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1 [The R.M.C. 803 session was called to order at 1417, 2 June
2 2016.]

3 MJ [COL POHL]: Commission is called to order. I believe
4 all parties are again present. Although, Mr. Harrington, is
5 your team the same now as it ----

6 LDC [MR. HARRINGTON]: Yes, sir.

7 MTC [MR. TRIVETT]: Sir, Major Dykstra has joined the
8 prosecution team.

9 MJ [COL POHL]: Does Mr. Zubaydah speak English?

10 LDC [MR. HARRINGTON]: Yes, Judge.

11 MJ [COL POHL]: Okay. We may need some help, but --
12 again, just understand, we'll call him in a minute. The
13 interpreters have a tough time if they're going back and forth
14 quickly because they're translating English into Arabic. I'll
15 tell Mr. Zubaydah the same thing I told Mr. Gouled. You've
16 got to stay all English or all Arabic, but be careful -- I'm
17 just telling you that's a concern.

18 LDC [MR. HARRINGTON]: It would be unlikely with him to do
19 that, because he will stop if he doesn't know something.

20 MJ [COL POHL]: Okay.

21 LDC [MR. HARRINGTON]: Judge, before we begin, Commander
22 Patrick Flor is here. He is Mr. Abu Zubaydah's attorney.

23 MJ [COL POHL]: I thought I saw a new face.

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1 LDC [MR. HARRINGTON]: Anyways.

2 MJ [COL POHL]: Commander, you represent Mr. Zubaydah?

3 DDC [CDR FLOR]: Yes, sir. I'm his detailed military
4 counsel.

5 MJ [COL POHL]: I'm assuming that you have no issue with
6 him testifying today?

7 DDC [CDR FLOR]: No, sir.

8 MJ [COL POHL]: Okay.

9 DDC [CDR FLOR]: Unless, of course, questions go beyond
10 the subject matter of the motion and into issues which may be
11 incriminating, then I'll have to object to that.

12 MJ [COL POHL]: Well, before we call the witness, let's
13 address that issue. Who -- Mr. Ryan, are you going to do the
14 cross-examination of him?

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

16 MJ [COL POHL]: Okay. Would it be fair to say -- well,
17 let me ask you this ----

18 TC [MR. RYAN]: Yes.

19 MJ [COL POHL]: ---- do you intend to ask any questions of
20 Mr. al Zubaydah -- I'm sorry, Mr. Zubaydah as relating to his
21 potentially illegal activities?

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

23 MJ [COL POHL]: Okay.

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1 TC [MR. RYAN]: For purposes of showing bias against the
2 United States, bias in favor of the accused, relationships
3 with the accused, shared values, et cetera, sir.

4 MJ [COL POHL]: Commander, I'm sorry, I didn't get your
5 name.

6 DDC [CDR FLOR]: Flor.

7 MJ [COL POHL]: Flor?

8 DDC [CDR FLOR]: Flor. F-L-O-R.

9 MJ [COL POHL]: Flor. And you're going to object to that?

10 DDC [CDR FLOR]: Yes, sir.

11 MJ [COL POHL]: Okay. Mr. Harrington, you're kind of the
12 man in the middle here.

13 LDC [MR. HARRINGTON]: A rose between two thorns.

14 TC [MR. RYAN]: A short rose.

15 LDC [MR. HARRINGTON]: A short rose, I was told, Judge.

16 MJ [COL POHL]: Okay. Do you see the issue?

17 LDC [MR. HARRINGTON]: I do. I think, Judge, we take it
18 question by question and he asserts the Fifth Amendment, and
19 the court has to make a determination of whether the court
20 wants to try and overrule that. If the court does, I think
21 you have to give him immunity for the question that he asked,
22 use immunity. I'm not sure you have the authority to do that.

23 MJ [COL POHL]: I don't. Okay. I say that very quickly,

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1 because I know in a court-martial I don't. I doubt very much
2 I have it here.

3 TC [MR. RYAN]: You do not, Judge.

4 MJ [COL POHL]: Okay. So where does that leave us,
5 Mr. Harrington? I mean, to me -- I mean, the normal remedy of
6 the -- if a witness refuses to -- and I'm willing to listen to
7 arguments from any one of you three. You know, if a witness
8 invokes on cross-examination, then the direct testimony is
9 generally struck, correct?

10 LDC [MR. HARRINGTON]: But it depends on how it's invoked,
11 Judge.

12 MJ [COL POHL]: Okay.

13 LDC [MR. HARRINGTON]: If it's invoked to the direct
14 subject matter, then clearly you strike the testimony. But if
15 it's a collateral matter, I mean collateral in the sense of
16 cross-examination as to bias or something like that, I think
17 the court has to determine whether you can take an adverse
18 inference from it or not, but I don't think you can compel the
19 person to testify. I don't think you strike his testimony.

20 MJ [COL POHL]: Well, let me ask you this: Is bias an
21 appropriate area for cross-examination of any witness?

22 LDC [MR. HARRINGTON]: Sure it is. Of course it is.

23 MJ [COL POHL]: Okay. So it would not be collateral?

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1 LDC [MR. HARRINGTON]: Well, it's collateral to the direct
2 issue before the court, that's all. But it's an essential
3 part of the testimony.

4 MJ [COL POHL]: I mean, because every witness puts his or
5 her credibility on the line.

6 LDC [MR. HARRINGTON]: Correct.

7 MJ [COL POHL]: So I'm just saying is we can start this if
8 you want to, but ----

9 LDC [MR. HARRINGTON]: Perhaps ----

10 MJ [COL POHL]: I'm willing to listen to a
11 counter-argument, but it seems to me evidence of bias is
12 appropriate for cross-examination, and evidence of bias of
13 the -- of this witness' prior conduct in an organization --
14 and I'm just making no judgments here, you understand that,
15 but just the nature of Mr. Ryan's cross-examination of the
16 previous witness is his prior alleged involvement in
17 activities with al Qaeda or whomever, to show bias, do you
18 believe that's -- I mean, if the answer is I'm not going to
19 answer that, through counsel, I understand that.

20 LDC [MR. HARRINGTON]: Well, Judge, I mean, without
21 arguing this on the merits, and you overruled my objections,
22 but I don't think that what Mr. Ryan did established bias
23 because he -- there was no connection to the questions that he

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1 asked with Mr. Binalshibh that I could see. I mean, he asked
2 him about al Qaeda before I objected. He said, "I'm not a
3 member of al Qaeda." But, I mean, Judge ----

4 MJ [COL POHL]: I mean, the problem we're going to get in
5 here, unlike Mr. Gouled, this witness is represented by
6 counsel.

7 LDC [MR. HARRINGTON]: Correct.

8 MJ [COL POHL]: So Mr. Ryan says, "Isn't it true that
9 you're a member of al Qaeda," for example, to indicate a bias
10 against the United States or a bias against whatever. I
11 suspect we're never going to get the answer because we're
12 going to hear an objection.

13 LDC [MR. HARRINGTON]: Right. Well, he might answer that
14 one because the answer would be no.

15 MJ [COL POHL]: Well, but what I'm saying, Mr. Harrington,
16 is that I suspect Commander Flor is not going to wait for the
17 answer before the objection.

18 LDC [MR. HARRINGTON]: That's correct, Judge.

19 MJ [COL POHL]: I mean, I don't know any lawyer who would
20 in the hopes that the answer helps.

21 So you talked about immunity here. Does he need use
22 immunity before he even testifies?

23 LDC [MR. HARRINGTON]: No. You don't get the immunity

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1 until you raise the issue in terms of question and answer.

2 MJ [COL POHL]: Well, understand this: If you want to
3 call him, you know, that's your option, okay, and the
4 commander will represent his interests. But you know what my
5 rulings have been on the prior witness as far as bias. I
6 don't give advisory rulings, but if we get down that road, we
7 get down that road. And if it turns out that he refuses to
8 answer those questions on the advice of counsel, we'll take an
9 appropriate remedy.

10 LDC [MR. HARRINGTON]: Right. Judge, what I would suggest
11 as an alternative is that we postpone this testimony until the
12 next hearing and we come back and we can brief the issue for
13 the court.

14 MJ [COL POHL]: Okay. That's fine. I mean, it's -- it's
15 kind of a -- it has some nuances to it that -- and again, this
16 issue is important to your client, I mean that, but it is
17 not -- it doesn't -- it's not a case roadblock, for want of a
18 better term.

19 TC [MR. RYAN]: Your Honor, can I ask for a moment with
20 counsel, both counsel?

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

22 [Pause.]

23 TC [MR. RYAN]: Nothing further, sir.

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1 MJ [COL POHL]: Okay. Then, Mr. Harrington, you're
2 requesting that we defer this witness to a later time if at
3 all?

4 LDC [MR. HARRINGTON]: Yes, Judge.

5 MJ [COL POHL]: I'm sorry?

6 LDC [MR. HARRINGTON]: Yes. I'm sorry.

7 MJ [COL POHL]: Okay. Your request is granted. I
8 understand Mr. Zubaydah has been standing outside for quite a
9 while, so you can release him back to the confinement facility
10 unless you want to talk to him.

11 DDC [CDR FLOR]: Yes, sir, I would.

12 MJ [COL POHL]: Just a second, let his lawyer give him
13 kind of an update of what happened and why he won't be
14 testifying. So go ahead and do that. You may do that.

15 DDC [CDR FLOR]: Yes, sir.

16 MJ [COL POHL]: Okay. Since this was the only thing we
17 were going to do this afternoon, we will recess. As I've said
18 on many occasions, I'm more optimistic than realistic, but
19 actually this week we got a lot of things done, much more than
20 I anticipated, and we've kind of exhausted what's on the
21 docket.

22 Tomorrow I have an in chambers 802 with defense
23 counsel and the prosecution. At 0900, we will take the VTC

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1 witness in open court. Once he has completed that, the
2 accused will be permitted to stay in here with their lawyers
3 until 1200 hours when they will be escorted back to the camps.
4 And at 1300 hours, we will have a closed session to discuss
5 classified information under Rule for Military Commission 806.

6 I know what you're going to ask me, Mr. Nevin, of
7 course, and it's now 1430. You can have an hour with your
8 clients.

9 So, guard force, the accused stay here until 1530,
10 then escort them back to the camp. Yes, one hour, yes. One
11 hour.

12 LDC [MR. NEVIN]: Your Honor, just -- we have a photo
13 session. Is that set for this afternoon? Yeah, we have a
14 photo session that's been arranged in advance for after the
15 commissions have finished.

16 MJ [COL POHL]: Well, we're finishing much earlier than we
17 anticipated, so ----

18 LDC [MR. NEVIN]: Understood.

19 MJ [COL POHL]: ---- it seems like you have plenty of
20 time.

21 LDC [MR. NEVIN]: I guess my request would be could we
22 have more time than you gave us? I believe you said 1530.
23 Could we have 1600?

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1 MJ [COL POHL]: No, it's not -- I've got to give
2 definition to the guard force. So it does not do any good to
3 say we may or may not need it. Okay, Mr. Nevin, you always
4 ask for more. We were planning to go all day anyway. 1600,
5 but it's a firm cut-off. If your photo session isn't done, do
6 it another day. Okay.

7 The commission is in recess.

8 [The R.M.C. 803 session recessed at 1430, 2 June 2016.]

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