

# Capital Charges Are Filed in 9/11 Trials

BY JESS BRAVIN

The U.S. moved a step closer to prosecuting alleged planners of the Sept. 11, 2001, terror attacks by filing capital charges against Khalid Sheikh Mohamed and five other suspected al Qaeda conspirators. How many steps remain, however, is anyone's guess.

"You are asking me to tell you how long it will take to get to a place I've never been, with a map I don't have," said Col. Steve David, chief defense counsel for Guantanamo detainees.

Col. David said he hadn't received a copy of the charges and even if he had, the defense office was unprepared for the massive challenge of a 9/11 conspiracy trial. The defense staff includes seven military attorneys, six military paralegals and one intelligence analyst, Col. David said. They are largely tied up on cases against lower-level Guantanamo defendants.

Col. Lawrence Morris, the chief military prosecutor, has asked for a joint trial. However, Col. David said each of the six 9/11 defendants will require a separate legal team because they have conflicting legal interests, and the lawyers may request separate trials for their clients. In capital cases, he said, defendants are entitled to two attorneys and each will need his own paralegal and intelligence analyst. That staff will have to be recruited, cleared to see highly classified evidence and provided resources for a defense.

In contrast, "the government has had years and years and years to prepare their cases; they've had unlimited access to the accused; they've had all-but-unlimited resources," said Col. David, an Army reservist who in civilian life is a state court judge in Lebanon, Ind.

The charges released yesterday must be approved at the Pentagon, starting a 30-day clock for each defendant's arraignment. Such approval is essentially a formality, and attorneys on both sides are readying for issues spotlighting the tension between due process and national se-



Lawrence Morris

curity. For instance, six years after the Guantanamo Bay prison opened, it remains unclear whether the U.S. Constitution applies there. The Supreme Court is weighing the question, and Col. Morris said he realizes the outcome could force the prosecution to re-evaluate some of its arguments.

The biggest issue hanging over the proceedings is that of torture. Federal and international law prohibit use of evidence obtained through torture. The government denies any of its interrogation practices meet its legal definition of torture. The Central Intelligence Agency acknowledges subjecting Mr. Mohammed to waterboarding, a form of simulated drowning, and destroying tapes of that interrogation.

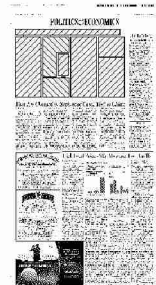
Col. Morris declined to say if he considers waterboarding torture. His immediate predecessor, Col. Morris Davis, said it is. Col. Davis quit the post in October after disputes with his superiors, including, he said, their refusal to rule out use of waterboarding evidence.

The military commission system's leadership "appears to support the use of evidence obtained by techniques most people consider torture," Col. Davis said. "On the other hand, ethical rules and standards appear to prohibit using evidence obtained by illegal means. I suppose each person has to weigh the alternatives and make his own decision. I made mine, and I stand by it."

Another defendant, Mohammed al-Qahtani, faced extended periods of sleep deprivation, sexual humiliation and was forced into painful "stress positions," among other treatment that a Pentagon investigation later said was "abusive and degrading," if not torture. Yesterday, lawyers for Mr. Qahtani said they would try to turn the tables on the government, making any trial focus on what the U.S. did to their client, not his alleged crimes.

Mr. Qahtani, an alleged "20th hijacker," "may be the one charged today, but it is the illegality of his interrogation under torture that will be tried in the commission," the [Center for Constitutional Rights](#), a New York based advocacy group that represents Mr. Qahtani, wrote in a statement.

Retired Maj. Gen. John Altenburg, who headed the military commissions apparatus from 2004 to 2006, said, "It may not be quite as controversial as ev-



everyone thinks it's going to be." Gen. Altenburg said the government may be able to prove its case without relying on evidence from coercive interrogations.

Indeed, last year, Lt. Col. V. Stuart Couch, who previously was assigned to prosecute Mr. Qahtani, said he could present his case based solely on evidence obtained before the military subjected the detainee to the abusive interrogation. Col. Couch said he would exclude everything the government had obtained through or after the abuse.

Likewise, Gen. Altenburg said, "I suspect that for a lot of these guys, they have their own statements even before they were captured. They've got computers and hard drives and everything else." Moreover, he said, given al Qaeda's ideological motives, the terrorist network's senior echelon might not even try to beat the rap.

In the past, he said, "Some of these guys were in a hurry to brag."