

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

AE 555 (AAA)

v.

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

**Mr. al Baluchi's Motion to Dismiss for
Unlawful Influence over Convening Authority
and Legal Advisor**

9 February 2018

- 1. Timeliness:** This motion is timely filed.
- 2. Relief Requested:** The military commission should dismiss the charges against the defendants.
- 3. Overview:** Secretary of Defense James Mattis and Acting General Counsel William Castle acted together to fire the leadership of the Office of Military Commissions, now-former Convening Authority Harvey Rishikof and now-former Legal Advisor Gary Brown. Although the Department of Defense has not divulged the reason for the firing, the only reasonable hypothesis is retaliation for their decisions as Convening Authority and Legal Advisor. The media certainly has drawn this conclusion, demonstrating apparent as well as actual unlawful influence by the SECDEF and Acting General Counsel over the administration of the military commissions. These conclusions are buttressed by the fact that the Acting General Counsel replaced Mr. Brown with Mark Toole, best known to the record as the Acting Legal Adviser for the 2015 unlawful influence over military judges.
- 4. Burden of Proof and Persuasion:** The defense has the initial burden to show potential unlawful influence by “some evidence”: a low burden, but more than mere allegation or

speculation.¹ Put another way, once unlawful influence is raised at the trial level, “a presumption of prejudice is created.”² The burden then shifts to the government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings are untainted.³

5. Facts:

Prior litigation over role of Mr. Toole as Acting Legal Advisor

Although the military commission denied an evidentiary hearing, the parties litigated the role of Mr. Toole in the January 2015 unlawful influence over the military commission. The military commission in *United States v. al Nashiri* disqualified Mr. Toole from further participation in that case, but this military commission denied disqualification of Mr. Toole.

a. On 1 October 2014, Major General Vaughn A. Ary (Ret.) was appointed Convening Authority.

b. Shortly after becoming Convening Authority, MajGen Ary reviewed the effectiveness and efficiency of the military judges and other elements of the Office of the Convening Authority with a view to implementing what he viewed as improvements. MajGen Ary prepared a report which found that, “. . . the status quo does not support the pace of litigation necessary to bring these cases to a just solution. I believe we must realign resources and reposition the trial judiciary to make it a full-time, on-site duty for the judges assigned to the military commissions.”⁴

¹ *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2003).

² *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010).

³ *United States v. Stoneman*, 58 M.J. 35, 41 (C.A.A.F. 2002).

⁴ AE343, Attachment B.

c. On 9 December 2014, MajGen Ary lobbied Deputy Secretary of Defense (DEPSECDEF) Robert Work to amend the Regulation for Trial by Military Commission (RTMC) to make military commissions the exclusive duty of the military judges assigned to the trial judiciary and, moreover, directing that they “shall be issued assignment orders for duty at the venue where the military commissions are to be convened.”⁵ The stated reason for altering the regulation by trial judiciary was “to accelerate the pace of litigation[.]”⁶ Acting Legal Adviser Mark Toole worked on the recommendation to DEPSECDEF Work for the proposal to require military commission judges to move to Guantanamo.⁷

d. On 7 January 2015, DEPSECDEF Work signed the rule change proposed by MajGen Ary. Change 1 to RTMC § 6-2(a) provided in relevant part, “A detailed military judge shall be issued assignment orders for duty at the venue where the military commissions are to be convened.”⁸

e. On 30 January 2015, Mr. al Baluchi and others filed AE343 Defense Motion to Dismiss for Unlawful Influence on Trial Judiciary and AE344 Defense Motion to Dismiss for Convening Authority Review of Trial Judiciary Effectiveness and Efficiency in Violation of 10 U.S.C. § 948j(f).

f. On 25 February 2015, the military commission granted AE343. It held, “The actions by the DEPSECDEF, on the recommendation of the Convening Authority, constitute, at least the appearance of, an unlawful attempt to pressure the Military Judge to accelerate the pace of

⁵ AE343, Attachment C.

⁶ AE343, Attachment B.

⁷ AE343F, Attachment D at 5575-77.

⁸ AE343, Attachment C.

litigation and an improper attempt to usurp judicial discretion; thereby, compromising the independence of the Military Judge.”⁹ The military commission denied the defense request for witness testimony on the basis that, “The pleadings speak for themselves.”¹⁰ The military commission abated the proceedings until a proper authority rescinded Change 1.

g. On 25 February 2015, MajGen Ary testified before the military commission on the same issue in *United States v. Nashiri*.¹¹ MajGen Ary identified Mr. Toole as the Acting Legal Advisor who worked on the recommendation to the DEPSECDEF for the proposal to require military commission judges to move to Guantanamo.¹²

h. On 26 February 2015, the DEPSECDEF rescinded Change 1.¹³

i. On 27 February 2015, the military commission rescinded the abatement and denied AE343.¹⁴

j. On 4 March 2015, the military commission in *United States v. al Nashiri* issued AE332U Order.¹⁵ In the *al Nashiri* AE332U Order, the military commission in that case disqualified the Convening Authority and his legal staff, including Mr. Toole, from further action in the case:¹⁶

⁹ AE343C Ruling.

¹⁰ AE343C at 2.

¹¹ AE343F, Attachments C & D. *United States v. al Nashiri* AE332 Defense Motion to Dismiss for Unlawful Influence and Denial or Due Process for Failure to Provide an Independent Judiciary is found in the record at AE343F Joint Defense Motion to Disqualify the Convening Authority Due to Unlawful Influence, Attachment B.

¹² AE343F, Attachment D at 5575-77.

¹³ AE343D, Attachment B.

¹⁴ AE343E Order.

¹⁵ AE343F, Attachment F.

¹⁶ *Id.* at 20-21.

c. The actions of the Convening Authority and his legal staff are central to the cause of the unlawful influence. Due to the number of measures orchestrated outside of their scope, any further actions by the Convening Authority, or his legal staff, would still be viewed by the public as tainted as the Convening Authority impacting the “pace” of the litigation. The Convening Authority’s approving of experts, additional staff, or funding for investigation, hearings, etc. that proves detrimental to either the prosecution or defense will carry with it taint that these decisions were based upon the Convening Authority wanting to quicken the pace of litigation, despite such denials generally creating additional litigation. In order to further absolve the proceedings of taint, the current Convening Authority (Mr. Vaughn Ary) and his staff of legal advisors (Mr. Mark Toole, Ms. Alyssa Adams, LTC Patricia Lewis, CDR Raghav Kotval,⁵⁰ and CPT Matthew Rich) are disqualified from taking any future action in this case. They are disqualified from all decisions related to this case and from providing recommendations specific to this case from this point forward. Similar to disqualifications of a convening authority in the traditional Military Justice scenario, the Secretary of Defense or his designee will appoint a new Convening

Authority who will seek legal advice from a legal staff outside the Office of Military Commission/Office of the Convening Authority.

k. On 10 March 2015, the defendants filed AE343F Joint Defense Motion to Disqualify the Convening Authority Due to Unlawful Influence, seeking similar relief to that granted by the *al Nashiri* military commission, including the disqualification of Mr. Toole.

l. On 21 March 2015, MajGen Ary resigned as Convening Authority.¹⁷

¹⁷ AE352 Government Notice of Newly Designated Official as Convening Authority for Military Commission.

m. On 30 March 2015, Mr. bin 'Atash filed AE343H (WBA) Defense Motion to Reconsider AE343C Ruling and AE343E Order, citing new discovery as a basis for reconsideration.

n. On 11 January 2017, the SECDEF designated DEPSECDEF Work as Convening Authority.¹⁸

o. On 8 February 2017, Mr. al Baluchi filed AE343H (AAA Sup) Mr. al Baluchi's Supplement to AE343H (WBA) Defense Motion to Reconsider AE343C Ruling and AE343E Order. The supplement objected to DEPSECDEF Work's designation as Convening Authority, given his primary involvement in the prior unlawful influence.

p. On 31 March 2017, the military commission issued AE343M/AE344C Ruling, which denied AE344 and the additional relief of disqualification of DEPSECDEF Work and Mr. Toole requested in the AE343 series.

Presidential comments on the military commissions

The President has consistently made his views known that military commission justice should be swift and brutal. The President has commented on the perceived lack of speed in the military commissions both before and since becoming Commander-in-Chief.

q. On 7 May 2012, prior to becoming president, Donald Trump gave an interview regarding this military commission. In a *Fox & Friends* segment called, "Who's Running 9/11 Trial? Donald Trump Weighs In," then-Mr. Trump described this military commission as "disgraceful" "legal gridlock."¹⁹ He stated that, "frankly we have to speed up the system for one

¹⁸ AE343H (AAA Sup) Mr. al Baluchi's Supplement to AE343H (WBA) Defense Motion to Reconsider AE343C Ruling and AE343E Order, Attachment C.

¹⁹ Fox & Friends, *Who's Running 9/11 Trial? Donald Trump weighs in*, May 7, 2012, available at <http://video.foxnews.com/v/1625324751001/?#sp=show-clips>.

thing and they have to get tough.” Then-Mr. Trump continued, “It’s not only the decorum which is terrible, it’s the speed. I mean, you’re talking about years and years just to learn when the trial is going to begin. The speed has to change and I think they maybe should pass a law, they should give special when somebody, when somebody’s a terrorist I think you have to give a special little bit of unce [sic] because, I’ll tell you what, it’s not workin’.” He also tweeted about it:



The following is a transcript of the portion of the interview regarding this military commission:

Steve Doocy: Alright, Donald, let’s talk a little bit about the GTMO trial. Khalid Sheikh Mohammed and, you know, a total of five of those terrorists down there, for all the world to watch and so far what we’ve seen, it looks like a circus.

Donald Trump: Well, what you've seen is gridlock and it's legal gridlock and it's disgraceful and they ought to pass a law where, uh, terrorists go quickly. You know in China it takes 24 hours and then the bullet and you pay for the bullet, the family pays for the bullet. It takes 24 hours. You see what happens over there they catch somebody and it's like they're gone, they don't even know what happened to 'em, they're gone and I mean they're killed, they're not just, like, put in a prison.

Ainsley Earhardt: Yeah, but, Donald, even in a normal courtroom in the United States most judges wouldn't put up with these antics.

Donald Trump: Well these antics are horrible and they're laughing at everybody and they think we're all a bunch of jerks and frankly we have to speed up the system for one thing and they have to get tough. They have to get a lot tougher.

Brian Kilmeade: Sure, but I'm just wondering, Donald, now I'm not burdened with a law degree, but I was wondering if they changed the rules because they were on the fast track three years ago with another administration now this administration seems to be playing this out. Hey we don't get what we wanted which was a New York trial, but we'll bring the circus and bring it to Cuba. You think that's a possibility?

Donald Trump: Well these people killed thousands of people and they're laughing at the relatives right now and something has to be done and speed has to also take place. It's not only the decorum which is terrible, it's the speed. I mean, you're talking about years and years just to learn when the trial is going to begin. The speed has to change and I think they maybe should pass a law, they should give

special when somebody, when somebody's a terrorist I think you have to give a special little bit of unce [sic] because, I'll tell you what, it's not workin'.

Steve Doocy: And we had some of the family members down at GTMO. One guy who, Eddie Bratton, Bracken I think is his name, from Staten Island he lost his sister. One of the guys gave him a thumbs up. Another guy threw a paper airplane, you know, the symbolism not lost on the families. You know, they're just ready to speed it up as well.

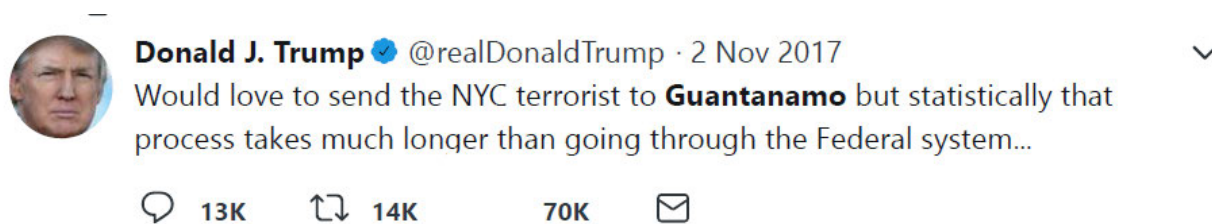
Donald Trump: Yeah, it's a very sad thing and we have to do something about it.

r. On 1 November 2017, following an attack in New York, the President stated that he would "certainly consider" sending terrorism suspect Sayfullo Saipov to the Guantanamo Bay detention facility.²⁰ He then tweeted that the suspect should receive the death penalty:



²⁰ Ali Vitali & Jane C. Timm, *Trump: Consider Sending NYC Truck Attacker to Guantanamo Bay*, Nov. 2, 2017, available at <https://www.nbcnews.com/storyline/nyc-terrorist-attack/nyc-truck-attacker-should-be-declared-enemy-combatant-graham-says-n816396>.

s. On 2 November 2017, the President reconsidered sending the suspect to Guantanamo, and tweeted that the military commission system “takes much longer than going through the Federal system”:



t. On 30 January 2018, the President weighed in on the question of whether “terrorists” are “unlawful enemy combatants”:

Terrorists who do things like place bombs in civilian hospitals are evil. When possible, we have no choice but to annihilate them. When necessary, we must be able to detain and question them. But we must be clear: Terrorists are not merely criminals. They are unlawful enemy combatants. And when captured overseas, they must be treated like the terrorists they are.²¹

....

So today, I’m keeping another promise. I just signed, prior to walking in, an order directing Secretary Mattis, who is doing a great job, thank you—to reexamine our military detention policy and to keep open the detention facilities in Guantanamo Bay.²²

²¹ Remarks by President Trump in State of the Union Address, *available at* <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-state-union-address/>. These precise remarks are the subject of AE550 (AAA) Mr. al Baluchi’s Motion to Dismiss for Presidential Comments Regarding Personal Jurisdiction Determination.

²² *Id.*

Litigation over attorney-client surveillance

Attorney-client surveillance has been a persistent issue in the military commissions. Recently, Mr. Rishikof has taken steps to address the issue, including a request for a surveillance-free meeting space and favorable consideration for a technical surveillance counter-measures sweep.

u. On 31 January 2013, Captain Thomas J. Welsh observed microphones disguised as smoke detectors in the attorney-client meeting rooms at Echo 2.²³ This discovery set off substantial litigation over monitoring of attorney-client communication at Echo 2 and elsewhere.

v. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]²⁴ Substantial classified correspondence followed.²⁵

w. On 17 July 2017, Mr. al Baluchi filed AE133RR (AAA) Mr. al Baluchi's Motion to Permanently and Verifiably Disable Audio Monitoring Capability in Attorney-Client Meeting Rooms.

x. On 11 October 2017, Mr. al Baluchi requested Mr. Rishikof to assign experts in technical surveillance countermeasures to inspect attorney-client meeting spaces at Guantanamo.²⁶

²³ Unofficial/Unauthenticated Transcript of 12 February 2013 at 1984.

²⁴ AE133RR (AAA) Mr. al Baluchi's Motion to Permanently and Verifiably Disable Audio Monitoring Capability in Attorney-Client Meeting Rooms, [REDACTED].

²⁵ *See id.*, Attachments E-J.

²⁶ AE133XX.

y. On 2 November 2017, a different military commission held Brigadier General Baker in contempt for refusing to countermand his excusal of civilian counsel in *United States v. al Nashiri*.²⁷ Brigadier General Baker originally excused civilian counsel because of their belief that they could not ethically represent Mr. al Nashiri in light of alleged evidence of attorney-client communication monitoring.

z. On 21 November 2017, Mr. Rishikof took action in the contempt proceedings against Brigadier General Baker. Within that action, Mr. Rishikof acknowledged “Security concerns and classification issues have raised legitimacy issues from the outset of military commissions.”²⁸ To solve these concerns, Mr. Rishikof, recognizing his limits in operational authority over the facilities in Guantanamo, Bay, asked the cognizant military command to establish a “clean facility” to better aid in resolving these issues. Mr. Rishikof further recommended that “This clean facility would also be checked periodically to ensure compliance with confidentiality expectations by an independent team to ensure it remains free of listening and inappropriate monitoring devices.”²⁹

aa. On 26 January 2018, Brigadier General Baker informed James Connell, counsel for Mr. al Baluchi, that Mr. Rishikof had informed him that he would fund a technical surveillance counter-measures sweep of the Echo 2 meeting facility. Mr. Connell recorded that conversation in his contemporaneous notes:³⁰

²⁷ See, e.g., Dan Lamothe, *In a highly unusual move, an American general is sentenced to confinement at Guantanamo Bay*, Washington Post, Nov. 2, 2017, available at https://www.washingtonpost.com/news/checkpoint/wp/2017/11/02/in-a-highly-unusual-move-an-american-general-is-sentenced-to-confinement-at-guantanamo-bay/?utm_term=.568cf6c4b1ed.

²⁸ AE133RR (AAA Sup) Mr. al Baluchi’s Supplement to AE133RR, Att. B at 9.

²⁹ *Id.*

³⁰ Attachment B.

1/26/18
called BGen Baker
[REDACTED]
CA told him they will fund TSCM

bb. After that conversation, at Brigadier General Baker's request, Mr. Connell forwarded the pending TSCM request for his review.³¹

Sir,

Attached is the TSCM request we have pending before the CA. I am also attaching the information on the agency we identified, although we ultimately chose not to include it in the request.

Best regards,

James Connell

cc. On 29 January 2018, Brigadier General Baker emailed Mr. Rishikof and Mr. Brown to memorialize their conversation of the week before.³²

3. Independent Technological Inspection of attorney-client meeting rooms - you explained that you would favorably consider a reasonable request for funding for an independent inspector (you seemed to express a preference for a request for a government entity) to conduct a technological inspection of attorney-client meeting rooms at GTMO to ensure no monitoring capability beyond video with no audio capability. You were clear that you are not the decider whether these inspectors would be allowed to access JTF (or other entity) controlled attorney-client meeting rooms. I plan to get you that resource request this week if possible.

Mr. al Baluchi does not know what action Mr. Rishikof and/or Mr. Brown took regarding TSCM of attorney-client meeting spaces before or after this exchange.

³¹ Attachment C.

³² Attachment D.

Firing of Mr. Rishikof and Mr. Brown

dd. On 4 April 2017, SECDEF James Mattis designated Harvey Rishikof as Convening Authority.³³ At around the same time, Gary Brown was designated as Legal Advisor to the Convening Authority.

ee. On Saturday, 3 February 2018, SECDEF Mattis rescinded the designation of Mr. Rishikof as Convening Authority.³⁴

ff. On Monday, 5 February 2018, Acting General Counsel William S. Castle replaced Mr. Gary Brown as Legal Advisor with Mr. Toole as Acting Legal Advisor.³⁵

6. Argument:

The concerted action of the SECDEF and Acting General Counsel in firing Convening Authority Harvey Rishikof and Legal Advisor Gary Brown constitutes both actual and apparent unlawful influence. Superiors within the Department of Defense apparently disapproved some actions of the Convening Authority—likely involving issues before this military commission—and retaliated against them. Even if DoD authorities reinstate Mr. Rishikof and Mr. Brown, those authorities have already sent a message to supposedly independent military justice actors that they must toe the new Administration’s line or face retaliation. Dismissal is a drastic remedy, but justified in this case.

Actual unlawful influence

Unlawful influence is the “mortal enemy” of military justice because of the recognition that members of the military, including most convening authorities, military judges, witnesses, and

³³ Attachment E.

³⁴ Attachment F.

³⁵ Attachment G.

most counsel, through strict discipline and adherence to a military chain of command, are more susceptible to the influence of military superiors and policies than their civilian counterparts in a civilian judicial proceeding.³⁶ “The term ‘unlawful command influence’ has been used broadly in our jurisprudence to cover a multitude of situations in which superiors have unlawfully controlled the actions of subordinates in the exercise of their duties under the UCMJ.”³⁷ Article 37, UCMJ, prohibits, *inter alia*, any person subject to the UCMJ from attempting to “coerce or, by any unauthorized means, influence the action” of courts-martial or military tribunals.³⁸ “While statutory in form, the prohibition can also raise due process concerns, where for example unlawful influence undermines a defendant’s right to a fair trial or the opportunity to put on a defense.”³⁹

The MCA prohibition on unlawful influence clearly covers the relationship between the SECDEF and Convening Authority. The Military Commissions Act broadens the protections of UCMJ Article 37, extending the scope of the prohibition to “any person”—not only those subject to the UCMJ—and prohibits attempts to coerce or influence the “action of any convening, approving, or reviewing authority with respect to their judicial acts.”⁴⁰ RTMC § 1-3(a) provides that, “The Secretary of Defense is responsible for the overall supervision and administration of military commissions within the DoD.” The Secretary of Defense is the direct supervisor of the Deputy Secretary of Defense, who is the direct supervisor of the Convening Authority.⁴¹ RTMC

³⁶ *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

³⁷ *United States v. Hamilton*, 41 M.J. 32, 36 (C.M.A. 1994).

³⁸ 10 U.S.C. § 837.

³⁹ *Salyer*, 72 M.J. at 423.

⁴⁰ 10 U.S.C. § 949b(a)(2)(B).

⁴¹ AE343F, Attachment C at 5548.

§ 1-4 continues in relevant part, “All persons involved in the administration of military commission must avoid the appearance or actuality of unlawful influence and otherwise ensure that the military commission system is free of unlawful influence.”

The adverse employment actions against Mr. Rishikof and Mr. Brown bear all the hallmarks of retaliation. Mr. Rishikof, advised by Mr. Brown, had acted adversely to some perceived interests of the DoD, including by seeking a surveillance-free attorney-client meeting space. A “senior defense official” told CNN that senior DoD leaders had a “loss of confidence” in Mr. Rishikof and Mr. Brown.⁴² The fact that Mr. al Baluchi does not know which Convening Authority decision the SECDEF has retaliated against only demonstrates the importance of the burden of proof on this motion.

The removal of the Convening Authority bears an analogy to *United States v. Lewis*, in which the military courts held that improper removal of a military judge can constitute unlawful command influence. In that case, a Staff Judge Advocate succeeded in having a military judge recuse herself through improper questioning.⁴³ The C.A.A.F. held that given the seriousness of removal of a member of the military justice system from the case, the only viable remedy was dismissal.⁴⁴

Apparent unlawful influence

Whatever the actual motivation for the adverse employment actions against Mr. Rishikof and Mr. Harvey, all reasonable outside observers have considered them to show disapproval of Convening Authority actions. Mainstream media outlets have seen the firings as retaliation for

⁴² Attachment H.

⁴³ *United States v. Lewis*, 63 M.J. 405, 412 (C.A.A.F. 2006).

⁴⁴ *Id.* at 416.

judicial acts such as requesting surveillance-free attorney-client meeting spaces, the perceived slow pace of litigation, or the Convening Authority's handling of the contempt proceeding against Brigadier General Baker. The actual observations of reasonable outside observers demonstrate the apparent unlawful influence over the Convening Authority and his Legal Advisor.

The military commission must review the actions of the Deputy Secretary of Defense and Convening Authority for the appearance of unlawful influence as well as actual unlawful influence.⁴⁵ “The ‘appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.’”⁴⁶ The objective test for appearance of unlawful influence “focus[es] upon the perception of fairness in military justice system as viewed through the eyes of a reasonable member of the public.”⁴⁷ “An appearance of unlawful command influence arises ‘where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.’”⁴⁸

Every outside observer understood the removal of Mr. Rishikof and Mr. Brown to be punitive. CNN reported:⁴⁹

Mattis fires two top Guantanamo officials

⁴⁵ *Salyer*, 72 M.J. at 423-24.

⁴⁶ *United States v. Lewis*, 63 M.J. 405, 407 (C.A.A.F. 2006) (quoting *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003)).

⁴⁷ *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).

⁴⁸ *Salyer*, 72 M.J. at 423 (quoting *Lewis*, 63 M.J. at 415).

⁴⁹ Attachment H.

The *Miami Herald* reported:⁵⁰

Secretary of Defense fires Guantánamo war court overseer

Wire service UPI reported:⁵¹



Pentagon: Two top Guantanamo Bay officials fired

Washington insider newspaper *The Hill* reported:⁵²



Pentagon fires top official overseeing Guantanamo detainees' 9/11 trials: report

BY ELLEN MITCHELL - 02/05/18 03:14 PM EST

⁵⁰ Attachment I.

⁵¹ Attachment J.

⁵² Attachment K.

The *Washington Examiner*, a magazine focused on political issues, wrote:⁵³

Jim Mattis fires lawyer overseeing Guantánamo trials of 9/11 terrorists: Report

In a follow-up story, the *Miami Herald* continued to refer to Mr. Rishikof as “fired”:⁵⁴

Pentagon won't say why war court overseer was fired, but he's not under investigation

Jess Bravin, *Wall Street Journal* reporter and author of a book on the military commissions, tweeted about Mr. Rishikof's firing:



Jess Bravin ● @JessBravin · Feb 5

Fired military commissions honcho Harvey Rishikof was counselor to Chief Justice Rehnquist and a senior national-security lawyer at the @FBI.

Carol Rosenberg ● @carolrosenberg

Updated: The war court legal adviser is gone too. Still no comment from the Pentagon. miamiherald.com/news/nation-wo...

National security observers across the political spectrum also called the adverse employment actions “firing”:



Nat.Sec.L. Podcast @NSLpodcast · Feb 6

Ep.58 is up. Listen in for:

- 1.Trump's treason remarks
2. #mehmo: what if Trump opposes release of the @AdamSchiffCA reply memo?
- 3.Mil Coms and the firing of Harvey Rishikof and Gary Brown
- 4.Doe v. Mattis and the transfer-notice appeal.

⁵³ Attachment L.

⁵⁴ Attachment M.



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Sarah Grant summarizes a puzzling development at the military commissions: the firing of convener Harvey Rishikof.

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Following

Harvey Rishikof was fired over the weekend. The Defense Department has declined to comment on the situation. More at [@miamiherald](#):



Pentagon: Secretary of Defense fired Guantánamo war court overseer

In a surprise move, the Pentagon has fired its top official overseeing the war court where five former CIA captives are accused of plotting the 9/11 attacks and other ...

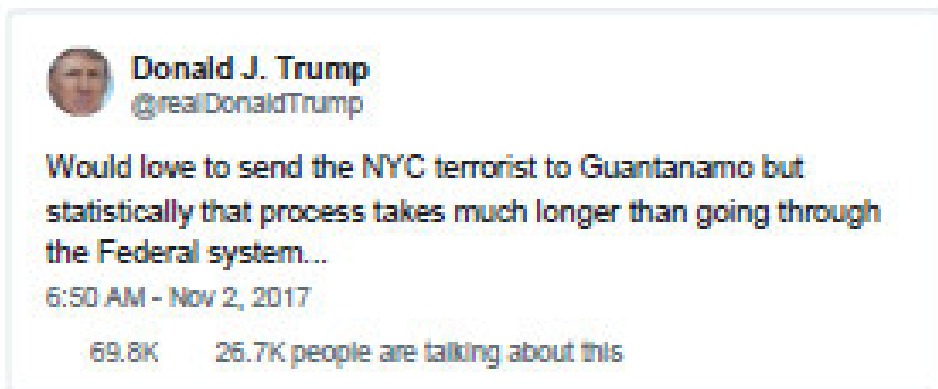
[miamiherald.com](#)

All outside observers perceived the adverse employment actions as negative. Although the DoD has not stated a reason for the firings, CNN reported,⁵⁵

Washington (CNN) — Secretary of Defense James Mattis fired two top Guantanamo Bay officials on Monday over a "loss of confidence," a senior defense official tells CNN.

Many outside observers posited that the SECDEF fired Mr. Rishikof and Mr. Brown because Trump Administration is dissatisfied with the pace of litigation. The *Miami Herald* linked the firing to the President's criticism of the speed of military commission prosecutions:⁵⁶

President Donald J. Trump has also been critical of the pace of trials by military commission. He tweeted on Nov. 2 that he had changed his mind about sending a suspected terrorist captured in New York to Guantánamo for trial because "statistically that process takes much longer than going through the Federal system."



⁵⁵ Attachment H.

⁵⁶ Attachment I.

The Hill had a similar observation:⁵⁷

President Trump last November criticized the pace of trials under the military justice system after he ruled out the possibility of sending the suspect in last year's New York City terror attack, Sayfullo Saipov, to Guantánamo.

"Would love to send the NYC terrorist to Guantanamo but statistically that process takes much longer than going through the Federal system," Trump tweeted Nov. 2.

Rishikof's firing comes a week after Trump signed an executive order to keep open the military detention facility at Guantánamo, reversing a Obama-era executive order to attempt to shutter the controversial prison.

As did the *Washington Examiner*:⁵⁸

President Trump has been critical of the speed at which trials by military commission moved. On Nov. 2 he tweeted that he wanted to send a suspected terrorist to Guantánamo, but it would take "much longer than going through the federal system."

Outside observers have also suggested that the Administration fired Mr. Rishikof and Mr. Brown for their attempt to resolve the persistent and well-founded allegations of monitoring of attorney-client communications at Guantanamo. The *Miami Herald* wrote:⁵⁹

Rishikof also has recommended that the chief of the prison guard force build a new compound at Guantánamo for attorney-client meetings after Baker and others said the privileged conversations had been compromised.

⁵⁷ Attachment K.

⁵⁸ Attachment L.

⁵⁹ Attachment I.

In its article on Mr. Rishikof's firing, *The Hill* reported:⁶⁰

He had pushed a handful of controversial decisions, including recommending that the chief of the prison guards build a new compound for attorney-client meetings over concerns of eavesdropping.

Others focused on the surveillance issue in their tweets on the firings:



Jeffrey Kaye @jeff_kaye · Feb 6

Reading between the lines, it appears that Mattis fired Rishikof as Convening Authority because he perceived him as too soft on the issue of government eavesdropping on privileged conversations btw attorneys & accused detainees. Bodes ill for MC defense miamiherald.com/news/nation-wo...



12

11



The point of these traditional and social media observations is not that they are correct—although they probably are. The point is that regular and independent observers of the military commissions universally see the adverse employment actions against Mr. Rishikof and Mr. Brown as related to their decisions and recommendations in the military commission process. No observer has suggested that the men were fired for malfeasance or any other cause. The sequence of events, and the coordinated firings, have convinced all outside observers that senior DoD officials disapprove some official action of Mr. Rishikof and Mr. Brown, even if no one knows which one. Even if there were no actual unlawful influence, the manner in which senior DoD leaders conducted the firings has created apparent unlawful influence.

Judicial independence

The prohibition against unlawful influence is not merely an aspect of U.S. military law; it is an essential guarantee of due process through the independence of the military judiciary.

⁶⁰ Attachment K.

Common Article 3 of the Geneva Conventions prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples,”⁶¹ which include an independent and impartial judiciary.⁶²

Although U.S. courts have had little opportunity to construe the judicial independence requirement, the European Court of Human Rights (ECHR) has applied the requirement for an independent and impartial tribunal⁶³ to a military proceeding under a “convening officer” structure very similar to the military commissions’ Convening Authority.⁶⁴ The ECHR explained that, “in order to establish whether a tribunal can be considered as ‘independent,’ regard must be had, *inter alia*, to . . . the existence of guarantees against outside pressures and the question whether the body

⁶¹ Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Article 3(1)(d).

⁶² See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) § 75(4) (June 8, 1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) § 6(2) (June 8, 1977). The United States has not adopted Additional Protocols I or II, but recognizes Additional Protocol I Art. 75 and Additional Protocol II Art. 4-6 as customary international law. *Hamdan*, 548 U.S. 557, 633-34 (2006) (plurality op.) (regarding Additional Protocol I Art. 75); DoD Directive No. 2310.01E § 3(a)(2)-(3) (regarding Additional Protocol II Art. 4-6 during non-international armed conflict and Additional Protocol I Art. 75 during international armed conflict); *Report on U.S. Practice* Ch. 5.3 (1997) (“It is the *opinion juris* of the U.S. that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5, and 6 [of Additional Protocol II].”); see also *Civilians Claims (Eritrea v. Ethiopia)*, Eritrea’s Claims 15, 16, 23 & 27-32, Partial Award (Eritrea Ethiopia Claims Comm’n 2004) (“The Commission views Article 75 of Additional Protocol I as reflecting particularly important customary principles.”).

⁶³ See, e.g., Article 14 (1) of the International Covenant on Civil and Political Rights; Article 6(1) of the European Convention on Human Rights; Article 8(1) of the American Convention of Human Rights.

⁶⁴ *Findlay v. United Kingdom*, Judgment, No. 22107/93 (E.C.H.R. 1997). The United Kingdom abolished the role of “convening officer” in 1996.

presents an appearance of independence.”⁶⁵ Both the actual and the apparent unlawful influence of the SECDEF and Acting General Counsel violate Common Article 3 by compromising the independence of the trial judiciary.

Dismissal is a drastic remedy, but the only appropriate one in this case. The SECDEF and Acting General Counsel have distorted the entire structure of the military commissions system by firing the Convening Authority and his Legal Adviser in a coordinated retaliation. The only alternative remedy is reinstatement, but the retaliation has already sent a message to Mr. Rishikof and Mr. Brown that they face adverse employment action if they make decisions or recommendations their superiors do not approve. The replacement for Mr. Brown is already disqualified in *United States v. al Nashiri*, and should have been disqualified in this case, for his prior participation in the unlawful order to send military judges to live at Guantanamo Bay. The new Convening Authority, as well as Mr. Toole, now know that they must follow their supervisor’s wishes or face the same fate as their predecessors. This situation is far from the independence required by due process and the Military Commissions Act.

7. Oral Argument: The defense requests oral argument.

8. Witnesses:

- a. Secretary of Defense James Mattis;
- b. Acting General Counsel William Castle;
- c. Mr. Harvey Rishikof;
- d. Mr. Gary Brown;
- e. Mr. Mark Toole.

⁶⁵ *Findlay*, No. 22107/93, at ¶ 73; *see also* *Çiraklar v. Turkey*, No. 19601/92 (E.C.H.R. 1998); *Şahiner v. Turkey*, No. 29279/95 (E.C.H.R. 1995).

9. **Conference with Opposing Counsel:** The prosecution opposes this motion.
10. **List of Attachments:**
 - A. Certificate of Service
 - B. James Connell's Contemporaneous Notes (26 January 2018)
 - C. TSCM Email request
 - D. BGen Baker's email to Mr. Rishikof and Mr. Brown
 - E. SECDEF Mattis designates Mr. Rishikof as CA
 - F. SECDEF Mattis rescinded the designation of Mr. Rishikof as CA
 - G. Acting General Counsel Mr. Castle replaces Mr. Brown with Mr. Toole as Acting Legal Advisor
 - H. CNN: Mattis fires two top Guantanamo Officials
 - I. Miami Herald: Secretary of Defense fires Guantanamo war court overseer
 - J. UPI: Pentagon: Two top Guantanamo Bay officials fired
 - K. The Hill: Pentagon fires top official overseeing Guantanamo detainees' 9/11 trials
 - L. Washington Examiner: Jim Mattis fires lawyer overseeing Guantanamo trials of 9/11 terrorists
 - M. Miami Herald: Pentagon won't say why war court overseer was fired

Very respectfully,

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

//s//
ALKA PRADHAN
Defense Counsel

Counsel for Mr. al Baluchi

//s//
STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 9th day of February, 2018, 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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1/26/18
called Ben Baker

[REDACTED]

CA told him they will find TSCM

[REDACTED]

Attachment C

Connell, James G III CIV (US)

From: Connell, James G III CIV (US)
Sent: Monday, January 29, 2018 2:21 PM
To: Baker, John G BGen USMC (US)
Cc: Aaron, Wayne J COL USARMY OSD OMC (US)
Subject: RE: ~~(S)~~ TSCM request (UNCLASSIFIED)
Signed By: james.connell2 [REDACTED]

~~CLASSIFICATION: UNCLASSIFIED~~

~~CLASSIFICATION: UNCLASSIFIED~~

~~CLASSIFICATION: UNCLASSIFIED~~

Technical Surveillance Counter Measures is a term of art.

I would be satisfied if any organization outside SOUTHCOM (including DSS) did the TSCM inspection.

I cannot speak for other teams, but can inquire if you would like.

Best,
J. Connell

~~CLASSIFICATION: UNCLASSIFIED~~

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

From: Baker, John G BGen USMC (US)
Sent: Monday, January 29, 2018 2:17 PM
To: Connell, James G III CIV (US) <james.g.connell7.civ [REDACTED] [REDACTED]>
Cc: Aaron, Wayne J COL USARMY OSD OMC (US) <way [REDACTED] mil [REDACTED]>
Subject: RE: TSCM request (UNCLASSIFIED)

Jay,

To be clear, you would be satisfied if the DSS did the technological inspection (is TSCM a term of art?) of all attorney-client meeting rooms at GTMO. Any sense if the other teams would agree to a DoD entity doing this?

S/F,

JB

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

From: Connell, James G III CIV (US)
Sent: Friday, January 26, 2018 3:08 PM
To: Baker, John G BGen USMC (US) <john.g.baker.mil [REDACTED] [REDACTED]>
Cc: Aaron, Wayne J COL USARMY OSD OMC (US) <wayne.j.aaron.mil [REDACTED] [REDACTED]>
Subject: TSCM request (UNCLASSIFIED)

~~CLASSIFICATION: UNCLASSIFIED~~

~~CLASSIFICATION: UNCLASSIFIED~~

Sir,

Attached is the TSCM request we have pending before the CA. I am also attaching the information on the agency we identified, although we ultimately chose not to include it in the request.

Best regards,

James Connell

~~CLASSIFICATION: UNCLASSIFIED~~

~~CLASSIFICATION: UNCLASSIFIED~~

~~CLASSIFICATION: UNCLASSIFIED~~

Attachment D

Connell, James G III CIV (US)

From: Baker, John G BGen USMC (US) <john.g.baker.mil [REDACTED]>
Sent: Monday, January 29, 2018 2:06 PM
To: Rishikof, Harvey (HQE) HQE OSD OMC CA (US); Kelly, Wendy I CIV OSD OMC CA (US)
Cc: Brown, Gary D HQE OSD OMC CA (US); 'Wayne Aaron'; [REDACTED] CIV (US); Van Dalen, Matthew D Col USAF OSD OMC CA (US)
Subject: Follow Up/AAR [REDACTED]
Attachments: [REDACTED]
Signed By: john.baker [REDACTED]

Harvey,

[REDACTED]

[REDACTED]

[REDACTED]

3. Independent Technological Inspection of attorney-client meeting rooms - you explained that you would favorably consider a reasonable request for funding for an independent inspector (you seemed to express a preference for a request for a government entity) to conduct a technological inspection of attorney-client meeting rooms at GTMO to ensure no monitoring capability beyond video with no audio capability. You were clear that you are not the decider whether these inspectors would be allowed to access JTF (or other entity) controlled attorney-client meeting rooms. I plan to get you that resource request this week if possible.

[REDACTED]

[REDACTED]

Please let me know if you have any corrections to the above or anything else to add to this summary.

Semper Fi,

John G. Baker
Brigadier General, U.S. Marine Corps
Chief Defense Counsel
Military Commissions Defense Organization
1620 Defense Pentagon
Washington, DC 20301-1620


E-mail: john.g.baker.mil


Attachment E



SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

APR 04 2017

MEMORANDUM FOR DEPUTY SECRETARY OF DEFENSE
SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE

SUBJECT: Designation of Harvey Rishikof as Convening Authority for Military Commissions

Pursuant to chapter 47A of title 10, U.S.C., section 948h, Harvey Rishikof is designated as Convening Authority for Military Commissions. This designation is effective as of April 3, 2017, and will continue until a new convening authority is designated. In his role as Convening Authority, and in accordance with the applicable Rules for Military Commission, provisions of the Regulation for Trial by Military Commission, and applicable judicial orders, Mr. Rishikof is to receive legal advice relating to military commissions solely from an appropriately designated Legal Advisor to the Convening Authority and members of the appropriately designated Legal Advisor's staff as necessary.

A handwritten signature in black ink, which appears to read "Jean H. Matei".

cc:
Legal Advisor to the Convening Authority for Military Commissions
Chief Prosecutor, Office of the Chief Prosecutor
Chief Defense Counsel, Office of the Chief Defense Counsel
Chief Judge, Military Commissions Trial Judiciary



Attachment F



SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

2/3/2018

MEMORANDUM FOR DEPUTY SECRETARY OF DEFENSE
SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
CHIEFS OF MILITARY SERVICES
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE

SUBJECT: Designation of James Coyne as Acting Convening Authority for Military Commissions

Pursuant to chapter 47A of title 10, U.S.C., section 948h, James Coyne is designated as Acting Convening Authority for Military Commissions. This designation is effective as of February 3, 2018, and will continue until a new convening authority is designated. In his role as Convening Authority, and in accordance with the applicable Rules for Military Commission, provisions of the Regulation for Trial by Military Commission, and applicable judicial orders, Mr. Coyne is to receive legal advice relating to military commissions solely from an appropriately designated Legal Advisor to the Convening Authority and members of the appropriately designated Legal Advisor's staff as necessary.

The memorandum, subject: Designation of Harvey Rishikof as the Convening Authority for Military Commissions, dated April 4, 2017, is hereby rescinded.

cc:
Acting Legal Advisors to the Convening Authority for Military Commissions
Chief Prosecutor, Office of the Chief Prosecutor
Chief Defense Counsel, Office of the Chief Defense Counsel
Chief Judge, Military Commissions Trial Judiciary



Attachment G



DEPARTMENT OF DEFENSE
OFFICE OF THE GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

FEB - 5 2018

MEMORANDUM FOR MARK W. TOOLE, DEPUTY LEGAL ADVISOR, OFFICE OF THE
CONVENING AUTHORITY FOR MILITARY COMMISSIONS

SUBJECT: Appointment as the Acting Legal Advisor to the Convening Authority

Effective today, you are appointed as the Acting Legal Advisor to the Convening Authority for Military Commissions ("Convening Authority") for all military commission cases with the exception of *United States v. Nashiri*. As such, you serve in the Office of the Convening Authority and report to the Convening Authority.

The duties and responsibilities of the Legal Advisor are set forth in the Manual for Military Commissions and the Regulation for Trial by Military Commission. As a member of the Defense Legal Services Agency, you are supervised by the Deputy General Counsel (Legal Counsel), Office of the General Counsel, Department of Defense (DGC (LC)). You are assigned to the Office of the Convening Authority and will report on a day-to-day basis and perform duties at the direction of the Convening Authority.

As Acting Legal Advisor, you are responsible for informing and coordinating with the Deputy General Counsel (Legal Counsel) on matters of law or policy that may require the attention of the DoD General Counsel, except for those matters of law and policy that impact the Office of the Chief Defense Counsel. For those matters, you are responsible for will informing and coordinating with the Deputy General Counsel for Personnel and Health Policy, Office of the General Counsel, Department of Defense (DGC (P&HP)), as appropriate.

A handwritten signature in black ink that reads "William S. Castle".

William S. Castle
Performing the Duties of the General Counsel

cc:
Acting Convening Authority
DGC (LC)
DGC (P&HP)



Attachment H



Mattis fires two top Guantanamo officials



By [Barbara Starr](#) and [Ryan Browne](#), CNN

Updated 7:36 PM ET, Mon February 5, 2018



Trump reverses Obama policy on Guantanamo Bay 01:52

Washington (CNN) — Secretary of Defense James Mattis fired two top Guantanamo Bay officials on Monday over a "loss of confidence," a senior defense official tells CNN.

"Secretary of Defense James N. Mattis rescinded the designations of Harvey Rishikof as the Director of the Office of the Convening Authority for Military Commissions and as the Convening Authority for Military Commissions. Additionally, William S. Castle, acting General Counsel, rescinded the designation of Gary Brown as the Legal Advisor to the Convening Authority" Pentagon spokesperson Tom Crosson said in a statement.

provided to CNN.

Crosson said that Mattis has appointed Jim Coyne, who currently serves as the general counsel at the Defense Logistics Agency, as the acting convening authority.



Related Article: Trump signs order to keep Guantanamo open

There are several hearings underway pertaining to inmates at the detention facility but the Pentagon said these personnel actions "do not impact ongoing (Office of the Convening Authority for Military Commissions) hearings and proceedings."

The Pentagon said that Castle, in his capacity as acting general counsel, "appointed Mark Toole as Acting Legal Advisor to the Convening Authority for all military commissions except for the case of U.S. v. al-Nashiri, and appointed US Air Force Col. Matthew van Dalen as Acting Legal Advisor to the Convening Authority for the al-Nashiri commission."

"Toole previously served as the Deputy Legal Advisor to the Convening Authority and van Dalen was previously an assistant legal advisor to the Convening Authority," the

statement said.

The Miami Herald was [first to report](#) this story.

Last week President Donald Trump signed a new executive order which called for the detention facility to be kept open and opened the door to sending new prisoners there. There is no indication at this time that the firings were related to the executive order.

The decision to keep the facility indefinitely open is a major reversal of his predecessor President Barack Obama's policy who attempted to shutter the detention facility in his first year of office.

In December, Mattis became the first secretary of defense since the Bush administration to visit Guantanamo Bay, visiting troops there during the holidays. Officials said the visit was purely intended to boost morale and not related to the detention facility's operations.



Pilot's crazy photos from an airplane cockpit



Bill Belichick Takes the Blame for Patriots Loss vs. Eagles in Super Bowl...



Trump ambassador nominee promoted fringe conspiracy theories on Twitter



Democrats' chances of winning back the House just got a major boost

Attachment I



Harvey Rishkof moderating a Sept. 16, 2014 Debate on War and the Constitution between attorneys John Yoo and Bruce Fein. - CSPAN

GUANTÁNAMO

Secretary of Defense fires Guantánamo war court overseer

BY CAROL ROSENBERG
crosenberg@im.amiherald.com
February 05, 2018 01 18 PM
Updated February 06, 2018 06 53 AM

GUANTANAMO BAY NAVY BASE, CUBA — In a surprise move, Secretary of Defense Jim Mattis on Monday fired the top official overseeing the trials of the five men accused of plotting the 9/11 attacks and other alleged war criminals held at Guantánamo.

It was not immediately known what caused Mattis to dismiss Harvey Rishkof, an attorney with experience in national security law who, unlike earlier war court overseers, had no U.S. military experience. Mattis named Rishkof convening authority for military commissions on April 3.

Gary Brown, the legal adviser for military commissions, also lost his Pentagon job. He was temporarily replaced by two lawyers from his staff.

The decision had no impact on ongoing war court proceedings, said Tom Crosson, a spokesman for the Department of Defense, because Mattis designated the general counsel at the Defense Logistics Agency, Jim Coyne, as acting convening authority.

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The Office of the Convening Authority is responsible for approving cases for trial, plea agreements, reviewing convictions and sentences — and resourcing defense teams.

Coyne's LinkedIn page says he's a retired Army colonel who has worked for the Department of Defense both in and out of uniform for 37 years.



Jim Coyne in this Oct. 9, 2012 Pentagon photo.

He got his law degree from the University of the Pacific in 1980, a year before he began service. Upon his retirement in 2008, he went straight to work for the Africa Command from Germany, then returned to Washington, D.C., area in 2010 to work at the DLA, which he describes as "a Combat Support Agency." He became General Counsel in May 2016.

Crosson said the two men were removed from their jobs Monday. Mattis "rescinded

the designations" of Rishkof as the convening authority for military commissions and as director of that office. Additionally, he said, William S. Castle, acting general counsel, rescinded Brown's designation.

Rishkof has been responsible for several recent controversial decisions, including suspending the contempt of court sentence of the chief defense counsel, Marine Brig. Gen. John Baker. Without explanation, his office also rejected a proposed charge sheet for three former CIA captives held here on suspicion of plotting terror attacks in Southeast Asia, including the grisly 2002 Bali nightclub bombing.

RELATED: Secret SNAFU smags Hambali's proposed Bali bombing prosecution

President Donald J. Trump has also been critical of the pace of trials by military commission. He tweeted on Nov. 2 that he had changed his mind about sending a suspected terrorist captured in New York to Guantánamo for trial because "statistically that process takes much longer than going through the Federal system."



Rishkof also has recommended that the chief of the prison guard force build a new compound at Guantánamo for attorney-client meetings after Baker and others said the privileged conversations had been compromised.

RELATED: Prison shops for pop-up site for attorney-client meetings

In court Monday, a prosecutor in an al-Qaida commander case described the problem cast by defense attorneys as an ethical conflict as "a red herring that has been rotting in the Guantánamo sun for months."

Questioning whether somebody was eavesdropping on privileged conversations is "a speculative tactical decision" by the overarching defense organization led by Baker, prosecutor Vaughn Spencer argued.



Inside a communal cell block for low-value detainees days after President Donald Trump cancelled his predecessor's closure order. U.S. Army soldiers approved the release of this Miami Herald material. **José A. Iglesias** — The Miami Herald

Defense attorney Adam Thurschwell replied "It's some other kind of fish. And it stinks. And it's there and has to be resolved."

The commissions have been clouded by uncertainty since the entire civilian defense team resigned from the USS Cole death-penalty case, leaving an inexperienced former Navy SEAL in court to defend alleged bombing mastermind Abd al Rahim al Nashiri.

RELATED: Pentagon official frees Marine general confined to quarters at Guantánamo

Although Rishikof was appointed at the start of the Trump administration, his name went forward as a candidate for the job toward the end of the Obama administration. He was removed less than a week after the president signed an executive order formally rescinding Obama's closure order for the prison.

In it, he tasks Mattis with crafting policy for bringing new captives to the detention center that currently houses 41 captives, 10 of them with military commissions cases.

The decision also comes two weeks before a captive turned government witness is due to return to Saudi Arabia to serve a terrorism sentence under a plea agreement worked out during the Obama administration and approved by an earlier convening authority.

The job of acting legal adviser went to Mark Toole, a long-serving deputy in that office. One duty he won't take over is handling matters related to the USS Cole case, where Nashiri awaits a death penalty trial. A different deputy legal adviser, Air Force Col. Matthew van Dalen, was assigned to provide Coyne with legal advice on the Cole case.

The military judge in that case disqualified Toole in 2015 over his role in an earlier attempt by the Pentagon to order the war court judges to live permanently at Guantánamo until their cases are over — meaning they would live here for years.

The Pentagon withdrew that order after the Sept. 11 terror trial judge suspended that case because the move-in order created an appearance of illegal meddling in the independence of the judiciary known as unlawful command influence.

Upon learning about the latest development, veteran war court watcher Stephen Vladeck, a University of Texas law professor, said it was too soon to know if the Rishikof firing would lead to allegations of unlawful command influence.

"It's hard to know without knowing why he was fired," Vladeck said by email. "But it's not at all difficult to imagine that at least some of the commission defendants will use this as further proof that Secretary Mattis is exercising too much control over the proceedings."

PENTAGON STATEMENT

Today, Secretary of Defense James N. Mattis rescinded the designations of Harvey Rishikof as the Director of the Office of the Convening Authority for Military Commissions and as the Convening Authority for Military Commissions. Additionally, William S. Castle, acting General Counsel, rescinded the designation of Gary Brown as the Legal Advisor to the Convening Authority.

Secretary Mattis appointed Jim Coyne as Acting Convening Authority. Coyne currently serves as the General Counsel at the Defense Logistics Agency. Mr. Castle appointed Mark Toole as Acting Legal Advisor to the Convening Authority for all military commissions except for the case of U.S. v. al-Nashiri, and appointed U.S. Air Force Colonel Matthew van Dalen as Acting Legal Advisor to the Convening Authority for the al-Nashiri commission. Toole previously served as the Deputy Legal Advisor to the Convening Authority and van Dalen was previously an assistant legal advisor to the Convening Authority.

These personnel actions do not impact ongoing OMC hearings and proceedings.

Tom Crosson, Pentagon spokesman

(OMC=Office of Military Commissions)

COMMENTS

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Here's How This Father Was Able to Get Ahead For His Family

By United Way of Central Ohio —

Here's how a computer training program enabled this father to give his family a brighter future.

Attachment J



Pentagon: Two top Guantanamo Bay officials fired

Published: Feb. 6, 2018 at 12:08 AM

Daniel Uria

Feb. 5 (UPI) -- A pair of top Guantanamo Bay officials were fired from their positions Monday, according to the Pentagon.

U.S. Secretary of Defense James Mattis dismissed Harvey Rishikof, the top official overseeing the trials of the five men accused of plotting the 9/11 attacks, the [Miami Herald reported](#).

"Today, Secretary of Defense James N. Mattis rescinded the designations of Harvey Rishikof as the Director of the Office of the Convening Authority for Military Commissions and as the Convening Authority for Military Commissions," the Pentagon said.

Mattis appointed Jim Coyne, who currently serves as the general counsel at the Defense Logistics Agency, as the acting convening authority, Pentagon spokesman Tom Crosson [told CNN](#).

Crosson added the decision had no impact on ongoing war court proceedings.

William S. Castle, acting general counsel, also rescinded the designation of Gary Brown, the legal adviser for military commissions.

Brown was replaced by two lawyers from his staff.

The moves come a week after President Donald Trump signed an executive order to keep Guantanamo Bay open.

During his [State of the Union address](#) Trump said the order will "re-examine our military detention policy and to keep open the detention facilities in Guantanamo Bay."

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Attachment K



Pentagon fires top official overseeing Guantanamo detainees' 9/11 trials: report

BY ELLEN MITCHELL - 02/08/18 03:14 PM EST

Just In...

Drug dealers among us: Look for those wearing lab coats or pinstripe suits
OPINION — 5M 20S AGO

Trump calls for illegal immigration crackdown after NFL player's death
ADMINISTRATION — 11M 24S AGO

Conway freezing out experts, relying on political staff in drug policy office: report
ADMINISTRATION — 12M 29S AGO

Scarborough to Trump: 'your own lawyers think you are too stupid' to talk to Mueller
MEDIA — 17M 40S AGO

Fox's Napolitano says he hopes Trump releases Dem memo
MEDIA — 20M 16S AGO

Schiff worried White House will make 'political redactions' to Dem memo
HOUSE — 28M 13S AGO

Seniors — not middlemen — deserve the Medicare Part D discounts
OPINION — 35M 19S AGO

GOP rep: Dems' State of the Union response not 'treasonous,' but 'embarrassing'
BLOG BRIEFING ROOM — 38M 23S AGO

VIEW ALL

89 SHARES



© Getty Images

Defense Secretary James Mattis has fired the top official overseeing the trials of the five men being held at Guantánamo Bay who are accused of planning the 9/11 terrorist attacks, the Miami Herald [reported](#).

Two people aware of the development told the Herald that Mattis dismissed Harvey Rishikof, who has been convening authority — responsible for resourcing defense teams and for approving cases for trial — for military commissions since last April.

Mattis now technically is convening authority until a new designee is named, so the decision does not stop ongoing hearings at the war court. The Pentagon declined to comment on the dismissal and no reason has been given for it.

Rishikof, a lawyer with experience in national security law, had no U.S. military experience, unlike his predecessors.

He had pushed a handful of controversial decisions, including recommending that the chief of the prison guards build a new compound for attorney-client meetings over concerns of eavesdropping.

He was also an Obama administration pick, though his appointment was delayed until the start of the Trump administration.

President Trump last November [criticized](#) the pace of trials under the military justice system after he ruled out the possibility of sending the suspect in last year's New York City terror attack, Sayfullo Saipov, to Guantánamo.

"Would love to send the NYC terrorist to Guantanamo but statistically that process takes much longer than going through the Federal system," Trump tweeted Nov. 2.

Rishikof's firing comes a week after Trump signed an executive order to keep open the military detention facility at Guantánamo, reversing a Obama-era executive order to attempt to shutter the controversial prison.

TAGS: JAMES MATTIS DONALD TRUMP JIM MATTIS GUANTÁNAMO BAY

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Attachment L



Jim Mattis fires lawyer overseeing Guantánamo trials of 9/11 terrorists: Report

by Katelyn Caralle | Feb 5, 2018, 4:32 PM

Defense Secretary Jim Mattis on Monday fired the top official overseeing the trials of five men being held at Guantánamo Bay who have been accused of plotting the 9/11 attacks.

Harvey Rishikof is an attorney with experience in national security law, but with no military experience. According to the Miami Herald, there is **no known reason** for Mattis' decision to fire the man he named convening authority for military commission last April.

Two Pentagon lawyers have replaced Rishikof and Gary Brown, a legal adviser for military commissions who was fired by acting general counsel William S. Castle.

Tom Crosson, a spokesman for the Department of Defense, said the two men were removed from their positions on Monday.

President Trump has been critical of the speed at which trials by military commission moved. On Nov. 2 he tweeted that he wanted to send a suspected terrorist to Guantánamo, but it would take "much longer than going through the federal system."

Would love to send the NYC terrorist to Guantanamo but statistically that process takes much longer than going through the Federal system. ~~~~~ Donald J. Trump (@realDonaldTrump) November 2, 2017

Rishikof was at the center of multiple controversial decisions, like suspending chief defense counsel Marine Brig. Gen. John Baker, and rejecting a proposed charge sheet for three former CIA captives suspected of plotting terror attacks.

Attachment M



GUANTÁNAMO

Pentagon won't say why war court overseer was fired, but he's not under investigation

BY CAROL ROSENBERG
crossenberg@miamiherald.com

February 06, 2018 06:57 PM
Updated February 06, 2018 08:04 PM

GUANTANAMO BAY NAVY BASE, CUBA — The Pentagon for a second straight day declined to explain why Defense Secretary Jim Mattis fired his Guantánamo war court overseer of 10 months but said there was no investigation related to the abrupt departures.

Military Commissions Convening Authority Harvey Rishikof and his legal adviser Gary Brown were removed on Monday from their Virginia-based jobs, which have oversight of the war crimes trials of the alleged plotters of the Sept. 11 terror attacks and others. The two men were replaced, in acting capacities, by three veteran Department of Defense lawyers.

The Pentagon “does not discuss personnel actions,” Department of Defense spokesman Tom Crosson said Tuesday. “However, I can confirm that the Department has not initiated nor is it aware of any investigation involving Mr. Rishikof or Mr. Brown.”

Rishikof has so far declined to comment on the firings. The Herald has been unable to reach Brown.

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Crosson also said there was no immediate word on whether there were candidates to fill the positions.

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Meantime, a 37-year career Department of Defense lawyer, retired Army Col. Jim Coyne, is acting convening authority while handling his full-time job as general counsel of the Defense Logistics Agency.

Coyne got his law degree from the University of the Pacific in 1980, a year before he joined the Army's Judge Advocate General service. Upon his retirement in 2008, he went straight to work for the Pentagon's Africa Command, according to his LinkedIn page, then returned to the Washington, D.C., area in 2010 to join the Defense Logistics Agency, a self-described combat support agency based at Fort Belvoir, Virginia.

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Fired Military Commissions Convening Authority Harvey Rishikof on Sept. 16, 2014, before taking the post. CSPAN

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