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**Presenter:** Secretary of Defense Donald H. Rumsfeld

Thursday, March 21, 2002 - 2:00 p.m.  
EST

### DoD News Briefing on Military Commissions

(Also participating were Marine Corps Gen. Peter Pace, vice chairman, Joint Chiefs of Staff; Under Secretary of Defense Douglas Feith; and Department of Defense General Counsel William J. Haynes. The fact sheet distributed during the briefing is on the web at <http://www.defenselink.mil/news/Mar2002/d20020321fact.pdf> . The DoD Military Commission Order discussed during the briefing is on the web at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> . Also see the related news release at [http://www.defenselink.mil/releases/2002/b03212002\\_bt140-02.html](http://www.defenselink.mil/releases/2002/b03212002_bt140-02.html) .)

Q: You're on the wrong side.

Rumsfeld: I don't feel right over here. (Laughter.) There's something wrong with this picture. (At the podium.)

Q: (Off mike) -- on the left.

Rumsfeld: Good afternoon.

Q: Good afternoon.

Rumsfeld: We were reminded last week, as the coalition forces battled Taliban and al Qaeda in the mountains, that we're still in the early stages of this dangerous and what promises to be long war. But while much of the difficult work remains, thanks to the courage and dedication of the soldiers and sailors and airmen and Marines, we've had some good success thus far.

On September 11th, the terrorists attacked the United States, killing thousands of innocent men, women and children. Less than a month later, the coalition countries responded and the Taliban had been driven from power. Hundreds of Taliban and al Qaeda terrorists have been killed, and hundreds more have been rounded up and detained by coalition forces.

This success has given us a glimpse into the future we face. As the president noted in his State of the Union address, we have found evidence, in caves and tunnels and safe houses in Afghanistan, of further terrorist plots to kill Americans and others, as well as terrorist efforts to acquire weapons of mass destruction, capabilities that, if they are successful, could help them kill not thousands more but tens of thousands more.

This is a dangerous and determined adversary for whom September 11th was an opening salvo in a long war against our country, our people and our way of life. Our task, our purpose must be to stop the terrorists; to find them, to root them out and get them off the street so that they cannot murder more American citizens.

One of the tools at our disposal to meet that challenge is the use of military commissions to try some of those who are captured in the conflict. Today we are announcing some of the procedures we plan to use to carry out the president's military order. Before discussing them, I want to mention some of the thinking that went into their development.

In the president's military order, he directed the Department of Defense to find ways to conduct commissions in a manner that would be consistent both with our national security interests and with the traditions of fairness and justice under law, on which this nation was founded, the very principles that the terrorists seek to attack and destroy.

In the months since the president issued his order, we have consulted with a number of experts from around the country, in and out of government, in and out of Washington, in an effort to come up with rules and procedures that will ensure just outcomes while protecting the American people from the dangers that are in fact posed by terrorists.

There's a powerful tension between getting a story fast and getting a story right. That's a fact. You all know that. It's important, I believe, to try to balance those competing pressures. Often the pressures of the moment for speed tend to overpower the desirability of getting it right. On and after September 11th, in reporting the number of people who were killed here at the Pentagon, DoD was criticized for being too slow, but we got it right. With respect to the global position device recently found in Afghanistan, DoD got it fast, but we now believe we got it wrong. On the development of the rules for the military commissions, DoD has been characterized by some as being slow. The fact is, I have been determined to try to get it right. It is an exceedingly important subject, and it's important for our country that we do it right.

I've taken some time, first because I wanted to do it well, but second because we had the time available. No individual has yet been assigned to be tried by a military commission. So despite the appetite for speed, it was more important to do it well than to do it fast.

Our approach has been based on two important principles. First, the president decided to establish military commissions because he wanted the option of a process that is different from those processes which we already have, namely, the federal court system in the United States and the military court system under the Uniform Code of Military Justice.

So when people take note of the fact that there are differences with respect to the procedures for the military commissions, they should understand that there is a reason for it. Those two systems have different rules and procedures, yet each produces just

outcomes. It follows, therefore, that military commissions, which will have rules and procedures that are somewhat different from either of those two systems, can also produce just outcomes, despite the differences. An observer who may be more familiar with the federal court system or the military code of justice may try to evaluate the new approach being fashioned for military commissions against what they're familiar with and then raise questions about the rules and procedures for the military commissions. That's understandable.

But I want to be clear from the start. The commissions are intended to be different, and the reason is -- is because the president recognized that there had to be differences to deal with the unusual situation we face and that a different approach was needed for that reason, just as was the case during several previous conflicts in our country's history.

Our second guiding principle is related. Observers may be inclined to examine each separate provision and compare it to what they know of the federal criminal court system or the court-martial system, and feel that they might prefer a system that they were more comfortable with. I suggest that no one provision should be evaluated in isolation from the others. If one steps back from examining the procedures provision by provision, and instead drops a plumb line down through the center of them all, we believe that most people will find that taken together, they are fair and balanced and that justice will be served in their application.

The general counsel, Jim Haynes, who has spent an enormous amount of time on this subject, and the undersecretary of Defense for Policy -- and needless to say, there's a mixture here of legal and political policy questions -- are here. They will come up to the podium and respond to technical questions after General Pace and I depart. They'll review the procedures and answer questions. However, I do want to highlight some of the main provisions.

The accused will enjoy a presumption of innocence; will not be required to testify or incriminate themselves at the trial. They will have the ability to discover information and to obtain witnesses and evidence needed for trial and be present at public trial. Cannot be tried for the same offense twice. Will be provided with military defense counsel at government expense, and will also be able to hire defense counsel of their choosing at their expense.

Further, proceedings will be open, unless the presiding officer determines it's necessary to close the proceedings to protect classified or sensitive information, or for another reason; namely, the safety of the trial participants.

The standard for conviction will be "beyond a reasonable doubt" and will require a two-thirds vote of the commission. The imposition of a death penalty will require a unanimous vote of the seven-member commission. After the trial, there will be an automatic post-trial process of appeal and review.

Let there be no doubt, commissions will conduct trials that are fair and impartial. At the same time while ensuring just outcomes, the procedures are also designed to respond to the unique circumstances for which they were established.

For example, military commissions will allow the use of classified information without

The procedures allow us to protect civilian judges, juries, counsel and witnesses from ongoing terrorist threats. For example, the judge who handled the trial for the first World Trade Center attack is still under 24-hour protection by Federal Marshals, and may be for the rest of his life. That is unacceptable in the cases likely to be assigned to the commissions.

Let me conclude. We are a nation of laws. We have been attacked by lawless terrorists. The manner in which we conduct trials under military commissions will speak volumes about our character as a nation, just as the manner in which we were attacked speaks volumes about the character of our adversaries. We have made every reasonable effort to establish a process that is just; one that protects both the rights of the defendant to a fair trial, but also protects the rights of the American people to their security and to live as they were meant to live, in freedom, and without free of terrorists.

(To staff) I believe we have their names that are going to be passed out in the materials?

Rumsfeld: Good.

General Pete Pace, United States Marine Corps.

I am personally very comfortable with these procedures. They are in fact fair, they are balanced, they are just. And I am also very proud of the process that we went through to get to these procedures. I personally sat in on hours and hours of deliberations with the secretary and his team, both from inside the Pentagon and, as he mentioned, experts from outside, and certainly experts from outside of government who were advising him, and the process itself was very reassuring to me and it should be to all of you.

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mentioned, the safety of the participants in the trials, and also to protect our intelligence in the ongoing war on global terrorism.

And finally, and very importantly, I have absolute faith in the men and women of our armed forces who, when called upon to participate in these commissions, will do their utmost to ensure a very fair, forthright, honest trial.

Thank you, sir.

Rumsfeld: On reflection, I would like to mention the names of the individuals who helped out. They did it without compensation because of their patriotism: Judge Griffin Bell, former attorney general; the Honorable Bill Coleman, former secretary of Transportation; the Honorable Lloyd Cutler, former counselor with the president -- two presidents; the Honorable Mark Hoffman, who served as general counsel of the Department of Defense and also secretary of the Army; Professor Bernard Meltzer -- Dr. Meltzer is University of Chicago law school and was involved in the Nuremburg trials; the Honorable Newt Minow, who was the -- President Kennedy's chairman of the Federal Communications Commission; the Honorable Terry O'Donnell, who's a former Department of Defense general counsel; Judge William Webster, former federal judge, former director of CIA and FBI; and Professor Ruth Wedgwood of Yale University and Johns Hopkins University. As I say, they didn't -- they don't -- none of them work for this department; they just volunteered to help out and have been enormously helpful.

A couple of questions. Charlie.

Q: Mr. Secretary, there are still critics who say that no matter how you cut it or couch it, that military trials are not as fair or as thorough as civilian trials, trials in civilian courts. Are you looking -- will these military trials guarantee simply more swift and sure justice than civilian courts? And are you worried about security -- someone throwing a hand grenade into a courtroom? Is that why you're going to military trials?

Rumsfeld: Charlie, there will always be critics. It's a free country! We learn from our critics. They say it's your -- that all of that dialogue and discussion that takes place informs the public, informs the people in government, and it's helpful. Are we very, very pleased and satisfied that this will produce just outcomes? You bet. We also have the ability to amend it if, for some reason, we found that there was something that we hadn't thought of. We're plowing new ground here, to a certain extent. So the critics can be critics, and we can be government officials, and you can be members of the press. We'll all do our jobs and try to do them well.

Q: And regarding security, will military trials allow you to hold it, say, aboard ship or in more secluded places, where you will have more secure protection?

Rumsfeld: There's nothing in the military order that I can recall that discusses the location of the commission.

Q: You've made no decision on where these will be?

Rumsfeld: We have not decided it, because we do not have any candidates yet to be tried before commissions.

Shall we make this the last question? (Groans from the press corps.)

Q: Under what --

Q: No pressure!

Rumsfeld: No, leave her alone. Come on!

Q: How about a couple of quickies?

Q: There's a provision that says that you and -- or the president must give final approval to the findings and the sentencing. Under what conditions or circumstances do you think you will be overruling what the commission has found, or the sentence?

Rumsfeld: Oh, my goodness. You're asking -- first of all, we don't have any candidates for the commissions.

Q: What is the practical purpose of that for --

Rumsfeld: That's what the order provided, and there it is. The president's military order provided -- left it that way, and trying to speculate as to how some accused might or might not be handled down the road, I think, is beyond my ability. You can try Jim Haynes on that. Maybe he has a better answer.

And since I didn't answer that, I'll ask Pam to have the last question.

Q: (Sighs.) Again with the pressure!

Rumsfeld: Well, you can handle it. You can handle it.

Q: Yeah. Actually, I have sort of two big questions for you. One is something --

Rumsfeld: One question, not two.

Q: What if I do it in one long run-on sentence?

Rumsfeld: No. Won't work.

Q: You say that you have a commitment to having an open process, and in this fact sheet that you've given us, it talks about that. But at the same time, you say you need to be able to present national security information that cannot be expressed openly. So how are you going to balance those two? How can the people who will be following these proceedings be assured that they are impartial and fair, and not sort of kangaroo courts with a predetermined outcome, if they cannot have access to that?

Rumsfeld: There's that word. There's that word.

Q: I had to raise it.

Rumsfeld: You had to get that "kangaroo court" in there so that people would have that in their minds --

Q: (Off mike) -- opportunities to address --

Rumsfeld: -- in their minds, when we've just presented something that is the product of many months of effort. It is --

Q: So the other option --

Rumsfeld: -- it is balanced. It is fair. It is designed to produce just outcomes, which it will.

Q: How will you make it open?

Rumsfeld: And that characterization is so far from the mark that I am shocked -- sort of.

Q: Yes. So the other option is for us to just go get these quotes from people and not give you a chance to address it.

Rumsfeld: I understand. I --

Q: But how will you balance that openness? How can it be open if at the same time you're trying to protect national security?

Rumsfeld: Our country faces that already. We deal with classified material in court. It's done on a regular basis, and there are ways that it can be handled so that -- I happen to know the answer of this. To give it to you, it is -- it would get me down to a level of detail that I'd prefer not. But there is one way of knowing that -- is, I believe that the -- I'm going to let Jim do it. If the military counsel would be present during any period when anyone else who should not be present because of the sensitivity of classified material might be excluded from the process, nonetheless, the defendant's military counsel would, in fact, be present at all times.

Q (Inaudible) -- ask General Pace a question, sir?

Rumsfeld: Yeah. All right. (Laughs; soft laughter.)

Q: Thank you. I appreciate it.

General Pace, understanding we're not going to talk about any particular instance or -- this is not really a hypothetical: Is the Department of Defense -- the Pentagon and the U.S. military -- in fact, prepared to invoke the death penalty against -- in this process, against an accused person?

Pace: I'm not exactly sure why you would come specifically to me with that question, but as the rules of the court are laid out, it is well within the authority of a tribunal, when a person's brought before them, if they are charged with a capital crime, if they deem it appropriate to find that person guilty and if all seven vote unanimously that that person

should be put to death, then that is well within their prerogative to do. And then, of course, it would go the process that the secretary laid out, as far as who would make the final decision.

Q: Can we do a follow-up on that?

Rumsfeld: Tell you what I'm going to do: I'm going to ask Jim Haynes and Doug Feith to come up. Jim is the general counsel; Doug Feith is the undersecretary for policy. They have been -- particularly Jim, but Doug to some extent -- have been deeply involved in this process. They are able to answer a whole host of questions at a level of detail, and I would think in a manner that would be very helpful to the folks here. And I'd prefer to have them take over at this time.

Thank you.

Q: Do you think any of those prisoners you captured are innocent? (Laughter.)

A: Trick question.

Rumsfeld: I haven't had a chance to look them over. That process is --

Q: Just wondering if you thought you'd captured any innocent people.

Rumsfeld: We've captured some innocent people and turned 'em loose from time to time, as you well know.

Q: Can I do a follow-up to the question just asked?

Haynes: May I say one thing first, just so you'll know? I am Haynes -- (laughter) -- and this is Feith.

(Cross talk.)

Haynes: I also would like to echo something the secretary said about the process. We were very careful about it, very deliberate. We reached out not just to those people identified, but also to the experts within the building -- the Judge Advocates General and the general counsels of the military department were very important in the development of these procedures. They will have substantial roles in implementing them. And we also, of course, consulted with other agencies. We considered everything that we heard on the Hill and in the press. It was very helpful to read about all of the things that you wrote, and we found that to be very helpful.

Furthermore, we don't intend this to be the end of that deliberate process. The rules provide that we will have full and fair trials, and I am very confident that those who are charged with executing that responsibility will do so.

Q: On the three-member review boards we're talking about, the president appoints those - does the president appoint those boards? And does it automatically go --



Haynes: Let me say one thing. We gave some fact sheets at the outset. We will have the actual rules for you when you leave. And at a very quick time afterwards, if they're not already up, they'll be on the website.

Q: But the president can appoint civilian members to those review boards, can he not?

Haynes: There is a review panel of three members. Those members may be appointed by -- will be appointed by the Secretary of Defense. If any of the three is a civilian, then the president will appoint that civilian as a temporary military officer, under existing legislation.

Q: Do things go automatically to the review panel, or would a thing have to appeal?

Q: What would you say to the suggestion that -- which is coming from many quarters, as you know -- that the structure is designed simply to make it easier for you to win convictions, that that's the purpose of this whole thing, to make it easier to convict?

Feith: I would say that's wrong. This was a -- the process of putting together these procedures was a balancing process. We have a number of important objectives that we had to keep in mind as we developed the procedures. Clearly, as has been emphasized, one of the key objectives is providing a fair trial for the individuals. But we're in the middle of a war, and we had to design a procedure that would allow us to pursue justice for these individuals while at the same time prosecuting the war most effectively. And that means setting rules that would allow us to preserve our intelligence secrets, develop more information about terrorist activities that might be planned for the future so that we can take action to prevent terrorist attacks against the United States.

I mean, there was a constant balancing of the requirements of our war policy and the importance of providing justice for the individuals. And that's why the secretary refers to this plumb line. I mean, there were lots of considerations at play here, and each deviation from the standard kinds of rules that we have in our criminal courts was motivated by the desire to strike this balance between individual justice and the broader war policy.

Q: Can I ask a question about the openness of these proceedings? In the trial format, it says the trial proceedings will be open unless otherwise determined by the presiding officer; but in reading through this fact sheet, it seems to be weighed much more heavily toward closing the proceedings than having them open; number one. Number two, the presiding officer may also allow attendance by the public and press. Well, if it's to be open, I mean, who besides the public and press would it be open to; number one? Number two, why doesn't it say that the proceedings will be open to the public and press?

Haynes: The procedures do say that the proceedings will be open to the maximum extent practicable, but under certain circumstances that are identified in the rules, such as the presentation of classified information or the safety of witnesses or the timing of the trials for particular reasons to be determined at the time, then they may be closed insofar that it's necessary to protect that information.

Q: But even -- if I could follow up -- but even the sentence, "The presiding officer may also allow," it's almost as if that's an afterthought --

Haynes: It's not an afterthought.

Q: -- as opposed to a ground rule that they will be open to the press and public and closed under only extraordinary circumstances. The way this is written is weighed far more in favor of closing the proceedings than having them open.

Haynes: I would suggest that you read the rules. And I know you don't have them now, but you'll have them soon.

Q: Is there appeal authority for --

(Cross talk.)

Q: One thing you apparently have not addressed here, which I think is very germane: Are any of the members of these commissions going to be legally trained, coming from JAGs or what have you, or you don't consider that necessary?

And a follow-up to that is, how similar will any of these tribunals be to the Nuremberg trials at the end of World War II?

Haynes: To answer your first question, yes, people who will serve on the commissions must be competent to perform the duties. The presiding officer of the commission must be a judge advocate. The other members are not necessarily judge advocates, but they may be. Traditionally, military commissions -- and this is true of courts-martial -- are not necessarily legally trained, but they are competent and educated people and will be chosen on that basis.

Q: (Inaudible) --

Q: Wait a minute! What about the Nuremberg thing?

Haynes: Well, there are some similarities to Nuremberg and there are some dissimilarities to Nuremberg. These procedures are, frankly, much more detailed, and in many respects are more generous than what was done at Nuremberg.

Q: Under the procedures that you have outlined --

Q: But as far as --

Q: Sorry. Please, go ahead.

Q: As far as trials and procedures are concerned, are you in touch with any country, or if any country have asked any help or consultations in any way?

Haynes: We have received so much unsolicited and solicited help, and we've considered it all.

Q: Can you answer the question the secretary didn't answer about under what circumstances would he or the president be allowed to overrule the findings reached by

the commission and a review board, and why is that needed, that last step of them approving it?

Haynes: Well, remember that the secretary's procedures are implementing the president's military order. The president's military order specifically provided that he would be the final approval authority, unless he specifies that the secretary of Defense will be.

Nevertheless, we do have in these procedures some specific instructions, including, for example, an acquittal or a finding of "not guilty," once it is final, may not be changed, even though the case will proceed up for final approval by the president or the secretary of the Defense.

Q: Do these procedures guarantee that if a defendant is acquitted, that the defendant will be set free?

Haynes: The procedures don't address the outcome of a trial, except to say that a sentence will be enforced quickly.

Q: Does that mean that if you are acquitted, there is a chance that you will not be set free?

Haynes: Well, it's -- as the secretary said, we're talking about hypothetical two or three times removed. If we had a trial right this minute, it is conceivable that somebody could be tried and acquitted of that charge, but may not necessarily automatically be released. The people that we are detaining, for example, in Guantanamo Bay, Cuba, are enemy combatants that we captured on the battlefield seeking to harm U.S. soldiers or allies, and they're dangerous people. At the moment, we're not about to release any of them unless we find that they don't meet those criteria. At some point in the future --

Q: But if you -- (off mike) -- convict them, if you can't find them guilty, you would still paint them with the brush that we find you dangerous even though we can't convict you, and continue to incarcerate them?

Feith: Part of the reason I don't think you can give an unqualified answer to that question is you couldn't do it even under our domestic criminal legal system. I mean, one could have circumstances where you're going to charge -- or somebody is charged with a number of offenses, and they might be tried for one and acquitted, but there still may be other reasons to hold the person. And so, I mean, you can't even say in a domestic court that if somebody gets acquitted of a particular charge he'll be let free. It depends on what else may be pending against the person.

Q: (Off mike) -- of other cases, though.

Haynes: May I say a couple things?

Feith: Sure.

Haynes: One thing we can say, that if a person is found not guilty, they will not be charged again for the same crime.

Q: Double jeopardy you have ruled out. But you haven't -- (laughs). But what is curious to me is, if you are acquitted, if you are found not guilty doesn't necessarily mean you're going to be released.

Haynes: Let me answer it in part this way. And I think the secretary's been very clear about this in other contexts. He is not interested in holding people gratuitously indefinitely. As I said at the outset, the people that we now hold in Guantanamo are held for a specific reason that is not tied specifically to any particular crime. They're not held - - they're not being held on the basis that they are necessarily criminals. It might be that as we investigate -- and that's what we're doing now -- that they will be appropriately charged with crimes, in which case we can address that. But there are two separate bases --

Q: One of the other issues about the defendants is when there is classified information being presented, is the defendant able to hear the evidence that is being presented against him when that evidence is classified, or does the defendant not get to hear what is being said about what he is accused of?

Haynes: Again, we need to remember that these will be individual trials involving individual people. So to generalize is something that I'm reluctant to do. But, you've asked the question, Is it possible? It is possible that there will be some evidence that will be so highly classified that we will not find it appropriate to have the accused present when the evidence is admitted. After all, the defendant might be found not guilty at some point and eventually, perhaps, released, and we would not want to provide classified information under those circumstances.

But even in those circumstances -- in fact, under all circumstances -- the rules are very, very clear that his defense counsel, his military defense counsel, must be present, must have access to all information considered by the commission, so he will be represented and protected under those circumstances.

Q: In attempting to ensure the security for those on the commission --

Haynes: Jim --

Q: May I ask a question, please?

Haynes: Just a second.

Q: Okay.

Q: Two questions, actually. Can you define what you mean by "competent"? For example, could a commission member come from any military career area? And number two, the list of people that can be tried by commission include those who would harbor terrorists. So what -- under what circumstances might you prosecute a foreign government official? And how would the process be affected by that fact?

Haynes: The procedures that we're releasing today implement the president's military order. The president's military order of November 13th specifically says that he must personally determine that an individual will be subject to the military order. The person

may not be a United States citizen. But in this determination, the president would have -- would state that he has reason to believe that the person is a member of al Qaeda or, as you said, potentially harbored or assisted and aided and abetted such a person. Under those circumstances, these rules would apply.

We do not anticipate that would be trying somebody that's not currently in -- under the control of the United States government. So your hypothetical about a foreign government official, unless we have them or have that person, would not be subject to it.

Yeah, sir? Sorry.

Q: In attempting to ensure the security or safety of the members of the commission, even witnesses, does that simply mean that their identities will not be released, or does that mean that the proceedings would be closed to protect the security of those individuals?

Haynes: We don't write about every conceivable scenario in these rules you'll see. They're more detailed than we gave to you just as you came in, but there are some things that remain to be applied. We leave discretion to the presiding officer or the appointing authority in a particular case to decide how best to protect information or people under circumstances like what you've described.

But I'll point out, in our civil court system, it is widely accepted that judges have the ability to protect witnesses through various measures, including protecting their identity or masking their voices or otherwise. And I would think that a presiding officer, or appointing authority in this case, would consider the same range of things, consistent with the admonition that trials shall be open to the maximum extent practical.

Q: Including protection -- or the protection of the identity of those involved in the commission itself, if that were so deemed necessary?

Haynes: Conceivably. But we didn't specifically write about that.

Q: And could you describe the difference between a commission and tribunal? Because I know it was called a tribunal originally, then the Pentagon made a concerted effort to shift it to commission. And then yesterday we heard the president call it a tribunal once more. So is there a legal, technical difference between the two or are they just interchangeable?

Haynes: Sometimes they're interchangeable. But in the statutes that reference them, tribunals seem to encompass commissions and courts-martial. But that's not always the same.

Q: Mr. Haynes, could you -- let me ask, sir, a legal point. Is it correct that you have a legal reason to try and keep these proceedings outside of the United States in order -- we keep hearing this, and I just want to understand it -- in order to keep any appellate process outside of U.S. federal court jurisdiction? Is there a legal reason to physically, geographically keep them outside of the United States to keep them out of the U.S. justice system? And is there any appellate process in this that is fully independent of the U.S. military or, you know, does the buck stop with the U.S. military in terms of an appellate process?

Haynes: Answering your first question, I will agree that there are consequences to holding trials in certain places. To say that we are acting in a particular way to avoid certain things I think would be an overstatement. Certainly, a number of things factor into decisions. But --

Q: Well what would be the consequences of holding them in the United States, the legal consequences?

Haynes: Well, it would depend on each case, and it would depend on who the defendants were, and it would depend on the method of trial, and so forth, and so on.

For example, the 1942 case involving the Nazi saboteurs, which was the employment of a military commissions, was held in the -- it was held in the Justice Department building downtown. The defendants were both foreign nationals and United States citizens. The court reviewed that all the way up to the Supreme Court and found that the president's order in that case was constitutional and properly applied. But it -- I would anticipate that there would be a different set of -- a different analysis that the Supreme Court, in this case, might use if the trial were held in, say Guantanamo or in Afghanistan or somewhere else. And I wouldn't want to make any predictions about that.

Q: (Inaudible) -- try and understand as clear as possible: If a detainee held by the United States -- and clearly, they all fall into the same fold -- a detainee -- if they --

Haynes: -- held in the United States, yeah.

Q: -- being held by the United States right now in Guantanamo or Afghanistan came before a U.S. military commission geographically inside the United States, would that person then have jurisdiction...could you then be under the jurisdiction of the federal court system? Are you opening yourself to that possibility? And my question on the appellate process.

Haynes: The answer is that a -- yes a United States District Court would have jurisdiction to consider a petition by a defendant in that case for certain purposes. There has already been a habeas corpus petition considered in Los Angeles. There's one pending now in the District Court of the District of Columbia. I would imagine that we will have more of those as we go forward.

Q: (Inaudible.)

Q: And is there any independent appellate process?

Haynes: Well, I'll let you read the rules, but the --

Q: (Inaudible)

Haynes: The rules provide for the review panel that I described a few minutes earlier that will be selected by the secretary of Defense and will be charged with reviewing the record of the trial and any written submissions they seek from counsel. And they may return the case to the commission, or they may advise the secretary for disposition. But they are not outside of the structure, other than what I've just described.

Q: Could you explain --

Q: Do the procedures allow for indefinite detentions without charges? And also, are intended for use against a select group of prisoners? Or are they intended for use against this whole body of prisoners who are in U.S. military custody?

Haynes: The procedures are strictly written for conduct of trials or conduct of commission proceedings. They don't -- they do not address detention outside the scope of a trial.

And secondly, as to the people to whom these procedures might apply, as I said, these implement the president's military order so that people that may be tried by these commissions are those who the president has determined in writing are subject to the military order.

Q: But it's the intention to use them against only a select group of prisoners? (Off mike.)

Haynes: Well, the president's -- the president's order spells out the types of people that potentially can be subject to it. So, members of al Qaeda, persons who are otherwise involved in international --

Q: I guess -- I guess what I'm driving at is whether we can expect that this will be applied only to top al Qaeda leaders as opposed to, you know, people who were fighters in Afghanistan but not -- were not necessarily leaders of the organization. I know it could be applied to anybody that fit that definition, but in terms of what the administration intends to do here.

Feith: The decision as to who might be prosecuted in a military commission is the president's decision. And --

Q: But he needs advice from you, doesn't he?

Feith: But in answer to the question, the president has the authority to put people that he selects into the military commission process. No recommendations have been made with regard to anybody yet. And so it's too early to answer the question that you've posed.

Q: So --

Haynes: Let -- let me just add to that. We're very early in the process. We're still interrogating and talking to the people that we have detained. And they're -- I would say it's fair to say they're singularly uncooperative. So we have -- we have a lot of facts to find beforehand. It's not just from them that we'll necessarily find them. So to build a case takes time and takes evidence, and we'll have to see.

Q: To follow up on Jim's question --

Q: Could you explain why -- could you --

Q: Excuse me. Just for a minute. I want to follow just very briefly on Jim's question

about how long you might hold people before you put them on trial.

Have you all made any attempt to address the question of due process, as there is in civilian courts, you know: doing -- bringing people to trial or releasing them in a timely fashion? Or -- or -- could you just hold these people for years just to keep them off the street without charging them? Has there been any attempt to address that question?

Haynes: Well, I tried to do it earlier in this press conference when I noted that the people we're holding in Guantanamo we're holding because we found them to be enemy combatants. That is totally different from a criminal justice system. That is a widely accepted and a historical concept of great depth and longevity that it's permissible to do that. When somebody's trying to kill you or your people, and you capture them, you can hold them. That's why we're holding the people in Guantanamo. The separate question about speedy trial and so forth doesn't apply to those people. So these rules do not address anything of that nature, except to charge the commission with conducting the proceedings expeditiously once they begin.

Q: So you could in fact hold these people for years without charging them, simply to keep them off the street, even if you don't charge them?

Haynes: Well, you're asking a separate question from what the rules provide. The rules don't say anything about that. So --

Q: No, I know that. But you could, in effect, do this, based on what you've said.

Haynes: We are within our rights, and I don't think anyone disputes it, that we may hold enemy combatants for the duration of the conflict. And the conflict is still going and we don't see an end in sight right now.

Q: Sir, could you explain with some specificity what the problems are with the UCMJ and with civilian courts that make you -- besides the fact that the president told you to do so -- that require setting up this new kind of legal system? The secretary addressed the question of national security, but he also said that there are already procedures in place to protect national security when such evidence is introduced in trials. He addressed the question of the physical security of the people involved, but already people are -- face that every day, especially in New York with mafia trials, there are judges that have round-the-clock protection. So those are two main reasons that have sort of already been asked and answered in other courts.

The cynical interpretation out there is that the main difference between this and the UCMJ is that the UCMJ allows people to appeal up to the Supreme Court, so the interpretation is that the department's or the administration's attempt is to keep this completely out of the Supreme Court's area of jurisdiction.

Haynes: That would be a cynical interpretation, and you --

Q: Can you explain how it's not that?

Haynes: Well, you shouldn't read this -- nor do we -- read this as an indictment or any dissatisfaction with existing judicial systems in the United States. Our federal judiciary is



a fine institution to do what it does. The court-martial system, under the Uniform Code of Military Justice, is the best in the world.

This is an additional option for the president.

Q: Why is it necessary?

Haynes: It's necessary -- well, and it is also not new. It is consistent with American history; I mean the use of military commissions historically has been an option for the president.

This is a unique conflict. It is unique in several respects -- and Doug may have some comments about that as well. We've never been attacked quite like this before. We've never had the intersection of criminality and warlike acts in quite this way before. We've never had to face an organization whose principal mode of operation is to hide behind civilians and to attack innocent people indiscriminately on such a large scale. The president needed to have this extra option for him to consider, to employ in appropriate circumstances.

Q: Can we go back to the question --

Haynes: I'm sorry. Did you have something?

Feith: No. I got -- well, I'll just add one point. The -- there has been for many years a debate about the nature of terrorism, and is it more in the nature of war or is it more in the nature of crime? And what was driven home on September 11th was obviously that it's both. And we are -- we're dealing -- when you ask, "Why do we need to have a new device or a new vehicle for these purposes," it is precisely because we find ourselves in a very unusual type of war. The enemy in this war, as opposed to past wars, is not, by and large, the regular armed forces of a country, wearing uniforms and attacking enemy armed forces. Here the enemy is a terrorist network with people who do not distinguish themselves as -- in uniforms as soldiers, and their principal targets of attack are not armed forces but civilians. And their principal method is by infiltrating into our country or into other, you know, friendly countries.

So -- and we are furthermore fighting a war that's going to last for a long time, and we want to try to bring justice to some of these individuals while the war is still under way. In many past cases, military commissions were after the war was over. One of the things that is on our minds here is this war is going to go on for a long time, and we want to make sure that these proceedings, which are going on in the middle of the war, do not interfere with our war effort and may -- because of the way we would be able to handle interrogations and intelligence information, may actually assist us in promoting our war aims.

So those, I think, are some of the motives that led the president to decide that he needs to use this well-established institution and apply it in new ways to this case.

Q: But why specifically exclude the Supreme Court from the process? That's just not an option in this process. Why --

Feith: I don't think you'll find anything that excludes the Supreme -- it's not within our power to exclude the Supreme Court from the process.

Q: It says that the -- under the UCMJ, you can appeal up to the Supreme Court. Here you appeal only to the president or the secretary of Defense after the review panel is done. They seem -- they are the highest.

Feith: That is the only appeal provided for in the rules that were prepared by the Defense Department. And as far as whether the Supreme Court gets involved in the process, that's beyond our authority to say.

Q: But is that still a possibility, that the Supreme Court could weigh in on this?

Haynes: Far be it from me to tell the Supreme Court not to do something. We anticipate that anybody that is tried will have vigorous, competent representation, and we expect that they will seek every avenue they can to protect the interests of their client. And we are confident that the rules will withstand any scrutiny and that we will produce a full and fair trial and a just result.

Q: Back to the question of openness, to follow up on the point that was made earlier, there does seem to be a presumption in this fact sheet that it would be more closed than more open, the sense that the presiding judge gets to decide whether to open it. And we've heard now several reasons that it could be closed. Confidential or classified information that reveals security sources. The secretary mentioned he doesn't want the panel presiding members to be under 24-hour watch, so you've got security now as an issue.

Give us your sense, based on what you know about these rules and the cases that are likely come before it: Do you expect to see most of these cases open, with little pieces closed when there's classified information, or most of them closed, with little pieces open when there's not classified information? What is your sense of how open these really are going to be?

Haynes: Well, recognizing that we're in the realm of complete speculation now, I will say that I would expect most of them would be mostly open. The rules provide that they shall be open to the maximum extent practicable. And that's what they'll do.

Sir?

Q: You said that the secretary doesn't want to hold detainees gratuitously. Under what circumstances would detainees be extradited to their countries of citizenship?

Feith: We have had from the beginning a screening process to make sure that we do not take into our custody people that should not be held. Most of the people that we are holding were, I believe, captured not by American forces, in the first instance, but by Afghan forces. And the Afghan forces made available a number of these people to us. They were screened. We had specific criteria that applied to decide whether -- to allow our people to decide whether we wanted to take them into U.S. custody. And it had to do with whether they were higher-level people, whether they posed a particular threat to us, whether we had particular intelligence interests in them.

And there were thousands of people who were captured by Afghan forces, and yet we are holding only a fraction of that number. And the people that we're holding we are interrogating. And we're continually reviewing the information that we have about these people that we're getting from interrogations, that we're getting from other countries that are cooperating with us in the field of intelligence or in the field of law enforcement. And if we find that we're holding somebody who is not of intelligence interest to us, is not of law enforcement interest to us, is not a threat, in our view, to Americans, to the United States, to our interests, to our, you know, allies or friends as a terrorist, if we don't have any interest in holding the person, we'll let them go.

Your particular question was releasing people to -- I believe you were asking, releasing people to other countries that may want to hold and prosecute them. We are talking with various countries about the possibility of transferring people that we are holding after we are no longer interested in holding them to other countries that might be interested in prosecuting them. And we have a broad coalition that's fighting this war, and it serves the interests of the whole coalition if countries that have a desire and a basis for prosecuting the detainees are given an opportunity to do so.

Q: Are you concerned that, given the non-cooperativeness of these people, given the choppy nature of the paper trail and shadowy identities and so forth that even with these rules you're going to have a hard time getting convictions?

Haynes: It's too early to say. We don't --

Q: You -- you just said a moment ago that, you know, it's still very early, we haven't even -- you know, we're just beginning to build up a case, I mean, these -- there are a lot of -- this is -- these detentions have been going on for months. It's been a while. We've been hearing for weeks and weeks about U.S. forces collecting intelligence. Is there a concern that you're going to have great difficulty mounting a successful case against any of these people?

Feith: I wouldn't say there's a concern, but I would say that you're putting your finger on an enormously important point, which is that it is very difficult to collect information about many of these people. And they -- if you look at the training manuals that have already been published, that al Qaeda and other terrorist groups use for their own operatives, you will see that there are deception and denial techniques that al Qaeda and other terrorist organizations teach their people. And -- I mean, we've seen these put into effect. And it takes a lot of digging, in many cases, just to find out basic information about the identity of people, let alone all of their activities. It is a hard slog. We're doing it very systematically. We're doing it very well. We're using all of the resources of the U.S. government, and we're using the resources of numerous other governments around the world that are cooperating with us. And we are developing a lot of useful information, but we've got a very long way to go.

Q: Given that, do you think that it's going to be hard to even bring anybody before a military commission? Do you have any -- I mean, sort of a feeling right now on whether these things will be used rarely or occasionally?

Haynes: I think it's too early to tell. The impetus for this exercise was that we wanted to give the president a tool. And it's a useful tool for him. It is simply too early to say how

often the tool's going to be used.

Q: (Inaudible) -- that these procedures would remain in place indefinitely, as an ongoing additional judicial system created by the executive branch?

Haynes: Well, the rules the secretary issued today do not have a sunset provision in them. So that's a partial answer to your question. I'd only observe that the war, we think, will last for a while. We'll just have to wait and see.

Q: Historically, these tribunals -- commissions have not been open-ended, have they?

Haynes: There are no currently open military commissions. That's a -- so that yes, they've all shut down in the past.

Q: So far, how many of them are you holding and from how many countries? And finally, when you said that when you are not interested or no longer interested in many of them, they will be sent back to particular countries. If any particular country has shown any interest, or are they in touch with you? (Isolated chuckle.)

Haynes: We're in touch with various countries who have expressed interest in people -- sometimes their own nationals, sometimes not their own nationals.

Q: Can you name some of them?

Feith: I'd prefer not to.

Staff: Let's take just two more.

Q: One of the absolute taboos in the military court system is command influence. And yesterday, when the president referred to these detainees as "killers," is that an improper command influence on the part of the commander in chief who, after all, is the ultimate commander over any military officers who would preside over these commissions? And will the president and secretary be advised to refrain from such public characterizations in the future to avoid any appearance of command influence?

Haynes: Let me just try to answer the question this way. You're right, military command influence is an important concept that all our military justice experts know very well and they know very well how to deal with it and how to avoid it. I can assure you that is something that we will continue to be vigilant about. And I'm not concerned at all that the commissions will do anything other than do what the president has also instructed them to do, and that is to produce a full and fair trial.

Feith: And they are ordered to conduct impartial proceedings. I mean, it is --

Q: But I guess it could be argued that it could appear that the commander in chief has made up his mind.

Q: The president has publicly already declared them killers. (Laughter.) Would it be advisable -- and I'm not asking you to advise the president from this podium, and I

understand you wouldn't do that. But as a lawyer, would you prefer that your clients not make those kind of public pronouncements, given the sensitivity of the procedures that are about to begin?

Haynes: I'm not concerned that we're not going to have full and fair trials.

Staff: All right, let's just do the last one.

Q: Two questions. One, a follow-up from before. Why not wait until the end of the war to do this? What is the desire to do this during the war? As you said, there are certain challenges that that poses.

And the other question is, you're saying that the administration reserves the right to do this because of the war. But war has not been declared by the Congress. And can I just get sort of legal analysis of that? I mean, how does he get all these rights if we're not officially, legally, under the Constitution at war?

Haynes: Well, first off, what we've done today is issue procedures. There's been no announcement that there will be a trial at any particular time. So your comment about why not wait until some later time, that remains to be seen when they'll be employed.

As far as the authority to issue these rules, they're not limited to wartime. That's one legal answer. It's an authority and responsibility under Article II of the Constitution, which is there during peace and war. So I'm not concerned about the fact that there's not been an official declaration of war by the Congress. There's no doubt that we are in a war situation.

Q: On these countries that you're talking with, the secretary has said people could be sent back to their countries of origin if those countries can be relied upon to punish them. Are your talks involving extracting some sort of promise or agreement from these countries? How will that be handled? A formal agreement that they will be punished?

Feith: We will have understandings with countries if we're going to make transfers of detainees to them. And we'll have understandings of various kind, not the least being that the basic humane treatment that we are committed to affording the detainees will be afforded by the country to whom we transfer them. But there will be a number of understandings that we will want to reach with any country to whom we transfer the detainees.

Q: So if you don't agree with the way they're going to punish them, that will be a factor as well in sending them back to those countries?

Feith: I mean, the --

Q: The treatment of the --

Feith: As I said, we -- well, one of the considerations is we want to ensure humane treatment. We are -- we feel committed to providing that, and we will make sure that we have an understanding with countries that we transfer any detainees to that they will provide humane treatment also.

Q: Would you want to ensure that they would prosecute them? Besides how they're treated, do you want to ensure that any detainee transferred to, let's say, his home country is prosecuted?

Haynes: Well, it would depend on the case.

Feith: It would depend on the case. If you -- one might transfer somebody that you've decided shouldn't be prosecuted. I mean, it depends.

Staff: Thank you, ladies and gentlemen.

Q: Thank you.

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