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1 [The R.M.C. 803 session was called to order at 0907,  
2 12 October 2016.]

3 MJ [COL POHL]: Commission is called to order. General  
4 Martins, any change in the prosecution team since we last  
5 recessed?

6 CP [BG MARTINS]: Good morning, Your Honor. No. I would  
7 note, Your Honor, though, that there's a -- my understanding  
8 is there's a member of the defense bar in the courtroom who  
9 has not yet been -- we've been told by the security personnel,  
10 been cleared by you to be in the SCIF. He's not a party to  
11 the proceeding.

12 MJ [COL POHL]: Okay. Let's go through the parties and  
13 we'll address that.

14 Mr. Nevin, any changes from yesterday?

15 LDC [MR. NEVIN]: No, Your Honor.

16 MJ [COL POHL]: I note Mr. Mohammad is here. No changes?

17 LDC [MR. NEVIN]: No changes.

18 MJ [COL POHL]: Mr. Bin'Attash is here.

19 Ms. Bormann, any changes?

20 LDC [MS. BORMANN]: Did you hear that? No, Judge.

21 MJ [COL POHL]: Mr. Binalshibh is here. Mr. Harrington,  
22 any changes?

23 LDC [MR. HARRINGTON]: No changes, Judge.

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1 MJ [COL POHL]: Mr. Ali is here. Mr. Connell, any  
2 changes?

3 LDC [MR. CONNELL]: No, sir.

4 MJ [COL POHL]: Mr. Hawsawi is absent. Mr. Ruiz, any  
5 changes?

6 LDC [MR. RUIZ]: No, Judge.

7 MJ [COL POHL]: So let's account for Mr. Hawsawi's  
8 absence, and then we'll go to the issue that General Martins  
9 just raised.

10 MAJOR, U.S. ARMY, was called as a witness for the prosecution,  
11 was previously sworn, and testified as follows:

12 DIRECT EXAMINATION

13 Questions by the Trial Counsel [MR. SWANN]:

14 Q. Major, you testified in yesterday's proceeding. You  
15 were given an oath at that particular point in time. Do you  
16 remember that oath?

17 A. I do.

18 Q. I remind you you are still under oath. Did you have  
19 occasion to advise Mr. Hawsawi of his right to attend this  
20 morning?

21 A. I did.

22 Q. What time did you do that?

23 A. I started reading the English version of the waiver

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1 at 0602 hours.

2 Q. All right. Did he execute the English version, or  
3 did he execute the Arabic version of this document?

4 A. I read him the entire document in English. He  
5 followed along with the Arabic version, and then I had the  
6 translator read the entire Arabic version to him, and he  
7 executed the Arabic version of the waiver form.

8 Q. All right. Were there any issues with respect to the  
9 execution of this waiver?

10 A. There were none.

11 Q. Do you believe he understood his right to attend this  
12 morning?

13 A. I do.

14 Q. All right. Now, I know he's not in attendance today.  
15 I think he elected to go take his medical -- excuse me, to  
16 take his legal meetings at Echo II today?

17 A. That's correct. Once he indicated that he did not  
18 want to come to the commissions, I asked if he wanted to  
19 attend the legal meetings that we schedule for them, and he  
20 indicated that he would accept his legal meetings this morning  
21 and this afternoon.

22 Q. All right. And the camp is going to make those  
23 available to him.

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1 A. That's correct.

2 TC [MR. SWANN]: I have in front of me Appellate  
3 Exhibit 458, consisting of three pages. I ask that it be made  
4 part of the record.

5 MJ [COL POHL]: Mr. Ruiz, any questions?

6 LDC [MR. RUIZ]: No, Judge.

7 MJ [COL POHL]: Thank you, Major. You are excused.

8 WIT: Thanks, Judge.

9 [The witness was excused.]

10 MJ [COL POHL]: General Martins.

11 CP [BG MARTINS]: Your Honor, before we move on from  
12 presence, I wanted to give you the opportunity to find that  
13 the individual, that the defendant has knowingly, voluntarily,  
14 and intelligently ----

15 MJ [COL POHL]: You're right. I do so find that  
16 Mr. Hawsawi's knowingly and voluntarily waived his right to be  
17 present here today after being informed of his right to be  
18 present.

19 Go ahead.

20 CP [BG MARTINS]: Your Honor, we're informed there is an  
21 individual here who may represent another detainee but who is  
22 in the courtroom and who is not one of the defense teams. Our  
23 understanding of the rule, the security team's understanding

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1 of the rules are that in the courtroom, you've got to approve  
2 individuals coming in who are not parties.

3 MJ [COL POHL]: Okay. Mr. Harrington.

4 LDC [MR. HARRINGTON]: Judge, the attorney they're talking  
5 about is Mark Denbeaux. He is one of Mr. Abu Zubaydah's  
6 attorneys, and he is here because we're going to argue 152JJJ  
7 and I was going to ask the court for permission for him to be  
8 here before it was brought up now. If the court feels he  
9 should not stay here until that issue is raised, or even when  
10 the issue is raised, we defer to your judgment.

11 LDC [MS. BORMANN]: Judge, can we turn up the microphones?  
12 I'm having a very difficult time hearing Mr. Harrington.

13 MJ [COL POHL]: Sure.

14 Well, we were going to do some other issues first.  
15 Why don't we just do 152JJJ now, and then he can remain for  
16 that motion, because I think he has a dog in that fight, and  
17 then we'll go on from there. So for that purpose, he's  
18 allowed to remain.

19 I know we're changing the order we talked about, but  
20 let's go ahead and do 152JJJ.

21 LDC [MR. HARRINGTON]: Judge, on 152JJJ, we are here  
22 seeking the court's overturning, essentially, of the convening  
23 authority's denial of a request that we made to them to grant

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1 testimonial immunity to a potential witness for Mr. Binalshibh  
2 on the 152 issue.

3           The reasons that the convening authority gave were  
4 that Mr. Abu Zubaydah's testimony would be cumulative, that  
5 there was a heavy burden on the proponent of the witness, and  
6 that the issue was collateral to guilt or innocence.

7           INT: Your Honor if Mr. Harrington can speak closer to the  
8 microphone, please.

9           LDC [MR. HARRINGTON]: I don't know how I can get closer,  
10 Judge. I'll speak up.

11          MJ [COL POHL]: Well, you can speak up a little louder.  
12 Go ahead.

13          LDC [MR. HARRINGTON]: And, Judge, essentially, the court  
14 has to review the criteria of Military Rules of Evidence 704  
15 subdivision (e), and the first is that the witness intends to  
16 invoke his constitutional or statutory right to refuse to  
17 answer a question.

18                If you recall, when we were here, I think it was in  
19 June, June 2, we proposed Mr. Abu Zubaydah as a witness. And  
20 he appeared at that time with his military lawyer, Commander  
21 Patrick Flor, and he advised that if there were going to be  
22 questions of Mr. Abu Zubaydah the same as or similar to the  
23 questions that were asked of the other witness that we

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1 proposed, that he was going to invoke that right.

2           And Mr. Ryan confirmed the fact that he did intend to  
3 make such inquiry on cross-examination, going to truthfulness  
4 and potential bias. And at that time we obviously abated that  
5 witness testifying and allowed this request to the convening  
6 authority to be made and this motion to be filed with the  
7 court. So I think the first prong of 704(e) is clearly met.

8           The second is whether the government is gaining a  
9 tactical advantage or overreaching in the denial of -- or the  
10 objection to the granting of immunity. In this particular  
11 case, we've alleged in our brief, and I'll go into it in more  
12 detail in a moment, but that there is a tactical advantage to  
13 the government, which amounts to an abuse, and that the court  
14 should consider this.

15           And lastly, the criteria is that the testimony is  
16 material and cannot be obtained through another source, and I  
17 will go through our reasons for that, also. There is a  
18 criteria in there that talks about that it's exculpable which  
19 I will attempt to deal with also.

20           Judge, before I go into that, I mean, I think that  
21 the question of testimonial immunity, really the foundations  
22 for it and the reasons that there are restrictions on it  
23 happening are in the case where someone is charged with an

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1 offense and they bring in a witness who seeks testimonial  
2 immunity, and then that witness comes in and admits that  
3 they're the one that committed the crime and that the person  
4 on trial is not the one that committed the crime, and the  
5 person on trial is acquitted, and the person that testifies  
6 can't be convicted because there's not independent evidence  
7 against the person other than the admission in court.

8           That was not -- obviously not the situation here.  
9 This is not about the guilt or innocence of my client and it's  
10 about a secondary issue.

11           Judge, with respect to the overreaching by the  
12 government, a little history has to be presented to the court  
13 about Mr. Abu Zubaydah. He has been in custody for 14 years  
14 by the United States Government. There is an extensive report  
15 about him in the Senate Select Committee on Intelligence about  
16 what -- the treatment that he endured after he was arrested.

17           No charges have ever been filed against him. Based  
18 upon our investigation and the representations by the  
19 government in their response, there does not appear to be any  
20 charge whatsoever that he is being considered for that would  
21 be a capital charge which would invoke arguments about statute  
22 of limitations and other potential defenses. But there's no  
23 allegation that I'm aware of that he has anything to do with

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1 the underlying charges that we face in this particular case.

2           There has been reference to him by the prosecution  
3 and vague threats that he may be charged. Back in May of  
4 2002, he was named -- he was on a list of persons that were --  
5 could potentially be charged. In 2014 in a letter which we've  
6 attached to 152JJJ Attachment E, there's a letter from General  
7 Martins that does not have him on the list, which -- of  
8 persons that are potentially going to be charged by 2019. And  
9 then in Mr. Ryan's response to 152JJJ, he kind of waffles a  
10 bit on it, but says that they have other information and that  
11 the final decision has not been made.

12           But the reason that we believe that there's  
13 overreaching here by the government is that if they had  
14 evidence to charge him, they could easily have done it. He is  
15 a very high profile name. He was the original person that the  
16 torture program was used by -- on, and he is somebody who has  
17 been written about widely, and there is a -- we've quoted in  
18 our brief from the SSCI a CIA cable that said "Seeking  
19 reasonable assurances that Mr. Abu Zubaydah will remain in  
20 isolation and incommunicado for the rest of his life."

21           So it's our argument that the government has other  
22 motivation to keep Mr. Abu Zubaydah silenced without charging  
23 him and that that is an abuse of his potential rights and a

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1 detriment to us which the court should consider in terms of  
2 determining whether we meet that prong.

3           Then the issue of why he is important in this case is  
4 the convening authority said that his testimony would be  
5 cumulative, and we submit to you that it would not. It would  
6 confirm testimony of Mr. Binalshibh. It would confirm  
7 testimony of Mr. Gouled.

8           But we call him, Judge, because he has a special role  
9 within Camp VII, and he has testified by the -- as testified  
10 by the previous camp commander in both unclassified and  
11 classified testimony. And I won't refer to what was said in  
12 the classified testimony. But in the unclassified testimony,  
13 he acknowledged that Mr. Zubaydah was a representative for the  
14 tier on which Mr. Zubaydah lives, and Mr. Zubaydah lives on  
15 the same tier with Mr. Binalshibh.

16           And the reason that his testimony is different and  
17 that it's not cumulative is that he can present the court with  
18 information not only about what we claim is happening at the  
19 camp, but also on efforts to mitigate or remove that problem.  
20 And his trustworthiness comes from the fact that the camp  
21 commander deals with him regularly on many issues. It's not  
22 just on Mr. Binalshibh's complaints.

23           He deals with him on many issues that arise within

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1 the camp, and he would testify to that, and the procedures  
2 that are followed, the good faith between them, their attempts  
3 to work compromises out, and he brings an entirely different  
4 perspective to this situation.

5 He also, Judge, has a unique view of the frustration  
6 experienced by Mr. Binalshibh. I would assume that Mr. Ryan,  
7 in cross-examination, would ask questions about that and about  
8 Mr. Binalshibh's complaining and other things that the court  
9 should consider. And we don't disagree that that is -- those  
10 are fair game. That goes right to the heart of the issue that  
11 we have. But we also would note, Judge, that he can testify  
12 that Mr. Binalshibh's frustration arises from the problems  
13 that he faces within the camp.

14 Yesterday morning, Judge, we had an incident in the  
15 court. We haven't had one for a very long time.  
16 Mr. Binalshibh has been here and compliant for many, many  
17 hearings. But yesterday we were at one of those points, one  
18 of those boiling points, and there was comments that he made  
19 to the court. The court removed him from here. And  
20 Mr. Binalshibh said yesterday that he wasn't coming back. And  
21 you basically said to him you will do what I tell you to do  
22 within the courtroom. And he obviously was upset, there's no  
23 question about that.

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1           And I met with him three times before the afternoon  
2 session and, fortunately, was able to assist him. And based  
3 upon, you know, the efforts of many years of trying to work  
4 through issues, able to get him to agree to come to the court  
5 and not do something because of his frustration or his anger.  
6 And, fortunately, that was accomplished. But Mr. Abu Zubaydah  
7 can testify to what it's like and what the outbursts from  
8 Mr. Zubaydah -- or Mr. Binalshibh are and what causes them.

9           Judge, in addition to the statutory prongs which we  
10 believe that we have met, we also cite to the court  
11 Murphy v. Waterfront Commission. That's an old case. It's an  
12 old Supreme Court case. The reason it's cited to court is  
13 Murphy holds that in any hearing or any trial, if someone  
14 refuses to answer a question by the invocation of a right  
15 against self-incrimination and the court directs the witness  
16 to answer the question, that that confers immunity on the  
17 person, not immunity from prosecution, but immunity from using  
18 his -- the person's testimony against him.

19           And that makes sense, because the witness is in a  
20 situation where he has a Hobson's choice: Say something that  
21 may be incriminating against him resulting in criminal  
22 charges, or disobey a court order and face the ----

23           MJ [COL POHL]: Wouldn't that order be basically de facto

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1 immunity, then?

2 LDC [MR. HARRINGTON]: Testimonial immunity.

3 MJ [COL POHL]: Yes.

4 LDC [MR. HARRINGTON]: That's what Murphy says. That's  
5 what Murphy says. But, I mean, it's something other than  
6 what's in the statute. The importance of Murphy, Judge, is  
7 this wasn't in a hearing. This was an administrative law  
8 judge. There was nothing in the procedures or anything that  
9 allowed that administrative judge to grant immunity to  
10 somebody. A person asserted the Fifth Amendment right, and  
11 the judge told him that he hadn't answered the question. And  
12 the Supreme Court found that when the judge, no matter what  
13 the level of the judge, directs a person to answer the  
14 question, that, in effect, is de facto immunity.

15 MJ [COL POHL]: But under those facts, the judge didn't  
16 have the authority to do that, but you weren't going to  
17 penalize the witness for obeying a judicial order that is  
18 ultra vires.

19 LDC [MR. HARRINGTON]: That's correct. But it doesn't  
20 exclude other courts from doing the same thing. The fact that  
21 there is a procedure there does not mean that a decision by  
22 the United States Supreme Court cannot apply to the court.  
23 You always refer to the fact that you are a statutory court,

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1 not an Article III court, which we recognize.

2 MJ [COL POHL]: Uh-huh.

3 LDC [MR. HARRINGTON]: But I'm just trying to represent to  
4 the court that the Supreme Court has recognized the very broad  
5 authority of trial judges or hearing officers in this.

6 Judge, there are two types of -- and two separate  
7 rules here about the cross-examination, and the first is  
8 608 subdivision (b) which talks about the truthfulness of the  
9 witness in cross-examination about conduct for which the  
10 person has not been convicted, which is what we would be  
11 dealing with in this situation, because Mr. Abu Zubaydah  
12 has -- my understanding, is not going to be cross-examined  
13 about any convictions or potential convictions that he has.

14 And that rule provides you can't bring in extrinsic  
15 evidence. But the rule also has a caveat about that the  
16 person is not waiving their right against self-incrimination  
17 with respect to the truthfulness. And I think a reasonable  
18 reading of that statute would be that the person could assert  
19 his Fifth Amendment right and still be allowed to testify  
20 because the statute provides for it.

21 Now, it says in there that it only -- it doesn't  
22 apply to everything, because if we're talking just about the  
23 issue of the person's character for truthfulness, we're not

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1 talking about the underlying events itself. So the person  
2 couldn't bring that argument against questions concerning the  
3 issue at hand before the court, but only to the collateral  
4 issue.

5           Then the second basis of cross-examination under  
6 608(c) would be evidence of bias, which does not relate to --  
7 does not say in there that there's a separate right of  
8 self-incrimination. But I think what that means is the right  
9 of self-incrimination that I referenced to before on the  
10 truthfulness issue applies. And with respect to bias, it  
11 would be my position that you don't give up your right against  
12 self-incrimination and that that has to be treated a little  
13 bit differently, and the rule is written a little bit  
14 differently.

15           But, of course, we go to what the -- obviously, it is  
16 a trial issue, what the extent of the cross-examination is  
17 going to be allowed to happen. But that would happen question  
18 by question, and obviously we'd address it at the time of the  
19 questioning.

20           MJ [COL POHL]: Mr. Harrington, let me ask you this:  
21 Looking at 704(c)(1), it talks about immunity for these  
22 accused and their status. One thing it mentions is that  
23 before the convening authority may grant immunity to a person

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1 subject to 47(a) of Title 10, before it extends to prosecution  
2 in district court, it must be specifically authorized to do so  
3 by the attorney general of the United States, pursuant to  
4 18 U.S. Code 6004.

5 LDC [MR. HARRINGTON]: Right.

6 MJ [COL POHL]: So don't we have another issue here that,  
7 even if I were to grant your testimonial immunity for these  
8 proceedings, that it would not necessarily cover if some day  
9 in the future they wanted to try him in federal court?

10 LDC [MR. HARRINGTON]: Absolutely. I agree with that,  
11 Judge. I don't disagree with that. And, Judge, the immunity  
12 that we're asking for here is not transactional immunity.  
13 It's testimonial immunity.

14 MJ [COL POHL]: No, I understand that. But if I granted  
15 it, would it be binding on federal district court without  
16 prior coordination with the attorney general?

17 LDC [MR. HARRINGTON]: I think not, Judge. I think it  
18 would be an independent decision that a federal judge would  
19 have to make based upon what it is that he was going to  
20 testify about.

21 MJ [COL POHL]: Then even if I were to grant the  
22 testimonial immunity for this court, would he still have a  
23 right not to testify because he's subject to -- subject to

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1 prosecution in a federal court, and they could use the  
2 questions -- or the answers to the questions in this court,  
3 this commission, in that court? How does it protect him from  
4 use of the statements for that?

5 LDC [MR. HARRINGTON]: Judge, the protection that he would  
6 get from your grant of immunity would be limited to his  
7 testimony regarding truthfulness and bias in this case, and it  
8 would be limited to those questions that were asked of him.

9 If at some point in time he were called as a witness  
10 in federal court, there would have to be an independent  
11 determination made by the federal court.

12 MJ [COL POHL]: What if he was a defendant in federal  
13 court?

14 LDC [MR. HARRINGTON]: Fine. What if he was a defendant  
15 in the commission?

16 MJ [COL POHL]: No, but I'm saying if he was a defendant  
17 in the commission ----

18 LDC [MR. HARRINGTON]: Right.

19 MJ [COL POHL]: ---- and he gets testimonial immunity in  
20 the commission process, it would seem to me that the  
21 statements that he made under that grant of immunity cannot be  
22 used against him in a commission case.

23 LDC [MR. HARRINGTON]: Right.

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1 MJ [COL POHL]: Okay. But I'm saying is, is there  
2 anything to prohibit the United States Government from using  
3 the statements, the immunized statements in the commission  
4 case, against him if he were to be a defendant in a ----

5 LDC [MR. HARRINGTON]: I'm sorry.

6 MJ [COL POHL]: ---- in a district court.

7 LDC [MR. HARRINGTON]: I'm sorry. I misunderstood your  
8 question.

9 MJ [COL POHL]: Okay.

10 LDC [MR. HARRINGTON]: The answer is yes, your granting of  
11 immunity would protect him any place.

12 MJ [COL POHL]: Notwithstanding that provision in the  
13 rule.

14 LDC [MR. HARRINGTON]: But that provision is about some  
15 application that he's making for immunity or someone else is  
16 making for immunity in the new case.

17 I mean, Judge, in any case where immunity is granted,  
18 the prosecution has the burden, and one of the things that  
19 they complain about is -- and the convening authority found,  
20 that it would be difficult for the prosecution to overcome the  
21 argument that the prosecution didn't have independent  
22 evidence -- you know, which I think is really pretty specious,  
23 if ----

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1 MJ [COL POHL]: It comes up in every immunity case.

2 LDC [MR. HARRINGTON]: After 14 years, if they don't have  
3 it, his testimony or his admissions here and after all of the  
4 admissions that he made at the time when he was in U.S.  
5 custody, it's pretty farfetched to think that there's going to  
6 be something that they don't have.

7 MJ [COL POHL]: But it's your position -- back to my  
8 original question: It's your position that if he were -- if I  
9 gave him immunity for this proceeding, that immunity would  
10 also apply to any subsequent, if there was in the future,  
11 federal proceeding where he was a defendant?

12 LDC [MR. HARRINGTON]: Yes.

13 MJ [COL POHL]: Okay.

14 LDC [MR. HARRINGTON]: But just to the questions ----

15 MJ [COL POHL]: Absolutely, just for what was covered in  
16 here.

17 LDC [MR. HARRINGTON]: And I've never seen a defendant in  
18 a federal charge be asking for immunity to testify.

19 MJ [COL POHL]: Well, that's not my point. I'm not asking  
20 for -- I think maybe we're talking across each other. What  
21 I'm saying is if he's asked a question here under -- let's  
22 say, did you do X, and X is going to an inculpatory event, and  
23 for some reason he says yes; and his immunity would cover any

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1 subsequent commission prosecution of him, however unlikely  
2 that may be.

3           But if he were then tried in federal court, the law  
4 changes -- they take every -- they close GTMO and move  
5 everybody to CONUS and they try him in federal court -- would  
6 my grant of immunity in a commission case cover that statement  
7 if they wanted to use it against him as a defendant in federal  
8 court? That's my question.

9           LDC [MR. HARRINGTON]: I say yes.

10          MJ [COL POHL]: Okay.

11          LDC [MR. HARRINGTON]: I don't think there's any question  
12 about it.

13          MJ [COL POHL]: Despite this provision that requires prior  
14 coordination? Although it does talk about the convening  
15 authority, not me, I understand that. But it would seem to me  
16 there seems to be some concern that any grant of immunity  
17 would have to be coordinated, or do you believe that only  
18 applies to the convening authority in that if I granted the  
19 immunity, then I would not have to -- well, it would cover any  
20 subsequent criminal proceeding regardless of forum.

21          LDC [MR. HARRINGTON]: It would. It would have to, Judge.  
22 Otherwise there's no -- let's say the convening authority had  
23 granted it to him.

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1 MJ [COL POHL]: Uh-huh.

2 LDC [MR. HARRINGTON]: He came in here and that question  
3 was hanging over his head, he wouldn't testify, either.

4 MJ [COL POHL]: Right. But the rule is very clear what  
5 the convening authority has to do ahead of time before it  
6 grants immunity.

7 LDC [MR. HARRINGTON]: Right.

8 MJ [COL POHL]: But it applies to the convening authority.  
9 It doesn't necessarily apply to me. I got that. Go ahead,  
10 Mr. Harrington.

11 LDC [MR. HARRINGTON]: Judge, one of the things is, I  
12 mean, Mr. Ryan made some statements to the court about things  
13 that he might ask Mr. Abu Zubaydah just in general terms, and  
14 in his response he went through other things that he would  
15 want to question him about. Whether you will allow him to ask  
16 those questions is obviously going to be taken at the time  
17 that the questions are asked, whether they're -- before we get  
18 to the immunity issue or asserting the Fifth Amendment right,  
19 whether they're even relevant or whether they're proper  
20 cross-examination. We understand that.

21 But it's interesting to note that Mr. Ryan writes  
22 about the charges against my client, and seems to imply that  
23 because he has really serious charges against him, he

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1 shouldn't have the audacity to be in here asking for  
2 something. And then he attempts to say that Mr. Abu Zubaydah,  
3 without you having heard him, is unworthy of belief.

4 And yet in the same response he puts in there  
5 admissions that Mr. Abu Zubaydah made after he was arrested  
6 when he was in intensive care after almost dying under  
7 questioning by U.S. authorities, that those apparently show  
8 that he's truthful, and it's just -- it's the height of  
9 hypocrisy, I think.

10 Judge, one of the prongs here talks about that the  
11 testimony is supposed to be exculpatory, and we concede that  
12 that's a difficult problem for us in this particular case  
13 because the testimony that we propose is not about the  
14 underlying guilt or innocence of my client, and it's not that  
15 the witness is getting up on the stand and saying I did this,  
16 and Mr. Binalshibh didn't do it, which, as I mentioned  
17 earlier, is the normal way that immunity is considered.

18 But we proffer to the court that the government is  
19 claiming that Mr. Binalshibh is presenting false evidence to  
20 the court, and that with respect to that issue, Mr. Abu  
21 Zubaydah can help to corroborate what he says.

22 And that also they cite the case of  
23 United States v. James. And I ask the court to consider when

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1 you review that case is that James was a case where immunity  
2 is denied, and on appeal the defendant is trying to get it.  
3 So the James case is really about the standard of review.  
4 It's not necessarily a case about the fact that the court  
5 didn't have the discretion to do it, if the court felt that it  
6 should.

7           Judge, we have like a progression of remedies that  
8 we're asking you to consider. The first is that, obviously,  
9 that you grant the immunity or direct the convening authority  
10 to grant the immunity based either on the statutory basis or  
11 on the Murphy case, but that if you deny immunity, that you do  
12 not prohibit Mr. Abu Zubaydah from testifying, that you allow  
13 him to testify, and that you treat his answers under 301(f)(2)  
14 as you would treat any other witness' testimony.

15           And the rule does give you the authority to strike in  
16 whole or in part testimony, and we believe that you could do  
17 that, but you can't do that until after you actually hear the  
18 testimony and hear the assertions of the Fifth Amendment.  
19 With the issue that's at hand here, we believe that the court,  
20 if answers are -- if he doesn't have immunity and answers are  
21 refused to be answered because -- claiming the  
22 self-incrimination privilege, that the court can take an  
23 adverse inference from the answer.

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1 MJ [COL POHL]: Mr. Harrington, I'm not sure of the exact  
2 number, and I don't -- I'm not sure whether it's classified or  
3 not, but there are a number of individuals in Camp VII,  
4 correct?

5 LDC [MR. HARRINGTON]: Yes.

6 MJ [COL POHL]: One of the -- and one of the prongs here,  
7 (e)(3) of 704, talks about that the witness testimony is  
8 material, clearly exculpatory, and clearly not cumulative and,  
9 the one I'm going to focus on, not obtainable from any other  
10 source. And we have also heard from one other source already.

11 LDC [MR. HARRINGTON]: Right.

12 MJ [COL POHL]: We've also heard from your client. Are  
13 you saying that Mr. Zubaydah is the only other source that can  
14 provide this testimony?

15 LDC [MR. HARRINGTON]: It depends on which part of the  
16 testimony we're talking about, Judge. He certainly can  
17 provide testimony that nobody else has been able to provide  
18 with respect -- which counters what the camp commander said,  
19 which is why it's important, with respect to how  
20 Mr. Binalshibh reacts, what he has been able to do to mollify  
21 the situation.

22 MJ [COL POHL]: He's the only one who has seen this?

23 LDC [MR. HARRINGTON]: No, he's not the only one who has

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1 seen it, but he's the only one that participates in the  
2 efforts in the camp, which the court really needs to hear  
3 about this issue, and it helps the court to validate the  
4 credibility of Mr. Binalshibh.

5 I mean, the government has said that this stuff is  
6 all a fiction. It's not happening. We understand what their  
7 position is, and I didn't -- we didn't come in here with eight  
8 witnesses to come in and say the same thing. Mr. Gouled came  
9 in and talked about it, because he said the same thing happens  
10 to him, and that helps Mr. Binalshibh's claim. Mr. Zubaydah  
11 says the same thing happens to him. Now, you could say that  
12 that's cumulative, but it doesn't seem to me that two  
13 witnesses saying that's cumulative. At some point in time,  
14 you do reach a point where it does become cumulative.

15 But we have a situation here of the people that we  
16 can bring to testify are the detainees. Prosecution has the  
17 camp commander, who has got a stake in this just -- you can  
18 say Mr. Binalshibh does, too. But the camp commander does not  
19 want to be found to be somebody who is not complying with your  
20 order, and his guards are under his control. We don't have  
21 any place else to go to bring witnesses to you, and this is  
22 what it is.

23 But Mr. Abu Zubaydah brings a totally different

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1 perspective on it because of his role in the camp, but not  
2 only because of his role in the camp, but because of the fact  
3 that he has some credibility that the other two witnesses, my  
4 client and Mr. Gouled, may not have because of the  
5 cross-examination that was done with him.

6           And Mr. Abu Zubaydah has a relationship where people,  
7 including the camp commander, trust him. And even if he came  
8 in and Mr. Ryan went crazy yelling at him about all of these  
9 things from 15 and 20 years ago, you have somebody who's going  
10 to come in and has a track record now, and a recent track  
11 record, of being credible. And that's not cumulative. We  
12 need that in order to convince you that what we are alleging  
13 is in fact -- is in fact true.

14           Because, Judge, you still have to -- with any  
15 witness, I mean, you could find that he's biased. You could  
16 find that he was untruthful about something. That does not  
17 necessarily mean that you exclude his entire testimony. You  
18 may exclude some of it. You may exclude none of it. You have  
19 to go through and examine his demeanor and his history, recent  
20 history, all sorts of other things in doing what you do all  
21 the time in making the determination about the credibility of  
22 somebody.

23           So, Judge, the first thing that we would say with

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1 respect to this and his testimony is not to preclude him from  
2 testifying and not to strike his testimony until such time as  
3 he finishes his testimony and the criteria that are needed are  
4 raised by the government, but that's a better point in time to  
5 do it.

6           Judge, I can tell you in my experience in federal  
7 court, where this issue comes up -- and usually it's about the  
8 guilt and innocence -- but what most federal judges do, they  
9 have the person come in and testify outside the presence of  
10 the jury so you can make a record of it and so there's an  
11 appeal record of it, but the testimony is allowed to be put on  
12 the record.

13           In our particular case, I'm not asking you to do  
14 that, obviously, because you're the fact-finder. I mean, it  
15 would be silly to come in and say do this just as a proffer,  
16 and then say, okay, let's do it again. So that's really not a  
17 viable issue.

18           Judge, I mentioned earlier, the example of yesterday  
19 and the fact that we had to make efforts to calm that  
20 situation down and get it calmed down and have Mr. Binalshibh  
21 here without further delays. But this underlying issue which  
22 you've heard from me and you've heard from Lieutenant  
23 Commander Bogucki before is something that drives a dagger

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1 right through our attorney-client relationship.

2 It affects the preparation of our case.

3 Mr. Binalshibh has testified it affects his ability to sleep,  
4 it affects his ability to read, it affects his ability to  
5 pray. This is not an insignificant issue with respect to our  
6 representation of Mr. Binalshibh.

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

8 Trial Counsel? Mr. Ryan.

9 TC [MR. RYAN]: Good morning, Your Honor.

10 MJ [COL POHL]: Good morning.

11 TC [MR. RYAN]: Your Honor, we are here today on the very  
12 serious issue of judicially imposed testimonial immunity for  
13 someone with a legitimate concern for self-incrimination in  
14 any testimony he would give.

15 Ramzi Binalshibh comes to this court and asks the  
16 commission to hold in contempt the guard force or parts of it  
17 or entities connected to it for actions he claims they are  
18 doing to him specifically. His claims are that the guard  
19 force has been engaging for years now in efforts to harass  
20 him, intimidate him, interfere with his ability to defend  
21 himself, interfere with his ability to be represented by  
22 counsel.

23 It all comes down to, as we've heard over and over,

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1 that Mr. Binalshibh says the people, the guard force at  
2 Camp VII shakes his cell, puts out interfering noises, I  
3 believe smells have come up as well. And in this case we've  
4 had the benefit of Mr. Binalshibh actually taking the witness  
5 stand to testify as to these different complaints that he has.

6 He states that it happens in his Charlie rec area,  
7 that the noises are made on the fences around him, that  
8 vibrations and noises come out of the shower drain, that  
9 noises and vibrations are done in the toilet. He testified  
10 that the guards -- as evidence, that the guards are doing this  
11 intentionally, that they wait and watch him and wait for him  
12 to be on the verge of falling asleep or begin to read or write  
13 as part of his representation, and they begin effecting those  
14 noises and vibrations at that particular time.

15 He testified that the guards have the ability and do  
16 in fact move the vibrations to follow him wherever he might be  
17 at the particular time so that the vibrations are in contact  
18 with his body where he is sitting or where he is lying or  
19 where he is standing.

20 He testified that these vibrations come from some  
21 sort of a machine that he can't see. He testified that every  
22 guard is in on this subversive plot, and in fact through the  
23 years, as Your Honor knows, as the units have rotated, every

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1 unit is in on this subversive plot.

2           Significantly and finally, I will note this, he  
3 testified very clearly that he considers the United States of  
4 America to be his enemy.

5           Ramzi Binalshibh called as a witness a man named  
6 Gouled Dourad -- I believe I'm saying it correctly -- who was  
7 a fellow detainee. I won't go into great detail, nor will I  
8 comment at this time upon his credibility, but I think it's  
9 fair to say that he generally supported the testimony of Ramzi  
10 Binalshibh and did in fact note that Ramzi Binalshibh is known  
11 for complaining more than anyone else.

12           Binalshibh also called as a witness a man  
13 identified -- an Army major identified as the current  
14 commander, which he was at the time, although he no longer is.  
15 His testimony in significant part noted that the facility is  
16 constructed of concrete and steel, in general terms. He did  
17 in fact concede that there are noises that occur in such a  
18 facility, although he described them as the normal types of  
19 noises you would expect. There are big doors that are made of  
20 heavy substances, and when they close they tend to make noise.

21           There are different things that must go on in terms  
22 of maintenance: Things break down, air conditioners have to  
23 be fixed, et cetera. Furthermore, there are different devices

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1 that by their nature put out certain degrees of noise, that  
2 includes the air conditioner.

3 He testified that Ramzi Binalshibh has been the only  
4 one who has complained as to any sort of unexplained or  
5 out-of-the-ordinary noises and vibrations. He testified that  
6 through the course of time Binalshibh's complaining has led to  
7 or has risen to the level of becoming very loud, being  
8 disrespectful, and at times, not only through his testimony,  
9 but through other evidence, we know that it also reached  
10 levels of threats.

11 He testified that he has personally conducted  
12 inspections in the camp and found no evidence of any sort of a  
13 machine or anything else that would be causing these kinds of  
14 vibrations and noises complained of. He found no voids in  
15 cells or -- and I note that other officers have -- there's  
16 been evidence of other officers conducting similar inspections  
17 and making similar findings.

18 He has noted -- he noted in his testimony that the  
19 order of the military judge, Your Honor, is in fact in place.  
20 He understands that and understands his obligation to follow  
21 it, as do all of his soldiers. We have had evidence that in  
22 fact the order itself is taped on or near Binalshibh's cell so  
23 that everyone is constantly reminded of it. The current camp

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1 commander also testified that if, in fact, he ever were to  
2 find that one of the soldiers under his command, or for that  
3 matter anyone else, was conducting this kind of activity, he  
4 would have immediately removed the soldier and requested an  
5 investigation.

6 Mr. Binalshibh, with the evidence that's on the  
7 record currently before Your Honor, is not satisfied. He now  
8 seeks to call as a witness Abu Zubaydah, a fellow detainee, as  
9 a witness. Mr. Binalshibh has already gone to the convening  
10 authority and requested such immunity pursuant to the rules,  
11 and it was denied. They now ask Your Honor to compel such  
12 testimony through the use of judicially imposed immunity.

13 I note, Judge, that in their petition first to the  
14 convening authority and in their motion to Your Honor, there  
15 is no description of what Zubaydah would testify to in regard  
16 to noises and vibrations other than the simple notation of the  
17 word noises, and then following on with observations that he  
18 would support the fact that Binalshibh complains about it a  
19 lot and gets very upset, none of it which is in dispute. No  
20 one knows better than the guard force and, through them, us,  
21 the prosecution, that Binalshibh complains loud, hard, often,  
22 in an aggressive and threatening manner.

23 So really we're down to the issue, at least according

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1 to their petition and their motion, that he would testify to  
2 noises. And again, I note the current camp commander in his  
3 testimony readily acknowledged that a place like this has  
4 noises in it.

5           Unlike in the civilian world, there is actual rules  
6 governing the use of judicially imposed immunity in  
7 commissions and in courts-martial. And I think that helps us  
8 in giving us a roadmap, as Your Honor may have seen from some  
9 of the case law we cited. Civilian courts, Judge, for the  
10 most part avoid the issue of judicial immunity like the  
11 plague.

12           There is a U.S.C. statute that governs it as a  
13 possibility, but it's completely in the hands of the Justice  
14 Department, and courts often and frequently, readily state  
15 that that's where it belongs, that they wish to get not  
16 involved at all in these difficult and -- choices that require  
17 an awful lot of knowledge and strategy, calls that the courts  
18 feel unwilling and unable to make.

19           But as I said, here we have a roadmap, and that's  
20 704. I believe it's very similar to or pretty much identical  
21 to the rule for courts-martial as well, so therefore Your  
22 Honor may have had experience with it as well.

23           In relevant part, it reads, "The military judge may,

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1 upon motion by the defense, grant appropriate relief directing  
2 that either an appropriate convening authority grant  
3 testimonial immunity to a defense witness or, as to the  
4 affected charges and specifications, the proceedings against  
5 the accused be abated, upon findings that, one, the witness  
6 intends to invoke the right against self-incrimination; and  
7 two, the government has engaged in discriminatory use of  
8 immunity to obtain a tactical advantage, or the government,  
9 through its own overreaching, has forced the witness to invoke  
10 the privilege against self-incrimination; and three, the  
11 witness testimony is material, clearly exculpatory,  
12 noncumulative, nonobtainable from any other source and does  
13 more than merely affect the credibility of other witnesses."

14           The three prongs, Judge, are in the conjunctive. All  
15 three must be met for immunity to be considered. As we note  
16 in our pleading ----

17           MJ [COL POHL]: Mr. Ryan, slow down, please.

18           TC [MR. RYAN]: I'm sorry.

19           MJ [COL POHL]: Go ahead.

20           TC [MR. RYAN]: As we note in our pleading, we have no  
21 quarrel with the first prong, for obvious reasons. Counsel  
22 has indicated that the accused would, in fact, invoke and we  
23 understand that and accept that.

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1           Number two and number three, where the argument lies,  
2 Binalshibh's argument as to number two is that because we have  
3 detained this, I submit to you, dangerous enemy of this  
4 country who was part of a group that waged war against the  
5 United States, that that somehow amounts to overreaching and  
6 we have forced Zubaydah to invoke his right against  
7 self-incrimination, and I think this is a tremendous confusion  
8 of the issues.

9           The concern, the justifiable concern of  
10 Zubaydah incriminating himself is utterly unconnected to where  
11 his current geographical location happens to be. If he was to  
12 walk into this courtroom free as a bird and say I'm ready to  
13 testify, he would have the same -- as long as his background  
14 was the same, he would have the same justifiable concerns for  
15 his right against self-incrimination. His past is his past.  
16 Where he happens to be is not connected to it. And as for the  
17 issue of whether they like the fact that he's been locked up  
18 for 14 years or not is a matter for, I would suggest, another  
19 hearing, another setting, another case, probably.

20           They offer no authority to support their claim that  
21 it's the government's fault on this. The reality, as I've  
22 said, Judge -- and we've put very small bits in our pleading  
23 about his background, and I wanted to stick with just the

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1 things that are readily publicly available. So it's the SSCI  
2 Report and the 9/11 Commission Report. But there's a great  
3 deal more than that which we would be able to get into, or we  
4 submit we would be able to get into.

5 Now, I want to take this moment to address this. In  
6 the past, we heard it in the testimony of Gouled. We heard it  
7 in the -- at the point at which Zubaydah was ready to take the  
8 stand. Counsel for both Zubaydah and for Binalshibh were  
9 objecting to the government's ability to question Zubaydah  
10 about his prior criminal activities prior to the time he was  
11 arrested and detained. And they called it at times collateral  
12 and irrelevant.

13 I think this is important, Judge, and I want to  
14 address it here briefly. We use the terms like bias and  
15 untruthfulness as sort of the labels within the law that exist  
16 that govern these kinds of situations. And within the law,  
17 the rules that we live by, including the rules of evidence,  
18 apply to the full spectrum of every case and every witness and  
19 every piece of evidence that Your Honor may end up hearing.

20 So in a certain case, we could say that, you know,  
21 bias might be brought up for a witness who happens to be  
22 friends with the defendant, and I could -- and a prosecutor  
23 could point that out as evidence that he was biased possibly

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1 in favor of the defendant. Or if the witness had a gripe  
2 against the United States military and he was testifying in a  
3 military case, we could point that out. And that would be  
4 evidence of bias. And untruthfulness, shoplifting when he was  
5 a child or something along those lines, I call that out on the  
6 sort of most benign end of the spectrum.

7           And a fact-finder might attach a lot of weight to  
8 something, might attach very little, but that's in the eyes of  
9 the fact-finder. A judge controlling what is going before the  
10 fact-finder makes his own calls about how useful it is or how  
11 useful it is not, and from there we continue on.

12           This is not that situation. If I'm talking about it  
13 in terms of a spectrum, I've now leapt to the very, very, very  
14 far end of the other side of the spectrum. What we have here  
15 is a witness who wants to take the stand with the protections  
16 of this court through immunity to testify as a self-avowed  
17 enemy of the United States testifying on behalf of another  
18 self-avowed enemy of the United States.

19           The testimony he would get into would concern  
20 numerous activities that he specifically was involved with,  
21 certain ideologies to which he subscribed, which puts him,  
22 number one, very close to the accused.

23           MJ [COL POHL]: Does the degree of inculpatory statements

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1 figure in the equation of whether or not to grant immunity?  
2 By that I mean you seem to be saying, you know, there's the  
3 shoplifting bias ----

4 TC [MR. RYAN]: Yes, sir.

5 MJ [COL POHL]: ---- and then there's the enemy of the  
6 U.S. bias.

7 TC [MR. RYAN]: Yes, sir.

8 MJ [COL POHL]: Okay. Does that fit in the rubric of  
9 whether or not you get immunity?

10 TC [MR. RYAN]: No, sir.

11 MJ [COL POHL]: As long as it is a self-incriminatory  
12 activity or statement.

13 TC [MR. RYAN]: Right. Shoplifting is the same in terms  
14 of the immunity question alone in that very narrow sense.  
15 What I'm raising it for is this reason, Judge, and I'll put it  
16 as clearly as I can, candidly as I can.

17 The defense, I expect, as they did in Gouled, as they  
18 did with Binalshibh, would object vociferously, saying that's  
19 irrelevant, that's a long time ago. He doesn't have to get  
20 into that. Everybody knows who he is or what he did, or  
21 something along those lines. And I understand that, and I've  
22 probably been in situations where it's happened.

23 What I am trying to attack with you now, Judge, is to

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1 let you know that this is not the situation where we could  
2 simply skip past it and say everyone knows who he is, Judge  
3 gets it, let's go on from there.

4           We've got a very difficult issue here, a motion with  
5 high stakes. Certainly from the prosecution's standpoint we  
6 consider it very high stakes. The evidence I can develop, if  
7 he answers truthfully, will be of such a level of bias both  
8 towards the defendant and against the United States that it  
9 would be quite chilling. It would be a deep hatred and intent  
10 to do violent harm.

11           So where in a shoplifting case it's something that  
12 matters, but how much is up to you. What I'm saying, Judge,  
13 is the degree of bias, combined with other acts of  
14 untruthfulness that I can bring out as well will take it to  
15 the extreme end of the spectrum, to the point that you, Your  
16 Honor, our fact-finder, who must make calls of credibility as  
17 to witnesses, the unenviable position, the evidence we can put  
18 on the stand if that man testifies, Your Honor won't believe a  
19 word he says. That's our position. That's why it's relevant.  
20 That's why it's not collateral. And I wanted to jump on this  
21 now so that we don't have a tendency to sort of walk on past  
22 it.

23           So that's covering prong number two as to

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1 overreaching. There is no evidence of overreaching. The  
2 government hasn't used immunity in any situation in this  
3 particular case, in fact, I don't think in any of these  
4 proceedings.

5 Everything the defense says about overreaching  
6 concerns other matters that I don't believe go to that issue  
7 of overreaching or improper use of immunity, as I said, things  
8 like law of war detention.

9 But three is where it all falls apart for them.

10 MJ [COL POHL]: Before you get to three, let me just get  
11 your position when it goes -- there's no evidence before me of  
12 any use of immunity for any other witness.

13 TC [MR. RYAN]: Yes, sir.

14 MJ [COL POHL]: So that part of two would not seem to  
15 apply.

16 TC [MR. RYAN]: Yes, sir.

17 MJ [COL POHL]: But it talks about through its own  
18 overreaching has forced the witness to invoke the privilege of  
19 self-incrimination.

20 TC [MR. RYAN]: Yes, sir.

21 MJ [COL POHL]: What do you believe that means? I mean,  
22 what you're saying is you're going to ask questions that  
23 clearly are going to -- as you did of the other witnesses,

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1 too ----

2 TC [MR. RYAN]: Yes, sir.

3 MJ [COL POHL]: ---- that result in inculpatory answers,  
4 or at least the -- depending how they're answered.

5 TC [MR. RYAN]: Yes, sir.

6 MJ [COL POHL]: But the questions themselves would seek  
7 inculpatory answers, although I'm not sure you got them, but  
8 that's neither here nor there.

9 TC [MR. RYAN]: Agreed.

10 MJ [COL POHL]: I mean, is that what we mean by  
11 overreaching, that you're going to ask him questions that go  
12 to -- whether it's 608(b) or (c), and does that mean if you do  
13 that, is that government overreaching causing an you  
14 invocation, or does it mean something else?

15 TC [MR. RYAN]: The term "overreaching," I think, by  
16 itself is fairly vague and is open to interpretation. I would  
17 not be surprised if the accused were to make that argument,  
18 although I don't think they have thus far.

19 The reason I just went into that whole bit about the  
20 significance of the testimony was, in part, to sort of put out  
21 there to you why this is a case of -- why going into this is  
22 what we see as critical in representing our interests in this  
23 case. It's not simply a matter of we're using these things to

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1 make him invoke. We're using these things to destroy his  
2 credibility. We're using these things to make him useless as  
3 a witness for the defense.

4           So but now back to the question of what does  
5 constitute overreaching. As I said, it is a vague term. Here  
6 is an example I remember in a far different situation, but  
7 where a case had been charged, and a certain number of people  
8 were defendants in the case, and trial was approaching and so  
9 on. And it became known to the prosecution that certain other  
10 persons not charged in the case were being called or were to  
11 be called as defense witnesses. And agents of the  
12 prosecution -- I forget which agency it was -- began making  
13 house calls on some of these people and letting them know that  
14 they were pretty darn close to the activities themselves and  
15 maybe they should count themselves lucky that they weren't  
16 being charged.

17           I emphasize that I was not involved in that case,  
18 but I don't -- and I don't recall the exact result, but what I  
19 did want to bring up is I do recall that there were complaints  
20 to the court that this was the government trying to use the  
21 threat of prosecution as a chill to the witnesses testifying  
22 on behalf of the defendant. I would consider that an example  
23 of overreaching that's referred to in that rule, sir ----

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1 MJ [COL POHL]: Thank you.

2 TC [MR. RYAN]: ---- if it was actually true.

3 Number three, Judge, as I said, is where it all falls  
4 apart. And 152 is a motion concerning conditions of  
5 confinement of the accused and of Mr. Zubaydah. It has  
6 nothing to do with the actual charges against him.

7 Nowhere in anything filed by the defense is it stated  
8 that Zubaydah would testify that Binalshibh wasn't involved in  
9 the mass murder of 2,976, which is in fact, of course, the  
10 charge. To the contrary, my guess is that Zubaydah would  
11 testify he did participate in what Zubaydah refers to as "that  
12 magnificent plot."

13 So it's not clearly exculpatory as referred to in the  
14 rule. And as Mr. Harrington raised the case of U.S. v. James  
15 which the government cited in its brief, I do think that  
16 language was the best I could find which states out very  
17 clearly, "Clearly exculpatory is just that. It must be  
18 evidence which clearly negates guilt."

19 In this case it doesn't go anywhere near actual  
20 guilt. Also, it is not material or noncumulative because, as  
21 we have noted in the matter, the potential witness, Zubaydah,  
22 based on what we have had filed, has offered nothing new,  
23 nothing beyond what everyone understands and accepts, that is,

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1 that there are noises in this place. But even if it goes far  
2 beyond that, we have heard significantly from Binalshibh and  
3 we heard from Gouled any testimony coming from Zubaydah would  
4 simply be cumulative of theirs.

5 As far as everything else they propose in terms of  
6 Mr. Zubaydah being a tier leader and he could testify that  
7 Binalshibh gets very upset, again, we do not dispute any of  
8 these things.

9 MJ [COL POHL]: How do you respond to Mr. Harrington's  
10 alternative argument relying on  
11 Murphy v. Waterfront Commission?

12 TC [MR. RYAN]: Murphy, Judge, is one of those, what I  
13 would suggest is sort of an anomaly in the law, in the sense  
14 that it's an invitation to do that which everyone knows  
15 shouldn't have been done.

16 And the facts of Murphy -- and I agree with  
17 Mr. Harrington, it was far removed from the setting in which  
18 the person was ordered to testify from where he actually ended  
19 up being prosecuted, and it ultimately came down to basic  
20 fairness. And because it was a case of who could have known  
21 what was coming and steps along the way, and when that  
22 judge -- or that authority ordered the witness to testify, he  
23 probably did so without any clue that there was a possible

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1 prosecution coming later that he would be responsible for  
2 sidetracking.

3 Murphy has been criticized, which we point out in our  
4 brief. In short what the Supreme Court has said is that  
5 happened but that's not the way it should be done. The  
6 process that is in place in civilian court, it's  
7 Title 18 U.S.C. 6001, here it's Rule 704, same I believe for  
8 courts-martial. Follow the rule. Follow the authority that's  
9 been presented. Do it that way.

10 What defense is suggesting to you is, well, even if  
11 we don't satisfy the prongs of the rule, you could always just  
12 do it anyway. And then under Murphy, we have got our immunity  
13 after all, as I think Your Honor pointed out to them.

14 We obviously submit that's not the proper way of  
15 doing things. Especially since it's Your Honor who would be  
16 ruling on matters within the military commissions setting, and  
17 that's the place where Zubaydah would end up being prosecuted  
18 anyway.

19 The last point I want to make, Judge, is the claim  
20 that there's no evidence -- or the claim that is in their  
21 brief and was made mention of this morning, that the accused  
22 won't be prosecuted, or even if it ever comes to pass ----

23 MJ [COL POHL]: You're talking about the witness?

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1 TC [MR. RYAN]: I'm sorry, the witness. The accused is  
2 absolutely being prosecuted.

3 The witness won't be prosecuted, but even if he was  
4 to be, that an immunity issue would have no great detrimental  
5 effect, that it could all sort of just be swept under the rug,  
6 and really it's being done for the purpose of silencing him,  
7 silencing the witness.

8 We rely on our brief to a great extent on this, but I  
9 do point out, and I want to make this very clear: The  
10 prospect of prosecuting someone after they've been given  
11 immunity is very, very difficult, and it's gotten much harder.  
12 The Kastigar line of cases that goes up through the North case  
13 and so on, makes it not just a case of the use of the  
14 testimony itself that can't be used, but everything that  
15 derives from it. And when I say derives from it, I'm not  
16 talking about simply a witness, another witness found as a  
17 result, or the testimony says I buried the gun over there and  
18 they go and find the gun in the sort of typical derivative use  
19 situation. But it goes far beyond that to the point of even a  
20 witness that even heard about the immunized testimony and may  
21 have gleaned anything from it becomes precluded, even to the  
22 point, sir, of investigative leads that an agent uses as a  
23 result of the immunized testimony, even to the point, sir, of

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1 a prosecutorial strategy or charging decision made as a result  
2 of the immunized testimony.

3 Now ----

4 MJ [COL POHL]: How do you respond to Mr. Harrington's  
5 argument that's somewhat of a red herring and that there's no  
6 intent to ever prosecute Mr. Zubaydah?

7 TC [MR. RYAN]: Yeah. Mr. Harrington has the benefit of  
8 not having to worry about prosecuting these people, and I say  
9 that with complete respect to him. The cases come much later  
10 than would -- than justice sometimes would dictate. There are  
11 instances of Klan members testifying decades after a murder  
12 occurred because evidence suddenly arises.

13 I'll put it to you this way, Judge. This man's  
14 offenses -- and it was not simply a matter of thinking or  
15 talking. He ran a camp that trained terrorists, including  
16 some of the 9/11 hijackers. This man has got his fingers in  
17 lots of things. He deserves to be prosecuted. There are lots  
18 of decisions that go into that. This goes back to the issue  
19 of why these decisions have to remain in the hands of the  
20 prosecutor's office.

21 To suggest that it's never going to happen is simply  
22 an assumption that shouldn't be made. Evidence arises.  
23 Witnesses step forward. Persons involved in conspiracies

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1 suddenly decide, sometimes after many years, that it's time to  
2 cooperate, and cases often come far down the road from when  
3 they actually occurred. All of this is covered at times in  
4 various places in some of the case law that we have cited.

5 But that's all I wanted to say, Judge, absent any  
6 questions.

7 MJ [COL POHL]: Thank you.

8 Mr. Harrington.

9 LDC [MR. HARRINGTON]: Judge, the vast majority of what  
10 Mr. Ryan talked about was really his closing arguments on  
11 whether this is -- we have proved this issue or not, but I  
12 want to go through some of the points that he made.

13 One is he went through a litany of things that he  
14 said Mr. Binalshibh complains about, and one he said was the  
15 shaking of the cells. He didn't testify to that. We haven't  
16 alleged that in this case. That's happened to him before. We  
17 didn't allege that here. I point it out because it shows the  
18 broad brush that's being painted here of this is not a valid  
19 motion and it's not a valid issue.

20 Mr. Binalshibh comes to this case, and this motion  
21 with the history of being subjected to torture for a long  
22 period of time in which many, many things were done that are  
23 reflected in the SSCI report.

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1           Judge, he -- Mr. Ryan tries to -- I think what he's  
2 trying to say to you is Mr. Abu Zubaydah is just so bad that  
3 he should not be allowed to testify. How do you determine  
4 that? How do you determine if he has got bias? How do you  
5 determine anything if he's not allowed to testify? I mean, in  
6 this case one way or another, the court should allow him to  
7 testify.

8           If you grant him immunity, that's one way to do it.  
9 If you don't grant him immunity, that's another way to do it.  
10 Mr. Abu Zubaydah has risk in doing this to himself. He has  
11 been held by our government for 14 years with no charges and  
12 no prospect of charges. His lawyers have written asking for  
13 him to be charged. Nothing.

14           Judge, if an American was held in some other country  
15 for 14 years without being charged, what would we say? What  
16 would we say about that government? And I listened to  
17 Mr. Ryan talking about Kastigar problems. Are you really  
18 kidding me? With what he just said of everything that they  
19 know about Mr. Abu Zubaydah and they still haven't charged  
20 him, and he's worried about some derivative use from  
21 admissions he might make on the stand?

22           And also the question also becomes is how far are you  
23 going to allow questioning to go with respect to the bias?

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1 Suppose he asks the question, are you an enemy of the United  
2 States, and he says yes? Okay. Are you going to let him go  
3 through all 500 things that he claims Mr. Abu Zubaydah's  
4 position is, or are you going to say, okay, he's admitted  
5 that, I can consider that with respect to bias. I'm not  
6 saying that he's going to say that, but I'm just saying that  
7 that's the issue that we deal with.

8           And, Judge, he mentions that with respect to the  
9 order and following the order. You heard testimony yesterday  
10 on a different issue from an assistant SJA saying they weren't  
11 following your orders with respect to scarfing up legal mail  
12 if it wasn't in a legal bin. Your order doesn't talk about  
13 legal bins. It talks about attorney-client privilege. I'm  
14 not talking about the issue that it doesn't have proper  
15 markings on it. He said it's open game if it's not in the  
16 legal bin. That's not your order. That's this camp not  
17 obeying an order that you gave where they claim they train  
18 people and they look at your orders very carefully.

19           Judge, Mr. Ryan tries to say that Mr. Binalshibh is  
20 an enemy of this country and he's waging jihad. This motion  
21 is not jihad. What's he trying to get out of this? He's  
22 trying to get something to stop. His motive isn't to be upset  
23 all the time. His motive isn't to go through what he went

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1 through yesterday morning and spend three or four hours in a  
2 very bad emotional stage. That's not what he wants. What he  
3 wants is this to stop. That's what he's asking for. This is  
4 not part of any war against the United States.

5           And Mr. Ryan in his implication about the badness of  
6 Mr. Abu Zubaydah, do you think, Judge, that I would be here on  
7 this issue proffering a witness who has -- if what Mr. Ryan  
8 says is accurate, the background that he has, if it wasn't the  
9 witness that I had and the witness that I needed?

10           And the bottom line is -- you had cases. You've been  
11 a judge for a long time. There are people, the government --  
12 Mr. Ryan used to be a prosecutor in federal court. How many  
13 opening statements do I hear in a drug case where the  
14 prosecutors get up and say my witnesses are terrible, they're  
15 awful people, they're drug dealers, they're this, they're  
16 that, but they're cooperating with me. And I can't do that.  
17 I have to take the witnesses that I have.

18           Well, we're all like that. And sometimes juries  
19 believe those people, sometimes they don't. Sometimes you  
20 cross-examine those witnesses mercilessly, showing they're not  
21 good people and not trustworthy people, and jurors still  
22 believe them. That's the function of a fact-finder in any  
23 hearing.

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1 I mean, when I was listening to him I'm almost saying  
2 to myself why don't they consent to the immunity and just go.  
3 Just go with their cross-examination.

4 Judge, this -- just one last thing about the length  
5 of time that's gone on, and you mentioned for example, Klan  
6 cases or other cases like that, cold cases that are started.  
7 They're all murders. There's a statute of limitations on  
8 everything else. They're all murders. There's nothing that  
9 we have here that indicates in any way that this man is  
10 involved in any case that has a murder.

11 And he mentioned conspiracy. Do we have conspiracy  
12 here? We do have conspiracy? What do the courts say about  
13 conspiracy in the commissions? I understand the argument  
14 about conspiracy within the substantive charge, which is an  
15 issue to be dealt with later, but in terms of charging  
16 somebody with conspiracy, we don't have it, and the  
17 prosecution isn't going to do it.

18 Thank you.

19 MJ [COL POHL]: Thank you, Mr. Harrington. Mr. Ryan,  
20 anything further?

21 TC [MR. RYAN]: No, sir. Thank you.

22 MJ [COL POHL]: We're going to go ahead and recess at this  
23 time. Just for the way ahead -- the attorney for Mr. Zubaydah

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1 will be excused from the courtroom -- I want to do 449 before  
2 I do 447, just for the order of march.

3 We'll be in recess for 15 minutes. Commission is in  
4 recess.

5 [The R.M.C. 803 session recessed at 1021, 12 October 2016.]

6 [END OF PAGE]

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