

admitted the report was not credible.

In the past week, she has raised more questions about the administration's credibility. Rice said Bush told her on Sept. 16, 2001, that "Iraq is to the side" in setting priorities for the war on terrorism, but this is contradicted by an order signed by the president on September 17 ordering the Pentagon to start formulating military options for invading Iraq. Rice said the White House had a strategy before 9/11 for military operations against al Qaeda and the Taliban. But Deputy Secretary of State Richard Armitage appeared to contradict that in testimony before the commission. He said military options were not included in the planning before September 11.

**Retractions.** Perhaps most important, Rice has backed away from her previous statement that "I don't think anybody could have predicted that these people would take an airplane and slam it into the World Trade Center . . . that they would try to use an airplane as a missile." Rice told the investigative commission that she erred. The commission, in fact, has been informed that U.S. intelligence agencies and Clarke had issued warnings prior to 9/11 that terrorists could use airplanes as missiles.

Rice has long been considered a reasonable bet to become the first African-American woman named as secretary of state if Bush wins a second term and Powell leaves. Now that bet is uncertain. For her part, Rice in private takes the criticism hard, partly because she isn't used to it; she has always enjoyed adulation and positive media coverage and has seemed to enjoy the work. "I told her she would love it at the White House," said Scowcroft, "and she's come to me again and again and said I was right." Now friends describe her as weary and unsettled but stoic, believing she can recover. "Her poise almost seems to be a gift from God that she has developed through deep faith," says Kiron Skinner, a longtime Rice friend and historian at Carnegie Mellon University. Rice says that when she needs strength, she reads Romans 5 in the Bible, which advises the righteous to "glory in tribulations" because suffering breeds patience and hope. For the foreseeable future, Condoleezza Rice will have no end of tribulations to glory in. ●

*With Kevin Whitelaw, Mark Mazzetti, Anne C. Marek, and Thomas Omestad*



**PERP WALK.** A detainee is escorted at the Navy base in Guantánamo Bay, Cuba.

## A BATTLE IN THE BRIG

Ashcroft and Rumsfeld are fighting their own war over legal rights for detainees

BY CHITRA RAGAVAN

**T**he remark was intended to provoke. And it did. In December 2001, Attorney General John Ashcroft was the man on the hot seat as the Senate Judiciary Committee examined the government's creation of so-called military commissions to try alleged terrorists. The decision to create the controversial commissions came from the White House, but as the Bush administration's lawyer, Ashcroft had the job of defending it. "To those who scare peace-loving people with phantoms of lost liberty," Ashcroft declared, "my message is this: Your tactics only aid terrorists."

Ashcroft's performance solidified his image—as a loyal, no-nonsense cop in the eyes of conservatives, as a bully playing fast and loose with civil liberties in the eyes of liberals. But *U.S. News* has learned that behind the scenes, Ashcroft—while supporting the commission concept—has been arguing against the exclusive use of commissions at the expense of the courts. He has also expressed exasperation at how long it has taken the Pentagon to set up the commissions and bring cases before them. In April, the Supreme Court is poised to hear oral arguments on the constitutionality of the government's indefinite detention—without counsel—of both foreigners and American citizens as



EPA/SIPA

**MASS TRANSIT.** Former Guantánamo detainees leave an Afghan prison on their way to freedom.

“unlawful enemy combatants.” On the eve of those arguments, officials gave *U.S. News* a rare glimpse into the infighting over the administration’s policies. Their comments paint a picture of two departments—Justice and Defense—with differing priorities, and an attorney general, Ashcroft, growing ever more impatient with Defense Secretary Donald Rumsfeld.

The issue first arose after the 9/11 attacks. An order signed by President Bush on Nov. 13, 2001, gave the secretary of defense the right to hold terrorists as “unlawful enemy combatants” and the right to create military commissions, or tribunals, to deal with them. Procedures and charges were not defined, and it has taken two years for a legal framework to be established. Some 650 “unlawful enemy combatants” have been sent to the U.S. Navy base at Guantánamo Bay, Cuba, and there has been an international outcry over their lack of access to any sort of legal process. In February, the Pentagon charged two men—both alleged aides to Osama bin Laden—with conspiracy to commit war crimes. They could be tried later this year before the first U.S. military commission convened since World War II.

**“Law of war.”** Reactions to the commissions reveal the differing perspectives of the Justice Department and the Pentagon. Rumsfeld has said the policy is necessitated by “the law of war, which has as its purpose, first, to keep the enemy off the

battlefield so they can’t kill more innocent people.” Pentagon officials also want to interrogate prisoners to gather intelligence, which takes time, says spokesman Bryan Whitman. “To people who say it’s been two years before there’s been a military commission,” says Whitman, “I would argue it’s been *only* two years before a military commission,” adding that 131 detainees have been released. Sources say Rumsfeld never considered tribunals a top priority. “Rumsfeld sees his job as dealing out death, not legal sentences,” says former White House associate counsel Bradford Berenson, who helped draft the commission order. “My impression is all these questions strike him as sissy stuff.”

For his part, “Ashcroft thought Rumsfeld blew it, by allowing Guantánamo to become a black hole in the minds of people both at home and abroad,” says a senior official. Even some military lawyers at the Pentagon were concerned. “My feeling was that we needed to get as much intelligence out of them as we could, and it might take a while,” says a former Navy judge advocate general and retired admiral, Don Guter, who grew frustrated by the proc-

ess. Now the commission procedure, Guter says, “looks completely arbitrary.”

For his part, Ashcroft successfully beat back some efforts by the military to supplant the courts, especially in trying U.S. citizens accused of terrorism, except in rare cases. “The attorney general has been on the side of being cautious and sparing in using these kinds of extraordinary powers domestically,” says one former Justice official. But some administration sources say Ashcroft’s motivation may have been turf as much as principle. “He’s got prosecutors hot to try terrorists,” says former Bush associate counsel Berenson. “He has to stick up for their institutional interests.”

Once Rumsfeld was handed the tribunal as a *fait accompli*, he understandably wanted legal control over the commission’s decisions. But Ashcroft obtained a provision within the commission order requiring consultation with Justice on all legal procedures. Ashcroft was “concerned that you have to be able to sell the fairness of the commission to the public,” says a former Justice official.

The biggest disagreements began when two U.S. citizens, Jose Padilla and Yasser Hamdi, were classified as “unlawful enemy combatants,” held in military brigades, and, until recently, denied access to counsel. Rumsfeld was acting in accordance with the military’s policy on battlefield detainees, but Ashcroft said the pair

should have a chance to challenge their detentions in civilian courts. That is now happening. But with those Supreme Court cases looming, it’s unlikely the controversies over military commissions will be absent from the headlines for long. ●

*With Mark Mazzetti*

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