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1 [The R.M.C. 803 session was called to order at 1404, 30 May
2 2016.]

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

6 During the recess, the court reporter indicated that,
7 Mr. Nevin, you wanted to bring something to my attention for
8 something that happened over the break?

9 LDC [MR. NEVIN]: Yes, Your Honor, and I had a
10 conversation with the guard force command -- or with the
11 person who was leading the guard force about this issue, and
12 I -- apparently, their SOP has an indication that several
13 things are required that have not been required in the past,
14 and they actually do make a difference to, particularly in a
15 situation like this where we're trying to balance lunch and
16 prayer and one thing and another.

17 So the first issue is this: The guard force is under
18 the impression that we were allowed to meet with our clients
19 for ten minutes after the court session ended, and that we
20 were then required -- all of the lawyers were required to
21 simultaneously vacate the courtroom. And that presents a
22 problem for a number of reasons.

23 MJ [COL POHL]: Got it.

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1 LDC [MR. NEVIN]: And second, it has always been the
2 practice -- these holding containers out here are air
3 conditioned, and they are air conditioned usually very
4 efficiently so that they're cold, in fact. And the process
5 has always been that the -- that Mr. Mohammad was allowed to
6 either turn down or asked to have turned down the air
7 conditioning so that it wasn't blasting quite so cold. And
8 apparently the guard force is under the impression that that's
9 not allowed, that it has to stay at that cold setting.

10 I ask that the military commission express the view
11 that these things can be done a different way.

12 MJ [COL POHL]: Okay. Just so I'm clear, and I understand
13 we have a new guard force here.

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

15 MJ [COL POHL]: And everybody's just trying to do the best
16 they can.

17 LDC [MR. NEVIN]: Right.

18 MJ [COL POHL]: So this is not to be interpreted as
19 criticism.

20 LDC [MR. NEVIN]: Right.

21 MJ [COL POHL]: But the past practice has permitted the
22 attorneys to stay with their client during lunch in this room.

23 LDC [MR. NEVIN]: Right.

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1 MJ [COL POHL]: And that practice will continue.

2 LDC [MR. NEVIN]: Okay.

3 MJ [COL POHL]: As far as the holding cells, again, that's
4 somewhat outside my jurisdiction. But on the other hand, it
5 seems to me that reasonable minds can adjust that. It's
6 not -- I fail to see any security reason, but, again, it's not
7 my lane as to how they run their confinement facility. But
8 certainly, I think between you and I, one could agree that
9 adjusting a thermostat that's adjustable is not an
10 unreasonable request.

11 LDC [MR. NEVIN]: All right. Thank you, Your Honor. I'll
12 talk to them, and ----

13 MJ [COL POHL]: Yeah. If I need to talk to the new guard
14 force commander, I can. And I understand that new people come
15 in ----

16 LDC [MR. NEVIN]: Sure.

17 MJ [COL POHL]: ---- and there's not criticism applied any
18 way, one way or the other, it's just that ----

19 LDC [MR. NEVIN]: And we had a friendly interaction.

20 They're just following rules that ----

21 MJ [COL POHL]: Yeah.

22 LDC [MR. NEVIN]: ---- looked to them in a particular way.

23 MJ [COL POHL]: Got it.

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1 LDC [MR. NEVIN]: Thank you, Your Honor.

2 ACC [MR. BIN'ATTASH]: The problem is in the morning they
3 agreed to reduce the temperature but in the afternoon they
4 refused to do so. It's almost like cold freezer. I mean it's
5 like torture.

6 MJ [COL POHL]: Mr. Bin'Attash, thank you. We've
7 addressed the issue. We'll see if it's going to be resolved.
8 When it's resolved, I'll resolve it with the attorneys.

9 ACC [MR. BIN'ATTASH]: It happened before.

10 MJ [COL POHL]: Okay, thank you, Mr. Bin'Attash. That's
11 enough. Who else wants to be -- okay, Mr. Connell, I believe
12 we finished with you on 18; is that correct? Did any other
13 defense counsel wish to be heard on 18?

14 LDC [MR. NEVIN]: Yes.

15 MJ [COL POHL]: Mr. Nevin.

16 LDC [MR. NEVIN]: Your Honor, just a couple of things to
17 add to Mr. Connell's argument, and I want to go back to the
18 issues that started 018Y in the first place, the family
19 letter, the correspondence with the Rory Green and the
20 so-called "invitation to happiness." We -- in our responses,
21 we were quick to point out to you that we had done everything
22 that it seemed that the government or JTF or anybody else who
23 was in view had wanted us to do. And we submitted a number of

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1 these things for review, and we told people this is intended
2 for public release. We sent the letters, for example. We
3 sent those through a review process at JTF-GTMO, so we were --
4 so part of our response to the original 018Y, which suggested
5 that we had intentionally broken these rules was to say, no,
6 no, we didn't. We didn't break the rules. We followed the
7 rules.

8 But I don't want that position to detract from where
9 we are now, which is that, in fact, we didn't need to get
10 those reviews either under the existing scheme of review, or
11 the one that we're arguing about asking you to impose or not
12 impose now, that that was not required. We just had to make
13 that argument because it happened to be true.

14 And I think what Mr. Connell said about the letter to
15 President Obama is really true, we -- and I believe I have
16 said this to you before, and I won't say it at length, but we
17 did go -- we made a lot of stops trying to hand that letter to
18 someone for review. And, quite literally, no one would take
19 it, and so we ended up coming to you.

20 And so I support the position that Mr. Connell has
21 taken, even though we did things in the past that might be
22 seen as being inconsistent with our view of the way the rules
23 should be.

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1 MJ [COL POHL]: I understand.

2 LDC [MR. NEVIN]: Okay. I think the second -- the second
3 thing for me to say is that I -- in trying to wrap my head
4 around this, I think I have -- I'm not sure that we've all
5 gotten to the same place, that the issue here is really what
6 the definition of "nonlegal mail" is.

7 So there's -- the proposition is that nonlegal mail
8 could be reviewed for content, and, right now, nonlegal mail
9 is apparently limited to however many pages and however many
10 post cards that is per month. And I think everybody would
11 agree that nonlegal mail can be reviewed for content. So
12 there's no quarrel there.

13 The problem is with the definition of "nonlegal
14 mail," and the language that the government proposed in its
15 amendment refers to -- I think, the specific language is
16 "thereby waiving privilege," and I think the point of what
17 Mr. Connell has been arguing all along and what we argued in
18 018SSS is that the actions that are described don't have the
19 effect of defeating privilege, and that's really literally
20 within the definition of lawyer-client privileged
21 communications that is in -- it's in 018U, which is important
22 for -- obviously for these purposes, but it's -- that is a
23 universally understood definition of privileged

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1 communications.

2 So you have both lawyer-client privilege and you also
3 have work product privilege, and one of them is waived by
4 sending it out to a third party who is not within the
5 privilege, that is to say the lawyer-client privilege, but the
6 work product doctrine is not waived in that way. And work
7 product material is frequently shared outside the so-called
8 defense team. And as long as you're doing it in a way that is
9 consistent with keeping it secret from your adversary, the
10 U.S. Supreme Court has been really clear that that does not
11 waive the protection of the work product doctrine.

12 And I think what you could say is that all of the --
13 everything that we've been talking about here boils down to --
14 boils down to this idea, and possibly some of the
15 misunderstanding arises from context. Because -- and this is
16 a point that we tried to make in 018SSS, which is that -- and
17 it's true what Procunier v. Martinez says, that the government
18 is not allowed to -- is not allowed to censor the ideas that
19 prisoners want to express, including in the mass media, just
20 because they disagree with them or because ----

21 MJ [COL POHL]: Is that a blanket rule or are there
22 exceptions?

23 LDC [MR. NEVIN]: To be sure, there are exceptions. I

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1 understand that. But I think that's a baseline. That's a
2 place to begin, and restrictions have to be -- have to make
3 sense and have to be justified, because here in our context,
4 we're talking about Eighth Amendment -- Eighth Amendment
5 rights that can be compromised as well.

6 We are dealing with a world within this capital case
7 where we literally have two separate -- potentially have two
8 separate trials, each with its own -- each being exclusive and
9 inclusive within itself of penalty phase -- sorry, of guilt
10 phase and also penalty phase, and both -- and in both there is
11 a presumption of innocence and in both there is a requirement
12 for proof beyond a reasonable doubt. In both there is an
13 obligation of counsel to provide constitutionally effective
14 assistance.

15 And I made this point in our pleading, that one of
16 the things that we are obligated to do is to develop
17 mitigation. And I think Mr. Connell was maybe referring,
18 generally speaking, to investigation of the case, which is
19 absolutely an important consideration. But that investigation
20 reaches to an additional idea in a capital case, which is
21 mitigation.

22 And I made the point -- we made the point in our
23 memorandum that one aspect of mitigation is execution impact.

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1 And I think that as of 2013 there were 78 cases that had been
2 documented in the federal court system where defendants had
3 gone to the jury and had presented the testimony of a family
4 member to say, if -- I do not want you to execute my -- my
5 brother or my son, or whomever it is. It will have -- this
6 person continues, even from prison, to have a role in my life,
7 a legitimate, important role in my life.

8 And juries have made decisions based on that
9 evidence, and sometimes very, very close to that evidence
10 alone, have made a decision to save -- to vote for life, for
11 life imprisonment, as opposed to death.

12 And this is evidence that a defendant is entitled to
13 develop, that we are obligated to develop and preserve and
14 present to the extent that we can do it.

15 MJ [COL POHL]: But he has limited access to his family
16 members.

17 LDC [MR. NEVIN]: That's correct. And in a way, you could
18 say that's one of the things here in our mind that we're
19 arguing about, is what ability do we have to go to -- to have
20 communications with the family in which we say, you know, this
21 person is in your family, and ----

22 MJ [COL POHL]: And ----

23 LDC [MR. NEVIN]: Sorry.

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1 MJ [COL POHL]: I'm sorry for interrupting. But in a
2 federal case, does the Bureau of Prisons give them
3 unfettered -- the attorney unfettered authority to send
4 letters from an accused to third parties?

5 LDC [MR. NEVIN]: Well, and I -- make sure you said
6 that -- I believe the answer to that is yes, because you said
7 attorneys to ----

8 MJ [COL POHL]: No, what I'm saying ----

9 LDC [MR. NEVIN]: ---- to facilitate communication.

10 MJ [COL POHL]: What I'm saying is -- what we're talking
11 about here is we're not talking about what attorneys do to
12 develop the case. What we're talking about is mail from the
13 detainee through the attorney to third parties.

14 LDC [MR. NEVIN]: Yes.

15 MJ [COL POHL]: And is it not true, at least in some
16 cases, that that has been both -- in fact, prohibited
17 altogether?

18 LDC [MR. NEVIN]: Yes. And I do not claim that there is
19 an absolute right, and I think when you say in some cases or
20 in some -- maybe you could say in some situations, too. I
21 think you have to analyze it on a case-by-case basis. What's
22 at issue, what's the nature of the communication ----

23 MJ [COL POHL]: Uh-huh.

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1 LDC [MR. NEVIN]: ---- and so on, who is the communication
2 to, what's the point of it.

3 And an interview with Al-Jazeera and a communication
4 to a family member, you could -- you need to take each one of
5 these things, each one of these situations on its merits, look
6 at what's at issue there, and think what interest is this
7 serving, what was their purpose in attempting to do this.

8 We have heard on a number of occasions a reference to
9 propaganda. But the -- you know, and I think Mr. Trivett was
10 speaking to this when he spoke of continuing to fight the war,
11 or how the Department of Defense wants to fight the war and so
12 on. And, you know, you may get into a situation here where
13 we're just saying, well, you can hold them under these
14 circumstances. You can say that you only get to write four
15 pages and two note cards a month, if that's what -- maybe
16 that's permitted, if you're just holding them. But now you're
17 having a capital, criminal prosecution in a federal court of
18 the United States, and all of a sudden -- now you have a whole
19 bunch of additional rules that get laid over the top of this
20 situation, and one of them is that we're obligated to conduct
21 mitigation and to develop it, and a communication from
22 Mr. Mohammad to his family is right in the heartland of a lot
23 of the mitigation that we are required to do.

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1 So -- and the other point in terms of responding to
2 your question, Your Honor, the other point I wanted to make is
3 that there's a difference between Mr. Mohammad writing a
4 letter to someone, such as the President, but it would be
5 better, for example, to take just a person on the street
6 writing a letter to a person on the street on the one hand and
7 on the other, giving a letter to counsel to deliver to a
8 person. There's a difference between those two things.

9 And I think you would find that there is -- there
10 is -- in the federal system, let's say, in the federal prison
11 system, there is permission for scrutinizing the former but
12 not the latter. And that's because you have lawyers, in this
13 case lawyers who have security clearances and who are -- who
14 have some degree of training on what the situation is, and who
15 understand their mission and the requirements for it. And
16 honestly, if you look at the things that have been under
17 discussion so far, the Rory Green correspondence and all of
18 the rest of it, you look pretty hard in there to try to find
19 something that's actually harmful, that could actually result
20 in someone being harmed, it's pretty pallid stuff.

21 And that's, in part, because people have the
22 opportunity -- people on the legal team had the opportunity to
23 look at it and screen it, and we take that obligation

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1 seriously and we follow it along.

2 But the rule, the definition of attorney-client
3 privileged communications is material, is statements or
4 information that's designed to facilitate the rendering of
5 professional legal services. And when it speaks of
6 confidentiality, it says material that is not shared outside
7 of -- with people for a purpose other than facilitating the
8 provision of professional legal services.

9 And I think it's important to note that that does not
10 say attorney-client privileged communications are limited to
11 communications which are themselves the provision of legal
12 services, or which constitute the provision of legal services.

13 So in other words, the attorney-client privilege is
14 not limited to just me saying to Mr. Mohammad, Rule 505 so and
15 so means such and such in my opinion as a professional. It
16 goes a lot farther than that. It's everything that permit me,
17 or any of the other lawyers on the team, to facilitate the
18 provision of legal services.

19 And so when you marry that up, when you marry that
20 idea up with just, for example, our obligation to provide --
21 to research and preserve and present mitigation evidence, what
22 you get is, I think, a very different picture of admissibility
23 and of transmissibility in what the government is pointing to.

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1 MJ [COL POHL]: So -- and, I mean -- and I think, just to
2 understand your position, because I think it's the same,
3 basically if it meets the legal mail definition or even the
4 other definition, case-related materials, that it's the
5 defense position that it's the defense counsel's personal
6 decision whether or not that can be conveyed to third parties
7 without any type of review other than a classification review?

8 LDC [MR. NEVIN]: Right. And classification review
9 clearly is a legal construct or a legal overlay on the whole
10 thing, and we understand that, and that's why these materials
11 get submitted for classification review. But the rest of it
12 is -- and, you know, obviously there's a crime/fraud
13 exception, also, and this is one of the things that, you know,
14 keeps us all up at night, being confident that we've gotten
15 this right; and we tend to stay pretty far away from it.

16 But I understand that the work product privilege and
17 the lawyer-client privilege doesn't entitle me to do anything
18 or to convey anything.

19 MJ [COL POHL]: Uh-huh.

20 LDC [MR. NEVIN]: And that was my point about when you
21 read the materials that have been all at issue here, read all
22 of the materials that have been at issue here and compare them
23 to AE 120 in the prior round of military commissions, what has

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1 been called the Islamic response, which I will say after the
2 pro se accused filed it during the last round of commissions,
3 it was on the website within a matter of a couple of days.
4 And it is far more inflammatory and accusatory than any of the
5 materials that have been under discussion so far.

6 MJ [COL POHL]: Well, that gets -- if we go down that
7 road, that becomes a content review issue.

8 LDC [MR. NEVIN]: Right. No, and I only mean to say
9 that I don't think that the military commission needs to have
10 a great deal of concern that counsel -- or I mean ----

11 MJ [COL POHL]: No, I understand what you're saying,
12 Mr. Nevin. I'm not impugning that or anything else, but, I
13 mean, there comes a point where content review becomes
14 problematical, that's all I'm saying.

15 LDC [MR. NEVIN]: Yes.

16 MJ [COL POHL]: Okay. Because what we have here are two
17 separate issues, potentially. One is, who gets the third --
18 who decides and who gets the mail from the detainees through
19 the counsel to third parties. And as I understand the defense
20 position is, you guys want to decide that, and don't get
21 wrapped around the privilege of work confidentiality issue and
22 we'll never go through a -- for want of a better term, a
23 JTF-GTMO review.

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1 But my question comes back is, in Moussaoui, didn't
2 the judge -- wasn't there a SAM in Moussaoui that prevented
3 any mail from going to third parties?

4 LDC [MR. NEVIN]: I think there have been SAMs like that,
5 I'm not sure there was one in Moussaoui or not. I could see.

6 MJ [COL POHL]: Okay. But if there was one in Moussaoui
7 like that, similarly situated death penalty case, and in that
8 case there appeared to be a SAM that says no -- that inmate's
9 attorney may not send, communicate or distribute or divulge
10 the inmate's mail or any portion of its contents to third
11 parties, period.

12 Now, I'm not necessarily going to follow that, but
13 I'm saying that's at one end of the spectrum and then you guys
14 are at the other end.

15 LDC [MR. NEVIN]: Yeah. And, I mean, I guess all I can
16 say is that -- about that is that that's not -- in other
17 words, he got a life sentence, and so ----

18 MJ [COL POHL]: But you look at it at the time it was
19 imposed, not what the result was down the road. That SAM was
20 imposed from the start of the process. He got a life
21 sentence, I know that.

22 LDC [MR. NEVIN]: I just mean ----

23 MJ [COL POHL]: But he is exactly -- at the time that SAM

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1 was instituted ----

2 LDC [MR. NEVIN]: Yeah.

3 MJ [COL POHL]: ---- he was in the exact same position
4 your clients are in.

5 LDC [MR. NEVIN]: All I'm saying is because he got a life
6 sentence, that SAM never got litigated on appeal, there was
7 never an authoritative -- what I call an authoritative review
8 from the U.S. Supreme Court saying that is consistent with the
9 provision of effective assistance of counsel in a capital
10 criminal case.

11 MJ [COL POHL]: Okay. I understand.

12 LDC [MR. NEVIN]: But it's there. Yeah.

13 MJ [COL POHL]: Okay. Okay.

14 LDC [MR. NEVIN]: Clearly.

15 On this exact line, just to -- as a way of
16 illustrating the -- maybe the way in which the parties'
17 positions are different, I thought I heard Mr. Trivett saying
18 there would be no problem with us making contact with a
19 witness, a fact witness, as long as that witness was not
20 associated with al Qaeda.

21 And I have pointed out to the military commission
22 before that al Qaeda is an unindicted coconspirator or members
23 of al Qaeda are unindicted conspirators, and whether we still

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1 have a conspiracy charge or not, I don't know, but the point
2 is there is a direct allegation that al Qaeda is involved in
3 this. When I sat for my security clearance review the last
4 time around, the first question out of the person's mouth was,
5 "Have you associated with anybody who is known to be a
6 terrorist or accused of being a terrorist?"

7 I said, "Ma'am, do I know what I do for a living?"

8 And this is a case in which these allegations are
9 front and center. We are absolutely obligated to be
10 interviewing al Qaeda members, and you just take -- even just
11 a vouching letter, I show up in my -- in my western garb and I
12 say, "Hi, I'm from the United States, and I'd like to chat
13 with you about al Qaeda." You know, these are the kinds of
14 things -- there is a different environment in this case than
15 there would be in an ordinary case, is really the only point I
16 wanted to make.

17 MJ [COL POHL]: Uh-huh.

18 LDC [MR. NEVIN]: And I think the last point that I'll
19 make, and then sit down, was one that I referred to in 018SSS,
20 and it had to do with the government's pleadings on the -- in
21 371 on the Obama letter. And they made the point that the
22 Obama letter was quote/unquote, intercepted during the
23 privilege review process and routed to JTF-GTMO. And I take

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1 it that when we talk about -- when Mr. Connell puts slides up
2 or when the military commission refers to that privilege
3 review process, that we sort of jump right over the question
4 of whether it's really privileged.

5 And I take it that there is substantial question
6 about whether it actually is privileged, whether these
7 materials are, indeed, walled off and not shared outside the
8 privilege, or are not shared with anyone who is not outside
9 the privilege, at least as that -- as the term "privilege" is
10 defined within the definition of the privilege review.

11 So I think before we settle on that or anything like
12 it as a remedy for part or all of this, we have to go back to
13 examining whether it really is privileged. So that's what --
14 that's my argument.

15 Thank you, Your Honor.

16 MJ [COL POHL]: Any other defense counsel wish to be
17 heard?

18 Mr. Ruiz.

19 LDC [MR. RUIZ]: Yeah, Judge, a couple of observations,
20 and I think which are -- hopefully add to the argument and are
21 not redundant in what I'm saying, but there are a couple of
22 things I'm concerned about as I'm listening to the arguments
23 and some of the questions. And I know you always say don't

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1 read anything into your questions, so I try not to do that.

2 I guess I'll start with, Mr. Trivett's argument
3 seemed to indicate that there is an interest that is not being
4 met. That interest is the government's interest in reviewing
5 information and assuring itself that that information is not
6 used for an inappropriate purpose.

7 And the reason that that caught my attention is
8 because, as I see it, there is a government interest in
9 determining whether that information is, in fact ----

10 MJ [COL POHL]: One moment, please.

11 [Pause.]

12 MJ [COL POHL]: Go ahead.

13 LDC [MR. RUIZ]: Sure. So I think what's at the heart of
14 the matter for me is the question of the interest. And
15 certainly, I think none of us would say there's no legitimate
16 interest looking at communication at some level, making sure
17 that there is no threat to national security. I think
18 Mr. Trivett used the words "coded messages," and then he
19 delved into the propaganda aspect of that.

20 But what strikes me as difficult to digest in that
21 analysis is how the classification review process is not a
22 more, for lack of a better term, robust process for ensuring
23 that those communications are, in fact, not ones that raise

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1 those concerns. And if you look at the genesis of this
2 litigation, and you look at what has spurred this litigation,
3 the communications to Mr. Green, Mr. Mohammad's invitation to
4 happiness, those communications were communications that were
5 not just unilaterally delivered by the attorney to a third
6 party. Those were communications that went through a review
7 process, classification review process.

8 Now, I've never been involved in the classification
9 review process.

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

11 LDC [MR. RUIZ]: Go ahead, Judge.

12 MJ [COL POHL]: No, no. Go ahead.

13 LDC [MR. RUIZ]: I've never been involved in the
14 classification review process as a participant other than now
15 in terms of submitting it to a process that's been set up.
16 However, at one point this court did issue an order that
17 provided us with the tools, in the way of an expert who was in
18 the position to understand what a classification review
19 process was and is. Our particular defense information
20 security officer has, in fact, at one point been and worked as
21 a classification authority reviewing documents and being
22 engaged in that part of the classification review process.

23 So as I sit here and listen, I think more and more,

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1 I'm concerned that there is not a real understanding of
2 exactly what the classification review process is at a deeper
3 level and perhaps a more important level, that we need to make
4 sure that those interests are being balanced accordingly.
5 Because I understand that that would be your concern. I
6 understand that's where your questions go with respect to what
7 was done in other systems and other prisons. That is, is the
8 measure in place good enough to make sure that we balance
9 those interests in communicating for the defense to do its
10 job, and for there also to prevent any breaches or damages to
11 national security.

12 What I am told about the classification review
13 process is that it's not just a matter of looking at a
14 document and saying, is there classified information. As part
15 of that process, that classification review officer, that
16 person who looks at that information, looks at that document,
17 knows the source. In this instance they know where it's
18 coming from and what the purpose is because, as has been
19 stated, it was meant to be for public release. So they're
20 looking at that document with that reference in mind, they
21 look at that for a threat assessment.

22 Obviously, the purpose of classified information is
23 to prevent state secrets, but also to prevent information

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1 that, if publicly disseminated, would create a threat to
2 national security. The classification or classified
3 information designation itself is meant to be a protection for
4 national security.

5 So to stand here and to say that having gone through
6 that process there is still something more that needs to be
7 done to protect a governmental interest is something that I
8 don't quite understand. I do not believe the government has
9 adequately articulated exactly what that difference is.

10 So when it goes through a classification review
11 process, they look for coded messages. They look for threats
12 to national security. They look to see if there's anything
13 within that document that could necessarily place in jeopardy
14 the security of the United States. If there is, then maybe it
15 gets a classification review -- excuse me -- a classification
16 designation.

17 I think Mr. Connell put forth an example where it
18 wasn't determined to be classified, but it was given an FOUO
19 determination, and that was certainly another step in that
20 tiered process.

21 I think what also can't be dismissed is the fact
22 that, Judge, we're not just talking about one original
23 classification authority. In this case, we're talking about

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1 multiple entities on a national level that have equities in
2 this case and equities in this information, who have the
3 opportunity to review this information at their leisure.
4 There is no timeline, because we are beholden to whatever
5 timeline they take to review this information. They review
6 the information and they come back and provide it to counsel.
7 And that's what happened -- that's what's happened in every
8 instance, at least that I'm aware of that we're discussing
9 that led to this litigation.

10 It wasn't a unilateral delivery of information by
11 counsel to a third party that wasn't put through that
12 classification review process that's in place to balance those
13 equities.

14 So it begs the question, Judge. The question that is
15 still unclear to me is exactly what is it that JTF can add to
16 that security review process, to that legitimate pursuit of
17 protecting national security that is not already being done on
18 a national level by multiple classification authorities. And,
19 Judge, if it is still unclear to you, if you need more
20 information in terms of what exactly is involved in the
21 classification review process, we can present evidence to that
22 fact. We can call a witness, somebody who can be qualified as
23 an expert in that, and who can tell you exactly how that

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1 information is looked at, how it protects national security,
2 how it assesses and how it addresses each of the concerns that
3 the prosecutor has raised.

4 I would suggest to you, and I've said to you this
5 before, this is not about national security. This comes down
6 to a content review issue. It comes down to the fact that
7 when this information was released publicly, the prosecutor,
8 or somebody at a different level, did not like the fact that
9 this information was available for public review. This does
10 then come into the area of propaganda and regulating what the
11 government calls propaganda.

12 Well, as I've said before, there is a stark
13 difference between a national security issue and an issue
14 where we just don't like what a person has to say. And as I
15 said it before, I'll say it again, it's decidedly un-American
16 to try to regulate that. And in this case, all of these
17 entities looked at this information, decided it wasn't
18 classified, it wasn't any security threats that were
19 identified, the information was publicly disseminated and then
20 the reaction came from the prosecution.

21 And what is really at the heart of this is not the
22 classification review or the threat to national security, it's
23 the fact that they simply do not like the fact that these

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1 communications were made public. They do not think that
2 Mr. Mohammad's communications that were put out for public
3 consumption are ones that our citizens ought to be entrusted
4 to look at and to make a reasoned determination based on their
5 own free will as to whether they accept or reject this
6 information. Because the government wants to make the
7 determination ahead of time that it is propaganda, and it's
8 not worth your public consumption.

9 That is what this litigation is about. It's not
10 about threat assessment, because that has been assessed at
11 multiple levels already. As I said, we stand ready to provide
12 more evidence and call a witness if necessary to articulate
13 for you exactly what goes into that.

14 MJ [COL POHL]: Are you saying -- let me just make sure I
15 understand your position -- is that -- and the government used
16 the term "propaganda," so I'm not going to use that term.

17 If the -- if the detainee wants to put out
18 information for any purpose that's related in some ways to the
19 charges in this case or what he did before, or how the case
20 has gone on, so it gets that little case-related material
21 there, you're basically saying that simply goes to a
22 classification review and then he or she has a -- or not
23 "she" -- he has an unfettered right of some kind to publish

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1 this under ----

2 LDC [MR. RUIZ]: The unfettered part is where I get
3 concerned when I hear you use that term, because there's
4 nothing that's been done.

5 MJ [COL POHL]: I'm just trying to figure out how it's
6 going to be fettered.

7 LDC [MR. RUIZ]: If you look at the facts that stand
8 before you, you have seen how it has been fettered. What you
9 have not seen is an avalanche of propaganda. We have been at
10 this litigation since 2011. We are talking about essentially
11 three instances, four -- I'm not sure -- of information that
12 was put through a classification review, that was vetted at
13 that level, and then was consumed by people who we had
14 legitimate reasons -- or counsel had legitimate reasons for
15 distributing to.

16 So I understand why we always go to the absolute and
17 to the extremist example, because we're taught to talk about
18 the slippery slope and to try to prevent that, but that's not
19 what we're dealing with, and I don't think it's unfettered
20 for a number of reasons. Number one, because of some of the
21 trust that has to be placed in ourselves as learned counsel,
22 and ourselves as citizens and professionals, and in ourselves
23 in terms of the obligations that we've undertaken to protect

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1 national security and that we've signed multiple security
2 documents and secret compartmentalized agreements, ACCM
3 programs.

4 So it's not unfettered to the extent that you've
5 already got professionals, who, yes, are advocates and are
6 supposed to zealously advocate, but you've also injected into
7 our agreement these obligations to protect national security,
8 and we take those seriously, as Mr. Nevin says. So, number
9 one, that's not unfettered; number two, you've created a
10 balance. If you've created an appropriate balance in this
11 case, that doesn't make it unfettered because there is a
12 process that we can submit that information through.

13 We always do go back to the capital litigation
14 context. And I think to the extent that we have shown our
15 advocacy in this case, we have shown it to be responsible and
16 we will continue to do that. But if the prosecution gets its
17 way here, I do agree wholeheartedly with my colleague's
18 overhead projection that it will become essentially a
19 repository for trash. That is what we will end up with. I
20 will expect there will be an exponentially higher amount of
21 litigation. And if so, that's fine. That's what we do.

22 They said we're hired by the U.S. Government and paid
23 by the U.S. Government to do it. The more work there is, the

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1 more work we will do. But the reality is, if we're going to
2 come back to the court every time we try to send a
3 communication and every time the JTF says no, that's simply
4 going to mean we're going to have more litigation in this case
5 and we're going to be litigating these issues over and over
6 and over and over.

7 What I would say to the court is that resist the idea
8 that somehow we've got unfettered right to do anything,
9 because we don't. We don't have that unfettered right. Your
10 communications order, your written privileged communications
11 order makes it not be unfettered and it strikes -- it strikes
12 the appropriate balance.

13 What the prosecution wants is to be more imbalanced,
14 and I would ask you to resist doing that, because there is no
15 reason to do that. And the best evidence of that is what you
16 have before you, which is those discrete incidents where the
17 government has been involved when attorneys have undertaken
18 their obligations seriously, where they've put it through a
19 review process and where that information has been vetted,
20 it's been looked at, it's been reviewed and it's been analyzed
21 by professionals who are not within the defense teams and
22 they've come back and made a determination that there was
23 nothing in there that was a threat to national security and

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1 that ought to be good enough for this court as it is good
2 enough for the security agencies that guard the United States
3 at the highest level.

4 Thank you.

5 MJ [COL POHL]: Thank you, Mr. Ruiz.

6 Ms. Bormann or Mr. Harrington, do you wish to be
7 heard?

8 Mr. Harrington.

9 LDC [MR. HARRINGTON]: Judge, I think all of the
10 discussions here should indicate to the court that the defense
11 is searching for a system that works, and I know you are, too,
12 and the prosecution is, too, but we're the ones that are faced
13 with this dilemma. And Mr. Connell gave the example of
14 something is submitted, and it gets packet vetoed, it just
15 gets disappeared someplace. And right now there's no process
16 for time limit, there's no process for a response for why it
17 was rejected. It may be that it was rejected for a legitimate
18 reason and perhaps it could be corrected or something could be
19 done to accomplish the same thing, but we don't know that and
20 never will. And there's no ability to go to the court or
21 anybody else to have it analyzed.

22 And I think what happens here, Judge, is that -- and
23 you alluded to it in your question before, is it's that with

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1 the definitions for case-related and nonlegal mail, the --
2 there's some gray in the middle of that and some judgment that
3 has to be used of how you assess that, and you force us to, if
4 we're trying to accomplish something that we believe in good
5 faith is something that needs to be done, and is not violating
6 national security, is helpful to our clients, helpful to our
7 case, to broaden the definition of "case related," and push
8 things into the case-related system rather than legal mail.
9 And I'm not sure that that's what -- what anyone really
10 intends.

11 And the issue that was raised about attorney-client
12 privilege and the work product, you get the question of when
13 you submit something basically to your adversary, and while
14 JTF may not be part of the prosecution team, they're certainly
15 part of the same government. And in this particular role that
16 they play, they would be looked upon as our adversary, and we
17 certainly have no intention of waiving any attorney-client
18 privilege or work product privilege by submitting something to
19 them.

20 But what happens when they just reject something? Do
21 they have the ability to just turn that over to the
22 prosecution now where there's been no waiver of the work
23 product privilege because it never got to the person that we

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1 intended it to go to, but then they can provide it to the
2 prosecution, and the prosecution can use it for whatever --
3 whatever reason they want?

4 And so the structure of things, the way it is now and
5 the way that it's proposed, I think is just fatally flawed.

6 MJ [COL POHL]: Hold that thought.

7 Mr. Connell, can you put up paragraph 2.h again,
8 please, on the overhead?

9 LDC [MR. CONNELL]: If we could have the feed from
10 Table 4, sir?

11 MJ [COL POHL]: Yeah. You can put it on the overhead.
12 Okay.

13 You mentioned this thing on the waiving the
14 privilege, and I'm going to ask the government the same
15 question, so understand it's coming to them also.

16 The way I read this, as drafted, the third line from
17 the bottom, "Thus partially or wholly waiving privilege," that
18 if that were true, any documents that met those requirements
19 would no longer be privileged to anybody.

20 LDC [MR. HARRINGTON]: That's the way the government views
21 it.

22 MJ [COL POHL]: I mean, is that how you would ----

23 LDC [MR. HARRINGTON]: Yes.

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1 MJ [COL POHL]: Can't selectively waive privilege, for
2 want of a better term, at least to these third parties?

3 LDC [MR. HARRINGTON]: Right.

4 MJ [COL POHL]: So ----

5 LDC [MR. HARRINGTON]: But the problem is this is a forced
6 waiver. You can't even get to the point of giving the
7 information to the person.

8 MJ [COL POHL]: Well, would it put you in the position
9 that, if this were the order going forward, that for you to do
10 this would put you in the position of either waiving it,
11 forced waiver, or not proceeding to a -- disseminate to a
12 third party.

13 LDC [MR. HARRINGTON]: I think the way that it's written,
14 those are the two options, Judge.

15 MJ [COL POHL]: Okay. Thank you, Mr. Harrington.
16 Anything more?

17 LDC [MR. HARRINGTON]: No, Judge.

18 MJ [COL POHL]: Mr. Schwartz.

19 DDC [MR. SCHWARTZ]: Thank you, Your Honor.

20 Just on that last point, the idea that JTF-Guantanamo
21 and the prosecution team are just two independent entities of
22 the same big government is not something that I would adopt.
23 I think they're very much related in the sense that you might

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1 not call JTF a part of the prosecution team, but this isn't
2 just turning it over and waiving privilege to somebody within
3 the government. This is turning over information to an entity
4 that is supported or supports the team of prosecutors sitting
5 here today, to the point that recently there was a newspaper
6 article quoting an incoming member of the SJA's office who
7 concluded that he was going to be supporting the prosecution
8 of the 9/11 case.

9 I'll adopt arguments of co-counsel, but I do want to
10 make just a few distinctions.

11 It seems clear that we need to put evidence in the
12 record with respect to the classification review process, and
13 then also this JTF review process that doesn't exist. Because
14 Mr. Nevin's comment about the classification review process
15 possibly not being privileged is -- honestly, I guess I don't
16 know anymore.

17 MJ [COL POHL]: Well, the state of the record is that
18 JTF -- and I'm certainly willing to listen to a contrary
19 thing, but the JTF permits six pieces of nonlegal mail a
20 month, none of which -- I'll rephrase that -- except for the
21 letters, arguably, and those limitations. So anything that
22 we're talking about here that would go to any other third
23 party that's not on that list, they wouldn't approve. There's

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1 no review process -- as I understand it, as explained to me
2 here, they look at the address. If the address isn't a family
3 member, we're now done. So there's no review process.

4 DDC [MR. SCHWARTZ]: Right. Maybe I misunderstood. I
5 think his comment was about the classification review process.

6 MJ [COL POHL]: Well, the classification review process is
7 different, but to slide this into the nonlegal mail process,
8 is as soon as they look at the address or it's not a post card
9 or an -- it's not a letter to the family, as far as I
10 understand, and I'm certainly willing to ask the government,
11 it doesn't go.

12 So there is no nonlegal mail option except for those
13 narrow ICRC options.

14 DDC [MR. SCHWARTZ]: Right.

15 MJ [COL POHL]: I don't know if we need witnesses on it.
16 Nobody's contradicted that. I think that's the state of that.
17 So when we talk about JTF review, I'm -- again, I think the
18 review would be read the address and now we're done.

19 DDC [MR. SCHWARTZ]: That's right. Sure.

20 MJ [COL POHL]: Go ahead.

21 DDC [MR. SCHWARTZ]: Mr. Ruiz made the comment that this
22 isn't a large number of transactions that we're talking about,
23 that over three or four years this has only, I think he said

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1 for his team, been an issue three or four times. I don't know
2 that it's been an issue for Mr. Bin'Attash more than that,
3 significantly more than that, but that doesn't -- it shouldn't
4 minimize the impact that -- minimize the impact that having to
5 forego this process of reaching out to NGOs or third parties
6 without waiving privilege would have on the defense team. It
7 probably is the biggest source of mitigation information.

8 MJ [COL POHL]: But you still have an option to reach out
9 to them, you just can't send letters straight from the
10 detainees to them if you follow the government's thing.

11 DDC [MR. SCHWARTZ]: Right, it would be getting into a
12 nuanced discussion of that without going into privileged
13 information.

14 MJ [COL POHL]: Okay.

15 DDC [MR. SCHWARTZ]: But often reaching out to these third
16 parties would involve or would require certain communications
17 from a detainee.

18 On that point also, there was maybe the conclusion
19 from one of Mr. Connell's slides was that often these
20 third-party communications are meant for ultimate publication,
21 and I just want to stress that in the case of Mr. Bin'Attash,
22 that's the exception. More often than not, these endeavors,
23 these efforts to reach out to third parties would be for the

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1 purpose of gathering litigation information, having nothing to
2 do with public ----

3 MJ [COL POHL]: But if you have a communication that is
4 designed to go to a third party for publication, you said it's
5 your exception, not the rule, then how can you still claim
6 privilege on them?

7 DDC [MR. SCHWARTZ]: I think we're still getting caught up
8 on that. I think that's what Mr. Connell's Deloitte case, and
9 there are a handful of other cases that we cite in 018VVV,
10 talk about this intermediary privilege. And so ----

11 MJ [COL POHL]: I'm not talking about that gray area that
12 he was talking about. I'm talking about, if you have a piece
13 of paper from the detainee that you intended to distribute to
14 third parties, media third parties for dissemination by them,
15 that's clearly not -- you're waiving any privilege on that,
16 aren't you?

17 DDC [MR. SCHWARTZ]: Media, yes. NGOs. I'm saying
18 exclude the media for this. This is the arrow that goes up
19 from the NGOs to the third parties.

20 MJ [COL POHL]: I'm going to have to have a lot of
21 subparagraphs in this order to go to all of the possible
22 recipients.

23 DDC [MR. SCHWARTZ]: It's important because I think this

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1 is the first question that you asked on this topic months ago,
2 years ago, is it possible to disseminate privileged work
3 product to a third party not within the privilege otherwise
4 and to continue to claim privilege over that information. And
5 clearly the answer to that is yes.

6 MJ [COL POHL]: Yes sometimes and no sometimes, right?

7 DDC [MR. SCHWARTZ]: Well, if it's ----

8 MJ [COL POHL]: Maybe giving it to -- giving it to a --
9 somebody to publish in a newspaper.

10 DDC [MR. SCHWARTZ]: Yes, right.

11 MJ [COL POHL]: That would be the no.

12 DDC [MR. SCHWARTZ]: That would be the down arrow.

13 MJ [COL POHL]: That would be the down arrow, but all of
14 the other ones, assuming you have some type of ----

15 DDC [MR. SCHWARTZ]: Reason to protect it.

16 MJ [COL POHL]: But, of course, there is a whole 'nother
17 morass now. An NGO, what are they going to do with it?

18 DDC [MR. SCHWARTZ]: And I think we could probably all
19 stand here for the next six hours and tell you in a privileged
20 setting.

21 MJ [COL POHL]: No, you don't want to hear -- all I'm
22 simply saying is you handle -- you hand information to an NGO
23 and now they say, now they've got control over it and I have

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1 no authority. Well, I have limited authority over you guys
2 and I have no authority over them and that's -- I'm just
3 spinning this out because there's just not an easy way, when
4 we start parsing it down, well, it goes to the NGO and they
5 promise not to do -- to keep it confidential, and that
6 presents your work product, I'm not necessarily rejecting that
7 argument, therefore it's still privileged, okay. And then
8 what about the NGO that's going to publish it? Well, that's
9 not privileged, so that's something else. That goes -- say
10 they want to do a report on it. Do you see ----

11 DDC [MR. SCHWARTZ]: That's on us. I think as the defense
12 team who makes the decision, who negotiates, I think was
13 Mr. Connell's word, this arrangement, it's on us to make sure
14 that the privileged information remains privileged. The
15 commission has no concern precisely because we've gone through
16 the classification review process. So there's no concern if
17 the NGO -- and I don't like the NGO analogy because more often
18 we're talking about sources or witnesses. But if this third
19 party were to take the information and decide to publish it
20 unilaterally without consent, that's our fault. But there's
21 no concern of any kind of breach of classified information or
22 a spill.

23 MJ [COL POHL]: Now, I know Mr. Trivett, when he was up

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1 here, he seemed to have no problem with -- and I'm going to
2 give him an opportunity to explain it, giving information or
3 letters from the detainees to potential witnesses, as long as
4 they weren't members of al Qaeda, and I'll -- I take
5 Mr. Nevin's point on that. I'm not -- if you know whether
6 they're members of al Qaeda or not, and of course, there's the
7 other practical issue of perhaps there may be some that are
8 involved, but I'm not going to get into that. But I'm saying
9 that you believe letters, not just introductory letters,
10 substantive letters, can be -- after a classification review,
11 that's okay to give those to potential witnesses?

12 DDC [MR. SCHWARTZ]: I do. Yes.

13 MJ [COL POHL]: Okay.

14 DDC [MR. SCHWARTZ]: There was one other comment, this is
15 somewhat off-topic. I don't think you're relying on this
16 fact. But it was suggested that the communications we have
17 with the convening authority on ex parte resourcing issues are
18 not privileged, and I disagree with that position completely.
19 I think that's a privileged communication. I just wanted to
20 make that clear. Okay.

21 Thank you.

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

23 Mr. Trivett, anything further?

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1 MTC [MR. TRIVETT]: Subject to your questions, sir.

2 MJ [COL POHL]: Well, good. I have a question for you.

3 In order to implement your amended order, and I'm focusing

4 again on paragraph 2.h, do I have to conclude that any mail

5 that goes to a third party, any of the third parties on

6 Mr. Connell's diagram, is -- amounts to a waiver of the

7 privilege and, therefore, would require a JTF review?

8 MTC [MR. TRIVETT]: Yes. I think it comes down to

9 defining who's appropriate -- who's an appropriate third party

10 for provision of legal services and who is not.

11 And I think when you look at the argument that

12 Mr. Connell advanced and Mr. Nevin and I think Mr. Schwartz

13 just did as well, and I cite to the Deloitte case, that's

14 limitless. If we are relying on the imagination of creative,

15 talented, learned counsel as to what may constitute provision

16 of legal services, it never ends, and it's not something that

17 can ever be regulated in any way, and that can't be the case.

18 Your Honor pointed to the Moussaoui SAMs that

19 indicated clearly that they couldn't share any communications

20 with any third party, and we also cited to the Ghailani case

21 in 018XX. It was one of our attachments, it's an under-seal

22 motion. But it's clear that even in federal court when SAMs

23 are applied to alleged terrorists that there are limitations

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1 on what they can and can't share with third people, or third
2 parties for the same reasons. It's really a national security
3 issue, but ----

4 MJ [COL POHL]: How ----

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

6 MJ [COL POHL]: How is it a national security issue if it
7 goes -- because I'm looking at your motion and I'm trying to
8 figure out.

9 MTC [MR. TRIVETT]: Uh-huh.

10 MJ [COL POHL]: And maybe you can help me here. We got
11 the classification review, which should address, I suspect,
12 most of the national security issues.

13 MTC [MR. TRIVETT]: I wouldn't concede that, but I take
14 your point.

15 MJ [COL POHL]: Okay. Okay. So there's going to be
16 national security issues that don't have classified
17 information that would require a judgment call by somebody
18 from -- you want to do JTF-GTMO, but we'll go back to that in
19 a second -- to decide whether or not this represents some
20 additional risk to the United States.

21 MTC [MR. TRIVETT]: Correct. And my example of an
22 individual in al Qaeda was just that, it was an example of
23 things they may want to look at. That doesn't mean they would

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1 necessarily approve it.

2 MJ [COL POHL]: But I thought -- let me go back to
3 something in a minute, and I apologize for interrupting, but I
4 think we got to drill this down.

5 MTC [MR. TRIVETT]: Sure.

6 MJ [COL POHL]: The government seems to be proposing an
7 alternate system for screening and release of nonlegal mail
8 through the JTF system.

9 And if we can get -- I don't want to get wrapped
10 around the axle of what's legal mail and nonlegal mail.

11 MTC [MR. TRIVETT]: Okay.

12 MJ [COL POHL]: But what I'm being told is that if it's
13 nonlegal mail and it doesn't meet one of the ICRC six pieces
14 per month, it doesn't go out. So there is -- so what's the
15 review that's being done?

16 MTC [MR. TRIVETT]: I think that that is generally the
17 default views as to what the HVDs get collectively. I think
18 that's accurate. But if you look at 018U, you also indicated
19 that they were right to do an expedited review of things such
20 as letters of introduction. And then Mr. Nevin also pointed
21 out that he had put ----

22 MJ [COL POHL]: Slow down, please.

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

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1 ---- that he had put something through a JTF review
2 that had been approved. He's -- and that was specifically one
3 of the letters where he claimed that he sent it to one of the
4 SJAs and the SJA came back and said they were good to go. I
5 think there might be a differing opinion between JTF as a
6 whole and this one SJA between what was approved and what
7 wasn't, which is what caused us to put it in the filing.

8 But be that as it may, there is a process. Now,
9 ultimately, will they deny things that they believe would
10 impact information going out? Yeah, I think they would. But
11 is that a 100 percent thing? No. In light of 018U, where you
12 said specifically letters of introduction as a nonlegal mail
13 example, is something that they have to review.

14 So I think they're under an order now that they have
15 to review it anyway. So to say that there's ----

16 MJ [COL POHL]: That's a narrow category.

17 MTC [MR. TRIVETT]: It is a narrow category, but nonlegal
18 mail that needs to be displayed to third parties should be a
19 very narrow category, in our view. Because remember, this
20 doesn't impact anything that is legal mail. So, I know you
21 don't want to get into the nuances of legal mail and nonlegal
22 mail. But we're only asking for this for
23 nonlegal-mail-specific items.

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1 MJ [COL POHL]: But you define in your proposed order is
2 that it's now legal mail that's losing its protection if it
3 wants to go to third parties. It's the same mail. It's the
4 same piece of paper.

5 MTC [MR. TRIVETT]: And perhaps we're getting ----

6 MJ [COL POHL]: And if it goes to a third party, you say
7 the privilege is waived, which tells me it's legal mail with a
8 waived privilege, not nonlegal mail.

9 MTC [MR. TRIVETT]: I think we're a little bit, we're
10 working with the definitions that we have currently in 018U.
11 Maybe they're imprecise. Maybe that's part of the problem.
12 Because even under our proposed order and what Mr. Connell
13 showed in his diagram is that he's getting a classification
14 review done of something. If it comes back classified, he
15 knows that he's limited to only sharing that with cleared
16 defense counsel, and he -- and anyone who's cleared on his
17 defense team.

18 If it comes back unclassified FOUO, he knows he's
19 limited in some way to only for official use. But if it comes
20 back completely unclassified, he believes at that point he's
21 free to share it with everyone in the world that he wants to
22 under his own view of what is provision of legal services.

23 And that's the issue, it's this -- at some point, he

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1 doesn't have to share it with the media. He doesn't have to
2 share it with the NGO. He doesn't have to share it with
3 another court. But when he makes a decision that he is going
4 to publicly share this, share this information, at that point
5 he is making an -- he is making a decision that the privilege,
6 whatever privilege may have attached to it, is going to be
7 gone the second he hands it to these three people.

8 Our position is that it is. That might not be his
9 position that it's legally gone. But to the extent that
10 they're sharing that publicly and are making a decision to do
11 it publicly, the U.S. Government has a need and a legitimate
12 interest in making sure it has reviewed that to the extent
13 it's nonlegal mail, or -- well see, that's where we're in the
14 definitions again. So I'm going to prevent -- I'm going to
15 stop saying "nonlegal mail."

16 But to the extent that they are going to present
17 something to someone inconsistent with keeping an absolute
18 privilege over it, then there is no argument for why the
19 government shouldn't get to see that before that happens.
20 Because Mr. Schwartz made a perfect example of what the
21 government's concern is. He says, "We get into negotiations
22 with a nongovernmental organization as to what they're going
23 to protect and what they're not going to protect. But if they

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1 don't follow the rules, that's on us," and he claimed that's
2 on him. And what he didn't realize is that it might be on him
3 that his privilege was waived, but it's on the government to
4 have to deal with whatever impact that may be.

5 And we have presented a lot of evidence, including,
6 you know, evidence of the al Bahlul transcript in 018Y when we
7 supplemented. Propaganda is a huge issue for the U.S.
8 Government because of its ability to recruit additional
9 fighters in their war against America. And that's the main
10 concern that we have. Once that bell is rung, it's too late
11 for us. We're not telling them to ring the bell. They're
12 deciding to ring the bell for their purposes and present it to
13 someone in the public. We need to -- the U.S. Government
14 needs to have a role in reviewing anything that's going out
15 publicly like that when it's clear that they're not asserting
16 a waiver -- a privilege anymore over it.

17 So that's why we're getting a little bit hung up on
18 this nonlegal mail/legal mail definition, but ultimately is,
19 is it going to maintain privilege? And if they're voluntarily
20 waiving a privilege, we shouldn't have to find that out on the
21 back end. We should be able to get a chop on it at the
22 beginning and say, you know what, this guy is an enemy
23 combatant of the United States and this statement, even if

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1 it's not classified under a classification guidance, can still
2 hurt the war effort because it's going to -- it's going to
3 cause the recruitment of additional people that are going to
4 fight in al Qaeda or one of its associated splinter groups.

5 MJ [COL POHL]: Now, will there be any -- it sounds like
6 an awful subjective standard.

7 MTC [MR. TRIVETT]: In what way, sir?

8 MJ [COL POHL]: Well, what I'm saying is that somebody
9 could read -- it's all unclassified, and somebody says, well,
10 this could be a recruiting device and, therefore, we don't
11 want it going out. Somebody else could read the same thing
12 and say, oh, this is innocuous, this could go out. Sounds
13 like -- at least for the classification rules, there's
14 guidance and declarations and things like this. This is
15 simply an individual's personal opinion. And if you go down
16 this road, that ----

17 MTC [MR. TRIVETT]: Sure.

18 MJ [COL POHL]: ---- that there should be some review to
19 third-party release.

20 MTC [MR. TRIVETT]: Sure.

21 MJ [COL POHL]: Why couldn't you just embed that into the
22 current classification process?

23 MTC [MR. TRIVETT]: Well, I mean, I think it could be

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1 embedded in.

2 MJ [COL POHL]: Then you've solved the problem.

3 MTC [MR. TRIVETT]: Correct, but I don't know under the
4 current reading of what your privileged classification review
5 process is, that it would allow for that.

6 MJ [COL POHL]: Well, what I'm trying to figure out is
7 this additional review that you're talking about, you use the
8 term "propaganda" frequently, do you have some written
9 guidance of what that review would look like?

10 MTC [MR. TRIVETT]: I don't, but I can give you some other
11 examples of some things that it may be.

12 MJ [COL POHL]: No, but my point is this, is that they go
13 through this process, and what they're going to do with the --
14 we're getting wrapped around the axle of where the mail's
15 going to be delivered. Okay? They go to this person, that's
16 okay. If it goes to the convening authority, that appears to
17 be okay. If it goes to a potential witness, that appears to
18 be okay, although that's you saying that.

19 If it goes to the media, that's clearly not okay, and
20 the NGOs and other people may be in some other categories. So
21 all wrapped around that part of it, okay.

22 But I'm saying when they go through the
23 classification review, rather than saying, well, tell me who

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1 you're going to give it to, we'll do one type of review as
2 opposed to another type of review. Just embed whatever
3 JTF-GTMO's concerns are in that review. Then you don't --
4 then when you give it back to the defense counsel, they could
5 do with it as they see fit, given what it's marked as.

6 MTC [MR. TRIVETT]: But understanding that ----

7 MJ [COL POHL]: And you don't worry about where it goes
8 and you don't worry about coming back here to a system that
9 appears to be very difficult to go through and, quite frankly,
10 I don't control anyway. Talking about the nonlegal mail
11 system.

12 MTC [MR. TRIVETT]: I understand, and I anticipated this
13 question.

14 MJ [COL POHL]: Good.

15 MTC [MR. TRIVETT]: But that being said, I don't know that
16 it's the government's position right now that, as currently
17 written, it's allowed to do that.

18 Because it goes through a classification review.
19 That's what it does. But the government's interests aren't
20 limited simply by what's classified.

21 MJ [COL POHL]: Again, Mr. Trivett, you and I sometimes
22 have difficulty here because you keep saying that. I just
23 don't know what you're talking about.

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1 All you do is tell me is here's examples of where a
2 JTF review would be different than a classification review. I
3 got it. But don't we have to have some -- if we're talking
4 about restricting mail and the government says under some
5 circumstances it's okay to go to third parties and in some
6 circumstances it's not, don't we need to take those
7 circumstances with some type of guidance, both to the
8 reviewing authorities and the defense counsel, of what they're
9 going to look at?

10 MTC [MR. TRIVETT]: I think it can be done by identifying
11 the categories in which the privilege stays attached for
12 defense counsel. And that would be the ones like, you know,
13 the part of the investigation, the witnesses, potential
14 experts.

15 MJ [COL POHL]: Now you're going back to you're defining
16 it by the recipient.

17 MTC [MR. TRIVETT]: Exactly. I think that that's the only
18 way to do it for purposes of JTF's review.

19 So to the extent that there's a -- to the extent that
20 there's a classification review done through the regular
21 privilege review process, to the extent that that happens and
22 it's unclassified and they want to provide it to someone that,
23 under the statute, you believe they have a right to provide

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1 them to, that need not go through JTF because that's legal in
2 its -- that's required under the law governing this case. But
3 if it's going to another entity that's not a right that they
4 have under the statute, such as an NGO, such as the media,
5 and, you know, potentially a foreign court, then that's where
6 JTF-GTMO should weigh in, because they're either partially or
7 wholly waiving privilege anyway, and there's a separate equity
8 in ensuring that the communications from these particular men
9 are looked at before we grant public dissemination of their
10 words.

11 So I think it needs to be tied, quite frankly, to the
12 recipient, and Your Honor needs to determine what he feels is
13 the correct way -- what right they might have under the
14 statute and who that would -- it would require people to
15 receive information from. So JTF-GTMO is not looking to get
16 into every single thing they ever send to someone if it's
17 consistent with the statute and it's particular to their job
18 under the statute to represent these men with these charges.

19 And that's where they're not getting the opportunity
20 when people are going directly to the media. Just because
21 it's unclassified, there's still a legitimate government
22 interest to not allow the dissemination of that information.

23 MJ [COL POHL]: So if you took a letter and went through

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1 the JTF -- or, excuse me, the classification process, and at
2 the time it goes through there, nothing's classified in it,
3 and then Mr. Connell or Mr. Nevin or whomever decided, I want
4 to send this to somebody, some third party, then we're going
5 to have a matrix of third parties.

6 MTC [MR. TRIVETT]: Uh-huh.

7 MJ [COL POHL]: And if it goes to -- now, you say if it
8 goes to a witness, that's fine.

9 MTC [MR. TRIVETT]: If it's unclassified and it goes to a
10 witness, that's consistent with their statutory obligation
11 under the act, providing it's unclassified, not FOUO.

12 MJ [COL POHL]: And so they hand a letter to a witness
13 from one of the detainees, and you don't care what the witness
14 does with the letter at that point.

15 MTC [MR. TRIVETT]: It's already gone through a
16 classification review.

17 MJ [COL POHL]: Yeah. Okay. But you're not -- no, you're
18 not -- no, what I'm saying is -- and this is where this is
19 getting -- there's just so many permutations of this thing.
20 You say it's okay to give it to the witness, then give it to
21 the witness and goodbye, Mr. Nevin, thanks for visiting. And
22 he walks down the street and goes to wherever, wherever and
23 Oh, by the way, I got this letter from one of -- Mr. Mohammad,

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1 here, local press guy, why don't you put it in your newspaper?
2 What's to prevent that?

3 MTC [MR. TRIVETT]: Nothing. Nothing prevents that, but
4 it would -- it would ----

5 MJ [COL POHL]: That's your same risk.

6 MTC [MR. TRIVETT]: It is. It would depend on the context
7 of what it was. The recognition of the letters of
8 introduction saying, "This is my counsel, he's trying to help
9 me, please cooperate with him."

10 MJ [COL POHL]: And we don't care if the press gets those.
11 I've got that.

12 MTC [MR. TRIVETT]: Yeah.

13 MJ [COL POHL]: Now what I'm saying is, when you say it's
14 okay to give these things because we want to protect, we want
15 these limitations to protect disseminating to create
16 propaganda value. In the same breath you're saying it's okay
17 to give it to these witnesses who may or may not be al Qaeda
18 sympathizers, who knows. And then once they get it, you've
19 now lost total control of it and you have your same propaganda
20 risk that way, it's just you didn't hand it straight to the
21 newspaper. They handed it to a guy.

22 MTC [MR. TRIVETT]: It also depends on ----

23 MJ [COL POHL]: You're willing to accept that risk?

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1 MTC [MR. TRIVETT]: Yes. It depends on what's written,
2 right? Clearly, the invitation to happiness, which is
3 attached so we can talk about that, that's not a letter to a
4 witness. That's simply an invitation to -- an invitation to
5 the public to convert to Islam.

6 MJ [COL POHL]: Okay. So let's take that example.

7 MTC [MR. TRIVETT]: Yep.

8 MJ [COL POHL]: Let's take that invite. Instead of how
9 it's previously worded, it's now Dear Citizens of This City,
10 or Dear -- rephrase that. Dear Mr. So and So, I'd like you to
11 convert to Islam and here's why you should. And then it stays
12 the same all the way through or whatever is in there. I
13 mean -- it doesn't -- I mean, now you're saying he can't give
14 it to -- he can't release it to the press, but now he can give
15 it to Mr. So and So who can release it to the press.

16 You mean, I'm just trying to ----

17 MTC [MR. TRIVETT]: Yeah, I understand. We're skipping a
18 piece of this, right? Because what happens is -- what
19 happens, is through this current classification review, if --
20 if it's reviewed and it's found to be unclassified, there's
21 still the ability, and at times this has happened based on the
22 defense filings, that they will go back and say, we do not
23 consider this to be legal mail; therefore, send it back

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1 through the JTF process. That's what I'm saying, it depends
2 on the context of what it is.

3 But if it's a typical letter that the classification
4 review believes is legal in nature, then we're not of -- the
5 government's not opposed to that letter, once it goes through
6 the classification review, going to that recipient, providing
7 it's one of the legitimate recipients, such as an expert
8 consultant or potential expert consultant or witness.

9 MJ [COL POHL]: Again, I think expert consultants or
10 potential members of the defense team are a separate category
11 I want to put those over here. That is not what I'm talking
12 about.

13 MTC [MR. TRIVETT]: Okay.

14 MJ [COL POHL]: What I'm saying here is instead of what
15 you're talking about, it goes from here, whatever,
16 classification review down to whatever it's okay to give it
17 directly to a witness but not okay to give it directly to the
18 media without going through a JTF review of some sort.

19 MTC [MR. TRIVETT]: Providing that the classification
20 review ----

21 MJ [COL POHL]: Yeah.

22 MTC [MR. TRIVETT]: ---- decided that it was legal in
23 nature. And that's -- that's where it comes down to. That's

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1 what I'm saying is that ----

2 MJ [COL POHL]: So they make that decision, too.

3 MTC [MR. TRIVETT]: At times they do. Sometimes -- my
4 understanding, based on the pleadings, is sometimes the
5 defense will tell them what they intend to use it for,
6 sometimes they won't. There's no requirement to do that, but
7 sometimes they'll say "I want to use this publicly." They'll
8 coming back and say, it is unclassified, however, we do not
9 view this as legal mail. Please send through the JTF-GTMO
10 process.

11 MJ [COL POHL]: Not legal mail because they're going to
12 use it publicly.

13 MTC [MR. TRIVETT]: Depends on the nature of it.
14 Specifically for the invitation to happiness, the invitation
15 to happiness is not an example of an appropriate communication
16 that would be considered a legal communication by the
17 privilege team to send to a witness. It has nothing to do
18 with the witness, what they're talking with the witness about.

19 MJ [COL POHL]: Again, this is what I was talking about
20 before. Instead of focusing on the recipient, you focused on
21 the mail itself. The missive, for want of a better term ----

22 MTC [MR. TRIVETT]: Yep.

23 MJ [COL POHL]: ---- comes in and you say, okay, this

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1 clearly is legal mail, okay, okay, and then you make the next
2 decision of does it -- does it present some type of --
3 whatever the JTF threat is. And again, it's never been
4 articulated clearly to me whether that is different than
5 everything else. But let's assume we do that and embed that
6 in at that point and you hand it back to Mr. Nevin or
7 Mr. Connell and say, okay, use it for whatever you want to and
8 don't get tied into who they're going to give it to. Because
9 once you say -- once Mr. Connell comes in and says, I've got
10 this and I'm going to go give it to a particular NGO and they
11 promised me they wouldn't do anything with it and the NGO says
12 after looking at this, we're going to put it out in the press
13 and Mr. Connell may be upset that they didn't keep their word,
14 but there's nothing that he can do about it, there's nothing
15 that you can do about it, and there's nothing that I can do
16 about it.

17 If we rely on how that's handled afterwards to set up
18 a different regime, your -- I don't see how your solution
19 solves that.

20 MTC [MR. TRIVETT]: And my solution wasn't meant to be an
21 all-encompassing solution but that at least in the guidance as
22 to when something is waived just in understanding what we
23 meant by paragraph H is to the extent it's going to some place

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1 that's not a recognized place where privilege would be
2 maintained, JTF-GTMO needs to be a piece -- a part of that.

3 I'm not opposed to embedding the JTF review within
4 that classification review. The government's not opposed to
5 that. It would formalize their review. But understand that
6 their review is an original classification authority review.
7 That's what I'm trying, and failing evidently, to really
8 convince -- to get you to understand the difference between an
9 OCA is learned in the classification guidance at issue. Takes
10 a document, looks at the classification guidance and says,
11 based on this guidance, it's either classified or it's not
12 classified. That's what they say. Right?

13 They then don't have the -- their own determination
14 to say, and I think it's fine to go to five people, but not
15 the media. That's not their job. They're not doing it. And
16 quite frankly, the Privilege Review Team right now is not
17 doing that. All they would do is if they believed it was not
18 legal mail under the current regime, they would simply say,
19 but go back to JTF-GTMO. So JTF-GTMO is not looking at it to
20 see whether or not it's classified. They're looking at it to
21 say does this harm the war effort? Not everything that harms
22 the war effort is not necessarily classified under the
23 guidance, but that's the difference.

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1 MJ [COL POHL]: I got it. Okay. Are you saying
2 currently -- make sure I understand this -- that it goes to
3 the classification review, they make a decision whether it's
4 legal mail or not?

5 MTC [MR. TRIVETT]: Yeah, they believe that if it's
6 nonlegal mail, they have -- I don't know if it's 100 percent,
7 but they have ----

8 MJ [COL POHL]: Returned it to the ----

9 MTC [MR. TRIVETT]: ---- asked the defense to return to
10 JTF-GTMO.

11 MJ [COL POHL]: Or return it to the attorney and they can
12 do with as they see fit.

13 MTC [MR. TRIVETT]: It's unclassified but goes to
14 JTF-GTMO.

15 MJ [COL POHL]: They do the classification review but it's
16 not legal mail.

17 MTC [MR. TRIVETT]: Right.

18 MJ [COL POHL]: But the problem child is not that one.
19 The problem child is it appears to be it's legal mail that
20 loses its protection, for want of a better term, once they
21 disseminate it to thirty parties. Right?

22 MTC [MR. TRIVETT]: Correct. When they disseminate to
23 third parties ----

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1 MJ [COL POHL]: Your scenario is it's not legal mail on
2 its face, therefore it goes back to JTF-GTMO or its attorneys.

3 MTC [MR. TRIVETT]: Correct.

4 MJ [COL POHL]: If it's legal mail on its face and the
5 defense doesn't say what they're going to do with it, so it's
6 legal mail on its face, then if it's going to go to some third
7 parties, they're supposed to go back to it becomes nonlegal
8 mail for your -- but the same exact mail becomes -- stays
9 legal mail, it goes to other third parties, right?

10 MTC [MR. TRIVETT]: Say that last line again. I'm having
11 a hard time processing it.

12 MJ [COL POHL]: We'll get there, Mr. Trivett. Goes to
13 classification review.

14 MTC [MR. TRIVETT]: Yep.

15 MJ [COL POHL]: Unclassified, but legal mail.

16 MTC [MR. TRIVETT]: Uh-huh.

17 MJ [COL POHL]: You told me they look at that. Okay.

18 MTC [MR. TRIVETT]: Uh-huh.

19 MJ [COL POHL]: Then it can go to a number of different
20 third parties, some of which, if it goes to some, it stays
21 legal mail, and others, you say it becomes a waiver of the
22 privilege and it -- if it goes to those, it has got to go back
23 through the nonlegal mail procedure of JTF-GTMO.

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

2 MJ [COL POHL]: That's your regime.

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

4 MJ [COL POHL]: Okay. Just quickly, if you can tell me,
5 which are the approved third parties and which would be the
6 ones requiring the JTF-GTMO review?

7 MTC [MR. TRIVETT]: I think it would be anyone of the
8 defense team, experts, potential experts, and potential
9 witnesses.

10 MJ [COL POHL]: And that would -- all of that mail to
11 those people would still remain privileged?

12 MTC [MR. TRIVETT]: It wouldn't need to go through the
13 JTF-GTMO separate process under the current regime.

14 MJ [COL POHL]: Okay, no, but ----

15 MTC [MR. TRIVETT]: Because they're not -- I don't think
16 anyone on the privilege team, to the extent we go through the
17 recipients ----

18 MJ [COL POHL]: I'm assuming the convening authority would
19 be in that category also.

20 MTC [MR. TRIVETT]: Sure. Yeah, sure.

21 MJ [COL POHL]: All right. So the unapproved recipients
22 would be third-party organizations, basically is what you're
23 saying.

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1 MTC [MR. TRIVETT]: To include the media and foreign
2 courts.

3 MJ [COL POHL]: Courts, media ----

4 MTC [MR. TRIVETT]: Correct.

5 MJ [COL POHL]: ---- NGOs. Okay.

6 MTC [MR. TRIVETT]: Correct. That's why I think -- and
7 again, our proposed order is our amended proposed order. I'm
8 just trying to explain what it meant when we said thus
9 partially or wholly waiving the privilege. And my example to
10 that is there are certain entities that they can send it to
11 that would do that. And obviously the media's sole purpose is
12 to disseminate information that they get. Although that might
13 not be the NGO's sole purpose, as Mr. Schwartz said, there's a
14 risk that they're going to do that. Generally, when you're
15 sharing information with people on your defense team they fall
16 under your cloak of privilege anyway.

17 So we're not trying to be Draconian and say, you
18 can't ever get anything out because it goes through a process.
19 They are right in that it goes through a process, but
20 depending on what they want to do with it, it's simply not
21 authorized under current JTF-GTMO nonlegal mail to allow
22 dissemination out to the press, to allow dissemination to the
23 NGOs, or certainly to allow dissemination to foreign courts.

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1 It's so -- so that's why I brought up this issue of
2 the recipient being significant in how you analyze our
3 paragraph h.

4 MJ [COL POHL]: Thank you, Mr. Trivett.

5 Mr. Connell, you wish to add something?

6 LDC [MR. CONNELL]: Sir, I don't want to repeat anything,
7 but I will note that it's funny that we sort of ended up where
8 we began this conversation in February when we -- when this
9 question first came up in February, when it seemed to occur to
10 the government the first time that the current system is the
11 way that it is, I made the observation that I'm the sort of
12 person who likes to find out what the rules are and then
13 follow them. And that's why I like the classification review
14 process so much and that's why I've used it 161 times, because
15 they will tell me what the rules are.

16 And at the time I made the observation, if I could
17 find a security review or a -- I also don't understand what
18 this JTF review is other than we don't like it. But assuming
19 that it has some content to it like the security review, I
20 said, hey, give us a privileged security review, that would be
21 fine. That was my comment in February.

22 So after February, I went back and researched the DoD
23 regulations to look for some other kind of review, and the

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1 only review that I could find is that there is -- for
2 government employees who want to represent the policy of the
3 United States, there is a policy review that you can submit
4 things for. And of course, under Executive Order 13526 and
5 the DoD manual 5105.1, there is a classification review that
6 you can seek, but there is no such thing in the Department of
7 Defense called a security review. Because if there was one, I
8 was going to apply for it to find -- because I like top cover
9 as much as the next person.

10 And the -- I think that one of the good things which
11 emerged out of this conversation today is the unworkability of
12 an end-stage analysis of, you know, a big, long flow chart
13 that has six or ten different outcomes at the end of it, and
14 choosing who goes when at that point. But what would work in
15 my opinion is if we had the opportunity to -- if there were a
16 review that existed that had standards and we -- there was
17 privilege, we could submit our -- whatever document we wanted
18 for that review.

19 And I feel confident that none of the material that
20 we have talked about in the 53 examples that I talked about
21 for our team is the sort of propaganda that Mr. -- the
22 government is talking about because it's all about, you know,
23 health concerns. It's all about here are my symptoms of

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1 traumatic brain injury, it's all about here are -- here is my
2 treatment -- which the government has told us in 013RRR is now
3 unclassified, here's my treatment by the CIA. These are not
4 propaganda tools, these are the core of what we have -- are
5 debating in this court.

6 So I said it at the beginning that I would be
7 willing -- I would love to be offered some additional review,
8 if that were a tool that were available to us. But I cannot
9 find such a tool in the Department of Defense regulations.

10 MJ [COL POHL]: Assuming the government could articulate
11 in an understandable manner exactly what the JTF review would
12 be, and they embedded that into the classification review
13 process, so when it got done with the classification review
14 process, you would either have it unclassified, do with it as
15 you see fit; unclassified, you can't do with it as you see fit
16 because it violates this guidance, and then you'd come to me
17 if you wanted it. I mean, it strikes to me, the problem with
18 one of these proposals depends who you decide to send it to
19 has different standards and I'm not sure that's ----

20 LDC [MR. CONNELL]: Right. Assuming Your Honor were
21 asking me what I think of such a thing embedded ----

22 MJ [COL POHL]: So when you got it back you knew right
23 away there are limitations on it, we don't have to go through

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1 the -- the problem is when you define legal mail and nonlegal
2 mail ----

3 LDC [MR. CONNELL]: Sir, I want to answer the question.
4 And my answer is not only am I fine with that, I think that's
5 what the current system is, right? I mean, as the government
6 pointed out, often we write on there, I intend to release this
7 to the public. The reason why I write that on there is I want
8 the review. I don't want to endanger national security; I
9 don't want to endanger my security clearance; I don't want to
10 do anything that's going to get anyone in any trouble. I want
11 to follow the rules.

12 And not only do I think that -- I believe that that
13 review that you just described is embedded, the DoD can refer
14 to any of its subcomponents that it wants to. It can send it
15 to SOUTHCOM as long as it maintains privilege. It can send it
16 to a walled-off person at JTF. I think that's fine. And if
17 we need to make that more explicit, that's fine. I think they
18 do it already. But if we want to encourage them to do it with
19 greater vigor, then that's fine, too.

20 MJ [COL POHL]: If we did that process, should we --
21 should they -- that review make the assumption that it's going
22 to be given to a particular third party? What I'm saying is a
23 piece of paper is submitted ----

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

2 MJ [COL POHL]: ---- for review.

3 LDC [MR. CONNELL]: Yes.

4 MJ [COL POHL]: And you have a choice. You say, I want to
5 give this to a witness. I want to give this to the convening
6 authority. I want to give this to the press. Whatever third
7 party is in there. And there's nothing in there that should
8 be assumed is going to be publicly disseminated for the
9 review.

10 LDC [MR. CONNELL]: Yes. That makes a lot of sense.

11 MJ [COL POHL]: There has to be some type of ----

12 LDC [MR. CONNELL]: That's right. The default would be
13 that it has its uses -- its use is in the professional
14 discretion of the attorney. But if there is, you know,
15 obviously, as has been pointed out, there are more narrow
16 categories. I want to give this to the convening authority,
17 and if that's the only thing that I want do with it, it makes
18 sense for me to provide that information in the classification
19 review cover letter that I send every time, to say, look,
20 don't -- I don't need to know whether this can go to the
21 public or not, I just want to give this to the convening
22 authority, and ----

23 MJ [COL POHL]: It seems to me if we went down this way,

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1 and I'm just thinking this through, is either that a
2 requirement of the cover letter would be any third-party
3 dissemination, and if you -- that were to change, you would
4 have to resubmit it.

5 LDC [MR. CONNELL]: Say that again, sir.

6 MJ [COL POHL]: What I'm saying is the cover letter would
7 have any intended third-party dissemination as of the date of
8 the cover letter.

9 LDC [MR. CONNELL]: Right. And if the intent changes, you
10 have to resubmit it.

11 MJ [COL POHL]: There's no information on this and if it
12 changes later on you have to go back through the process.

13 LDC [MR. CONNELL]: That makes sense.

14 MJ [COL POHL]: Okay. I'm not saying I'm going to go that
15 way, I'm just trying to figure out a way.

16 LDC [MR. NEVIN]: Can I say one more thing?

17 MJ [COL POHL]: Sure, Mr. Nevin.

18 LDC [MR. NEVIN]: Just the only thing that I wanted to say
19 is I heard a lot of discussion of the idea of propaganda, and
20 also a discussion of the proposition that this is a war, a war
21 court, that there is a war ongoing, and, as Mr. Trivett said,
22 that the government sees itself as having to protect itself
23 from its enemies here.

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1 And I just want to call to the military commission's
2 attention the proposition that much of what we are referring
3 to as propaganda here -- and I agree, the invitation to
4 happiness is just an invitation to -- it's essentially
5 proselytizing. It invites people to embrace the religion of
6 Islam. But much of what we -- much of what is in play here
7 will be -- I think the government will attempt to characterize
8 it as propaganda.

9 Our defenses in this case may well be aspects of a
10 philosophy or of history or of the treatment of, let's say,
11 Muslim people that are relevant to a determination, at least
12 of penalty, and possibly of guilt, and that -- it's not
13 propaganda. I mean, propaganda is the word that governments
14 use to describe opinions that they disagree with, that's what
15 propaganda is; as opposed to, let's say, using a term like
16 philosophy, a philosophy.

17 And so I just want to make sure that in structuring
18 wherever the military commission goes from here, it bears in
19 mind that propaganda may be a way of -- a shorthand word for
20 referring to something that may be extremely important and
21 entirely appropriate for -- to be considered in this court.

22 So thank you.

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

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1 LDC [MR. RUIZ]: Your Honor, just a few.

2 MJ [COL POHL]: Yes, Mr. Ruiz.

3 LDC [MR. RUIZ]: Judge, as you know, we are a co-defendant
4 in the case and there are carefully parsed distinctions in our
5 positions, and I want to make Mr. Hawsawi's unmistakably
6 clear. We are not all for additional layers of review,
7 particularly when we find them to be decidedly unnecessary.
8 Our position is that the current classification review, Judge,
9 it's already -- already embeds the type of review that the
10 commission is envisioning.

11 MJ [COL POHL]: Then it wouldn't hurt to make it explicit,
12 then, would it?

13 LDC [MR. RUIZ]: No.

14 MJ [COL POHL]: It wouldn't change things. Go ahead.

15 LDC [MR. RUIZ]: Yes. My concern, Judge, is that we still
16 do not understand exactly what that means. I don't think that
17 the commission does. I certainly do not know exactly what
18 this additional layer of review is or what it means. Because,
19 quite frankly, we've allowed the prosecution -- or so far it
20 has been allowed, the prosecution to state with generalities
21 what that interest is.

22 What my proposal is, Judge, is that the prosecution
23 be required to submit some type of proposal that clearly

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1 articulates who will be conducting this review in terms of
2 personnel, what agencies they're affiliated with. When we
3 talk about JTF, we talk about this JTF as this amorphous type
4 entity. It's a Joint Task Force. And as we've known before
5 from different examinations that I've conducted, there are JTF
6 partners. There are lots of pieces to Joint Task
7 Force-Guantanamo.

8 When we talk about a JTF review, I don't understand
9 what that means. I'd like to understand what that means
10 because I think it that would help me articulate better what
11 my agreement or disagreement or concerns or objections are to
12 that.

13 So in fashioning that relief, if that's where you're
14 headed, I would submit that, based on my read, that's where
15 we're going, I would suggest, Judge, that you ask the
16 prosecution to articulate clearly exactly who it is that will
17 be conducting this additional review, what it is that they're
18 looking for, what type of standards they are going to apply.

19 The term propaganda, and I talked again to my
20 information security officer and asked him about this question
21 whether, that's embedded within the classification review,
22 because they continue to make these statements alluding to the
23 fact that the classification review doesn't take that into

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1 account. And what he said to me is that the term propaganda
2 is not used because what they focus on is the threat of the
3 information or whether the information creates a threat,
4 incites a threat, or could lead other people to involve
5 themselves in a threat, which I think is at the heart of what
6 they're trying to prevent.

7 So I am not exactly sure what it is that they want to
8 continue to censor more, but I am not comfortable simply
9 saying, sure, Judge, let's go ahead and sign up for that, I'm
10 all for it. I'm not, without more information, without
11 understanding exactly what it is the prosecution means and
12 what it is they're going to do that they're not already doing
13 and haven't already done.

14 And that would be my request. I would submit that
15 the prosecution should be required to present a witness to
16 articulate for you what kind of review they're going to engage
17 in, or a declaration.

18 So, in essence, what I'm saying is some type of show
19 cause as to why they should get the procedures that they're
20 requesting. It is their procedures. It is their modification
21 or clarification that they're requesting. We need more
22 information about exactly what that means before we sign on to
23 that proposal. And that's on behalf of Mr. Hawsawi, Judge.

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1 Thank you.

2 MJ [COL POHL]: Got it. Thank you.

3 Mr. Ruiz just spent ten minutes asking me to do
4 something I was going to do anyway, but that's okay.

5 Government, I want -- I'm assuming it can be
6 unclassified, but if it's got to be classified, I'll defer
7 that to you, just that what would be the review guidance that
8 you believe would provide structure to this JTF review,
9 regardless of where it's done, whether it's done in an
10 embedded way or we do it at the JTF. Just so that we know
11 what they're talking about. Do you follow me there,
12 Mr. Trivett?

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

14 MJ [COL POHL]: Just simply -- because I don't want to
15 depend -- although Mr. Ruiz talks about who's going to do it,
16 I don't want to depend on that. Just like everything else,
17 here's your classification guidance. But here's your guidance
18 whether you're this guy or that guy, this gal or that gal,
19 they've got the guidance. Got that?

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

21 MJ [COL POHL]: I'll give you the same extension I gave
22 Ms. Bormann, you have two weeks after the close of hearing, on
23 the 17th of June. And this issue is not done because we have

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1 to talk about the classified part of it in a couple of days.

2 I want to touch briefly back to you Mr. Schwartz on
3 426. Is that over the lunch break I kind of reviewed the
4 pleadings in the case, and what I have is the 19 May pleading
5 that you talked about before was submitted ex parte under
6 seal, so I'm just kind of curious how the government was going
7 to respond.

8 DDC [MR. SCHWARTZ]: It's -- if the version you're holding
9 includes attachments C and D, then that version is ex parte
10 under seal.

11 MJ [COL POHL]: Only that part of it.

12 DDC [MR. SCHWARTZ]: Everything else was open and was
13 filed open.

14 MJ [COL POHL]: Okay. That clears it up for me.

15 Not yet, not yet.

16 And then you also mentioned the 27 May supplement
17 with the affidavit.

18 DDC [MR. SCHWARTZ]: Yes, sir.

19 MJ [COL POHL]: Okay. But I also have a 27 May supplement
20 for discovery.

21 DDC [MR. SCHWARTZ]: Not supplement; independent motion.

22 MJ [COL POHL]: Independent motion. Okay. You're right.

23 That's 426A. That was just filed.

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1 DDC [MR. SCHWARTZ]: Friday.

2 MJ [COL POHL]: Friday.

3 DDC [MR. SCHWARTZ]: Yes, sir.

4 MJ [COL POHL]: Doesn't the government need time to
5 respond to your discovery request?

6 DDC [MR. SCHWARTZ]: So these two motions are intertwined,
7 obviously. The 426A is a request for discovery. The initial
8 discovery request I'll concede was only served on the
9 government Monday, which would have been the 23rd. And the
10 government's position is they haven't had enough time to
11 respond to that on a matter of public health over five days.
12 Whether that's sufficient time maybe we don't need to debate,
13 but regardless of your ruling on 426A, 426 is going to
14 require -- so the information sought in 426A is even more
15 technical than what we're going to discuss on Wednesday if you
16 provide us that opportunity.

17 The assistance of an expert in this area is going to
18 be required. I'm hopeful that if the government complies with
19 the motion in 426A, the level of assistance that will be
20 necessary will be minimal. It won't take much information to
21 prove to us, prove to everybody in this room that our concerns
22 are -- we don't need to have concerns, that this is, without
23 question and with transparency, a safe place to work.

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1 So we will -- may I have a moment?

2 MJ [COL POHL]: Sure.

3 [Pause.]

4 DDC [MR. SCHWARTZ]: So our requests, Your Honor, wouldn't
5 be for an expedited briefing schedule or a special oral
6 argument on the discovery motion simply because the expert
7 hasn't been appointed yet, so we can't do much with that
8 discovery. We've moved for the discovery so the expert can
9 make an analysis, can make an assessment and advise us
10 competently.

11 MJ [COL POHL]: Okay. Thank you. Got it.

12 My intent is to keep going for another half hour,
13 40 minutes and then we'll call it for the day.

14 Let's talk about 183, which I believe was your
15 motion, Mr. Nevin, or -- Mr. Sowards. Okay.

16 Mr. Sowards.

17 CDC [MR. SOWARDS]: Yes, Your Honor. Good afternoon.

18 MJ [COL POHL]: Good afternoon. Go ahead.

19 CDC [MR. SOWARDS]: I heard the commission say it wanted
20 to talk about it. I thought you had a preliminary question.

21 MJ [COL POHL]: Oh, no. I just wanted to hear -- this is
22 the first time we've discussed this.

23 CDC [MR. SOWARDS]: Yes. I beg your pardon because I

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1 wasn't sure whether this was an 802 matter or this matter.
2 But in reviewing the pleadings and getting ready for the
3 motion, I realize that we, as far as I can tell, and perhaps
4 my colleagues across the aisle have a different recollection,
5 we're actually still waiting for the commission's order on our
6 discovery motion of 183C.

7 And just by way of background, unless someone recalls
8 a substantive ruling on that, what occurred was in response to
9 a back and forth about the feasibility of supporting the
10 requested telephonic communication, we had filed a motion to
11 compel both documentary evidence, as well as certain witnesses
12 who can inform the commission as to the ease with which Joint
13 Task Force-Guantanamo could accommodate the request for the
14 telephonic communication.

15 In response, the government opposed it, but along the
16 way mentioned that while they did not believe there was a
17 constitutional right or other enforceable right to the level
18 of telephonic communication that we were seeking,
19 nevertheless, on its own initiative, it was going to undertake
20 a feasibility study.

21 And then I think probably in the hopes that, as the
22 commission says, peace could break out, the commission issued
23 180 -- I'm sorry, issued 183G back in March of 2015, and cited

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1 the government to its promise or its offer of its initiative
2 to undertake this investigation.

3 And then in -- and the commission also specifically
4 referenced the outstanding discovery motion. It said, you
5 know, let's proceed and see what they're going to give us.

6 And then in March -- on March 20 of 2015, the
7 government filed its response in which it essentially said the
8 infrastructure will not support it, that was their
9 information, but did not comply with our request to support
10 the discovery of its view or previously expressed contrary
11 opinion, which was also, by the way, supported by Admiral
12 Woods' order that provided the protocol and the procedures for
13 exactly these sorts of phone conversations.

14 The government also noted in explaining to the
15 commission that their proffered feasibility study had met with
16 negative results. They then returned to the question, their
17 perspective, that there was no right to the telephone access
18 we received. All of which was to say that this sort of boiled
19 down to the commission perhaps fighting -- looking for some
20 compromise, asking them to report back. They reported back,
21 said it won't work, so now we're back with the issues joined
22 and then we are waiting for some discovery on the ----

23 MJ [COL POHL]: Yeah. And, of course, the reason why I

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1 brought this back up ----

2 CDC [MR. SOWARDS]: Sure.

3 MJ [COL POHL]: ---- I know the discovery thing is out
4 there, is there's a difference between "can't" and "won't,"
5 okay? And your discovery kind of goes to a lot of "can't."

6 CDC [MR. SOWARDS]: Uh-huh.

7 MJ [COL POHL]: Because you say, well, you can do it this
8 way and you filed a subsequent pleading about here's another
9 option for this.

10 CDC [MR. SOWARDS]: We sure did, Your Honor, yes.

11 MJ [COL POHL]: But I just want to -- rather than deal on
12 the mechanical level of this thing, as I understand your
13 request, just so I understand it, and I want to give the
14 government an opportunity because I think there may be a
15 way -- well, there may or may not be a way to resolve this,
16 that you want the ability for unmonitored telephone
17 communication, oral communication -- I'm not going to get into
18 the type -- between detainee down here and one's office,
19 probably in Washington.

20 CDC [MR. SOWARDS]: Up there someplace, yes.

21 MJ [COL POHL]: Or -- okay. Okay. But from the detainee
22 here to a place in the United States ----

23 CDC [MR. SOWARDS]: Right.

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1 MJ [COL POHL]: ---- unmonitored. Okay. Got it. Okay.
2 Okay.

3 I got that part of it.

4 Trial counsel.

5 CDC [MR. SOWARDS]: Okay. And just perhaps ----

6 MJ [COL POHL]: Go ahead, if you have something more,
7 Mr. Sowards.

8 CDC [MR. SOWARDS]: Didn't mean to interrupt, but just to
9 maybe also assist in guiding that response is -- and the
10 discovery motion in particular we submitted goes to
11 evidentiary support for the Turner v. Safley question which,
12 of course, has sort of enjoyed a renaissance in the commission
13 lately. So that's what it's directly relevant to.

14 MJ [COL POHL]: Thank you, Mr. Sowards.

15 Mr. Swann.

16 TC [MR. SWANN]: And your specific issue is what, Your
17 Honor?

18 MJ [COL POHL]: Do you oppose unmonitored telephone calls?

19 TC [MR. SWANN]: Yes, sir.

20 MJ [COL POHL]: Okay. Because you can't do it or you
21 won't do it?

22 TC [MR. SWANN]: You have a filing, Your Honor.

23 MJ [COL POHL]: Yeah. I've read it.

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1 TC [MR. SWANN]: It's not because -- well, we can't do it
2 under those -- under a number of circumstances.

3 MJ [COL POHL]: Okay. And your -- why can't you do it?

4 TC [MR. SWANN]: Why can't we do -- why didn't we build an
5 infrastructure to make this happen?

6 MJ [COL POHL]: I don't want to get -- is there a way to
7 put a phone line from a camp to a secure location in the
8 States? Is that what we're talking about?

9 TC [MR. SWANN]: We're not talking about from the camp.
10 It's not from the camp. It would have been from Echo to begin
11 with. That's where an infrastructure exists to be able to do
12 it at least on one occasion in the past. We have done it.
13 That was in another case. And the individual needed to talk
14 to his parents prior to a plea in the case. That is the only
15 time this has ever been done.

16 Now, that was done for that one instance only and
17 that was monitored on both ends.

18 MJ [COL POHL]: Okay. Is your objection to the
19 unmonitored part of it or -- I'm just -- okay. I said I
20 wasn't going to do this with Mr. Sowards. I'll do it with
21 you.

22 There's a concern about classified information. I
23 got it. Okay. So an unmonitored classified STU line from

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1 someplace in Cuba to someplace in the United States is
2 nondoable?

3 TC [MR. SWANN]: Nondoable. Nondoable. But see, the
4 motion -- the motion encompasses something much larger than
5 that. The way I envision it, Mr. Nevin wants to be able to
6 talk to his client at his client's desire whenever the client
7 wishes to talk to Mr. Nevin in Idaho or some other place like
8 that. Mr. Sowards wants to talk to his client from his
9 location in California. Ms. Leboeuf might want to talk to the
10 client from Louisiana. And it just goes right down the line
11 like that.

12 Now, listen, the -- and, sir, you know this, the
13 access -- the issue is access. I know we're not going to
14 litigate the 254 issue because you resolved that quite well in
15 the last footnote when we argued the female guards issue. But
16 I have been keeping tabs on exactly how many appointments have
17 been arranged by the camp since the 1st of January, for
18 instance. And we're well over 500 appointments that they have
19 offered up to the various five teams in this case. About half
20 of those appointments don't come to pass for a variety of
21 reasons, because the accused refuses to go or the lawyer
22 cancels them.

23 So the access issue, they can see their client

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1 practically any day of the week, for eight hours a day or
2 thereabouts anytime they want to, and have been able to do
3 that for a considerable period of time. We can't be running
4 phone lines from one location into the United States. It's
5 not feasible. It's not practical. And I believe one of the
6 filings indicates that there are other concerns with it.

7 So that's where we are, sir.

8 MJ [COL POHL]: Okay.

9 So it's kind of a two-edged thing. I mean, it's the
10 practicality and all of that other stuff to be designed; it's
11 not required because they have access other ways.

12 TC [MR. SWANN]: When we said that we would -- when they
13 first filed their pleading, we didn't know the answer to the
14 question. We went and asked and investigated and looked at
15 this from every possible angle, and then we came back and
16 said, sorry, it cannot happen. There are plenty of
17 opportunities for you to come down here and spend a
18 considerable amount of time to see your client. And it's --
19 quite frankly, it's almost seven days a week these times.

20 So it is not possible for this to happen.

21 MJ [COL POHL]: Okay. I just kind of wanted to get an
22 update of where it was at, because obviously it could impact
23 the ability to move the case along. That's why I raised it at

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1 this ----

2 TC [MR. SWANN]: I understand that, sir. But there are
3 other ways to deal with that issue. Thank you.

4 MJ [COL POHL]: Thank you.

5 LDC [MR. CONNELL]: May I be heard, Your Honor? We had a
6 motion ----

7 MJ [COL POHL]: Ms. Bormann.

8 LDC [MS. BORMANN]: I just very quickly want to correct
9 something so that the record is very clear. Currently, you
10 called it a STU line, I call it a STE line that runs from our
11 offices in Rosslyn, which I was at all last week, to a
12 facility right over here. We've used it, oh, I don't know,
13 maybe ----

14 MJ [COL POHL]: When you say right over here, are you
15 pointing to the gallery?

16 LDC [MS. BORMANN]: No. You know, in our office, what,
17 500 feet from here.

18 MJ [COL POHL]: I got it.

19 LDC [MS. BORMANN]: And so the idea that there's no
20 capability of having an unmonitored, secure line that covers
21 TS information from a place in Cuba to a place in the United
22 States is nonsense, because it exists now.

23 And there's one in the Bin'Attash office. There's

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1 one in the Binalshibh office. There's one in the --
2 Mr. Mohammad's office, there's one in the -- so, I mean, there
3 are several. And so it's unclear to me how it could be -- we
4 could capably do it here but we can't capably do it on another
5 part of the base.

6 MJ [COL POHL]: Thank you.

7 Mr. Connell.

8 LDC [MR. CONNELL]: I was going to make that same
9 observation. The other observation I will make is that there
10 is a telephone infrastructure at Echo II. They have a
11 telephone. And there's data infrastructure at Echo II because
12 that's how the nonconsecutive communications occur with family
13 members when those are allowed to happen through the ICRC.

14 So I do agree that there's a difference between can't
15 and don't want to, and I think that this is a situation where
16 the government is offering reasons why it doesn't want to, not
17 that it's technically not feasible.

18 Thank you.

19 MJ [COL POHL]: Mr. Sowards.

20 CDC [MR. SOWARDS]: Yes, Your Honor, and with due respect
21 to my colleagues, I just want to make sure that what we're
22 talking about here is still the question about whether we
23 should resolve the discovery motion before we go forward on

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1 the substantive motion. And while I -- I once again
2 appreciate the commission's attempt to reach out and try to
3 find some common ground, I -- and I certainly respect the
4 integrity of the prosecution in making representations to the
5 commission about what is and is not possible. Those
6 representations are not evidence. And what we have before we
7 filed the -- or in filing the motion to compel and subsequent
8 filings to that, before the commission stepped in to see if we
9 could work it out perhaps in a more informal practical basis
10 was pretty clear evidence that now, as the prosecution has
11 confirmed, that at least when it suits the government's
12 purposes in effectuating a plea, those telephone calls can be
13 arranged. Suddenly they can do it. It is only that they move
14 into the category of can't do when it may be something that
15 facilitates the representation of death-charged clients.

16 So without getting into the particulars, the merits,
17 because I think they -- this record is woefully inadequate,
18 frankly, for the commission to be able to undertake its Turner
19 analysis about whether this is an important enough
20 effectuation of the Sixth Amendment and Eighth Amendment right
21 to competent representation in a capital case to put aside
22 whatever inconvenience the government alludes to.

23 But I will say, just in parting on that particular

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1 note, that the potentially false impression created by the
2 government that somehow we have easy and ready 24/7 access to
3 our clients is simply not the case; that to the extent there
4 may be 500 appointments available to meet with anybody over
5 any period of time, not one of those appointments can be made
6 without an attorney undertaking anywhere from two to three
7 days' travel to come down to Guantanamo and spend the time
8 with the client for perhaps a four- or five-hour interview.

9 But what we're talking about is the more -- and the
10 reason we think it's important to have the discovery on it, to
11 see if this can be accomplished, is what Mr. Connell was
12 alluding to in terms of, for instance, Internet-supported
13 delayed video telephonic transmissions or things of that
14 nature that don't involve running phone lines anyplace in this
15 day and age, but would allow a client to come forward as need
16 be and contact his attorney about something of some great
17 urgency or to clarify it. It doesn't require -- or doesn't
18 necessarily necessitate over a week of travel for the attorney
19 to come down and meet with a person for a week to answer a
20 particular question which nevertheless may be of great
21 consequence.

22 So that's the kind of stuff we're talking about and
23 the kind of stuff that the commission will have to weigh. But

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1 I believe the commission needs some hard data to see whether
2 it is a matter of just "won't," whether it is a matter of
3 "can," and how practical that "can" is.

4 MJ [COL POHL]: Okay, Mr. Sowards.

5 CDC [MR. SOWARDS]: Yes, Your Honor.

6 MJ [COL POHL]: Mr. Swann alluded to the fact that you
7 guys -- you had requested that a communication system be set
8 up at each of your individual offices. Is that accurate?

9 CDC [MR. SOWARDS]: No. What we were -- and I was
10 heartened when Your Honor said you didn't want to get into the
11 technology, because I thought that's exactly where I live,
12 too, is not get into the technology. But I assume what we're
13 talking about is ways to receive these Internet-supported, if
14 it that's the way we go, and I think the shorthand we have
15 been talking about is Skype calls, but the sorts of things
16 that -- I was trying to read "slow down" and they turned it
17 off -- the types of things that enable prisoners to speak with
18 their families and speak with them overseas, that we all have
19 computers, we all have laptops, we all have the ability, in
20 one form or another, to receive the calls.

21 I think what Mr. Swann was underscoring is that these
22 would, and as need be, involve attorneys who are spread out
23 across the United States. But these, number one, are the same

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1 attorneys who, when they are down here after traveling for a
2 couple of days, spend time with the clients under what the
3 government represents is an unmonitored setting in which we
4 talk about the same sort of information.

5 As I had envisioned it, it was not to -- not to take
6 the place of detailed consultation with the clients, but it
7 would afford, in particular, the opportunity for the client to
8 address concerns of some pressing importance, some urgency,
9 something that doesn't wait for a trip down or, you know,
10 figuring when the rotator is going next or when the commission
11 flight ----

12 MJ [COL POHL]: Whether -- and, again, I'm not a
13 technology guy.

14 CDC [MR. SOWARDS]: Great.

15 MJ [COL POHL]: Well, I'm just old.

16 CDC [MR. SOWARDS]: Plead to that, too.

17 MJ [COL POHL]: The issue is if it's unmonitored, I
18 suspect that the government might have an issue over it being
19 over an unsecured line, which creates the issue about multiple
20 receiving locations.

21 CDC [MR. SOWARDS]: Sure. And the ----

22 MJ [COL POHL]: My question basically is this: Would
23 having one point to point on a classified line from

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1 Guantanamo Bay to the defense counsel's offices in
2 Washington ----

3 CDC [MR. SOWARDS]: What I'll say, and I haven't had the
4 benefit of consulting with co-defendant counsel so I don't
5 want to commit them to this, but I will say listening to the
6 colloquy you were having with Mr. Swann, one of the things we
7 previous briefly discussed among ourselves is, well, maybe if
8 the real objection is the unmonitored, we can -- you know, we
9 can concede that and have it be monitored or have it be, you
10 know, the walled-off privilege review or somehow secure it.
11 So that if what they're concerned about is the information
12 being -- I see you frowning. You were talking about something
13 else.

14 If their concern is either the means of
15 transportation -- transmission, or ensuring that only
16 unclassified information is discussed ----

17 MJ [COL POHL]: I think it's the former, not the latter.

18 CDC [MR. SOWARDS]: Okay. Well, that's fine.

19 MJ [COL POHL]: The former meaning that it's not that they
20 want to monitor attorney-client discussions, it's just that
21 they want to make sure nobody else is monitoring it because of
22 the possibility of classified information which would
23 necessitate it to be going over a classified line.

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1 CDC [MR. SOWARDS]: Sure. And, again, if that's the one
2 hurdle and we can work that out on both ends, again without
3 getting into some complication that if our client wants to
4 speak with Mr. Nevin, he has to travel to a, you know, remote
5 SAC base someplace in the hills of Idaho as opposed to can he
6 take it over some configured telephone that allows him to
7 receive it, you know, we're good with that.

8 MJ [COL POHL]: Okay. Well, good. Again, I don't want
9 to -- I'm not ruling on this issue. I am just kind of seeing
10 where we're at and get kind of a status of it, and I know you
11 have your discovery issues.

12 CDC [MR. SOWARDS]: Right.

13 MJ [COL POHL]: The "can't" is a different issue than the
14 "won't." By that I mean the technology, if it's a requirement
15 and the technology exists then it's a matter of making it
16 happen. If it's not a requirement, whether the technology
17 exists or not, doesn't make it a requirement. That's what I
18 was trying to get to right today.

19 CDC [MR. SOWARDS]: Right. And maybe what I can -- I
20 could suggest, or maybe that was what the commission was
21 suggesting earlier, is while the commission returns its
22 attention to discovery motion, we could in the meantime be
23 speaking with Mr. Swann and his colleagues to see if there are

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1 some of these barriers that they've raised that we can resolve
2 and propose that to the commission.

3 MJ [COL POHL]: Thank you.

4 CDC [MR. SOWARDS]: Thank you, Your Honor.

5 MJ [COL POHL]: Okay. What I'm going to do now, I was
6 going to indicate we were going to go for about another 20
7 more minutes, but the only other scheduled motion for -- we
8 have gone through more than I thought we would, is 422, but
9 I'll do that first thing in the morning. What we'll do is
10 we'll just simply -- we're going to recess. This is a safe
11 transcript only. Nobody's got to leave. Nobody's going to be
12 leaving. We're going to recess and then do an 802 on the
13 motions to take up after we do 422 in the morning. Everybody
14 got it? So when I say recess, don't get up and leave.
15 Commission is in recess.

16 [The R.M.C. 803 session recessed at 1605, 30 May 2016.]

17 [END OF PAGE]

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