combatants.

16 MJ [COL POHL]: I got. I got it. But what I am saying is  
17 what I see the problem here is is a major disagreement of the  
18 definition of legal mail, because your proposed order just  
19 talks about how you process nonlegal mail.

20 You think Mr. Mohammad's letter is clearly nonlegal  
21 mail and therefore should go through the JTF screening  
22 procedures. The defense is saying no, it's not, it's legal  
23 mail under the regime that Mr. Connell talked about. And so

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1 when you come to me, in some ways the -- I'm not sure it's a  
2 difficult -- a difficult question to answer, how does nonlegal  
3 mail to be processed in this confinement facility, which I  
4 would probably argue like all my other -- my question to  
5 Mr. Nevin, in all other confinement facilities, what do they  
6 do with nonlegal mail.

7 CP [BG MARTINS]: You have to rely on this is a law of war  
8 facility and these individuals are part of a belligerent  
9 element unless they ask for a hearing, which they are entitled  
10 to, evidence based hearing where we have to prove it or you  
11 otherwise determine they are not.

12 MJ [COL POHL]: I got it, but is there anything in my  
13 order that indicates that nonlegal mail should not follow the  
14 JTF screening procedure?

15 CP [BG MARTINS]: I think the paragraphs I mentioned  
16 creates the opening and I believe -- so 3.f(3) is -- which  
17 relates to how in meetings materials are going to be handled  
18 with the Privilege Team and nonlegal mail and material going  
19 to JTF-GTMO, we believe that approach for materials should be  
20 strengthened as what should be happening to nonlegal mail and  
21 material; 4(d), about the log.

22 Again, you know, how the Privilege Team works with  
23 the defense counsel. And then 12, paragraph 12 is, I said

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1 paragraph 20 is my last paragraph before, I meant page 20,  
2 paragraph 12, which is on actually 19, page 19, you say,  
3 "Storage of and access to nonlegal material." It seems to be  
4 the intent of this is my order refers to privileged written  
5 communications and everything else ought to be going through  
6 the normal system. Because you say "storage of and access  
7 to," it kind of seems like it's a -- it may not discuss or  
8 pertain -- this language may not limit this to nonlegal mail  
9 that's going out. So we would ask that that be clarified.

10 MJ [COL POHL]: Okay. Okay.

11 CP [BG MARTINS]: And the implication, Your Honor, is that  
12 the background set of rules are appropriate rules, they are  
13 within the discretion of the commander and your rule actually  
14 sets up an opposition to that that is creating a seam, and it  
15 is that underlying rule that's entitled to deference, and  
16 there clearly is a sphere for the ----

17 MJ [COL POHL]: You know, General Martins, when you and I  
18 have these discussions, sometimes I feel like we are just not  
19 communicating very well, because I don't see an issue with  
20 nonlegal mail per se. If it is nonlegal mail, everybody knows  
21 how it is to be handled. Okay? There is no dispute about  
22 that.

23 This order, when it addresses nonlegal -- the problem

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1 I'm having, which I think is the problem you are having, is  
2 the expansive definition of "legal mail." They're -- I have  
3 heard nobody over here on the defense say we are sending out  
4 nonlegal mail through this process. This is only legal mail  
5 we are sending out through this process that you set up,  
6 Judge, for which there is no review.

7           And so I come back, I circle back, is the problem --  
8 it's a definitional problem of what's legal mail. I saw it  
9 defined here, you heard Mr. Connell's expansiveness. If you  
10 take his definition of legal mail, your proposal doesn't even  
11 address it because it only talks about nonlegal mail, isn't  
12 that the problem of how legal mail is being defined?

13           CP [BG MARTINS]: We would like a more limited definition  
14 of legal mail. I would like that. But the point is actually  
15 not just about the order and -- it's the background on which  
16 the order sits. Those rules ought to continue to have force  
17 and it's not -- it involves a recognition of how different  
18 messages can leave a facility.

19           So, Your Honor, I do agree, we haven't been  
20 communicating, and I take responsibility for that. I want to  
21 present more information. I would like you to take -- begin  
22 by taking notice of the adjudicative facts which are not in  
23 dispute, because I need to convey the kinds of harm that can

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1 come from this. And they are not imaginary, they do involve  
2 the kind of detainee that we have, and I owe that.

3 So I do request that these items here be studied by  
4 counsel to the extent they want to object is, they are pieces  
5 of the record.

6 LDC [MR. RUIZ]: Objection, Your Honor. I am going to  
7 object to any descriptions of what these documents ----

8 MJ [COL POHL]: Mr. Ruiz, your objection is preserved. He  
9 is just asking me to consider them at the appropriate time. I  
10 got it. The objection is overruled.

11 CP [BG MARTINS]: At the appropriate time. Your Honor, in  
12 this light of communications and how they can leave, we do --  
13 and I don't want to bring in the laptop thing, you have issued  
14 an order yesterday, but in there there are -- there is an  
15 apparent remedy within it to communicate if we can't do what  
16 you are ordering. So we are going to avail ourselves of that.

17 We are also going to provide you more information,  
18 because apparently yesterday there was some understanding that  
19 we have been -- or the JTF has been in some way blocking  
20 something or failing to -- you know, to do what was clearly  
21 done in 2010, and I just need to convey to you ----

22 MJ [COL POHL]: I try to issue the orders based on the  
23 facts I have before me. If those facts change or when I order

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1 a prospective action, if there is need to, I will always  
2 listen. Okay.

3 CP [BG MARTINS]: So, Your Honor, I would like to be able  
4 to continue to ----

5 MJ [COL POHL]: I think I know what I am going to do on  
6 this, and if I do what I think I am right now, you are going  
7 to get an another opportunity to talk.

8 CP [BG MARTINS]: Thank you, Your Honor.

9 MJ [COL POHL]: Mr. Connell.

10 LDC [MR. CONNELL]: The first thing that bears noting is  
11 that the definitions -- there is no such thing as legal mail  
12 in AE 018U. The military commission may recall the defense  
13 argued for a category of legal mail and we lost.

14 MJ [COL POHL]: What about a category of nonlegal mail?

15 LDC [MR. CONNELL]: Right. So what we wound up with  
16 instead was three categories: Lawyer-client privileged  
17 communication, other case-related material, and nonlegal mail.

18 I just went back and looked at AE 018, Attachment A,  
19 which is the original proposed order from the government on  
20 this matter, and these -- the definitions that made it into  
21 AE 018U are the government's definitions. They won that  
22 debate.

23 MJ [COL POHL]: Let me ask you this, Mr. Connell. And,

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1 again, sometimes I see the issue differently than counsel  
2 does.

3 LDC [MR. CONNELL]: Sure.

4 MJ [COL POHL]: You put up a slide yesterday of privilege,  
5 which is ----

6 LDC [MR. CONNELL]: Yes, sir, it's ready. If we could  
7 have the feed from Table 4.

8 MJ [COL POHL]: That's not the slide I am talking about.  
9 The one that says "privileged."

10 LDC [MR. CONNELL]: I don't see any slides, so ----

11 MJ [COL POHL]: What?

12 LDC [MR. CONNELL]: I don't see any slides. It says  
13 "current privilege architecture" at the top.

14 MJ [COL POHL]: That's not the one I want. It is one that  
15 says "privileged" the with two bullets on it, the lights on  
16 it. You can put it on the big screen. Do you have a copy of  
17 the written communication order there?

18 LDC [MR. CONNELL]: I do, close.

19 MJ [COL POHL]: Get it because my question is going to be  
20 based on that.

21 LDC [MR. CONNELL]: Okay.

22 [Pause.]

23 LDC [MR. CONNELL]: Your Honor, I was using my soft copy

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1 of the computer. Why don't you ask me a question and I will  
2 see if I can answer it.

3 MJ [COL POHL]: As you alluded to earlier, paragraphs 2(f)  
4 and 2(g) in the order, one entitled "lawyer-client privileged  
5 communications" with two subparagraphs.

6 LDC [MR. CONNELL]: Yes, sir.

7 MJ [COL POHL]: The other one, the other "case-related  
8 material," also two subparagraphs.

9 LDC [MR. CONNELL]: Yes.

10 MJ [COL POHL]: Okay. That universe, then everything that  
11 doesn't fit in that universe, the next paragraph says is  
12 "nonlegal mail."

13 LDC [MR. CONNELL]: That's right.

14 MJ [COL POHL]: Okay. Is there anything in the universe  
15 of (f) and (g) that is inconsistent or doesn't fit your  
16 definition of -- and I'm going to use the term "privileged  
17 materials," but basically we are talking about legal mail?

18 LDC [MR. CONNELL]: Could you repeat the question because  
19 I want to make sure that I answer it.

20 MJ [COL POHL]: What I am saying is there is definitions  
21 in the order ----

22 LDC [MR. CONNELL]: Yes, sir.

23 MJ [COL POHL]: ---- of what is, and I didn't use the term

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1 "legal mail," but let's for shorthand use the term "legal  
2 mail."

3 LDC [MR. CONNELL]: (f) and (g) together are legal mail.

4 MJ [COL POHL]: My question is there are different words  
5 there than there is on your slide there.

6 LDC [MR. CONNELL]: Yes.

7 MJ [COL POHL]: Is there anything included in your slide  
8 that is not encompassed by the legal mail definitions in the  
9 order?

10 LDC [MR. CONNELL]: No, sir. And the reason for this  
11 slide is the reference in 2(f)(1) to the definition of LCPC is  
12 communications that are privileged within the meaning of  
13 M.C.R.E. 502, so I went to M.C.R.E. 502 to see what it said,  
14 and then under 2(f)(2), it says "attorney work product is  
15 encompassed within lawyer privileged communications," so I  
16 went to the leading case in the D.C. Circuit on what is  
17 attorney work product, which is United States v. Deloitte.

18 MJ [COL POHL]: Okay. Just so I am clear here. Okay.

19 LDC [MR. CONNELL]: Yes.

20 MJ [COL POHL]: Now, we are back to my question that I had  
21 with General Martins, and I think this is -- to me this is  
22 where the rub is.

23 LDC [MR. CONNELL]: Right.

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1 MJ [COL POHL]: I may be wrong, it won't be the first  
2 time, it won't be the last, but the rub appears to be, is the  
3 defense definition of legal mail; by that I mean your  
4 definition of legal mail includes almost anything prepared for  
5 litigation that could have impact on the commission process?

6 LDC [MR. CONNELL]: Yes, sir.

7 MJ [COL POHL]: Even though not directly related to  
8 representations before this commission. For example, a  
9 lobbying effort on an NGO.

10 LDC [MR. CONNELL]: Yes, sir. Absolutely, that's true.

11 MJ [COL POHL]: That's indirectly at best -- well, what I  
12 want to say directly, but it is an indirect attempt to benefit  
13 your client before this commission by having somebody else do  
14 something.

15 LDC [MR. CONNELL]: Right, because we don't operate in a  
16 vacuum here.

17 MJ [COL POHL]: Right. I got it. The same thing with the  
18 media.

19 LDC [MR. CONNELL]: Of course.

20 MJ [COL POHL]: And you're talking about sending stuff to  
21 other courts.

22 LDC [MR. CONNELL]: D.C. District, for example.

23 MJ [COL POHL]: I was thinking more like foreign courts

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1 like the European Court of Human Rights.

2 LDC [MR. CONNELL]: I was thinking D.C. District, but  
3 foreign courts, too.

4 MJ [COL POHL]: Sure. If that's your definition of legal  
5 mail here.

6 LDC [MR. CONNELL]: Yes.

7 MJ [COL POHL]: Then your view is there is no JDG cut on  
8 that?

9 LDC [MR. CONNELL]: We keep saying that JDG doesn't get a  
10 cut, which is confusing to me because my understanding is that  
11 SOUTHCOM -- I mean, JDG is just one little cog in a great big  
12 machine and SOUTHCOM -- it is my understanding SOUTHCOM is one  
13 of the big five who get a cut on everything which goes for  
14 classification review. And so, you know, the interests of  
15 JDG, you know, whatever couple of thousand people are there,  
16 are represented by SOUTHCOM, and so yes, they get a cut on it.

17 Here is what to me seems the rub.

18 MJ [COL POHL]: Okay.

19 LDC [MR. CONNELL]: To me the real question is what  
20 government -- what review does the government feel is lacking?  
21 I can think of two possibilities. One of those is DOCEX. All  
22 right. That the government wants a privilege list peek at  
23 everything that we want to use in the D.C. District or to

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1 lobby an NGO or to lobby the President or to lobby a member of  
2 Congress or whatever, right? That's number one. And  
3 truthfully, my -- I have little sympathy for that position.  
4 They really just can't have that.

5           But if their concern is there is a separate security  
6 review, separate from the damage to national security review,  
7 which takes place as part of the classification review, then  
8 the solution to this problem is to give us a privileged  
9 security review. If they are really concerned about a  
10 security review, give us a -- you know, add another paragraph  
11 to 4(d) in Protective Order #1 and let's assign an additional  
12 responsibility to the Washington Headquarters Service or  
13 whoever -- you know, I don't control the bureaucracy, and  
14 let's get a security review process in there. Because if  
15 there needs to be a security review, if that's really the  
16 government's problem, let's have one. I would love to have a  
17 security review, and I would love to have it to be privileged.

18           The reason why I object so strongly to, and I know  
19 that no one -- I can't say no one, because Mr. Mohammad did  
20 take advantage of the JDG review, but very few people would do  
21 that because you are surrendering privilege when you do that,  
22 and -- but we do have a privileged pipeline for classification  
23 review, why not have a privilege pipeline for security review.

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1 If that's the problem, let's solve it that way.

2 MJ [COL POHL]: Okay. Anything further?

3 LDC [MR. CONNELL]: Yes. The last point that I wanted to  
4 leave you with is what the government describes as a seam or  
5 an opening is in fact the plain reading of your order which  
6 has been given to it by dozens and dozens of legal and  
7 security professionals operating on a consensus, good-faith  
8 basis. So what I am going to ask, if the military commission  
9 decides to amend its order, either as a defense request or a  
10 prosecution order -- request, please do it as an amendment and  
11 not a "clarification." Because if you are simply clarifying  
12 something, then you are retroactively telling dozens and  
13 dozens of people who depend on security and their legal good  
14 faith for their livelihood that this -- it didn't mean what  
15 everyone thought it meant and there was some other meaning  
16 that was out there. If you decide to amend it, it's your  
17 order and you have ----

18 MJ [COL POHL]: On that point -- but the other -- put up  
19 the slide with all the arrows on it.

20 LDC [MR. CONNELL]: Yes. One slide back, please.

21 MJ [COL POHL]: You are talking about the people at the  
22 top?

23 LDC [MR. CONNELL]: Yes.

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1 MJ [COL POHL]: What ----

2 LDC [MR. CONNELL]: No, no, I am not talking about the  
3 people at the top, I am talking about the Washington  
4 Headquarters Services, I am talking about DSO, I am talking  
5 about me and the other lawyers.

6 MJ [COL POHL]: Okay. But they return it to you and at  
7 that point you feel you have authority to disseminate it to  
8 whom you wished?

9 LDC [MR. CONNELL]: Yes.

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: And I will tell you on many  
12 circumstances we put that right on the cover letter. This  
13 document is intended for release to the media, because I could  
14 see that could be different. Sometimes what happens,  
15 Your Honor, is they send things back "FOUO." And if they mark  
16 them "UNCLASSIFIED/FOUO," we don't disseminate to anyone  
17 outside of the government. That's one of their options is to  
18 declare things FOUO and when they do that, we honor those  
19 markings. But if it comes back with a marking "unclassified,"  
20 there is nothing in any of these orders that restricts our  
21 legal judgment of to whom we will further distribute it.

22 MJ [COL POHL]: Thank you.

23 LDC [MR. CONNELL]: Thank you very much.

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1 MJ [COL POHL]: Anything further from any of the defense  
2 counsel?

3 LDC [MR. NEVIN]: Yes, Your Honor. Just two things.  
4 First, the two-page limitation is not a limitation -- remember  
5 General Martins told you that the two-page limitation was an  
6 arrangement, that was a limitation that the ICRC imposed? Do  
7 you remember that?

8 MJ [COL POHL]: Vaguely, but go ahead.

9 LDC [MR. NEVIN]: Well, anyway, that's a requirement that  
10 JTF-GTMO imposed on the ICRC and which they comply with and  
11 it's not -- it's not the ICRC's idea.

12 The second thing I would say is that definition of  
13 legal mail, that incorporates M.C.R.E. 502 I believe is the  
14 same that the federal courts use, that the Bureau of Prisons  
15 uses to define legal mail incorporating, of course, not  
16 M.C.R.E. but the Federal Rules of Evidence, Rule 502 as well.  
17 I will confirm that in any event for the military commission.

18 MJ [COL POHL]: Okay. Right. Anything more from the  
19 defense counsel? General Martins?

20 CP [BG MARTINS]: Your Honor, I appreciate Mr. Nevin  
21 saying that so I can clarify, and I don't want to imply the  
22 ICRC is making rules here. I meant to say that the mail --  
23 the two letters that are sent using the International

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1 Community of the Red Cross system are an appropriate  
2 limitation under law of armed conflict detention. Thank you.

3 MJ [COL POHL]: Reading the government's motion, it is  
4 unclear to the commission exactly what it wants, and we also  
5 have the issue about the judicial notice.

6 So, Trial Counsel, I just -- I need you to tell me  
7 exactly what you are asking for. And when I say that, I want  
8 it in writing and I want a motion of -- you want it -- I am  
9 going to treat it -- and God knows, I amend orders all the  
10 time. If you wish to have changes in 018U, you will provide a  
11 pleading, indicate exactly what wording you want, because the  
12 confusion here is, is what -- what, what do you want changed  
13 and how do you want it processed? Do you want the legal mail  
14 definition changed? How do you want it processed? So we are  
15 clear about what your proposed procedure is. And so that's  
16 point one.

17 Point two is you can just make a request for judicial  
18 notice of the al Bahlul pleading if you want or you can  
19 include that in your motion of why you think that's relevant.  
20 And like I said, I always hate to kick things down the road,  
21 but it's unclear to me, if I granted you relief, what exactly  
22 I would grant because I don't think there is enough  
23 specificity in that.

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1           So file that in the normal briefing schedule and we  
2 will pick up 018Y in the April sessions and we will go from  
3 there. Again, I just need to know exactly what you want and  
4 then trial counsel or defense, you will have an opportunity to  
5 respond and you will also have an opportunity to review the  
6 al Bahlul materials before then. Okay. I think that  
7 addresses Mr. Ruiz's concern about the al Bahlul materials.

8           LDC [MR. CONNELL]: Sir, do you want to cut the feed from  
9 Table 4.

10          MJ [COL POHL]: Oh, yes, I'm sorry.

11 [Pause.]

12          MJ [COL POHL]: And just to perhaps expedite this  
13 procedure, because now I just looked at 018W, and that's -- as  
14 you said I believe yesterday, Mr. Connell indicates neither  
15 side likes the written order and you have -- okay -- and I  
16 don't want to go into it now because we will not have time to  
17 get to it right now, but would it be fair to say the  
18 government is going to submit their modifications, I'll  
19 consider that and also 018W and your response, because I think  
20 in your case -- correct me if I am wrong, who drafted this,  
21 018W? It's a joint motion, that's the only reason I am  
22 asking.

23          DC [LtCol GLEASON]: It was a joint motion, but it was

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1 drafted by team Hawsawi.

2 MJ [COL POHL]: Just to be clear, because I am looking  
3 real quickly here, you have a specific language you want  
4 changed; is that correct?

5 DC [LtCol GLEASON]: Yes, sir.

6 MJ [COL POHL]: So I know exactly what language in the  
7 order you want changed, correct?

8 DC [LtCol GLEASON]: Yes, sir.

9 MJ [COL POHL]: What we will do at the April sessions, we  
10 will combine 018Y and 018W with both sides telling me --  
11 because both sides now want to change the order, and I know  
12 exactly what the defense wants and then the government will  
13 tell me what they want and we will address it from there.  
14 Okay?

15 Okay. That being said, does either side believe any  
16 of the other 018 series orders can be meaningfully addressed  
17 at this time given the status of the two I just talked about?  
18 When I say "at this time," I am really meaning today or  
19 Friday.

20 LDC [MR. RUIZ]: Judge, we think that 018FFF is a  
21 discovery motion -- well, requesting witnesses. We can  
22 address that ----

23 MJ [COL POHL]: Okay.

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1 LDC [MR. RUIZ]: ---- I think. And I think that will free  
2 up the way for additional pleadings related to that motion in  
3 future hearings.

4 MJ [COL POHL]: Okay.

5 LDC [MS. BORMANN]: And also, Judge, 018HH, I don't know,  
6 I mean, it's going to take a little while to explain it, but  
7 maybe Friday.

8 MJ [COL POHL]: Is that a discovery motion also?

9 LDC [MS. BORMANN]: No, it has to do with the provision of  
10 words -- classified words that came from my client put in  
11 motion form and then able to go back to him for review.

12 MJ [COL POHL]: Okay. Okay. Given the plan that we are  
13 going to go to a 505(h) hearing, I don't want to start  
14 something knowing we can't finish, but when we get done with  
15 the 505(h) hearing, we will have an 802 for scheduling  
16 purposes for the way ahead on Friday. That being said, the  
17 commission is in recess.

18 CDC [MR. SOWARDS]: [Microphone button not pushed; no  
19 audio].

20 Your Honor ----

21 MJ [COL POHL]: I heard you the other day, Mr. Sowards.

22 Go ahead.

23 CDC [MR. SOWARDS]: I have one question about something

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1 General Martins said with regard to 182K. Just a point of  
2 clarification. I heard General Martins indicate something  
3 about some change of circumstance that might affect the  
4 ability to give you a status report or affect the substance of  
5 the status report that's due March 8 with respect to the  
6 return of the laptops and your order, paragraph 2.a had  
7 indicated that they should be returned to the defendants by  
8 that date and with respect to 2.b, only in the event that they  
9 weren't, didn't have the same functionality, they should be  
10 returned before March 8.

11 And as I understand it, the defendants are about to  
12 be returned to the camp and we won't see them again until  
13 Friday. We have Mr. Mohammad's laptop with us. We would like  
14 to give it to him before he returns to the camp and it is the  
15 same laptop and has the same functionality as the one the  
16 government seized and then returned to our defense security  
17 office.

18 MJ [COL POHL]: That's an issue for the JDG, not me.

19 CDC [MR. SOWARDS]: Okay.

20 MJ [COL POHL]: If they are comfortable with you handling  
21 it straight back to him, I am not going to deal with those  
22 issues. If there is a problem dealing with the compliance,  
23 that is one thing, but if it is something taken back to the

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1 camp and I am not sure what the procedures are, if you believe  
2 they are not complying with the order, it is one type of  
3 thing, but I am not going to get in the position of telling  
4 the camp what they have to ----

5 CDC [MR. SOWARDS]: So I would just speak with the guard?

6 MJ [COL POHL]: Coordinate with them and see what they say  
7 and if we have to come back, we will come back.

8 CDC [MR. SOWARDS]: Thank you.

9 MJ [COL POHL]: Mr. Ruiz? Okay. The commission is in  
10 recess for the rest of today. Once the courtroom and  
11 everybody else is clear, we will do the normal 505(h) hearing.  
12 Just so everybody understands -- you can sit down. This is a  
13 hearing that's designed to see whether or not classified  
14 evidence is necessary to entail a closed session. I think, as  
15 I said earlier, we had one of these on -- a week ago last  
16 Friday. At that time I made certain findings that we had to  
17 discuss some classified information, which will be in a closed  
18 session pursuant to Rule for Military Commission 806 tomorrow.  
19 And this session we are going to do tonight will be only to  
20 see whether or not we need to add things to that particular  
21 docket.

22 Again, according to the rules and so everybody  
23 understands, such closed sessions are narrowly tailored to

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