

Military Commissions:
Pre-Trial Hearings
February 12 – March 8, 2024

ISN 10024 Khalid Sheikh Mohammad
ISN 10014 Walid Muhammed Salih Mubarek Bin Attash
ISN 10018 Ali “Ammar Al Baluchi” Abdul Aziz Ali, and
ISN 10011 Mustafa Ahmed Adam Al Hawsawi

Events:

The four weeks of hearings beginning on February 12, 2024, were scheduled for open and closed testimony of witnesses in a number of motions. These motions questioned the admissibility of the FBI Letterhead Memorandum (LHM) statements as evidence on the basis of whether or not the statements were given voluntarily. The original schedule included witnesses who worked for the FBI, Dr. James Mitchell who had been a contractor for the CIA, and a medical doctor associated with the detention facilities either under the CIA or the DOD. The schedule was rearranged when the unnamed medical doctor developed a severe infection that required treatment with narcotic medications, which would have made her testimony inadmissible. Instead of the medical doctor testifying, a supervisory intelligence analyst was shifted forward to the final week, and motions that were prepared but unscheduled were given room for argument before the commission.

The accused did not for the most part attend the hearings, with the exception of ISN 10018 Ali/Baluchi, who listened to at least one day of witness testimony from the back of the courtroom, which was specifically made available for detainees to view the live courtroom feed without sitting at their defense tables. The judge found the absences to be voluntary, though there was one day that ISN 10014 Bin Attash refused to sign his absence consent form with the complaint that he was not being informed in a timely manner whether court the next day would be open session or closed session. The defense and government teams and the judge examined the detention operations’ witness (callsign “Pepe”) who stated that guard staff had reportedly informed Bin Attash at 5:00 p.m. the evening before in response to previous complaints of a similar nature. The judge found Bin Attash's absence voluntary but admonished the government to ensure that detainee information procedures were robust and redundant. He further admonished the defense team to impress upon Bin Attash that either his signature pledging voluntary absence, or his attendance was mandatory. The judge noted that forced cell extractions and attendance enforcement had occurred in the past, and it was his preference they not become necessary again.

Testimony of former FBI Special Agent Fitzsimmons

The week of 12 February was largely given to the direct examination, cross-examination, and redirect examination of former FBI Special Agent Fitzsimmons, who had been involved in conducting LHM interviews and recording the statements. Fitzsimmons was able to provide some information on apparent detainee disposition, FBI interviewing and rapport-building procedures, and the establishment of the clean teams that took the LHM interviews. However, he noted more than once that the details the defense teams requested had been dimmed by the intervening time. Fitzsimmons did offer to attest to the truth of government-provided documents that contained the details the defense requested of him, if the defense showed them to him.

Testimony of Dr. Mitchell

The week of 19 February opened on 20 February with discussion of procedural disconnects that prevented or delayed ISN 10024 KSM meeting with his legal team on 18 February and renovations in the detention buildings requiring Ali/Baluchi to store his legal materials in two separate places. Procedural corrections were already in place to prevent repetition of the KSM problem, and the judge directed investigation of remedies for the Ali/Baluchi problem. The judge also laid out his expectations that Dr. Mitchell's open testimony would be taken 20-22, 24 (Saturday), and possibly 26 February, and in the absence of detainees the sessions would continue until 6:30 p.m. or later without prayer breaks. Dr. Mitchell was examined in open session on 20 and 21 February, was scheduled for 22 February, but after several delays the hearing was canceled at 10:40 a.m. and concluded on 26 February. Some intervening days were used for closed session testimony, and days with open testimony ran until near 7:00 p.m.

Dr. Mitchell's testimony was not intended to cover information on which he previously testified, but to discuss information from newer discovery that included several white papers he wrote at the request of the CIA to explain how human memory works, define and standardize application of coercive pressure, and assist in interpreting differences in responses to questioning that may or may not be rooted in resistance. Dr. Mitchell also introduced newly generated discovery for the purposes of addressing the entirety of the EIT program better than he felt was accomplished the last time he testified. Information added to the commission record included:

- Memory does not function like a videotape, and it is influenced by the emphasis each person places on particular details.
 - A memory takes 1-3 hours after an experience to consolidate, though head injuries and drugs can interrupt that process.
 - Recall reconstructs the memory from the pieces the person emphasized most.
 - If a memory is recalled under particularly positive or negative circumstances, it can be stored again with a more positive or negative tone than it originally had. This frames the memory in current events.
- “Confabulation” is inadvertently constructing a false memory based on logical extrapolation or by incorporating false information. If an interrogator bluffs a subject with false or uncertain information, a week later the subject may incorporate that information as true without remembering where it came from.
- Confidence does not indicate memory accuracy.
- Mitchell considered Enhanced Interrogation Techniques (EITs) no longer necessary once Hambali's intended attack was stopped because there was no longer a critical, urgent need to prevent imminent actions.
 - “EIT” was a CIA acronym; Mitchell preferred to call the measures “coercive physical pressures.”
 - EITs on particular detainees were to be halted once the given detainee showed evidence of cooperating in providing information.
- The Rendition, Detention, and Interrogation (RDI) program contained two phases, of which the

EIT portion was the shorter.

- EIT Phase:
 - “Classical Conditioning” consisting of negative stimulus (unpleasant experience, such as being walled) is applied when a problem behavior (examples: refusal to talk; insistence on discussing past attacks instead of future attacks) occurs.
 - Classical conditioning trains a nervous-system response rather than a thought-based response. A signal of potential negative stimulus triggered a chemical release of adrenaline.
 - Motivation is in avoidance of consequences.
 - Attempted to make a rolled towel the indicator of potential negative stimulus, so the detainee would be comfortable talking with the interrogator or the debriefer and tension could be reduced by putting the towel outside.
 - Debriefers were never left alone with detainees during this phase.
- Full Debriefing Status:
 - “Operant Conditioning” consisting of supplying positive reinforcement (improvements to living conditions, provision of requested food, etc.) when a desired behavior (continuation of attempts to cooperate) occurs.
 - Operant conditioning trains a thought-based response.
 - Motivation is in obtaining or maintaining rewards.
 - During this period, the RDI program featured no EITs, and detainees underwent a “fear extinction” process, whereby threats of returns to EITs were made but never followed through. Dr. Mitchell cited papers that indicate that the more often a threat is made but not enacted, the less the nervous system responds to the threat and the less unthinking fear that subject feels.
 - Only debriefers performed this phase, unless the detainee or a debriefer requested a particular interrogator.
- Mitchell Jessen Associates (MJA) was responsible for training interrogators, though NX2, the “New Sheriff,” trained interrogators prior to 2005 when the CIA hired MJA for the task. Mitchell did not know who trained the debriefers.
- Mitchell confirmed meeting two FBI debriefers at Location 6, but he did not know if they were detailed to the CIA or not.
- Mitchell identified several slide show presentations as having been created by MA7, “The Preacher,” as training aids prior to MJA, and noted that the slides contained either misappropriated/misdefined psychological terms or propaganda strategies from countries that captured U.S. personnel.
- KSM had nicknames for several interrogators and debriefers. Mitchell did not know who “Abu George” was, but “Abu Maximillian” was Y47, who was chief of the department overseeing the RDI program.
- The EIT phase was entirely focused on gaining information to prevent future attacks, so when KSM tried to talk about the 9-11 Plot he was subjected to negative stimuli.
- The debriefing phase often asked for information about future plans, but exploration of other

topics was allowed, so when KSM discussed 9-11 during the debriefing phase he was not punished.

- Though detainees were often nude during the EIT phase, they were given towels to cover themselves when a debriefer was called in to join the session.
- When asked about his time in 2002 being involved in the interrogation of Abu Zubaydah and consulted about FBI involvement, Mitchell disagreed with other witness testimony and stated that the FBI did not lose access to Abu Zubaydah because he identified KSM, but because of the behavior of agents like Ali Soufan. The chief of base discovered that Soufan was using back-channel communication routes to circumvent the agreement subsisting between the FBI and the CIA.
- Mitchell recalled Special Agent Gaudin as obtaining much of the information from Abu Zubaydah that Ali Soufan later claimed but noted that the agents' rapport-building was not timely or effective for gaining information on attack prevention, only for gaining prosecution evidence. Abu Zubaydah shut down after Gaudin and Soufan pulled a “Zippowitz Maneuver.”
- Mitchell only saw FBI agents at sites 3 and 4, but not at sites 2, 4, 7, or any other connected location.
- There were no DOD corpsmen or other DOD personnel to provide medical care; the RDI program was CIA-compartmented, so medical care was provided by the CIA.
- Mitchell confirmed that he never saw an interrogator exploiting a medical condition to facilitate interrogation. Additionally, anyone involved in or watching an interrogation could halt it, including medical staff.
- The personnel that MJA hired were backgrounded and approved by the CIA, Mitchell wasn't “just hiring thugs,” though the “New Sheriff” disliked the hiring practices.
- Mitchell only saw one detainee while at Location 2, but the cells and building condition reminded him of a dungeon. He wasn't aware of who authorized the conditions of Location 2 but agreed that the environment could have been used to reduce prisoner resistance.
- The sort of fear that classical conditioning creates is a reflexive fear that produces a hyper-focused state intent on preventing or protecting against the threat indicated by the presence of a related item (the towel). The conditioned, reflexive fear must be extinguished so the subject can think beyond this hyper-focus.
- Conditioned fear attaches to items that have a predictive value, not items ubiquitous to the experience. For instance, the rolled towel was only present when EITs were a possibility, but the chairs of the interrogation location were present whether EITs were to be used or not, so the towel gained predictive value where the chairs did not.
- When Mitchell was queried about opinions written by other psychologists, he disagreed that fear memories last for a lifetime, pointing to PTSD therapy working to inhibit the signaling of fear and inducing new synapses to form, modifying and covering fear memories.
- Mitchell did agree that psychological impacts can be as great in magnitude as physical impacts.
- When asked about “generalization,” Mitchell agreed that generalization could shift the threat prediction from the presence of the towel to the presence of an interrogator, especially if multiple interrogators “took turns” in the same session, as is asserted about Ali/Baluchi's experience.
- Fear extinction can be reversed deliberately or by accident, if multiple cues converge, especially in the case of a mind suffering PTSD.

- KSM's EIT portion classically conditioned him to fear lying. KSM's full debriefing portion operantly conditioned him to feel relief by cooperating. Cooperation was entertaining questions, not necessarily giving true answers.
- There is a methodology for measuring fear extinction using physiological response monitoring, but it was not practical or used in the RDI program, partly because “that would be experimenting on humans, which is a war crime.”
- Mitchell had intended to include a chapter about fear extinction in his book, but a discussion with his editor informed him that the topic was too dull.
- Mitchell did not witness Bin Attash being interrogated, either at location 2 or location 4, but was with Bin Attash during debriefing four times at location 4. He did not see Bin Attash while at location 5.

Testimony of James F. Hodgson

The morning of 29 February began with an oral motion to suppress the testimony of James Hodgson on the basis of shifting classification guidance causing additional information to be declassified, causing difficulties with establishing boundaries between open and closed session. The judge denied the motion but acknowledged the classification difficulties.

The witness, James F. Hodgson of the CIFO (formerly the Army's Criminal Investigation Task Force [CITF]), was called to testify about the “Fan Mail Program” set up to examine non-legal mail incoming to the detainees, which added outbound mail from the detainees circa 2015 and ending in 2021. This program reviewed a 2009 letter sent through the International Committee of the Red Cross from Ali/Baluchi to his mother in Iran that was blank but bore the attachment “Islamic Response to the Government's Nine Accusations” written by the “9/11 Shura Council.” The attachment was originally a document the accused prepared when they were going to represent themselves in the military commissions, so it being sent outside of the military court system to a destination in a hostile power with no attached personal explanation was considered a cause for concern. It was also likely to bear evidentiary significance and was reported to the prosecution.

Hodgson also testified on his function as a courier for recordings traveling from GTMO to a permanent storage facility in northern Virginia and procedures for documenting the chain of custody.

Some of the defense examined Hodgson on his training and preferred techniques for interviewing witnesses, suspects, and persons of interest, including the importance of rapport-building and the reading of body language. Hodgson noted that cold calling is frowned upon. This led to questions about Hodgson's part in delivering request-for-interview letters from the Hawsawi team to members of the CIA identified under Unique Functional Identifiers (UFI) to protect national and personal security. Sometimes the letters were delivered individually, but generally they were to a small group called into an auditorium at CIA headquarters. The recipients were thanked for being there and supplied the sealed envelopes containing letters from the Hawsawi team and a document advising them of their legal rights. They were allowed to open and read the letters privately in the auditorium. The recipients gave verbal responses as to whether or not they were inclined to be interviewed prior to departing the auditorium. Most declined, but a few offered that they may be willing to interview but gave no preference as to in person or over the phone. One expressed great agitation indicating that he found the

letter to contain threatening insinuations. Hodgson read the letter and assessed it to be polite. Hodgson had not heard anyone express that the defense teams should not have access to the witnesses. He found the exact opposite and said that “Cogley was very proactive in setting up the few agreed interviews.”

The Hawsawi team asked Hodgson about best practices for contacting witnesses for interview and standard operating procedures for taking “clean” statements as part of a “clean team.”

The KSM team asked about Hodgson's experience in rapport-building interviews with low-value detainees (LVDs) and medium-value detainees (MVDs) prior to being assigned to high-value detainee (HVD) prosecution investigations in 2007. When Hodgson was involved in interviewing Hadi Al Iraqi, he didn't recall anyone asking about Hadi's health but did recall Hadi looking healthy and talking about working out and using elliptical machines. Hodgson believes that he is part of delivering the witness request letters for the 9-11 team because he had previous experience delivering letter requests the same way for the Majid Khan trial in 2020.

Testimony of Kimberly Waltz

The judge began the week of 4 March by discussing witnesses available to schedule for the May session. He then unexpectedly closed the session for the rest of the day to hear argument and discussion concerning Protective Orders 3 and 4.

The morning of 5 March called Supervisory Intelligence Analyst Kimberly Waltz of the FBI to the witness stand. Until 2001, she worked in the Criminal Investigative Division on Healthcare Fraud and mostly analyzed financial intelligence. She and members of her team had been at the FBI headquarters waiting to brief the director on a large case on September 11 and got pulled in to work the counter-terrorism effort and the Pentagon attack investigation. She was responsible for obtaining and analyzing financial, business, and communications records associated with the suspects.

By 14SEP2001, the FBI published the names of the hijackers. By 28SEP2001, the FBI added photographic identifications. The photographs came from U.S. driver's licenses, visas, and luggage owned by hijacker Mohammed Atta that had flown ahead of him. The car that hijacker Hazni abandoned at Dulles Airport contained a receipt for a package shipment through Mailboxes, Etc. The flight stoppage after 9-11 prevented the package from being shipped, and it was found to be addressed to a P.O. Box in the United Arab Emirates (UAE) that was traced to one of the accused. Searches of dumpsters yielded Western Union and other money transfer service receipts that originated from several of the accused. Bank accounts through SunTrust Bank that belonged to Atta and hijacker Shahi were frozen and record subpoenas revealed wire transfers from Ali/Baluchi, Bin Al Shihb (presently severed from the 9-11 commission for mental health reasons), and Hawsawi traced to another P.O. Box in the UAE.

Adel Raffia, a contact for Hazni and hijacker Midar in Los Angeles, reported receiving a transfer of \$5,000 from Ali/Baluchi through the Wall Street Exchange Center, and a copy of an employment card that the center made matched Ali/Baluchi's passport.

By December 2001, Waltz and the FBI identified a Visa card used for money transfers and purchases that was connected with Hawsawi and KSM. Waltz and agents of the FBI went to the UAE and received assistance from the UAE government to gather evidence concerning financial transfers and telephone calls from the UAE to the hijackers or from the hijackers to the UAE. The UAE inventoried, stamped, and authorized evidence documents prior to the FBI taking them. Waltz spent several years between 2002 and 2005 periodically working from the UAE.

When Waltz became involved in prosecuting Moussaoui, she organized sets of the bank documents and returned to the UAE to have them recertified. When Bin Al Shibh was captured in the raid at Tariq Road in December 2002, a laptop containing photographs of the hijackers and associating hijacker first names with their kunyas, allowing for the incorporation of a number of documents bearing the kunyas to be analyzed as part of the conspiracy. Telephone records also came to light, with Hawsawi receiving calls from several of the hijackers repeatedly. Waltz was a remote observer when the accused made statements to the FBI in 2007, and she observed part of the KSM interview, all of the Hawsawi interview, and all of the Ali/Baluchi interview. She also observed a 2008 interview of Bin Attash but saw no interviews of Bin Al Shibh.

Waltz described the KSM interview as sounding like “good ol' boys,” relaxed and joking around, no threats or anger, no apparent fear, and no towel present. She described the Hawsawi interview as straightforward question and answer, with documents presented, no anger or fear, and no towel. She described the Ali/Baluchi interview as dynamic, with Ali/Baluchi looking forward to seeing what was next among the documents, no threats, no fear, no towel, and a shared meal of McDonalds burgers and pies. She described the Bin Attash interview as using photographs and a few raid items, but both Bin Attash and the agent seemed happy to see each other again, so there was no anger, lots of laughter, no threats, no fear, and no towel.

The judge excused Waltz with admonishment not to discuss her testimony with anyone until court reconvened and called her again in April, when the defense teams will cross-examine her.

The day of 7 March was given to argument of several motions. The first motion was not a motion, but a continuation of efforts by the KSM defense team to assert that Protective Order 3 has made defense untenable or impossible, which should be relieved either by dismissal of the case or allowing the defense to ask all questions in open court with the burden falling to the government and the security personnel to cut the feed in time. The Hawsawi team noted that the judge's one-time solution involving submission of only questions that might run afoul of Protective Order 3 for security review might become a repeated solution if the next judge sees it as a precedent. The Ali/Baluchi team indicated that they intended to submit the questions anyway to illustrate that Protective Order 3 is overbroad.

The second motion was from the AE 732 line, wherein the Ali/Baluchi team argued that Ali/Baluchi's first overt act occurred in January 2000. Since RMC 1001 G was passed in April 2010, it would make it an ex-post factor violation to use RMC 1001 G to deny Ali/Baluchi pre-trial confinement credit. The Ali/Baluchi team holds that denial of pre-trial confinement credit through RMC 1001 G retroactively expands punishment against Ali/Baluchi in the event that he is sentenced to a duration of confinement. The Ali/Baluchi team noted that arguments that law of war detention does not count as administrative pre-trial confinement are invalid because identification of a person for trial triggers pre-trial

confinement, and President Bush announced that the accused were sent to GTMO to face justice in 2006. The KSM team adopted the arguments of the Ali/Baluchi team, with additional assertions of targeted malice on the part of the government. The Hawsawi team noted that two motions in the AE 874 and AE 876 lines are related to the AE 732 motion and requested that the judge delay ruling until those were argued too, to which the judge agreed.

The third motion was from the AE 858 line, wherein the KSM team again argued that the Constitution applied to the proceedings but also noted that the statute of MC 907 B 2 b (1) discusses when jeopardy attaches to the case in order to avoid double jeopardy. Though most often jeopardy attaches at the point of the panel members swearing in, in some cases jeopardy also attaches at the swearing and testimony of some witnesses. The Ali/Baluchi team agreed with the KSM team arguments, adding that the accuracy and reliability of the attachment of jeopardy is of emphasized importance because this is a capital case. The government argued that because there is an annex in the courts martial handbook for treating capital cases, moving to a separate procedure to account for jeopardy is incorrect. The KSM team closed argument by mentioning that military capital cases have an 80 percent reversal rate in federal court, so capital cases should have a jury trial instead of a panel trial in light of attached jeopardy.

The fourth motion was from the AE 809 line, in which the Ali/Baluchi team argued for the provision of more UFI designations, because an unsatisfactorily large number of personnel were not found to have “direct and substantial” interaction with detainees and so were not issued UFIs, reducing the size of the requestable witness pool. The reduced witness pool leaves the Ali/Baluchi team with a severely reduced ability to track detainee treatment and experience at some locations and renders the supplied detainee interaction index unreliable and misleading.

The KSM team adopted the Ali/Baluchi team's arguments, indicating that the additional UFIs are necessary for proper attenuation, mitigation, and cross-examination purposes. The KSM team noted that some of the information is beyond the prosecution's reach, but that this places witnesses beyond the reach of the defense, so appropriate relief in the event of no further UFIs would involve dismissal of charges.

The government team argued that, given the situation with many requested witnesses refusing interview, the defense is encouraged to propose stipulations of expected testimony, which the government would stipulate as fact as long as it is tethered to reality. The government also noted that there are other processes through the RMC by which the defense can force testimony, rather than insisting on witness interviews outside of the commission. The “direct and substantial” standard was defined by Judge Perella through RMC 707 procedures, and the government followed the definition to produce large tranches of substitution documents, which would have to be recreated and re-processed for release if a change to the standard is mandated. The government noted that each of the documents has individually been reviewed by sitting judges with full knowledge of the defense teams' theory of defense and has been ruled as a reasonable and useful substitution. The judge asked the government why the defense should have to keep submitting letters for delivery requesting interview, and the government said that, in light of the low numbers of agreements to be interviewed, it recommended that the defense used RMC 703 procedures, as it did to compel the testimony of Dr. Mitchell.

The Bin Attash team argued that it has been refusing stipulations because they have no color, and that pre-testimony interviews are important for either providing that color or keeping from wasting the commission's time with useless witness testimony.

The Ali/Baluchi team noted that it had asked the government to stipulate that walling had knocked Ali/Baluchi unconscious, but that the government had refused. The KSM team argued that stipulations of fact are never sufficient, especially without directly talking to UFIs, and that Mitchell was self-serving and represented a failure of RMC 703 processes. The Hawsawi team accused the government of obstructing its ability to defend its client and stated that the government would have to choose between national security and due process and asserted that if the choice is for national security, then withdrawal of charges is the solution.

The judge recessed the commission until April.

Observations:

Discussion between the various teams and the judge indicated that teams were feeling the strain of a month of commission sessions, but the judge stated clearly that he intended to continue intense and long-duration sessions in an effort to conclude the pre-trial phase before he retires. The judge indicated that this was in order to provide the next judge the cleanest record possible to read in order to get up to speed for conducting the trial phase. The judge followed through with this intent during the open court sessions by minimizing duplicate testimony and halting circular or argumentative examination of witnesses.

Non-government sources have indicated that the 9-11 accused are currently hunger-striking, and that that is one reason for their decision not to attend the commission hearings. This would be an odd time to have chosen to hunger-strike, being both the month before Ramadan and in the midst of construction in their confinement block that is designed to meet some of their requests and needs. It is possible that the accused have become aware of a threshold for hunger strikes and are timing it to fall during Ramadan to put guard force in the position of having to choose between lifesaving and religion-respecting standard operating procedures. A hunger strike could explain a diminished desire to attend hearings, but it is more likely a desire to avoid the witnesses being called, since attendance from the back room and non-attendance increased the last time Dr. Mitchell testified, after Dr. Mitchell pointed out that KSM was smirking during witness examination.

The Hawsawi defense team made concerted efforts to distance Hawsawi from the rest of the accused throughout the month, in referring to motions to sever Hawsawi from the proceedings, in prefacing argument or examination by noting that Hawsawi did not have the same concerns as the other accused, and in raising objections when testimony generalized to all of the accused. The Hawsawi defense also objected to Kimberly Waltz's testimony prior to the witness being called on the basis that years of documents were sufficient to explain Hawsawi's involvement with the 9-11 conspiracy. This unusual motion from a normally reserved team to suppress the testimony before it was given was explained when Waltz repeatedly revealed strong connections between Hawsawi and the 9-11 hijackers, contradicting the Hawsawi team's strategy of defense that has focused on depicting Hawsawi as minimally involved in the 9-11 plot execution.

Although it appears that neither the defense teams nor Dr. Mitchell appear to intentionally antagonize one another, there is an apparent feeling of rancor evidenced in the commission hearings each time the defense calls Dr. Mitchell to testify. Interactions have been generally neutral between Mitchell and the Ali/Baluchi and Bin Attash defense teams, and neutral to mildly hostile between Mitchell and the Hawsawi team, but they have been openly hostile between Mitchell and the KSM team. This could be the result of the defense team's strategy to insist that KSM was outrageously tortured – and thereby implicating Mitchell as the torturer, since he is known to have been KSM's primary interrogator. However, it is also possible that Mitchell's hostile response has more to do with his reaction to the defense team's deceptive examination style than being implicated as KSM's torturer. For example, one day the KSM lead counsel adopted a vague mien that made it uncertain if his (the lead counsel's) misunderstanding of the subject matter was true misunderstanding or a tactic to trap the witness (Mitchell) into contradicting himself when hostilities erupted, and the judge recessed for the night. During the second day, the KSM lead counsel made a very obvious good-faith effort to track and understand the subject matter and interactions remained more neutral.