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After Terror, a Secret Rewriting of Military Law

By Tim Golden

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In early November 2001, with Americans still staggered by the September 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 Guantánamo 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 Guantánamo 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 Guantánamo 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 Guantánamo 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 Guantánamo 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, softspoken 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 September 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 preemptively 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 mar-

gin, 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 Guantánamo 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 Guantánamo 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 Guantánamo "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 January 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 January 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 Guantánamo 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 Guantánamo 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.