

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

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**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 555G**

**NOTICE OF RECEIPT**  
Declaration of Harvey Rishikof  
and Gary D. Brown

**20 March 2018**

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On 19 March 2018, the Commission received, via email, the attached joint declaration. The Commission hereby notifies the parties of the existence of the declaration and its contents. This Notice, a photocopy of the transmittal email, and the declaration will be marked as an appellate exhibit and included within the record of trial.

So **ORDERED** this 20th day of March, 2018.

Attachment:

A. Mr. Brown Email/Declaration

*//s//*  
JAMES L. POHL  
COL, JA, USA  
Military Judge

# Attachment A

**From:** Gary Brown [REDACTED]  
**Sent:** Monday, March 19, 2018 3:00 PM  
**To:** Toole, Mark W CIV OSD OMC CA (US) <mark.w.toole.civ@mail.mil>; Taylor, Fred P CIV OSD OMC TJ (US) <fred.p.taylor.civ@mail.mil>; Harvey Rishikof <rishikofh@me.com>  
**Subject:** [Non-DoD Source] Rishikof & Brown Joint Declaration

Mr Toole and Mr Taylor,

Attached is the joint declaration from Mr Rishikof and me. It is our intent that this document be provided to the court, as requested by Judge Pohl. In order to shield individuals who might have conflicts, we are providing the statement to you two, leaving it to your discretion to determine how best to file the declaration.

We do not request that it be filed under seal.

We would like to be provided a copy of the declarations of Secretary Mattis and Mr Castle as soon as possible.

Very respectfully,

//s//

GARY D. BROWN  
[REDACTED]

## Declaration of Harvey Rishikof and Gary D. Brown (19 March 2018)

### Declaration

We fully respect the authority of the Commissions and appreciate the opportunity afforded us to make this declaration.<sup>1</sup> It has been an honor and privilege to serve in the Office of the Convening Authority (OCA), to work with and alongside such dedicated and talented members of the OCA, and to have tried to bring a fair and just resolution of these cases for the surviving family members.

1. The first we learned of our dismissals on the morning of February 5, 2018 was when Mr. William Castle, DOD's acting general counsel, handed us separation memos from the doorway of the Office of General Counsel (OGC) conference room. After the statement was read to us, we were immediately read out of all the relevant security programs, asked to turn over our CAC cards and government phones, and escorted out of the Pentagon. We were immediately placed on administrative leave and were to be formally separated on February 7, 2018.
2. There was never any attempt made at any time to approach us about any issue concerning our duty performance during our tenure. We never believed, or had reason to believe, there were any issues with OGC or anyone else above us in the chain of command. We had no indication that any personnel action was under consideration. As officials in the department have stated, there was no investigation of either of us, ongoing or contemplated. Our understanding was that we were performing our duties appropriately and that was based on our weekly calls with our point of contact in OGC (designated by the then acting principal deputy general counsel Mr. Chuck Allen and then by acting general counsel Mr. Castle). We never received any negative feedback on our monthly reports to the deputy secretary, which were copied to the acting general counsel and his staff. Because OGC and the deputy secretary had opportunities to provide us feedback on a weekly or more frequent basis, we understood our actions and recommendations to the department were on a successful track.
3. The decision to remove the Convening Authority occurred not later than 3 February, the date Mr. Coyne (the acting Convening Authority) agreed to his appointment. Prior to that date, and while Mr. Rishikof was serving as Convening Authority, based on these dates, we now assume there must have been discussions between Mr. Coyne and others in government about Mr. Coyne assuming the position. We were not privy to any of these discussions, nor were we privy to the content of any assessments of our performance.
4. At no time did we meet with or have any direct communications with the Secretary of Defense during our tenure. We communicated with his staff and made requests to meet with Secretary Mattis, but the requests were never acted upon.

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<sup>1</sup> We are submitting this declaration through the Office of the Convening Authority (OCA) because given the circumstances of this motion and the fact that we were not privy to all the possible communications among the Office of the Prosecutor, the Office of the General Counsel and Office of the Secretary leading up to our separation from the OCA, there is a potential conflict of interest among the parties.

## Declaration of Harvey Rishikof and Gary D. Brown (19 March 2018)

5. We met with deputy secretary's predecessor monthly, but after our first meeting with the new deputy secretary last summer, his staff indicated that our meetings with him would be quarterly rather than monthly. We were later asked to have all our communications directed to the deputy secretary run through the (acting) general counsel. As we went forward, quarterly meetings did not occur, and as a result we met with the deputy secretary only twice. Those two meetings were our introductory meeting and one subsequent meeting in October. We sent written status reports monthly to OGC, the deputy secretary, and the office of the secretary of defense.

6. As noted, we had no conversations with anyone about our duty performance and were not provided any sort of rationale for our dismissal. We issued a number of opinions and orders under the authority of the Convening Authority, some of which were undoubtedly controversial and not popular with all parties to the Commissions or with people who work in roles supporting Commissions. That is the nature of legal decisions and leadership positions: one is sometimes not popular. There have been no accusations that the decisions were beyond the scope of the authority of the Office of the Convening Authority, or that the decisions did not follow the law and facts, nor has there been any assertion that judgments were not supported by clearly stated rationale.

7. Some of the decisions and courses of action undertaken during our tenures as Convening Authority and Legal Advisor concerned conspiracy charges, capital charges, guilty pleas in the 9/11 and *USS Cole* cases, conditions of detention relating to military commissions, recommendations for the reorganization of DOD's prosecutorial and security process to provide for a unity of command to avoid potential ethical conflicts, review of contempt charges, and adequate funding of the defense. It is unknown to us if the decisions and recommendations in these cases played a role in our removal.

8. Pursuant to the authority of Convening Authority we explored all avenues to resolve the cases in a fair and just manner. This involved meetings with the defense counsel, senior officials in the government, and appropriate members of Congress. All of these responsibilities and authorities are detailed in Chapter 2, Convening Authority in *Regulation for Trial by Military Commission*. See paragraph 2-3, RESPONSIBILITIES AND FUNCTIONS. As we performed our duties in these areas we had periodic meetings with officials. Although these activities were detailed in our monthly reports, as well as in our other written and oral communications with OGC, based on some subsequent questions and comments it appears the staff was not conveying all our actions to the most senior officials in the most fulsome and timely manner.

9. Based on these facts, there may well have been concerns about future judicial decisions on plea agreements, the organization of prosecutorial functions, and the referral of future cases, but these decisions of law and regulation fall squarely under the authority of the Convening Authority. A number of judicial decisions concerning prosecutions and referrals were pending. When making these decisions some subordinate parties in the process expressed concerns about the future advice and decisions of the Legal Advisor and the Convening Authority; and about whom should be the final authority on when and whether cases should

## **Declaration of Harvey Rishikof and Gary D. Brown (19 March 2018)**

be referred, as well as about how and whether referred cases should be prosecuted. These attempts to influence the process were not consonant with our understanding of the role of a just and fair Convening Authority making independent judicial decisions in the cases, informed by independent legal advice.

10. As our declaration reflects, we know little about the reasons that led to our dismissal; what we do not know is much greater. For example, we do not understand why a new Convening Authority was appointed before Mr. Rishikof was informed of his removal, because having two convening authorities appointed simultaneously could have created a number of legal and policy issues. We also do not understand why the Convening Authority and the Legal Advisor were removed simultaneously. Further, it is unclear why the Convening Authority's supervisor, the Secretary, or designee the deputy secretary, never met with the Convening Authority to discuss any performance issues, and it is unclear why the Legal Advisor's reporting official, the Convening Authority, was never consulted about the Legal Advisor's duty performance or the decision to remove him. There were no concerns or problems ever expressed by our superiors, and our only work concerned tasks assigned by law and regulation to the Convening Authority. Therefore, we can only conclude our dismissal must have been based on something related to the performance of Convening Authority duties. We are concerned that there may be a potential conflict of interest reflected in the dismissal actions themselves, and in the circumstances surrounding the execution of the actions.

11. We have tried to be as complete as possible without being overly lengthy in this declaration, but we would like to reserve the right to respond to the statements of Secretary of Defense Mattis and Mr. Castle. We will not see these statements until after our filing, and we expect to learn of any asserted rationale for our dismissals for the first time in those official filings to the court rather than through the normal administrative process for personnel actions. Depending on the nature of the statements, if they are sealed, we may request the Commissions to "unseal" them in order for there to be transparency on this matter.

12. What this turn of events has demonstrated to us more than anything else is how important it is to protect the independence and judgment of the Legal Advisor and the Convening Authority. It is critical to have a fair, independent Convening Authority who is not fearful of retribution for exercising appropriate independent judgment supported by independent and unbiased legal advice. Our goal has always been to find a fair and just resolution to Commissions cases so the victim family members may finally have closure. That motivation is what drove both of us to leave our previous positions to take on these difficult jobs. It would undermine the ability of officials in these positions in the future to be expected to give fair, impartial, independent, and sound advice while understanding that any decision regarding a case could result in immediate termination of employment, suspension of credentials, and being escorted from the facility without advance discussion or notice. It is even more disconcerting when there appears to be the possibility that such draconian action could be driven by the wishes of subordinate offices or outside interveners with little responsibility for the actual operation of military commissions.

**Declaration of Harvey Rishikof and Gary D. Brown (19 March 2018)**

Under penalty of perjury, we affirm that the forgoing declaration is true and correct to the best of our knowledge and belief.

Respectfully,

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//s//

Harvey Rishikof

Gary D. Brown