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1 [The Military Commission was called to order at 1051,
2 24 February 2014.]

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

6 ATC [MR. SHER]: Morning, Your Honor.

7 MJ [COL POHL]: Good morning.

8 ATC [MR. SHER]: I want to start with this. The
9 government will not present classified information against the
10 accused during its case in chief. The government's case in
11 chief is completely unclassified.

12 The issue today regarding the accused's access to
13 classified information pretrial is not unique to military
14 commissions. The same issue comes up in Article III courts.
15 And those courts consistently hold that an uncleared
16 counsel -- that an uncleared accused may not access classified
17 information in pretrial proceedings. That's Abu Ali in the
18 Fourth Circuit, Embassy Bombings in the Second Circuit, the
19 Marzook case, the pretrial suppression hearing. And that
20 includes reviewing classified discovery, participating in
21 pretrial hearings involving classified information, or having
22 cleared defense counsel disclose classified information to the
23 accused.

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1 The process here is really no different than the
2 process in federal civilian courts. The accused is in no
3 different a position than a criminal defendant where
4 classified information is at issue. Like CIPA here, the law
5 wants it all. It wants to provide the accused with a fair
6 trial and it wants to provide the government with the
7 opportunity to protect national security information. And it
8 can have it all.

9 MJ [COL POHL]: Let me ask a variation of your position.
10 You said on the case in chief the government will put no
11 classified evidence in. What if the defense wants to produce
12 classified evidence in their case in chief?

13 ATC [MR. SHER]: Then the parties work through the 505
14 process, Your Honor. They provide notice of the particular
15 information that's classified that they want. Your Honor has
16 the -- Your Honor makes the call on whether it's relevant and
17 admissible. And if it is, like Your Honor said during the
18 last hearing, the ball at that point is in the government's
19 court.

20 MJ [COL POHL]: But just so I understand the
21 government's position, defense has a whole bunch of classified
22 information that currently they cannot share with their
23 client. Defense feels that some of this information should be

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1 shared with the client in order to prepare their case in
2 chief. They provide the 505(g) notice and then we litigate
3 whether or not they can share it with their client. Is that
4 where we're at? Because at this point, we're talking about
5 something different than whether or not we're going to close
6 hearings.

7 ATC [MR. SHER]: That's correct.

8 MJ [COL POHL]: We're talking about the use of
9 classified information -- or the disclosure of classified
10 information to an uncleared accused.

11 ATC [MR. SHER]: During the pretrial proceedings they
12 cannot disclose classified information ----

13 MJ [COL POHL]: I'm not talking about pretrial
14 proceedings. Say the government says we have this classified
15 information that we want to discuss with the accused to
16 prepare our case in chief, okay? How does that work?

17 ATC [MR. SHER]: They cannot disclose classified
18 information to him. What they can do is they can review the
19 86 percent of the discovery we produced to them with the
20 accused. And what they can do is talk to the accused and he
21 can share anything he knows with them, including classified
22 information. He has to know it. They cannot disclose it to
23 him now ----

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1 MJ [COL POHL]: Okay. Just -- I'm working my way
2 through this.

3 ATC [MR. SHER]: Okay.

4 MJ [COL POHL]: If the government wanted to introduce it
5 in its case in chief, the government could do that with the
6 accused present, correct? That's what your pleading says.

7 ATC [MR. SHER]: That's correct.

8 MJ [COL POHL]: It's still classified. Now, whether or
9 not the hearing is closed or open is a different issue. I'm
10 just talking about for the accused.

11 ATC [MR. SHER]: Correct. Any information the
12 government presents in its case in chief, if there's any
13 classified, which there won't be, he gets to stay.

14 MJ [COL POHL]: So he gets access to it.

15 ATC [MR. SHER]: Correct.

16 MJ [COL POHL]: Now if the defense wants to present
17 classified information, the accused will be permitted to stay
18 for that too, correct, under the same rules?

19 ATC [MR. SHER]: That's correct, with the caveat of we'd
20 go through the 505.

21 MJ [COL POHL]: Okay.

22 ATC [MR. SHER]: Because they can't disclose -- nobody
23 can disclose the classified information to him until we ----

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1 MJ [COL POHL]: So let me go through the 505 procedure
2 and then we say the initial thing is whether or not, again
3 applying the standard, but they say -- defense says we want to
4 discuss this with our accused to prepare for his defense, is
5 that part of the 505 procedure also?

6 ATC [MR. SHER]: It is not.

7 MJ [COL POHL]: Okay. So the first time the accused
8 would hear this evidence would be in court during the case in
9 chief? Is that the government's position?

10 ATC [MR. SHER]: Well, it is with the exception of,
11 again, I mean, stuff that he knows he can talk about with
12 them.

13 MJ [COL POHL]: Okay.

14 ATC [MR. SHER]: Which really narrows the subset of ----

15 MJ [COL POHL]: I got your position. Let me ask you
16 about the second part though, because you carefully used the
17 word "case in chief." How about presentencing, does the
18 government intend to use any classified information in
19 presentencing that ----

20 ATC [MR. SHER]: No, the government is not going to rely
21 on classified information.

22 MJ [COL POHL]: So when you said your case in chief,
23 you're saying -- I understand, Mr. Sher, you're going to be

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1 held to this. You're saying the government does not intend to
2 use any classified information in its case in chief or in its
3 presentencing presentation?

4 ATC [MR. SHER]: That's correct.

5 MJ [COL POHL]: Okay.

6 ATC [MR. SHER]: May I have one second, sir?

7 MJ [COL POHL]: Sure.

8 ATC [MR. SHER]: The reality is, Your Honor, there's a
9 very small set of -- a small subset of information that may
10 not be shared with the accused. Again, he can access all of
11 the discovery that's not classified, and only 14 percent of
12 what's produced is classified. And the accused can talk,
13 again, with his attorneys about whatever information he knows.

14 That narrow limitation on the accused's right to
15 learn classified information from his attorneys does not deny
16 him right to counsel. The Fourth Circuit found that in
17 Moussaoui, which was a capital case. They found it in
18 Abu Ali. Second Circuit came to the same conclusion in
19 Embassy Bombings, and, again Marzook is another instance,
20 pretrial hearings, suppression hearing where the government
21 produced documentary and testimonial evidence outside the
22 presence of the accused.

23 The defense hasn't cited to any case where any

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1 court has sanctioned the government by dismissing the capital
2 referral because an uncleared accused can't access classified
3 information. The only case they cited today was the
4 Gardner v. Florida case. A jury sentenced an accused to life,
5 the trial judge increased that punishment to death on his own
6 based on information never shared with the accused, never
7 shared with his lawyers. They had zero opportunity to explain
8 or work through that issue. That is not the case here. The
9 accused has at least five cleared defense counsel that are
10 representing his interests and that can access the classified
11 information.

12 In Abu Ali, which is a Fourth Circuit case I think
13 in 2008, the court didn't allow the accused or his uncleared
14 counsel to attend hearings involving classified information,
15 they didn't allow his -- the accused or his uncleared counsel,
16 which were his lead counsel, to review classified information
17 or to cross-examine government witnesses that were relating
18 classified information, relating to classified information.
19 Rather, the accused had to have his cleared defense counsel do
20 so.

21 Your Honor, the statute's clear, the accused may
22 not access classified information pretrial. He is in no
23 different a position than a criminal defendant tried in

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1 Article III courts or courts-martial, and the commission
2 should deny the defense motion. Thank you.

3 MJ [COL POHL]: Thank you.

4 Mr. Kammen.

5 LDC [MR. KAMMEN]: In Abu Ali there was a cleared
6 defense counsel who had access to classified information, same
7 as here, but the accused and the uncleared lawyers had access
8 to unclassified summaries, completely different than what
9 exists here. There are no unclassified summaries. There is
10 no bridge.

11 In Moussaoui, there was a procedure under which
12 Moussaoui had access to unclassified summaries of material.
13 And I think it's important because Moussaoui ended up
14 ultimately pleading guilty to the underlying charge, and it
15 was simply a sentencing case. The court really didn't reach
16 the issue of whether or not even that was appropriate in a
17 capital case. And Moussaoui is, I believe, the only capital
18 case where this has been an issue.

19 In the other case that the prosecutor cited, as I
20 recall, there were four documents that maybe were a total of a
21 couple hundred words that were withheld from the accused, not
22 14 percent of the evidence. It doesn't say -- the
23 Sixth Amendment doesn't say the accused has a right to

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1 86 percent of a lawyer. It says he has a right to a lawyer,
2 and what -- what kind of lawyer says I'm just not going to
3 tell you about the 15 percent of the case?

4 Now, I can't really respond publicly to the
5 prosecution's remark, well, just talk to your client, other
6 than to say this: The whole point of discovery is to talk to
7 a client. You don't just get this stuff and file it away and
8 forget about it. You get this stuff, and you then say to the
9 client, here's what they have, is this true? Sometimes
10 clients say, yeah, what can I tell you, and sometimes clients
11 say, no, it's not.

12 The notion of just saying to somebody, well, tell
13 me what you remember is not how real lawyers work, and any
14 notion that that's how real lawyers work is frivolous. That's
15 why every state bar, that's why every military bar has the
16 duty of consultation.

17 Now, the prosecutor said -- and, you know, it's
18 just this sort of word salad, well, if they decide they're
19 going to present classified information, then we go through
20 this 505 and -- you know, and then he says then the government
21 makes a choice. But I'm not sure that we're all talking the
22 same language. Is the choice that we don't get to present the
23 information, or is the choice that they, the defendant, gets

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1 excluded? I mean, is that the price we pay to exclude that,
2 to deal with that?

3 MJ [COL POHL]: Are you talking about -- you're talking
4 about the case in chief now?

5 LDC [MR. KAMMEN]: Well, their case in chief, perhaps.

6 MJ [COL POHL]: Well, let me just see.

7 LDC [MR. KAMMEN]: Okay.

8 MJ [COL POHL]: If classified evidence is introduced in
9 the case in chief by anybody, by anybody ----

10 LDC [MR. KAMMEN]: Sure.

11 MJ [COL POHL]: ---- their position seems to be the
12 accused is present for that presentation?

13 LDC [MR. KAMMEN]: I didn't understand it that way. I
14 understood them to say that if the accused is going to present
15 classified information at any point, you have to file a 505
16 notice, fair enough, and at that point then there's some kind
17 of 505 litigation. And then -- all we heard was and then the
18 government has to make a choice. It's not clear what the
19 choice is.

20 MJ [COL POHL]: Well, there's various choices. Hold
21 that thought, Mr. Kammen.

22 Mr. Sher, just -- this is a yes or no -- no,
23 don't -- don't -- stay back there, because I'm going to let

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1 Mr. Kammen finish. Just so I'm clear, if classified
2 information was introduced by the defense on the case in chief
3 after appropriate 505 procedural things, would the accused be
4 excluded from hearing that, whether on findings or sentence?

5 LDC [MR. KAMMEN]: Let me just be clear.

6 MJ [COL POHL]: No, let him answer my question and then
7 I'll let you go again.

8 LDC [MR. KAMMEN]: All right.

9 ATC [MR. SHER]: If we get through the 505 process ----

10 MJ [COL POHL]: Right.

11 ATC [MR. SHER]: ---- and there is relevant classified
12 information.

13 MJ [COL POHL]: Okay.

14 ATC [MR. SHER]: Then the ball's in the government's
15 court to work through whether there are -- to look for
16 substitutions that would place the accused in ----

17 INT: Your Honor ----

18 MJ [COL POHL]: Slow down.

19 INT: No, Your Honor, we are not able to hear the
20 speaker very well.

21 MJ [COL POHL]: Use the other microphone. And I know I
22 interrupted your argument, but I'm going to let you finish.

23 Mr. Sher, come to the front.

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1 LDC [MR. KAMMEN]: I think it's important to hear what
2 the ----

3 MJ [COL POHL]: Mr. Sher, if we go through the 505
4 procedures and a conclusion is reached that this evidence in
5 its current form, classified form, is admissible, okay, and
6 that an unclassified substitute is not -- not adequate and the
7 government chooses not to ----

8 ATC [MR. SHER]: Stipulate to any facts ----

9 MJ [COL POHL]: Okay. So I want to go to the end here.

10 ATC [MR. SHER]: Okay.

11 MJ [COL POHL]: A piece of classified evidence the
12 defense want to introduce is admissible, goes to the
13 fact-finder and all those other gates, the possible -- I
14 understand there's also permutations, but this is the one I'm
15 talking about. If that were to occur, would the accused be
16 excluded from any part of the case while said classified
17 information was being discussed?

18 ATC [MR. SHER]: That's a very -- I know you don't view
19 it this way, but it is a very complicated hypothetical because
20 it's the sort of thing that it's a -- it's on a case-by-case
21 basis when you look at all this stuff. It's hard to imagine a
22 scenario in which there are absolutely no substitutions or no
23 way to stipulate or no way to come up with ----

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1 MJ [COL POHL]: I just want to address Mr. Kammen's
2 remark at the end of the day. I'm not saying we'd get there
3 because I know there's all sorts of ways to get there and the
4 government has all sorts of options.

5 ATC [MR. SHER]: Sure.

6 MJ [COL POHL]: I'm just saying if we get to a point
7 where defense wants to discuss classified evidence, it's
8 admissible, relevant material to the defense, whatever
9 standard you want to use, that should go to the fact-finder,
10 when that evidence was being presented, would the accused be
11 allowed to hear it?

12 ATC [MR. SHER]: I think the answer -- I think the
13 answer to that is yes, sir.

14 MJ [COL POHL]: It would be no different than if the
15 government wanted to introduce classified evidence?

16 ATC [MR. SHER]: May I have one second, sir?

17 MJ [COL POHL]: Sure.

18 ATC [MR. SHER]: If we -- if we get to the very end of
19 that hypothetical, it may -- we may come to a point where if
20 the -- where Your Honor would have to fashion some sort of a
21 remedy, some sort of a sanction if we were to actually get to
22 that point if we didn't have authorization to allow that
23 classified evidence to be given to him.

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1 MJ [COL POHL]: But if we ever got to the point where
2 the government chose not to pursue other remedies, and I
3 understand under the rule there's all sorts of other remedies
4 that you can choose to do and there was classified evidence
5 being introduced, your position would be the accused would be
6 able to stay in the courtroom if we got to that point?

7 ATC [MR. SHER]: If we got to that point and we kept
8 going and the owners ----

9 MJ [COL POHL]: I don't need to ----

10 ATC [MR. SHER]: You know, it is such a -- I
11 understand -- I understand ----

12 MJ [COL POHL]: I know it's a long, tortuous road. I've
13 got that. I'm just trying to get to what's at the end of that
14 road. And if we get to the end of that road, I understand the
15 government's position. Okay. Thank you, Mr. Sher.

16 Mr. Kammen, you may continue.

17 LDC [MR. KAMMEN]: What everyone's overlooking, Your
18 Honor, is that in the government's case in chief I presume we
19 still have a right to cross-examine their witnesses, and it is
20 easy for me to conceive of circumstances that almost certainly
21 will apply in which among the things we will need to
22 cross-examine witnesses about, especially if Mr. Nashiri's
23 clean team statement is deemed admissible, is classified

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1 information.

2 Now, you know, this is not as simple as, you know,
3 they offer evidence and that exposes people to a wide range of
4 subjects for cross-examination. And so, you know, sure
5 there's a 505 litigation, but, you know, at the end what
6 substitute is there for cross-examination? Or is it really
7 going to be the government's position that they not only get
8 to control what witnesses, they get to control what the scope
9 and content of cross-examination is.

10 So -- and if we get into this, what happens,
11 again, Your Honor, when we're only dealing with these things
12 for the first time at trial when somebody says X, Y and Z and
13 Mr. Nashiri says to us, not true, didn't happen, didn't happen
14 that way, he's lying?

15 Now, under normal circumstances you stand up and
16 you cross-examine. Here apparently the government says we
17 stop, file some kind of notice, have all this ancillary
18 hearing; and supposing the government says yeah, it is true.
19 And so we have a factual dispute, and we say we need time to
20 investigate, we need X -- we need another witness, we
21 need ----

22 MJ [COL POHL]: Well, if ----

23 LDC [MR. KAMMEN]: I mean, all of this should be -- the

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1 whole point of pretrial preparation, Your Honor, is pretrial
2 preparation.

3 MJ [COL POHL]: No, I understand, but what I'm saying is
4 if -- if a witness testifies to unclassified information,
5 you'll be on notice of what he's going to say.

6 LDC [MR. KAMMEN]: Right. Unclassified information ----

7 MJ [COL POHL]: Let me finish. Okay.

8 Now, if you raise classified issues on your
9 cross-examination in your hypothetical, you know, at that
10 point you believe that could generate more investigation?

11 LDC [MR. KAMMEN]: Depending on what the witness says,
12 depending ----

13 MJ [COL POHL]: But isn't -- but wouldn't that -- forget
14 whether it's classified or unclassified. Any time you
15 cross-examine a witness you could make that argument, couldn't
16 you?

17 LDC [MR. KAMMEN]: No, because in this scenario, the
18 first time Mr. Nashiri's aware of these classified facts is
19 when he hears them in the cross-examination. In any other
20 proceeding you've had these conversations with the client well
21 before. And he says -- so that's -- the whole point of
22 pretrial preparation is pretrial preparation.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. KAMMEN]: You don't prepare -- I mean, it is
2 the classic -- you know, it is the classic -- you know, in
3 criminal defense we call people who just sort of show up for
4 major trial unprepared as a V6, a walking violation of the
5 Sixth Amendment. Because that's what V6s do. You know, I'm a
6 trial lawyer, I'll wing it. That's not what this is about.
7 It's not what it's about in a major case, and it certain --
8 any case, and it's certainly not what it's about in a death
9 penalty case.

10 MJ [COL POHL]: Is it your position -- and I'm just
11 asking this. Is it your position, then, that all the
12 classified discovery should be discussible with Mr. Nashiri?

13 LDC [MR. KAMMEN]: Well, I really have to address that
14 in the closed session.

15 MJ [COL POHL]: Okay. We'll talk about that ----

16 LDC [MR. KAMMEN]: Okay.

17 MJ [COL POHL]: ---- that's okay.

18 LDC [MR. KAMMEN]: Let me say this.

19 MJ [COL POHL]: That's fine.

20 LDC [MR. KAMMEN]: But let me say this. Because, I
21 mean, I don't want to say yes and then, you know, there could
22 be ----

23 MJ [COL POHL]: Let's just wait. We can wait for the

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1 closed session.

2 LDC [MR. KAMMEN]: But let me say this. This isn't
3 really about us. It's really about them and you. They've
4 chosen to make this classified. They have chosen to make
5 14 percent of their case, using their calculations -- I think
6 it's higher, but they have chosen to make 14 percent of their
7 case off limits for -- at this juncture from pretrial
8 preparation. That is a huge amount. That is not an
9 inconsequential situation.

10 Any lawyer who said I'm not talking to -- and I'm
11 just rounding, around 15 percent of the case of an important
12 case, especially in a death penalty case, with my client would
13 be ineffective as a matter of law. And so they say, well,
14 that's the way it is. And so we say, well, they've made that
15 choice. Fine. That's a choice that under this situation,
16 this regime, they apparently get to make.

17 But you have a choice, Your Honor. You can say to
18 the government, okay, fine, you've made this choice, but you
19 can't have it both ways. You can't exclude 14 percent of the
20 case from pretrial preparation, from meaningful trial
21 preparation, and still try and kill this guy. You know,
22 that's -- those are -- it's really their choice and yours.

23 One final point, Your Honor, is the prosecutor

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1 said, well, you know, they haven't shown you any case where a
2 death penalty case was -- what's the right word? -- where the
3 death penalty was set aside or the referral or the charges
4 dropped because of the failure to grant the classified
5 information. Well, that is true and not true.

6 My memory is that when the CIA was caught in
7 its -- one of its initial lies to Judge Brinkema in the
8 Moussaoui case, and strangely enough, the lie that it was
9 caught in was about whether videotapes of torture had existed,
10 and the CIA told the government absolutely not, and the
11 government went in and said that, and then it was proven to be
12 one of the many lies the CIA has told to various courts,
13 agencies. I was rereading last night, even as recently in
14 preparation of the Senate Select Intelligence Committee, they
15 were lying to the U.S. Congress as recently as a couple of
16 years ago.

17 I think Judge Brinkema did exclude the death
18 penalty. Now, that was appealed and set aside, but -- and
19 then ultimately, as I said, Mr. Moussaoui pled guilty. But
20 for the government to say this is just, you know, something
21 that's unprecedented is simply not correct. Some judges when
22 they are confronted with behavior that is -- you know, really
23 renders a situation so unfair, level the playing field. And

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1 that's all we ask you to do.

2 If they want to make it -- if they want to
3 withhold this evidence, that is their prerogative, but they
4 made that choice. That brings us to the choice of we ask you
5 to make the choice to strike death, because that's what the
6 law requires. Thank you.

7 MJ [COL POHL]: Thank you. Mr. Sher, anything further?

8 ATC [MR. SHER]: Briefly, Your Honor, just it's
9 important to clear up one thing. It's not 14 -- the accused
10 is entitled to 100 percent of the evidence against him, what
11 the government will prove beyond a reasonable doubt the
12 charges. It's 14 percent of the discovery, which includes
13 defense requested information, that the accused is not
14 entitled to access. Thank you.

15 MJ [COL POHL]: Thank you. That brings us to 187.
16 Commander.

17 ADDC [CDR MIZER]: Thank you, Your Honor. I rise
18 seeking Your Honor move the location of this military
19 commission to Norfolk, Virginia, which is the subject of 187,
20 Judge.

21 If a crime were to occur on the USS COLE today,
22 you can be certain that that case would be heard -- while she
23 was underway if that crime occurred, you can be certain that

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1 that case would be heard in Norfolk, Virginia.

2 Indeed the convening authority -- even though the
3 convening authority could have the power to, say, arbitrarily
4 designate this naval base as the situs of that trial, RCM
5 906(b)(11) would most certainly be invoked, and that trial
6 would be moved back to Norfolk because that is where the crime
7 scene is, that is where the convening authority is, and that's
8 where the witnesses are.

9 Judge, I've had that experience myself in a case
10 somewhat analogous to the case at bar when I was last here in
11 2007, a case that I had won at the C.A.A.F., the Moreno case
12 on post-trial delay, required me to go to Okinawa after an IMC
13 request. And it was a sexual assault case that had taken
14 place in 1998 on Okinawa, Japan.

15 And so now we were in 2007 after the case was
16 reversed, and when we went to Okinawa, Japan, none of the
17 witnesses were in Japan anymore. The convening authority was
18 certainly in Japan, but all of the witnesses were located in
19 the United States. And although the government opposed it, it
20 didn't take long for the judge to determine that that case had
21 to be moved to Quantico, Virginia.

22 And you're dealing really with a very similar
23 situation here. The witnesses are not here at Guantanamo Bay,

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1 neither the prosecution nor defense are permanently here at
2 Guantanamo Bay. The convening authority sits in Washington.
3 The ship itself when she's not underway is in Norfolk, and any
4 number of witnesses are CONUS and many of them are in the
5 Hampton Roads area of Virginia. All of these facts, Judge,
6 militate in the direction of this court moving this case to
7 Norfolk, Virginia instead of this artificial venue that we're
8 currently proceeding in.

9 Now, Judge, the prosecution submits that the Rule
10 for Military Commissions has no analog to RM -- excuse me, RCM
11 906(b)(11), but I don't think that it can be understated. And
12 as I alluded to the other day, I think the best analogy for
13 the M.C.A. is, again, back to the UCMJ in its infancy because
14 RCM 906(b)(11) was not always provided for. You won't find
15 that provision in the 1950 Manual for Courts-Martial.

16 In fact, like we were talking about last Friday,
17 this is another jurisdictionally created rule. And you see in
18 our pleadings the Gravitt case. And in the Gravitt case COMA
19 ultimately affirms the power of the military judge to move the
20 venue of a court-martial, in that case to avoid pretrial
21 publicity.

22 MJ [COL POHL]: Commander, let me ask you kind of two
23 questions. First of all, back to the manual provision, it

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1 talks about in the discussion section, and I understand the
2 discussion section of the manual is advisory at best, it talks
3 about -- one of the things is the inability to obtain service
4 of compulsory process over an essential witness.

5 ADDC [CDR MIZER]: Yes, Your Honor.

6 MJ [COL POHL]: As we discussed earlier, whether or not
7 I have such authority here, from the premise that I don't --
8 and again I'm not deciding the issue ----

9 ADDC [CDR MIZER]: Yes, Your Honor.

10 MJ [COL POHL]: ---- but I can read the Regulation For
11 Trial for Military Commissions seems to say I don't. Was the
12 fact that they did not put that in the Rules for Military
13 Commission, the whole 906(b)(11) change of venue provision,
14 some indication that they didn't intend to vest me with that
15 authority?

16 ADDC [CDR MIZER]: It could be read with that as such,
17 Your Honor, and in fact with respect to the subpoena motion
18 you heard me argue last week that the fact that they
19 removed -- that the Secretary of Defense removed the bar on
20 subpoenas issuing outside of the territorial jurisdiction
21 should be some indicia.

22 MJ [COL POHL]: So if you were to win on that motion,
23 then you lose on this one?

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1 ADDC [CDR MIZER]: No, Your Honor. We should win both
2 motions, frankly.

3 MJ [COL POHL]: I would expect nothing else.

4 ADDC [CDR MIZER]: Which shouldn't surprise you. But
5 I'm just saying that the level of authority is consistent.
6 We're not going to take inconsistent positions on what can be
7 inferred from the removal of the Rules for Military
8 Commission, the removal language. What's sauce for the goose
9 is sauce for the gander.

10 So when they remove the provisions barring your
11 power to subpoena people to this commission from the United
12 States, which they clearly did in the provisions dealing with
13 the subpoena, Your Honor, that we discussed last Friday, that
14 you can infer something similar from the Secretary of
15 Defense's intent from the removal of 906(b)(11).

16 My only response here, Judge, is that, again, the
17 hierarchy of authority that the rules themselves in the
18 discussion section is even, as you know, less authoritative
19 than the rules themselves. And the Manual -- excuse me, the
20 Military Commissions Act has two provisions, that being 949j,
21 which says that the opportunity to obtain evidence and
22 witnesses shall be similar to that in federal courts, and then
23 also 949a, which is essentially the Article 36 analog, Judge,

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1 that says that the procedures here should be similar to
2 court-martial except as otherwise provided under the statute.
3 And the change of venue is not one of those express exceptions
4 that's carved out. If you look at 949a, you'll see Article 10
5 doesn't apply. You'll see Article 31 doesn't apply. And so
6 we believe that this court does have the power to change venue
7 based upon those statutory provisions.

8 And ultimately, if you look at the Nivens case,
9 which is also cited in the pleadings, the COMA looks to the
10 Federal Rules of Civil Procedure, in that case 21(b), that for
11 the convenience of the parties and witnesses and in the
12 interest of justice, the court, upon motion of the defendant,
13 may transfer the proceedings as to him or any one or more of
14 the counts to another district.

15 And so, again, judicially created rules, Judge, to
16 avoid prejudice to the accused and to protect the defendant's
17 right to a fair trial. And you mentioned the prosecution's
18 position to the subpoena motion, Judge, and I think that's
19 telling because in 184A at page 7, they say that your lack of
20 subpoena power isn't deficient because the M.C.A. clearly
21 leaves open the option. It didn't bar a change of venue. And
22 that all we need to do is, by inference, move for venue.

23 And so we did precisely that, Judge, we sought

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1 subpoena power here which we believe you have. But if you
2 rule that you don't, we simply ask that you take the
3 prosecution up on page 7 of their pleading and move this venue
4 to where the witnesses are, to where the crime scene is and to
5 a location where, certainly, issues like the participation of
6 counsel -- I'm not going to get back into Captain Jackson's
7 issues, but that certainly would not have been presented if we
8 weren't talking about flying to a remote island. And so
9 there's ----

10 MJ [COL POHL]: Do we have -- and you've not mentioned
11 it, but don't we have another statute that causes you pause?
12 Isn't there a current Congressional bar from the accused being
13 put into the United States?

14 ADDC [CDR MIZER]: Not that I'm aware of, Judge. What I
15 am aware of is Section 1033 of the current Defense
16 Authorization Act ----

17 MJ [COL POHL]: Okay.

18 ADDC [CDR MIZER]: ---- which says that Department of
19 Defense funds cannot be used to transfer an individual to the
20 United States. That's the only prohibition that the defense
21 is aware of. And so ----

22 MJ [COL POHL]: And so I should direct the Department of
23 Homeland Security to do this and the Coast Guard?

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1 ADDC [CDR MIZER]: It could be Department of Homeland
2 Security, or I would think the more likely option, Judge,
3 would be to use the professionals that move hundreds of
4 prisoners around our nation on any given day, that -- that is
5 the Marshal's Service.

6 MJ [COL POHL]: In your view the NDAA prohibition only
7 refers to the cost of moving a detainee from Guantanamo Bay to
8 the United States, and whatever costs incurred in the United
9 States by DoD doesn't count?

10 ADDC [CDR MIZER]: Your Honor ----

11 MJ [COL POHL]: So all we're talking about is who pays
12 for the plane ticket?

13 ADDC [CDR MIZER]: That's right, Judge.

14 MJ [COL POHL]: Okay.

15 ADDC [CDR MIZER]: The language of 1033(a) is no amounts
16 authorized to be appropriated or otherwise made available to
17 the Department of Defense may be used after this to construct
18 or modify any facility for the purposes of detention or
19 imprisonment in the custody or under control of the Department
20 of Defense.

21 So you just have Congress using its power of the
22 purse, Judge, to say that the Department of Defense cannot
23 expend funds. But I'm unaware of any general prohibition that

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1 would prevent this court from issuing that order.

2 And let me be clear, I don't know that this
3 court's order would have to direct the expenditure of any
4 funds, whether it be the Department of Justice's funds with
5 the U.S. Marshal Service or the Department of Homeland
6 Security. Put that in the pleading simply to suggest the
7 narrowness of the NDAA.

8 I think if Your Honor were to say the interest of
9 justice require this case to be moved to Norfolk -- and, Your
10 Honor, I don't know that we would even have a serious
11 discussion as to this, again, if we were across the bay, you
12 again sitting as an Article I judge but this was, you know,
13 Lance Corporal Nashiri instead of Mr. Nashiri as he's
14 currently situated, it would certainly be moved to the
15 appropriate venue under those circumstances.

16 And all we're asking, Your Honor, is to apply the
17 rules as they have been interpreted by the COMA since 1952,
18 that if the interest of justice and the preparation of the
19 defense require moving a trial, then the situs of the trial
20 should be changed.

21 Your Honor, if there are no further questions,
22 that concludes my argument.

23 MJ [COL POHL]: Thank you.

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1 Trial Counsel? Lieutenant Davis. Go ahead.

2 ATC [LT DAVIS]: Your Honor, between the defense brief
3 and its argument here today, the defense justifies its request
4 to have this trial moved to Norfolk, Virginia, first on the
5 false premise and the false assertion that the Constitution
6 requires a trial to be held in the same location as the
7 charged offense; and second, the false assertion that the --
8 that the accused and the location of this trial in
9 Guantanamo Bay somehow deprives the accused of his rights to a
10 fair trial.

11 Given that neither of those things reflects either
12 the state of the law or the facts in this case, the defense
13 request should be denied. And, Your Honor, with the court's
14 indulgence I'll take those two arguments in turn beginning
15 with this legal argument and the defense position that the
16 trial must have some nexus to the location of the charged
17 offenses.

18 Your Honor, it's interesting that the defense in
19 both its motion and reply cites the case of *Chenoweth v.*
20 *VanArsdall*, but fails to state one of the clear holdings of
21 that case which is that that requirement, that requirement
22 that applies in Article III courts where the -- where the case
23 has to be held in some relation to geographically the charged

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1 offenses in *Chenoweth v. VanArsdall* finds clearly and
2 explicitly that those rules do not apply in the military
3 context or do not apply to military commissions. And,
4 frankly, that -- that's really a common sense argument.

5 When we're talking about Article III courts those
6 are courts of limited geographic jurisdiction compared to a
7 military commission which has jurisdiction to try offenses
8 from around the globe.

9 Also in the defense motion they assert that to the
10 extent possible practice should mirror that which occurs in
11 federal courts and Article III courts. And it's the
12 government's position that, in fact, holding a trial in a
13 place that's not necessarily directly related to the charged
14 offenses is consistent with federal practice, because you find
15 under 18 U.S.C. 3283 those cases that either begin or take
16 place on the high seas were not committed in a particular
17 state or district, actually they do allow those cases to be
18 held without -- without attention being paid to whether there
19 is that nexus between charges and the -- in the location of
20 the trial.

21 But, Your Honor, getting more the argument that
22 the defense raises here before you today, which seems to
23 suggest that there is some prejudice to the accused which

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1 requires moving the case from Guantanamo Bay, it's the
2 government's position that these are mere assertions, that
3 there's no evidence whatsoever to suggest that the accused
4 cannot or has not gotten a fair trial merely because of the
5 location in Guantanamo Bay.

6 And, Your Honor, when these change of venue or
7 change of location of trial, when these things often come up
8 is when there is a concern that the local environment is
9 somehow hostile to the accused, and, as such, the jury would
10 be swayed or would be so biased against the accused that he
11 can't get a fair trial.

12 And as Your Honor is aware, regardless of whether
13 the case is held here in Guantanamo Bay or somewhere else, the
14 jury is going to be exactly the same. We have juror that are
15 going to be -- or members that are going to be drawn from
16 across the world that have no location to the environment
17 here, so there aren't those kind of traditional concerns about
18 venue or hostility in a particular environment that
19 necessitate a move of the trial.

20 Probably the more prominent issue would be the
21 issue of the production of witnesses. And as the government
22 argued in AE 104, this commission does not have subpoena power
23 to bring witnesses to Guantanamo Bay and believe that the

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1 commission should find as such.

2 However, that does not deprive the defense of
3 compulsory process. The defense would still have compulsory
4 process, this commission still has the authority of compulsory
5 process and could issue a subpoena to have any witness testify
6 from a VTC location, which is contemplated under Rule For
7 Military Commission 703, so that the defense would not be
8 deprived whatsoever of any evidence or witnesses before this
9 commission.

10 And also point out that these rules with regard to
11 whether or not witnesses can be brought to Guantanamo Bay
12 affect the government equally if not more than the defense.
13 The government is going to be subject to the same rules. If
14 there are any difficulties in bringing witnesses, they would
15 be experienced similarly between the government and the
16 defense.

17 And the government will also point out that we're
18 now over two years since arraignment in this case, and there
19 has not been a single witness that this commission has found
20 to be relevant and necessary that has either refused or has
21 not appeared before this commission.

22 So, Your Honor, under Rule For Military
23 Commission 504(e), the authority given to the convening

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1 authority indicates that the convening authority shall set the
2 location of the trial. The convening authority has chosen
3 Guantanamo Bay, has weighed the costs and benefits and has
4 determined lawfully that this case should be held here in
5 Guantanamo Bay.

6 Again, it is just pure assertions, there's no
7 evidence to suggest that the accused is going to be biased by
8 the location here in Guantanamo Bay. The accused has a
9 statutory right to a fair and impartial trial. The accused
10 has the right to present evidence and witnesses, and that will
11 not change and has not changed because the trial is simply
12 located here in Guantanamo Bay.

13 The accused has certainly a right to counsel.
14 He's represented here today by four attorneys. He has the
15 right to expert assistance. The defense has brought expert
16 assistance down to the island. All of these rights come
17 together to ensure that there will be a fair and impartial
18 trial, which is exactly what we have had to date and which is
19 exactly what we'll have from this date because the location
20 which has been chosen by the convening authority in accordance
21 with the rules does not deprive him of any of those rights.

22 Absent any question, Your Honor, I'll submit on
23 that.

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1 MJ [COL POHL]: Thank you. Commander?

2 ADDC [CDR MIZER]: Judge, the provisions with respect to
3 the convening authority selecting the situs of the trial are
4 no different than those in the Manual for Courts-Martial. And
5 that's ultimately what was at issue in the Nivens case which I
6 referenced, was the power -- and in that case the military
7 judge and the convening authority got into a dispute as to
8 where the trial was going to be held, whether it was going to
9 be held in Port Hueneme or San Diego.

10 And so what ultimately goes up in Nivens -- one of
11 the aspects of that case is does the power to change venue go
12 beyond pretrial publicity as just suggested by the prosecutor?
13 And the C.A.A.F. answers that yes. And then the second is
14 that the military judge also has the power to change the
15 convening authority's determination. The quote on 423 is the
16 trial judge does have the power to determine the situs of the
17 trial to facilitate the preparation of the defense for the
18 convenience of the parties and the accused.

19 And there's one other aspect of this, Judge,
20 that -- from this opinion. I want you to know how great the
21 COMA thinks that you are. On page 424 of that case, "The
22 Congress of the United States has placed upon the shoulders of
23 the military judge the duty to conduct a fair and impartial

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1 trial. His judicial temperament and legal expertise are the
2 bedrock of criminal justice in the military." And then it
3 goes on to talk about the ability to resist the convening
4 authority, in this case the situs of the trial, "The system
5 cannot function if the convening authority is permitted to
6 usurp the powers of the military judge." And so COMA believes
7 that you have great power. I think in this instance, Judge,
8 you should exercise it.

9 If I can correct one thing that I said earlier. I
10 referenced Section 1033 of the NDAA. It's actually 1034 that
11 deals with the funds to transfer, Judge. And so 1033 deals
12 with modifying facilities, 1034 deals with the funds with
13 respect to transfer. And we know facilities don't need to be
14 modified, Judge, because as you will recall Hamdi, Padilla,
15 and Rasul were all held in military brigs as unlawful military
16 combatants, all in the Fourth Circuit, and there's no reason
17 to believe that Mr. Nashiri couldn't also be held in those
18 same facilities.

19 Judge, the problem here is, as we discussed last
20 Friday, that we've at least been given notice that the
21 prosecution's going to present a paper hearsay case in large
22 part, 72 statements, 66 witnesses. And at the very least we
23 should be allowed, if the government is going to be allowed,

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1 to do that, something antithetical to both military and
2 federal courts, that we have live witnesses, Judge, sitting in
3 the box over there to talk to witnesses.

4 That's what's behind the subpoena motion, and
5 that's what's behind the change of venue motion, Judge, that
6 we, and particularly this man, has the right to a fair trial,
7 the right to prevent prejudice to the accused and to secure
8 and obtain a fair trial, Judge, and that's really what is
9 behind a change of venue motion.

10 I have demonstrated more prejudice than will be
11 demonstrated in any court-martial at this point and justifying
12 a change of venue. There will be no doubt, again, if this was
13 a court-martial where the witnesses aren't here, the crime
14 scene's not here, the parties aren't here, the judge isn't
15 here, the connection to this place is entirely artificial,
16 Judge, and we ask you to use that great power that COMA talks
17 about in Nivens and change the location of this trial to
18 Norfolk, Virginia.

19 MJ [COL POHL]: Thank you. Anything further?

20 ATC [LT DAVIS]: Not from the government, Your Honor.

21 MJ [COL POHL]: Let's start 171. Or would you prefer us
22 to break for lunch and then start -- let's do this. It's
23 11:45 now, I'm rounding up. We'll go ahead and take the lunch

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1 break now and start that right after.

2 So commission is in recess for one hour.

3 [The Military Commission recessed at 1146, 24 February 2014.]

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