

**ASSOCIATION OF DEFENCE COUNSEL
PRACTISING BEFORE THE
INTERNATIONAL COURTS AND TRIBUNALS**

**ADC-ICT Guantánamo Bay Observer
Programme**



Trip Report to the Khalid Sheikh Mohammed et al Pre-Trial
Hearings at the Military Commissions in Guantánamo Bay

26 October – 9 November 2019

Observers:

Dominic Kennedy and Dragan Ivetic

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I. Overview

The ADC-ICT was granted NGO Observer Status at the Military Commissions in August 2019 by the Pentagon's Guantánamo Bay Military Commissions Convening Authority. This granted permission for ADC-ICT representatives to travel to Guantánamo Bay, Cuba, or Fort Meade, Maryland to carry out the role as an observer at the Military Commission proceedings. There are currently only 26 participant organisations worldwide which have been granted permission to observe proceedings.

Between 26 October and 2 November 2019, Dominic Kennedy, Head of Office travelled to Guantánamo Bay to observe proceedings in the Khalid Sheikh Mohammed et al proceedings and between 2 and 9 November 2019, Dragan Ivetic, President attended to observe proceedings.

The aim of this Report is to give an overview of these two weeks of proceedings at the Military Commissions.

During the two weeks of hearings the Military Commission heard testimony from witnesses regarding the suppression of evidence gathered during interrogations/debriefings/interviews conducted with the defendants upon their arrival at Guantánamo Bay in 2007 by the FBI. The defence is trying to show that these interrogations are unreliable and tainted by the Central Intelligence Agency (CIA). As context, earlier interrogations conducted in the 'black-sites' have been suppressed due to the use of 'Enhanced Interrogation Techniques' (EIT's) and the defence is wanting to show that any alleged evidence gained through the interrogations in 2007 is also unreliable due to the same.

II. Witness Testimony Overview

The witnesses who testified during the period between 28 October and 8 November 2019 were:

1. Adam Drucker, former FBI Agent
2. Former Commander of Camp 7
3. Michael Butsch, FBI Agent

i. Adam Drucker, former FBI Agent

Adam Drucker is a former FBI Agent who was involved in the investigation into the 9/11 attacks. Former Agent Drucker has been called by the defence team representing Mr. Baluchi as part of several hearings where the defence is asking for the suppression of the interrogations of the accused which were conducted by the FBI in Guantánamo Bay in 2007. Mr. Drucker is a former special agent of the FBI and now works for a financial institution in the US. He explained that he was one of 1,000 agents in New York City in 2001 and worked for the bank fraud squad.

Mr. Drucker described his personal experience of the morning of 11 September 2001. He stated that he was on his way to buy coffee with colleagues and noticed papers flying in the air and saw that the World Trade Centre had been hit. He said that he and his colleagues went to the World Trade Centre and saw chaos and destruction. He described the moment when the first tower collapsed and the cloud of smoke and debris and how he managed to avoid injury. He went on to say that a field office was setup as the FBI Headquarters was unable to be used. In the immediate aftermath of the attack he worked on leads based on the USS Intrepid and also from the morgue, describing in detail the injuries which had been suffered by the victims.

In the weeks after the attacks, Mr. Drucker was assigned as a counter-terrorism agent investigating the financial aspects of the 9/11 attacks. He stated that in early 2002 he was sent to the United Arab Emirates with Agent Perkins to collect documents and visit banks and financial institutes and built relationships with the UAE authorities. He stated that he visited the UAE on another two occasions in 2002 and that the UAE officials brought witnesses to him. Mr. Drucker next told Mr. Connell, defence counsel that he learned of the arrest of Ramzi bin al-Shibh whilst he was in the UAE and he and Agent Perkins were requested to fly to Karachi, Pakistan.

Upon arrival in Karachi they were escorted by an individual to a room in the US Consulate which had boxes with evidence which had been collected from multiple raid sites. Mr. Drucker stated that he and Agent Perkins began to examine the contents until they were told to leave by an individual who could not be identified for national security reasons. They were later taken to watch the interrogations at another location controlled by Pakistani authorities. Mr. Drucker described how people were rummaging through

suitcases of evidence and that proper procedures were clearly not being adhered to, describing the situation as ‘a feeding frenzy’. Mr. Drucker stated that he discovered a lanyard with Mr. Baluchi’s name and a diploma with Khalid Sheikh Mohammed’s name on it.

Mr. Drucker next spoke about how a hooded prisoner was brought into a room and sat on the floor and questions were asked by the interrogators. He indicated that he had personally witnessed four such interrogations over two days. Although Mr. Drucker thought he was there to see Ramzi bin al-Shibh he was subsequently told that he had been taken elsewhere. Mr. Drucker testified that he next went to Islamabad where the evidence he had seen previously in the Consulate was and at this point was being correctly handled.

Later, Mr. Drucker was asked about his testimony before the 9/11 Commission and how he had stated that sometimes what the detainees were telling the CIA was not always the truth as he knew the answers to some of the questions already and these were not the answers which were provided by the detainees.

Mr. Connell presented Mr. Drucker with a cable from the FBI to the CIA with potential questions to put to Mr. Baluchi while he was being held at a ‘black site’. The exact contents of this cable were not read in court due to it being classified.

The afternoon session ended with two short video clips being played to the court of Mr. Drucker’s testimony before the 9/11 Commission. Mr. Drucker was seen quoting from a statement made by Khalid Sheikh Mohammed which he confirms was classified information even though the proceedings were being broadcast on television. Mr. Drucker stated that all information was up for discussion at the Commission proceedings including classified information.

On 30 October 2019, Mr. Drucker was back in Court to continue with his direct examination by Mr. Connell. He testified regarding the joint CIA-FBI team which was responsible for investigating terrorism. Mr. Connell began to ask about email communications at which point the feed was cut to the public gallery. There is a unique system in place in the courtroom to prevent ‘spillage’ of classified information. On the Bench next to the judge sits a security officer who has in front of him a red button and a red flashing light. The button is hit when there may have been a potential leak of classified information, the red light starts to flash and white noise is played into the gallery. Upon resumption the Judge announced that in an abundance of caution if any Party raises a potential leak of classified information, he will immediately hit the red button going forward.

Mr. Connell asked Mr. Drucker about the manner in which the CIA and FBI communicated, and several cables were discussed, including one from the FBI to the CIA with potential questions for detainees held in black sites.

Mr. Drucker next testified that there was a plan put in place for the FBI to have access to the detainees once they were transferred to Guantánamo Bay. He thought that he would

interview Mr. Baluchi and Mr. Hawsawi as they are accused of sending funds to the hijackers, but this is not what happened and instead he was observing in case the interrogators needed to ask him questions, which ultimately, they did not. He stated that these new rounds of interrogations took place in January 2007 and that he watched the interrogations of Mr. Mohammed, Mr. al Baluchi and Mr. Hawsawi. Mr. Drucker explained that he was detailed to the CIA for a five-year period but kept access to his FBI emails as well as his CIA email system.

After the direct examination, Prosecutor Ryan proceeded with cross-examination asking Mr. Drucker about terror attacks which occurred prior to 9/11 including the embassy bombings in Kenya and Tanzania, the 2003 World Trade Centre bombing and the attack on the USS Cole. Mr. Drucker stated that the 9/11 attacks were unprecedented and changed his career from focusing on bank fraud to focusing on terrorism. He agreed that the attacks brought down the wall between criminal and intelligence agencies and that the US was at war.

Mr. Drucker testified that they had initially found Western Union receipts in the trash at a hotel where one of the hijackers had stayed and that this financial trail ultimately led to finding other accused, including Mr. al Baluchi. He continued to explain in detail some of the other financial investigations he had undertaken which led to identifying the accused.

Mr. Drucker was asked about the interrogations which took place in 2007 at Guantánamo Bay of the accused and stated that they were more like conversations and that at one-point Mr. Baluchi had commented on how delicious the McDonalds was, which they had provided him for lunch. He stated that there was no indication that the interviews were being done involuntarily.

During re-direct, by Mr. Connell, Mr. Drucker stated that he prefers to use the term interviews for the 2007 questioning as for him interrogation is when 'Enhanced Interrogation Techniques' were used, and this was not the case during the 2007 interviews.

The open session testimony ended with some questions from Mr. Sowards, defence counsel for Mr. Mohammed. He asked Mr. Drucker whether he knew what had happened to the accused when they were held in the black sites to which Mr. Drucker responded that he had heard rumors that some of them were subjected to Enhanced Interrogation Techniques (EITs) but he had not been told by anyone the full details. He said he had learned about EITs when he was detailed to the CIA in 2004 but that it had stopped. Mr. Sowards then asked Mr. Drucker whether he was aware that Mr. Mohammed had been hung from the ceiling naked for 12 hours at a time, subjected to multiple anal rapes and had threats made to his family. Mr. Drucker responded that he was not aware and that these things were not the EITs that he had been made aware of. Mr. Sowards asked whether if he had known this information whether he would recategorize the 2007 questioning and indicated that the accused could have been complying as to avoid a repeat of the EITs they had previously being subjected to at the black sites. Mr. Drucker said he was not a medical professional and unable to answer that question.

His testimony was concluded in closed session and was not available to the public.

ii. Former Commander of Camp 7

On 1 November, a former Commander of Camp 7, where the accused are detained, was brought as a witness by the Prosecution. The Witness testified about how he took custody of the accused when they first arrived in Guantánamo Bay in September 2006.

He explained that he was responsible for the detention of the accused, including the processing of the 14 detainees who arrived at Guantánamo Bay on September 2006. He gave information regarding Common Article 3 of the Geneva Conventions even though he had not been instructed to do this but personally decided to do this.

He explained that each detainee was held in a cell with a shower, sink, toilet, desk, chair, bed and were provided with footwear, prayer beads, prayer mat and a copy of the Koran. He stated that each detainee had an intercom system where they could press a button to reach the guards if they needed anything. He said that the call to prayer was provided five times per day. The detainees were permitted to access an outdoor recreational area which had exercise equipment and that the detainees could take coffee and meals outside if they wished. In October 2006, the detainees were allocated a partner who they could communicate with through a hole in the wall. The detainees had access to a library of books in their native language and were visited by the ICRC. Medical and dental exams were carried out between September 2006 and January 2007.

The Commander stated that he was solely responsible for Camp 7 and that he would spend 8-12 hours at Camp 7 and the other time at Camp America completing administration tasks.

He stated that the guards were informed not to engage in detailed conversations with the detainees and that interaction was kept to 'transactional conversations'. The guards did not use names but used pseudonyms for the detainees as standard practice. When asked by the Prosecution whether he meant by 'transactional conversations' that "the detainees could press a button in their cells to request water boarding ... er, water bottles?", there was a slight pause in the courtroom for this unfortunate slip of the tongue. The Commander confirmed that conversations were limited to such requests and no in depth conversations were held between the guards and the detainees.

The Commander stated that the law enforcement interviews conducted by the FBI occurred in January and February 2007. He said that detainees would be notified when they had an interview and that they could voluntarily choose whether they wanted to attend. He stated that KSM had agreed to meet with the FBI on four occasions in January 2007. The Commander could not recall whether KSM had declined to attend but if anyone refused then he had no authority to force them to attend. He stated that on occasions the FBI had placed a hand brush in KSM's hands and the FBI had said that this was to see how he held the brush and compare it to a video of the beheading of Daniel Pearl.

The Commander stated that he watched most of the interviews by video from a secure location and that he never saw any unprofessional actions done by the FBI during the interviews he observed. He stated that he never received any reports of mistreatment during these FBI interviews.

He said that the Standard Operating Procedures at Camp 7 were similar to those which had been implemented at Camps 5 and 6 but were generally ahead of the other camps with regards to Standard Operating Procedures.

When asked whether he would recognise distress in the detainees if he saw it, he stated that he would be able to recognize it.

He was asked about the statement in the Senate Select Committee Report that the detainees were under the control of the CIA to which he responded that was not true and that he, as Commander, had full authority over the detainees.

Mr. Connell, defence counsel, was the first to cross-examine the Witness and immediately as he began his examination the red button was activated and the Parties engaged in prolonged discussions in the center of the courtroom. Upon resumption, the defence asked that the reasons the prosecution was alleging the previous question posed be put on the public record to ensure a public trial records. It was decided that the discussion would take place in closed session at a later time.

The Witness stated that he learned that he would be responsible for the detainees at an inter-agency meeting and that Camp Echo II had been used by the CIA.

At this point, Mr. Connell wanted to show the Witness a series of photographs, the Prosecution objected that the screens could be seen by the Public Gallery and the photographs were classified. The proceedings were halted while a discussion took place between the Parties and a visit to the public gallery took place to see what could or could not be seen by the Gallery. It was decided that the screens could be viewed by the Public Gallery and therefore physical printed copies were distributed to everyone in the Courtroom and the questioning continued 1.5 hours later.

The Commander confirmed that one of the photos was of the inside of one of the Camp 7 cells and confirmed a number of other photographs were of Camp 7. He was asked about the specific doors which were on the cells and how they differed from camps 5 and 6 in that they had a double door and that he had asked for the second door to be removed but that this was not done due to a decision by a Group (specifics classified).

During their first Ramadan at Camp 7, the Commander said that the detainees ate alone, prayed alone and had no contact with each other and that a recorded call to prayer was played through a speaker system. He stated that the detainees were provided with halal meals, which the guards delivered by opening the two doors leading to their cells.

The Commander was next about the clothing which was worn by the internal guards at Camp 7. There was an objection from the Prosecution due to classified information. After

a rephrasing of the question, the Witness stated that the guards wore military uniforms but they were not standard issue as they did not have any rank and only pseudonyms where their names should be.

During cross-examination by Ms. Radostitz, the Witness stated that there had never been any reports of mistreatments of the detainees. She mentioned that there had been a complaint about shackles being too tight, to which the Commander responded that this was reported to the Commander of the Joint Task Force but it was more of a violation of the Standard Operating Procedure than an injury. When he was asked about waterboarding, sleep deprivation and other EIT's he stated that he did not know anything about this. He stated that he was not aware that the detainees had been kept incommunicado prior to being transferred to Guantanamo. He stated that his guards had received training on the Geneva Conventions and that he was responsible for conducting the trainings. He said that there were no other government agencies involved.

When the Commander was asked "did the detainees have just clothes and nothing else when they arrived", the answer was reserved for a subsequent closed session.

The remainder of the Commander's testimony was heard over two days in closed session.

iii. Michael Butsch, FBI Agent

For two days prior to the testimony of Michael Butsch, the Military Commission had closed sessions relating to 802 conferences between the parties. Likewise, part of the testimony of FBI Agent Butsch was undertaken in closed session, without the public. The instant review thus will only deal with what was presented publicly during 6 November 2019 to 8 November 2019.

Witness Michael Butsch was called as part of the ongoing hearings as to the pending appeal of suppression of evidence filings. He was first examined by the Prosecution/Government. Witness Butsch testified that he is a current FBI Supervisory Special Agent overseeing a squad that deals with public corruption and civil rights. His current position includes monitoring of vulnerable communities.

Witness Butsch's background started off at the United States Coast Guard Academy and served in the Coast Guard for 5 years before joining the FBI in the summer of 1997. After joining, Butsch joined the New York JTTF (Joint Terrorism Task Force), a partnership between various federal, state, and local law enforcement agencies, as well as the D.E.A. which focused on Al-Qaeda activities. Witness Butsch was not familiar with Arabic beyond certain phrases.

Witness Butsch recounted his personal involvement during the 9/11 attacks, as he was in lower Manhattan 4 blocks away from the World Trade Center when he saw plane flying low and later heard an explosion. When he turned around, he saw a hole in the North Tower of the WTC. When he reported to his boss, he was told to return to the office and watched a 2nd plane hit on TV, hitting the South Tower of the WTC. The information that they had was that 1 plane had hit the pentagon and a 4th was unaccounted for. The

witness' involvement in the 9/11 investigation began that same day as he was tasked with other agents to set up a command post, which never happened as the South Tower collapsed and pandemonium took over. The command post was then re-located to the plaza at St. Andrews outside the United States Attorney's Offices.

Thereafter the witness was assigned to a new team called PENTTBOMB, tasked with investigating the WTC, Pentagon and 4th plane hijackings.

Very soon the attention of PENTTBOMB was focused on Hamburg, Germany and the so-called "Hamburg Cell" because 4 individuals, including 3 out of the 4 pilots in the 9/11 attacks, had links to the "Hamburg Cell." It was determined this cell had played a significant role in the 9/11 attacks.

Witness Butsch recalled two weeks of intelligence duties at the command post working 10 hours shifts to deal with evidence and leads coming in.

Approximately two to three weeks after the 9/11 attacks, Witness Butsch went to Germany with a German speaking agent to collaborate and work with the German Authorities, after the significance of Hamburg in the attacks began to emerge.

Early in the direct examination of the Prosecution/Government, Witness Butsch made it known that at some point in time he became the lead FBI investigator as to Ramzi bin al-Shibh, whom he also identified as the defendant seated in the 3rd row on the defence side.

The witness acknowledged his knowledge that a Prosecution Task Force was established to collect evidence and build a case at the Military Commissions for those responsible for the 9/11 attacks, including Ramzi bin al-Shibh. Witness Butsch testified as to a 2007 interview with one female agent, one male agent and a language interpreter with Mr. Bin al-Shibh. Prior to that, the two of them had not spoken.¹ He recalled these interviews (at Guantanamo Bay) were on the 11th and 12 of January of 2007. Another agent, Ms. McGuire took notes of this interview, as per the FBI policy to have one set of notes taken. An Exhibit was authenticated as a "Letterhead Memorandum" documenting this interview ("LHM" for short) which was 78 pages long and finalized approximately 13 or 14 January based on the notes of McGuire and his and the other agent's collaboration (with the linguist). Witness Butsch admitted that it was not common for the FBI to use LHM's.

As part of his investigation and preparation for the interview, Agent Butsch had collected key evidence chronologically in a notebook, including the standard criminal evidence that had been prepared for the Moussaoui prosecution.² Butsch testified that Ramzi bin al-Shibh was important to the Moussaoui trial, so that various evidence, including money transfers, and flight lesson plans, had been gathered before 2002.

¹ Later testimony would clarify this was not the first time the witness had been in proximity to Ramzi bin al-Shibh, but not having a spoken conversation.

² Referring to Zacarias Moussaoui (the "20th Hijacker"), subject to a US Federal Court proceeding, convicted in the Eastern District of Virginia after a guilty plea, and serving a life sentence.

As to additional investigative materials, Butsch identified that he knew of some US Government acquired communications that another investigator came up with. He also acknowledged 2 videos and an Iranian visa that had been recovered for Mr. Ramzi bin al-Shibh. He recalled requests were made to the CIA via FBI Office of General Counsel Attorneys.

Testifying as to the videos, one was dated 2000 and was a gathering of Al-Qaeda and Osama Bin Laden where it was said that Ramzi bin al-Shibh was in attendance, and purported to show him meeting Bin Laden.

During the 2007 interview Agent Butsch showed Ramzi bin al-Shibh first made clear that although he did not agree with what their end result or tactics were that he had respect for Ramzi bin al-Shibh and his brothers and that what they had pulled off was a complicated operation that had been completed with precision and secrecy. He also initially said he showed Ramzi bin al-Shibh the video meeting with Bin Laden and asked about the Iranian Visa but did not reach that part of the chronology with the communications, as Ramzi bin al-Shibh eventually refused to continue with the interview.

At the time of the 2007 interview at Guantanamo Bay, witness Butsch also knew of statements attributed to Mr. Ramzi bin al-Shibh in the media claiming responsibility for the 9/11 attacks, especially in Al-Jazeera. Agent Butsch had been present when the author of the Al-Jazeera media had been interviewed. The also recognized the Book "Masterminds of Terror" written by the journalist, but the Judge was clear that the contents, substance and conclusions of the author in the book were not being admitted at this stage, just the identification of Ramzi bin al-Shibh and Khalid Shiekh Mohammed on the cover

The witness acknowledged that he knew that he knew of Khalid Shiekh Mohammed's capture 1 March 2003. And the witness also acknowledged that he knew of the capture of Ramzi bin al-Shibh 11 September 2002.

The witness acknowledged that the CIA had initial custody of all High Value Detainees ("HVD") at Guantanamo. When asked about and specific guidance as to interviews of HVD prior to his interview of Ramzi bin al-Shibh, Agent Butsch stated:

- a) This was not typical as it was a unique situation;
- b) This was not typical for the FBI;
- c) The interviewee had been known to be in CIA custody and then US Army Custody for years; and
- d) He only recalled an oral briefing, but not the specifics of the same.

One such guidance that was clearly remembered by Butsch was that "No statements from any Intelligence Agency were to be used for questioning without prior approval of the prosecutor and the agency." He did not show Ramzi bin al-Shibh any such prior statement sand did not seek the aforesaid permission to use any such statements in the 2007 interview. According to Butsch, although he and others at the FBI had access to CIA databases it was limited to:

- a) Background Documents;
- b) TD's;
- c) TDX's; and
- d) CIR's.

Butsch did not ask for any of these as he had enough personal knowledge of Ramzi bin al-Shibh, and the only "CIA" material he asked to use was the Iranian visa and the video entitled "Eid el Fitr" (dated 2000) that were classified at the time. He claimed no knowledge if any of the other agents involved in the interview may have examined other CIA material.

The witness acknowledged that standard procedure called for interviews to follow Miranda and to not use intimidation and to use real names and reveal their FBI affiliation. However, as to Ramzi bin al-Shibh, in 2007 full Miranda warnings had not been given because he had not been formally charged and thus did not have a right to an attorney. However, neither he nor the other FBI agents engaged in any intimidation. All the agents introduced themselves to Ramzi bin al-Shibh at the time of the interview. The witness acknowledged that even if Ramzi bin al-Shibh had asked for an attorney none would be provided as this was not a standard FBI interview, but rather being conducted under the ambit of the Military Commissions. Butsch later stressed that during the entire 2007 interview Ramzi bin al-Shibh never even asked for an attorney.

Based on the contents of the LHM and Agent Butsch's recollections, he showed the "Eid el Fitr" video to Ramzi bin al-Shibh who asked to view it again. Agent Butsch testified that the interviewee was asked multiple times if he wanted to talk and that it was voluntary and up to him. The witness only confronted Ramzi bin al-Shibh one time about something that Butsch said was not in accord with the evidence, namely Ramzi bin al-Shibh claimed that Bin Laden had named him the "Emir" in charge of 9/11; whereas Agent Butsch told Ramzi bin al-Shibh that this was not true since it was Mohammed Atta who had been named the Emir of 9/11. The response of Ramzi bin al-Shibh was to say only he and Bin Laden knew what was actually said, and given his circumstances currently why would he (Ramzi bin al-Shibh) exaggerate rather than minimize his role in the 9/11 attacks.

Agent Butsch stressed that he explained (as instructed) to Ramzi bin al-Shibh that they were not part of the "previous detaining custodians" and that irrespective of whether he voluntarily agreed to talk with them or not he would not be sent back to the "previous custodians." Agent Butsch stated his understanding and belief that this was meant to stress and differentiate the current circumstances from the prior period when Ramzi bin al-Shibh had been in the custody of the CIA. Butsch stated that he was not aware of what "Enhanced Interrogation Techniques" had been utilized on Ramzi bin al-Shibh, but that he had been briefed as to several "EIT" by the CIA at some time prior. During the 2007 interview he denied bringing up "EIT" while talking with Ramzi bin al-Shibh. Agent Butsch did not recall any complaints made by Ramzi bin al-Shibh and stated that any such complaints would have been documented by the Agents.

Again, returning to questions about his understanding of why it was essential to distinguish from “prior custodians” who had detained Ramzi bin al-Shibh, Agent Butsch testified that he want the interviewee to be clear that the decision was up to him if he wanted to talk, and that under no circumstances was there a chance of him going back to CIA custody. He thus also reminded Ramzi bin al-Shibh of a recent International Red Cross visit to the facilities.

Butsch did not ask or inform that the interview could be used in subsequent proceedings, since Ramzi bin al-Shibh himself stated at the start that they knew why the interview was taking place, namely to be used as evidence at court “without torture.” Agent Butsch did not elaborate on this comment except to say that the impression he got was that Ramzi bin al-Shibh wanted to obtain some changes as to the conditions of his detention. Agent Butsch told that he advised he had no such authority as to do that. The agents offered Ramzi bin al-Shibh food, water, tea, and prayer breaks, but neither the food nor drinks were accepted. During the initial listing of the admonishments described above, a checklist was kept to ensure that all was covered. A copy of said checklist was an exhibit authenticated by the witness. Agent Butsch could not recall if he or agent McGuire did the checklist.

When asked by the government if he had been advised or advised Ramzi bin al-Shibh that though the facility was the same as used before the new custodian was the Department of Defence, Agent Butsch acknowledged that he knew Ramzi bin al-Shibh may have been at GITMO before but did not know nor inquire if that particular room/facility had been used to hold Ramzi bin al-Shibh previously for any purpose.

At this point Agent Butsch admitted the 2007 interview at GITMO was not the first time he had seen Ramzi bin al-Shibh in person. At this point the Government elicited testimony revealing that Agent Butsch was sent to Karachi, Pakistan immediately upon the arrest of Ramzi bin al-Shibh to interview him and saw him on the tarmac of an airport, where several detainees were delivered into “US” custody. Agent Butsch was asked to identify Ramzi bin al-Shibh at that time (since he was the lead investigator), and the hood over the head of Ramzi bin al-Shibh was removed, and a flashlight shone in his face to permit Agent Butsch to positively identify him. Butsch stated he was a few paces behind the person with the flashlight, and the hood was only off for a few seconds, and that it was dark, such that he believed Ramzi bin al-Shibh could not see him (Agent Butsch). When asked about a publication of another agent present, he stated he had not reviewed the same previously but it was not right, in that Butsch did not hold the flashlight, and that the other FBI present were Agents Zebley, Soufan and Holcombe. During this 2007 interview this 2002 encounter on the tarmac was neither mentioned by Ramzi bin al-Shibh nor Agent Butsch.

Regarding preparations for the 2007 interview at GITMO of Ramzi bin al-Shibh, Agent Butsch denied having received any CIA recommendations or preparation. He did not have any help from CIA Office of General Counsel except to get permission for use of documents. Butsch claimed overall knowledge of the Ramzi bin al-Shibh investigation based on the majority of the FBI investigation into Ramzi bin al-Shibh being previously in his hands. Agent Drucker (who testified last week) was also part of the PENTTBOMB

team but more involved in the financial aspects of the investigation. Agent Butsch did not recall talking to Agent Drucker about either the 2007 interview at Gitmo, nor speaking with him while there.

Returning to the 2007 interview of Ramzi bin al-Shibh, Agent Butsch stated that the goal was to get “admissible” admissions/statements about the involvement of the interviewee in the 9/11 attacks. He recalls that the room where the interview took place has having chairs, air-conditioning and a table of 6 to 7 feet from where he was seated and where Ramzi bin al-Shibh was situated. Ramzi bin al-Shibh was restrained by an ankle restraint to the floor when they entered. At first Ramzi bin al-Shibh spoke in English but eventually he asked about a language translator especially when Agent Butsch was discussing how his situation was different now than when in CIA Detention. When the linguist arrived, Agent Butsch went through all the same admonishments previously done without a translator. Butsch stressed that the DoD was a military organ now in custody of him and that CIA custody was ended and would not be resumed. Per Butsch, 4 months prior to this 2007 interview (specifically Sep 2006) Ramzi bin al-Shibh had been transferred to DoD Custody. Per Butsch, at no point did Ramzi bin al-Shibh appear to be intimidated and often stated he had no fear and was not intimidated.

Butsch testified to explaining to Ramzi bin al-Shibh that they were not interested in any documents looked at or statements given to him before (i.e. while in CIA custody). Ramzi bin al-Shibh confirmed that he understood. The First day of the interview lasted 5-6 hours. By the end Ramzi bin al-Shibh stated he was not certain if he wished to continue the second day. An indeed the second day Ramzi bin al-Shibh did not want to continue speaking with Butsch and the others present.

Butsch recalled that a member of the guard force told either him or another of the Agents that Ramzi bin al-Shibh had been in an altercation before the interview, with a guard, and had ripped a camera from the cell. Butsch decided to remain calm, and reported that Ramzi bin al-Shibh did not appear agitated but was “leery” the day of the second interview. The second interview lasted only about 20 minutes as Butsch showed Ramzi bin al-Shibh the video “Eid el Fitr”, which was viewed 2 times at the request of Ramzi bin al-Shibh but he refused to discuss anything about the video.

Per Butsch, no one raised their voice during either day of the interview, and that Ramzi bin al-Shibh stated early that he would agree to talk about himself but not answer questions about anyone else. He also refused to talk about certain topics/questions.

Butsch stressed that the interview with Ramzi bin al-Shibh started by Butsch telling him that he had gained Butsch’s respect since during his investigation he had not found a single person who said anything negative about Ramzi bin al-Shibh. Agent Butsch told Ramzi bin al-Shibh he did not agree with that he and his brothers did, but that he respected the sacrifices that they made for a cause that they believed in, and that Butsch respected the complexity and success of the 9/11 operation being pulled off as it was, despite not agreeing with it.

To convince Ramzi bin al-Shibh to talk openly, Agent Butsch told him that anything previously told to other interrogators would never go public and that if Ramzi bin al-Shibh wanted his story to be made public, that this FBI interview was an opportunity for him to get it out to the public.

Recounting the substance of the facts discussed with Ramzi bin al-Shibh, Agent Butsch testified that 9/11 did not happen in a vacuum, and that Ramzi bin al-Shibh explained that it resulted from the United States invasion of the Holy Lands in the Middle East. Ramzi bin al-Shibh told Agent Butsch that it was a war between the Muslim people and the US/Jews/Christians on the other side. The 1996 warning and a second one declaring war issued by Bin Laden were central to Ramzi bin al-Shibh's account, and he referred to Bin Laden as "Sheikh" or "Abu Abdullah" in the interview with Butsch. It was described as a war of cultures between Islam and Christianity, and which Ramzi bin al-Shibh and his brothers viewed as a matter of life and death. This war could only end if the United States left the Gulf and ended its support for Israel. It was stressed that in 1996 Bin Laden had in essence declared war and then later that year proclaimed a Fatwah against Americans. Per Butsch, Ramzi bin al-Shibh indicated that Jihad was the highest obligation of a Muslim and it was a sin not to participate in Jihad.

Per Butsch, Ramzi bin al-Shibh in 1999 travelled to Afghanistan for Jihad, as he wanted to fight against Americans and "other enemies" (left undefined except for a reference to "Russians"). Ramzi bin al-Shibh went on that occasion with 4 "brothers", including Mohamed Atta, and 3 persons in total who later would be 9/11 hijackers.

Agent Butsch was shown still photos from the "Eid el Fitr" video and said he asked Ramzi bin al-Shibh if this was indeed him seated in the still. Ramzi bin al-Shibh replied "God Knows" and while admitting he had been present, otherwise denied that the photograph was of him. Agent Butsch testified that he is certain that the photo was of Ramzi bin al-Shibh. During that "Eid el Fitr" video Bin Laden spoke of various conflicts, including Chechnya.

Another exhibit was shown to Butsch, and he testified that this was depicting Ramzi bin al-Shibh on the left and Mohamed Atta on the right and that Ramzi bin al-Shibh recognized this particular video as something he had made in Afghanistan after the meeting while still at Bin Laden's compound. Per Butsch, Ramzi bin al-Shibh described the video (which had no sound) as a last will of a martyr, and that he had already been tasked by Bin Laden to become a martyr for the 9/11 operation. Ramzi bin al-Shibh indicated to Butsch that Bin Laden had traits of the prophet Mohammed. Per Butsch, Ramzi bin al-Shibh identified Bin Laden as the head of the Al-Qaeda organization.

When asked about a "Kunja" – Agent Butsch stated that this was a code name adopted in the Afghan camps for security reasons in case one of the participants in the activities was ever captured. Per Butsch, Ramzi bin al-Shibh chose the name Abu Ubaidah for himself as his "Kunja."

From the Interview in 2007, Butsch said that Ramzi bin al-Shibh stated that Hamburg was chosen for the operation, specifically the Hamburg cell, because of their having lived

in the West and familiarity with the West, which was to assist in the attacks. Ramzi bin al-Shibh and his “brothers” were thus instructed to return to Germany to attend flight training lessons. Ramzi bin al-Shibh did not remain in Afghanistan to receive any military training.

Butsch then testified that Ramzi bin al-Shibh returned to Germany to research flight schools, and was directed to Amersfoort, Netherlands, and went there to inquire about the same, but was told that US training centers were better due to the cost of the same, and the better weather conditions.

Butsch was shown a 2000 application by Ramzi bin al-Shibh for a US Visa, which he said the defendant confirmed during the 2007 interview. The name and date of birth were consistent on all visa applications (this one being dated May 17, 2000). Ramzi bin al-Shibh told Butsch the purpose of going to the United States (under this Visa) was to attend flight training schools, and that others had already succeeded prior to him in this goal. This Visa Request was denied.

Butsch then testified about another document, a 2nd visa application also shown to Ramzi bin al-Shibh during the 2007 interview, and pointed out that unlike the first this one listed a specific address in Hamburg that was significant to the investigation, as other hijackers were registered at the same address. Ramzi bin al-Shibh confirmed that he had applied for this Visa also to attend flight school and that also was denied. Ramzi bin al-Shibh told Butsch that the others did not wait for him but rather left from Germany for New York and Florida, which Butsch testified was consistent with the FBI investigation conclusions as to the movement of the hijackers).

Another document was shown, relating to a flight school in the United States with some Arabic handwriting. Butsch testified that this document had been obtain by way of seizure from Zacarias Moussaou, and that Mr. bin al-Shibh identified the Arabic handwriting as belonging partly to him and partly to Mohammed Atta.

Butsch continued to testify about additional attempts by Mr. Bin al-Shibh to obtain a Visa from different locations. Another document was shown that was a 3rd attempt submitted from Yemen. Agent Butsch testified that this particular document had been obtained from the State Department and highlighted that it listed the purpose of the trip as “tourist” but then said he was not entirely sure if the source was the State Department or if the FBI had also gotten by another means. Butsch testified that Ramzi bin al-Shibh again explained in his 2007 interview to Butsch that he used the address of a friend as he needed an address for the application.

The next document shown to Agent Butsch was an Application to the Florida Flight Training Center. Per Butsch, this had been shown to Ramzi bin al-Shibh in the 2007 interview and Ramzi bin al-Shibh acknowledged having sent the same to that school. Ramzi bin al-Shibh further offered that he had been told to go to an affiliated language flight school to learn English used by pilots, which is why he then changed the Visa Application to “student” rather than “tourist.” The address of a friend previously

discussed was confirmed to be of a Mr. El Nafand who neither was applying to the flight center nor was aware of the use of his address for this purpose.

Per Agent Butsch, all the documents from the Florida Flight training and language school had been in FBI possession and known to them before September 2002 (i.e. before the arrest of Ramzi bin al-Shibh).

After going through some correspondences between Ramzi bin al-Shibh and the Florida Flight Center, a 4th Visa Application was used with the witness, who confirmed this too was used and shown to Ramzi bin al-Shibh during the 2007 interview, and at that time authenticated, and now again listing a German address. Per Agent Butsch this application was also denied, but Ramzi bin al-Shibh said he did not give up trying to get a Visa for America.

The next 3 documents shown to Agent Butsch by the Government were two "MoneyGram" send forms and one "Western Union" send form. Per the witness, Ramzi bin al-Shibh acknowledged having sent money to the US on 2 or 3 occasions and that the first was from Mr. Al-Shehri's own account in Europe, but for security purposes did not want to use his bank card in the US, thus necessitating the wire transfer. As to the second MoneyGram, Butsch stated that Ramzi bin al-Shibh repeated he only sent money 2-3 times and could not confirm this as one of those times, and that his signature was forged and that he did not admit this as his. As to the Western Union (sent to one of the hijackers), per Butsch, Ramzi bin al-Shibh again did not confirm his signature nor having sent the money wire in question.

Per Butsch, Ramzi bin al-Shibh then went to London to try and find a British wife in an effort to help his ability to obtain a visa. Atta had telephone conversations with Ramzi bin al-Shibh that were in code and limited, requiring them to meet in person, so in late 2000 both Ramzi bin al-Shibh and Mohammed Atta went to Berlin for a face to face meeting. Per Agent Butsch's testimony, in the 2007 interview Ramzi bin al-Shibh this meeting was in the context of relaying orders via Atta to the others to proceed with the attack. Butsch added that the FBI's own investigation corroborated that Atta travelled to Berlin during the period indicated by Ramzi bin al-Shibh.

Butsch then recounted Ramzi bin al-Shibh's second trip to Afghanistan, with the purpose of updating Osama Bin Laden after the Berlin meeting with Atta. Ramzi bin al-Shibh Travelled through the Netherlands and Iran before slipping into Afghanistan. Butsch testified that Ramzi bin al-Shibh's interview in 2007 admitted that he had sought from Bin Laden permission to go ahead and join the operation by obtaining a false passport to permit his travel to America. Per Ramzi bin al-Shibh (as recounted by Agent Butsch), Bin Laden gave the go ahead for the attack operation to proceed, but did not allow any attempt to obtain entry via a forged passport. On this trip, Ramzi bin al-Shibh met with the remaining 14-15 hijackers in Afghanistan awaiting their orders.

The Government then asked Agent Butsch to switch gears and explain who "Al-Sahab Productions" was. Witness Butsch testified that this was the media wing of Al-Qaeda and that the knowledge of that fact was known to him in 2006 and that is what he was

acting upon during the 2007 interview of Ramzi bin al-Shibh. This was the production company that had produced the film shown 2 times to Ramzi bin al-Shibh in the 2007 interview. Per Butsch, while Ramzi bin al-Shibh confirmed the film was dated after the 9/11 attacks, he neither confirmed nor denied that it was him in the video.

At some point in the 2007 interview, Ramzi bin al-Shibh asked Agent Butsch for a pen and paper. Butsch complied with this request. Per Butsch, on the 2nd day of the interview one of the guards, returned the pen and paper, which purported to be writing from Ramzi bin al-Shibh. The next document shown in the Military Commission by the Government prosecutor was identified as a copy of this note, drafted 11 January 2007 after the first day of Butsch's interview with Ramzi bin al-Shibh, as translated by the linguist. Butsch interpreted what was written/depicted on the paper as an indication that Ramzi bin al-Shibh was neither bothered by his surroundings nor the prior day's interview by him. The essence of what was said was summarized as (not a direct quote) "My tongue is sharp and you cannot hurt me."

Per Butsch's appraisal and opinion, Ramzi bin al-Shibh seemed at all times to take pride and be proud of his role in the 9/11 attacks, and at all times during the 2007 interview seemed engaged, and in the opinion of Butsch was still committed to "the Cause." Butsch denied that Ramzi bin al-Shibh appeared distressed, irrational or depressed during these interviews in 2007. No complaints were made to Butsch by Ramzi bin al-Shibh about guards keeping him awake at night. Butsch then stated that if he had any concern of Ramzi bin al-Shibh being psychotic, he would not have interviewed him without seeking the consultation of a legal and doctor consultant for confirmation of the same. Thus, he did not see any such signs. Butsch assessed that Ramzi bin al-Shibh was making use of the 2007 interview with him to get out his pride over the 9/11 attack.

The Government attorney next asked Witness Butsch about a meeting with Al-Jazeera journalist Fouda. Butsch stated that he met with Yosri Fouda in New York with special agent McGuire and prosecutors from the NY Southern District. Butsch confirmed that Agent McGuire had also interviewed Fouda in Cairo in 2009.

The documentation from Fouda purporting to be interviews or statements of Ramzi bin al-Shibh were the subject of various objections and rulings.

Witness Butsch testified that the FBI DOC EX team was a document exploitation team tasked with taking possession of material seized from raids, tasked with identifying it all with unique numbers and storing the same and presenting it. Several documents were shown alleged to be from Fouda to Ramzi bin al-Shibh and Atta in 2002 and follow-up questions from the journalist (Fouda) to Ramzi bin al-Shibh. The witness said that these were all seized and captured in the so-called "Tariq Road Raids" @ Karachi, Pakistan. Per Butsch, Fouda admitted authoring the letters. Butsch said his information was that these had been seized precisely from the home of Ramzi bin al-Shibh as part of the "Tariq Road Raids."

Butsch then was shown a 2009 TV interview and he identified Fouda on the right and Mohamed Atta on the left. The Videos were also found in the "Tariq Road Raids"

according to the witness. Butsch testified that fingerprints found on some documents from these raids had been identified as belonging to Ramzi bin al-Shibh.

Returning to the narrative that Butsch claimed to have received in the 2007 interview at GITMO from Ramzi bin al-Shibh, after Afghanistan Ramzi bin al-Shibh travelled to Karachi while the “muscle hijackers” were coordinated to go to the United States and get in contact with Atta.

When asked by Prosecution Counsel what he had reviewed to prepare for his testimony, Agent Butsch identified:

- a) The LHM
- b) Notes
- c) Binders of Documents disclosed TO the Defence (containing evidence of communications from around the world with or involving Ramzi bin al-Shibh)
- d) Statements as to the CIA’s destruction of tapes from Black Site interviews

Butsch was then asked if he had reviewed any of the materials from Perkins, Fitzsimmons, or Drucker. He stated that he had not reviewed their material. He further stated that he did not recall asking either of the 3 of them to assist with the interview of Ramzi bin al-Shibh. He also testified that within the FBI, any substantive investigative work would be communicated by official forms and that email would not be used as a means of such communication.

Butsch did not recall ANY emails that he would have looked at subsequent to the 2007 interview that dealt with Ramzi bin al-Shibh.

With this the Government passed the witness to the Defence, and the first day of our public observations of his testimony ended.

On 7 November 2019 the proceedings in the 9/11 “KSM” hearings continued with some procedural matters, and then with Witness Supervisory Special Agent Michael Butsch being re-called and reminded of being under oath. Surprisingly, the first Defence Counsel to cross-examine the witness was Jay Connell, learned counsel representing Defendant Al-Baluchi (also known as “AAA”) and NOT the defence of Ramzi bin al-Shibh.

Counsel Connell first oriented the witness as to the various binders that were in front of him that they would be going through and the contents of each. Connell further apprised the witness that he would conduct his examination as if going through various books and chapters and would announce when moving to a new topic. He further explained to the witness the government had asserted classification and national security privilege to remove certain documents or information from the case and that he and the judge and prosecution were operating pursuant to guidelines, such that if questions appear to be asking about classified information it is because the Defence believes, but does not know if something has been so removed from the evidence by the Government’s assertion of national security privilege. And that if the witness believed an answer might be relating to evidence of such a nature that the witness should make that known and could seek

direction from the Government, based on the guidelines. After confirming the witness understood, Counsel for Al-Baluchi began his Cross-Examination.

On Cross-Examination Agent Butsch confirmed that his current security clearance was “Top Secret” and that he first learned he would be testifying in these proceedings about 3 to 4 weeks ago. The witness confirmed he did meet with Government/Prosecution counsel to prepare “the week before last week” and on 3 separate days for a grand total of around 10 hours.

When asked if during preparation with the Government his direct examination was discussed with him the witness initially answered that he “did not remember.” Upon follow-up questioning it was agreed and established that:

- a) The witness met with Prosecutor Tribett who told him what areas would be covered in his direct questioning and what documents would be shown; and
- b) The witness had undergone a “moot” and practice of his direct examination with the Government attorneys (which had not been memorialized);

When asked if anyone else was present during the Government Counsel’s preparation with him, Butsch stated that the FBI had counsel present as well. Defence Counsel Connell asked Butsch if his offer to meet with him to go over documents to be used in the Defence Cross had been communicated to him. Butsch answered that it had been communicated to him and it was his own personal decision to deny the offer, shrugging his shoulders when asked why, stating that in general it seemed to him a better idea to do it in the courtroom. When asked by Connell if he could have made the offer to meet in any different manner that would have prompted Butsch to meet with him, the witness said probably not.

Butsch testified that the Government had given him 3 binders, one with discovery and 3 with motions and miscellaneous documents. Butsch admitted it had been quite a while since he had previously seen some of the documents shown to him. Based upon the request of the defence, the Judge ordered the Government/Prosecution to provide a list of documents used in preparation with the witness.

Connell then continued his cross-examination into the training and background of the witness. Agent Butsch acknowledged his familiarity with the Jencks Act³ and obligations as to documents authored by him. He stated that during preparations he was only shown redacted versions even of his own leads/statements. The witness did not ask why that was the case.

Agent Butsch stated that at the FBI Academy he was trained as to Miranda requirements and confirmed that a lot of training post Academy focused on the importance that a suspect their right to remain silent and to an attorney. Indeed, the witness confirmed the FBI publishes this Miranda instruction in several languages, including Arabic. These were not used in the 2007 interview at GITMO.

³ https://en.wikipedia.org/wiki/Jencks_Act (note: this Federal Act requires the Prosecution to provide all statements in its possessions of a witness, including any transmission or transcription approved or authorized by the witness.)

Testifying about his arrival to the JTTF squad in 1998, the witness indicated he worked on the I-46 team that tracked Al-Qaeda investigations and that he had been involved in a few publicly known cases prior to the 9/11 attacks. His New York Office led all such cases. The most notable was the “Millennium Plot Case.” In 1999 Ahmed Ressam Crossed the Canadian border into the US and US Customs agents found a truck full of explosives. Due to the Al-Qaida link the New York FBI office worked with the Seattle office and eventually investigated a cell leader in London.

When asked if in the course of these investigations his New York Office had access to intelligence from intelligence agencies, Agent Butsch stated “yes, I am sure we did.” He could not recall the distribution hierarchy but said the JTTF itself had representatives of other agencies, and the FBI had liaisons embedded at the other intelligence agencies as well.

Defence Counsel Connell next asked about Agent Butsch’s involvement in arrests and the witness recalled his personal involvement in about 10 arrests, but was unsure if any were of non-US citizens. He did confirm that if a non-US national was arrested there was a time limit to notify that national’s Consulate and that in essence the non-US nationals arrested by the FBI thus should have more rights than those provided under Miranda.

When asked if there was a CIA liaison within the JTTF, the Government/Prosecution first objected after the witness indicated this might be classified information for a confidential session. After some discussion the Government/Prosecution **changed their objection to an invocation of national security privilege** and thus prevented the questioning or any answers even in confidential session on the topic.

Defence Counsel Connell then moved to another topic, the events of 9/11. The witness was shown a document identified as a fax received from the Florida Flight School (FFTCC). Agent Butsch stated that this had been obtained early in the investigation and that the name of Ramzi bin al-Shibh was already known to him by this time. He also identified that these documents appeared to come from the FBI Tampa field office and mentioned someone named Alfani. He was then shown another document “FBI0629” which appeared to contain information identical to the FBI documents he had just looked at but for which he testified that it was a “cable” and of “another agency” not the FBI. The witness claims not to have seen this document and that at the time of the same (17 Sep. 2001) he would not likely have set this particular lead mentioned therein, but later in his investigation he probably did set that lead. When asked about a redaction, the witness said he had no idea what the redaction related to.

The witness was then shown an FBI document prepared by a Special Agent Remy, relating to El Maghrabi with some info redacted. The witness confirmed he did not know why such information would be redacted, and in the FBI if redactions were to protect a source it would be so noted. He confirmed no such notation was present as to this redaction.

Witness Butsch was then shown another document of which he confirmed he was the author, but was so heavily redacted that even he as the author of the document could not determine from a review of the same the reasons for the redactions, nor:

- a) To whom it was sent;
- b) What the substance of the document is; and
- c) What leads he had set via this document.

The witness also confirmed that in the course of an investigation such redactions would pose a serious obstacle.

The witness was then shown a document (FBI4785) which he had drafted as a “de-briefing” interview in relation to the Millennium Plot” and admitted that the suspect had an attorney present for this interview, and that the presence of the attorney did not hinder the de-briefing. The witness also confirmed it was standard FBI procedure to have a suspect’s attorney present for a de-briefing. When asked about an envelope of evidence identified, he stated that at the time the FBI system could not handle electronic copies of same – so that the actual envelope would exist in hard copy...somewhere...not known to him. His attention was called to the fact that the name of Ramzi bin al-Shibh was redacted in this version provided by the Government, and again could offer no explanation why the name was redacted, and that it definitely was not due to him being a “protected source.”

Defence Counsel Connell then showed two almost identical documents to the witness, save that one had redactions and other differences. The witness was present for the interview that was being discussed in both documents. He had no explanation for why 2 different versions would be prepared and that there was no FBI practice in place that would explain that.

The witness was next asked about his involvement in the investigation/interview and arrest of a German national (Ludden, also known as Saifullah) who was a suspect. The witness at first was not sure based on the paperwork if the suspect was a German citizen but concluded he must have been if he had been afforded the rights to speak to the German consulate in accord with policy. Both the witness and agent Zebly arrested Ludden as a material witness, in August of 2002.

The Defence Counsel now moved to the investigation post 9/11 in Germany. Agent Butsch testified that he went to Germany about 3 weeks after the attack, first to Berlin and then Hamburg, staying 1-1.5 months. The witness stated that the German authorities worked with him in the investigation. When shown another of the documents authored by the witness, dated 20 September 2001, Agent Butsch was able to decipher the redactions relating to another ‘agency’ and stated he believed in this case it was the German BKA. However, when he was shown another FBI document authored by him (FBI21320, pgs. 4-5) the witness spent some time examining the same and agreed with the Defence Counsel that as to this document, even though authored by the witness, he could not even guess what it related to or what leads he had set as the heavy redactions made it impossible to get anything from the document.

The cross-examination then turned to Pakistan. Agent Butsch confirmed that he went from Germany to Islamabad, Pakistan. He recalled this was around November 2001 and was for 2 or 3 weeks. The purpose of this trip was described as following up on leads as to 9/11, but the witness said any further explanation would be a “505” issue dealing with classified information that would need to be in confidential session.

By the time that Agent Butsch had returned the PENTTBOMB team began to condense and pull together. He stated that within the team information was often shared face to face and thus no written record existed. When dealing with agents not part of PENTTBOMB, the information would be drafted in a 302 document and sent with a call or email follow up. When asked how PENTTBOMB dealt with other intelligence agencies, Agent Butsch stated that it was mostly face to face with representatives of those agencies and via cables of the other agencies.

Turning to the arrest of Al Nashari by the Germans, the witness first saw this on CNN, even though for a time period the German BKA was a part of PENTTBOMB. The witness was then shown several intelligence reports from another “agency” received by the PENTTBOMB team. Agent Butsch testified that the rules as to “sharing “of agency information within PENTTBOMB were rather “relaxed” at the time.

Turning to a new topic, Defence Counsel wished to examine the witness as to his travel in late 2002 in an “unclassified” manner. The witness confirmed again that 11 September 2002 he was notified of the arrest of Ramzi bin al-Shibh in Pakistan and that he flew to Pakistan and had the event on the tarmac. When Defence Counsel Connell asked if after the tarmac incident the witness flew to a “different location,” the Government objected as this was classified. Agreeing to proceed without naming the locations, the Counsel and witness agreed that Agent Butsch went to a second location different than Pakistan, and then after that to a 3rd location that they agreed to refer to a “Location #5.”⁴ It is stressed in court that the witness could neither identify the country, city, affiliation nor building that comprised “Location #5” as it would result in assertion of the national security classified information privilege.

Treading carefully, Defence Counsel Connell continued to ask the witness, whether prior or upon his arrival at the place where “Location #5” was situated, whether he checked into “a hotel” and if he met with “some people.” The Agent confirmed this. When asked if these people gave him some information, Agent Butsch stated that he could not recall. When asked if these other people gave him some instructions, Agent Butsch also could not recall. When asked “Based on your conversations with those people you and another person went to a specific site at Location #5?” Agent Butsch testified that he could not recall such conversations.

Then Defence Counsel Connell showed the witness FBI22681 and asked him to read just the last paragraph on the second page of this FBI memo drafted by the witness to refresh his recollection. The information in the document stated that based on the conversation

⁴ Note: it is my understanding, from talking to other observers, “Location #5” is a euphemism used during the trial for one of the CIA “Black-sites” so as not to reveal the identity of the location.

at the hotel at some point after Agent Butsch had a conversation (he clarified “maybe not at the hotel”) and then went to “Location #5” and to a structure that they agreed to refer to as “The Building.”

When arriving at “The Building” Agent Butsch confirmed he and another agent were provided information by people at “The Building.” It was not clear to Butsch if Ramzi bin al-Shibh was at “The Building” but he admitted subsequently learning that Ramzi bin al-Shibh had been there. When asked if Butsch had observed any “activities” undertaken as to Ramzi bin al-Shibh at “The Building” the Prosecution Objected.

Defence Counsel thus changed the question to whether Agent Butsch was able to watch the “de-briefing” of Ramzi bin al-Shibh. Agent Butsch confirmed that he had, from an observation room within “The Building.” When asked if the observation room was adjacent to where Ramzi bin al-Shibh was being de-briefed, Agent Butsch claimed he could not recall. Defence Counsel then produced another FBI 302 memorandum prepared by the witness, which refreshed his recollection that he was in a room in “close proximity” to where Ramzi bin al-Shibh was being de-briefed watching on a monitor, and that he was allowed to take notes that only a small portion of which were turned into cables.

Agent Butsch testified that as to the Ramzi bin al-Shibh de-briefing at “The Building” at “Location #5” he had no reason to believe that any attorney was allowed for Ramzi bin al-Shibh. He had no knowledge if any embassy/consular contact had been permitted. He did not know if Ramzi bin al-Shibh had been given access to communicate or meet his family. Similar denials of information were claimed as to the ability to send letters/calls/emails; access of the International Red Cross; and if the right to remain silent had been addressed or honored during the de-briefing.

After returning from “Location #5” Agent Butsch returned to the US, and told his superiors he wished to return to “Location #5” to continue efforts with Ramzi bin al-Shibh to address information important to the Moussaoui trial. Agent Butsch testified as to meetings with “government officials” to try and go back, and eventually the FBI team sent cables to intelligence service about these issues and why they wanted to address these issues with Ramzi bin al-Shibh. When asked what agency were the “government officials” that were part of these meetings, Agent Butsch stated “the CIA.”

The witness was then shown a 12 November 2002 cable, from the FBI to the CIA with proposed questions to be asked to Ramzi bin al-Shibh and a timeline. When asked about this document and if he ever travelled back to “Location #5” – the witness and government said that would have to be handled in closed session.

At that point, after some conferencing, Defence Counsel announced he was going to skip some of his questions, because the Government had just agreed to provide a witness they

previously had withheld – former FBI agent Ali Soufan.⁵ This was viewed by everyone as a major breakthrough (for the Defence).

Returning to “Location #2” Agent Butsch confirmed that he or someone else made the call to FBI HQ to negotiate to continue to be involved in the handling of Ramzi bin al-Shibh, and that that is how he and the second agent got permission to go to “Location #5.”

Returning to the incident at the tarmac in Karachi, Agent Butsch did not recall if he and the others on the plane went through customs or immigration. There were 20 persons on the plane that arrived; from the FBI it was special agents Soufan, Zebly and Holcombe. When asked who the remaining people were – the government refused to allow that question to be answered. The witness was able to verify that 16 people got off the plane at Karachi (including all 3 other FBI agents) and that on the ground they were met by persons the witness believed to be CIA, and some Pakistani force, whose identity the witness did not know. The witness testified that he and the other FBI agents got on the plane with the detainees and the CIA. Later when asked if his understanding was that the FBI had handed Ramzi bin al-Shibh and the others over to the custody of the CIA at Karachi, the witness claimed not to know the answer. However, he did admit it was his understanding that the plane in question (which he had travelled to Karachi on and which took them further) **had been chartered by the CIA.**⁶

Turning to the so-called “Tariq Road Raids” the witness confirmed documents seen and used by him that bore a certain designation were understood by him to have come from those raids. Since he was not personally involved, he did not know if the FBI was involved in the capture of the evidence and could not recall who told him of the same. He stated he did not know the “agency affiliation” of who collected the documents.

Turning to the topic of any discussions before Karachi, the Agent testified that as soon as notified of the arrests, he and the other agents later on the plane met in the National Capital Region. This is when the agent acknowledged that the plane itself was chartered by the CIA.

After a break in the proceedings, Mr. Montrose (Defence Counsel for the lead Accused) presented brief oral submissions on a pending motion to disqualify the Convening Authority due to bias, based on 999 pages provided to the defence of email and other exchanges between the chief prosecutor (General Martens) and the Convening Authority that it is argued show interactions that go well beyond a professional level. Due to these

⁵ Note: a peculiarity of this hearing is that the Prosecution gets to authorize or deny witnesses that can be called. Per public source materials, and the recent films “THE REPORT” and “THE LOOMING TOWER”, Agent Soufan resigned from the FBI criticizing the CIA and enhanced Interrogation Techniques, and testified before the Senate Judiciary Committee on torture (that actionable intelligence was actually hindered and/or stopped when enhanced interrogation was introduced).

⁶ Defence Counsel Connell told the court other evidence would show that this particular plane was used extensively for black site travel, when the Government objected to a question about the tail fin registration number of the plane.

letters, the Defence was seeking to compel the Convening Authority and one other individual to testify under oath. The Judge promised a ruling next week.

Returning to the testimony of Agent Butsch, and the cross-examination of counsel Connell, he was shown document FBI2710 that was from the FBI to the CIA and requested that detainees be asked 26 numbered questions. The witness did not know who had prepared the document in question. 2 more documents drafted by the witness were shown, again with redactions but dealing with information sharing.

At this point the Judge interrupted the further questions on this topic, by announcing that he was satisfied that sufficient evidence had been presented by this and prior witnesses to establish the extensive sharing of information and cooperation of the CIA and FBI on this matter.

Acknowledging this Ruling and Finding of Fact, and allowed to ask just a few more questions on the topic, Defence Counsel Connell showed a few more documents to Agent Butsch to obtain the admission the information in 2002 that the FBI was relying on came from reporting of detainee interviews at “Location #5.”

The 8 November 2019 hearings (that portion that was public) continued with the cross-examination of Agent Butsch by Connell. The topic turned to the involvement of the witness in the Abu Ghaith case, where the suspect was captured and arrested by the FBI in another country. The witness confirmed that he rode on the same plane as Abu Ghaith and interviewed him. Agent Butsch further confirmed that Abu Ghaith was administered his Miranda Rights, and was advised by Counsel who was present on how to proceed and that the presence of counsel and administration of Miranda rights did not interfere in the interview/investigation. Indeed, Witness Butsch stated this is the normal procedure in law enforcement. Butsch stated Abu Ghaith was advised of a right to be brought before a neutral judicial officer and ultimately decided to be presented to a Magistrate (with this request honored by the FBI).

The next topic was the assignment to the High Value Detainee Task Force in 2006. Butsch recalled this was in the autumn of 2006 and that he and others were allowed to work on a closed, stand-alone network with information on it. CIA and other information sources were arranged in “buckets” on the server. As to the Iranian visa, Butsch believed it was brought to his attention by an intelligence analyst. He did not recall if this was discussed at “Location #5.” He did acknowledge it was obtained by a classified source and method and if they wanted to use anything classified in the interviews the FBI had to seek permission via a form. Again, as to Ramzi bin al-Shibh, Butsch recalled only the video and Iranian visa as being “classified” items.

The witness acknowledged being briefed in 2006 on Enhanced Interrogation techniques. When asked to define a “Black site” the witness stated that in his mind is that it is the type of interrogation technique used but that he was not really clear on what was or was not a black site. He did not believe “Location #5” to be a Black Site, but believed the next location was. Also – since he went to “Location #5” he believed it was not a “Black Site” based on his belief that only CIA were at those. He was never made aware that other FBI agents had been to sites identified as “Black Sites.” The witness was shown a

summary intelligence report (STA461) which dealt with some of what he saw at Location #2 and Location #5 as “Black Site Material” he did not have a clear definition so did not consider those at the time, again, due to his lack of a clear definition from anyone.

When Defence Counsel Connell attempted to go back to the 2007 interview of Ramzi bin al-Shibh at GITMO⁷, the government objected as to how this was relevant to the case against Connell’s client, since the Government would not be using anything from the Ramzi bin al-Shibh interview against Mr. Baluchi. A stunned Connell shouted “SOLD!” An equally puzzled judge said that this was a “**Pivotal moment**” in the proceedings and asked Prosecution counsel to consult and make a clear representation to the Judge as he was “ready to make a finding of fact” and wanted to make sure the Prosecution had now departed from its earlier position.

A short break was then called with the entire Prosecution team huddling. After the break the Prosecution made the submission to the Court that in fact the Government was actually taking the same position that it had all along, namely that CIA statements and 2007 interviews would not be used against the accused Baluchi that came from the interview of Ramzi bin al-Shibh. From the reactions of all the defence and the judge, it seemed like a surprise to them that this was the original position.

The judge thus made a ruling that LHM’s from the 2007 interviews will be subjected to review under the Federal Bruton standard, will not be allowed to be used against any of the other accused irrespective of the results of the suppression hearing and if left – would only go towards the individual accused. The Judge also stated overt acts would need to be established for each Accused. From the Reactions of everyone in the Courtroom this was a huge ruling.

Defence Counsel Connell ended his cross and commenced direct examination of Mr. Butsch, which was brief, and then ended.

Defence Counsel Harrington (attorney for Ramzi bin al-Shibh) then undertook a cross-examination going over some of the same documents. The questions were more of a general nature of how an FBI agent was taught to effectuate arrests and conduct interviews and how the Ramzi bin al-Shibh situation differed.

Some of the most critical elements – Agent Butsch confirmed that he had received some training on cultural aspects of interviewing Muslim individuals, after 9/11 and definitely before his 2007 interview of Ramzi bin al-Shibh. He confirmed the Ramzi bin al-Shibh 2007 interview was the first time he had interviewed someone in custody over 7 years.

The witness confirmed this was the “biggest case in FBI history”, however denied having reviewed any reports on Ramzi bin al-Shibh’s medical status or had not researched any aspects of his prior detention at GITMO. He did not inquire further about the “altercation” reported either by a guard or a member of his team.

⁷ Essentially that GITMO was “unique because it is standing practice at FBI to issue Miranda warning.

When asked if he was aware of the rule in Muslim culture about women approaching without a hijab, Butsch stated “as I sit here today, yes, but at the time (of the interview) it did not cross my mind, and McGuire was uncovered.” Agent Butsch further confirmed that he did not inquire of Ramzi bin al-Shibh if he objected to agent McGuire being present as a female officer.

When asked if he was aware how many times Ramzi bin al-Shibh had given almost the identical statement to others, Agent Butsch said 2 times at “Location #5” and a slightly different version to Agent Soulfan at “Location #2” and that he was not aware of how many times or any statements given to other agencies.

When asked why he had to make clear not going back to the CIA, Butsch stated that this was to make clear he did not have to cooperate. Butsch stated it was his understanding Enhanced Interrogation Techniques had been subjected upon Ramzi bin al-Shibh while at the CIA and they didn’t know what specific techniques.

The LHM was neither translated into Arabic nor given to Ramzi bin al-Shibh to confirm its contents as accurate. Neither of the agents in the room spoke Arabic and they were relying on the interpreter. Agent Butsch also admitted the “pitch” he gave to Ramzi bin al-Shibh to use this to get his story public was not recorded in the notes of McGuire nor the official LHM of the interview. There was no recording made of the interview.

When asked if he knew the interview room at GITMO was a room previously used with Ramzi bin al-Shibh by the CIA, Agent Butsch stated he did not make any such inquiries but acknowledged if that was the case he could see the room itself re-traumatizing him if he had been mistreated there. He did admit Ramzi bin al-Shibh said he wanted to speak without any threats, and that Butsch assured him that the FBI does not make threats.

The Testimony of the witness was not completed (there was some confidential parts remaining).

III. Personal Impressions of Observers

i. Dominic Kennedy

As the first time observing the hearings, it was initially a strange feeling, having heard and read about Guantánamo Bay it was a very different experience attending in person. There were times when proceedings were difficult to follow due to not having access to documents and background information; this is due to the fact that the Military Commissions website is unavailable outside of the USA.

The Courtroom layout had similarities to the international courts and tribunals, in that the public gallery was behind glass at the back of the Courtroom, but beyond that it was a very different situation. Firstly having the audio delayed in the gallery by 40 seconds was at times disorientating and the judge having a security officer with the capability of cutting the feed and initiating a red flashing light whenever the Prosecution stated something is classified.

The amount of discussions on classified information was overwhelming and interrupted proceedings throughout the week on regular occasions. The judge having no ability to rule on whether something was in his view classified or not and this was at the sole discretion of the Prosecution. One incident which was perplexing was when the defence wanted to show photographs of the detention facilities in Camp 7 and objections were raised that the Public Gallery may be able to see these on the defence teams' computer screens in the courtroom. After 1.5 hours of discussions, and visits by the Parties to the Public Gallery, it was decided to revert to printed copies for everyone in the courtroom, which in fact made these photos more visible to the public gallery as they were handed around the courtroom and flipped over by counsel on full view of the camera which was broadcast in the gallery. After being informed at the beginning of the week that this was one of the most secure courtrooms in the world, I could not help but wonder how something so simple such as having computer screens in the direct view of the public gallery had not been an issue previously, despite the courtroom being in use for over a decade. Personally there was a simple solution, to have the benches angled to the side so that the screens were not in full view of the gallery, the same as at the ICTY and ICC. The Parties have been asked to file submissions on this issue as it will become even more of an issue once the jury is in place as they will be located directly next to the Prosecution computers.

Another issue which made me question the right to fair trial was that the accused were not permitted to be present during closed sessions of proceedings and their counsel were unable to discuss any closed sessions or classified information with them. I did wonder why there was a whole procedure every morning when the accused waived their right to attend an open session and a representative of Camp 7 had to appear as a witness to testify they had been read their rights in the morning and had voluntarily waived their right to attend. However, the moment proceedings went in to closed session they had no

right to be there at all and negated their right to know the case against them and take any meaningful part in their case.

Throughout the week I sensed frustration on the part of many who have been involved in cases at the Military Commissions both due to the lack of progress, procedural irregularities and the over-riding feeling that no matter what happens in these cases the defendants will not be released, begging the question what is the purpose?

Overall I would describe the experience as surreal and by the end of the week I had the feeling that the abnormal began to feel quite normal at Guantánamo Bay.

ii. Dragan Ivetic

Preparing for the trip I was not sure what to expect. Despite regular updates from our head of office, Dominic, for me it was a new experience, going to a place that I knew very little about and to observe hearings that I had heard only limited information about. Definitely I can say that the entire week was an eye-opener into the entire process, complexity, cost, and other factors relating to the Military Commissions that I had never imagined nor taken the time to research. Not having prior access to motions or documents and being “dropped” mid-stream to observe trial proceedings definitely was a challenge, which is why I turned to a trusted tactic of taking as detailed notes as possible with the aim of correcting mis-spellings later. Again, as I think Dominic mentioned – the documents from the Military Commissions are not available to us via the provided web-link as we are in Europe. I have information that transcripts from the hearings that I attended are available, but I do not have access to them. This definitely is a hurdle as to the “transparency” of these proceedings. It must be stressed that this is a “Death Penalty” case which itself is really FIVE cases being tried together and all of which is just one of several ongoing or planned trials at the Military Commissions.

The “rough” and surreal living conditions at the base for NGO observers was something that I had been warned of and the extra information that I had from Dominic definitely prepared me better than most for the same. Knowing which tent and which stall has the ability to generate warm water for a shower was a very valuable bit of knowledge.

As with cases at the ICTY and the IRMCT – the idea of “closed” or “confidential” sessions neither surprise nor cause concern for me. Indeed, the first 2 days spent on the ground were completely closed session which allowed the various NGO observers to get to know one another and the organizations which they represented better. What struck me was the breadth in terms of experience and knowledge in the group. It was obvious that certain members of the NGO observers had been studying these proceedings for some time and were a remarkable resource for knowledge and information to help get up to speed on things.

The NGO observers also had to learn to cooperate together a lot to just get things done (like grocery trips; dinner; use of the limited internet, etc.) It was strange how the very foreign and surreal surroundings became “natural” and almost a part of your routine in

such a short time (like the playing of the American Anthem in the morning and revelry at dusk over the loudspeakers).

It was also strange how used one got to being restricted in terms of access, and how we were instructed to hide our ID badges when in town and be vague about who we were, and what we were doing. Even this seemed normal.

As to observations in the public gallery, I think that much of what Dominic has stated covers concerns or observations I would have. One thing that I can add – during our observation week one critical issue that came up was whether the witness could finish his testimony from another location via video link to spare the cost and hassle of bringing everyone back to Guantanamo bay (each flight is rumored to cost \$100,000). It was remarkable that the Defence all agreed and the prosecution objected due to concerns about secure video feeds. At the ICTY and IRMCT we have been doing video link testimony for decades. Likewise, so have domestic courts in the former Yugoslavia. This struck me as odd. (As did the explanation that the only places that video link could function were at Fort Meade....only to be told the first day that persons had been able to watch the video link at the Pentagon)

The costs of the Military Commissions and the projected amount of work still to be done are staggering, especially having seen the “base” or that part of the base where most personal such as NGO’s would be based. It is hard to foresee that the same can be accomplished without significantly more costs and time/delay in the proceedings. For one thing – there is only ONE secure courtroom...and multiple trials scheduled for next year. The budget required is astounding – \$13 million for each of the persons detained at Guantanamo Bay.

I have to echo Dominic at the end as his summation is really the best way to describe things – “Throughout the week I sensed frustration on the part of many who have been involved in cases at the Military Commissions both due to the lack of progress, procedural irregularities and the over-riding feeling that no matter what happens in these cases the defendants will not be released, begging the question what is the purpose?”

Overall I would describe the experience as surreal and by the end of the week I had the feeling that the abnormal began to feel quite normal at Guantánamo Bay.”

Since I cannot come up with better words, I will end with his, and the hope that the ADC-ICT’s continued involvement in the NGO program will assist in answering these questions and assuring that Rule of Law prevails.

