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1 [The R.M.C. 803 session was called to order at 1131, 25 July
2 2016.]

3 MJ [COL POHL]: Commission is called to order. I believe
4 all parties are again present that were present when the
5 commission recessed.

6 Mr. Connell, before Mr. Nevin, I have a question or
7 two for you.

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

9 MJ [COL POHL]: Yes, ma'am? Okay.

10 LDC [MS. BORMANN]: I'm going to ask that Major Seeger be
11 excused for this portion so he can work on some other matters.

12 MJ [COL POHL]: Sure.

13 LDC [MS. BORMANN]: Thank you.

14 MJ [COL POHL]: Mr. Connell, when you completed, you
15 talked about your responsibility, I believe you said, to
16 humanize your client.

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

18 MJ [COL POHL]: Paraphrasing here.

19 So would that mean that anything that came from your
20 client that would tend to humanize him came from your client
21 to you, and therefore, assuming the classification review is
22 done, the handling issue is done, and at that point you'd have
23 unfettered discretion of where that piece of paper goes?

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1 LDC [MR. CONNELL]: Yes.

2 MJ [COL POHL]: So if he said -- and I know the ----

3 LDC [MR. CONNELL]: Let me back off of that just a little
4 bit. Obviously, I can't break any other laws.

5 MJ [COL POHL]: No, I know that. I know that.

6 LDC [MR. CONNELL]: I mean, my discretion is not
7 unfettered in general. I have ethical responsibilities. I
8 have legal responsibility.

9 MJ [COL POHL]: But given the -- I just want to understand
10 your position.

11 LDC [MR. CONNELL]: Yes.

12 MJ [COL POHL]: So if he said I want you to send a
13 birthday card to somebody in my old village, that would meet
14 that definition of human -- that is your call of whether or
15 not that should go there, assuming there's no classification
16 issue.

17 LDC [MR. CONNELL]: Assuming it's been through
18 classification review, and there's no handling caveats. It's
19 unclassified, then, yes, I can send a birthday card. But the
20 key part of that is it is left to my professional discretion
21 as to whether it is appropriate to send that birthday card.
22 It is not JTF's review of my professional discretion as to
23 whether to send that birthday card.

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1 MJ [COL POHL]: Is there any review that would say, well,
2 wait a minute, this doesn't -- this is not legal mail?

3 LDC [MR. CONNELL]: Is there any review ----

4 MJ [COL POHL]: So what I'm saying is ----

5 LDC [MR. CONNELL]: Once it gets to me ----

6 MJ [COL POHL]: Let's say it gets to you. It comes from
7 your client, so ----

8 LDC [MR. CONNELL]: Right.

9 MJ [COL POHL]: ---- it comes from your client, so
10 anything that comes from your client to you will always be
11 legal mail ----

12 LDC [MR. CONNELL]: Yes.

13 MJ [COL POHL]: ---- no matter what the content of it is.
14 Assuming it doesn't violate any laws. I've got that part of
15 it.

16 LDC [MR. CONNELL]: Right. I mean -- so we skipped over
17 the idea of -- earlier about what is nonlegal mail when I send
18 it to the client. And so if I send the client a book that
19 he's interested in, right, and it's a book that doesn't have
20 anything to do with Guantanamo or his case or anything like
21 that. You know, let's -- if I send him a book, that book, I
22 have to submit it through the nonlegal mail process, the
23 censors look at it, they make whatever decisions it is that

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1 they make, and they give him the book, if they choose to do
2 so. One can -- it is -- you know, you gave me an absolute.
3 If he then gave me that book back, that would be nonlegal
4 mail.

5 MJ [COL POHL]: Okay. Just a second.

6 [Pause.]

7 MJ [COL POHL]: Okay. Thank you, Mr. Connell.

8 LDC [MR. CONNELL]: Yes, thank you.

9 MJ [COL POHL]: Mr. Nevin?

10 LDC [MR. NEVIN]: Your Honor, I can go -- I actually had
11 intended to start in a place that was very close to where
12 you -- to the question you asked Mr. Connell, and I would just
13 point you to Rule 502, Military Commission Rules of Evidence,
14 which uses the standard definition for attorney-client
15 privileged communications, which is to say, communications
16 made for the purpose of facilitating the rendition of
17 professional legal services to the client.

18 Now, it has always been notable to me, noteworthy to
19 me, that it doesn't say which constitute the rendition of
20 professional legal services to the client. So we're not
21 limited in this definition to the client saying, you know,
22 what is the law on suppression of statements, and then I
23 respond and I say what the law is.

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1 And, of course, if we think about that, if you think
2 about what the rule is designed to try to achieve, of course,
3 it couldn't -- it could not be anything other than what it is
4 because most communications are made about -- most important
5 communications between the parties are made about factual
6 matters, and are made for the purpose of allowing the lawyer
7 to practice law and render a defense to the client, and that's
8 why the language is phrased the way it is.

9 So I join Mr. Connell in saying -- and it may be that
10 there is a communication from client to lawyer in this context
11 that would not be a lawyer-client privileged communication,
12 and I haven't tried to imagine every, among infinite
13 possibilities, but I would I say the vast, vast majority of
14 them would be.

15 And that gets you back to the question that you asked
16 of Mr. Connell previously, which is: Does that change? Does
17 that situation change if you do something later with that
18 concededly lawyer-client privileged communication? I guess
19 the point is, as it sits in my hands, it gets to my hands in
20 my understanding because it is a lawyer-client privileged
21 communication. And then the restrictions on what I do with it
22 later are the ones that you and Mr. Connell were just talking
23 about, and I agree with that.

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1 And one of the points that I want to make to you is
2 that -- is the same one Mr. Connell made, which is that
3 despite all the dire warnings and, I have to say, over-the-top
4 responses -- and I'm thinking of 371, Mr. Mohammad's letter to
5 the President -- there has been very little in these materials
6 which has been anything harmful, indeed anything even
7 controversial, particularly. We've pointed out several times
8 with respect to that whole *Huffington Post* matter that the
9 headline in the *Huffington Post* was something that the effect
10 that Mr. Mohammad encourages this young man to live a peaceful
11 life.

12 There wasn't anything harmful in those materials, and
13 that's important in a couple of ways: First, the one that
14 Mr. Connell mentioned, which is that the attorneys use
15 judgment in this and have some -- have worked in this to a
16 considerable degree, and we don't and would not pass along a
17 communication which was likely to have negative impact.

18 And the second is that there's an irony to this,
19 which is that, I take it when the government uses the sort of
20 core term propaganda, that it's talking about making an
21 argument for a particular point of view that is your
22 particular point of view. And Mr. Mohammad certainly has a
23 point of view, and part of what's going on in this case and

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1 will continue to go on in this case is an articulation of his
2 point of view. And I take it the government believes that
3 that point of view is incorrect and believe that it's
4 dangerous and damaging, that point of view. And we haven't
5 had the opportunity fully to articulate that, but certainly,
6 that's what these proceedings are all about.

7 And if you want a mechanism for conveying information
8 about a point of view, you would be hard pressed to find a
9 better place than this to spread it as widely as possible, by
10 which I mean it's a function of this case that these ideas
11 that the government considers propaganda and harmful ideas,
12 that these ideas are part of Mr. Mohammad's defense and will
13 be discussed and articulated widely as a result of this case
14 being litigated.

15 Now, the materials that are under discussion, the
16 letter to the President, the invitation to happiness, the
17 correspondence with Mr. Green, and I've talked to you about
18 those before and I'm not going to go into those because I
19 think we've passed the question whether there was some
20 violation of the rules that was associated with those, and I
21 haven't heard any kind of credible argument that there was.

22 So setting that aside, honestly, Your Honor, I keep
23 hearing about a document that the government -- that was filed

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1 in this case in the first round of military commissions,
2 before the current military commission came into existence,
3 and this occurred back in late 2008 or early 2009, and it's
4 called D120, is the filing designation. It was also referred
5 to as the Islamic response.

6 And it was a document -- it was an advocacy document.
7 It filled -- it would fit all of the definitions of propaganda
8 that I've heard the government refer to in the pleadings and
9 in argument, and yet it's on the website. It's on the
10 military commissions website today. It was filed publicly
11 within days of it being submitted by Mr. Mohammad and the
12 other defendants in the case, and it's still there today. And
13 I believe that the government still hands it out liberally to
14 persons who participate in this process and observe the
15 process as an example of something that it finds useful.

16 So I -- one of the things I want to say to you is
17 that I think the reference to -- the reference to propaganda
18 is something that is not a genuine way of sorting out what
19 should come and what should go.

20 And so, Your Honor, the last thing that I want to say
21 to you is this: We keep running into this same problem again
22 and again and again. This is a capital prosecution. The laws
23 that the Supreme Court has -- or the principles that the

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1 Supreme Court has articulated are very clear, and we have a
2 long line of cases that require a high degree of reliability
3 and fact-finding in this context because it's a capital case.
4 And we have a requirement within the Military Commissions Act
5 or within the enabling legislation that requires counsel
6 learned in the law of capital punishment to be provided to
7 Mr. Mohammad and to the other defendants.

8 And we have an obligation in the ABA Guidelines and
9 in the ABA Supplementary Guidelines that in fulfilling our
10 duty as lawyers we have to develop mitigation, and the U.S.
11 Supreme Court has been very clear that mitigation is
12 essentially limitless. And the military commission during
13 voir dire on our very first day in this case acknowledged
14 something to that effect in our conversation that we had, so I
15 know I'm not talking about something you're not aware of.

16 But we are obligated both as lawyers and also as
17 people who are making a -- trying to make a process work -- we
18 are obligated to take the kinds of actions that are under
19 discussion here. We are obligated to maintain contact with
20 family members, because any capital defender will tell you
21 that at least potentially some of the most powerful evidence
22 that can be presented to a jury deciding whether to take or
23 not take a defendant's life is an articulation by his or her

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1 family of their love and high regard for the person and it's
2 necessary for there to be a relationship there on which that's
3 based. So we are required to make contact with the family.

4 MJ [COL POHL]: Do you join Mr. Connell's position that
5 basically the current order is fine?

6 LDC [MR. NEVIN]: Well, the current order is operating
7 effectively and ----

8 MJ [COL POHL]: So let me just -- just so I understand,
9 it's -- the definition of legal -- I'm talking about outgoing
10 legal mail here, not incoming. Outgoing legal mail, something
11 from the client to you, goes for the classification review and
12 the handling review. And once it's done with that, assuming
13 there's no limitations from that point on, then it's your view
14 the current order permits you to do with it as you see fit?

15 LDC [MR. NEVIN]: Yes. Yes. The reason I hesitated when
16 you asked me that is because I remember writing a long
17 document for submission to the military commission saying this
18 word should be changed and this comma shouldn't be here, this
19 is not necessary, take this out and so on. And I won some of
20 that, and I lost some of it. So would I have said some of the
21 things differently? Yes, of course.

22 But we have -- we've been working with it now for, as
23 Mr. Connell said, for something on the order of three years.

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1 It's worked pretty well. The government has not articulated
2 really any genuine fallout problems from it. And now we're
3 down to talking about it, not only in terms of experience, but
4 also in terms of just what are the legal -- what are the
5 motivating principles behind it.

6 And all I mean to say in this last few minutes of
7 discussion to you is this: It's not time, in my view, for a
8 motion on this subject. But again and again and again what we
9 hear is you can't do what you have to do as a capital defender
10 because of national security, and maybe not now, definitely
11 not now, but someday soon we're going to have to deal with the
12 proposition that we're putting a square peg in a round hole
13 here. This is not an environment in which a capital
14 prosecution can go forward, and this is just another example
15 of it.

16 MJ [COL POHL]: Okay. I believe you were the one General
17 Martins asked a couple of times about the attachments to 182L
18 as being a part of this motion?

19 LDC [MR. NEVIN]: Yes, sir.

20 MJ [COL POHL]: Do you object to that?

21 LDC [MR. NEVIN]: Well, I object to the military
22 commission taking judicial notice of just those individual
23 portions of it, and I remember that I was thinking at the time

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1 that Bahlu was a noncapital case and that many of the
2 principles that were important there -- that were important
3 here may not have been present there, and that was the reason
4 for my objection. I ----

5 MJ [COL POHL]: But, you know, I get it from the
6 government's position is they just want me to consider it as
7 if they were attachments to this motion rather than generating
8 another inch worth of paperwork on it and I'd give it the
9 weight I thought it deserved.

10 LDC [MR. NEVIN]: Yes, sir. I don't object to that.

11 MJ [COL POHL]: Thank you.

12 LDC [MR. NEVIN]: Okay. Thank you.

13 MJ [COL POHL]: Any other defense counsel wish to be heard
14 on this. Mr. Harrington? Mr. Ruiz? Mr. Harrington.

15 LDC [MR. HARRINGTON]: Judge, I think to help to put this
16 in context is the difference without a distinction in us going
17 and talking to our clients or them sending us a letter, and is
18 there any difference. I guess one thing is in writing and the
19 other is oral, but the same communication, the same
20 information can be conveyed.

21 And so we sit and talk with our clients and they tell
22 us things and we come out and some of those things ----

23 MJ [COL POHL]: It seems like the judge in Ghailani made a

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1 distinction between those two. Excuse me, I take that back.
2 The SAMs in Ghailani, which isn't by the judge, I understand
3 that, makes a distinction between taking a letter from the
4 client to a third party and the attorney telling a third party
5 what the client said. It may be a distinction without a
6 difference, I don't know. I just read what the SAM says.

7 LDC [MR. HARRINGTON]: But I think it is, Judge,
8 regardless of what the ----

9 MJ [COL POHL]: Do you think there is a difference?

10 LDC [MR. HARRINGTON]: No, I don't think there is a
11 difference.

12 MJ [COL POHL]: So if I said -- if I just simply pulled
13 the language out of Ghailani saying that no mail can go from
14 outside the defense team, but the defense counsel themselves
15 may say -- tell anybody what they want, what the accused told
16 them?

17 LDC [MR. HARRINGTON]: No, that's not -- that's not the
18 point I was trying to get at.

19 MJ [COL POHL]: Okay.

20 LDC [MR. HARRINGTON]: The point I was trying to emphasize
21 is the fact that it shows the court that this is not really a
22 problem. We talk to our clients all the time, and this
23 distribution of information is not something that has

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1 happened. We know what we're not supposed to do, and we all
2 of us try to diligently follow that.

3 And for example, in Mr. Connell's example of
4 submitting things to the classification review board, we don't
5 submit our oral conversations with our clients to the
6 classification authority because we don't try to distribute
7 them, but I think it helps to keep it in the framework that
8 you need to do in considering this. That's all.

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

10 Mr. Ruiz?

11 LDC [MR. RUIZ]: Judge, on behalf of Mr. al Hawsawi, our
12 position is squarely that the current order is working, and I
13 would advance the position to the court that the maxim "If it
14 ain't broke, don't fix it" is very applicable here. It's a
15 very simplistic way of putting it, but I think it's the most
16 accurate based on the facts as they exist.

17 And my colleagues have chronicled what brought us to
18 this stage. And what I would submit to you is that there is
19 nothing before you that indicates that there is a real problem
20 that has been a threat to national security or has caused a
21 security breach or has sought to incite violence or brought
22 into question the safety of the guard force or the personnel
23 in Guantanamo Bay or otherwise.

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1 And I would submit to you that what has motivated
2 this motion is simply a desire to further censor the defense,
3 to stifle our speech, and to limit the ability that we have to
4 continue to represent each of the persons that we are
5 entrusted with representing.

6 And I think this is an ongoing effort. This is the
7 latest installment of the prosecutor's deliberate attempts to
8 continue to control and to continue to stifle the defense
9 efforts, Judge. We've chronicled those issues, and Mr. Nevin
10 talked about the national security issue which we put off for
11 another day, and this is another example of this issue.

12 What this is about, Judge, is about control. It's
13 about gaining greater control over the defense function. The
14 history that we've experienced in this litigation, and I'm not
15 going to go into it at great length, Your Honor, but it has
16 been a history of seeking greater control and greater controls
17 over the defense function from the JTF review to the FBI
18 intrusion, to the translators on our team, to the JTF orders,
19 these have all been efforts by the government to gain greater
20 control over the defense.

21 The ACCM chronicles the government's attempts to
22 define within defense teams which members need access to
23 information, which team members don't need access to

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1 information, independent of the defense judgment.

2 This is exactly what this is, Judge. And our
3 position is that the order has been working, continues to
4 work. There are multiple equities, as many of my colleagues
5 have pointed out, about people whose job in the government it
6 is to vet information for threat assessments, to look into
7 that information and make sure that something that is
8 unclassified is not a threat to national security.

9 General Martins has referred to this as having seams
10 or gaps that have been identified and having additional
11 equities from Joint Task Force Guantanamo Bay. I would
12 suggest to you that you should reject that argument. There
13 are no seams. There are no gaps. There have been no national
14 security concerns. Simply what there has been is an
15 offensive -- has offended people's sensibilities that there
16 has been some speech that has been made publicly available for
17 people to think and decide, decide for themselves what it is
18 that they think.

19 That's ultimately not what this is about for us, but
20 what it is about for us is having the ability to do just the
21 kinds of things that Mr. Connell talked about that are
22 valuable, that are necessary, and that are part of what we
23 need to do as defense counsel.

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1 And it may be ultimately we're going to bring this
2 issue to you on the national security and fundamental fairness
3 of the trial. But as an advocate, independent of that motion,
4 we will have to make a decision at some point as to whether we
5 can continue ethically to represent somebody in a system that
6 does not allow for just that type of communication.

7 In terms of a mechanism for enforcing this proposal
8 by the government, the question you had is very clear: What's
9 the mechanism? Who makes the determination on what is legal
10 mail, what is not legal mail? Mr. Connell pointed out the
11 four subcategories of what they define as legal mail.

12 The answer is simply clear. The answer is: If you
13 adopt this scheme that the prosecution has proposed to you,
14 when there is a dispute, the arbiter is going to be the court,
15 and we're going to bring the motion to you, and we're going to
16 litigate each of these issues independently. That's simply
17 where we're headed.

18 It is an unnecessary step to address an unnecessary
19 concern that is not borne out here by any of the facts, and we
20 ask you to reject the government's proposal and continue to
21 apply the order as it exists. It has protected national
22 security. There have been no incidents that the prosecution
23 have pointed to that have brought that into real or genuine

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1 concern of this court.

2 And as we've told the commission a number of times,
3 independent of those orders, we have independent obligations,
4 such as ethical obligations, such as obligations contractually
5 to safeguard classified information and to exercise our
6 judgment in a way that will advance the case of our client
7 without creating something that's unlawful or a threat to
8 national security. And I think that's where we are and the
9 proper balance has been struck. Thank you, Judge.

10 MJ [COL POHL]: Thank you.

11 LDC [MS. BORMANN]: Between April of 2003 and September of
12 2006 Mr. Bin'Attash was repeatedly caused to lose
13 consciousness by having his head smashed against walls, by
14 being strung up from the ceiling until the blood rushed from
15 his head. That, Your Honor, is probably considered by
16 JTF-GTMO to be propaganda.

17 Those very allegations come in part from the SSCI
18 report and in part from Mr. Bin'Attash. Those very
19 allegations are true, and they're contained in numerous
20 documents that I have provided to experts, that I have
21 provided to the convening authority, and that I have provided
22 to you in attempts to seek resources.

23 If I had to take that information and run it through

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1 JTF-GTMO, it would likely be considered propaganda, one of the
2 prongs, first prong, of the government's most recent proposed
3 order. And it violates and completely abrogates my ability to
4 do my job.

5 Now, that's just one bit of propaganda. Let's take
6 the second one. Mr. Bin'Attash comes from a culture where men
7 and women are forbidden from having contact unless they are
8 close family relatives. His religious beliefs and his
9 cultural background require him to avoid contact with females
10 who are not closely related to him. He objects to being
11 touched by females who he is not closely related to.

12 We know that JTF and the United States Government
13 considered that propaganda because no less than General John
14 Kelly got in front of the United States Congress and the press
15 to cite those very beliefs as propaganda. Those beliefs came
16 directly from my client. I provided those statements to
17 experts, consultants in seeking to determine to what extent I
18 should argue 254Y, whether or not we should file it at all,
19 and what evidence we might have to put forward in making that
20 argument. That -- we know JTF's position on that because
21 they've said it. They considered that propaganda.

22 That information would be -- I would be barred under
23 the government's regime from providing that information to

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1 anyone outside of the current defense team. That can't
2 possibly be the way capital defense is supposed to work, and
3 it isn't.

4 I want to comment upon the last of their proposed
5 types of information they believe -- the government believes
6 should not be provided outside the defense function, and it's
7 slide number -- I don't know, it's titled 3rd Government
8 Proposal, part four. It was shown already. I'd ask to bring
9 up the camera here, the document camera.

10 MJ [COL POHL]: Sure.

11 LDC [MS. BORMANN]: Number five, Judge. Number five on
12 the list of the information the government seeks to prohibit
13 me from relaying to anybody outside of the defense team is
14 this: Anything that discusses the status of other detainees,
15 including former detainees at Guantanamo Bay, Cuba, and
16 information regarding any of the detainees.

17 There is an immediate problem with this particular
18 one. My client's brother, Hassan, is detained in
19 Guantanamo Bay currently.

20 MJ [COL POHL]: Do you think this prevents you from
21 discussing this or just from correspondence with this stuff in
22 it?

23 LDC [MS. BORMANN]: Well, General Martins got up and said,

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1 and I don't want to misquote him because I'm having some
2 difficulty hearing from the back, that it's not only written
3 communications that they want to bar, but anything orally
4 conveyed. That was the first time I had heard that, and he
5 said it when he made his argument. So maybe if I
6 misunderstood, you know, that's one thing, but I think that's
7 what he said.

8 But my argument applies to both. So let me give you
9 an example: Mr. Bin'Attash writes me a letter and says
10 there's been a death in the family. I'm very worried about
11 Hassan. Please tell the family that the next time they speak
12 with him they should, you know, make sure that he's doing
13 okay.

14 I take that communication. I read it. I think oh,
15 my goodness, there's been a death in the family. You know, my
16 client is concerned about his brother. He wants to make sure
17 the family knows that, you know, they need to take care of his
18 brother. I am forbidden by this very thing from communicating
19 with my client's family about a death in the family and about
20 my client's concerns about his younger brother. That clearly
21 can't be what we're talking about here.

22 What we're talking about here, and the only
23 legitimate interest they have is this: It's the one in

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1 yellow, "Is reasonably expected to result in immediate and
2 substantial harm to national security or imminent acts of
3 violence."

4 Everything we're talking about here, from my client's
5 concerns about his younger brother to whether or not and to
6 what extent there's traumatic brain injury and we need some
7 expert assistance on that because of acts of the United States
8 Government, all of it is unclassified. None of it is
9 classified. None of it threatens national security.

10 So, yes, the government has an interest. It's listed
11 under the ii there and highlighted in yellow. We have
12 followed that scrupulously. But if you were to institute this
13 regime at this point, it would further exacerbate the
14 difficulty that we're experiencing on our defense team, much
15 of which results from the abrogation of the attorney-client
16 relationship by actions of the United States Government.
17 Currently pending before you is AE 401, our motion to dismiss
18 based on that very set of real facts; issues where because of
19 the rules put into place, it has imposed restrictions and made
20 attorney-client relationships almost impossible to build.

21 And so this is just one more in an instance of dozens
22 of instances where the United States Government is doing
23 everything they can to interrupt the defense function. If you

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1 you impose this type of regime, you will be, one, inviting
2 unnecessary litigation and delaying it even further -- because
3 I can tell you, you know, I submit -- I'm required to submit
4 something to JTF and they get back to me in three weeks and it
5 has to do with a death in my client's family, it will be on
6 your desk within a day, right? So that's what you're
7 inviting, and there's no reason for it.

8 We're here not because there was anything horrific
9 said or sent. It was a letter to the United States President,
10 and nothing actually even inflammatory in that. So don't
11 clobber the process in an attempt to fix something that
12 doesn't need fixing.

13 We suggest to you that in this capital prosecution
14 you not follow the SAMs imposed in Ghailani, which should be
15 noted was not a capital prosecution; that you not abrogate the
16 First Amendment rights of Mr. Bin'Attash's counsel, an issue
17 not raised in Ghailani; and that you allow counsel to make
18 professional judgments in the exercise of their duties that
19 provide resources and appropriate, effective representation to
20 their clients.

21 MJ [COL POHL]: Thank you.

22 General Martins.

23 CP [BG MARTINS]: Your Honor, we'll have nothing further

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1 because nothing that any of the defense counsel have said has
2 persuaded us to change our position from ----

3 MJ [COL POHL]: Which position are you on now, your most
4 recent position?

5 CP [BG MARTINS]: 018MMMM is our position.

6 MJ [COL POHL]: Let me ask you this, going back to a
7 previous position you held ----

8 CP [BG MARTINS]: Your Honor, we have been holding
9 positions, if you will, based on demonstrated references ----

10 MJ [COL POHL]: I got it.

11 CP [BG MARTINS]: ---- and actions of the defense. So
12 those have been principled changes that we have been making to
13 try to accommodate ----

14 MJ [COL POHL]: General Martins, I didn't say it was
15 unprincipled. I just want to focus on what we have got here.
16 What I have in front of me is you guys had one position
17 originally, we've discussed it, and you've modified your
18 position. That's fine. But since the paper is sitting before
19 me, I've just got some questions about it.

20 These six categories you have on the previous
21 position, okay, wouldn't many of these also raise
22 classification concerns, if not all of them?

23 CP [BG MARTINS]: We sought to try to answer your request

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1 for a standard of review that would enable a danger to
2 national security analysis that could occur through the
3 classification process.

4 MJ [COL POHL]: So but in essence ----

5 CP [BG MARTINS]: And they've opposed that, so we've ----

6 MJ [COL POHL]: I know they've opposed it, so I know
7 you've moved on to a clear rule.

8 CP [BG MARTINS]: To a clear rule. We're moving on to a
9 bright-line rule.

10 MJ [COL POHL]: And I love bright-line rules, but
11 sometimes you -- if you can't do a bright-line rule ----

12 CP [BG MARTINS]: They did it in Ghailani, Your Honor.

13 MJ [COL POHL]: Okay. Now, since you want to come back to
14 that, in Ghailani, who made the decision to issue the SAMs?

15 CP [BG MARTINS]: The Attorney General sends a special
16 administrative measures memorandum to the head of the Bureau
17 of Prisons.

18 MJ [COL POHL]: Is that based solely on what he has in the
19 indictment, or has he also got background information that
20 would cause him concern?

21 CP [BG MARTINS]: There's, you know, a request for the
22 special administrative measures that goes to him, and it has
23 information such as Ghailani's background. We would submit

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1 you have this information. These individuals are being held
2 as ----

3 MJ [COL POHL]: All I have before me is allegations, I
4 have no background information. Do you say that -- what I'm
5 saying, I'm just reading the SAMs from the Attorney General,
6 and he talks about he got letters from the New York FBI,
7 Southern District of New York -- I'm sorry, Southern District
8 of New York court, and based on information provided to me
9 related to Mr. Ghailani's connection to al Qaeda, he
10 finds blah, blah, blah. But he apparently -- and, again, he's
11 not the judge.

12 CP [BG MARTINS]: You have the matters we submitted in the
13 litigation of 018U. You have before you a referred set of
14 charges of alien unprivileged enemy belligerents. That's not
15 a casual statement. They have the ability to get an upfront
16 evidentiary hearing that is jurisdictional in nature under the
17 U.S.C.M.C.R.'s recent decision. So you are to treat them as
18 alien unprivileged enemy belligerents in a conflict with the
19 United States.

20 Yes, it is a capital case, but it's also a case
21 dealing with a recognized enemy armed force that these
22 individuals are, until it gets litigated, until they challenge
23 it, are unprivileged belligerents. That's a fact. That's an

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1 adjudicated fact that you can take account of.

2 MJ [COL POHL]: Let me ask you this: Ghailani's SAMs
3 makes a distinction between written correspondence from
4 Mr. Ghailani and to what his lawyers can say. And the way I'm
5 reading it, are you reading it the same way? That let's say,
6 for example, Mr. Nevin can't take a letter from Mr. Mohammad
7 to a third party, but Mr. Nevin can take that letter, read
8 that letter, and then tell a third party verbally A, B, C and
9 D?

10 CP [BG MARTINS]: I agree with the way the Ghailani
11 measures parse that out, that they -- something emanating
12 directly from the client is what's being prevented.

13 MJ [COL POHL]: But there's no limits, no limits on the
14 attorney saying, I talked to my -- again ----

15 CP [BG MARTINS]: I think, well ----

16 MJ [COL POHL]: Moving classified information aside.

17 CP [BG MARTINS]: Well, this is where the media comes into
18 play. So the attorney could not take a movie they made where
19 they interview the client -- this was the oral statement. I
20 think Ms. Bormann misunderstood me. They can't play an
21 audiotape of the client. They can't play a video that
22 integrates text that purports to be from the client. They
23 just -- that is speech and writings emanating from someone

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1 whose expressive rights are very justifiably being restrained.

2 And the standard for that, I would submit, Your
3 Honor, is not the strict scrutiny standard that Mr. Connell is
4 speaking of. All of those cases are in apposite. This is a
5 valid, rational connection to a legitimate government purpose.

6 MJ [COL POHL]: Let me ask you this: In Ghailani, the
7 SAMs, he was given to the custody of the Bureau of Prisons on
8 or about June 9 of 2009, and the SAMs were imposed the next
9 day. So they were prospective SAMs.

10 We have a little different situation here. Defense
11 keeps mentioning we've had this regime for three years. Okay.

12 CP [BG MARTINS]: Well, it was a regime, Your Honor, where
13 we had a -- what we thought was tenable, but we didn't seek to
14 appeal it or some other remedy. You were trying to put some
15 restraints on so-called nonlegal mail, and it's clear from
16 just the colloquies today there's no -- you know, legal mail
17 is everything now, apparently.

18 This is the problem. It expands and it's become a
19 wide, gaping hole. We don't agree with this notion that
20 there's no problem, and so we -- that's why we stand by this
21 request for the position in MMMM.

22 MJ [COL POHL]: So the government is -- the government
23 is -- just so I'm clear, we have spent a lot of time talking

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1 about the six GTMO JTF categories. But basically, the
2 government -- and, again, don't -- I know things change, so I
3 got it. So the government's basic position is, we don't want
4 to do that. We want the bright-line rule basically mirroring
5 the Ghailani SAMs.

6 CP [BG MARTINS]: They don't want to do that either.

7 MJ [COL POHL]: I know they don't want to do it. I'm
8 asking you what you want to do.

9 CP [BG MARTINS]: I have given you our position, Your
10 Honor, it's MMMM, and nothing certainly has restrained his
11 attorneys and the expressive rights that they claim. There's
12 every opportunity to make a defense here and to raise the very
13 kinds of things they have been relating to the conditions of
14 confinement.

15 MJ [COL POHL]: Just raising something that Ms. Bormann
16 already raised, and I think you already have, we're just
17 talking about the, writ large, the written correspondence
18 here, not what the accused may say orally to their attorney.

19 CP [BG MARTINS]: Orally to their counsel. If it's
20 recorded in some kind of media, that becomes a form of mail
21 that is just as regulated as the written.

22 MJ [COL POHL]: Okay. But what I'm saying is
23 Mr. Binalshibh tells Mr. Harrington say hi to my mom for me.

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1 Let's assume that's innocuous.

2 CP [BG MARTINS]: That's allowed under Ghailani, and
3 that's allowed here.

4 MJ [COL POHL]: But if he handed her a birthday card for
5 Mr. Harrington to give to his mother, under Ghailani and the
6 regime you want me to impose, Mr. Harrington couldn't give
7 that to his mother.

8 CP [BG MARTINS]: He'd have to put it through nonlegal
9 mail because that's what it is. He'd have to have it sorted
10 and looked at through nonlegal mail. That kind of restraint
11 is an appropriate restraint. It's a written ----

12 MJ [COL POHL]: What if it's legal mail? Under your --
13 again, you drew a distinction there.

14 CP [BG MARTINS]: Well, no, remember ----

15 MJ [COL POHL]: Let's say something is clearly legal mail.

16 CP [BG MARTINS]: ---- our position ----

17 MJ [COL POHL]: Your position is that doesn't go anyway.

18 CP [BG MARTINS]: Our position now is to use the Ghailani
19 approach. They shouldn't be giving communications by the
20 accused to third parties. That's a bright-line rule.

21 MJ [COL POHL]: No matter what the contents of that is?

22 CP [BG MARTINS]: Not something directly handwritten or
23 written by the ----

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1 MJ [COL POHL]: Okay.

2 CP [BG MARTINS]: ---- detainee or a message by the
3 detainee that is part of or all of a communication.

4 MJ [COL POHL]: Just so I understand your position, let's
5 say the detainee wanted to write to the convening authority
6 or, quite frankly, even the President of the United States,
7 saying that I should get -- I should get clemency because A,
8 B, C and D and this case shouldn't be capital. Under your
9 regime that could not be sent to the convening authority or
10 the President?

11 CP [BG MARTINS]: We have not spoken to -- you know,
12 communications with the JTF, communication with the command,
13 the convening authority through appropriate channels. Given
14 that the President has a clemency function down the road,
15 sending something directly to him is problematic statutorily
16 for that reason.

17 But nonlegal mail is nonlegal mail. There used to be
18 a meaning to that. Based on your colloquies just today with
19 counsel, it's clear there's nothing -- that is no restraint at
20 all, Your Honor.

21 MJ [COL POHL]: I understand that. But what I'm saying is
22 if it fits the legal mail category, who can the defense give
23 it to under your proposed regime? Anybody?

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1 CP [BG MARTINS]: They can seek to handle it ----

2 MJ [COL POHL]: What about the carve-out exception we
3 talked about a long time ago about the introductory letters.

4 CP [BG MARTINS]: That's what you tried to keep as a
5 carve-out exception. It turns out it was a massive hole.

6 MJ [COL POHL]: So just understand, I'm just trying to
7 understand people's positions here. That's all.

8 So the introductory letters under your proposed
9 regime would not be allowed to be given to third parties.

10 CP [BG MARTINS]: We think the proper rule is the rule in
11 the Ghailani case.

12 MJ [COL POHL]: So is that a yes?

13 CP [BG MARTINS]: That it would not be -- they couldn't
14 show it to third parties.

15 MJ [COL POHL]: Okay. So under your proposed regime, the
16 introductory letters could not be shown to third parties?

17 CP [BG MARTINS]: Inmate's attorney may not send,
18 communicate, distribute or divulge the inmate's mail or any
19 portion of its contents, legal or otherwise, to third parties.

20 MJ [COL POHL]: Okay.

21 CP [BG MARTINS]: I believe that's clear.

22 MJ [COL POHL]: Yeah. I just want to read it. There's no
23 carve-out. You don't even want that section to be carved out.

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1 CP [BG MARTINS]: Your Honor, the carve-outs have proven
2 to be problematic. And again, the attorneys are able to make
3 a defense. It is a capital case, but it's also a case
4 involving accused who are in an armed conflict with the United
5 States, and these are appropriate limitations on expression.

6 MJ [COL POHL]: Let me ask this, and I forget which
7 defense counsel raised it, there was an allegation that
8 something that came out before directly from the accused --
9 and I don't read your website very often, so just -- I may
10 look at a transcript occasionally, but I try to stick to
11 things that happen in court.

12 But anyway, I believe it was Ms. Bormann that
13 mentioned -- or maybe it was Mr. Nevin, that there was a
14 letter from Mr. Mohammad and the others in the first iteration
15 of this trial, and that would clearly fall within your
16 definition of mail, and that's posted on the OMC website
17 apparently. Again, I can't confirm that.

18 Is that the government wanting it one way when
19 it ----

20 CP [BG MARTINS]: Your Honor, I'd have to review the
21 facts, but if someone in a pro se capacity is filing
22 something, that becomes a document of the court that's filed
23 and posted on the website. What is the question? I mean,

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1 this is ----

2 MJ [COL POHL]: Well, no.

3 CP [BG MARTINS]: We're in a different world, aren't we?

4 MJ [COL POHL]: Well, no, because it comes up to

5 Mr. Mohammad's most recent letter, is you don't even want

6 that -- you filed and I granted your temporary motion that it

7 not be publicly disseminated because of ----

8 CP [BG MARTINS]: You saw that was end run around the

9 nonlegal mail prohibition.

10 MJ [COL POHL]: But it's attached to a motion.

11 CP [BG MARTINS]: That was a filing by the party that ----

12 MJ [COL POHL]: Right.

13 CP [BG MARTINS]: ---- you know, that in the past judge,

14 past regime, that thing was put up on the web. I think we're

15 in a different place.

16 MJ [COL POHL]: Okay. Let's talk about the most recent

17 one, because I believe the most recent one that -- Mr. Nevin's

18 team filed a motion on Mr. Mohammad's letter. Now, does that

19 get ----

20 CP [BG MARTINS]: Yeah. We believe that was nonlegal mail

21 that was not provided. The general rationales for why that

22 kind of thing could be prohibited by a country that's holding

23 captive enemies and trying to subject them to the judgment of

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1 the law for war crimes is that if they have a tendency to
2 recruit or to send messages that could intimidate, distinct
3 from classification, whether the contents themselves are, you
4 know, likely to cause damage to national security, the fact
5 that they're coming from an individual could be seen as having
6 special status or veracity. This is the importance of those
7 exhibits that I asked you to take judicial notice of.

8 Those are nontrivial concerns about recruiting
9 individuals into -- not just any cause, not just Mr. Connell's
10 trivial cause of -- or, you know, unharmful cause of helping
11 with the case, but to al Qaeda. And those are legitimate
12 reasons we objected to putting that up on the website, Your
13 Honor, because it was an end-around the mail system.

14 MJ [COL POHL]: So you don't believe that the standard for
15 confidential, which is reasonably could be expected to cause
16 damage to the national security -- it's something less than
17 that?

18 CP [BG MARTINS]: I think there are national security
19 concerns. These are reflected in the SAMs, by the way. The
20 SAMs isn't reduced all the way to just classified information.

21 MJ [COL POHL]: I know, but isn't your basic argument is
22 that releasing all of this information somehow will hurt the
23 United States?

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1 CP [BG MARTINS]: Your Honor, what I'm saying is that ----

2 MJ [COL POHL]: What am I -- what are you asking me to
3 protect here?

4 CP [BG MARTINS]: I'm asking you to do what courts do when
5 we're dealing with individuals who are in an armed conflict
6 against the United States.

7 MJ [COL POHL]: Let's try this again: What are you asking
8 me to protect?

9 CP [BG MARTINS]: I'm asking you to take our position in
10 018MMMM, which is essentially the Ghailani standard on
11 nonlegal mail. We think that's pretty clear.

12 MJ [COL POHL]: Okay. I'll ask you a third time: What am
13 I protecting? What I'm saying is -- obviously, I'm not making
14 myself clear. You have the confidential, which is the lowest
15 standard, which talks about cause damage to national security,
16 expected to cause -- okay. You're saying it doesn't reach
17 that.

18 CP [BG MARTINS]: No, I'm not. I'm saying, Your Honor --
19 I mean, a good example is the special administrative measures,
20 repeatedly signed into effect with regard to Ghailani. That
21 wasn't just about classified information. It's about
22 controlling the communications of someone who -- and they have
23 the ability to challenge this, but someone who the court can

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1 and should recognize is part of a group trying to harm the
2 United States.

3 It's not all about whether or not something is going
4 to be classified by an original classification authority as
5 damaging to national security in its contents. That does not
6 exhaust the national security interests of the United States.

7 We also have an interest in holding people in
8 confinement conditions, subject to the Geneva Conventions and
9 the law of armed conflict, that limit their communications
10 with other members of al Qaeda. It can't all be reduced
11 down -- and in some ways I think what we were trying to do
12 with the court's -- at the court's request, was put all of
13 that under the classification structure and the classification
14 determination. The command has an interest in also holding
15 these individuals with limited ability to communicate with
16 other members of al Qaeda.

17 That's a legitimate, valid governmental interest that
18 the JTF's regulations served, and we respectfully maintain
19 this commission should not be changing that and disrupting
20 that unless it's linked to its core concerns. And 018U we
21 thought could do that, and it's demonstrated that it can't as
22 late as today, when counsel described what they thought legal
23 mail consisted of.

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1 MJ [COL POHL]: Okay.

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

3 Your Honor, I have an announcement relating to the
4 courtroom. Modifications can be made to provide microphones
5 on that last table, but because of your standing order
6 relating to modifications of the courtroom, we would need to
7 have you approve that, but they could undertake those in short
8 order.

9 MJ [COL POHL]: Okay. Actually, I was going to ask about
10 that, but if you need my permission to do it, you have it.

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

12 MJ [COL POHL]: Mr. Connell, anything further?

13 LDC [MR. CONNELL]: The position that the government
14 advances today, which was articulated in a grand total of
15 three paragraphs in AE 018MMMM is, quote, The prosecution
16 believes that the only way for the legitimate interests of the
17 United States to be protected is for the military judge to now
18 prohibit defense counsel from sharing any of the accused's
19 mail with any third parties, comma, and the word "period,"
20 comma, and to define third parties as everyone outside the
21 defense team.

22 Now, there's no defense briefing on that. There's a
23 specific reason that there's no defense briefing on that, that

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1 that position was articulated in a reply. Rule of Court
2 701(e)(1) states that parties may not raise new matters in a
3 reply. There's a reason for that. Because if you are going
4 to do something as drastic as what the government is
5 suggesting, it needs to be fully briefed.

6 Now, I'd like to address the specific issues raised
7 by ----

8 MJ [COL POHL]: Are you asking leave to file a response to
9 the reply?

10 LDC [MR. CONNELL]: Well, to be honest, the whole idea is
11 ill conceived and I'm just asking you to deny it flat out.

12 MJ [COL POHL]: Okay.

13 LDC [MR. CONNELL]: But if you feel you need briefing on
14 this, I'm, as always, delighted to comply.

15 MJ [COL POHL]: No, I'm good.

16 LDC [MR. CONNELL]: The first question from the military
17 commission is whether classification, including the
18 confidential standard, covers the matters that are outlined in
19 the government's six categories and to a great extent it is.
20 On multiple times in this military commission, we have dealt
21 with matters touching on JTF equities handled at the
22 SECRET/NOFORN level, and we have done so in closed sessions
23 through ordinary procedures.

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1 The reasonably expected to damage national security
2 standard set forth in the confidential definition of
3 confidential in Executive Order 13526 clearly covers anything
4 other than unreasonable fears to damage national security.

5 Now, the government just argued that these men are
6 alien unlawful enemy belligerents and have to be treated as
7 such until they challenge it. Apparently the government has
8 forgotten AE 119, which is our challenge to the jurisdiction
9 of this court based under the law of armed conflict.

10 Now, under the Geneva Conventions, which the
11 government just cited, Article V, these men are to be treated
12 as enemy prisoners of war until their status is adjudicated
13 otherwise. That adjudication, or whatever conclusion the
14 military commission reaches, has not yet taken place, although
15 it has been pending for -- since 2013.

16 The next point that the government makes is that
17 there can be a distinction -- or possible distinction between
18 written and verbal information. The -- or at least that was
19 the question that was asked. I think that the government's
20 position is there is no distinction, which significantly
21 limits our ability to advocate. Many of the examples that I
22 gave you are examples, not where I could sit down and have a
23 discussion with the committee against torture. I have to send

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1 them an alternative report. I am not -- I am prohibited from
2 sitting down and having a discussion with the convening
3 authority. I have to send him a copy of Mr. al Baluchi's
4 paper.

5 And, in fact, the exact interview that is covered in
6 AE 018 Government Third Supplement is my oral -- my verbal
7 interview with Al-Jazeera where I'm sitting with the
8 unclassified papers in my lap commenting upon them. You know,
9 this is not a clear, bright line ----

10 MJ [COL POHL]: Well, the government keeps coming back to
11 Ghailani, and the term that's used in Ghailani is the inmate's
12 attorney may disseminate the contents of the inmate's
13 communication to third parties.

14 LDC [MR. CONNELL]: Disseminate.

15 MJ [COL POHL]: They use the word disseminate. And later
16 on they talk about the blanket prohibition of sending the
17 inmate's mail to third parties outside the defense team,
18 so ----

19 LDC [MR. CONNELL]: And that is exactly why when you first
20 said if the attorney -- you asked me the question, if the
21 attorney can disseminate information according to their
22 professional judgment, is there a problem and I said no. And
23 then you said, well, what if I read that as you can discuss it

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1 but can't hand out papers, and I would say yes, that would be
2 a significant restriction on attorney advocacy.

3 MJ [COL POHL]: Yes, you could hand out papers, but you
4 couldn't hand out papers from the accused.

5 LDC [MR. CONNELL]: No, you have to ----

6 MJ [COL POHL]: Now, where is the middle ground here of
7 you handing out a paper saying Mr. al Baluchi told me X, that
8 you -- papers that you drafted, is that in the attorney
9 dissemination category, or is that in the accused mail
10 category? And this, I'm coming back to General Martins'
11 discussion of the different forms of media.

12 LDC [MR. CONNELL]: Right. That is -- number one, I don't
13 think it's clear, right? I could take a position -- I could
14 pick one on a strategic basis right now, but it's certainly
15 not clear which category it falls into, which I think
16 demonstrates the invalidity of the whole distinction.

17 There are times when verbal representations as to
18 what Mr. al Baluchi has said are necessary for my -- to carry
19 out my ethical obligation of a zealous advocacy, and there are
20 times when I have to do it on paper. And sometimes I have to
21 do it retyping what Mr. al Baluchi said, which are three
22 different examples that the court already has in the record.

23 But let's talk about the Ghailani SAMs for a second.

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1 The first one is -- the first major distinction or most
2 important factor is that those were imposed by the attorney
3 general post-conviction. There are a couple of reasons why
4 that's important.

5 One of those reasons is the time factor, the fact
6 that if, when an actual case is pending against someone,
7 attorneys ----

8 MJ [COL POHL]: Are you sure about that?

9 LDC [MR. CONNELL]: Well, here's what I am sure ----

10 MJ [COL POHL]: The only reason I say that is I don't know
11 what the date of Mr. Ghailani's conviction was.

12 LDC [MR. CONNELL]: Sure.

13 MJ [COL POHL]: I'm just reading from the first paragraph
14 of it, and it says, "Until recently, Ghailani has been
15 detained as an enemy combatant in a military prison in
16 Guantanamo Bay, Cuba."

17 LDC [MR. CONNELL]: There are two separate SAMs imposed on
18 him.

19 MJ [COL POHL]: But the first one, June 9, 2009, he was
20 transferred to the BOP, and the next day was that SAMs, so I'm
21 assuming that's pre-conviction.

22 LDC [MR. CONNELL]: If you say so. I don't know, I ----

23 MJ [COL POHL]: I'm just saying I don't know what the date

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1 of this trial actually was but reading the document would
2 certainly lead to the conclusion that this SAMs was
3 pre-conviction.

4 LDC [MR. CONNELL]: And here's the end note to the whole
5 thing: Those SAMs have now been lifted. When I'm currently
6 making efforts to interview Mr. Ghailani, I know perfectly
7 well he doesn't have SAMs in place. Those SAMs are not in
8 effect anymore. I don't think that necessarily demonstrates
9 that they weren't a good idea to begin with, but it does speak
10 to ----

11 MJ [COL POHL]: Wouldn't there be a distinction, though,
12 of pre-conviction restrictions and post-conviction
13 restrictions on an inmate?

14 LDC [MR. CONNELL]: Yeah, there has to be.

15 MJ [COL POHL]: So I'm saying SAMs -- because this talks
16 about things going to the defense counsel and things like
17 that. So SAMs before sentencing, for want of a better
18 term ----

19 LDC [MR. CONNELL]: Should be less restrictive on the
20 attorney than afterwards.

21 MJ [COL POHL]: Well, you may have to delineate a little
22 bit more, because once you're convicted, now you're in the BOP
23 world of -- and I suspect that they would have their own

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1 built-in procedures for a post-conviction inmate.

2 LDC [MR. CONNELL]: They all run through the Attorney
3 General, sir. The Attorney General is the only person under
4 regulation who has the authority to impose special
5 administrative measures. But I agree there has to be a
6 distinction for a couple of reasons.

7 The first is once a person is at the BOP, they may
8 have an appeal or they may not. They're not in the same
9 situation where their attorney has to investigate and prepare
10 for trial. There's also a greatly expanded time factor when
11 you get to post-conviction, because things have to happen in
12 this court, you know, on a timeline, sometimes within two
13 weeks, sometimes within some other timeline that's set, but
14 things have to happen according to the schedule set by the
15 military commissions. That's generally not the case in
16 post-conviction.

17 And the last observation that I want to make, though
18 I'm happy to answer any other questions, is that I have to
19 disagree with the government's characterization of our efforts
20 as trivial. What we are trying to accomplish here is not just
21 defend individuals, but to do so while maintaining the
22 national security of the United States, which is why that we
23 have been entrusted with such high security clearances.

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1 The last three years have demonstrated the
2 workability of the current framework, and the military
3 commission simply should not change it. The parade of
4 horrors that the government suggests could come to pass have
5 not and will not.

6 MJ [COL POHL]: Thank you, Mr. Connell.

7 Mr. Nevin, anything further?

8 LDC [MR. NEVIN]: Thank you, Your Honor. The pleading
9 that I referred to as being an advocacy document that the
10 defendants filed previously and that I believe as recently as
11 this session the prosecution has distributed to observers of
12 these proceedings and that I said are available on the --
13 today as we sit here, on the military commissions website,
14 that is a document that was filed by pro se defendants, that's
15 true.

16 But we have plenty of capability in the military
17 commission for taking documents that are duly filed but not
18 releasing them on the website or redacting them, redacting
19 anything in them that's thought to be harmful or a problem.
20 But those -- that document is on the website today.

21 I mentioned it for precisely the reason the military
22 commission questioned General Martins about, which is that
23 to -- if you compare the letter to the President with that

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1 document, that document is much more an advocacy document.
2 And the letter to the President, as we know, generated a high
3 degree of agitation and emergency action for no reason other
4 than -- other than it was not a document that the government
5 saw as being in its interest. It didn't have anything -- that
6 distinction didn't have anything to do with national security.
7 That was -- that was true when I made the comment a few
8 minutes ago, and it's still true now.

9 I wanted to also point out to Your Honor that the
10 definition of national security, as we know, has changed over
11 time. You know, we labored for quite a while with the idea of
12 presumptive classification, that every word out of
13 Mr. Mohammad's mouth was to be treated as classified, no
14 matter how mundane or trivial. And then after a while, that
15 restriction went away.

16 The reason we had presumptive classification, even
17 though it didn't exist in the executive order -- the reason we
18 had it was because we had to protect national security. These
19 were enemies of the United States. They were trying to harm
20 us. Nothing less would guarantee national security. But when
21 it went away, the national security hasn't been harmed in the
22 slightest.

23 We heard that it would harm national security for

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1 Mr. Mohammad to be allowed to wear a turban in court or to be
2 allowed to wear that jacket he's wearing right now, and we
3 raised this, and that was a matter of national security.

4 We heard that any mention of what was done to
5 Mr. Mohammad for years -- we heard that any mention of what
6 was done to Mr. Mohammad in the black sites would endanger
7 national security, and we couldn't talk about that openly. Now
8 after December of 2014 that's no longer classified at all
9 because, as it turns out, it doesn't harm national security.

10 I know we all know this, as we sit here. I mention
11 it now only to say that this invocation of the idea of
12 national security is a useful tool for the government because
13 everybody wants to protect the national security, of course,
14 but it is malleable and changeable, and it is frequently
15 offered up by the government as a way of supporting its
16 positions, I submit, unnecessarily. This is really another
17 way of making the point that several people have made to you
18 about the actual track record of where we are now, which --
19 under 018U, which is that there hasn't been any harm to the
20 national security at all.

21 And let me just finish by saying I was so struck by
22 the military commission asking General Martins repeatedly what
23 interests are you trying to protect, and I submit to you that

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1 he didn't answer that question because it's clear that the
2 classification regime, which gets at this issue of national
3 security, puts it in the hands of experts -- that the
4 classification regime, plus the element that Mr. Connell has
5 spoken to, and we all have, of the -- of the attorneys
6 exercising professional judgment, trying desperately to
7 fulfill our obligation to defend this capital case but at the
8 same time to protect the national security, that it has all
9 worked out pretty well under the circumstances. And as
10 Mr. Ruiz said, the remark about not being broken and not
11 needing to be fixed.

12 And then finally, this, Your Honor: I heard General
13 Martins say, as he has said many times, that our situation
14 here is that the defendants in the case are alleged to be
15 enemies of the country and that it's not unreasonable to
16 keep -- to have a desire to keep them from communicating with
17 the outside world. And just set aside my argument about the
18 Islamic response, D120 in the previous filing and the fact
19 that it's available to the entire world on the website right
20 now. Set that aside.

21 MJ [COL POHL]: It's also attached to a government exhibit
22 in this proceedings.

23 LDC [MR. NEVIN]: I'm sorry, Your Honor?

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1 MJ [COL POHL]: I said it's on 254EE which is a government
2 pleading in these proceedings, so it's not just in the other
3 proceedings. Go ahead.

4 LDC [MR. NEVIN]: Yes, sir.

5 But whatever limitations you can put, you've captured
6 the enemy, and you've put him into a prison, let's say, and
7 you don't want him to talk to the outside world. And I don't
8 know what all of the restrictions are that you can put on him
9 when he's sitting in a prison somewhere, and I don't want to
10 speak comprehensively to it. I don't think this motion
11 requires that.

12 The problem we have here is, as I said before, they
13 have initiated a capital prosecution. It has not been enough
14 to hold that enemy to whatever degree incommunicado, it's
15 right to hold him, now we're having a capital prosecution.
16 Now we're invoking the entire jurisprudence of the United
17 States Supreme Court and that puts us in a different world.

18 Thank you for hearing me.

19 MJ [COL POHL]: Thank you, Mr. Nevin. Anything further?
20 Nothing from Mr. Harrington. Mr. Ruiz? Ms. Bormann?

21 LDC [MS. BORMANN]: Nothing.

22 MJ [COL POHL]: Nothing further. Okay. General Martins,
23 you indicated there's a way to put the microphones in there.

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1 Can that be done over lunch or do we need more time than that?

2 CP [BG MARTINS]: It's going to need a little more time
3 than that.

4 MJ [COL POHL]: Okay. Rather than start the next motion,
5 which will be 251, we'll recess now and we'll reconvene
6 tomorrow at 1400. If it can be done, it can be done. If it
7 can't, I understand.

8 CP [BG MARTINS]: Your Honor, we understand it can be done
9 tonight and be available for tomorrow.

10 MJ [COL POHL]: Commission is recessed until 1400 hours.

11 CP [BG MARTINS]: Tomorrow at 1400?

12 MJ [COL POHL]: I'm conflating two issues. We're breaking
13 for lunch now, coming back at 1400 today.

14 CP [BG MARTINS]: Understood.

15 [The R.M.C. 803 session recessed at 1242, 25 July 2016.]

16 [END OF PAGE]

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