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Administration Officials Split Over Stalled Military Tribunals

By Tim Golden
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WASHINGTON - When hundreds of prisoners arrived at the American naval base in Guantánamo 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 Guantánamo 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 Guantánamo'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.

"Guantánamo 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 Guantánamo 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 Guantánamo, 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 Guantánamo 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 Guantánamo 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 Guantánamo 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 Guantánamo 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 Guantánamo, 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 Guantánamo 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 Guantánamo 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 Guantánamo 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 Guantánamo 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 Guantánamo 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 Guantánamo 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 Guantánamo'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 Guantánamo, 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 Guantánamo 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 Guantánamo 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 Guantánamo 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 Guantánamo 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 Guantánamo, a policy to transfer detainees back to their home countries and a requirement to periodically assess whether those who remained at Guantánamo 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 Guantánamo 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 Guantánamo, 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 Guantánamo, 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 Guantánamo 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 Guantánamo 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 Guantánamo 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 Guantánamo 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 Guantánamo and the military commissions is uncertain.

Military officials say construction is soon to begin at Guantánamo 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 Guantánamo?" the official asked in an interview. "Maybe not. Maybe Guantánamo 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 Guantánamo 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 Guantánamo 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 Guantánamo.

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 Guantánamo 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."