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For Guantánamo Review Boards, Limits Abound

By TIM GOLDEN

At one end of a converted trailer in the American military detention center here, a graying Pakistani businessman sat shackled before a review board of uniformed officers, pleading for his freedom.

The prisoner had seen just a brief summary of what officials said was a thick dossier of intelligence linking him to Al Qaeda. He had not seen his own legal papers since they were taken away in an unrelated investigation. He has lawyers working on his behalf in Washington, London and Pakistan, but here his only assistance came from an Army lieutenant colonel, who stumbled as he read the prisoner's handwritten statement.

As the hearing concluded, the detainee, who cannot be identified publicly under military rules, had a question. He is a citizen of Pakistan, he noted. He was arrested on a business trip to Thailand. On what authority or charges was he even being held?

"That question," a Marine colonel presiding over the panel answered, "is outside the limits of what this board is permitted to consider."

Under a law passed by Congress and signed by President Bush in October, this double-wide trailer may be as close to a courtroom as most Guantánamo prisoners ever get. The law prohibits them from challenging their detention or treatment by writs of habeas corpus in the federal courts. Instead, they may only petition a single federal appeals court to examine whether the review boards followed the military's own procedures in reviewing their status as "enemy combatants."

But an examination of the Guantánamo review boards by The New York Times suggests that they have often fallen short, not only as a source of due process for the hundreds of men held here, but also as a forum to resolve questions about what the detainees have done and the threats they may pose.

Some limitations have long been evident. The prisoners have no right to a lawyer, or to see classified evidence, or even to know the identity of their accusers. What has been less visible, however, is what many officials describe as a continuing shortage of information about many detainees, including some who have been held on sketchy or disputed intelligence.

Behind the hearings that journalists are allowed to observe is a system that has at times been as long on government infighting and diplomatic maneuvering as it has been short on hard evidence. The result, current and former officials acknowledged, is that some detainees have been held for years on less compelling information, while a growing number of others for whom there was thought to be stronger evidence of militant activities have been released under secret arrangements between Washington and their home governments.

Military officials emphasize that the boards are an administrative forum and were never intended to replicate judicial standards of fairness. But they say the hearings offer prisoners a viable opportunity to rebut the government's evidence.

"At the end of the day, it's about giving the detainee the flexibility and freedom to present his case," said Capt. Philip L. Waddingham, a former Navy pilot who oversees the operations of the panels at Guantánamo.

Administration officials also emphasize that the reviews are more rigorous than the battlefield tribunals that have traditionally been used to determine the status of wartime prisoners under the 1949 Geneva Conventions.

But the Geneva tribunals were established to answer questions about the identities of soldiers and spies from regular armies. Sorting through the identities and past actions of suspected participants in a shadowy global terrorist network, military officials said, has proved far more complex.

To date, 377 Guantánamo detainees, nearly half of the 773 who have been held there, have been released or transferred to other governments. Of those, about 150 have been repatriated through the review process since mid-2004, officials said.

The administration's push to reduce the Guantánamo population is more evident in another statistic. The final arbiter of prisoner releases, Deputy Defense Secretary Gordon R. England, has overruled the panels' recommendations in more than 15 percent of the 237 cases he has decided so far this year, officials said. In virtually all of those, the boards had recommended continued detention.

Still, a recent study of the review process found that detainees arguing their innocence were routinely denied witnesses they tried to call, even when the witnesses were other prisoners at Guantánamo. Lawyers for the detainees complain that the government has made almost no effort to have the panels consider information they have gathered and has often blocked their attempts to learn the accusations against their clients.

"We have tried again and again to have a say in the process," said Barbara Olshansky, a lawyer who has coordinated much of the work of the detainees' lawyers for the Center for Constitutional Rights. "But we learned pretty early on that these were kangaroo courts."

Many of the detainees appear to have given up on the reviews as a way to win their freedom. In the latest round of annual hearings, which were completed this month, only 18 percent of the prisoners chose to attend.

Evolution of the Hearings

The review system at Guantánamo began operating in July 2004, more than two years after most detainees were imprisoned there. Officials said it was intended in part to deflect criticism that the prison had become a legal black hole. They also hoped it would resolve what had become a contentious struggle among national security agencies over which prisoners to hold and which to free.

Even before Mr. Bush decided in February 2002 that the United States would not observe the Geneva Conventions in fighting terrorism, Donald H. Rumsfeld, then the defense secretary, dismissed the idea of Geneva-style hearings for the detainees, maintaining that they would never be entitled to the prisoner-of-war status that such tribunals could grant them in other conflicts.

"There is no ambiguity in this case," Mr. Rumsfeld said.

Yet intelligence officers at Guantánamo found ambiguity everywhere. Many of the detainees had been

captured by Afghan militias, Pakistani border guards and other surrogates, and some had been turned in for bounties, intelligence officials said. Information about their identities and actions was often vague and secondhand. Physical evidence, if any existed, was sometimes lost before reaching Cuba.

Still, the detainees who were held on the weakest information tended not to be a priority for either intelligence officers or the military's criminal investigators.

"It wasn't the job of the intelligence community to verify their guilt or innocence," said Col. Brittain P. Mallow, a retired Army investigator who led a task force that gathered evidence for war crimes tribunals that are expected to prosecute about 50 to 70 of the remaining 396 detainees.

Faced with growing international criticism, the Bush administration moved in May 2004 to set up a kind of annual parole system, called Administrative Review Boards, to weigh each detainee's continuing threat and intelligence value. But before those hearings began, the Supreme Court called that June for a one-time review of all Guantánamo detainees using the sort of panels called for by Army regulations -- and by the Geneva Conventions.

Those first panels, called Combatant Status Review Tribunals, or C.S.R.T.'s in military parlance, required three military officers to decide cases by majority vote, based on a "preponderance of the evidence." The boards were allowed to consider a wide range of intelligence, including statements obtained by coercion.

Midlevel officers were assigned to help the detainees prepare for their hearings. Military lawyers were not permitted to serve in that role, however, because of concern that limitations on that assistance might open the lawyers to charges of violating professional ethics rules.

Lawyers at the Defense and Justice Departments had another worry: that detainees found to be "not enemy combatants" might sue the government for wrongful imprisonment. Partly for that reason, officials said, the review office was instructed to use the phrase "no longer enemy combatants."

By the time the C.S.R.T. reviews got under way, intelligence agencies had confirmed that half a dozen detainees released from Guantánamo were fighting for the Taliban in Afghanistan. Such risks were raised frequently in government debates.

"It was sort of a mantra in the system: 'You have got to make sure that you don't release any of the wrong people,'" recalled Charles W. Moore Jr., a now-retired vice admiral who set up the review apparatus under Mr. England.

Reviewing Decisions

The early results of the hearings, in which officials said a surprising number of detainees were found not to be enemy combatants, only heightened the unease.

Internal critics, including the Defense Intelligence Agency, the Central Intelligence Agency and the Special Operations branch of the Pentagon, complained heatedly that the boards did not properly understand the intelligence they were assessing, said current and former officials who participated in the debates.

The critics were later allowed to provide further training to the panels. In the first round of annual reviews after the C.S.R.T.'s, officers with military intelligence backgrounds also took over the role,

previously assigned to lawyers, of vetting evidence and presenting the government's case.

While some officials perceived an undue influence over the panels from intelligence agencies and their allies, others said those critics were mostly beaten back.

"The intelligence community wanted to derail the C.S.R.T. process and dictate the decisions, and that didn't happen," said one former senior official, who, like several others, would discuss the policy deliberations only on the condition of anonymity.

According to documents and interviews, the Pentagon office in charge of the reviews ordered the repetition of some C.S.R.T. boards that recommended the release of detainees. Defense Department officials would not discuss those cases in detail.

The largest number of repeated hearings appears to have involved some of the 22 Muslim detainees from western China who were part of the Uighur (pronounced WEE-gur) ethnic minority.

The Uighurs' sworn enemy was not the United States but the Communist government of China, which had long oppressed their people. The military accused the detainees of belonging to a separatist group that the Chinese authorities had persuaded Washington to list as a terrorist organization, but some experts on the region disputed that characterization of the group and the detainees denied any link to it.

The State Department, fearful that the men would be tortured if they were sent back to China, had already begun trying to place the Uighurs as refugees in Europe when their cases came for review at Guantánamo, officials said.

"We were shocked that they even sent those guys before the C.S.R.T.'s," said one former national security official who worked on the matter. "They had already been identified for release."

Because the Uighurs told very similar stories, Pentagon officials were confounded when at least five of them were determined not to be enemy combatants and the rest properly held, officials said.

At least several of the Uighurs, including some found not to be enemy combatants, had their cases reviewed again, officials said. They described the impetus for doing so as "quality control." But available documents show that at least one of the detainees, whose case was reviewed again, was finally found to be an enemy combatant.

Five Uighur detainees were finally sent to Albania as refugees in May.

Some Aren't Revisited

Yet other cases in which questions arose were not revisited. One of those involved a Sudanese man, Adel Hassan Hamad, who was seized in Pakistan in 2002.

According to the unclassified summary of allegations in his first hearing, Mr. Hamad, who is now about 48, had worked for two nongovernmental organizations, or N.G.O.'s, with ties to Al Qaeda and had come into contact "with persons who had positions of responsibility in Al Qaeda." But the military presented no unclassified information that Mr. Hamad was anything but a hospital administrator and former teacher, or that he knew of his employers' purported ties.

As with all such cases, it is not possible to judge independently the evidence against Mr. Hamad because

part of it is secret. But while two panel members found him to be rightfully detained, a third officer, an Army lawyer whose name was blacked out in the declassified document, objected strongly.

Even if the unclassified allegations were true -- and Mr. Hamad said he knew nothing about Qaeda links -- "a mere association with Al Qaeda does not qualify as a basis for enemy combatant status," the lawyer wrote in a formal dissent. The officer, who also studied the secret evidence, said the military was declaring Mr. Hamad an enemy combatant because some parts of the organization he worked for had allegedly supported "terrorist ideals and causes."

"To reach such a conclusion would provide for unconscionable results," he wrote. It might mean, he added, that "all physicians, nurses and aid workers employed by the alleged terrorist-connected N.G.O.'s would also be declared enemy combatants."

The panel's 2-to-1 decision was reviewed by two other military lawyers, each of whom tersely upheld its "legal sufficiency." One of them, Cmdr. James R. Crisfield Jr. of the Navy, described the Army officer's dissent as "articulate and thoughtful," but emphasized the review panels' modest standard of proof.

"Given the low evidentiary hurdle posed by a preponderance-of-evidence standard and the rebuttable presumption of genuineness and accuracy that attaches to government evidence, I believe that the test is satisfied in this case," Commander Crisfield wrote.

Despite the limited evidence against Mr. Hamad, documents from his first annual review show little further substance to the military's accusations. They noted that a brother of the Sept. 11 plotter Khalid Shaikh Mohammed was once a manager at one of the charities where Mr. Hamad worked. But the military was now asserting only that the group "may be affiliated with Osama bin Laden and Al Qaeda operations."

Two federal public defenders in Portland, Ore., who took Mr. Hamad's case last year said they had located about a dozen witnesses who corroborated parts of his account. Although much of that information has been filed as part of a habeas case in federal court, there is no sign yet that it has made any difference for Mr. Hamad.

"I don't think there was any substantive attempt by the military to find witnesses who could get to the bottom of this," said one of the lawyers, Patrick J. Ehlers. "There were hundreds of other people out there who worked for these groups. None of those people were arrested, and none of them were questioned."

Constraints on the System

Several officials who helped establish the review panels said they tried to create mechanisms that would let detainees present witnesses and evidence and allow the panels to gather new information.

But some officials said those ambitions, however sincere, had often been undone by the speed of most reviews -- often conducted in just hours -- and the low priority assigned to the collection of information on the detainees by intelligence agencies and foreign governments. This year, three panels at Guantánamo handled as many as 13 or 14 cases a week, they said.

"There are real time constraints and real resource constraints," one retired military officer said. "They usually ended up without anything new, so the boards were just dusting off old files and trying to have a fair and impartial body look at that old information."

Captain Waddingham, the chief of the review office at Guantánamo, said the boards followed the recommendations of military intelligence officials 95 percent of the time. But both he and the overall head of the review program, Frank Sweigart, insisted that the panels were able to get new information when they needed it.

"We are always looking for supporting facts, and if we can't find them, we ask for them," Mr. Sweigart, a retired Navy captain, said in an interview. "There really is a lot of information out there for a number of them -- especially for the detainees who are there today."

But other current and former officials described a system that was frequently inefficient in collecting information that might determine a prisoner's fate.

Some officials said military and civilian intelligence agencies gave little priority to requests for information from the panels, particularly when they involved time-consuming inquiries overseas. And though officials including Mr. England, the deputy defense secretary, have urged foreign governments to develop and pass on their own information about detainees from their countries, few of them did.

Officials said some governments, including those of Kuwait and Bahrain, had provided extensive files on their detainees. Partly out of diplomatic considerations, they said, the State Department pressed Mr. England to move up review hearings for at least several detainees from those two countries and, ultimately, to overrule review panel decisions and repatriate them.

On Nov. 3 last year, the Pentagon sent two Kuwaitis and three Bahrainis home from Guantánamo on Mr. England's approval, despite what two officials said had been negative rulings by the review panels in at least some of those cases.

But other releases are harder to explain. In one such case, lawyers for Nazar Chaman Gul, an Afghan prisoner, said they were mystified to learn of the repatriation on Dec. 16 of another Afghan, Mohammad Akhtiar, after his annual review.

Mr. Akhtiar had been accused of launching a rocket attack on an American military base in Afghanistan in early 2003. Declassified transcripts of Mr. Gul's hearings suggest that a major piece of incriminating evidence against him was that he was captured with Mr. Akhtiar at his home. (Another problem seemed to be that he was confused with another Afghan with the same name, who is also being held at Guantánamo.)

"Gul's greatest sin seemed to be his association with Mohammad Akhtiar," said a lawyer for Mr. Gul, Amy Baggio. "Unfathomably, Akhtiar is now home with his family while Nazar Gul is going on his fourth year in custody."

Lawyers say that detainees who have tried to use the review system to challenge the accusations against them have often been frustrated. According to a recent study of 102 unclassified C.S.R.T. files by the Seton Hall University law school, the military denied all requests by the detainees for witnesses who were not also being held at Guantánamo and denied requests for detainee witnesses 74 percent of the time.

Although a growing number of lawyers have begun to conduct their own investigations into accusations against their clients, a former military intelligence officer who has presided over dozens of review boards was dismissive of those contributions.

"As far as what the habeas lawyers have to say, for the most part it wouldn't factor in because they have made themselves not credible," said the officer, a Marine colonel who suggested that the lawyers took detainees' claims of innocence at face value.

The lawyers respond that the obstacles to their input in the process raise questions about the military's desire to learn everything it can about the detainees. More than a week after the hearing for the Pakistani businessman accused of ties to Al Qaeda, a Washington lawyer who had been trying to help him told a reporter that he had not even known the session had taken place.

"There is no hint of any kind of due process in this," said the lawyer, Gaillard T. Hunt. "He's got no right to an investigation. But substantively, it really doesn't matter, because they can always just say they have this classified information that he can't see."

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