MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD;** **WALID MUHAMMAD SALIH** **MUBARAK BIN 'ATTASH;** **RAMZI BINALSHIBH;** **ALI ABDUL AZIZ ALI;** **MUSTAFA AHMED ADAM** **AL HAWSAWI**	**AE 555HHH (GOV)** **Government Response** To Mr. Ali's Motion To Compel the Convening Authority To Produce a Complete Transcript of Mr. William Castle's Testimony on 13 November 2018 15 March 2019

1. Timeliness

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court ("R.C.") 3.7.

2. Relief Sought

The Prosecution respectfully requests the Commission deny AE 555GGG (AAA), Mr. Ali's Motion To Compel the Convening Authority To Produce a Complete Transcript of Mr. William Castle's Testimony on 13 November 2018, which was filed on 4 March 2019.

3. Burden of Proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. Rule for Military Commissions ("R.M.C.") 905(c)(1)–(2).

4. Facts

On 3 February 2018, the Secretary of Defense, acting on the recommendation of Acting General Counsel Mr. William Castle, rescinded the designations of Mr. Harvey Rishikof as Convening Authority for Military Commissions and Director of the Office of Military Commissions. AE 555DD (GOV), Attach. H. On 5 February 2018, Mr. Castle rescinded the designation of Mr. Gary Brown as the Legal Advisor to the Convening Authority. *Id*., Attach. J.

On 9 February 2018, the Defense moved to dismiss, claiming that the Secretary of Defense's removal of Mr. Rishikof constituted unlawful influence. AE 555 (AAA). After discovery and numerous motions,[1] the Commission denied the Defense Motion to Dismiss. *See* AE 555EEE, Ruling.

As part of the litigation regarding the Defense Motion to Dismiss, the Commission compelled the testimony of Mr. Castle. On 13 November 2018, Mr. Castle was called as a Defense witness. Mr. Castle testified that the events leading to Mr. Rishikof's termination occurred when Mr. Castle was "brand-new on the job" as the Acting General Counsel for the Department of Defense. Unofficial/Unauthenticated Transcript ("Tr.") at 21191, 21334. Mr. Castle testified that he recommended the Secretary of Defense remove Mr. Rishikof from his position as Convening Authority. Mr. Castle testified that his recommendation was based on Mr. Rishikof's failure to coordinate his actions with senior Department of Defense officials and other stakeholders, including unilaterally denying the use of the "fast boat" to the Trial Judiciary staff and military judges, and directing and attempting to direct DoD and Coast Guard assets without proper authorization. *See* AE 555EEE at 15–17.[2]

In his ruling, the Military Judge made specific findings of fact. *Id.* at 3–22. Regarding Mr. Castle's testimony, the Commission found that "[b]ased on his demeanor and the manner and content of his testimony, the Commission found this witness to be highly credible." *Id.* at 22. The Commission also found that Mr. Castle relied on a memorandum prepared by the Special Counsel to the Department of Defense General Counsel, entitled "Legal Considerations on Potential Military Commissions Personnel Action." *Id*. at 17 (citations omitted). "The memorandum was a report of a group of legal expert consultants assembled at AGC Castle's

[1] AE 555EEE (Ruling) at 2 n.5 (noting that "[s]ince the initial motion and response, filings in this series have been many and voluminous"). *See generally* AE 555 (AAA) through AE 555CCC (AAA).

[2] *See also* Tr. at 21201, 21202, 21206, 21221, 21169, 21194, 21200, 21201, 21202, 21221, 21242, 21245, 21246, 21247, 21248, 21261, 21274–75, 21276, 21290, 21292, 21293, 21294, 21309, 21310, 21311, 21321, 21322, 21349, 21352.

request. The report was inten[ded] and expect[ed] . . . [to be] a confidential communication made for the purpose of . . . formulat[ing] legal advice." *Id*. (citations omitted). "The report also (a) noted Mr. Rishikof had 'displayed questionable judgment . . . temperament and . . . decision making' from the beginning of his tenure; (b) noted AGC Castle 'spoke with the CA on several occasions but did not discuss PTAs," and analyzed Mr. Rishikof's failure to coordinate with Department of Defense officials and other stakeholders. *Id*. at 18 (citations omitted). "Ultimately, the report concluded that '[Mr. Castle] may appropriately recommend that the Secretary rescind Mr. Rishikoff's [*sic*] designation . . . and designate someone else." *Id*. (citation omitted). The Commission also specifically found that "[t]here is no indication that any person in authority over either Mr. Rishikof or Mr. Brown at any point throughout their tenure discouraged them from exploring potential PTAs with Defense Counsel in this case." *Id*. at 21 (citation omitted). Finally, the Commission found that "AGC Castle expressly reaffirmed under oath the statement made in his 29 January 2018 memorandum to Secretary Mattis that, in advising Mr. Rishikof's removal, he 'considered Mr. Rishikof's professional judgment, temperament, and decision-making. . . . not . . . his performance of any judicial or quasi-judicial actions.'" *Id*. at 22.

The Commission ultimately ruled that "the evidence . . . demonstrates beyond a reasonable doubt that there was no UI [unlawful influence]." *Id*. at 32.

5. Law and Argument

I. Contrary to the Defense's Claim, Both the Court-Martial and Military Commission Systems Require Verbatim Transcripts

The issue that must be decided in the present Motion is whether the transcript of Mr. William Castle's testimony satisfies the statutory and regulatory requirements for an accurate memorialization of his testimony. A review of the transcript and analysis of the relevant statutes and rules lead to the conclusion that the transcript satisfies these requirements.

Contrary to the Defense's claim, there is no functional difference between the requirements for a verbatim transcript in the military commissions and courts-martial systems.

Section 949o of the Military Commissions Act of 2009 ("M.C.A.") provides, in pertinent part, that "[e]ach military commission . . . 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." 10 U.S.C. § 949o(a). In comparison, Article 54 of the Uniform Code of Military Justice ("U.C.M.J.") provides, in pertinent part, as follows:

> Each general or special court-martial shall keep a separate record of the proceedings in each case brought before it. The record shall be certified by a court-reporter, except that in the case of death, disability, or absence of a court reporter, the record shall be certified by an official selected as the President may prescribe by regulation.

10 U.S.C. § 854(a) (2019). One difference between the current court-martial system and the military commission system is that, under the U.C.M.J., military judges are no longer required to authenticate the record. The Military Justice Act of 2016 shifted that responsibility to the court reporter. PUB. L. NO. 114-328 § 5238. Another difference, which the Defense believes is dispositive, is that the U.C.M.J. provision does not include the word "verbatim," whereas the M.C.A. provision does. AE 555GGG (AAA) at 4. The Defense argues that "[u]nlike court-martial transcripts, military commission transcripts must be verbatim to be considered complete." *Id*.

However, it is simply not the case that court-martial transcripts are not required to be verbatim. Although Article 54, U.C.M.J., does not contain the word "verbatim," the 1950 U.C.M.J.'s legislative history states: "It is intended that records of general courts-martial shall contain a verbatim transcript of the proceedings." S. REP. NO. 81-486, at 24 (1949); H.R. REP. NO. 81-491, at 27 (1949).[3] Additionally, the Manual for Courts-Martial explicitly requires a verbatim transcript. Before the amendments to the U.C.M.J. enacted by the Military Justice Act of 2016 and the amendments to the Manual for Courts-Martial promulgated by Executive Order ("E.O.") 13,825 (Mar. 1, 2018), the Rules for Courts-Martial ("R.C.M.") required that "[e]xcept

[3] The legislative history focuses only on general courts-martial because "[s]pecial courts-martial were not empowered to adjudge bad-conduct discharges when the Uniform Code was first enacted." 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDGER, COURT-MARTIAL PROCEDURE § 24-51.10, at 24–19 (2015).

as otherwise provided in subsection (j) of this rule, the record of trial shall include a verbatim transcript of all sessions except sessions closed for deliberations and voting . . . . " R.C.M. 1103(b)(2)(B) (2016).[4] Effective 1 January 2019, R.C.M. 1112, as amended by E.O. 13,825, provides that "[t]he record of trial in every general and special court-martial shall include [a] substantially verbatim record of the court-martial proceedings except sessions closed for deliberations and voting[.]" R.C.M. 1112(b)(1) (2019). Thus, it is incorrect for the Defense to assert that courts-martial are not required to maintain a verbatim transcript.

II. The Defense Misconstrues the Meaning of the Term "Verbatim"

Having established that both the court-martial and military commission systems require a verbatim transcript, contrary to the Defense's claim, we turn to the meaning of the term "verbatim." Case law counsels against the rigid meaning the Defense attempts to ascribe to the "verbatim" requirement.

In *United States v. Nelson*, 3 C.M.A. 482 (1953)—a case the Defense selectively quotes (*see* AE 555GGG (AAA) at 5–6 n.22 and accompanying text)—the United States Court of Military Appeals discussed the requirement of production of a verbatim record in courts-martial. After noting the legislative history and the language of the 1951 edition of the Manual for Courts-Martial, the court stated:

> Verbatim is defined by Webster as: "Word for word; in the same words." We must accept that definition, but we can apply it sensibly. A strict application would transform a common-sense provision into an impossible requirement. It must be conceded that the transcript in the instant case does not show every word uttered by every witness during the course of the trial. But if we insisted inflexibly on that standard, every record could be assailed as deficient. Many, if not all, records fail to record every word spoken at a hearing. If we were to grant a reversal solely on that basis, we would be stressing minutia over substance and departing from the obvious intent of Congress as expressed in Article 59(a) of the Code, 50 USC § 646, which states that we should not grant a reversal in a case in the absence of prejudice to the substantial rights of the accused.

[4] *See also United States v. Thompson*, 22 C.M.A. 448, 451 (1973) ("[T]here is no constitutional right to a verbatim transcript of the trial proceedings for review of a conviction. The requirement for a verbatim transcript must, therefore, be traced to the Uniform Code of Military Justice and authorized supplementary regulations.").

> It is not reasonably possible to set out the factors which can, in all instances, be used to test whether a record, which has some slight omissions, prejudiced an accused's right on appeal. Generally speaking, if the record is sufficiently complete to permit reviewing agencies to determine with reasonable certainty the substance and sense of the question, answer, or argument, then prejudice is not present. For instance, if the content of an answer by a witness is clearly discernible from the portions of the testimony transcribed, any appellate court can determine its substance regardless of a word or phrase being omitted. When the omissions are so unimportant that the thought being expressed is readily ascertainable, then the record can be said to be verbatim. Furthermore, the purpose of an appeal is to obtain a decision of the appellate tribunal on error claimed to have been committed in the forums below. If the transcript is sufficiently complete to present all material evidence bearing on all issues, minimal standards have been met and we will not reverse.

Nelson, 3 C.M.A. at 486.

The present Motion assails as deficient the transcript of Mr. Castle's testimony, and attempts to weaponize the requirement for a verbatim transcript, in exactly the manner the Court of Military Appeals counseled against. Just as the court stated in *Nelson*, "[a] strict application would transform a common-sense provision into an impossible requirement." *Id*.

Other cases also reflect this common-sense approach. For example, the Court of Military Appeals has stated that the verbatim record requirement only requires that the record of trial be "substantially verbatim." *United States v. Gray*, 7 M.J. 296, 297 (C.M.A. 1979). A record may be deficient if it omits critical elements such as exhibits, written findings, or records. *See United States v. Villareal*, 52 M.J. 27, 32 (C.A.A.F. 1999) (concluding that failure to attach special findings on unlawful command influence did not make record "misleading or so incomplete as to prevent meaningful review regarding litigation of the command influence motion"). However, "[i]nsubstantial omissions from a record of trial do not affect its completeness." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000). "Insubstantial omissions include the absence of photographic exhibits of stolen property . . . , a flier given to the members . . . , a court member's written question . . . , and an accused's personnel record . . . ." *Id*.

Thus, the verbatim record requirement is concerned more with ensuring that important evidence is included in the record. Here, no important evidence has been excluded or omitted from the record. Indeed, the transcript of Mr. Castle's testimony spans 255 pages of the record, Tr. at 21128–382, and the Defense does not argue that it departs so much from what the witness

said that it is not substantially verbatim. The Defense's attempt to argue that the record does not satisfy the statutory requirement is thus a misreading of the statute and its context.

III. The Transcript Preserves the Numerous Vocal Segregates and Attempts the Witness Made to Clarify His Testimony, Demonstrating His Credibility

The Defense also relies on *United States v. Campbell*, 76 M.J. 644 (A.F. Ct. Crim. App. 2017) in support of the argument that higher courts cannot "properly fulfill [their] appellate responsibilities" if a transcript lacks "pauses, fillers sounds, and non-verbal vocalizations" and therefore is not "'as accurate as possible and not cleaned up.'" AE 555GGG (AAA) at 4 (citing *Campbell*, 76 M.J. at 652 n.4). The Defense's selective quotation of *Campbell* omits the context in which the Air Force Court of Criminal Appeals assessed the sufficiency of a transcript. In *Campbell*, the context of the transcript was not a verbatim transcript of a witness testifying before the court-martial, but rather a transcript of a video recording of the accused's interview by military law enforcement officials made outside of court, and later admitted as evidence in court. *Campbell*, 76 M.J. at 652 n.4. Quoted in context, the court stated:

> In order for courts and other reviewing authorities to properly fulfill our statutory and regulatory responsibilities, it is essential that transcriptions of critical evidence, such as interviews of subjects and complaining witnesses, be as accurate as possible and not 'cleaned up.' Especially, as here, where a court must carefully evaluate the voluntariness of a subject interview, precision in reflecting the exact words spoken is key.

Id. The present Motion and transcript do not involve the voluntariness of an Accused's interview by law enforcement or evidence that is going to the members. The Motion involves the accuracy of a Defense witness, called by the Defense, in the presence of the Military Judge, on a wholly collateral matter.[5]

The Defense further argues that "the transcript of Mr. Castle's testimony on 13 November 2018 omits Mr. Castle's many pauses, filler sounds, and non-verbal vocalizations" and is therefore incomplete. AE 555GGG (AAA) at 1; *see also id.* at 6–7. However, and

[5] To wit: whether the Secretary of Defense exercised unlawful influence when he rescinded the designations of Harvey Rishikof as Convening Authority for Military Commissions and Director of the Office of Military Commissions

contrary to the Defense's characterization of the transcript, the transcript does in fact note, on at least 14 separate occasions, instances where the witness used vocal segregates and paused as he worked to articulate his recollections of the events. *See, e.g.*, Tr. at 21136, 21152, 21156, 21157–58, 21162, 21183, 21204, 21266, 21287, 21288–89, 21291–92, 21313, 21317, 21376. While the Defense may argue that "filler words" and "pause[s]" undermined the witness's credibility, the transcript does reflect such instances over a dozen times, and thus the issue of the witnesses credibility is adequately preserved for appeal, even if the transcript did not note every single such instance.

Nor should the Prosecution or the Military Judge have to listen to every word that was captured on the audio and compare it to the transcript to see if every segregate or pause is reflected in the transcript. After all, when does a "pause" become a "pause"? Two seconds? Four seconds? Thirty seconds? To require such a subjective review of every transcript would be to invite a Defense assault on every record, and set up the "impossible standard" that the *Nelson* Court so ardently cautioned against. *See Nelson*, 3 C.M.A. at 486.

This Commission presided over the testimony of Mr. Castle, and the Military Judge personally observed the witness's demeanor and disposition throughout his testimony, finding his testimony to be "highly credible."[6] The only picture that emerges from the witness's testimony is that of a highly professional, senior official within the Department of Defense who sought at every opportunity to do the right thing. *Id*. at 21231, 21234, 21235, 21260, 21266, 21337, 21375. To the extent the Defense wants to argue otherwise on appeal, the transcript is adequate for him to do so.

IV. If the Defense Believed There Was an Issue with the Witness's Testimony, the Defense Had the Responsibility To Preserve Any Issues in the Record

At several points throughout Mr. Castle's testimony, one or more of the participants involved in this process mentioned that his testimony would be transcribed for the record. At the very beginning of Mr. Castle's testimony, the Chief Prosecutor of Military Commissions

[6] *See* AE 555EEE at 22.

administered the oath and then asked the standard questions to introduce a witness, including the question: "Can you state your full name and spell your last name for the record?" Tr. at 21128. During his introductory line of questions, the Accused's Learned Counsel asked the witness, "And you understand that we have stenographers and linguists who have to repeat or record in some way everything, what I say and you say?" *Id*. at 21134.

At one point when Learned Counsel for Mr. Mohammad was questioning the witness, the Learned Counsel and the witness were talking over each other. The Military Judge interjected to "remind both counsel and the witness to please ensure [they do not] talk over each other, because we do have to get this transcribed." *Id*. at 21310–11. The Military Judge also asked that same Learned Counsel "just for the record, can you state again what appellate exhibit and what attachment that is?" *Id*. at 21303.

Thus, it should have been clear to the Accused's Learned Counsel who conducted the direct examination of the witness that the Commission was following the standard practice of creating a transcript of the witness's testimony. It is common practice in a courtroom for the counsel conducting examination, either direct or indirect, to state for the record anytime a witness testifying uses a non-verbal gesture or non-verbal communication. *See, e.g.*, *United States v. Betts*, No. ACM 38476, 2014 CCA LEXIS 868, at *3 (A.F. Ct. Crim. App. Nov. 20, 2014) ("TC: Let the record reflect that the witness used her right arm to point to the bend, the crease in her left arm."); *United States v. Loper*, No. 96 01747, 1998 CCA LEXIS 205, at *4 (N-M. Ct. Crim. App. Apr. 30, 1998) ("TC: Let the record reflect that the witness bent his head over facing the ground and shook it from side to side."); *United States v. Grant*, 42 M.J. 340, 342 (C.A.A.F. 1995) ("TC: Let the record reflect that the witness kissed her wrist."); *United States v. Unrue*, 46 C.M.R. 882, 884 (A. Ct. Mil. Rev. 1972) ("TC[:] Let the record reflect that the witness traced with his finger as something would walk outside the perimeter of a car."); *United States v. Szlosowski*, 39 C.M.R. 649, 650 (A.B.R. 1968) ("TC: Let the record reflect the witness indicated he hit her on the right eye.").

Occasionally, a military judge may perform the same role. *See*, *e.g.*, *United States v. Cooper*, 51 M.J. 247, 249 (C.A.A.F. 1999) ("After the defense counsel played the videotape for the witness (the appellant's wife), the military judge said: 'This is why still photographs are better. Let the record reflect that this video was jumping all around, and now we have a dark--no screen at all.'"); *see also United States v. Brux*, 15 C.M.A. 597, 599 (1966) ("LO: Let the record reflect that the defendant suddenly jumped from his seat, overturned the table with his counsel, attacked trial counsel, struck or threw a number of blows. It took approximately ten men to control and subdue him, that he was carried from the court-room, and that physicians were ordered into attendance."). The fact that none of the Defense counsel who examined Mr. Castle, or the Military Judge who observed the witness's testimony, felt it necessary to make such a notation for the record indicates that the record was being adequately preserved with an ordinary transcription of the witness's testimony.

If the Accused's counsel believed that the witness's testimony required a uniquely specific transcription for the record, he should have so indicated while the witness was testifying. It was the Defense's duty to make his narration (or objection) contemporaneous with the witness's testimony. His failure to do so constitutes waiver of the issue, and does not now make the transcript inadequate.

6. Conclusion

Based on the foregoing, the transcript of Mr. Castle's testimony clearly satisfies the statutory requirement under 10 U.S.C. § 949o. The Defense's argument to the contrary is without merit, and the Commission should deny the Defense Motion.

7. Oral Argument

The Prosecution asserts that this matter may be resolved without oral argument. Accordingly, the Prosecution does not request oral argument. Nevertheless, the Prosecution does not waive the right to oral argument, and reserves the right to make oral argument should the Defense request for oral argument be granted.

8. Witnesses and Evidence

The Prosecution does not intend to rely on any witnesses or additional evidence in support of this motion.

9. Additional Information

The Prosecution has no additional information.

10. Attachment

A. Certificate of Service, dated 15 March 2019.

Respectfully submitted,

//s//

Clay Trivett
Managing Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 15th day of March 2019, I filed AE 555HHH (GOV), Government Response To Mr. Ali's Motion to Compel the Convening Authority to Produce a Complete Transcript of Mr. William Castle's Testimony on 13 November 2018, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
Christopher Dykstra
Major, USAF
Assistant Trial Counsel