

Gitmo Grievances

Assigned to try detainees in the War on Terror, three former Guantánamo prosecutors now say the military-commission system is badly damaged.



Dan Efron NEWSWEEK Updated: 4:48 PM ET May 17, 2008

You might think that the case against Mohammed Al-Qahtani would be relatively straightforward. The military prosecutors' file on him included strong circumstantial evidence that he was sent to the United States to be the 20th hijacker in the September 11 attacks. In August 2001, Qahtani traveled to Orlando, Fla., from Dubai, using the airline that a number of the other hijackers had used around the same time—but he was turned back at the airport by border authorities. About the time Qahtani's plane touched down in Orlando, 9/11 ringleader Muhammad Atta's car was photographed entering the airport parking lot, presumably to pick him up. When U.S. troops nabbed him in Afghanistan after the start of the war and sent him to Guantánamo, the 29-year-old Saudi allegedly confessed. So why did the Pentagon abruptly dismiss the charges against Qahtani last week—and without explanation?

A clue may lie in the troubling account of Col. Morris Davis, the chief military prosecutor until last October. Colonel Davis thought he had the evidence to prosecute. But he was not willing to use Qahtani's alleged confessions because he knew from a Defense Department report and other official sources that the prisoner had been abused and

degraded at the U.S. detention facility at Guantánamo Bay. To Davis's way of thinking, that sort of evidence wouldn't—and shouldn't—hold up in the trials of men who have claimed their innocence, as Qahtani does now. But Davis says that a superior officer disagreed. During dinner in a restaurant at Guantánamo Naval Base last August, Davis says, Brig. Gen. Thomas Hartmann, the recently appointed top legal adviser in the military-commissions office, upbraided him. "Who gave you the authority to decide what evidence is admissible?" Davis describes him as saying. (Hartmann denies to NEWSWEEK that he ever discussed coerced testimony with Davis.) Incensed at what he viewed as interference in prosecutorial matters, Davis quit two months later.

Davis is just one of several military prosecutors who have come to believe the Guantánamo tribunal process is deeply flawed. None of these men is a bleeding-heart type; they are spit-and-polish career officers. But in the past four years, at least five of them have quit their jobs or walked away from Gitmo cases because they believed their own integrity was being compromised. In interviews with NEWSWEEK, three former Guantánamo prosecutors voiced concerns about issues ranging from the use of tainted evidence or secret trials to improper micromanaging by political appointees. All three thought the commissions, ordered by President George W. Bush two months after the 9/11 attacks (and revised by Congress in the 2006 Military Commission Act), might never be viewed as credible. The controversy comes as yet another delay was announced last week in the first full-blown trial at Guantánamo, to be followed by trials for five "high value" detainees indicted last week who will face the death penalty.

The lawyers who have balked about the system don't agree with each other on every point. Though they overlapped at the commissions office, they worked on different cases and found in them different faults. But all have potentially jeopardized their careers because they had reached an ethics line they believed they couldn't cross. Their stories reveal a pride in both the legal principles they learned in law school and the military justice they practiced for years—a system based not just on fairness but, crucially, on the perception of it. Yet this may also be a story about how opinions have changed since the darkest, most fearful days in the wake of the worst attacks ever conducted by foreigners on American soil. It may be that American views on what is deemed to be just have shifted as the perception of the threat has changed.

Lt. Col. Robert Preston remembers feeling queasy about the commissions process just a few weeks after joining the prosecution team in September 2003. Preston had been an Air Force lawyer for nearly a decade when he was picked for the job. Two years earlier, when the Qaeda hijackers had struck, he was just starting a master's degree program in international and comparative law at George Washington University in the capital. Preston decided to focus on the legal procedures that might be used against the culprits—if they were ever caught. "I wrote my thesis on the particular issue of prosecution by military tribunal and how that could be done during a time of war," he told NEWSWEEK in his first sit-down interview since leaving the commissions office in 2004. With his international law degree and a year of experience overseas, Preston became the go-to guy when questions arose among the roughly 20 prosecutors about

which treaties and conventions were binding on the United States—and what they say about due process for detainees.

From the start, Preston says, there was a gap between Defense Secretary Donald Rumsfeld's public portrayal of the Guantánamo detainees as the "worst of the worst" and the evidence contained in the files. Most of the detainees appeared to be low-level Qaeda and Taliban suspects whose prosecution for anything substantial would prove difficult. Preston, who now serves as the legal adviser to the LeMay Center at Maxwell-Gunter Air Force Base in Montgomery, Ala., also believed that defense challenges to the very legitimacy of the military trials had the potential to roil the commissions. Acting as defense attorney in a simulated Gitmo trial in November 2003, in front of a panel of outside experts, Preston raised the kind of procedural objections that would come to dog the prosecution in real cases (*Hamdan v. Rumsfeld*, for example). He says at least one expert in attendance dismissed his argument as unlikely to gain traction.

Preston also worried that the prosecution team was understaffed. During a visit to the Department of Justice, where lawyers were working on a parallel investigation of the September 11 Pentagon attack, Preston was awed by the size and scope of the operation. He says the administrative staff alone was bigger than the commissions' entire prosecuting team. "They had physical pieces of the Pentagon and forensic evidence," says Preston. "They had all this stuff and no one in custody. We had a bunch of people we were detaining and none of this." Though their efforts overlapped, Preston says it was clear the Justice Department's investigation was a "separate and independent venture" that included no flow of information or resources to the commissions office.

Preston and a colleague in the commissions office at the time, Capt. John Carr, raised their concerns with the chief prosecutor, Col. Fred Borch. Preston says Borch acknowledged problems with the system but had a stock answer to convey his faith that the commissions office would eventually get more resources: "If we build it, they will come." (Borch and Carr declined to be quoted for this article.) By March 2004, their frustration had peaked. Preston, Carr and a third prosecutor, Capt. Carrie Wolf, all wrote e-mails spelling out their complaints. (Wolf could not be reached for comment.) Though these messages reflect some of the personal disputes that had been brewing in the office, they also include some disturbing allegations. Wolf and Carr both wrote that Borch told them not to worry much about the defense because (as Carr e-mailed) "the military panel will be handpicked and will not acquit these detainees." Carr described hearing secondhand from FBI agents that detainees had been abused in Afghanistan (the e-mail preceded reports about abuse at Abu Ghraib Prison in Iraq by a few weeks). Preston wrote that the military-commissions process was "wrongly managed, wrongly focused and a blight on the reputation of the armed forces." The scandal became known in the office as the Ides of March and touched off an internal Pentagon investigation (which found no criminal wrongdoing). Within weeks, all three lawyers accepted assignments elsewhere.

Another prosecutor at the commissions office at the time, Lt. Col. Stuart Couch, says his Ides colleagues were wrong to suggest that the commissions might have been rigged. “We had no indication that the jurors would be selected to reach some preordained verdict,” he tells NEWSWEEK. BUT Couch, now an appellate judge at the Navy-Marine Corps Court of Criminal Appeals in Washington, D.C., had his own issues with the process. At least twice, he says, he was given files of detainees who had been abused by their interrogators, putting him in an impossible bind. On the one hand, Couch says, prosecutors were asked to prepare full and fair trials for the detainees. On the other hand, abusive interrogations were producing evidence he thought shouldn’t be used and might not stand up in court.

Couch had been a Marine pilot before he went to law school and was buddies with fellow corpsman Michael Horrocks, who had copiloted United Airlines 175, the second plane to hit the World Trade Center on September 11. That personal connection to the attacks boosted his motivation to prosecute members of Al Qaeda. But a visit to Guantánamo in 2003 gave him pause. Couch says he was watching a conventional interrogation of one of his detainees through a two-way mirror when he heard loud music from a cell down the hall. Through an open door, he caught a glimpse of another detainee shackled to the floor, rocking back and forth while a strobe light blinked in his cell.

In an interview with The Wall Street Journal more than a year ago, Couch recounted his involvement in the case of Mohamedou Ould Slahi, a Gitmo prisoner who is suspected of having helped assemble the Hamburg cell that included three of the 9/11 hijacker pilots. Couch worked on the Slahi case for nine months, suspecting at some point that a stream of information the detainee had suddenly provided was the result of abuse by interrogators. Conducting his own backdoor investigation, Couch learned that Slahi had been abused at Guantánamo and that little evidence existed beyond his confessions. Reluctantly, he decided to quit the case. About the commissions, Couch now says: “We lost what little bit of credibility that might have been there. And I’m not sure we can salvage it.”

Davis, the former chief prosecutor, says the fate of the commissions hinges on the willingness of higher-ups like Hartmann to leave the prosecution alone to do its work. In two years at the commissions office, Davis says he repeatedly fended off pressure from political appointees. Earlier this month, in one of the stranger episodes to have played out in a Guantánamo courtroom, Davis testified on behalf of the defense for Salim Ahmed Hamdan, whose lawyers accused Hartmann of involving himself unlawfully in prosecutorial matters. His testimony prompted a critical ruling against Hartmann, who was ordered to back off the Hamdan case. The judge in the case, Capt. Keith Allred, said in his decision that he found Davis’s allegations to be true—among them that Hartmann had pushed for the prosecution of “sexy” cases, including detainees with blood on their hands.

Hartmann insists justice will be served at Guantánamo. “I will stand by my goal to make these cases fair, transparent and just,” he tells NEWSWEEK. And he disputes each of

Davis's points: "I never said 'blood on their hands.' Those are the words that were used by the prosecutors, not by me." Though he says he favors open trials, Hartmann says people must expect that some secret evidence will be used in the Gitmo courts. "If you [wait to] declassify every piece of evidence that's going to be used in these cases," he says, "you might never have a case." Hartmann refuses to explain the decision to cancel the indictment against Qahtani, but says the Saudi could be charged again down the road. (Davis says separating Qahtani from the trial of the other five conspirators in the 9/11 attacks—who allege they were tortured by the CIA—might help the prosecution avoid the "cumulative impact of too much bad-treatment evidence." A CIA spokesman says, "The CIA neither conducts nor condones torture.")

Astonishing as it may seem, in nearly seven years since the 9/11 attacks only one Guantánamo detainee—Australian David Hicks—has been convicted, and only after a plea bargain in which he accepted a nine-month sentence. Davis believes if none of the September 11 conspirators are put on trial by November, the military-commissions process is dead. "All three presidential candidates want to close Guantánamo," he says. "A trial in progress is the only thing that might prevent it." Historians and legal experts will be assessing what went wrong for years to come. Davis has his own explanation: "I think if you combine excessive arrogance and excessive ignorance, you wind up 78 months later where we are in this process." You wind up nowhere good.