

MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID  
MUHAMMAD SALIH MUBARAK BIN  
‘ATTASH, RAMZI BIN AL SHIBH, ALI  
ABDUL-AZIZ ALI, MUSTAFA AHMED  
ADAM AL HAWSAWI

AE555GGG (AAA)

**Mr. al Baluchi’s Motion to Compel**  
The Convening Authority to Produce a  
Complete Transcript of Mr. William Castle’s  
Testimony on 13 November 2018

4 March 2019

1. **Timeliness**: This motion is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c.(1) and Rule for Military Commission 905(b).

2. **Relief Sought**: Mr. al Baluchi respectfully requests that the military commission compel production of a complete transcript of Mr. William Castle’s testimony on 13 November 2018.

3. **Overview**: Out of 22 witnesses identified by Mr. al Baluchi as having direct knowledge of important facts in the AE555 series, Mr. Castle was the only witness that the military commission compelled the government to produce. The military commission found Mr. Castle to be “highly credible” based “on his demeanor and the manner and content of his testimony.”<sup>1</sup> This determination will be subject to appellate review. However, the transcript of Mr. Castle’s testimony on 13 November 2018 omits Mr. Castle’s many pauses, filler sounds, and non-verbal vocalizations that may reflect on his credibility. As a result it is incomplete. The military commission should order the Convening Authority to produce a complete transcript of Mr. Castle’s testimony so that future reviewing authorities may properly consider the credibility of this crucial witness.

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<sup>1</sup> AE555EEE Ruling, Mr. al Baluchi’s Motion to Dismiss For Unlawful Influence over Convening Authority and Legal Advisor at 22.

4. **Burden of Proof:** Mr. al Baluchi must demonstrate by a preponderance of the evidence that the requested relief is warranted.<sup>2</sup>

5. **Facts:**

a. On 3 February 2018, Secretary of Defense James N. Mattis rescinded the designation of Mr. Harvey Rishikof as Convening Authority.<sup>3</sup>

b. Shortly thereafter, Acting General Counsel William S. Castle replaced Mr. Gary Brown as Legal Advisor.<sup>4</sup>

c. On 9 February 2018, Mr. al Baluchi filed AE555 (AAA) Mr. al Baluchi's Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor.

d. Mr. al Baluchi subsequently filed two motions to compel production of witnesses whose testimony was relevant and necessary to address the interlocutory question in AE555 (AAA).<sup>5</sup>

e. On September 11–12, LT Douglas R. Newman, a defense investigator, testified in support of Mr. al Baluchi's motions to compel witnesses.<sup>6</sup>

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<sup>2</sup> R.M.C. 905(c)(1)-(2).

<sup>3</sup> AE555E (GOV) Government Notice of Declarations Requested By The Military Commission, Attachment B.

<sup>4</sup> *Id.*, Attachment C.

<sup>5</sup> AE555R (AAA) Mr. al Baluchi's Motion to Compel Production of Witnesses Whose Testimony is Relevant and Necessary to Address the Pending Interlocutory Question in AE555 (AAA); AE555CC (AAA) Mr. al Baluchi's Second Motion to Compel Production of Witnesses Whose Testimony is Relevant and Necessary to Address the Pending Interlocutory Question in AE555.

<sup>6</sup> Unofficial/Unauthenticated Transcript of 11 September 2018 at 20768–883; Unofficial/Unauthenticated Transcript of 12 September 2018 at 20838–956.

f. On 1 November 2018, the military commission ordered the government to make Mr. Castle available to appear and testify during the November 2018 hearing session.<sup>7</sup>

g. On 13 November 2018, Mr. Castle appeared and testified via video teleconference.<sup>8</sup>

h. On 10 January 2019, the military commission found Mr. Castle to be “highly credible” based “on his demeanor and the manner and content of his testimony.”<sup>9</sup> The military commission denied Mr. al Baluchi’s requests for witnesses;<sup>10</sup> and it ruled that neither actual nor apparent unlawful influence had been shown by the defense.<sup>11</sup>

i. On 30 January 2019, the Office of Court Administration—pursuant to its responsibility to facilitate the authentication of the record of trial—made the November 2018 transcripts available for review by the defense.<sup>12</sup>

j. The transcript of Mr. Castle’s testimony on 13 November 2018 omits the many pauses, filler sounds, and non-verbal vocalizations of the witness that may reflect on his credibility.

k. On 15 February 2019, counsel for Mr. al Baluchi sent an e-mail to the Office of Court Administration objecting to the transcript of 13 November 2018 as incomplete.<sup>13</sup>

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<sup>7</sup> AE555AAA Ruling, Government Motion To Reconsider AE555O, Order, Defense Motion to Compel Discovery Regarding the Firing of the Convening Authority and Legal Advisor at 4.

<sup>8</sup> Unofficial/Unauthenticated Transcript of 13 November 2018 at 21128–378.

<sup>9</sup> AE555EEE Ruling, Mr. al Baluchi’s Motion to Dismiss For Unlawful Influence over Convening Authority and Legal Advisor at 22.

<sup>10</sup> *Id.* at 32.

<sup>11</sup> *Id.* at 31.

<sup>12</sup> Attachment B.

<sup>13</sup> Attachment C.

1. On 21 February 2019, counsel for Mr. al Baluchi attempted to resolve the transcript issue informally by speaking with a member of the Office of Court Administration staff. The staff member notified counsel for Mr. al Baluchi that the Office of Court Administration did not intend to add to the transcript as requested.

**6. Argument:**

In order for the Court of Military Commission Review to properly fulfill its appellate responsibilities, “it is essential that transcriptions of critical evidence . . . be as accurate as possible and not ‘cleaned up.’”<sup>14</sup> As such, pauses, filler sounds, and non-verbal vocalizations should be reflected.<sup>15</sup> The current transcript of Mr. Castle’s testimony omits these occurrences, however, and it is therefore incomplete.

Unlike court-martial transcripts, military commission transcripts must be verbatim to be considered complete. Military courts have long relied on Article 54(a), Uniform Code of Military Justice (“UCMJ”), in holding that transcripts of general court-martial proceedings are only required to be “substantially verbatim.”<sup>16</sup> But the record of trial provisions of the UCMJ and the Military Commissions Act of 2009 (“2009 MCA”) are dissimilar. Article 54(a), UCMJ, provides that “Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge.”<sup>17</sup> The word “verbatim” is not used. By contrast, the 2009 MCA specifically includes the word

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<sup>14</sup> *United States v. Campbell*, 76 M.J. 644, 652 n.4 (A.F. Crim. App. 2017).

<sup>15</sup> *See id.*

<sup>16</sup> *United States v. Lashley*, 14 M.J. 7, 8 (C.M.A. 1982) (quoting *United States v. Gray*, 7 M.J. 296, 297 (C.M.A. 1979)).

<sup>17</sup> 10 U.S.C. § 854(a).

“verbatim” in its record of trial provision: “Each military commission under this chapter shall keep a separate, *verbatim*, record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge.”<sup>18</sup> Thus, a plain reading of the 2009 MCA makes clear that in a military commission the record of trial must be verbatim vice substantially verbatim. Because the transcript of Mr. Castle’s testimony on 13 November 2018 omits the many pauses and non-verbal vocalizations of the witness, it fails to meet the verbatim requirement of the 2009 MCA.

While the requirement that general court-martial transcripts be “substantially verbatim” is inapplicable, it is worth noting that the transcript of Mr. Castle’s testimony would fall short of that requirement as well. Under the general court-martial standard, a substantial omission renders a record of trial incomplete and raises a presumption of prejudice that must be rebutted by the government.<sup>19</sup> The threshold question is “whether the omitted material was ‘substantial,’ either qualitatively or quantitatively.”<sup>20</sup> Omissions are qualitatively substantial if the substance of the omitted material “related directly to the sufficiency of the Government’s evidence on the merits,” and “the testimony could not ordinarily have been recalled with any degree of fidelity.”<sup>21</sup> Omissions are quantitatively substantial unless “[t]he totality of omissions . . . becomes so

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<sup>18</sup> 10 U.S.C. § 949o.(a) (emphasis added). The Regulation for Trial by Military Commission also specifically includes the word “verbatim” in its Records of Trial chapter. R.T.M.C. 22-2.a.

<sup>19</sup> *Lashley*, 14 M.J. at 8.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness.”<sup>22</sup>

First, the omissions from Mr. Castle’s testimony are qualitatively substantial. While the types of omissions at issue may not ordinarily be concerning, Mr. Castle is an especially crucial witness. He is the sole witness (out of at least 22) with direct knowledge of the facts surrounding the firing of Mr. Rishikof and Mr. Brown that the military commission allowed to testify. For all intents and purposes he is a prosecution witness.<sup>23</sup> The military commission found Mr. Castle to be “highly credible” based “on his demeanor and the manner and content of his testimony.”<sup>24</sup> The military commission subsequently denied Mr. al Baluchi’s requests for other relevant witnesses;<sup>25</sup> and it ruled that neither actual nor apparent unlawful influence had been shown by the defense.<sup>26</sup> Under these circumstances, the credibility of Mr. Castle as a witness is particularly significant, it goes directly to the sufficiency of the government’s evidence, and it must be scrutinized. Omissions that may affect his credibility are therefore quantitatively substantial.

The omissions from Mr. Castle’s testimony are also quantitatively substantial. He paused, spoke filler words, and/or expressed a non-verbal vocalization as part of many, if not the majority of the answers that he provided. The totality of these omissions result in a transcript that does not

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<sup>22</sup> *United States v. Nelson*, 3 C.M.A. 482, 487 (C.M.A. 1953).

<sup>23</sup> The prosecution team met with and prepared Mr. Castle for his testimony. Unofficial/Unauthenticated Transcript of 13 November 2018 at 21156–162. However, Mr. Castle refused to even speak with defense counsel prior to his testimony. Unofficial/Unauthenticated Transcript of 13 November 2018 at 21149–150.

<sup>24</sup> AE555EEE Ruling, Mr. al Baluchi’s Motion to Dismiss For Unlawful Influence over Convening Authority and Legal Advisor at 22.

<sup>25</sup> *Id.* at 32.

<sup>26</sup> *Id.* at 31.

accurately reflect Mr. Castle’s “demeanor” or the “manner and content of his testimony,” which the military commission relied on in finding him to be credible. Thus, even under the “substantially verbatim” standard, the omissions from Mr. Castle’s testimony result in a presumption of prejudice to Mr. al Baluchi.

The military commission should compel the Convening Authority to produce a complete transcript of Mr. Castles’ testimony on 13 November 2018.

**7. Oral Argument:** Mr. al Baluchi respectfully requests oral argument.

**8. Certificate of Conference:** The government’s position is as follows: “Trial Counsel reviewed the record, provided errata, and has otherwise found the record for 13 November 2018 to be in compliance with R.M.C. 1102. As such, it will oppose the Defense motion.”

**9. Attachments:**

- A. Certificate of Service;
- B. E-mail from Office of Court Administration to Defense Counsel in the case of *U.S. v. KSM, et al.* (30 January 2019, 0838);
- C. E-mail from Mr. James Connell to Office of Court Administration (15 February 2019, 1150).

Very respectfully,

//s//

JAMES G. CONNELL, III  
Learned Counsel

//s//

STERLING R. THOMAS  
Lt Col, USAF  
Defense Counsel

//s//

ALKA PRADHAN  
Defense Counsel

//s//

BENJAMIN R. FARLEY  
Defense Counsel

//s//

MARK E. ANDREU

Capt, USAF

Defense Counsel

Counsel for Mr. al Baluchi



# Attachment A

**CERTIFICATE OF SERVICE**

I certify that on the 4th day of March, 2019, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//  
JAMES G. CONNELL, III  
*Learned Counsel*

# Attachment B

**Andreu, Mark E Capt USAF (USA)**

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**From:** [REDACTED] CIV OSD OMC CA (USA)  
**Sent:** Wednesday, January 30, 2019 8:38 AM  
**To:** OSD NCR OMC List MCDO Team Hawsawi; OSD NCR OMC List MCDO Team Bin Attash; OSD NCR OMC List MCDO Team Al Baluchi; OSD NCR OMC List MCDO Team Mohammad; OSD NCR OMC List MCDO Team RBAS  
**Cc:** OSD Pentagon OMC List Convening Authority of Court Admin  
**Subject:** Transcripts from November 2018 Hearing in U.S. v. KSM, et al. for Errata  
**Signed By:** [REDACTED]

ALCON:

Good morning.

The transcripts in the case of U.S. v. KSM, et al., from 12 - 16 November 2018, are now ready for review/errata. Please acknowledge receipt of this email. The 803 transcripts are a total of 854 pages. Please contact our office to schedule a day/time to come to the [REDACTED] and retrieve/review the transcripts.

If you prefer to have the transcript taken to your location for review, our office can prepare a disc for you. The disc will require your office to come pick it up and courier it to your location, which of course will require the ability to view and store TS//SCI//CODEWORD information. You are not permitted to release the transcripts to any person or entity outside of the MCDO KSM, et al., trial teams without prior written authorization from the military judge. If you have any questions about the release of the written transcript for some purpose other than preparing errata, please contact the Trial Judiciary.

If the defense teams wish to have one team retrieve a disc for distribution to the other defense teams that are a party to this trial, please send an email, separate from your email in reference to errata.

If our office has not received your errata or has not heard from you to schedule a day/time to review the transcript by COB 15 February 2019, the record of trial will be made available to the military judge for review and approval/authentication shortly after that date.

If you have any questions or would like to make arrangements to pick up the transcripts via disc, please reply to this email, ensuring that all court reporters are in the To: line. Thank you and have a great day.

V/R

[REDACTED]  
Legal Administrative Specialist/Court Reporter  
Office of Court Administration  
Office of Military Commissions  
Alexandria, VA  
[REDACTED]

# Attachment C

**Andreu, Mark E Capt USAF (USA)**

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**From:** Connell, James G III CIV (USA)  
**Sent:** Friday, February 15, 2019 11:50 AM  
**To:** [REDACTED] CIV OSD OMC CA (USA); OSD NCR OMC List MCDO Team Hawsawi; OSD NCR OMC List MCDO Team Bin Attash; OSD NCR OMC List MCDO Team Al Baluchi; OSD NCR OMC List MCDO Team Mohammad; OSD NCR OMC List MCDO Team RBAS  
**Cc:** OSD Pentagon OMC List Convening Authority of Court Admin; Baker, John G BGen USMC

[REDACTED]

**Subject:** RE: Transcripts from November 2018 Hearing in U.S. v. KSM, et al. for Errata

**Attachments:** 2019-02-15 Errata for 15 Nov 2018.pdf

**Signed By:** [REDACTED]

**Classification:** [REDACTED]

CLASSIFICATION: ~~UNCLASSIFIED~~

CLASSIFICATION: ~~UNCLASSIFIED~~

Dear Mr. [REDACTED],

Thank you for the opportunity to review these transcripts.

These official transcripts, especially 15 November 2018, contain a lot of citations to the unofficial transcript. When this issue arose previously, the court reporters informed us that they intended to substitute official page citations for unofficial page citations in the authenticated record. Is this plan still in effect? If so, the transcripts (as well as the January 2019 transcripts) should not be authenticated until the substitutions are made. If not, we should discuss the issue on the record to formulate an alternative. Accordingly, we request that you wait to submit the November 2018 and January 2019 transcripts for authentication until the issues is resolved.

Second, the transcript of 13 November 2018 (the testimony of Mr. Castle) does not reflect the many non-verbal vocalizations of the witness. Ordinarily this exclusion does not matter, but the credibility of the witness on certain points is at issue, and these vocalizations may reflect negatively on his credibility. Accordingly, we object to the transcript of 13 November 2018 as incomplete. If you would like us to suggest a transcription of the vocalizations, we request access to the recording and an editable version of the transcript.

We have no errata with respect to the transcripts of 12 and 14 November 2018. Our errata sheet for 15 November 2018 is attached.

Thank you as always for your extensive efforts to maintain an accurate record.

Best regards,

James Connell

CLASSIFICATION: UNCLASSIFIED

-----Original Message-----

From: [REDACTED] CIV OSD OMC CA (USA)

Sent: Wednesday, January 30, 2019 8:38 AM

To: OSD NCR OMC List MCDO Team Hawsawi <osd.ncr.OMC.list.mcdo-team-hawsawi@[REDACTED]>; OSD NCR OMC List MCDO Team Bin Attash <osd.ncr.OMC.list.mcdo-team-bin-attash@[REDACTED]>; OSD NCR OMC List MCDO Team Al Baluchi <osd.ncr.OMC.list.mcdo-team-al-baluchi@[REDACTED]>; OSD NCR OMC List MCDO Team Mohammad <osd.ncr.OMC.list.mcdo-team-mohammad@[REDACTED]>; OSD NCR OMC List MCDO Team RBAS <osd.ncr.OMC.list.mcdo-team-rbas@[REDACTED]>

Cc: OSD Pentagon OMC List Convening Authority of Court Admin [REDACTED]

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V/R

[REDACTED]

Legal Administrative Specialist/Court Reporter  
Office of Court Administration  
Office of Military Commissions  
Alexandria, VA

[REDACTED]