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**A TWO-PART SERIES ON  
THE PMO & BUSH DETAINEE POLICY**

**By TIM GOLDEN**

**An in-depth account of the illegal White House detainee policies after 9/11.**

[http://pegc.no-ip.info/archive/Press/NY\\_Times/nyt\\_golden\\_20041024.pdf](http://pegc.no-ip.info/archive/Press/NY_Times/nyt_golden_20041024.pdf)

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[ PART 1 ]

**The New York Times**  
October 24, 2004

**After Terror,  
A Secret Rewriting of Military Law**

**By TIM GOLDEN**

[ <http://www.nytimes.com/2004/10/24/international/worldspecial2/24gitmo.html> ]

**WASHINGTON** - In early November 2001, with Americans still staggered by the Sept. 11 attacks, a small group of White House officials worked in great secrecy to devise a new system of justice for the new war they had declared on terrorism.

Determined to deal aggressively with the terrorists they expected to capture, the officials bypassed the federal courts and their constitutional guarantees, giving the military the authority to detain foreign suspects indefinitely and prosecute them in tribunals not used since World War II.

The plan was considered so sensitive that senior White House officials kept its final details hidden from the president's national security adviser, Condoleezza Rice, and the secretary of state, Colin L. Powell, officials said. It was so urgent, some of those involved said, that they hardly thought of consulting Congress.

White House officials said their use of extraordinary powers would allow the Pentagon to collect crucial intelligence and mete out swift, unmerciful justice. "We think it guarantees that we'll have the kind of treatment of these individuals that we believe they deserve," said Vice President Dick Cheney, who was a driving force behind the policy.

But three years later, not a single terrorist has been prosecuted. Of the roughly 560 men being held at the United States naval base at Guantanamo Bay, Cuba, only 4 have been formally charged. Preliminary hearings for those suspects brought such a barrage of procedural challenges and public criticism that verdicts could still be months away. And since a Supreme Court decision in June that gave the detainees the right to challenge their imprisonment in federal court, the Pentagon has stepped up efforts to send home hundreds of men whom it once branded as dangerous terrorists.

"We've cleared whole forests of paper developing procedures for these tribunals, and no one has been tried yet," said Richard L. Shiffrin, who worked on the issue as the Pentagon's deputy general counsel for intelligence matters. "They just ended up in this Kafkaesque sort of purgatory."

The story of how Guantanamo and the new military justice system became an intractable legacy of Sept. 11 has been largely hidden from public view.

But extensive interviews with current and former officials and a review of confidential documents reveal that the legal strategy took shape as the ambition of a small core of conservative administration officials whose political influence and bureaucratic skill gave them remarkable power in the aftermath of the attacks.

The strategy became a source of sharp conflict within the Bush administration, eventually pitting the highest-profile cabinet secretaries - including Ms. Rice and Defense Secretary Donald H. Rumsfeld - against one another over issues of due process, intelligence-gathering and international law.

In fact, many officials contend, some of the most serious problems with the military justice system are rooted in the secretive and contentious process from which it emerged.

Military lawyers were largely excluded from that process in the days after Sept. 11. They have since waged a long struggle to ensure that terrorist prosecutions meet what they say are basic standards of fairness. Uniformed lawyers now assigned to defend Guantanamo detainees have become among the most forceful critics of the Pentagon's own system.

Foreign policy officials voiced concerns about the legal and diplomatic ramifications, but had little influence. Increasingly, the administration's plan has come under criticism even from close allies, complicating efforts to transfer scores of Guantanamo prisoners back to their home governments.

To the policy's architects, the attacks on the World Trade Center and the Pentagon represented a stinging challenge to American power and an imperative to consider

measures that might have been unimaginable in less threatening times. Yet some officials said the strategy was also shaped by longstanding political agendas that had relatively little to do with fighting terrorism.

The administration's claim of authority to set up military commissions, as the tribunals are formally known, was guided by a desire to strengthen executive power, officials said. Its legal approach, including the decision not to apply the Geneva Conventions, reflected the determination of some influential officials to halt what they viewed as the United States' reflexive submission to international law.

In devising the new system, many officials said they had Osama bin Laden and other leaders of Al Qaeda in mind. But in picking through the hundreds of detainees at Guantanamo Bay, military investigators have struggled to find more than a dozen they can tie directly to significant terrorist acts, officials said. While important Qaeda figures have been captured and held by the C.I.A., administration officials said they were reluctant to bring those prisoners before tribunals they still consider unreliable.

Some administration officials involved in the policy declined to be interviewed, or would do so only on the condition they not be identified. Others defended it strongly, saying the administration had a responsibility to consider extraordinary measures to protect the country from a terrifying enemy.

"Everybody who was involved in this process had, in my mind, a white hat on," Timothy E. Flanigan, the former deputy White House counsel, said in an interview. "They were not out to be cowboys or create a radical new legal regime. What they wanted to do was to use existing legal models to assist in the process of saving lives, to get information. And the war on terror is all about information."

As the policy has faltered, other current and former officials have criticized it on pragmatic grounds, arguing that many of the problems could have been avoided. But some of the criticism also has a moral tone.

"What several of us were concerned about was due process," said John A. Gordon, a retired Air Force general and former deputy C.I.A. director who served as both the senior counterterrorism official and homeland security adviser on President Bush's National Security Council staff. "There was great concern that we were setting up a process that was contrary to our own ideals."

### An Aggressive Approach

The administration's legal approach to terrorism began to emerge in the first turbulent days after Sept. 11, as the officials in charge of key agencies exhorted their aides to confront Al Qaeda's threat with bold imagination.

"Legally, the watchword became 'forward-leaning,' " said a former associate White House counsel, Bradford Berenson, "by which everybody meant: 'We want to be aggressive. We want to take risks.' "

That challenge resounded among young lawyers who were settling into important posts at the White House, the Justice Department and other agencies. Many of them were members of the Federalist Society, a conservative legal fraternity. Some had clerked for Supreme Court justices, Clarence Thomas and Antonin Scalia in particular. A striking number had clerked for a prominent Reagan appointee, Lawrence H. Silberman of the United States Court of Appeals for the District of Columbia Circuit.

One young lawyer recalled looking around the room during a meeting with Attorney General John Ashcroft. "Of 10 people, 7 of us were former Silberman clerks," he said.

Mr. Berenson, then 36, had been consumed with the nomination of federal judges until he was suddenly reassigned to terrorism issues and thrown into intense, 15-hour workdays, filled with competing urgencies and intermittent new alerts.

"All of a sudden, the curtain was lifted on this incredibly frightening world," he said. "You were spending every day looking at the dossiers of the world's leading terrorists. There was a palpable sense of threat."

As generals prepared for war in Afghanistan, lawyers scrambled to understand how the new campaign against terrorism could be waged within the confines of old laws.

Mr. Flanigan was at the center of the administration's legal counteroffensive. A personable, soft-spoken father of 14 children, his easy manner sometimes belied the force of his beliefs. He had arrived at the White House after distinguishing himself as an agile legal thinker and a Republican stalwart: During the Clinton scandals, he defended the independent counsel, Kenneth W. Starr, saying he had conducted his investigation "in a moderate and appropriate fashion." In 2000, he played an important role on the Bush campaign's legal team in the Florida recount.

In the days after the Sept. 11 attacks, Mr. Flanigan sought advice from the Justice Department's Office of Legal Counsel on "the legality of the use of military force to prevent or deter terrorist activity inside the United States," according to a previously undisclosed department memorandum that was reviewed by The New York Times.

The 20-page response came from John C. Yoo, a 34-year-old Bush appointee with a glittering résumé and a reputation as perhaps the most intellectually aggressive among a small group of legal scholars who had challenged what they saw as the United States' excessive deference to international law. On Sept. 21, 2001, Mr. Yoo wrote that the question was how the Constitution's Fourth Amendment rights against unreasonable search and seizure might apply if the military used "deadly force in a manner that endangered the lives of United States citizens."

Mr. Yoo listed an inventory of possible operations: shooting down a civilian airliner hijacked by terrorists; setting up military checkpoints inside an American city; employing surveillance methods more sophisticated than those available to law enforcement; or using military forces "to raid or attack dwellings where terrorists were thought to be, despite risks that third parties could be killed or injured by exchanges of fire."

Mr. Yoo noted that those actions could raise constitutional issues, but said that in the face of devastating terrorist attacks, "the government may be justified in taking measures which in less troubled conditions could be seen as infringements of individual liberties." If the president decided the threat justified deploying the military inside the country, he wrote, then "we think that the Fourth Amendment should be no more relevant than it would be in cases of invasion or insurrection."

The prospect of such military action at home was mostly hypothetical at that point, but with the government taking the fight against terrorism to Afghanistan and elsewhere around the world, lawyers in the administration took the same "forward-leaning" approach to making plans for the terrorists they thought would be captured.

The idea of using military commissions to try suspected terrorists first came to Mr. Flanigan, he said, in a phone call a couple of days after the attacks from William P. Barr, the former attorney general under whom Mr. Flanigan had served as head of the Justice Department's Office of Legal Counsel during the first Bush administration.

Mr. Barr had first suggested the use of military tribunals a decade before, to try suspects in the bombing of Pan Am Flight 103 over Lockerbie, Scotland. Although the idea made little headway at the time, Mr. Barr said he reminded Mr. Flanigan that the Legal Counsel's Office had done considerable research on the question. Mr. Flanigan had an aide call for the files.

"I thought it was a great idea," he recalled.

Military commissions, he thought, would give the government wide latitude to hold, interrogate and prosecute the sort of suspects who might be silenced by lawyers in criminal courts. They would also put the control over prosecutions squarely in the hands of the president.

The same ideas were taking hold in the office of Vice President Cheney, championed by his 44-year-old counsel, David S. Addington. At the time, Mr. Addington, a longtime Cheney aide with an indistinct portfolio and no real staff, was not well-known even in the government. But he would become legendary as a voraciously hard-working official with strongly conservative views, an unusually sharp pen and wide influence over military, intelligence and other matters. In a matter of months, he would make a mark as one of the most important architects of the administration's legal strategy against foreign terrorism.

Beyond the prosecutorial benefits of military commissions, the two lawyers saw a less tangible, but perhaps equally important advantage. "From a political standpoint," Mr.

Flanigan said, "it communicated the message that we were at war, that this was not going to be business as usual."

### Changing the Rules

In fact, very little about how the tribunal policy came about resembled business as usual. For half a century, since the end of World War II, most major national-security initiatives had been forged through interagency debate. But some senior Bush administration officials felt that process placed undue power in the hands of cautious, slow-moving foreign policy bureaucrats. The sense of urgency after Sept. 11 brought that attitude to the surface.

Little more than a week after the attacks, officials said, the White House counsel, Alberto F. Gonzales, set up an interagency group to draw up options for prosecuting terrorists. They came together with high expectations.

"We were going to go after the people responsible for the attacks, and the operating assumption was that we would capture a significant number of Al Qaeda operatives," said Pierre-Richard Prosper, the State Department official assigned to lead the group. "We were thinking hundreds."

Mr. Prosper, then 37, had just been sworn in as the department's ambassador-at-large for war crimes issues. As a prosecutor, he had taken on street gangs and drug Mafias and had won the first genocide conviction before the International Criminal Tribunal for Rwanda. Even so, some administration lawyers eyed him suspiciously - as more diplomat than crime-fighter.

Mr. Gonzales had made it clear that he wanted Mr. Prosper's group to put forward military commissions as a viable option, officials said. The group laid out three others - criminal trials, military courts-martial and tribunals with both civilian and military members, like those used for Nazi war criminals at Nuremberg.

Representatives of the Justice Department's criminal division, which had prosecuted a string of Qaeda defendants in federal district court over the previous decade, argued that the federal courts could do the job again. The option of toughening criminal laws or adapting the courts, as several European countries had done, was discussed, but only briefly, two officials said.

"The towers were still smoking, literally," Mr. Prosper said. "I remember asking: Can the federal courts in New York handle this? It wasn't a legal question so much as it was logistical. You had 300 Al Qaeda members, potentially. And did we want to put the judges and juries in harm's way?"

Lawyers at the White House saw criminal courts as a minefield, several officials said.

Much of the evidence against terror suspects would be classified intelligence that would be difficult to air in court or too sketchy to meet federal standards, the lawyers warned. Another issue was security: Was it safe to try Osama bin Laden in Manhattan, where he was facing federal charges for the 1998 bombings of American Embassies in East Africa?

Then there was a tactical question. To act pre-emptively against Al Qaeda, the authorities would need information that defense lawyers and due-process rules might discourage suspects from giving up.

Mr. Flanigan framed the choice starkly: "Are we going to go with a system that is really guaranteed to prevent us from getting information in every case or are we going to go another route?"

Military commissions had no statutory rules of their own. In past American wars, when such tribunals had been used to carry out battlefield justice against spies, saboteurs and others accused of violating the laws of war, they had generally hewed to prevailing standards of military justice. But the advocates for commissions in the Bush administration saw no reason they could not adapt the rules, officials said. Standards of proof could be lowered. Secrecy provisions could be expanded. The death penalty could be more liberally applied.

But some members of the interagency group saw it as more complicated. Terrorism had not been clearly established as a war crime under international law. Writing new law for a military tribunal might end up being more difficult than prosecuting terrorism cases in existing courts.

By late October 2001, the White House lawyers had grown impatient with what they saw as the dithering of Mr. Prosper's group and what one former official called the "cold feet" of some of its members. Mr. Flanigan said he thought the government needed to move urgently in case a major terrorist linked to the attacks was apprehended.

He gathered up the research that the Prosper group had completed on military commissions and took charge of the matter himself. Suddenly, the other options were off the table and the Prosper group was out of business.

"Prosper is a thoughtful, gentle, process-oriented guy," the former official said. "At that time, gentle was not an adjective that anybody wanted."

#### A Secretive Circle

With the White House in charge, officials said, the planning for tribunals moved forward more quickly, and more secretly. Whole agencies were left out of the discussion. So were most of the government's experts in military and international law.

The legal basis for the administration's approach was laid out on Nov. 6 in a confidential 35-page memorandum sent to Mr. Gonzales from Patrick F. Philbin, a deputy in the

Legal Counsel's office. (Attorney General Ashcroft has refused recent Congressional requests for the document, but a copy was reviewed by The Times.)

The memorandum's plain legalese belied its bold assertions.

It said that the president, as commander in chief, has "inherent authority" to establish military commissions without Congressional authorization. It concluded that the Sept. 11 attacks were "plainly sufficient" to warrant applying the laws of war.

Opening a debate that would later divide the administration, the memorandum also suggested that the White House could apply international law selectively. It stated specifically that trying terrorists under the laws of war "does not mean that terrorists will receive the protections of the Geneva Conventions or the rights that laws of war accord to lawful combatants."

The central legal precedent cited in the memorandum was a 1942 case in which the Supreme Court upheld President Franklin D. Roosevelt's use of a military commission to try eight Nazi saboteurs who had sneaked into the United States aboard submarines. Since that ruling, revolutions had taken place in both international and military law, with the adoption of the Geneva Conventions in 1949 and the Uniform Code of Military Justice in 1951. Even so, the Justice memorandum said the 1942 ruling had "set a clear constitutional analysis" under which due process rights do not apply to military commissions.

Roosevelt, too, created his military commission without new and explicit Congressional approval, and authorized the military to fashion its own procedural rules. He also established himself, rather than a military judge, as the "final reviewing authority" for the case.

Mr. Addington seized on the Roosevelt precedent as a model, two people involved in the process said, despite vast differences. Roosevelt acted against enemy agents in a traditional war among nations. Mr. Bush would be asserting the same power to take on a shadowy network of adversaries with no geographic boundaries, in a conflict with no foreseeable end.

Mr. Addington, who drafted the order with Mr. Flanigan, was particularly influential, several officials said, because he represented Mr. Cheney and brought formidable experience in national-security law to a small circle of senior officials. Mr. Addington turned down several requests for interviews and a spokesman for the vice president's office declined to comment.

"He was probably the only one there who would know what an order would look like, what it would say," a former Justice Department official said, noting Mr. Addington's work at the Defense Department, the C.I.A., and Congressional intelligence committees. "He didn't have authority over anyone. But he's a persuasive guy."

To many officials outside the circle, the secrecy was remarkable.

While Mr. Ashcroft and his deputy, Larry D. Thompson, were closely consulted, the head of the Justice Department's criminal division, Michael Chertoff, who had argued for trying terror suspects in federal court, saw the military order only when it was published, officials said. Mr. Rumsfeld was kept informed of the plan mainly through his general counsel, William J. Haynes II, several Pentagon officials said.

Many of the Pentagon's experts on military justice, uniformed lawyers who had spent their careers working on such issues, were mostly kept in the dark. "I can't tell you how compartmented things were," said retired Rear Adm. Donald J. Guter, who was then the Navy's senior military lawyer, or judge advocate general. "This was a closed administration."

A group of experienced Army lawyers had been meeting with Mr. Haynes repeatedly on the process, but began to suspect that what they said did not resonate outside the Pentagon, several of them said.

On Friday, Nov. 9, Defense Department officials said, Mr. Haynes called the head of the team, Col. Lawrence J. Morris, into his office to review a draft of the presidential order. He was given 30 minutes to study it but was not allowed to keep a copy or even take notes.

The following day, the Army's judge advocate general, Maj. Gen. Thomas J. Romig, hurriedly convened a meeting of senior military lawyers to discuss a response. The group worked through the Veterans Day weekend to prepare suggestions that would have moved the tribunals closer to existing military justice. But when the final document was issued that Tuesday, it reflected none of the officers' ideas, several military officials said. "They hadn't changed a thing," one official said.

In fact, while the military lawyers were pulling together their response, they were unaware that senior administration officials were already at the White House putting finishing touches on the plan. At a meeting that Saturday in the Roosevelt Room, Mr. Cheney led a discussion among Attorney General Ashcroft, Mr. Haynes of the Defense Department, the White House lawyers and a few other aides.

Senior officials of the State Department and the National Security Council staff were excluded from final discussions of the policy, even at a time when they were meeting daily about Afghanistan with the officials who were drafting the order. According to two people involved in the process, Mr. Cheney advocated withholding the draft from Ms. Rice and Secretary Powell.

When the two cabinet members found out about the military order - upon its public release - Ms. Rice was particularly angry, several senior officials said. Spokesmen for both officials declined to comment.

Mr. Bush played only a modest role in the debate, senior administration officials said. In an initial discussion, he agreed that military commissions should be an option, the officials said. Later, Mr. Cheney discussed a draft of the order with Mr. Bush over lunch, one former official said. The president signed the three-page order on Nov. 13.

No ceremony accompanied the signing, and the order was released to the public that day without so much as a press briefing. But its historic significance was unmistakable.

The military could detain and prosecute any foreigner whom the president or his representative determined to have "engaged in, aided or abetted, or conspired to commit" terrorism. Echoing the Roosevelt order, the Bush document promised "free and fair" tribunals but offered few guarantees: There was no promise of public trials, no right to remain silent, no presumption of innocence. As in 1942, guilt did not necessarily have to be proven beyond a reasonable doubt and a death sentence could be imposed even with a divided verdict.

Despite those similarities, some military and international lawyers were struck by the differences.

"The Roosevelt order referred specifically to eight people, the eight Nazi saboteurs," said Mr. Shiffrin, who was then the Defense Department's deputy general counsel for intelligence matters and had studied the Nazi saboteurs' case. "Here we were putting in place a parallel system of justice for a universe of people who we had no idea about - who they would be, how many of them there would be. It was a very dramatic measure."

### Mounting Criticism

The White House did its best to play down the drama, but criticism of the order was immediate and widespread.

Civil libertarians and some Congressional leaders saw an attempt to supplant the criminal justice system. Critics also worried about the concentration of power: The president or his proxies would define the crimes (often after an act had been committed); set the rules for trial; and choose the judges, juries and appellate panels.

Senator Patrick J. Leahy, the Vermont Democrat who was then chairman of the Senate Judiciary Committee, was among a handful of legislators who argued that the administration's plan required explicit Congressional authorization. The Congress had just passed the Patriot Act by a huge margin, and Mr. Leahy proposed authorizing military commissions, but with some important changes, including a presumption of innocence for defendants and appellate review by the Supreme Court.

Critics seized on complaints from abroad, including an announcement from the Spanish authorities that they would not extradite some terrorist suspects to the United States if they would face the tribunals. "We are the most powerful nation on earth," Mr. Leahy said. "But in the struggle against terrorism, we don't have the option of going it alone."

Would these military tribunals be worth jeopardizing the cooperation we expect and need from our allies?"

Senators called for Mr. Rumsfeld and Mr. Ashcroft to testify about the tribunals plan. Instead, the administration sent Mr. Prosper from the State Department and Mr. Chertoff of the Justice Department - both of whom had questioned the use of commissions and were later excluded from the administration's final deliberations.

But the Congressional opposition melted in the face of opinion polls showing strong support for the president's measures against terrorism.

There was another reason fears were allayed. With the order signed, the Pentagon was writing rules for exactly how the commissions would be conducted, and an early draft that was leaked to the news media suggested defendants' rights would be expanded. Mr. Rumsfeld, who assembled a group of outside legal experts - including some who had worked on World War II-era tribunals - to consult on the rules, said critics' concerns would be taken into account.

But all of the critics were not outside the administration.

Many of the Pentagon's uniformed lawyers were angered by the implication that the military would be used to deliver "rough justice" for the terrorists. The Uniform Code of Military Justice had moved steadily into line with the due- process standards of the federal courts, and senior military lawyers were proud and protective of their system. They generally supported using commissions for terrorists, but argued that the system would not be fair without greater rights for defendants.

"The military lawyers would from time to time remind the civilians that there was a Constitution that we had to pay attention to," said Admiral Guter, who, after retiring as the Navy judge advocate general, signed a "friend of the court" brief on behalf of plaintiffs in the Guantanamo Supreme Court case.

Even as uniformed lawyers were given a greater role in writing rules for the commissions, they still felt out of the loop.

In early 2002, Admiral Guter said, during a weekly lunch with Mr. Haynes and the top lawyers for the military branches, he raised the issue with Mr. Haynes directly: "We need more information."

Mr. Haynes looked at him coldly. "No, you don't," he quoted Mr. Haynes as saying.

Mr. Haynes declined to comment on the exchange.

Lt. Col. William K. Lietzau, a Yale-trained Marine lawyer on Mr. Haynes's staff, often found himself in the middle. "I could see how the JAGs were frustrated that the task of setting up the commissions hadn't been delegated to them," he said, referring to the senior

military lawyers. "On the other hand, I could see how some of their recommendations frustrated the leadership because they didn't always appear to embrace the paradigm shift needed to deal with terrorism."

Some Justice Department officials also urged changes in the commission rules, current and former officials said. While Attorney General Ashcroft staunchly defended the policy in public, in a private meeting with Pentagon officials, he said some of the proposed commission rules would be seen as "draconian," two officials said.

On nearly every issue, interviews and documents show, the harder line was staked out by White House lawyers: Mr. Addington, Mr. Gonzales and Mr. Flanigan. They opposed allowing civilian lawyers to assist the tribunal defendants, as military courts-martial permit, or allowing civilians to serve on the appellate panel that would oversee the commissions. They also opposed granting defendants a presumption of innocence.

In the end, Mr. Rumsfeld compromised. He granted defendants a presumption of innocence and set "beyond a reasonable doubt" as a standard for proving guilt. He also allowed the defendants to hire civilian lawyers, but restricted the lawyers' access to case information. And he gave the presiding officer at a tribunal license to admit any evidence he thought might be convincing to a "reasonable person."

One right the administration sought to deny the prisoners was the ability to appeal the legality of their detentions in federal court. The administration had done its best to decide the question when searching for a place to detain hundreds of prisoners captured in Afghanistan. Every location it seriously considered - including an American military base in Germany and islands in the South Pacific - was outside the United States and, the administration believed, beyond the reach of the federal judiciary.

On Dec. 28, 2001, after officials settled on Guantanamo Bay, Mr. Philbin and Mr. Yoo told the Pentagon in a memorandum that it could make a "very strong" claim that prisoners there would be outside the purview of American courts. But the memorandum cautioned that a reasonable argument could also be made that Guantanamo "while not part of the sovereign territory of the United States, is within the territorial jurisdiction of a federal court." That warning would come back to haunt the administration.

### A Shift in Power

Some of the officials who helped design the new system of justice would later explain the influence they exercised in the chaotic days after Sept. 11 as a response to a crisis. But a more enduring shift of power within the administration was taking place - one that became apparent in a decision that would have significant consequences for how terror suspects were interrogated and detained.

At issue was whether the administration would apply the Geneva Conventions to the conflicts with Al Qaeda and the Taliban and whether those enemies would be treated as prisoners of war.

Based on the advice of White House and Justice Department lawyers, Mr. Bush initially decided on Jan. 18, 2002, that the conventions would not apply to either conflict. But at a meeting of senior national security officials several days later, Secretary of State Powell asked him to reconsider.

Mr. Powell agreed that the conventions did not apply to the global fight against Al Qaeda. But he said troops could be put at risk if the United States disavowed the conventions in dealing with the Taliban - the de facto government of Afghanistan. Both Mr. Rumsfeld and the chairman of the Joint Chiefs of Staff, Gen. Richard B. Myers, supported his position, Pentagon officials said.

In a debate that included the administration's most experienced national- security officials, a voice heard belonged to Mr. Yoo, only a deputy in the Office of Legal Counsel. He cast Afghanistan as a "failed state," and said its fighters should not be considered a real army but a "militant, terrorist-like group." In a Jan. 25 memorandum, the White House counsel, Mr. Gonzales, characterized that opinion as "definitive," although it was not the final basis for the president's decision.

The Gonzales memorandum suggested that the "new kind of war" Mr. Bush wanted to fight could hardly be reconciled with the "quaint" privileges that the Geneva Conventions gave to prisoners of war, or the "strict limitations" they imposed on interrogations.

Military lawyers disputed the idea that applying the conventions would necessarily limit interrogators to the name, rank and serial number of their captives. "There were very good reasons not to designate the detainees as prisoners of war, but the claim that they couldn't be interrogated was not one of them," Colonel Lietzau said. Again, though, such questions were scarcely heard, officials involved in the discussions said.

Mr. Yoo's rise reflected a different approach by the Bush administration to sensitive legal questions concerning foreign affairs, defense and intelligence.

In past administrations, officials said, the Office of Legal Counsel usually weighed in with opinions on questions that had already been deliberated by the legal staffs of the agencies involved. Under Mr. Bush, the office frequently had a first and final say. "O.L.C. was definitely running the show legally, and John Yoo in particular," a former Pentagon lawyer said. "He's kind of fun to be around, and he has an opinion on everything. Even though he was quite young, he exercised disproportionate authority because of his personality and his strong opinions."

Mr. Yoo's influence was amplified by friendships he developed not just with Mr. Addington and Mr. Flanigan, but also Mr. Haynes, with whom he played squash as often as three or four times a week at the Pentagon Officers Athletic Club.

If the Geneva Conventions debate raised Mr. Yoo's stature, it had the opposite effect on lawyers at the State Department, who were later excluded from sensitive discussions on matters like the interrogation of detainees, officials from several agencies said.

"State was cut out of a lot of this activity from February of 2002 on," one senior administration official said. "These were treaties that we were dealing with; they are meant to know about that."

The State Department legal adviser, William H. Taft IV, was shunned by the lawyers who dominated the detainee policy, officials said. Although Mr. Taft had served as the deputy secretary of defense during the Reagan administration, more conservative colleagues whispered that he lacked the constitution to fight terrorists.

"He was seen as ideologically squishy and suspect," a former White House official said. "People did not take him very seriously."

Through a State Department spokesman, Richard A. Boucher, Mr. Taft declined to comment.

The rivalries could be almost adolescent. When field trips to Guantanamo Bay were arranged for administration lawyers, the invitations were sometimes relayed last to the State Department and National Security Council, officials said, in the hope that lawyers there would not be able to go on short notice.

It was on the first field trip, 10 days after detainees began to arrive there on Jan. 11, 2002, that White House lawyers made clear their intention to move forward quickly with military commissions.

On the flight home, several officials said, Mr. Addington urged Mr. Gonzales to seek a blanket designation of all the detainees being sent to Guantanamo as eligible for trial under the president's order. Mr. Gonzales agreed.

The next day, the Pentagon instructed military intelligence officers at the base to start filling out one-page forms for each detainee, describing their alleged offenses. Weeks later, Mr. Haynes issued an urgent call to the military services, asking them to submit nominations for a chief prosecutor.

The first trials, many military and administration officials believed, were just around the corner. Next: A Policy Unravels.

[ Jack Begg contributed research for this article. ]

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[ PART 2 ]

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## **Slow Pace of Pentagon's Courts Set Off Friction at White House**

By **TIM GOLDEN**

[ <http://www.nytimes.com/2004/10/25/international/worldspecial2/25gitmo.html> ]

**WASHINGTON** - When hundreds of prisoners arrived at the American naval base in Guantanamo Bay, Cuba, in early 2002, the Bush administration laid out a straightforward plan: once the men were interrogated, the worst of the lot would be prosecuted before special military tribunals devised to bring terrorists to justice quickly.

A year later, with no trials yet in sight, some officials at the highest levels of the Bush administration began privately venting their frustration about both the slow pace of the Pentagon's new courts and the soundness of their rules. Attorney General John Ashcroft was especially vocal.

"Timothy McVeigh was one of the worst killers in U.S. history," Mr. Ashcroft said at one meeting of senior officials, according to two of those present. "But at least we had fair procedures for him."

The administration invoked extraordinary wartime powers to set up the new system of military justice, arguing that the Sept. 11 attacks and the continuing threat they exposed justified the use of legal authorities that had not been exercised since World War II. But as officials sought to apply those powers to a very different kind of conflict, they became mired in problems they are still struggling to solve.

Although White House lawyers said they rushed to devise a new judicial structure that could handle serious Qaeda terrorists, many of the detainees sent to Guantanamo turned out to be low-level militants, Taliban fighters and men simply caught in the wrong place at the wrong time. The Pentagon's efforts to gather intelligence from more valuable prisoners were also deeply flawed, military intelligence officers said, complicating the prosecution of some detainees and nearly paralyzing efforts to release others.

Interviews with dozens of officials show that the myriad problems ignited an often fierce behind-the-scenes struggle that set the Pentagon and its allies in the White House against adversaries at the National Security Council, the State Department and Justice Department. The friction among officials like Defense Secretary Donald H. Rumsfeld;

the national security adviser, Condoleezza Rice; and Mr. Ashcroft sheds new light on the internal dynamics of an administration that has shown a remarkably united public front.

In many cases, officials said, the battles were fueled by the discontent of military, foreign-policy and other officials who had been excluded from a role in shaping the policy after Sept. 11.

"Anytime you have a process which is not inclusive, you end up giving people a reason to be opposed to it," said Timothy E. Flanigan, a former deputy White House counsel who helped craft the legal strategy. "That was certainly the case here."

The Pentagon continues to defend military commissions, as the tribunals are called, as an important tool against terrorism. But in several instances, military officials said, Mr. Rumsfeld and his deputy, Paul D. Wolfowitz, resisted moving forward with prosecutions, in part because they felt the cases were weak.

As prosecutors prepare for their first two trials, now scheduled for December and January, the commissions have been roiled by vigorous attacks from the uniformed lawyers assigned to the defendants. Defense challenges have prompted the removal of half of the officers appointed to hear the first cases, and have called into question the independence of the presiding officer.

On Monday, Oct. 25, a federal district court judge in Washington is expected to hear arguments in a lawsuit by one of the defense lawyers challenging the commissions as unconstitutional. Already, White House and Pentagon lawyers are considering ways to revise the tribunals after Election Day, administration officials said.

As the Sept. 11 attacks have receded, political and diplomatic opposition to the administration's use of wartime powers has grown. Now, critics argue that the delays in moving forward with the commissions has weakened their legal justification as well.

"When commissions have been done in the past, they have either been authorized by Congress or done on the battlefield, typically during declared wars," said Neal K. Katyal, a Georgetown University law professor who will argue the case in federal court. "But here, you have a commission set up unilaterally by the president, at a time when war has not been declared, thousands of miles from a battlefield and now more than three years after the attacks."

### Hunting for Defendants

With American military, intelligence and law-enforcement efforts focused on Al Qaeda, administration officials expected to corner many of its members in Afghanistan, sweep up others around the world and start prosecuting the terrorists within months.

Mr. Rumsfeld had not been intimately involved in developing the plan for prosecuting terrorist suspects. But once the prisoners started to arrive from Afghanistan, he took a strong interest in Guantanamo's potential as a source of intelligence, officials said.

He was soon disappointed.

Experienced interrogators, analysts and interpreters were all in short supply. Few, if any, military intelligence officers had significant expertise on Al Qaeda or Afghanistan. Even plywood interrogation huts were scarce: One senior interrogator said he finally bribed some Navy Seabees with cases of beer to build two more.

"Guantanamo had been a backwater location for many years," said Gen. James T. Hill, who oversees the base as commander of the United States Southern Command. "Now, all of a sudden, we were involved in strategic intelligence-gathering from an enemy unlike any we've encountered on the battlefield before, in a Guantanamo environment that at the beginning was very austere. So all of this had to evolve."

It did not evolve fast enough for Mr. Rumsfeld, who ordered an overhaul of the intelligence effort in September 2002.

Three months later, he authorized the use of more coercive interrogation techniques, taking advantage of a decision by the White House that the detainees were not protected by the Geneva Conventions. Although Mr. Rumsfeld later disallowed some of the most severe methods, including the removal of clothing and the use of dogs to induce stress, disclosures about the harsh methods lent credence to charges of abuse leveled by former detainees.

But intelligence-gathering was only part of the problem. It quickly became apparent that few of the prisoners captured in Afghanistan were the sort of hardened terrorists the administration had hoped for.

"It became obvious to us as we reviewed the evidence that, in many cases, we had simply gotten the slowest guys on the battlefield," said Lt. Col. Thomas S. Berg, a member of the original military legal team set up to work on the prosecutions. "We literally found guys who had been shot in the butt."

The reserve officer chosen by Mr. Rumsfeld to lead the intelligence operation at Guantanamo, Maj. Gen. Michael E. Dunlavey, was told after his arrival there in February 2002 that as many as half of the initial detainees were thought to be of little or no intelligence value, two officers familiar with the briefings said. He also found that the prisoners included elderly and emotionally disturbed Afghan men, including one tribal elder so wizened that interrogators nicknamed him "Al Qaeda Claus."

Barely a month after taking command, General Dunlavey flew to Afghanistan and Kuwait to complain directly to military commanders there. But while the commanders acknowledged that prisoner screening could be improved, they said they had no other

place to put suspects who might be of some intelligence value or threat, a senior officer familiar with the meetings recalled.

"Basically, they said, 'General, please shut up and go home,' " the officer said.

The lack of solid information about the detainees undermined a basic premise of the administration's legal plan. The order that established the military commissions on Nov. 13, 2001, authorized the Pentagon to hold and prosecute any foreigners designated by the president as suspected terrorists.

On Jan. 22, 2002, at the request of the White House counsel, Alberto R. Gonzales, Pentagon lawyers directed intelligence officers at Guantanamo to fill out a one-page form for each prisoner, certifying the president's "reason to believe" their involvement with terrorism, officials said.

But within weeks, intelligence officers began reporting back to the Pentagon that they did not have enough evidence on most prisoners to even complete the forms, officials said. By March 21, Defense Department officials indicated they would hold the Guantanamo prisoners indefinitely and on different legal grounds - as "enemy combatants" in a war against the United States.

"We are within our rights, and I don't think anyone disputes it, that we may hold enemy combatants for the duration of the conflict," William J. Haynes II, the Pentagon's general counsel, said then. "And the conflict is still going and we don't see an end in sight right now."

### Emerging Divisions

As accounts of the problems at Guantanamo reached Washington in the spring of 2002, the question of how to deal with the detainees began to divide the Bush administration.

In public, the administration continued to maintain that the prisoners were both frighteningly dangerous and a likely font of vital intelligence. "They may well have information about future terrorist attacks against the United States," said Vice President Dick Cheney. "We need that information."

But at the State Department, diplomats were awash in complaints from foreign governments, many of them allies in the Afghan war, about the open-ended imprisonment of their citizens. F.B.I. agents and Justice Department officials were struck by how few strong prosecution cases there seemed to be, current and former officials said.

Officials said that C.I.A. officers who were trying to recruit some Guantanamo detainees as agents raised another fear: that the camp could become America's madrasa, or Islamic school, radicalizing prisoners by its harsh conditions, the indoctrination of militant leaders and the detainees' focused study of the Koran - the only book they were initially given to read.

Officials on the National Security Council staff were particularly uneasy. The discussions that produced the president's Nov. 13 military order had been dominated by a small circle of White House lawyers overseen by Mr. Cheney. Ms. Rice, like Secretary of State Colin L. Powell, had been excluded, officials said, an embarrassing slight given her role as a mediator on national security issues.

Mr. Bush later brought the council staff back into the process, assigning it to draw up a broader strategy to deal with the thousands of prisoners in Afghanistan. Two senior aides, Elliott Abrams and John B. Bellinger III, convened an interagency group to study the issue.

The men made an odd team: Mr. Bellinger, the council's legal adviser, was a measured former Justice Department official with a degree from Princeton and a taste for monogrammed dress shirts. Mr. Abrams, known as a bare-knuckled bureaucratic infighter, was making his return to government after being convicted of lying to Congress in the Iran-contra scandal and later pardoned by the first President Bush.

"They were very persistent," one senior administration official from another agency said of the National Security Council aides. "They kept pressing: Did all the detainees really belong there? What was the plan to start transferring them out?"

The council officials also worried what might happen after such transfers.

"There was real concern that if detainees were harshly treated and deprived of due process, they were going to end up turning against the United States, if they had not already," said retired Gen. John A. Gordon, a former deputy director of the C.I.A. who became President Bush's deputy national security adviser for counterterrorism. "We were not making any converts."

The Defense Department was notably unresponsive to prodding by other agencies. Requests for information were answered slowly, if at all, officials said. Promised policy changes - new criteria to improve the screening of detainees being sent to Guantanamo, or proposed terms for their transfer home - were delayed repeatedly.

"We provided them with only the information that we, in our arrogance - or the arrogance of our leadership - thought they needed," one former Pentagon official said. He added that he and others went into interagency meetings on Guantanamo with a standard script, dictated by their superiors: "Back off - we've got this under control."

The National Security Council officials were notably unsuccessful in pushing for a major public diplomacy effort to counter the widely seen images of shackled detainees in orange jumpsuits.

Members of Congress, journalists and others were eventually allowed to visit the base on tightly controlled tours. But the Pentagon, citing security concerns, refused to release

even basic information about the prisoners, or say publicly what they were accused of having done.

"Rumsfeld was very clear that he wanted the Department to be driving this bus," said a former Army secretary, Thomas E. White, who was closely involved in the Guantanamo policy. "He reigned supreme in the government. The vice president backed him up, and that was his power base."

### Documenting the Problems

Stymied by the Pentagon, National Security Council aides eventually began playing their own game of hardball.

In August 2002, at what officials said was the council's request, the C.I.A. dispatched a senior Arab-speaking intelligence analyst to assess the detainees and talk to intelligence officers at the base. He produced a top-secret report of about 15 pages that, according to several officials who read it, described many of the detainees as having no meaningful ties to Al Qaeda.

It also hinted that the harsh conditions, lack of reading materials and, in some cases, extended isolation bordered on abusive and might prove counterproductive, those officials said.

Back in Washington, administration officials said, the report made its way to Ms. Rice, who began building an alliance of dissenters within the administration's national security team.

She turned first to Mr. Powell, officials said. Her staff also sought out the president's Homeland Security adviser, Tom Ridge, and set up an off-the-record dinner at which he debriefed General Dunlavey, the Guantanamo commander, who was a friend of Mr. Ridge's from his days as a lawyer in Erie, Pa.

Ms. Rice also found a powerful ally at the Department of Justice.

Early on, Justice had seemed firmly with the administration's hard-liners. In December 2001, Attorney General Ashcroft defended the president's military order before the Senate, going so far as to warn those who saw an assault on civil liberties, "Your tactics only aid terrorists, for they erode our national unity and diminish our resolve."

But by the fall of 2002, some senior Justice Department officials were uneasy with the Pentagon's handling of the detainees, the slow progress of the military commissions and the seemingly improvised nature of decisions about how to prosecute suspected terrorists.

The administration had used the federal courts to convict John Walker Lindh, a young California man captured by the military in Afghanistan, but ordered the transfer to military custody of Jose Padilla, a young American arrested by the F.B.I. in Chicago. The

Justice Department had insisted on trying Zacarias Moussaoui, a French-born member of Al Qaeda arrested in Minnesota. But the Pentagon had held onto Yaser E. Hamdi, an American-born Saudi captured in Afghanistan, eventually moving him from Guantanamo to join Mr. Padilla in a naval brig in South Carolina.

"There was not a real process for determining who was an enemy combatant," said Viet D. Dinh, a former Justice Department official who worked on terrorism issues under Mr. Ashcroft. "And the ad hoc nature of that process gave a lot of power to the Pentagon."

With the federal courts starting to consider cases involving detainees, a split developed over whether to allow Mr. Hamdi and Mr. Padilla, in particular, some access to lawyers. Behind the disagreement was a philosophical difference about how best to achieve the shared goal of strengthening presidential power. A more reasonable position, many argued, would avoid review and possible reversal by the courts. Others, led by the vice president's influential counsel, David S. Addington, advocated taking the most aggressive stance they felt they could defend, officials said.

"Addington's position was, 'We think what we're doing is right - why should we stop doing it?' " a former White House official said. "If the courts tell us we're wrong, we'll stop then."

A spokesman for the vice president's office said Mr. Addington would not comment.

Officials of the Justice Department's criminal division, who worked closely with the F.B.I., were grappling with other questions. They saw the Guantanamo detentions as a source of cascading problems: angry foreign allies, a tarnishing of America's image overseas and declining cooperation in international counterterrorism efforts.

"This was an issue of basic fairness," one former senior official involved in the discussions said. "The never-ending detentions were creating a lot of animosity among our allies. We pushed hard for them to move quicker. The attorney general pushed hard for it. They didn't, and there was an immense amount of frustration."

#### Dissenters Make Gains

Eventually, the critics began to gain ground. At Ms. Rice's initiative, several officials said, members of the cabinet-level "principals' committee" on national security matters were called to a meeting about the Guantanamo situation on Friday, Oct. 18, 2002.

"We are not serving the president's interest; we are not serving the interests of the country," one senior official quoted her as saying. "Security has got to be paramount, but we have got to work better with other countries, and we have got to have better procedures."

Mr. Powell echoed the call for the release or transfer of less-important detainees. "He wanted to get down to the hard-core element that needed to be detained," a senior official

who attended the meeting said, "and he realized that there was a body of people we needed to move."

As for the most discussed of the elderly Afghans - Faiz Muhammad, or "Al Qaeda Claus" - Ms. Rice told the Pentagon: "Just get rid of this guy," one senior official said. A week after the meeting, Mr. Muhammad flew back to Afghanistan with three other detainees.

Several officials said Mr. Rumsfeld did not seem to appreciate his colleagues' growing involvement, but was also impatient with Guantanamo's problems.

"Certainly Don was ambivalent," another senior administration official said. "That phrase, 'I don't want to be the world's jailer,' that was one of the expressions he used."

The chief Pentagon spokesman, Lawrence Di Rita, said the defense secretary grew tired of hearing "that at lower levels, there was this anxiety or that anxiety" about Guantanamo, and ordered a series of briefings to keep his cabinet-level counterparts informed about operations there.

But several officials said that with preparations for war in Iraq moving forward and the Guantanamo intelligence issues unresolved, Mr. Rumsfeld's enthusiasm for the military commissions had waned.

By late 2002, officials said, secret plans for the tribunals cited prospective defendants including several men identified as high-level Qaeda figures and thought to be held by the C.I.A.: Abu Zubaydah, Ibn al-Sheikh al-Libi and Ramzi bin al-Shibh. But with both the C.I.A. captives and more important Guantanamo detainees, interrogation was given priority over prosecution, officials said.

At a Pentagon briefing on Oct. 19, the day after the interagency gathering, Mr. Rumsfeld instructed his lawyers to clear their prosecution plans with other top national-security officials. While officials said the briefings were partly intended as a show of openness, it effectively postponed action on the tribunals for months.

At Ms. Rice's urging, Mr. Rumsfeld also agreed to give comprehensive briefings on Guantanamo to cabinet-level national-security officials and their deputies. Officials said the higher-level presentation was delivered on Jan. 16, 2003, by Marshall S. Billingslea, a 31-year-old acting assistant secretary who was a favorite of Mr. Rumsfeld.

"It was basically a sales job: 'What we are doing down there is valuable, it's producing results,' " a former Pentagon official who viewed the briefing said. "They were factual reports, but they were also very much a public-relations job."

## Tweaking the Policy

In late 2002, partly in response to the mounting pressure, the Pentagon began to make some significant changes in its detention policies. By the time they took effect, though, many of the difficulties at Guantanamo were becoming harder to solve.

According to Pentagon documents reviewed by The New York Times, Mr. Wolfowitz approved several new measures on Dec. 26, 2002, including revised criteria for sending prisoners to Guantanamo, a policy to transfer detainees back to their home countries and a requirement to periodically assess whether those who remained at Guantanamo should stay.

Oddly, the Defense Department made no mention of what it called the "combatant-commander review" process. Mr. Haynes, who had pushed for the procedure, touted it in a draft op-ed article dated March 16, 2003, saying it went "far beyond anything required by international law." But other officials objected to disclosing the review effort, and the article was never submitted for publication.

The internal struggle over the prisoners' fate began to play out in dysfunctional weekly meetings at which officials from across the government assembled by secure video link to consider individual detainees put forward by the Pentagon for outright release or transfer to the custody of their home governments.

At Mr. Rumsfeld's insistence, the group tried to resolve the cases of at least 10 Guantanamo detainees a week, but that almost never happened. Information on the prisoners was often inconclusive. And while foreign-policy officials emphasized the diplomatic costs of the open-ended detentions, none of the officials wanted to take responsibility for releasing a potentially dangerous prisoner.

"There was tremendous concern in the interagency process about letting someone go who might come back to haunt us," Mr. White, the former Army secretary, recalled. The desire to release men who might be innocent, he added, "was a fairly small upside, compared to the possible downside of misjudging some guy who then goes out and commits some terrible act."

The process, some officials said, turned upside down not only any presumption of innocence but the American justice system's traditional premise that it is preferable to free a guilty man than to wrongly convict one who is innocent. It was also ineffective: by early 2004, the Pentagon had managed to transfer only 13 prisoners overseas.

"We don't want to be in a situation where we're reckless," the under secretary of defense who oversaw detainee issues, Douglas J. Feith, said in an interview. "But if you're unwilling to take risks, then you can't transfer people and then you wind up creating other risks."

Some other senior officials, who spoke on the condition of anonymity, said that was just what happened for the better part of a year.

"There were lots of factors that needed to be weighed - not just the risks," one administration official involved in the process said. "It can hurt us if we let the wrong guy out. But it can also hurt the country and hurt the president if people think we are holding people who should not be held, that we don't have fair procedures, or that we are mistreating them."

Even when the Pentagon was willing to release prisoners, it had trouble persuading foreign governments to take over their custody because of its rigid rules. According to administration officials and diplomats, the Defense Department initially demanded that foreign governments adopt the Bush administration's wartime legal framework, taking custody of the detainees as "enemy combatants," and promising to hold them "until the end of hostilities" by terrorists against the United States. It also insisted that Washington be able to retrieve the detainees at any subsequent time if they were needed for intelligence purposes.

"The rest of the world failed to see this as a real war, rather than a law-enforcement situation," said Lt. Col. William K. Lietzau, a war-crimes expert who worked in the Pentagon general counsel's office. "When we went to another country and told them, 'We need you to hold onto these people,' they looked differently at which laws applied."

#### Pressure for Action

At a White House meeting in late February 2003 - more than a year after the presidential order that created the commissions - Mr. Ashcroft finally lost his patience.

"When are those commissions going to get moving?" officials quoted him as demanding.

Pentagon officials pledged to get started by the end of March, and began a flurry of preparations that included hiring commission lawyers, fine-tuning procedures and even building a provisional courthouse at Guantanamo, officials said.

Defense Department officials had been searching for cases that would be easy to win in a system that still had kinks to be worked out. They did not expect that one kink would be public opinion overseas.

The officials settled on two British-born detainees at Guantanamo, in whom the Justice Department had taken a particular interest. The men, Feroz Abbasi and Moazzam Begg, spoke English, cooperated with interrogators and had ample dossiers in the data banks of British intelligence, several officials said. Neither ranked as a senior Qaeda operative, but both had enticing connections.

Mr. Abbasi, then 21, told his captors in Afghanistan that he had traveled there with a man whom the F.B.I. later identified as Earnest James Ujaama, an American convert to Islam who later pleaded guilty to illegally supporting the Taliban.

Officials said that Mr. Begg, 35, had drawn the interest of American and British counterterrorism officials since at least 1999, in part for what they said was his relationship with Abu Hamza al-Masri , a militant cleric at the Finsbury Park mosque in London..

Lawyers for both Mr. Abbasi and Mr. Begg denied that they were involved in terrorism and insisted that any confessions they were said to have made had probably been coerced.

In a letter dated Oct. 16, 2002, Michael Chertoff, the head of the Justice Department's criminal division, asked the Pentagon to allow federal prosecutors to try the two British detainees or, after their trial by military commission, let them use the men as witnesses against Mr. Ujaama and Mr. Masri. Eight months later, Defense Department officials said, they won agreement from the British government on a series of secret terms for the military trials, including diplomatic access to the men and a promise that they would not be subject to the death penalty. On July 3, 2003, Mr. Bush designated the two men and four other defendants for the first set of tribunals.

News of the men's prosecution became public in Britain just as Prime Minister Tony Blair was beginning a major public relations campaign to overcome his unpopular support for the Iraq war. Within days, he was under renewed attack in Parliament, this time over the detainees, and promising that any tribunals would follow "proper international law."

Mr. Blair's critics saw his inability to regain custody of a total of nine British detainees at Guantanamo as proof of his subjugation to Washington. After meetings with Mr. Blair the next week, Mr. Bush agreed to negotiate.

Neither government has disclosed details of the talks that followed. According to the accounts of several officials involved, American representatives grew distressed as the talks dragged on for months with the chief British negotiator, Attorney General Peter Goldsmith. Officials said Lord Goldsmith, who was himself under fire in Britain for his support of the Iraq war, would not budge from a basic demand: that verdicts of the military commissions be reviewed by civilian courts.

Bush administration officials argued that such a change would have rendered the commissions unworkable. Instead, they made a remarkable counteroffer, promising to send any convicted British defendants home to serve their sentences - a step that would almost certainly set off a review of the cases by British courts.

"We knew what that meant," one United States official said. "They would be released as soon as they set foot back there."

Yet even that proposal was rejected by Lord Goldsmith, officials said. During a state visit to Britain in late November 2003, Mr. Bush finally agreed to shelve the cases of the two British suspects for the foreseeable future, American officials said.

## Losing Control

As the commissions moved toward their first trial this year, the Defense Department's control over the process began to falter.

The collapse of negotiations with the British government and a decision by the Supreme Court to hear a case challenging the detentions at Guantanamo prompted yet another push by the Pentagon to get the commissions going. A retired Army lawyer with a reputation for independence, Maj. Gen. John D. Altenburg Jr., was hired to supervise the tribunals process, and refinements to the rules continued.

What was more difficult to manage was the handful of scrappy military lawyers who had been appointed as defense counsel for the prisoners.

"They expected us to stay within the box they designed for us - accept the rules, accept the process and just fight on the facts," said Lt. Cmdr. Philip Sundel, a Navy lawyer who was hired in March 2003 as one of the first two members of the defense team. "That was never going to happen."

One of the lawyers' first moves was to file a "friend of the court" brief to the Supreme Court on behalf of the Guantanamo detainees. Another was to challenge the Defense Department on speaking to the news media. When their blistering brief drew wide attention, Commander Sundel said, "We made it clear that if they tried to keep us gagged, we would sue."

It worked. The Pentagon relented and the lawyers used their new platform to attack the commissions process as unfair, unconstitutional and worse. In April, another member of the defense team, Lt. Cmdr. Charles Swift, filed suit in Federal District Court to block the commissions altogether.

While the defense was gaining momentum, the office of the commission prosecutors was in turmoil. The chief prosecutor, Col. Frederick L. Borch, left the commission and two prosecutors were reassigned after a dispute that officials said involved the supposed "hand-picking" of the commission panels.

Still, officials said, the resources of the prosecution team substantially outweighed those of the defense, and as the first hearings drew closer, the defense counsel complained that the deck was being further stacked against them.

While the defendants had a right to remain silent, they noted, information from coercive interrogations was determined to be admissible. The commissions were supposed to presume the innocence of the defendants, yet senior military officials had repeatedly

branded the Guantanamo detainees as dangerous terrorists. And although the commissions were to judge guilt "beyond a reasonable doubt," the rules of evidence allowed for evidence that, as one of the lawyers put it, "would be laughed out of any other court."

General Altenburg said in an interview he understood that public perceptions of the fairness of the commissions would be vitally important. But when preliminary hearings for the first four cases began in late August, neither he nor the panel he chose seemed ready for the scrutiny.

The impartiality of the retired Army lawyer presiding over the trials, Col. Peter S. Brownback III, was impugned by the defense, which pointed to his long friendship with General Altenburg. Other military officers on the panel, which combines the functions of judge and jury, were challenged for conflicts of interest or inexperience. Even the court interpreters were criticized for mistranslating key statements into Arabic for some of the defendants.

Weeks later, with most of the lawyers in the prosecutors' office demanding Colonel Brownback's removal, the chief prosecutor asked whether he could impartially continue. Colonel Brownback declined to step down, but General Altenburg removed two panel members and an alternate in response to the defense challenges.

That left only three members, the minimum needed to hold a commission - and two fewer than the number required to hear a felony case in a regular military court-martial.

### An Uncertain Future

Nearly three years after Mr. Bush signed his military order, senior officials have begun to acknowledge privately that the fate of both Guantanamo and the military commissions is uncertain.

Military officials say construction is soon to begin at Guantanamo on a second permanent prison unit, a \$24-million compound that will house 200 high-security detainees. Another, \$31 million unit, able to hold 100 detainees in supermax security, opened in April.

Yet in Washington, a senior legal official acknowledged that the administration still had "a major decision" to make about the base's future after the Supreme Court on June 28 upheld the right of the detainees to petition the federal courts for their freedom.

"Do we want to take them to Guantanamo?" the official asked in an interview. "Maybe not. Maybe Guantanamo is no longer a viable option."

In the meantime, the administration is redoubling efforts to broker agreements with foreign governments willing to take over custody of many of the roughly 560 prisoners still being held.

"We're making an effort," said Mr. Feith. "We're not eliminating the risks, we're managing them."

But even after long and complex negotiations with an assortment of foreign governments, the outcome of some of the 56 transfers has so far been less than promising.

In June, Russian prosecutors abruptly freed seven former Guantanamo prisoners whom other Russian officials had promised to prosecute upon their return. United States officials said they did not receive so much as a warning.

In another case, a 31-year-old Dane was sent home last February after signing an agreement to refrain from further militant activity. But last month, he said in an interview that he was on his way to Chechnya to fight with other Muslims, and invited Americans to use his earlier pledge "as toilet paper." (The man later retracted those statements, and Danish officials promised to keep him under close watch.)

In recent days, Pentagon officials have also confirmed reports that at least nine Afghans and a Pakistani who were formerly held at Guantanamo have rejoined militant forces after being freed outright. After refusing for months to discuss such mistakes, Defense Department officials now cite them as a sobering justification for the security concerns that have dominated their approach at Guantanamo.

The Pentagon has also put in place its third successive system to evaluate the prisoners' continuing status as enemy combatants. Administration officials hope that the latest version - at which the detainees may plead their case with the help of a military aide, but without access to lawyers, witnesses or exculpatory information - will help to persuade the court that the men have been given adequate review.

But critics insist that the changes the Pentagon has made at Guantanamo and to the military commissions amount to half-measures that will not fix a system that is fundamentally at odds with the country's legal values.

"As soon as the process was set up, it started to become something they never wanted it to be," said Commander Sundel. "But it is astounding that a small group of people could create an entirely new judicial process - without many of the due-process guarantees we expect - and think it could survive real challenges."

[ Don Van Natta Jr. contributed reporting for this article. ]

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