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1 [The R.M.C. 803 session was called to order at 1049, 30 May  
2 2016.]

3 MJ [COL POHL]: Commission is called to order.

4 Trial Counsel, everybody still here?

5 MTC [MR. TRIVETT]: Yes, sir.

6 MJ [COL POHL]: Wasn't there a guy sitting behind you?

7 MTC [MR. TRIVETT]: One of our paralegals, sir.

8 MJ [COL POHL]: Okay. Fine, thank you.

9 No change to any of the defense counsel? We're  
10 waiting for Ms. Bormann. Okay. Ms. Bormann and Mr. Sowards  
11 have rejoined us. I believe everybody else is present.

12 Mr. Nevin, have you had the opportunity to talk to  
13 Mr. Mohammad about the 411 waiver?

14 LDC [MR. NEVIN]: I did, Your Honor, and he confirms for  
15 me that this is his signature.

16 MJ [COL POHL]: Okay. A little confusion on that one; it  
17 was addressed to a different name?

18 LDC [MR. NEVIN]: That's his kunya, Abu Hamza and -- but  
19 that is him and that is his signature. And I will say, I  
20 witnessed it as well, and ----

21 MJ [COL POHL]: Mr. Mohammad, at the break, Mr. Nevin  
22 showed you a piece of paper, and I just wanted to confirm, did  
23 he discuss that with you and did you -- is that your signature

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1 on the bottom of it?

2 ACC [MR. MOHAMMAD]: Yes. Agreed.

3 MJ [COL POHL]: Do you have any questions about what it  
4 entailed?

5 ACC [MR. MOHAMMAD]: No.

6 MJ [COL POHL]: Thank you.

7 ACC [MR. MOHAMMAD]: No.

8 MJ [COL POHL]: Mr. Connell. Same question to you: Did  
9 you discuss it with Mr. al Baluchi over the break?

10 LDC [MR. CONNELL]: Yes, sir. And just so we're clear on  
11 what it is, AE 014, Attachment D.

12 MJ [COL POHL]: Yes. And you confirmed that he understood  
13 it and it was his signature?

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

15 MJ [COL POHL]: Mr. al Baluchi, Mr. Connell's showed you  
16 an attachment to an AE 411, which is a waiver of a conflict of  
17 interest.

18 Did he explain that document to you?

19 ACC [MR. AZIZ ALI]: [Microphone button not pushed; no  
20 audio].

21 MJ [COL POHL]: Do you have any questions about that  
22 document?

23 ACC [MR. AZIZ ALI]: [Microphone button not pushed; no

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1 audio]

2 MJ [COL POHL]: Do you agree that that's your signature on  
3 that document?

4 ACC [MR. AZIZ ALI]: Yes.

5 MJ [COL POHL]: Thank you. With that clarified, there  
6 will be an order in 411 issued in due course.

7 That brings us to ----

8 LDC [MS. BORMANN]: Judge, I hate to interrupt, but before  
9 we get there, there is something in the 802 conference we need  
10 to put on the record.

11 MJ [COL POHL]: Sure.

12 DDC [MR. SCHWARTZ]: At the 802 conference, Ms. Bormann  
13 brought up 426. We discussed the idea of having 426 argued on  
14 Friday. Then we discussed some other issues that might come  
15 up on Friday, including witness testimony. And so we just  
16 wanted to take a moment and highlight the fact that 426 is --  
17 it's a public health issue. 426 and 426A is the discovery  
18 request, discovery motion to 426. And hearing that this week  
19 really is essential. It's going to affect our operation and  
20 our preparation for the July hearings. We're going to request  
21 a ruling before the July hearings. It's a technical motion  
22 and oral argument seems appropriate. I suspect the commission  
23 will have questions.

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1 MJ [COL POHL]: Has it been fully briefed?

2 DDC [MR. SCHWARTZ]: It's not been fully briefed, I  
3 believe, until Thursday night which is why we proposed a  
4 Friday argument. The problem is pushing it to Friday, as we  
5 know, might end up in no argument on Friday. So if it pushes  
6 to July, not just affects our operation of our team, but, you  
7 know, as a matter of public health, this is something -- this  
8 is an unusual motion. It really is in everyone's interest to  
9 have this sorted out in a transparent way that the commission  
10 is aware of all of the facts. It's a longer motion, and, like  
11 I mentioned, it's kind of technical. I'm sure that the  
12 commission has had a chance to read it, but it's a difficult  
13 subject matter ----

14 MJ [COL POHL]: Okay.

15 DDC [MR. SCHWARTZ]: ---- which is why we're requesting an  
16 expert.

17 MJ [COL POHL]: Okay. You -- so would it be fair to say  
18 that if the government were able to respond by Thursday that  
19 you would waive any reply?

20 DDC [MR. SCHWARTZ]: We'd waive reply and we'd even be  
21 willing to do our oral argument before Friday, which is in the  
22 government's interest. The point is it's an adversarial  
23 process but this is not -- it's so collateral to the case,

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1 regarding the habitability of the facility here, that's in  
2 everybody's interests.

3           So we would propose argument on Wednesday, if  
4 possible, at least for our version, which would hopefully  
5 allow the commission to rule before July. That's ultimately  
6 what we're requesting, is an opinion before July.

7           MJ [COL POHL]: Okay.

8           Trial counsel, what's your position? Based on what  
9 I'm hearing them say, they want to present their position on  
10 Wednesday, understanding that you have an opportunity both to  
11 submit a written response and to make an oral argument at a  
12 subsequent time.

13          MTC [MR. TRIVETT]: Providing we get the full benefit of  
14 the briefing cycle, and if Your Honor wants to hear their  
15 argument on that -- usually, you know, we're often asked to  
16 respond to these emergency-type motions usually while we're  
17 down here in the middle of trial preparation. We believe that  
18 our due date is Friday, not Thursday, and that's even without  
19 a supplement that was recently added. We would like the full  
20 benefit of the full amount of time to respond to it, and we  
21 think it's appropriate that it get argued in the due course of  
22 business, like any other motion, after both parties have  
23 briefed their positions.

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1 MJ [COL POHL]: Mr. Schwartz, when was the initial report  
2 put out about the potential problem?

3 DDC [MR. SCHWARTZ]: There -- just to make sure I  
4 understand your question, Your Honor, there have been, my  
5 understanding, is five total reports. Only one has been  
6 provided to the defense, and that was dated February 23rd. It  
7 was provided to the defense on April 11th.

8 MJ [COL POHL]: When did you file your first pleading?

9 DDC [MR. SCHWARTZ]: May 19th. And we did -- Mr. Trivett  
10 is correct, we supplemented on Friday, and if that extends the  
11 briefing schedule -- we supplemented with simply an affidavit.  
12 If that allows the government two weeks from that date, so be  
13 it. The point here is because of the nature of the subject  
14 matter, this is information that I, and our defense team, want  
15 to provide to the commission as soon as possible.

16 Obviously in the motion itself, we requested an  
17 expedited briefing schedule and that didn't happen, but to  
18 leave this set of hearings without providing the commission  
19 this information, without putting forth our full argument on  
20 the record that would allow for ultimately a finding or ruling  
21 on 425A and then 425 before July ----

22 MJ [COL POHL]: Even under your procedure, which is  
23 somewhat irregular, if you give your oral argument on

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1 Wednesday, the government doesn't even file its pleading until  
2 two days later at best, maybe even after that with the  
3 supplement, wouldn't I have to give them an opportunity to  
4 orally argue also?

5 DDC [MR. SCHWARTZ]: Your Honor, you ----

6 MJ [COL POHL]: My general rule is if I'm going to give  
7 one side a chance to argue, I'll give the other side.

8 DDC [MR. SCHWARTZ]: Sure, and that's what we're asking  
9 here, is for this to be irregular. It's irregular to be  
10 working defending capital defendants in a facility where  
11 there's so much uncertainty about the safety. And this is --  
12 I think this is what gets lost on this issue, is I'll  
13 concede -- I'll be the first to say it's probably fine. This  
14 probably is not an issue. The odds are an expert would tell  
15 you that we don't have a problem here. But the nature of it,  
16 the risk involved, if we're wrong, and I don't see right or  
17 wrong as in if there exists toxins that are harmful, if we're  
18 wrong about taking the risk and continuing to occupy the  
19 facility, the consequences of that obviously are significant,  
20 not just for a defendant or a defense team, but for everybody  
21 in the room.

22 So that's why we requested the expedited briefing  
23 schedule. That's why today we'll request some kind of

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1 irregular oral argument process with the goal of having this  
2 issue resolved before July.

3 MJ [COL POHL]: So you -- but understand your proposed  
4 procedure, I would hear -- if you want oral argument, you  
5 wanted to start with an oral argument, I would only hear the  
6 defense oral argument and not give the government an  
7 opportunity to respond.

8 DDC [MR. SCHWARTZ]: The government should have an  
9 opportunity to respond.

10 MJ [COL POHL]: Then how can I hear the government before  
11 July?

12 DDC [MR. SCHWARTZ]: The idea that the government was  
13 provided notice of the motion on May 12. The filing on this  
14 one is unusual. I don't want to bring the trial judiciary  
15 staff into the decision here there's a long fact pattern but  
16 this motion was originally filed on May 13. 12th or 13th. It  
17 was rejected. It was filed again the following Monday or  
18 Tuesday. So we filed it on a Friday, three weeks before the  
19 hearing. We attempted to file it again the following Monday  
20 or Tuesday, that was rejected again. It was ultimately  
21 accepted, I believe the -- the inventories shows May 19th,  
22 which would have the government's due date on Thursday  
23 evening.

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1           Now, again, our supplement, to try to add to the  
2 facts here, to try to add to the universe of information on  
3 this issue, wasn't filed until Friday. But the supplement  
4 doesn't really change. It doesn't -- the government response  
5 to this issue shouldn't require an additional week just  
6 because an expert has now weighed in, suggesting that the  
7 information available to us -- and I don't know if it's  
8 available to the prosecution, but the information that's been  
9 provide to the defense is not reliable information.

10           So as leaders of defense teams and supervisors of  
11 enlisted and officers -- servicemembers, we're having to make  
12 decisions about how to utilize people, how to operate the  
13 defense team without information that is reliable, according  
14 to independent experts.

15           That's what warrants kind of an unusual ----

16           MJ [COL POHL]: And I don't want to get into the facts too  
17 much of this, but as I -- from reading your pleading, we have  
18 the initial -- somebody from not the government, from -- I'm  
19 going to say from ----

20           DDC [MR. SCHWARTZ]: Navy.

21           MJ [COL POHL]: ---- the Navy certified there was no  
22 problem. And then you file an affidavit saying this guy had  
23 bad methodology, or the report isn't reliable.

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1 DDC [MR. SCHWARTZ]: Um ----

2 MJ [COL POHL]: So let's -- so what do we do now, wait?

3 DDC [MR. SCHWARTZ]: Here are the facts just to make sure.  
4 I don't want to mislead you about that.

5 MJ [COL POHL]: I mean, you're saying again, I don't want  
6 to make it appear that I'm litigating the motion now because  
7 I'm not.

8 DDC [MR. SCHWARTZ]: Right.

9 MJ [COL POHL]: But I'm just trying to figure out how we  
10 compress all of this in your time frame when it sounds like,  
11 at -- we may end up having to take witnesses on this?

12 DDC [MR. SCHWARTZ]: No, sir.

13 MJ [COL POHL]: Or what is your end date?

14 DDC [MR. SCHWARTZ]: So the motion is -- 426 itself is  
15 only a request for an independent expert. It's a request for  
16 funding. So whether there's expert testimony or witness  
17 testimony in the future on a different issue, I wouldn't rule  
18 that out. But on this issue, it's simply: Do the facts  
19 warrant funding of an independent expert to look at this? And  
20 here's -- I think the immediate question, though, that you  
21 raise is, why would we break from the normal briefing cycle?  
22 Why would we have oral argument in an irregular way this week?  
23 And the answer is, in August 2015 we had the Navy do an

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1 initial assessment and say everything's fine.

2 In February -- in a report that we didn't receive  
3 until April, but February 23rd, a report was finally published  
4 that said, when we said in August that everything was fine, we  
5 didn't have our lab results back yet. Today, February 23rd,  
6 we can't tell you that the risk involved with being in Camp  
7 Justice until we do more testing. There's never been anymore  
8 testing on 15 of the 16 toxins at issue.

9 So we're all in here today doing our jobs, doing our  
10 best to uphold our duties under the guise of some kind of  
11 safety, under this certification of habitability that just  
12 isn't there at all. You know, when the Navy in February  
13 published its report, it essentially retracted its  
14 certifications of habitability. And then beyond that, I'm  
15 told -- there's sort of a rumor that somebody has said it's  
16 now safe and I've seen a slide show to that effect that says  
17 with respect to certain toxins it's now safe, but on the whole  
18 there is very little information for all of us to rely on in  
19 making a decision about entering this facility.

20 And that's just an unusual event. I can't imagine  
21 anybody's ever confronted an issue like this in a criminal  
22 setting. It's such an enormous distraction for us to have to  
23 weigh the severity of making a bad decision about this issue

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1 that there's -- there's every reason to make sure we get to  
2 this issue this week so that the commission can rule on it  
3 before July.

4 MJ [COL POHL]: Let me think about it.

5 DDC [MR. SCHWARTZ]: Thank you, sir.

6 MJ [COL POHL]: That brings us to the 018 -- I'm going to  
7 start with 018Y, and this is a government motion to amend the  
8 written communication order. Also, I'm sure everybody's aware  
9 of, there's an issue with classified information on this  
10 particular issue, a potential spillage from a government  
11 pleading and an issue with your disks, Mr. Connell.

12 LDC [MR. CONNELL]: Yes, sir. The -- to be clear, there  
13 are two government pleadings in this 018 series that we --  
14 that I reported as spills, one of which I have never read. I  
15 have never opened 018XXX. I have never opened it. There's  
16 another one as well. I understand that the other one has been  
17 determined to be a spill and we are trying to handle our  
18 proposed exhibit, which is open source information,  
19 appropriately.

20 There are a lot of 505(g) notices related to this,  
21 and we are currently drafting one regarding the government's  
22 pleading that was determined to be a spill, so that we can  
23 argue that one.

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1 MJ [COL POHL]: Okay.

2 LDC [MR. CONNELL]: Because it all just came up -- we made  
3 the report weeks ago, but the determination was only made  
4 today apparently. So if the military commission has guidance  
5 for us ----

6 MJ [COL POHL]: Well, we're not going to talk about any of  
7 the things that are classified or thought to be classified.  
8 So that would mean your disk. I think the other one is the  
9 third government supplement.

10 MTC [MR. TRIVETT]: Yes, sir.

11 MJ [COL POHL]: And you referred to another one. Okay.  
12 So what we're going to talk to today, I would turn to your  
13 diagram of last time. And then on Wednesday, we'll talk about  
14 whether or not the other information is necessary to be  
15 discussed on the 018 series on -- in a closed session later in  
16 the week, if we have one.

17 LDC [MR. CONNELL]: All right. And just to be clear, our  
18 response to AE 018Y second supplement, which is 18 --  
19 AE 018RRR is itself classified.

20 MJ [COL POHL]: Okay. Okay. Again, you -- do you know  
21 which ones are classified and which ones are not.

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

23 MJ [COL POHL]: I'll rephrase that.

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1 LDC [MR. CONNELL]: Right.

2 MJ [COL POHL]: You know when you filed a pleading it was  
3 a classified pleading.

4 LDC [MR. CONNELL]: Right.

5 MJ [COL POHL]: You're also on notice of these potentially  
6 two, if not three others, that should have been classified.  
7 Okay. Right?

8 LDC [MR. CONNELL]: Right.

9 MJ [COL POHL]: So we won't refer to those now. I'm just  
10 going to refer to the unclassified ones, and I don't  
11 believe -- primarily the government's second supplement.

12 LDC [MR. CONNELL]: Right. And the point that I'm making  
13 is that our response to that second supplement is classified.  
14 Two of the four pleadings on this topic that we're about to  
15 discuss are now classified.

16 MJ [COL POHL]: Okay. Okay. I got it. We may not get  
17 very far in an unclassified setting is what you're telling me.

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

19 MJ [COL POHL]: Fine. Got it. Thank you.

20 Trial Counsel. In your 018Y second supplement, 11  
21 March 2016, you proposed a new legal mail order, correct?

22 MTC [MR. TRIVETT]: That's correct. That took into  
23 account the other changes from 018W that the defense had

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1 requested that we didn't oppose.

2           So we included those in the draft proposed order as  
3 well, sir.

4           MJ [COL POHL]: Okay. Now, -- and, again, most of this  
5 have to be discussed in a classified setting. I got it. Let  
6 me make sure -- because I think Mr. Connell's diagram last  
7 time was very useful in identifying the issue, although  
8 certainly, there was completely different perspectives of what  
9 we're talking about here. So let me just go through this.

10          LDC [MR. CONNELL]: We can put up the diagram, if you  
11 like, sir.

12          MJ [COL POHL]: Yeah. Go ahead and do that, because  
13 it's ----

14          LDC [MR. CONNELL]: Sir, if we could have the feed from  
15 Table 4. And I can hand Mr. Trivett a copy.

16          MJ [COL POHL]: Not that one. Yeah, that one. Yeah. Go  
17 ahead and put it up. We already got it. Got it. This is  
18 already part of another exhibit. What was that exhibit  
19 number, Mr. Connell?

20          LDC [MR. CONNELL]: Sir, our slides are AE 018DDDDAAA.

21          MJ [COL POHL]: Okay.

22          LDC [MR. CONNELL]: It is the third slide in that packet.

23          MJ [COL POHL]: Okay. Okay. So what we're talking about

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1 here, and I just want to -- is material, written material  
2 going from the detainee to his defense counsel to third  
3 parties?

4 MTC [MR. TRIVETT]: Correct.

5 MJ [COL POHL]: Material between the detainee and his  
6 defense counsel, at that point there's no external involvement  
7 by the government?

8 MTC [MR. TRIVETT]: Correct.

9 MJ [COL POHL]: Following this diagram, if they send it  
10 over for a classification review, that's done by the Privilege  
11 Review Team, correct?

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

13 MJ [COL POHL]: Who does that?

14 MTC [MR. TRIVETT]: The classification review, which is a  
15 voluntary privilege review that the defense counsel has the  
16 ability to do, they provide it to the DSO, their Defense  
17 Security Officer, and then the Defense Security Officer  
18 presents it to Washington Headquarters Services, who is the  
19 agency responsible for the protection of classified  
20 information in these cases.

21 MJ [COL POHL]: So there's another step involved that I  
22 had missed.

23 MTC [MR. TRIVETT]: Right. The privilege team that you

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1 set up in protective order -- well, in the written privileged  
2 communications order is for incoming.

3 MJ [COL POHL]: Incoming. I got it.

4 MTC [MR. TRIVETT]: For information to the detainees.

5 MJ [COL POHL]: So through the DSO, it goes through the  
6 Washington services and they do a classification review only.

7 MTC [MR. TRIVETT]: Just for classification to determine  
8 under their current guidance whether or not that information  
9 is classified.

10 MJ [COL POHL]: Does that include a member of -- who would  
11 be familiar with classification issues dealing with TTPs in  
12 the confinement facility?

13 MTC [MR. TRIVETT]: For classification purposes, yes.

14 MJ [COL POHL]: Okay.

15 MTC [MR. TRIVETT]: But, again, we didn't want to -- we  
16 wanted to make sure that the government's position is clear on  
17 this, is that there's a conflation of a classified review  
18 process and JTF-GTMO's very valid reasons for not allowing  
19 certain nonlegal mail out to third parties, and they are two  
20 different distinct issues.

21 MJ [COL POHL]: Okay.

22 MTC [MR. TRIVETT]: There could be nonclassified  
23 information, information that one of the accused says that is

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1 not classified under guidance, but who's -- as an enemy  
2 belligerent of the United States, has a propaganda value that  
3 the Department of Defense does not want to allow out to the  
4 masses because we're trying to win the war.

5 MJ [COL POHL]: And who would be the stakeholder of that  
6 type of screening?

7 MTC [MR. TRIVETT]: That's SOUTHCOM JTF-GTMO. Meaning  
8 JTF-GTMO is a component of SOUTHCOM.

9 MJ [COL POHL]: No. I understand that. I'm just saying  
10 the way you frame it, it would seem like it would be a DoD  
11 concern. Because the SOUTHCOM could be the executive agent  
12 for it. Got it.

13 MTC [MR. TRIVETT]: Yes, sir. There's policy implications  
14 with large DoD as well.

15 MJ [COL POHL]: I got it. Okay.

16 MTC [MR. TRIVETT]: Yes, sir.

17 MJ [COL POHL]: I got it. So under the current privilege,  
18 they go through this classification review but not that  
19 review?

20 MTC [MR. TRIVETT]: Correct.

21 MJ [COL POHL]: Then it comes back and then at that  
22 point -- and if I'm misquoting you, make sure you tell me here  
23 Mr. Connell, at that point it goes back to the defense counsel

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1 and they can choose if it's commission related, what to do  
2 with it as far as going to third parties.

3 MTC [MR. TRIVETT]: Well, yeah. Our -- that's their  
4 position.

5 MJ [COL POHL]: That's their position.

6 MTC [MR. TRIVETT]: Yes, sir.

7 MJ [COL POHL]: Okay. Now, what's your position?

8 MTC [MR. TRIVETT]: Right. The rub in the defense  
9 counsel's position -- and Your Honor touched on it in the last  
10 hearings when General Martins actually argued our position,  
11 I'm not going to go completely over our position again, but  
12 the rub is in the definition of what constitutes nonlegal  
13 mail.

14 And ultimately Mr. Connell's position is that he  
15 can -- it is hard for him to even come up with an example of  
16 information that his client gives to him that would be -- that  
17 would constitute nonlegal mail that would put it under the  
18 ambit of JTF-GTMO's nonlegal mail policy, in that all of the  
19 communications that are given to him in some way, if he  
20 chooses to use them, are related to the case of a -- in a  
21 sufficient amount that he would not be required to go through  
22 the JTF screening process.

23 MJ [COL POHL]: In your proposed new order, I'm looking at

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1 paragraph 2.h.

2 MTC [MR. TRIVETT]: Military commissions nonlegal mail and  
3 material.

4 MJ [COL POHL]: And you got the new addition, the second  
5 sentence.

6 MTC [MR. TRIVETT]: Correct.

7 MJ [COL POHL]: And basically we define legal mail and we  
8 say anything that doesn't meet that definition is nonlegal  
9 mail. Okay.

10 MTC [MR. TRIVETT]: Correct.

11 MJ [COL POHL]: Now, are you defining it -- in your  
12 definition, is it meant to define nonlegal mail requiring a  
13 JTF-GTMO review would be legal mail going to third parties?

14 MTC [MR. TRIVETT]: No. With the understanding that we'd  
15 have to come to an agreement with what constitutes legal mail.  
16 I think that's the threshold issue that the commission needs  
17 to decide, because ultimately the way Mr. Connell explained  
18 the process is that the only time -- or at least of these  
19 three examples, I guess the media example specifically, he  
20 concedes that that would be a full waiver of any privilege  
21 that existed if he were to give it to the media. I believe  
22 that that was his argument.

23 Whereas his argument to the U.N. or the

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1 nongovernmental organizations is he believes that there is  
2 some type of partial privilege or confidentiality agreement  
3 that would allow for him to present messages, communications  
4 from his client to a nongovernment organization without going  
5 through JTF-GTMO's nonlegal mail policy because in his mind  
6 that still constitutes legal mail. And the fact that there  
7 may have been a partial revocation of the privilege isn't  
8 sufficient to then open up that communication to JTF-GTMO mail  
9 screening.

10 MJ [COL POHL]: Well, you know, I'm reading their  
11 responses is we define -- I define nonlegal mail as any mail  
12 that doesn't meet the definitions of paragraph 2.f and 2.g.

13 MTC [MR. TRIVETT]: Correct.

14 MJ [COL POHL]: Okay. And then their response is that  
15 privilege -- let's move privilege aside because that's a  
16 narrow category, but attorney work product is expansive and  
17 can be disclosed to third parties without waiving any work  
18 product confidentiality.

19 MTC [MR. TRIVETT]: That's their position.

20 MJ [COL POHL]: That's not your position?

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

22 MJ [COL POHL]: I mean, is it your position that once they  
23 disclose the information to a third party, even with a -- some

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1 type of confidentiality agreement, that because they are a  
2 third party that it necessarily no longer falls within the  
3 definition of 1.f -- or excuse me, 2.f or 2.g?

4 MTC [MR. TRIVETT]: Yes, sir. That is our position. And  
5 the concern with that is the timing of it, right?

6 So what we proposed in the order itself is that, you  
7 know, to the extent it goes from Mr. Ali to Mr. Connell and  
8 through a security screening and the security screening comes  
9 back and says unclassified -- now, not unclassified FOUO,  
10 which is an additional handling requirement that would require  
11 it stay within only for official use only, but providing that  
12 it comes back completely unclassified, then Mr. Connell has a  
13 decision -- and I just keep using Mr. Connell's name because  
14 we're looking at this diagram -- but he then wants to make a  
15 decision at some point, either he holds it or he wants to  
16 release it to one of these third parties.

17 The problem is the third-party release is  
18 obviously -- in the government's position it is inconsistent  
19 with keeping it a privileged communication between just your  
20 client and the attorney.

21 Just as if you go to court and you do an open-court  
22 filing, it's inconsistent with maintaining the privilege. And  
23 that exact example came when Mr. Ali just recently attached

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1 a -- you know, a declaration.

2           So there's things that can start privileged and which  
3 the government would concede are privileged to start, but then  
4 if the decision is to then release them to third parties  
5 inconsistent with that privilege or in the media, even  
6 concededly inconsistent with that privilege, by that time it's  
7 too late. It's too late for JTF-GTMO to have identified any  
8 legitimate equities they have as the detention facility of  
9 enemies of the United States and whether or not they want to  
10 authorize the release of that information by one of its  
11 enemies.

12           So what we've proposed in this order, specifically,  
13 would require Mr. Connell at some point, once he decides that  
14 he does want to release it to the United Nations,  
15 nongovernmental organizations, the media, or a court other  
16 than the statutorily identified courts here in this  
17 commission, which is we -- the government's position is that  
18 the rights that the accused have are statutory under the  
19 Military Commissions Act, providing it's some court of law  
20 specifically outside the United States federal system, that at  
21 that point in time, he would need to go back to JTF-GTMO to  
22 make a determination.

23           Now, ultimately, it's not as if they have complete

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1 authority over this, because what we had in the instance of  
2 Mr. Nevin and the letter to the President, is ultimately based  
3 on his filings. He provided it to JTF-GTMO, JTF-GTMO said I'm  
4 not accepting that, and so he filed his motion with you.  
5 Right? To the extent that they -- if for some reason JTF-GTMO  
6 denies the request to allow for the public dissemination of  
7 information, it's not as if the game's over for them. They  
8 still have recourse, their statutory recourse, which is you.  
9 And you then would make a determination as to whether or not  
10 it was information that was -- that was specific to their case  
11 and, therefore, would implicate one of the rights of the  
12 accused before a commission if it was not released. So that's  
13 ultimately the process that can occur, but JTF-GTMO needs that  
14 cut, they need to be able to look at that.

15           And quite frankly, what we assume -- well, it's not  
16 safe to assume it, but what we would believe is that many  
17 things that JTF-GTMO wouldn't approve that constitutes  
18 nonlegal mail, clearly nonlegal mail, that that falls outside  
19 the ambit of your first order, and, quite frankly, with all  
20 due respect, sir, falls outside the ambit of this commission.

21           So if, in fact, they're right and it was nonlegal  
22 mail and the defense proposed that that nonlegal mail be  
23 allowed to go out if they denied it and if it came to you, if

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1 the system worked right, you would agree that it was nonlegal  
2 and it didn't implicate any of their rights and then  
3 ultimately it wouldn't be allowed to be disseminated.

4           But right now, the way it is, and the -- our first  
5 motion was a motion to clarify. And why we wanted the  
6 clarification is we believed that your order was crystal  
7 clear, that for nonlegal mail, whatever constituted nonlegal  
8 mail would go through the JTF-GTMO policy. Obviously when we  
9 reached out to Mr. Nevin on that issue, they had a  
10 disagreement as to what the process was and whether or not  
11 your order required that.

12           Even in their argument in the last session, they  
13 disagree with what your argument said, but it was a very  
14 careful wording of what they said. They said that there are  
15 no restrictions in Protective Order No. 1, No. 2, or 018U on  
16 outgoing mail from detainees when considered unclassified.

17           I think that statement is true because it wasn't  
18 addressing nonlegal mail and it recognized JTF-GTMO's nonlegal  
19 mail policy. So to read 018U as to completely allow for the  
20 defense to no longer abide by JTF-GTMO's nonlegal mail policy  
21 we believe is the incorrect position.

22           So that's why we did a motion to clarify, because it  
23 was clear that the parties had a disagreement over the order

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1 that was issued. So when we propose our amended order which  
2 we -- the one that we just discussed, we wanted to have it  
3 clarify -- and we can have it as an amendment, we don't need  
4 it to be a retroactive thing. I know Mr. Connell was  
5 concerned about that. We need it amended to clarify our  
6 belief up front that this wasn't used to circumvent JTF-GTMO's  
7 nonlegal mail policy.

8 MJ [COL POHL]: But you seem to be saying -- you've not  
9 proposed any amendments to the definition of legal mail. You  
10 simply seem to be saying that any mail that goes to a third  
11 party is to be treated as nonlegal mail, in essence.

12 MTC [MR. TRIVETT]: I don't read it that way, sir, and let  
13 me ----

14 MJ [COL POHL]: Well, let me ask you this: You say in  
15 2.h ----

16 MTC [MR. TRIVETT]: Yes, sir.

17 MJ [COL POHL]: ---- that disclosing to a third party  
18 amounts to a partial or wholly waiving of the privilege, and  
19 therefore, appropriate for JTF review. But in paragraph 2.g,  
20 it talks about communications between a defense counsel and  
21 accused that relate to commission that are not privileged.  
22 And then you go back to the introductory paragraph of 2.h that  
23 says all correspondence, documents, meaning any form of

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1 similar material that do not fall within paragraphs 1.f or 1.g  
2 above. 1.g refers to nonprivileged material to begin with.

3 So it seems to me is the only way to read  
4 paragraph 178H is that if the defense wants to communicate any  
5 case-related material, whether privileged or unprivileged,  
6 whether work product or not work product, is requires a  
7 JTF-GTMO review.

8 MTC [MR. TRIVETT]: If it is to go -- if it is to be used  
9 in a way where they would waive, either partially or wholly,  
10 privileged, yes.

11 MJ [COL POHL]: What I'm saying is paragraph 1.g talks  
12 about case-related material that is not privileged, and that  
13 is the definition of legal mail. So it seems the government's  
14 position is hinged on that the third-party disclosure amounts  
15 to a waiver of the privilege.

16 MTC [MR. TRIVETT]: That's correct.

17 MJ [COL POHL]: Okay. But the order itself talks about  
18 nonprivileged case-related material. There's no -- so it  
19 starts out as nonprivileged, so why wouldn't all -- under your  
20 definition, all of 1 -- 2.g material have to go through  
21 JTF-GTMO review for any intent to disclose it to third  
22 parties?

23 MTC [MR. TRIVETT]: And I think I've identified the source

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1 of your concern.

2 MJ [COL POHL]: Okay.

3 MTC [MR. TRIVETT]: I don't read it that way. So let me  
4 explain how I understood it to be.

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

6 MTC [MR. TRIVETT]: Okay. So there was a distinction even  
7 in 018U at the beginning that there was lawyer-client  
8 privileged communications, other case-related material, and  
9 other nonlegal mail and that the lawyer-client privileged  
10 communications are -- don't encompass the larger attorney work  
11 product concerns, whereas the other case-related material  
12 does. We're not discussing -- we're not trying to purport  
13 that other case-related material, if it's privileged, when  
14 it's still being used as privileged under the attorney work  
15 product privilege, is something that JTF-GTMO needs to review.

16 We're not -- we're not -- our order itself isn't a  
17 huge expansion of what we just envision JTF-GTMO's legitimate  
18 process was all along, which was what -- if it's nonlegal  
19 mail, then it needs to go through -- including -- and that  
20 would include anything where there was certainly anything  
21 where it would be waived completely to send to the media, that  
22 that would have to be able to go through JTF-GTMO to have that  
23 review first.

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1           Now, even in 018U, you had a recognition that certain  
2 nonlegal mail may still be necessary for the defense to have,  
3 and you gave the example of the letters of introduction. And  
4 that ultimately, a letter of introduction, if they wanted to  
5 get it out, would go through JTF-GTMO. But if they needed an  
6 expedited review, your 018U called for an expedited review by  
7 JTF-GTMO of the nonlegal mail.

8           Now, JTF-GTMO follows your orders. You're saying --  
9 you're making a determination that letters of introduction are  
10 something that is appropriate and necessary, even if it would  
11 constitute nonlegal mail, for the defense to have for the  
12 purposes of representing their clients. Right?

13           So, as an example, if Mr. Connell gave a letter of  
14 introduction to JTF-GTMO that didn't raise any other concerns,  
15 if it was just to say, "Mom," or a fact witness not associated  
16 with al Qaeda, then ultimately, based on your order, they're  
17 required to look at that. And they can, if they choose to,  
18 release that information. If they don't, defense can come to  
19 you, and if we believe that it was something that they needed  
20 to do, we wouldn't oppose the motion.

21           But, if even on letters of introduction, if it was a  
22 letter of introduction that -- when JTF reviewed it, believed  
23 it was either coded or it was sent to a known member of

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1 al Qaeda, and it could raise concerns from either a propaganda  
2 position or a strengthening-of-the-enemy position, they have  
3 to be able to have that -- they have to be able to have that  
4 look at it.

5 Now, ultimately, they can always come back to you on  
6 this. I don't envision this to be thousands and thousands and  
7 thousands of documents. But clearly, when we're sending  
8 messages out from any of the accused to any media outlet,  
9 without JTF getting to look at it simply because it was deemed  
10 to be unclassified, that's not sufficient for the U.S.  
11 Government. The power to wage war is the power to wage war  
12 successfully.

13 We've detained these individuals under the laws of  
14 war, and we have a right to restrict what they say to the  
15 media. We just do. It's under the laws of war and it's  
16 always been that way. And JTF-GTMO is not getting a chance to  
17 do that right now.

18 MJ [COL POHL]: Okay. I'm just -- let me kind of come  
19 full circle here and then give the defense an opportunity.

20 The way I read 2.h -- rephrase that. One possible  
21 reading of 2.h is that any mail from the -- any mail from the  
22 detainees to any third party has to go through JTF-GTMO.

23 Forget the issue about whether it waives a privilege or not,

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1 that's not really -- I mean, that's your conclusion. But at  
2 the end of the day, isn't that what that says? Or it could be  
3 read that way. Any -- listen carefully.

4 MTC [MR. TRIVETT]: Yes, sir.

5 MJ [COL POHL]: Any detainee mail that the defense intends  
6 to send to third parties must be treated as nonlegal mail  
7 subject to JTF review. Is that the government's position?

8 MTC [MR. TRIVETT]: Let me read it closely so I can ----

9 MJ [COL POHL]: Sure. Take your time.

10 MTC [MR. TRIVETT]: ---- identify it for you.

11 LDC [MR. NEVIN]: Could I ask: Are you referring to .h as  
12 it exists now or as it was?

13 MJ [COL POHL]: No, no. They're proposed changes.

14 LDC [MS. BORMANN]: The amended.

15 MJ [COL POHL]: The amended.

16 LDC [MS. BORMANN]: Okay.

17 LDC [MR. CONNELL]: Your Honor, I put the amended language  
18 up on the screen.

19 MJ [COL POHL]: Okay. Thank you.

20 MTC [MR. TRIVETT]: All right. So I want to unpack this a  
21 little bit so you understand what the intent was of our  
22 language. And to the extent that it can be written -- to the  
23 extent it can be clarified, we think that's wholly

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1 appropriate.

2           The conclusion that something would partially or  
3 wholly waive the privilege is based on the fact that if  
4 they're giving it to a person, entity or party other than  
5 defense personnel, as that term is defined, it would also  
6 include witnesses or proposed witnesses, because that's  
7 already in 018U otherwise.

8           Clearly, the government takes no qualms with the  
9 defense claim that certain times they can share privileged  
10 information with potential experts, anyone who's a defense --  
11 is defense personnel or proposed defense personnel, the  
12 government is not asking for JTF review of that, just not.

13           So to the extent that we need to define more who we  
14 believe they can provide information to that wouldn't be  
15 partially or wholly waiving the privilege, we're not opposed  
16 to adding that language. But we fully believe that in giving  
17 it to a court, even if it's a court outside, certainly -- even  
18 giving it to federal court, if it's a -- providing it's not an  
19 ex parte filing, that waives the privilege.

20           That going to an NGO or a United Nations court of any  
21 type waives the privilege, and that going to the media waives  
22 the privilege. Now, every piece of information they give to  
23 potential witnesses or potential defense experts or personnel

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1 would not be required to go through JTF-GTMO. That's because  
2 that's consistent with the privilege.

3 So to the extent you're reading it that it's  
4 everybody except defense team, that's not consistent with the  
5 other parts of the order, and we didn't intend for it to read  
6 that way. So we would be ----

7 MJ [COL POHL]: No. What I'm addressing -- and I agree  
8 there's members of the defense team.

9 MTC [MR. TRIVETT]: Okay.

10 MJ [COL POHL]: Okay. I've got that.

11 MTC [MR. TRIVETT]: Yeah.

12 MJ [COL POHL]: Obviously, you got to talk to witnesses.  
13 I got that. I got that.

14 MTC [MR. TRIVETT]: Yeah.

15 MJ [COL POHL]: And there's experts, potential experts. I  
16 got that.

17 MTC [MR. TRIVETT]: Yeah.

18 MJ [COL POHL]: Okay. Let's put those over here.

19 MTC [MR. TRIVETT]: Okay.

20 MJ [COL POHL]: Okay. But that's not what we're talking  
21 about here. That's not the government's concern here. The  
22 government concern, I'm going to use this term -- may not be  
23 totally accurate -- but the best way I can say it,

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1 unaffiliated third parties ----

2 MTC [MR. TRIVETT]: Right.

3 MJ [COL POHL]: ---- NGOs, media, whomever, whether or not  
4 the government, defense agrees, partially or wholly waives the  
5 privilege is somewhat irrelevant is because as drafted, this  
6 would simply say, anything going to third parties unaffiliated  
7 third parties has to go through JTF review no matter what.

8 MTC [MR. TRIVETT]: Yes.

9 MJ [COL POHL]: Even if they were not going to waive any  
10 privilege or anything else.

11 MTC [MR. TRIVETT]: Correct.

12 MJ [COL POHL]: So it's not -- so to be precise, it's  
13 still legal mail but it's lost the protection of legal mail  
14 because they want it to go to a third party, therefore, now we  
15 call it nonlegal mail.

16 MTC [MR. TRIVETT]: Correct. I think that's right, with  
17 the important proviso that you mentioned that we are not  
18 concerned about the people you've identified, because those  
19 are the people they need to speak to in order to present their  
20 statutory case under the rights that they're given under the  
21 Military Commissions Act. They have access to these clients  
22 only to defend them for the charges before the Military  
23 Commissions Act. They're paid by the U.S. Government to do

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1 just that. That's their job. We're not -- and that's a  
2 legitimate role that everyone would agree with they have to  
3 do.

4 They believe they also have to go to the United  
5 Nations and go to the media and just -- and are able to  
6 disclose third-party communications -- or direct  
7 communications from their client to other people without going  
8 through the JTF-GTMO process.

9 And what we're saying is, no, that's the concern the  
10 U.S. Government has. That's why we want this order to reflect  
11 that concern. We believe JTF-GTMO has a legit penological  
12 interest in a wartime footing to do that.

13 MJ [COL POHL]: Let's say we go through that process and  
14 JTF-GTMO says no, then they come to me?

15 MTC [MR. TRIVETT]: Yes, sir.

16 MJ [COL POHL]: Okay. So like Mr. Hawsawi wanted to file  
17 some type of power of attorney with another court?

18 MTC [MR. TRIVETT]: Yes, sir.

19 MJ [COL POHL]: Okay.

20 MTC [MR. TRIVETT]: I mean ----

21 MJ [COL POHL]: I mean, what am I looking at there?

22 MTC [MR. TRIVETT]: I think you would make a determination  
23 under the statute ----

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1 MJ [COL POHL]: Whether it's ----

2 MTC [MR. TRIVETT]: ---- and the rules as to whether or  
3 not he needs to be able to do this.

4 MJ [COL POHL]: Okay.

5 MTC [MR. TRIVETT]: That's assuming that that was denied.

6 MJ [COL POHL]: And, again, we have gone through this on  
7 other issues so I've got it. Let me make sure that I  
8 understand. Is that, as I've said many times, I do not run a  
9 detention facility. So if they want to send something through  
10 nonlegal mail, and JTF-GTMO says no, do I have any role in  
11 that, assuming that it is nonlegal mail as whatever definition  
12 we want to apply? For example, the power of attorney dealt  
13 with the European Court of Human Rights, if I got it correct.  
14 It was a -- is that the right one, Mr. Ruiz?

15 LDC [MR. RUIZ]: Judge, I'm not even sure I can articulate  
16 the geographic location of the court based on some of our  
17 guidance, but you may be correct.

18 MJ [COL POHL]: Okay. Okay. It was to someplace else.  
19 Okay. And if I said, well, that's not nothing to do with the  
20 commission so therefore I don't have -- I don't review that  
21 nonlegal mail.

22 MTC [MR. TRIVETT]: It's not a matter of whether you  
23 review it, right, because every one of these -- we've often

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1 asserted the Turner v. Safley deference to penological  
2 institutions motions in a lot of what we do. The female guard  
3 issue is one of those examples. The same example for  
4 Mr. Mohammad's letter to the President. Ultimately, there is  
5 a deference that's due to them if, in fact, it doesn't impact  
6 one of their rights before the commission. You've recognized  
7 that in all of your filings is that you do not -- or in all of  
8 your motions, that you do not run the detention facility, save  
9 for when something they're doing impacts one of the rights of  
10 the accused.

11 MJ [COL POHL]: Okay. So if it meets a nonlegal mail  
12 definition, then it goes to JTF-GTMO with no judicial review  
13 except with -- unless they say no, it really is legal mail,  
14 and then we may have a discussion. For example,  
15 Mr. Mohammad's letter to the President.

16 MTC [MR. TRIVETT]: Right.

17 MJ [COL POHL]: Okay.

18 MTC [MR. TRIVETT]: Yes, sir.

19 MJ [COL POHL]: I understand the arguments both ways on  
20 that one, okay.

21 MTC [MR. TRIVETT]: Yes, sir.

22 MJ [COL POHL]: Okay. I understand the government's  
23 position. Thank you, Mr. Trivett.

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1 MTC [MR. TRIVETT]: Yes, sir.

2 MJ [COL POHL]: Mr. Connell.

3 LDC [MR. CONNELL]: Your Honor, I was told that it was  
4 somewhat difficult to hear me. I apologize.

5 I have marked for identification AE 018DDDD AAA. I  
6 have provided a copy of the slides to the court security  
7 officer and to the government and to the other parties. I  
8 would ask for permission to continue to display them to  
9 the ----

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

11 LDC [MR. CONNELL]: Thank you.

12 At the beginning, I would like to note that the --  
13 there are three changes that we agree with the government on,  
14 to paragraph 3.e.(1), that only the first page of an OCRM and  
15 other case-related material book needs to be marked. There  
16 was a question of when did every single page of a commercially  
17 produced book need to be marked.

18 The second agreed change is that -- is 3.e.(3), and  
19 that is that for a long time the government has been marking a  
20 number of items for release to the detainees. This has proven  
21 very burdensome to the government. And actually, I agree, I  
22 think they should be relieved of that burden. If something is  
23 filed as unclassified by the parties, there's no reason why it

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1 can't go to the people who it concerns most.

2           And in paragraph 7(c), it is the privilege team  
3 already reviews electronic media under other paragraphs in  
4 AE 018U, but this change would simply formalize the electronic  
5 media review to clear up an ambiguity that the privilege team  
6 has raised.

7           Now, moving past that to the heart of the issue is  
8 the question of whether the current regime in AE 018U is going  
9 to continue. I think that the military commission has a very  
10 good grasp on it. I'm not going to go over this slide again  
11 unless we decide we want to come back to it. But I do want to  
12 point out one very fundamental legal mistake that the  
13 government seems to make. And they keep saying that  
14 distributing information to third parties waives the  
15 privilege, and I think they are missing the distinction  
16 between attorney-client privilege and work-product privilege.

17           That is reflected both in controlling D.C. law in the  
18 United States v. Deloitte as well as in the commissions rules  
19 for evidence themselves 502. 502(b)(2) describes confidential  
20 as, "A communication which is not intended to disclose to  
21 third parties other than those to whom the disclosure is in  
22 the furtherance of the rendition of professional legal  
23 services to the client."

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1           So certainly there are third parties to whom we can  
2 disclose information and they can remain confidential  
3 communications. Deloitte makes the same thing clear for work  
4 product privilege, that "providing that a disclosure made in  
5 the pursuit of trial preparation and not inconsistent with  
6 maintaining secrecy against opponents should be allowed  
7 without waiver of privilege." Those are different from  
8 attorney-client privilege itself. And providing  
9 attorney-client privileged information to any third party,  
10 except under very limited circumstances, does waive the  
11 privilege. But work product privilege is far more robust,  
12 which only makes sense when you consider what attorneys do.  
13 We don't just advocate within these four walls. We do a lot  
14 of things in preparation and in furtherance of the rendition  
15 of professional legal services.

16           So in our pleading on this topic, we laid a lot of  
17 our cards on the table and -- to describe to the military  
18 commissions the reason why we wanted to do this was to  
19 describe how important this process that the military  
20 commissions set up has been to us. And I went back and  
21 reviewed our information, and there are 53 items which have --  
22 rely in some part on client information which have been gone  
23 through this process. On Mr. al Baluchi's team, we have used

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1 the classification review process 161 times, 53 of those were  
2 based in some part in some way on client information.

3           This chart demonstrates that we actually guessed  
4 pretty well when it comes to information we, quote, wish to  
5 disclose. I do want to make the point that AE 018U and the  
6 convening authority's policy on classification review  
7 contemplate disclosure. The protective order itself says when  
8 defense wishes to disclose information it shall follow this  
9 process. The convening authority's implementation of AE 018U  
10 says -- and Protective Order No. 1 says that when the defense  
11 wishes to disclose information, that it shall follow this  
12 process. So clearly, Protective Order No. 1, AE 018U and the  
13 convening authority process all contemplate disclosure at the  
14 end of the process.

15           Of the 53 items based on client information in some  
16 way that we have submitted for classification review, 40 of  
17 those have come back unclassified, and one of them came back  
18 unclassified FOUO.

19           Mr. Trivett correctly said that under most  
20 circumstances, FOUO information cannot be further distributed.  
21 I think it's really important to pause for a moment and talk  
22 about the FOUO document that we submitted. We spent a  
23 substantial amount of time over the past eight months talking

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1 about the ACCMs, and at one point a reporter asked me what the  
2 name of the ACCM was that we were discussing. And I didn't  
3 know whether that was allowed to be said or not allowed to be  
4 said, whether it was classified or unclassified, so I wrote a  
5 letter to that reporter and said, Dear Reporter, the name of  
6 the ACCM at issue is blank, and then I submitted that for  
7 classification review because that's the only way that I  
8 really have to find out the answers to these questions.

9           It turned out that the answer to that question was  
10 unclassified, but the government for other reasons of its own  
11 did not want that information distributed to the media, so  
12 that letter was returned to me marked "Unclassified FOUO."  
13 And I did not distribute it to the media. So the idea that  
14 there's no handling review that takes place in -- from the OCA  
15 is not accurate. It is not simply a classification review, it  
16 is a classification review linked with other government  
17 interests such as things which should be marked for official  
18 use only.

19           Now, what did we do with all of this information?  
20 That's what the next slide shows. And I broke out in this  
21 slide what of the 53 items based on client information in some  
22 way that we submitted for classification review, what were  
23 those used for. And they essentially fall into five different

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1 categories.

2           The first of those categories is investigation, that  
3 we wanted to use information provided by the client in some  
4 way for investigation. An example of that is the introduction  
5 letter, but there are a lot of other examples as well. Those  
6 were eight of the 53.

7           Potential experts that we wanted to interview and  
8 provide information as to whether they would be willing to --  
9 or whether they would be appropriate to be expert consultants  
10 for the defense, 13 of those 53 fell into that category.  
11 For -- eight of those fell into the category of  
12 nongovernmental organizations, which is, of course, a broad  
13 category. It includes not just international bodies but a lot  
14 of other groups as well. Seventeen of those fell into media  
15 categories, and seven of those we wanted to provide -- we  
16 wound up providing them to the convening authority, which  
17 would, of course, waive attorney-client privilege, but it's  
18 still under an ex parte process not accounted for by the  
19 government's proposal.

20           Now, I want to talk about the media for a second,  
21 because it might -- the government describes distributions to  
22 the media as if this were simply holding press releases or  
23 sending out documents. What happens in a lot of cases, and

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1 what we particularly do, is that these are part of ongoing  
2 negotiations.

3           Now, I'm not going to give any reference to the  
4 government's third supplemental pleading, but let me describe  
5 in general terms that it's not unusual for us to go to a -- an  
6 organization, loosely described as media, who has the ability  
7 to travel in countries where we can't. There are countries  
8 that the United States has stopped us from going to. There  
9 are countries that those countries have refused to issue us  
10 visas, and it's not unusual for us to negotiate using  
11 unclassified, cleared client information, to negotiate with  
12 third parties to leverage their ability to do investigation in  
13 a way that directly impacts what is ultimately introduced into  
14 this court, but comes through -- information that comes to us  
15 through a media ----

16           MJ [COL POHL]: Does that waive the privilege?

17           LDC [MR. CONNELL]: Does it waive attorney-client  
18 privilege? Yes.

19           MJ [COL POHL]: Does it waive the work product privilege?

20           LDC [MR. CONNELL]: Yes, because unless I were to  
21 negotiate. You know, there are different ways that you can  
22 negotiate.

23           MJ [COL POHL]: I got it. I got it. My question was ----

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1 LDC [MR. CONNELL]: For general usage, it waives for work  
2 product privilege.

3 MJ [COL POHL]: Okay. So there's no -- there's no  
4 privilege on that, but that went through no JTF-GTMO review?

5 LDC [MR. CONNELL]: I completely disagree there's no  
6 privilege on that. The privilege is waived when its  
7 disclosure becomes inconsistent with secrecy from the  
8 opponent. Once that information is published but in the  
9 negotiation process of that, if you will do this for me, then  
10 I'll do that for you, then that's absolutely consistent with  
11 the maintenance of secrecy from one's opponent. One  
12 negotiates protections for that.

13 MJ [COL POHL]: Once it's published, there's no privilege  
14 anymore.

15 LDC [MR. CONNELL]: Absolutely.

16 MJ [COL POHL]: But by then, JTF has had no opportunity to  
17 look at the material ahead of time.

18 LDC [MR. CONNELL]: Absolutely. JTF would never look at  
19 information ahead of time. And I wanted to talk about this  
20 so-called JTF review. There is no JTF review. And let's skip  
21 ahead to that, if I can.

22 MJ [COL POHL]: Sure.

23 LDC [MR. CONNELL]: Can we go to the slide that says "ICRC

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1 Mail," please. There are only two aspects to the JTF nonlegal  
2 mail policy that the government refers to.

3 The first aspect of those is ICRC mail. The  
4 government describes it in its pleading as the Joint Task  
5 Force policy limits nonlegal mail to two letters and four post  
6 cards to a detainee's family per month on forms provided by  
7 the ICRC.

8 That is the first aspect of JTF nonlegal mail policy,  
9 is that each detainee is entitled to send six pieces of mail  
10 via ICRC to their identified family members each month, four  
11 post cards and two one-page letters. All right. That has --  
12 all of the things which we have submitted through the  
13 classification review process, all 53 items would fall outside  
14 that category.

15 The second aspect of JTF nonlegal mail policy is what  
16 is document exploitation, which the government describes as  
17 substantive review in its pleading. There is no equivalent of  
18 the Protective Order No. 1 process by which we can submit  
19 information to JTF to get their classification marking on it,  
20 except the one that the government -- that the military  
21 commission set up in Protective Order No. 1, which is -- back  
22 to slide number three, please.

23 That is the only way that we can receive information

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1 back through the process is to submit it to the Defense  
2 Security Officer, who submits it to the Washington  
3 Headquarters Agency, Office of Special Security, who submits  
4 it to as many OCAs as want a chop. That includes, to my  
5 understanding, at least two DoD entities. If one of those DoD  
6 entities considers the information not to be appropriate for  
7 further distribution, they can mark it FOUO, as they have in  
8 the past.

9           The idea that the DoD cannot protect the interests at  
10 stake here, DoD interests at stake, is simply not realistic.  
11 The -- and there is no equivalent in this process. There is  
12 no JTF option. There is not a -- there is not a process  
13 whereby I could say, "Dear JTF Commander, please review this  
14 process and get it back to me. I would like to use this  
15 document -- and get it back to me. I'd like to use it three  
16 weeks from now. Sincerely, J. Connell."

17           That process just simply doesn't exist. Where it  
18 does exist by military commission order in the classification  
19 review process. There is not a -- there is no third aspect to  
20 the JTF-GTMO nonlegal mail policy. There is not the idea  
21 of -- unless it is one of the two letters -- even the letter  
22 of introduction has to be one of the two ICRC letters to be --  
23 and the government in its second supplement makes this clear.

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1 It is not asking, in the way that the government did today,  
2 for you to set up an alternate process like another chart,  
3 another vertical place on this chart for the JTF to put its  
4 stamp "unclassified" or "classified" or "FOUO" or whatever.  
5 It is instead asking for the military commission to require  
6 that all information -- like I guess after I had -- was done  
7 with it, I would send it back to Mr. al Baluchi and he would  
8 put it through, ask to send it out, and no nonlegal mail  
9 leaves Camp VII.

10 In my original pleading on this, which is 018AA, I in  
11 fact put a ----

12 MJ [COL POHL]: When you say no nonlegal mail, and I know  
13 the terms are perhaps not all that precise, the only way  
14 nonlegal mail leaves is the ICRC six pieces ----

15 LDC [MR. CONNELL]: And only to family members.

16 So in 018AA, I included the example of ----

17 MJ [COL POHL]: So, but no, let me ask you this: Let's  
18 say you wanted something that was clearly nonlegal mail that  
19 you wanted to send to *The New York Times* or somebody, okay?  
20 And you recognized it's nonlegal mail. The fact that you know  
21 they won't let it go out, does that give you -- don't you  
22 still have to comply with the JTF-GTMO rules I mean? You seem  
23 to be saying that.

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1 LDC [MR. CONNELL]: It's not the JTF-GTMO rules, sir.

2 JTF-GTMO has no authority to tell me what to do. Let me tell  
3 you outside of JTF-GTMO. Let me give you a perfect example.

4 MJ [COL POHL]: No, but what I'm saying is this: Is that  
5 JTF-GTMO, except for the ICRC stuff, really doesn't permit  
6 nonlegal mail to go out.

7 LDC [MR. CONNELL]: Right.

8 MJ [COL POHL]: So if we put anything in the nonlegal mail  
9 bin, for want of a better term, it's going to sit in that bin  
10 or returned to sender.

11 LDC [MR. CONNELL]: If there were such a bin, it would be  
12 round.

13 MJ [COL POHL]: Round. Okay. So under the scenario we  
14 talked about earlier, where a piece of paper was intended to  
15 go to be published in the press, okay, waiving any privilege,  
16 let's say ab initio, that was your plan.

17 LDC [MR. CONNELL]: I'm with you. I'm with you. You're  
18 skipping over a lot of nuance, but I get the point.

19 MJ [COL POHL]: I'm not a very nuanced guy, but let me get  
20 the big picture. You say this will help the case because it  
21 will get an editorial out of *The Washington Post* saying bring  
22 these guys somewhere else, whatever. That's your intent going  
23 at the start.

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1           So there's an intent from the beginning to waive any  
2 privilege, work product privilege and things like that, but it  
3 helps your case.

4           LDC [MR. CONNELL]: Right.

5           MJ [COL POHL]: Okay.

6           LDC [MR. CONNELL]: It is military commissions related, in  
7 the commission's words.

8           MJ [COL POHL]: And so but you would not require any type  
9 of -- could you do that under your regime, or would it require  
10 JTF-GTMO review?

11          LDC [MR. CONNELL]: There is no JTF-GTMO review, Your  
12 Honor. Any ----

13          MJ [COL POHL]: No, but what I'm ----

14          LDC [MR. CONNELL]: ---- any JTF-GTMO review is  
15 represented by the interests of the Department of Defense in  
16 the classification review process that you set up.

17          MJ [COL POHL]: No, I'm saying is that your example  
18 earlier, you talked about negotiating with the media, and down  
19 the road maybe they publish the document.

20          LDC [MR. CONNELL]: Sure.

21          MJ [COL POHL]: At that point, the privilege has been  
22 waived.

23          LDC [MR. CONNELL]: Yes. Correct.

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1 MJ [COL POHL]: It's no longer work product confidential.

2 LDC [MR. CONNELL]: Correct.

3 MJ [COL POHL]: But any type of -- but do you still  
4 consider that legal mail?

5 LDC [MR. CONNELL]: It was legal mail during all the times  
6 that I was handling it. It was legal mail while the -- it  
7 went for classification review. It was legal mail while it  
8 went through the privilege process that the military  
9 commissions established, yes.

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: Yes, because it is military  
12 commissions related and it was at that time being handled in a  
13 way which is consistent with secrecy from one's opponent.

14 The like sort of disconnect here is the idea that  
15 we're not submitting it for review, which is not true.

16 MJ [COL POHL]: No. No. I got the review. We're talking  
17 about a different review here.

18 LDC [MR. CONNELL]: Right. But there is no different  
19 review is my point. There's no way to go to JTF and say would  
20 you please -- even if the example that the government just  
21 gave, it wasn't that -- when Mr. Mohammad's team tendered  
22 their letter, it wasn't that JTF said we reviewed this and  
23 find it inappropriate for release. They refused to accept it

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1 for review. This is the situation. There is no JTF review.  
2 There is no process to get JTF review.

3 If I -- any document that I have, I cannot have it  
4 reviewed by JTF. What I can do is send it to the OCAs, which  
5 includes at least two DoD entities, and if they're interested  
6 in SOUTHCOM's take on it, they get all of the time in the  
7 world. Sometimes they take years with these documents. And I  
8 have no doubt that they are being circulated among everyone  
9 with a potential equity in this information.

10 So the idea -- the government is not really saying,  
11 asking you, and certainly not in its proposal -- in fact, if  
12 you will go forward to slide six, please, we'll take a look at  
13 that proposal right now. The government is not saying you  
14 should set up a JTF privileged review pipeline for us to use.  
15 What they are instead saying is information goes to die with  
16 JTF. Because when I was done with whatever information  
17 this -- I would give it back to Mr. al Baluchi, who would give  
18 it to JTF, who would exploit it and do nothing else with it.

19 That -- it is true that the government can decide  
20 that it wants to limit detainees from sending any more than  
21 four post cards and two letters per month. It is not true  
22 that they can impose that structure on their attorneys in a  
23 capital case. Those two things are inconsistent. And the

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1 balance that was struck in this case was properly struck by  
2 the military commissions when it set up AE 018U, Protective  
3 Order No. 1, and Protective Order No. 2, all of which in all  
4 53 of these instances have we complied with.

5           So the -- there is a catch-all in the government's  
6 proposal, which provides that even if we don't think it's  
7 contraband, nonlegal mail is to be routed through the JTF-GTMO  
8 process for nonlegal mail.

9           That JTF process, as we just discussed, is only ICRC  
10 letters to identified family members. And I want to pause  
11 there and talk about the example which is contained in  
12 AE 018AA, which was after a trip where I had met a postal  
13 historian who studies the question of mail from detention  
14 centers, from refugee defense centers in World War II, from  
15 Nazi concentration camps, from a wide variety of places,  
16 the -- Mr. al Baluchi took one of his four post cards, his  
17 ICRC post cards, wrote the address on it and tried to send it  
18 to this postal historian. The postal historian didn't care  
19 what it said on the back. He just wanted the stamp. That's  
20 what he does, he collects the stamps that people put on  
21 detention information.

22           It was not accepted because no detainee legal mail --  
23 I mean, nonlegal mail goes anywhere. And that's a clear

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1 example of nonlegal mail. It didn't have any content to it.  
2 It wasn't related to his case. It was a person that I met  
3 that I thought was interesting, talking to Mr. al Baluchi  
4 about it, and he wanted to share something for his collection.  
5 Clearly nonlegal mail, and clearly on one of those four ICRC  
6 post cards, but something that could not go out.

7           So the ICRC mail is the limit. The government is not  
8 asking for a review process, they are asking for a limit,  
9 which is that none of this information that has generated so  
10 much material helpful to Mr. al Baluchi's case under their new  
11 procedure would be allowed.

12           So the -- one more, please.

13           So I just want to end up with what the process would  
14 look like under the government's procedure, which is that  
15 information would be negotiated between Mr. al Baluchi and I.  
16 I would have to send it back to Mr. al Baluchi, who would  
17 provide it to JTF-GTMO, and whoever they -- their partners  
18 are, who would dispose of it. Right? It would go no further.  
19 It would cripple the investigative efforts in this case. It  
20 would totally destroy the structure that the military  
21 commission established in AE 018U and Protective Order No. 1,  
22 and it would mean that there would be substantial limitations  
23 on the defense investigation and the prosecution of this

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1 criminal case.

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

3 I'm assuming other defense counsel want to be heard  
4 on this motion. Okay. We're going to go and take the lunch  
5 break. But before we do that, did we agree on the witnesses  
6 for 152? Timing I'm just talking about here.

7 MTC [MR. TRIVETT]: I believe Thursday is the day. We're  
8 still going to talk about order and Mr. Harrington is going to  
9 get back to me on that.

10 MJ [COL POHL]: We're talking about two, two on Thursday  
11 and one by VTC on Friday?

12 MTC [MR. TRIVETT]: Three total. Two local and one VTC on  
13 Friday.

14 LDC [MR. HARRINGTON]: Correct, Judge.

15 MJ [COL POHL]: Okay.

16 MTC [MR. TRIVETT]: For the court's planning purposes,  
17 sir, for logistical reasons, the JTF-GTMO doesn't care about  
18 the order, but would require one in the morning and one in the  
19 afternoon for movement and handling.

20 MJ [COL POHL]: I understand. I understand. That will  
21 work. Thank you.

22 Mr. Nevin.

23 LDC [MR. NEVIN]: We're recommencing at 1400?

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1 MJ [COL POHL]: At 1400 because of the Memorial Day  
2 schedule to give people an opportunity.

3 The commission is in recess until 1400.

4 [The R.M.C. 803 session recessed at 1201, 30 May 2016.]

5 [END OF PAGE]

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