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1 [The R.M.C. 803 session was called to order at 0953, 25 July
2 2016.]

3 MJ [COL POHL]: Commission is called to order. All
4 parties are again present that were present when commission
5 recessed. At Mr. Bin'Attash's specific request, his attorneys
6 are not sitting at his table, rather, sitting behind table
7 five. Okay.

8 Just one housekeeping issue is -- I don't know what
9 the status is. We were going to arrange some witnesses to
10 testify on, I believe, 018PP. Do we have a status of them?

11 TC [MR. SWANN]: Yes, Your Honor. I still haven't located
12 the two. I've located one.

13 MJ [COL POHL]: Okay.

14 TC [MR. SWANN]: And I still have not located the other
15 two. I'm proposing that we do that in the first week of
16 October. That will give me a chance to get online and talk to
17 them.

18 MJ [COL POHL]: Let me just throw something out that I'm
19 sure you already considered and -- but if you haven't perhaps
20 you need to, if the -- I don't know who these people are so
21 I'm going to do this in the disjunctive or kind of in the
22 hypothetical. If these people are Reservists at the time and
23 are no longer on active duty and they're going to be asked

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1 classified questions or questions that relate to classified
2 information, they will need to have a current clearance. I
3 don't know what happens when people get inactivated as far as
4 their clearance or not. I'm just throwing it out to you,
5 Mr. Swann, since, you know, when we discussed in the 505, they
6 may evidence classified information, and I would hate to have
7 all of this logistics set up and then we find out that they
8 are not permitted to answer the questions they're asked. So
9 just kind of an FYI.

10 TC [MR. SWANN]: Thank you, sir. I'll make sure that's
11 taken into the equation.

12 MJ [COL POHL]: Okay. That brings us to 18KKKK/LLLL.

13 LDC [MR. RUIZ]: Judge, just so I understand, does that
14 mean we're going to put it off until October? Mr. Swann asked
15 for October. You didn't really specify.

16 MJ [COL POHL]: Currently there's only one of the three
17 that have been located, so realistically, I suspect that it's
18 going to be October.

19 LDC [MR. RUIZ]: Okay. I just wanted to know what to
20 expect.

21 MJ [COL POHL]: Now, this series of motions began with the
22 government motion to amend the written communication order,
23 and therefore I still see it as the government's motion, so

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1 the government will go first on this. And, again, we're down
2 the road ----

3 CP [BG MARTINS]: Right.

4 MJ [COL POHL]: ---- to where we left it last time.

5 General Martins?

6 CP [BG MARTINS]: Yes, Your Honor. This has been
7 extensively argued under the 018Y heading, and then you asked
8 for a standard of review related to the mail and writings of
9 the accused that would be given to -- or materials that would
10 be given to counsel.

11 We filed that notice with a proposed standard of
12 review, received response, and then you should have our reply
13 dated 13 July, 18MMMM.

14 MJ [COL POHL]: I have it.

15 CP [BG MARTINS]: Your Honor, the essential problem at
16 this point is that we have an ever-expanding definition of
17 what constitutes legal mail under your original order of 018U.

18 It's undisputed now that during oral argument in
19 February, and then indications in the filings in the
20 communications to the court from counsel for the accused, that
21 it's difficult for them to imagine what correspondence the
22 accused could provide them that would not constitute legal
23 mail. Something he gave -- I mean, it's difficult for us to

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1 discern anymore what they couldn't ram into that seam.

2 And so our position on consideration and in view of
3 the pleadings and the revealed position of the defense through
4 the litigation is that the bright-line rule -- I mean, they've
5 stated that proposal we provided in our notice was vague, so
6 we will say there ought to be a bright-line rule.

7 And our position, with respect, Your Honor, is that
8 the commission should amend 018U to prohibit defense counsel
9 from sharing any of the accused's mail with third parties,
10 period, and to define third parties as everyone outside the
11 defense team.

12 MJ [COL POHL]: So the government position, when we
13 discussed this last, was the question about the lack of JTF
14 screening of ----

15 CP [BG MARTINS]: Yes.

16 MJ [COL POHL]: ---- exhibits that are nonlegal mail.

17 CP [BG MARTINS]: Yes.

18 MJ [COL POHL]: And defense had their version of what they
19 believed legal mail was and nonlegal mail was.

20 CP [BG MARTINS]: Yes.

21 MJ [COL POHL]: So when we left it last time, the issue or
22 the question was whether or not we could embed the JTF-GTMO
23 stakeholder concerns in the review process currently in place,

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1 and that's when I asked for the notice. And you sent me the
2 notice of what that person would look at, and then the defense
3 objects to it.

4 And then the government's position now is more
5 restrictive, in that basically nothing goes to third parties,
6 so there would be no need for any JTF-GTMO or JTF
7 participation in the review process of legal mail, however
8 defined.

9 CP [BG MARTINS]: Yes, Your Honor. I mean, it's -- we
10 attempted to come up with a standard of review. We're basing
11 it on what we're getting. We believe this reveals the
12 position of the defense on an ever-expanding notion of legal
13 mail. And we believe that we have demonstrated a valid,
14 rational connection between the JTF's policy on nonlegal mail
15 and a legitimate government purpose, which is to prevent those
16 in armed conflict with the United States -- these are not just
17 individuals off, you know, in another context.

18 These are individuals who are in a law of armed
19 conflict facility. Regulation of their speech is completely
20 appropriate. That's what the JTF commander has done. And
21 your order attempting to do other valid things, we certainly
22 acknowledge that, has created a seam that is subject to being
23 abused. And we believe that the preference and the position

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1 of the defense is revealed through this litigation. You need
2 to look no further than that.

3 I would refer the commission to the
4 unofficial/unauthenticated transcript at page 1106. That's
5 the 23 February 2016 interchange with the commission by
6 counsel for Mr. Ali Abdul Aziz Ali. And, again, defense
7 counsel himself stating it's difficult to imagine what
8 correspondence an accused could provide him that does not
9 constitute legal mail.

10 I'm not -- I can understand that position. They're
11 zealously defending their clients. That's how they conceive
12 their role. We don't think that's the role conceived for them
13 under the Military Commissions Act, to be mailmen for their
14 clients, but that's what they see. And we believe it's opened
15 up a seam in your order that could have been interpreted
16 differently, but it was not, and so we are seeking a
17 bright-line rule, too. They want a bright-line rule, did not
18 like the standard of review that we had in our 13 July filing.

19 And with respect, Your Honor, I mean, there is a
20 valid, rational connection between this approach of not
21 allowing them to share mail with other parties, obviously with
22 the case, with members of the defense team, things that the
23 accused gives them. But to allow them to give it to

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1 nongovernmental organizations, to third parties, these things
2 are not allowed under the regime that you inherited from the
3 camp commander and from a state that is detaining, humanely
4 and securely, members of al Qaeda that are in armed conflict
5 with the United States. They simply don't have the expressive
6 freedoms that other individuals have, and that's a valid,
7 rational thing for a state to do.

8 MJ [COL POHL]: Let's assume that your position that legal
9 mail can't go to a third party. Would there be anything to
10 prevent the attorneys going to third parties and say --
11 assuming there's not a classification issue, saying my client
12 says X, will you help me?

13 CP [BG MARTINS]: This relates to writings that are
14 regulated by the nonlegal mail policy, which I would submit is
15 defined to not just be writings. It's also other types of
16 media. So -- but if something is coming from their client,
17 it's a writing, it purports to be authored by them, then that
18 should be prohibited under your order.

19 Those kinds of communications are properly regulated
20 by a state that is detaining its captives under the law of
21 war, and there shouldn't be a seam opened up in that through
22 this word legal.

23 MJ [COL POHL]: I just am looking at your pleading,

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1 018MMMM, and you footnote the SAM out of Ghailani out of
2 page 5 which talks about legal mail. But in the Ghailani SAMs
3 there's also a paragraph that says, attorneys may disseminate
4 inmate conversations. The inmate attorney may disseminate the
5 contents of the communication to third parties for the sole
6 purpose of preparing the inmate's defense and not for any
7 other reason, on the understanding that any such dissemination
8 shall be made solely by the inmate's attorney and not by the
9 attorney's staff.

10 Now, you in your pleading rely extensively on the SAM
11 framework. Would you take issue about that part of the
12 Ghailani SAM?

13 CP [BG MARTINS]: We think that is sound, Your Honor, the
14 Ghailani SAM. If I may, I would like to ask if Your Honor
15 will be taking judicial notice of the 11 items that we
16 incorporated by reference into our second supplement. This
17 came up before. We wanted to give counsel a chance to weigh
18 in on this. I believe counsel for Mr. Mohammad objected to
19 your taking notice of those.

20 We believe this is an important aspect of this and
21 need to understand how you regard these nonwritten types of
22 materials, so for instance, videos and media that might
23 emanate from some accused or purported to ----

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1 MJ [COL POHL]: Now we have to talk about what is mail.

2 CP [BG MARTINS]: Right.

3 MJ [COL POHL]: But my point is simply is that you cite
4 the Ghailani SAMs in your pleading, and my question is: Is
5 that paragraph I just read to you, do you also say that's ----

6 CP [BG MARTINS]: Your Honor, I'm saying yes, we approve
7 of the Ghailani SAMs and that's why you're citing to, and we
8 point to another military commission ----

9 MJ [COL POHL]: Right.

10 CP [BG MARTINS]: We think -- holistically we think it's a
11 good set of rules. You're having to deal with a background
12 set of procedures that are the Joint Task Force's that relate
13 to nonlegal mail, so we don't think it's exactly one for one,
14 but we think the Ghailani SAM is the appropriate regime for
15 controlling the communications of someone in this category.
16 And here we have a member of al Qaeda in armed conflict with
17 the United States, Your Honor. But what I'm asking is for me
18 to give you a full answer of what we propose, I'd like to know
19 if the commission is going to consider matters that we
20 submitted with this motion, namely, the 11 items that are
21 incorporated by reference into our second supplement to 018Y.

22 And I -- we incorporate by reference all of the
23 attachments to Appellate Exhibit 182L, which relates to the

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1 laptops, but we incorporate it by reference. We just -- I
2 just want to make sure that the appellate record is there that
3 you're considering these matters. We think these are very
4 important and serious, given the kinds of communications that
5 can be expected and that will be attempted -- could be
6 expected to be attempted, in light of capabilities that are
7 being sought with regard to laptops, nonlinear video editing
8 capability, extraordinary abilities with laptops that are
9 unprecedented and that we've opposed.

10 MJ [COL POHL]: Just so I'm clear, are you focusing on the
11 medium of the mail, for want of a better term?

12 CP [BG MARTINS]: I am. I am. I believe that a message
13 coming from an accused that isn't a writing but may be some
14 attempt to get a video record out or something integrating
15 imagery and media, what I've provided in those -- provided in
16 those 11 exhibits is material that we believe is subject to
17 judicial notice.

18 This is from the record of trial of the most
19 important case in our jurisdiction that is going up on appeal,
20 so it's readily capable of being verified. It meets all of
21 the criteria of judicial notice, and I'm eager to just find
22 out if you're going to consider it, because it's facing an
23 objection from one of the defense teams. It's the material

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1 from 182L. If it's not readily available to the commission, I
2 could provide a copy.

3 MJ [COL POHL]: Just a second. Again, I'm looking at your
4 second supplement and trying to find where the reference is.
5 I see it.

6 CP [BG MARTINS]: Rather than reprint all 11 exhibits, we
7 referred to 182L.

8 MJ [COL POHL]: I got it. Okay. I'll listen to what the
9 objection is, but okay. Got it. Okay. Anything further?

10 CP [BG MARTINS]: No, Your Honor.

11 MJ [COL POHL]: Thank you.

12 CP [BG MARTINS]: Subject to your questions.

13 MJ [COL POHL]: I have no more. No further questions.

14 Defense Counsel? Mr. Connell.

15 LDC [MR. CONNELL]: Thank you. Your Honor, the clerk has
16 marked as AE 018RRRR a set of slides. I previously provided
17 them to the court information security officer for review. I
18 provided a copy to the government and to all co-counsel. I
19 would ask permission at this time that they be authorized for
20 display to the public.

21 Your Honor, just so you know what you're looking at,
22 there are four additional exhibits that we'll take up in due
23 course. I'm just asking about the slides which are RRRR at

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1 this time.

2 MJ [COL POHL]: Okay. The -- we're not talking about the
3 other exhibits, right?

4 LDC [MR. CONNELL]: No, sir. Those I'm going to get to.

5 MJ [COL POHL]: Sure. Go ahead.

6 LDC [MR. CONNELL]: Your Honor, I'd request the feed from
7 Table 4, and I would request permission to display the feed
8 from Table 4 to the gallery and the remote public.

9 MJ [COL POHL]: Before you get started, Mr. Connell, let
10 me ask you.

11 ACC [MR. BIN'ATTASH]: **[Speaking English]** There is a
12 problem with translation. There is a problem with
13 translation.

14 MJ [COL POHL]: Okay. The translation is not coming
15 through to Mr. Bin'Attash.

16 Good?

17 Ms. Bormann.

18 LDC [MS. BORMANN]: Judge, I would ask Mr. Connell speak
19 louder. I'm having a difficult time hearing him back here.

20 MJ [COL POHL]: Okay. Mr. Connell, let me just ask you
21 this before we get started, because it seems like the issue
22 has changed.

23 LDC [MR. CONNELL]: So the government has had four

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1 separate positions we -- in the pleadings they advance two,
2 three and four and today they adopted four or they argued
3 four.

4 MJ [COL POHL]: So applying the recency test, the current
5 position is no legal mail goes to third parties, as I
6 understand.

7 LDC [MR. CONNELL]: Actually, their current position,
8 unless they explicitly abandon two and three, which that's
9 their choice to do, so their pleadings continue to advance
10 both their position in AE 018Y and their position in
11 AE 018Y -- excuse me, AE 018KKKK, they advance those in the
12 alternative and they say, well, if we can't work it out, let's
13 just ban the whole -- all communication.

14 MJ [COL POHL]: Going backwards in time, the current box
15 is no legal mail goes to third parties outside the defense
16 team.

17 LDC [MR. CONNELL]: Right.

18 MJ [COL POHL]: As I understood the previous, may not have
19 been the government's position but the previous discussion was
20 embed the JTF-GTMO's -- JTF's interests in with the
21 classification review team and have it done all at one time.

22 LDC [MR. CONNELL]: That's right. And I call that
23 propaganda review.

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1 MJ [COL POHL]: What's the third box?

2 LDC [MR. CONNELL]: The position in AE 018Y, Government
3 Second Supplement, was to rewrite the language of AE 018U, the
4 original written communication order, to somehow require us to
5 put information back through JTF at a later time.

6 MJ [COL POHL]: That's going to third parties?

7 LDC [MR. CONNELL]: Yeah, before -- once we selected --
8 once we wanted to use it in advocacy, they wanted to --
9 initially wanted to reinterpret 018U, and then they said go
10 back for JTF for later review.

11 MJ [COL POHL]: Okay. So boxes two and three require JTF
12 review, whether it is ----

13 LDC [MR. CONNELL]: In the classification process ----

14 MJ [COL POHL]: ---- return to sender or the other thing.
15 Yeah. Okay. That was your reply to the JTF review standards.

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

17 MJ [COL POHL]: Now we've got the ----

18 LDC [MR. CONNELL]: Now we have got something new.

19 MJ [COL POHL]: Now we have a new line in the sand. Go
20 ahead.

21 LDC [MR. CONNELL]: Thank you.

22 MJ [COL POHL]: You can put it up on the overhead.

23 LDC [MR. CONNELL]: Just to be completely clear, Your

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1 Honor, in this argument, we are responding to AE 018Y,
2 Government's third Supplement, AE 018Y Government Third
3 Supplement Amended, AE 018KKKK and AE 018MMMM.

4 I also want to check and see if I can be heard. I'm
5 getting a thumbs up from the back.

6 In AE 018GGGG, the military commission ordered a
7 closed session on AE 018Y on its supplements. We expect that
8 to be Friday. And also pending is AE 0180000, which was a
9 witness request that we filed in conjunction with AE 018LLLL,
10 our position. If the government abandons its propaganda
11 review position, then probably those witnesses are not
12 necessary. But if either version two or version three is
13 under consideration, then they probably are necessary.

14 So the first thing that I want to talk about is --
15 excuse me just one second. Okay. Do we have the -- technical
16 difficulty, excuse me. But I'll just talk while we're pulling
17 that up.

18 The government's characterization both in AE 018KKKK
19 and in court today is that it uses the phrase "ever-expanding
20 definition of legal mail." In fact, the definition of legal
21 mail has not expanded at any point. It was established in the
22 government's first position when the government prevailed in
23 AE 018U. And the government's position is not that the

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1 defense is incorrect in our explanation of what legal mail
2 means or our analysis as laid out in 18AA. In fact, they have
3 at various times acknowledged that our reading of legal mail
4 is correct, which is why they've asked to amend AE 018U.

5 We have at this point three years of experience with
6 the definition in AE 018U, since it went into effect in the
7 fall of 2013. The government's fourth position today is a
8 bright-line rule to prohibit all mail from going outside the
9 defense teams. After the abolition of presumptive
10 classification in the fall of 2012, we have not a position for
11 presumptive classification, but a total embargo. And the
12 standard that the government advances is a rational connection
13 standard, which is the wrong standard, because it's attorney
14 speech that is being controlled, as we'll explain in some
15 detail, which requires the strict scrutiny standard under the
16 First Amendment.

17 Can I have just one moment, Your Honor?

18 MJ [COL POHL]: Sure.

19 [Pause.]

20 LDC [MR. CONNELL]: I'll just continue, sir.

21 MJ [COL POHL]: Okay.

22 LDC [MR. CONNELL]: Just a very brief review of what the
23 current architecture is. All information that we wish to use

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1 publicly, unless it's completely obvious that it is
2 unclassified, is submitted for classification review, and
3 usually even in that situation out of an abundance of caution.
4 All of the information that we are talking about here is not
5 just unclassified, but has been determined by an original
6 classification authority to be classified -- unclassified,
7 rather. To be unclassified. So ----

8 MJ [COL POHL]: Just so we got it down, I know to review,
9 we're talking about -- and I know General Martins mentioned
10 various other forms of media. Let me just try to keep this
11 simple.

12 A letter from the accused, written by the accused,
13 that's what we're talking about, right?

14 LDC [MR. CONNELL]: Well, you say letter. One of the
15 things that we're going to talk about is that many -- why
16 don't we substitute document for letter.

17 MJ [COL POHL]: Document prepared by the accused.

18 LDC [MR. CONNELL]: Many of them are not letters.

19 MJ [COL POHL]: Whatever. Okay. Document prepared by the
20 accused.

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

22 MJ [COL POHL]: You want to transmit to third parties.

23 LDC [MR. CONNELL]: Often after changing it in some way,

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1 like incorporating it into a brief. I'll show you some
2 examples later of how we've used the statements that we are
3 talking about.

4 MJ [COL POHL]: But, again, what we're talking about is
5 documents prepared by the accused in whatever form, but from
6 the accused and then sent to third parties.

7 LDC [MR. CONNELL]: In some form, yes.

8 MJ [COL POHL]: In some -- all right.

9 LDC [MR. CONNELL]: Right. I'll be very specific about
10 that. And I'll show you; I have some exhibits here to show
11 you examples.

12 The current situation is that all information for
13 dissemination to third parties essentially all goes to the --
14 through the classification review procedure, after which we
15 receive it back, and then I as an attorney make a professional
16 judgment as to how to use it: Do I want to use it in a brief?
17 Do I want to attach it in a request for resources to the
18 convening authority? Do I want to show it to General Baker to
19 advocate for something within the office? Do I want to ask an
20 expert for assistance? In my professional judgment, I
21 currently decide what to do with unclassified information.

22 The government's third proposal -- let's see if we
23 can make this work now. Thank you. The government's third

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1 proposal has a number of parts to it, and -- but if the
2 military commission is telling me this is completely off the
3 table, not to be considered, I won't argue it. But if it is
4 still on the table, I will.

5 MJ [COL POHL]: Well, it may not be on the government's
6 table, but it's on my table.

7 LDC [MR. CONNELL]: It's in the mix. I understand, Your
8 Honor.

9 So one of the critical things about this proposal,
10 which we have broken into parts here, is its specific
11 discussion that we're talking about information which is
12 identified by defense counsel or the accused for transmission.
13 The significance of that is that we are talking about
14 information which has both been declared to be unclassified
15 and, in the exercise of professional judgment by defense
16 counsel, has been deemed to have advocacy value.

17 The -- this second process is targeted, which is
18 separate from -- in the government's third proposal, it's
19 separate from the classification review process. And I'm
20 going to pause there and take a moment.

21 The original discussion which came up at the last
22 hearing was about the idea of embedding SOUTHCOM or some
23 representative of JTF in the classification review process. I

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1 want to be completely clear. I think that's what happens now.
2 I don't have any objection to that because DoD, in whatever
3 form, in whatever components it chooses to bring to bear,
4 already gets a chop. It already has a pass on all of this
5 information when it goes through the classification review
6 process, and it's up to DoD to decide who -- which of their
7 elements do they choose to bring to bear.

8 It's my understanding that these documents go to five
9 different OCAs. I have never -- who the five OCAs are have
10 never been identified to me, but it's clear that some elements
11 of DoD, maybe multiple elements of DoD, are included in that
12 review process. And the part of that review process which
13 already takes place under AE 018Y and AE 013BBBB, the
14 Protective Order Number 1, is a review for is there any threat
15 to national security. One of the elements, of course, of
16 classification is threat to national security. So the review
17 already takes place under the current system.

18 But what the government's third proposal is that
19 there would then be at this -- in this idea there was an idea
20 that they would review the materials as part of the walled-off
21 classification review process, which I think this paragraph is
22 not really a problem because it's what already happens. It's
23 at the next paragraphs that we get to -- that we start to have

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1 trouble, and that is with the walled-off classification
2 review.

3 Now, the slide, the privileged architecture slide
4 which we have talked about many times, has always included a
5 yellow section for the classification review for the privilege
6 because we are not really certain what exactly privilege
7 positions are put into place.

8 In AE 013II, we asked the military commission to
9 institutionalize the walled-off classification review by
10 having the participants sign a nondisclosure agreement. This,
11 what I'm showing right now, is in AE 013II-1 where the
12 government opposed institutionalization of the wall. And what
13 the government argued was that the defense's proposed
14 restriction infringes on an OCA's inherent need to consult
15 with other subject matter experts to properly determine
16 whether submitted material is classified and the appropriate
17 level of classification. The autonomy of the OCA to perform
18 the function of classification review requires that each OCA
19 be allowed that discretion. That is the reason why we have
20 always been -- we have always questioned the nature of the
21 wall.

22 The military commission in AE 013CCC largely agreed
23 with the government's position. And in the last sentence of

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1 its ruling on this matter, the -- or the last two sentences,
2 the commission wrote, "The changes agreed to by the
3 parties" -- because some parts of it were agreed --
4 "facilitate the preservation of privilege while still
5 permitting the OCA to carry out the requested review in a
6 responsive, responsible manner. The commission expects
7 personnel participating in the review from organizations and
8 agencies in addition to the OCA to understand the sensitivity
9 of the review and the restrictions of a need to know limited
10 to the requirements of this trial."

11 So this is important for two reasons: The first is
12 that the wall may not be that tight. There's no formal --
13 nothing in the order provides for a separate wall other than
14 the fact that our submission of documents for classification
15 review does not waive privilege. But this also -- your ruling
16 in 013CCC also means that at government insistence, if the
17 OCAs feel that they need special subject matter expertise from
18 JTF-GTMO or their people, that the OCAs can reach out and
19 obtain that subject matter expertise.

20 Under the classification review process, not only is
21 DoD included, but the military commission has explicitly made
22 it possible for them to reach out and obtain specific
23 expertise when it is necessary.

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1 Now, that should resolve most of the government's
2 problems, but it has never resolved our problems. And one of
3 the reasons why this lack of a wall has always been so
4 problematic to us is that JTF itself, in its various forms
5 over the years, has been behind most of the communications
6 problems. They were behind the baseline review. They were
7 behind the 2011 interim order. They were behind the Woods
8 order. They were behind the maintenance of the audio
9 surveillance equipment, which was at issue in 155. They were
10 behind the seized attorney-client communications which were at
11 issue in 18PP and QQ. And they were behind the seized
12 attorney-client DVDs that are at issue in 373.

13 There are real concerns with hard-wiring JTF-GTMO
14 into this classification review process, especially when the
15 reviewing OCAs do not feel that they need that subject matter
16 expertise.

17 Now, that brings us to four categories of information
18 that the government has identified, and the -- those four
19 categories with SOUTHCOM, under the government's third
20 proposal, would have to reveal -- would have to review our
21 letters of introduction, attorney and expert consultation
22 solicitations, letters to nongovernmental organizations, and
23 letters to the media. These four categories create

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1 significant gaps in the actual advocacy which has taken place
2 over the last three years by myself and other defense counsel.

3 Let me just give you one quick example: Our number
4 one goal in this representation as defined by the client --
5 and you will remember the client gets to decide the objectives
6 in representations, and I'm tasked to carry those out -- is to
7 obtain treatment for the ongoing effects of his torture. That
8 has two major parts that are directly tied to this information
9 that we release. One of those is treatment for his traumatic
10 brain injury; we're trying to obtain an MRI. And one of those
11 is treatment for his inability to sleep; we're trying to
12 obtain a sleep study.

13 Now, in the course of that, we advocate with a lot of
14 different parties. One of those is the convening authority.
15 The convening authority is not one of these categories of
16 information that can be released under the government's
17 proposal. One of those is elements of the Department of
18 Defense and other parts of the government, not one of the
19 categories that the government has identified.

20 One of them is JTF itself. There was a time last
21 year, two -- more than a year ago, when there was
22 consideration of perhaps JTF was going to conduct the MRI on
23 its own without an order from anybody else. During that time,

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1 we advocated over which of the seven protocols which can be
2 used in a head MRI -- we advocated with JTF for which of those
3 protocols should be used, based in part on information
4 provided by the client. Under the government's categories
5 here, that would fall into a gap. And JTF, after its intel
6 portion reviewed the -- or whatever portion it uses, reviewed
7 the information, we would not then be allowed to release it as
8 one of these four categories.

9 And truthfully what's at issue in AE 370, a letter to
10 the President, is a perfect example, because seeking input
11 from the White House, from the National Security Council or
12 anyone else in a position of power in the government is not
13 one of the government's authorized categories.

14 I have previously marked for identification and have
15 provided to the -- to all parties, including the court, and
16 have previously provided to the CISO, although I don't intend
17 to display it especially, a document which has been marked
18 AE 018VVVV. It says at the top CR-133-AAA, which is our
19 classification review number.

20 With respect to this document, this is a description
21 of -- that Mr. al Baluchi wrote of his head trauma that he
22 suffered at the end of May or in early June of 2003. This
23 particular document, this exact document we used in an

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1 application to the convening authority for an MRI. Because
2 when we first asked the convening authority to have an MRI of
3 Mr. al Baluchi, it told us that we had not been sufficiently
4 specific and had not done enough to establish the need for the
5 MRI.

6 So what did we do? We went and we got information
7 from Mr. al Baluchi about the head trauma that he had
8 suffered, and we went to experts and talked to them about,
9 given this history of head trauma, what would be the ordinary
10 standard of care? What would take place in the civilian
11 world, in the servicemember world?

12 Under the government's taxonomy, this would be an
13 expert consultant solicitation, which means that we could take
14 it to third parties, to, you know, neurophysiologists or
15 whatever, with respect to the need for an MRI, but we couldn't
16 present it to the convening authority. And that's what we
17 actually did with 18VVVV, is present it to the convening
18 authority and to experts, an important element of our
19 advocacy.

20 So let's go on and talk about another category. I
21 have provided to the parties, the CISO, and military
22 commission, a document which has been marked as AE 018SSSS.
23 It is a letter from Mr. al Baluchi to the Special Rapporteur

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1 on Torture, Juan Mendez. When we were negotiating the facts
2 which became AE 424 and AE 424C, one of the questions which
3 came up was, well, does the individual who the special
4 rapporteur would be examining, is he interested in being
5 examined.

6 Because of that, we asked Mr. al Baluchi to write a
7 letter to the special rapporteur and to ask him to please
8 invite him to visit to meet -- Guantanamo Bay and meet with
9 the brothers and inspect Camp VII. This was not important.
10 I'm not saying this is legally important that the military
11 commission is in any way in 424 bound by Mr. al Baluchi's
12 witnesses, but it was important to the staff of the Special
13 Rapporteur on Torture to know that at least one of the
14 directly affected individuals was interested in the services
15 of Mr. -- of Mendez, the Special Rapporteur on Torture.

16 The significance of this is this is another example
17 of a document which was directly written by Mr. al Baluchi
18 conveyed to a third party, and this third party, the
19 U.N. Special Rapporteur on Torture, would not fall into one of
20 the government's four categories. The U.N., of course, is not
21 a governmental organization. It is an interim government
22 organization with governmental personality in its own right.

23 Another example -- and this is why I pushed back

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1 against the idea of the letter. The document which has been
2 provided to the parties, the CISO, and the court as AE 018TTTT
3 is an essay that Mr. al Baluchi wrote about the involvement of
4 doctors, of medical personnel, in black sites. This was
5 submitted for classification review as CR-144-AAA, determined
6 to be unclassified.

7 When we are speaking to people about the need for
8 regulation, the need for investigation into the involvement of
9 medical personnel in the black sites, which we do in order to
10 leverage their greater ability to do investigations than we
11 can, this is a document that we use, AE 018TTTT, to talk to
12 people about the need for an investigation in a medical
13 situation. It is not a letter. It is not addressed to any
14 particular person, but it is a powerful piece of advocacy that
15 I as a lawyer in the exercise of my professional judgment use.

16 It also demonstrates the significance of the attorney
17 speech aspect of it. By itself, this is just an essay, but
18 when I use it as part of a presentation, when I am trying to
19 seek resources or support or help or even understanding from
20 some third party, it becomes more powerful because it is part
21 of my speech, not simply a letter being conveyed by a mailman,
22 as the government describes it.

23 So that brings us to the third part of the

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1 government's proposal -- or the third part of the third
2 government proposal, which is the so-called propaganda review.
3 The government asks that JTF be allowed to veto defense
4 advocacy in six categories. The first is the most expansive,
5 and that would be that if the information has propaganda value
6 that would be detrimental to the interests of the United
7 States in its armed conflict against al Qaeda and affiliated
8 terrorist organizations.

9 The government defines propaganda as material
10 disseminated on one's behalf which is designed to either
11 recruit individuals to join an organization or cause, act on
12 behalf of that organization/cause or a person's goals, or
13 intimidate opponents of that person or that person's
14 organization. With the exception of intimidation, which I
15 will bracket and set to the side, there's not really a better
16 description of what attorney advocacy is.

17 When we go out in the world and seek help from
18 people, if we are asking them to join our team, we're trying
19 to recruit them to an organization. If we're asking them to
20 provide an affidavit that we could give to the convening
21 authority, then we're asking them to act on behalf of our
22 organization or our person -- my person's goals, me. This,
23 what the government calls propaganda, is what I do for a

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1 living, is that I try to convince people in a persuasive
2 manner to act on behalf of an organization, a cause or a
3 person's goals.

4 Now, we've heard a lot about propaganda in this case
5 already, you know, and propaganda is one of those terms that
6 depends entirely on viewpoint. You know, one person's
7 propaganda is another person's information. A perfect example
8 of that was brought up in AE 195 regarding the participation
9 of the CIA and the Department of Defense in the creation of
10 Zero Dark Thirty. To them, they were providing a valuable
11 public service by giving information to those two who needed
12 it. To us, they were creating propaganda.

13 The opposite occurs as well. Three example that have
14 been identified already: One is the use of -- is that the
15 underlying information itself is much more significant than
16 the form in which it comes. An example is the use of
17 indefinite solitary confinement. To most of the world that's
18 considered cruel, inhumane and degrading treatment.
19 Description of that would no doubt be propaganda. The use of
20 force feeding, condemned as unethical by the world medical
21 organization, description of that would be no doubt deemed
22 propaganda.

23 There's another example, which is the mere existence

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1 of Guantanamo Bay. On at least two occasions, our President
2 has explained that the existence of this place is itself
3 propaganda. On May -- on 21 May of 2009, in making remarks on
4 national security, the President stated that, quote, Instead
5 of serving as a tool to counter terrorism, Guantanamo became a
6 symbol that helped al Qaeda recruit terrorists to its cause.
7 Indeed, the existence of Guantanamo likely created more
8 terrorists around the world than it ever detained.

9 On 23 February of 2016, in his remarks on the plan to
10 close the prison at Guantanamo Bay, the President spoke
11 directly to this issue. He said, "For many years it has been
12 clear that the detention facility at Guantanamo Bay does not
13 advance our national security, it undermines it. This is not
14 just my opinion. This is the opinion of experts. This is the
15 opinion of many in our military. It is counterproductive to
16 our fight against terrorists because they use it as propaganda
17 in their efforts to recruit."

18 The problem with a propaganda review is that it means
19 so much to so many different people. It makes no sense to
20 place the veto over attorney advocacy in the hands of JTF.

21 I'll give you just one other example. This is
22 another thing that is not a letter but rather, was a question
23 about which of the enhanced interrogation techniques did

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1 Mr. al Baluchi suffer. The 13 approved declassified
2 techniques are stated. Mr. al Baluchi simply made comments on
3 them that for one of -- with respect to one of the techniques,
4 he can't remember how they did it. He described walling. To
5 him, it felt like smashing in the head only against the wall.
6 He answered yes, that all of these techniques had been used
7 with some variation.

8 I use this when people -- when I'm advocating with
9 torture organizations and they ask: Was your client subjected
10 do these enhanced interrogation techniques? And I use this
11 document to explain, yes, with some variation and with some
12 slight ambiguity on the abdominal slap. So, again, it's not
13 mail-carrying. It is advocacy by the attorney using
14 statements prepared by the client. That document that I just
15 referred to is -- has been marked and provided to counsel, has
16 been shown to the CISO, and it is AE 018UUUU.

17 Now, the rest of the government's proposal, in
18 addition to the propaganda review itself, has five additional
19 elements: Imminent acts of violence or imminent and immediate
20 and substantial harm to national security; relationship to an
21 ongoing or completed military intelligence, security or law
22 enforcement operation; security procedures at Guantanamo or
23 the physical layout; present or former detention personnel;

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1 and the status of other detainees at Guantanamo Bay.

2 Little romanette (ii) is the one of these categories
3 that the government can subject to prior restraint under
4 certain circumstances, and that is because it is a variation
5 of the standard in Brandenburg v. Ohio. It would take a
6 little tweaking to get it down to exactly the Brandenburg
7 standard. I fully acknowledge that incitement to implement
8 acts of violence is able to be prohibited by the United States
9 Government, and I will tell you that I will never engage in
10 it. That is the one of the categories ----

11 MJ [COL POHL]: Are some of these categories
12 double-dipping into the classified area?

13 LDC [MR. CONNELL]: Of course. To the extent that any of
14 these bear on national security they are already covered in
15 the classification review process.

16 And, you know, I told you last time -- and, in fact,
17 let me just skip ahead, if I can -- if I could. If we could
18 go to slide 18 please, LN1. I can answer this question
19 specifically.

20 So in this backup slide, this is a statement. It's
21 not 100 percent up to date now, but as of the last hearing,
22 the classifications which came back on the different items
23 that we submitted for classification review. Forty of the

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1 items which we submitted for classification review involving
2 client information came back as unclassified, but that's
3 certainly not the only way. Six of them came back as TOP
4 SECRET. One of them came back as SECRET. One of them came
5 back as FOUO. So if there's a national security concern, it
6 is already addressed in the classification review process.

7 If we could return, please, to slide 11.

8 MJ [COL POHL]: But back to my comment, though, is on
9 those, I've seen language like that in other areas, and it
10 appears -- like, look at just four and five.

11 LDC [MR. CONNELL]: Right. So the place that you're
12 thinking of is AE 018U under the definition of informational
13 contraband, some of these same -- so your question is was it
14 double-dipping into classified information, and that's
15 absolutely true, right. There are many things about JTF
16 security procedures that they've classified. Those are
17 already covered by the classification review process.

18 This question is about haven't we seen these -- some
19 of these standards before, and that's because it came out of
20 the -- parts of these came out of the informational contraband
21 definition in AE 018U. That is about information that the
22 defense did not provide to the -- to their clients except if
23 it is related to the case. There's -- in that situation, even

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1 for information flowing from the outside into the camp, a much
2 more serious concern which was addressed in AE 018U, the --
3 there is an exception for, well, if it's related to the case,
4 then you can provide these sorts of information.

5 There's also an appeal process. If there's
6 informational contraband for which there is no exception, then
7 it's possible to appeal to the JTF commander and ultimately to
8 the judge to get permission to provide the client the
9 information.

10 Does that answer your question, Your Honor?

11 MJ [COL POHL]: Yes.

12 LDC [MR. CONNELL]: Some of these categories are
13 especially troublesome. Category three is relating to ongoing
14 or completed military intelligence, security or law
15 enforcement operations.

16 In AE 018VVVV, the -- which we already discussed
17 briefly, the -- Mr. al Baluchi wrote about his head trauma.
18 And what he wrote is at -- and this is just the very beginning
19 of it, but I wanted to show you the unclassified marking
20 placed on there by the OCA, "At the CIA black site in the very
21 first days after the U.S. Government agents shaved my head,
22 then they smashed my head against the wall repeatedly."

23 That has a name to the CIA, which is walling, and

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1 that is a completed law enforcement or intelligence operation
2 which would be prohibited by JTF-GTMO, although it is
3 considered to be unclassified by the original classification
4 authorities and has been turned out to be extremely important
5 in our advocacy about treatment for Mr. al Baluchi's ongoing
6 effects of torture, including his head trauma.

7 There are plenty of other categories, too. The
8 category four as identified by the government involves
9 Guantanamo procedures. We would not have been able to address
10 any person about the female guards issue based on client
11 information which was litigated in 254VV. In category five,
12 which relates to former detention personnel, the many, many
13 witnesses we have testified who worked at Guantanamo, we would
14 not be able to talk to them using client information. And in
15 category six about other detainees, we would not be able to
16 talk about former detainees, that is, witnesses who may appear
17 in the case, or those who are before the periodic review board
18 based on client information.

19 Now, all of this -- all of the examples that I've
20 given you so far from AE 018SSSS to UUUU are Mr. al Baluchi's
21 direct statements in their original form, except for the
22 artifacts of classification review. But frequently, that's
23 not the way that this information is used, and many times this

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1 information is used as incorporated into a brief, a letter, a
2 document, which is being provided to some other organization.

3 In slide 13, I'm showing the military commission a
4 sample of a document which we sent to the United Nations
5 Committee Against Torture in June of this year. The Committee
6 Against Torture has a series of solicitations for alternative,
7 sometimes called shadow, but alternative reports from relevant
8 bodies, and one of those is in the process called the LOIPR,
9 or the list of issues for consideration in the periodic
10 review.

11 The United States -- that's an optional protocol that
12 the United States participates in where, instead of just
13 simply filing a report on what the United States thinks the
14 committee wants to hear about, the committee sends a list of
15 questions to the United States and the United States responds
16 to those questions. It helps focus the debate.

17 In June was the deadline for alternative reports to
18 the -- to the United Nations Committee Against Torture on --
19 for what questions should be asked in the LOIPR process. We
20 submitted an alternative report, and that alternative report
21 in this paragraph includes a portion of AE 018VVVV, where we
22 wrote, drawing on the words of Mr. al Baluchi, "As my head was
23 being hit each time, I would see sparks of light in my eyes.

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1 As the intensity of the -- intensity of these sparks were
2 increasing as a result of repeated hitting, all of a sudden, I
3 felt a strong jolt of electricity in my head and then I
4 couldn't see anything. Everything went dark, and I passed
5 out." Those are Mr. al Baluchi's exact words reviewed for
6 classification and determined to be unclassified and
7 incorporated into what is direct attorney speech.

8 The third proposal by the government reads a little
9 bit like a first-year Constitution law exam in that it's a
10 kitchen sink of First Amendment problems. The -- as we laid
11 out in AE 018LLLL, the burden of proof for regulating the
12 speech of a U.S. citizen such as myself is the strict scrutiny
13 standard.

14 This third government proposal is limited, as I noted
15 at the beginning, to statements which are selected, that is,
16 are identified by the exercise of professional judgment for
17 use in advocacy and is a classic prior restraint. The
18 procedural requirements which govern this element are laid out
19 in Freedman v. Maryland at 308 United States 51, a 1965 case.
20 And this would apply to the -- this applies to all censorship
21 regimes. It would apply to the government's fourth proposal
22 as well, the total ban, which is a complete prior restraint.

23 The first requirement is that any restraint prior to

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1 judicial review can only be imposed for a specified brief
2 period during which the status quo must be maintained; that
3 is, that there is essentially the restraining organization, in
4 this case, JTF-GTMO, can essentially obtain what is an
5 administrative temporary restraining order to hold things in
6 place while judicial review takes place.

7 The second standard is that expeditious judicial
8 review of that decision must be available. Both the third and
9 the fourth government proposals failed this miserably in that
10 they do not provide for judicial review of any kind in any
11 place, much less expeditious.

12 The third Freedman factor imposes the same issue,
13 that the censor ----

14 MJ [COL POHL]: Does the Ghailani SAM on legal mail
15 operate as a prior restraint?

16 LDC [MR. CONNELL]: Yes. Was it challenged? No.

17 MJ [COL POHL]: Okay. But you would say that would fail
18 on the same -- I'm talking about the legal mail provision,
19 the way I'm reading it, the legal mail we're talking about
20 from -- written by -- prepared by the detainee says
21 specifically in there it can't go to anybody outside the
22 defense team.

23 LDC [MR. CONNELL]: To the extent it restrains the speech

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1 of a person who has First Amendment rights. And truly, I'm
2 not actually prepared today to engage on the topic of what the
3 First Amendment rights of a non-U.S. citizen brought against
4 their will to a jail in the United States are, I'm not
5 100 percent sure. It might fall under the Verdugo-Urquidez
6 analysis but I'm not sure. Let's say it restrains the speech
7 of Mr. Ghailani's attorney, if that might be. If it restrains
8 the speech of an attorney is a prior restraint which must meet
9 the Freedman standard under the First Amendment.

10 MJ [COL POHL]: But then what are the other part of the
11 Ghailani SAMs that says that the attorney can -- the way I
12 read it, can disseminate inmate conversations?

13 LDC [MR. CONNELL]: Well, if it doesn't restrain the
14 attorney, then it's -- it doesn't violate the First Amendment.

15 MJ [COL POHL]: Okay. So reading those two together, the
16 way I read them is that the attorney is prevented from handing
17 documents prepared by the detainee to third parties, but can
18 certainly discuss any content of the inmate's communication
19 with third parties.

20 LDC [MR. CONNELL]: So that would be a restraint on
21 attorney speech, that construction of the two parts that you
22 just talked about. Because I have gone to some pains to
23 explain the way that this -- that this is not a mail delivery

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1 process in the way that the government construes it. This is
2 instead an attorney advocacy process which incorporates
3 elements of detainee writings.

4 In each of the four examples that I've given you,
5 I've explained how it is not simply -- you know, I don't put
6 it in an envelope and mail it to someone. Instead what
7 happens is a variation of what's on the screen now, except it
8 often happens orally instead of in writing, which is that we
9 use the writings of detainees in our advocacy process almost
10 like exhibits. It is not, you know, going around and dropping
11 off mail to people. It is instead attorney advocacy.

12 So with respect to the specific construction that you
13 just gave those two paragraphs, if what it means is that
14 the -- in their advocacy, the attorneys cannot rely on the
15 statements of detainees -- if that's what it means, then it is
16 a prior restraint which has to meet the requirements of the
17 Pentagon Papers case substantively and of Freedman v. Maryland
18 procedurally.

19 MJ [COL POHL]: Okay. And, again, it's one of the things
20 that's come up earlier -- General Martins mentioned it -- by
21 the definition of legal mail. And again going back to the
22 Ghailani SAMs, they're just talking about correspondence
23 marked legal mail between the accused and the attorney.

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1 That's how it's defined in Ghailani.

2 LDC [MR. CONNELL]: You're telling me that, and I don't
3 have any reason to doubt it.

4 MJ [COL POHL]: Okay. I mean, do you agree with that
5 definition? Let me ask you ----

6 LDC [MR. CONNELL]: Well, it's somewhat tautological. If
7 legal mail is what is marked as legal mail, that really
8 doesn't help us.

9 MJ [COL POHL]: It's defined as correspondence marked
10 legal mail addressed to and from the inmate's attorney. It
11 would seem to me that would cover all -- if that's the
12 definition of legal mail -- let me ask you this: Is the
13 current definition of legal mail consistent with that in the
14 military commission?

15 LDC [MR. CONNELL]: The current definition of legal mail,
16 because of the existence of OCRM, the other legal case-related
17 material, the definition in the military commission is
18 anything narrower than that because the military commission's
19 definition incorporates Military Commission Rule for Evidence
20 502 as things have to be privileged.

21 Now, as it -- in actual practice, like on paper, I
22 think the military commission's definition is narrower, but in
23 actual practice, virtually all communications between client

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1 and attorney are privileged under 802 unless they fall under
2 the crime/fraud exception, for example. The -- so in actual
3 practice, they more or less map onto each other.

4 MJ [COL POHL]: Just while we're on that topic -- and this
5 came up last time, which dealt with waiver of privilege.

6 LDC [MR. CONNELL]: Yes.

7 MJ [COL POHL]: And I'm discussing privilege also covering
8 attorney work product.

9 LDC [MR. CONNELL]: Uh-huh.

10 MJ [COL POHL]: Conceptually, if you have a document that
11 is privileged ----

12 LDC [MR. CONNELL]: Yes. Could we have slide 17, LN1?

13 MJ [COL POHL]: ---- and that indicates it's legal mail,
14 okay, does it become any less legal mail if you waive the
15 privilege? Do you understand my question?

16 LDC [MR. CONNELL]: Yeah. And that is an interesting
17 distinction between the Ghailani definition, which has to do
18 with how it's marked and conveyed, which something would never
19 lose its legal mail distinction.

20 So if something is conveyed from client to attorney,
21 it is legal mail while it's under the scope of JTF. So can
22 something lose its privilege as legal mail? Absolutely. If
23 I ----

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1 MJ [COL POHL]: No, what I'm saying is this, is that if
2 something starts out as legal mail, a letter between -- from
3 your client to you.

4 LDC [MR. CONNELL]: Sure.

5 MJ [COL POHL]: Okay. So it meets the definition of legal
6 mail. Does it only stay legal mail as long as the privilege
7 is not waived, or is it in essence still legal mail but just
8 the privilege part has been waived?

9 LDC [MR. CONNELL]: I think the latter. Its actual
10 character has not changed. It's the same piece of paper.
11 It's still a letter, Dear Mr. Connell, Thank you.
12 Mr. al Baluchi. So it is still the same document, but if I
13 disclose it -- if I act in a way that is inconsistent with
14 maintaining security against -- secrecy against our opponents,
15 then it loses its privilege.

16 MJ [COL POHL]: But it retains its character as legal
17 mail.

18 LDC [MR. CONNELL]: Its character is not all that
19 important as legal mail at that point, but ----

20 MJ [COL POHL]: Yeah.

21 LDC [MR. CONNELL]: But the document itself hasn't
22 changed. I feel like I'm not 100 percent getting to the
23 question that you want.

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1 MJ [COL POHL]: No, just reviewing the pleadings that time
2 around, that became the big, at least one of the major issues
3 maybe by the government once you disclose to a third party,
4 it's no longer legal mail because it's lost its privilege.

5 LDC [MR. CONNELL]: Right.

6 MJ [COL POHL]: But again when we go back to the
7 definition of legal mail, it's not necessarily contingent upon
8 whether you waive the privilege or not.

9 LDC [MR. CONNELL]: Yeah. I agree with that analysis. It
10 is still legal mail in the sense that it is a letter from the
11 client to the attorney, but if I act inconsistently with the
12 privilege, then I do so at my own risk and lose the privilege.

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

14 LDC [MR. CONNELL]: So if we could go back to slide 13,
15 please. The -- we were talking about the third Freedman
16 standard, which is that the censors must bear the burden of
17 going to court to suppress the speech and must bear the burden
18 of proof once in court. This has a serious flaw in both --
19 most prominently in the third government proposal, but equally
20 in the fourth government proposal, in that inaction by JTF
21 triggers restraint.

22 Under the standard the government is proposing in its
23 third proposal, then if JTF does nothing, if they sit on it

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1 for months, like most of the OCAs do, or for years like
2 happens once in a while, then that -- there's no judicial
3 review of that.

4 MJ [COL POHL]: Do you consider OCA review a prior
5 restraint?

6 LDC [MR. CONNELL]: Yes, but it is an allowed prior
7 restraint, right, because the information is classified, which
8 is a compelling governmental interest and is allowed as a
9 prior restraint.

10 Furthermore, I have a contractual duty to maintain
11 classified information which both the Supreme Court and the
12 D.C. Circuit have been willing to impose.

13 MJ [COL POHL]: The only reason I mention that is because
14 you talk about the OCA sitting on it for months.

15 LDC [MR. CONNELL]: Yeah. And during that time it is a
16 prior restraint, but it is an authorized prior restraint.

17 MJ [COL POHL]: Got it.

18 LDC [MR. CONNELL]: If we were not talking about
19 unclassified information, we would be in a whole different
20 analysis. But by definition the speech that the government
21 seeks to restrain here is unclassified because it's already
22 been to the OCA and they have already determined it to be
23 unclassified.

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1 MJ [COL POHL]: Go ahead.

2 LDC [MR. CONNELL]: So the other problems with the
3 government's proposal include a list of proscribed subjects.
4 In fact, what they do, listing six subjects which are subject
5 to prior restraint, is content review, content restrictions
6 specifically disallowed by the First Amendment. And even
7 more, even within proscribed categories, the United States
8 Government cannot engage in viewpoint discrimination, right?
9 That's R.A.V. v. City of Minneapolis.

10 And that's a perfect example that you just gave about
11 the classified information. The government can prohibit the
12 restriction, can have a prior restraint against dissemination
13 of classified information. It does -- and that is
14 constitutionally allowed. It cannot permit the -- it cannot,
15 within even that proscribed category of speech, discriminate
16 on the basis of viewpoint. It may not say that you may -- it
17 is illegal to disseminate classified information which
18 criticizes Guantanamo, but it is perfectly legal to
19 disseminate classified information which praises Guantanamo.

20 One of the problems with ----

21 MJ [COL POHL]: But in any -- that applies only to legal
22 mail, those prior restraint arguments?

23 LDC [MR. CONNELL]: Well, the viewpoint discrimination

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1 applies to the government's proposed propaganda review.

2 MJ [COL POHL]: What I'm saying is a confinement facility
3 would have -- would a confinement facility have the ability to
4 review content, review mail going out to protect the security
5 of the facility, of nonlegal mail?

6 LDC [MR. CONNELL]: Nonlegal mail, absolutely. Nonlegal
7 mail, the facility can do whatever it wants to.

8 MJ [COL POHL]: Okay. So there's a distinction between
9 nonlegal and legal mail in your view?

10 LDC [MR. CONNELL]: Yeah.

11 MJ [COL POHL]: Just asking.

12 LDC [MR. CONNELL]: That's certainly true. The cases are
13 Procunier. The other cases are pretty clear on that
14 distinction, if it's going to an attorney. But, you know, our
15 legal mail definition here doesn't govern the whole legal mail
16 universe under the First Amendment basis, right? There's
17 letters to courts, there's letters to government officials.
18 All of those are protected.

19 MJ [COL POHL]: What I'm saying is that your prior
20 restraint analysis, you say that only applies to legal mail,
21 that the government -- let's say it's five categories. If
22 they wanted to institute those five categories, they'd only
23 have to do that expeditiously, following your rubric here, to

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1 legal mail, but they wouldn't have to worry about that much on
2 nonlegal mail. But the prior restraint review only applies to
3 the legal mail?

4 LDC [MR. CONNELL]: This -- right. I didn't write this
5 system. The way the government proposes it in KKKK, 018KKKK,
6 is that this only applies to legal mail which is sent from a
7 client to an attorney, and then later in the exercise of that
8 attorney's professional discretion is selected or intended for
9 use with third parties.

10 So, yes, the way the government has set this up it
11 only applies to legal mail, and it only applies to legal mail
12 that I want to use.

13 MJ [COL POHL]: What would happen if you went through this
14 process and it gets up to this review team and the review team
15 says this is not legal mail? Then what happens?

16 LDC [MR. CONNELL]: The ----

17 MJ [COL POHL]: Do they have that ----

18 LDC [MR. CONNELL]: That's not within their scope of
19 review the way the government has set it out.

20 MJ [COL POHL]: I know it's not. What I'm just saying
21 is ----

22 LDC [MR. CONNELL]: Right.

23 MJ [COL POHL]: ---- one of the problems coming up here is

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1 exactly that, what's nonlegal mail and what's legal mail.

2 LDC [MR. CONNELL]: Right.

3 MJ [COL POHL]: And I've ----

4 LDC [MR. CONNELL]: In fact, it's even worse than the
5 military commission is speaking of. If we could have slide
6 six, please.

7 These are the four categories not -- so in the
8 government's view, JTF gets to make a distinction between
9 legal mail and nonlegal mail, whatever that distinction may
10 mean to them, but they have to apply four limited categories
11 that are subject to disclosure, that is: Letters of
12 introduction, whatever those are, attorney and expert
13 consultant solicitations. They might decide that the person
14 that we're asking is, you know, that they don't consider them
15 an expert. It happens from time to time with the convening
16 authority. Letters to nongovernmental organizations. They
17 might decide that it's not good enough nongovernmental
18 organization, and letters to the media. They might decide
19 that -- you know, not to cast aspersions on Gawker, but they
20 might decide that Gawker, who actually has done important work
21 in the case, does not qualify the media.

22 The point that you make about what happens if JTF
23 gets it and decides that it doesn't meet one of these criteria

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1 is, in fact, a substantial flaw in the system because that --
2 JTF should not be put in the position of deciding whether
3 things are legal or nonlegal mail. It shouldn't be put in the
4 position of deciding ----

5 MJ [COL POHL]: Well, who does, then, the attorney?

6 LDC [MR. CONNELL]: You do, sir.

7 MJ [COL POHL]: I mean, well, I know. I'm trying to avoid
8 having mail stacked on my desk every day as I review it for
9 being legal or nonlegal mail.

10 LDC [MR. CONNELL]: What happened is you already decided
11 in AE 018U.

12 MJ [COL POHL]: No, but what I'm saying is this: There's
13 a dispute here clearly between you and the government of what
14 is legal mail. And what I'm saying is, other than coming
15 straight to me on this, is there any review -- you put
16 something in -- let's take Mr. Mohammad's letter, for example,
17 and I'm just using it as an example.

18 The government says that's nonlegal mail, okay? And
19 I'm sure Mr. Nevin's view is it's legal mail for whatever the
20 analysis we heard before.

21 LDC [MR. CONNELL]: I'm putting up the definition on the
22 screen, Your Honor. This is the definition out of AE 018U.

23 MJ [COL POHL]: It says nonlegal mail is everything that's

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1 not legal mail.

2 LDC [MR. CONNELL]: That's true. But with respect to
3 legal mail, there is no definition of legal mail in AE 018U.
4 There are three categories. There's nonlegal mail, there is
5 lawyer-client privileged communications or LCPC, and other
6 case-related material or OCRM.

7 There's never a -- there's not a legal mail category,
8 but the LCPC category includes communications that are
9 privileged within the meaning of M.C.R.E. 502 which may
10 include original handwritten or typewritten correspondence
11 between the accused and his defense counsel, bearing the
12 signature of defense counsel or a representative of the
13 defense counsel encompassed by M.C.R.E. 502. So really the
14 question is: Is the material at the time it's sent a
15 communication that is privileged?

16 The definition goes further to say that attorney work
17 product is encompassed within lawyer-client privileged
18 communications. So for example, when I showed you the essay,
19 which is AE 018VVVV where Mr. al Baluchi described his head
20 trauma, that was work product, that is his work on the case.

21 Work product, even though we often call it attorney
22 work product, is really client work product. The attorney's
23 privilege is only derived of that from the client. All of

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1 this is laid out in Federal Rule of Criminal Procedure 26.

2 MJ [COL POHL]: But if you had a -- if you had a
3 communication from your client, okay, that's totally uncase
4 related, would that still be legal mail?

5 LDC [MR. CONNELL]: Yes. If he writes me and says, did
6 you see the news last night? I thought there was a really
7 interesting story about cats, that's still legal mail because
8 it is a communication that is privileged within the meaning of
9 M.C.R.E. 502.

10 MJ [COL POHL]: Okay. So if we maintain that definition,
11 then anything from your client to you is legal mail.

12 LDC [MR. CONNELL]: Yes.

13 MJ [COL POHL]: And therefore anything that legal mail, in
14 that definition -- I'm not sure what nonlegal mail is, quite
15 frankly at this point ----

16 LDC [MR. CONNELL]: Nonlegal mail -- I can answer that
17 question.

18 MJ [COL POHL]: You don't need to because I don't want to
19 go into that.

20 But I'm simply saying whatever he writes to you would
21 be legal mail, and then it would go through classification
22 review, and then the attorney could use it for anything he
23 wishes to use it for. So there would be really no

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1 restrictions on anything from the client through the attorney
2 under your regime absent a classification issue?

3 LDC [MR. CONNELL]: There is an absolute restriction,
4 which is classification. A second restriction, which is is
5 handling caveats. I gave the example, and I don't have it
6 here, but I gave the example of once we submitted something
7 for classification review and it came back UNCLASSIFIED/FOUO,
8 I did not distribute it further. That was not a question of
9 classification, that was a question of handling caveats.

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: And if it comes back with a handling
12 caveat, we follow the handling caveat.

13 MJ [COL POHL]: Assuming it comes back unclassified with
14 no handling caveat, at that point under your regime, defense
15 can do with it as they see fit?

16 LDC [MR. CONNELL]: Sir, yes. And it's not my regime. It
17 is the current regime in AE 018U that has been in place since
18 2013. It is a regime written by the prosecution and adopted
19 in large part by the court, and that's the way that it works.

20 I am a professional. The -- AE 018U respects the
21 exercise of my professional judgment. The -- and in doing so,
22 we have not had any empirical problem along these lines in the
23 past three years, right?

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1 When it comes down to it, the government has been
2 forced to admit that Mr. -- that the so-called manifesto was
3 submitted to classification review -- JTF even got a chop on
4 it -- and was handled properly. When it comes down to it, the
5 subject of AE 018 Government Third Supplement, which is my
6 interview to Al-Jazeera, is -- was correctly done. Nothing
7 was classified in the information and it was correctly handled
8 under the protective order and everything else; otherwise, we
9 would be here on a motion for contempt instead of an
10 amendment.

11 The three years of empirical practice under AE 018U
12 demonstrate that it is a workable, pragmatic solution that
13 balances the interests of the parties.

14 MJ [COL POHL]: Okay.

15 LDC [MR. CONNELL]: The last thing that I want to say is
16 we are really talking about the core of attorney advocacy
17 here. The government would have this characterized as
18 mail-handling, which is not what it is.

19 These are attorneys who have been tasked by the
20 convening authority, by the chief defense counsel, and by the
21 Military Commissions Act of 2009 to carry out a certain
22 defense function. Among that defense function is to
23 demonstrate the humanity of these men sitting at the far left

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1 of the courtroom. He has been unjustifiably characterized as
2 inhuman and we know, because of the Senate report, a victim of
3 torture. I have to seek resources. I have to seek
4 assistance, and I have to advocate on his behalf. AE 018U as
5 currently written allows me to do that while preserving the
6 United States' interests in safeguarding national security.

7 Thank you.

8 MJ [COL POHL]: Thank you, Mr. Connell. Let's go ahead
9 and take a 15-minute recess, and then we'll pick it back up.
10 Just for planning purposes, I plan to take the lunch break at
11 approximately 1245. Commission is in recess.

12 [The R.M.C. 803 session recessed at 1114, 25 July 2016.]

13 [END OF PAGE]

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