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Two Prosecutors At Guantanamo Quit in Protest

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TWO AIR FORCE prosecutors quit last year rather than take part in military trials they considered rigged against alleged terrorists held at Guantanamo Bay, Cuba.

Maj. John Carr, then a captain, and Maj. Robert Preston accused fellow prosecutors of ignoring torture allegations, failing to protect exculpatory evidence and withholding information from superiors. Altogether, the actions "may constitute dereliction of duty, false official statements or other criminal conduct," Maj. Carr wrote in a March 15, 2004, email summarizing his complaints to the then-chief prosecutor, Army Col. Fred Borch.

The email is one of several made available by officials in the Defense Department office that provides legal counsel to individuals charged under the military commission system President Bush created in 2001. The officials said defense lawyers obtained the emails last week from Col. Will Gunn, the departing head of the office, who is retiring from the Air Force. He couldn't be reached for comment.

Maj. Carr and Maj. Preston requested that they be reassigned rather than participate in the proceedings. Maj. Carr now handles civil litigation at the Pentagon, according to a colleague, and Maj. Preston is an instructor at the Air Force Judge Advocate General's School at Maxwell Air Force Base in Montgomery, Ala. Neither returned calls seeking comment.

The Defense Department says the allegations were investigated and found to be without merit, although they did prompt some management changes at the prosecution office.

The Bush administration hopes to restart the military commissions trying Guantanamo prisoners as soon as next month, after a federal appeals court in July found the proceedings lawful. The ruling, by a three-judge panel that included Supreme Court nominee John G. Roberts Jr., reversed a lower court that halted the proceedings in November on the grounds that they violated due process and U.S. obligations under the Geneva Conventions.

Lawyers for the Guantanamo defendants say they are pursuing appeals and other court action to declare the proceedings illegal. On Capitol Hill several lawmakers are considering possible legislation to regulate the military commissions and review detainee treatment. The Bush administration argues that congressional action would interfere with counterterrorism efforts.

Defense Department officials say several reviews, including one by a Pentagon inspector general, found nothing to substantiate the Carr and Preston allegations. "We found absolutely no evidence of ethical violations, no evidence of any criminal misconduct," says Air Force Brig. Gen. Thomas Hemingway, legal adviser to the military commissions' appointing authority, as the administrative arm of the trials is called.

Gen. Hemingway acknowledges personality differences and "an awful lot of miscommunications" in the prosecution office, but says organizational problems have since been corrected.

Still, military lawyers assigned to defend accused terrorists say the emails buttress longstanding complaints about the proceedings' fairness. They say they want to review the investigations of the former prosecutors' allegations but haven't been given access to the findings. "It's real concerning," says Air Force Lt. Col. Sharon Shaffer, who is defending alleged al Qaeda

accountant Ibrahim Ahmed Mahmoud al Qosi, who was captured in Afghanistan. "I know both of these Air Force prosecutors, they are very ethical, highly respected individuals."

The emails detail events in the preparation of cases against three of the four Guantanamo prisoners currently facing charges of war crimes.

In his email to Col. Borch, Maj. Carr describes "an environment of secrecy, deceit and dishonesty" in the prosecution office and suggests that despite lack of evidence, officials initially planned to tie the defendants to the most notorious al Qaeda attacks: the U.S. Embassy bombings in Africa, the USS Cole, and the Sept. 11, 2001, strikes on New York and Washington. Such charges were scaled back, he wrote, after Justice Department officials "appeared less than totally comfortable with our theory."

Col. Borch distributed the Carr and Preston emails throughout his office on March 15, 2004, with a cover note calling the allegations "monstrous lies."

The next month, Col. Borch was reassigned to the Army's Judge Advocate General's School in Charlottesville, Va., and later retired from the military. He now is court clerk at the U.S. District Court in Raleigh, N.C. "I've moved on with my life and don't care to discuss the case any more," Mr. Borch said.

Maj. Carr wrote that three prosecutors had suppressed "FBI allegations of abuse at Bagram" by failing to forward to superiors information they learned from Federal Bureau of Investigation agents "over dinner and drinks." Bagram is a military interrogation center in Afghanistan where many prisoners were held before being taken to Guantanamo. Maj. Carr singled out another superior officer for criticism, Navy Cmdr. Scott Lang, accusing him of misrepresentations regarding evidence. "Either he consciously lied to the office or does not know the facts of his case after 18 months of working on it," Maj. Carr wrote.

Specifically, he accused Cmdr. Lang of suppressing statements by defendant Ali Hamza Ahmad Sulayman al Bahlul that he had been tortured. Prosecutors say Mr. Bahlul, who was captured in Afghanistan, made al Qaeda propaganda videos. He is charged with conspiracy to commit war crimes.

Maj. Carr suggested that Mr. Bahlul told his interrogators that he had been tortured at a detention center after his capture. But Cmdr. Lang denied that there was any evidence of mistreatment during a November 2003 mock trial conducted by prosecutors to prepare for the real trial. Moreover, Maj. Carr wrote, his copy of Cmdr. Lang's notes detailing the torture allegations "is now missing from my notebook."

Maj. Carr added that an FBI agent "related last week that he called and spoke to Cmdr. Lang about the systematic destruction of statements of the detainees, and CDR Lang said that this did not raise any issues."

Cmdr. Lang has since retired from the Navy. He didn't return a telephone call seeking comment.

In his email, Maj. Carr suggests that prosecutors took steps to avoid putting comments or concerns about the proceedings in writing. He contends that prosecutors were providing advice to the appointing authority, the entity that oversees the proceedings and that may rule on defense motions and requests. After Maj. Preston told Col. Borch that advising the authority could create "a potential appearance of partiality, you advised him not to stop giving advice, but to only give advice orally," Maj. Carr wrote to Col. Borch.

Maj. Michael Mori, a Marine Corps lawyer defending another one of the detainees charged with war crimes, David Hicks of Australia, says the emails suggest the prosecution and appointing authority are "all living together, just one big, happy family."

Maj. Carr writes that Col. Borch "repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees, and we only needed to worry about building a record for the review panel."

Criticisms of the prosecution's professionalism are sprinkled throughout the emails. Instead of "at least a minimal effort to establish a fair process and diligently prepare cases against significant accused," Maj. Carr wrote, he found an amateurish attempt "to prosecute fairly low level accused [terrorists] in a process that appears to be rigged. It is difficult to believe that the White House has approved this situation, and I fully expect that one day, soon, someone will be called to answer for what our office has been doing for the last 14 months."

President Bush authorized the military commissions to try non-U.S. citizens alleged to be engaged in terrorism for war crimes. The president directed that the trials be "full and fair" but said they need not offer defendants the same rights required by the U.S. Constitution or afforded U.S. military defendants in courts-martial.

Maj. Preston, in an email dated March 11, 2004, wrote, "I lie awake worrying about this every night. . . . writing a motion saying that the process will be full and fair when you don't really believe it will be is kind of hard -- particularly when you want to call yourself an officer and a lawyer."