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White House Dismissed Legal Advice On Detainees

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Senior lawyers inside and outside the Bush administration repeatedly warned the White House that it was risking judicial scrutiny of its detention policies in Guantanamo Bay if it did not pursue a more pragmatic legal strategy that considered the likely reaction of the Supreme Court. But such advice, issued periodically over the past six years, was ignored or discounted, according to current and former administration officials familiar with the debates.

In August 2006, for example, the top lawyer at the State Department told senior officials at the White House that unless they won a congressional mandate that broadly supported their system of detaining terrorism suspects, their goal of keeping the detainees locked up was in jeopardy. "I can virtually guarantee you, without a legislative basis, federal courts are not going to be willing to uphold the indefinite detention of unlawful combatants," John B. Bellinger III warned in an e-mail.

The e-mail, disclosed by former White House officials familiar with the intense internal debates over detainee policy, was one of several red flags for the White House in its fierce battle to keep the detention facility in Cuba free of judicial oversight.

The result, they said, has been a series of losses at the Supreme Court, including last week's 5 to 4 ruling that detainees at Guantanamo have a constitutional right to a review of their detention in federal courts -- a ruling that holds out the prospect of heavy litigation and close judicial scrutiny of decision-making that the administration has long argued is best left to the president.

"Through misjudgment and overreaching, the White House ended up with the very result it sought to avoid -- heavy judicial involvement and erosion of deference to the president's view of wartime necessities," said Matthew Waxman, who worked on detainee affairs at the State Department and the Pentagon before leaving last fall to teach law at Columbia University.

"The administration pursued the policy course it wanted," said former State Department counselor Philip D. Zelikow, who was involved in some of the debates over detainee policy. "It planned for the best instead of preparing for the worst, and decided that it would prefer to fight for what it wanted."

Even some conservative allies of the administration agree that the White House may have mishandled elements of its strategy, but they pin most of the blame for the administration's predicament on the leanings of the Supreme Court.

"It may well be fair to fault the Bush administration politically for failing to work with Congress early on to develop a statutory framework governing Guantanamo detainees," said M. Edward Whelan III, a former Bush Justice Department official who now heads the Ethics and Public Policy Center. "But the narrow Supreme Court majorities in the Guantanamo cases deserve far harsher criticism for their gross misreadings of the law and their abandonment of sound precedent on which the administration reasonably relied."

White House officials said it is unfair to second-guess their strategy, given the narrow divisions on the court. "I don't think it takes a rocket scientist to say there was a chance that the administration could lose this case," said one top official involved in detainee policy, referring to last week's ruling. But he argued

that "it would be very unusual for a Congress and executive branch to formulate national security policy based on the expectation that the Supreme Court would misinterpret the Constitution."

From the days soon after the Sept. 11, 2001, attacks, the Bush administration has been divided over what to do with al-Qaeda and Taliban members and others picked up in Afghanistan and elsewhere. Hundreds of terrorism suspects were sent to the naval facility at Guantanamo Bay on the theory that it would be easier to keep them outside the formal U.S. court system.

Administration officials debated whether the detainees were protected by the Geneva Conventions; whether the president could order detentions without an act of Congress; and whether the detainees had the right to appeal their detentions.

A key issue for the White House was maximizing the power of the president -- a motivation that led the administration into a troubled Supreme Court strategy, according to several participants in these debates. A turning point, they said, came in 2004, when the Supreme Court announced that it would review whether the government could hold Yaser Esam Hamdi, a U.S. citizen whom the administration considered an enemy combatant, without trial or charge.

Jack L. Goldsmith, then head of the Justice Department's Office of Legal Counsel, wrote in his book "The Terror Presidency" of a White House meeting he attended in February of that year in which Paul D. Clement, of the solicitor general's office, warned that the administration might lose the case before the Supreme Court, despite its "solid legal arguments." Goldsmith said he suggested that the administration seek a congressional sign-off for the entire detention program, something that would make it harder for the court to strike down the program.

Goldsmith's view was supported by Clement, then-National Security Council lawyer Bellinger and Pentagon general counsel William J. Haynes II -- but not, Goldsmith said, by David S. Addington, then legal counsel to Vice President Cheney.

"Why are you trying to give away the president's power?" Addington asked, according to Goldsmith, who explains that Addington thought it might suggest that the president could not act on his own.

Others familiar with the debates say Addington was supported in his view by then-White House counsel Alberto R. Gonzales, who continued to defend the president's prerogatives when he became attorney general.

A spokesman from the vice president's office said Addington would not comment on the matter to preserve the confidentiality of administration deliberations.

That year, the Supreme Court handed the administration the first in a series of defeats on terrorism policy, ruling that the Guantanamo detainees can challenge their detentions in federal court, as a matter of law. The administration responded by establishing a system of Combatant Status Review Tribunals to review the status of detainees at Guantanamo.

The next year, Bush persuaded Congress to enact the Detainee Treatment Act, which stripped the courts of any right to hear habeas corpus challenges from Guantanamo detainees. The detainees were allowed to seek a limited review of the tribunal decisions in D.C. Circuit Court.

Several officials involved in the internal debates over detention policy said a group of administration officials -- including Zelikow and Deputy Defense Secretary Gordon R. England -- continued to argue that the White House would be better off obtaining congressional approval for the full detention program.

"There was a group of people both outside and inside who were saying that this overreaching would result ultimately in a loss that would weaken the presidency, and that the courts would just not accept it,"

said one senior administration official, who was not authorized to speak publicly about the deliberations and spoke on the condition of anonymity. The official added: "They kind of reaped what they sowed, and now they have 270 habeas cases."

After the Supreme Court's June 2006 decision in *Hamdan v. Rumsfeld* invalidated the military commissions set up by the Pentagon after Sept. 11, 2001, to try terrorism suspects, the White House finally pushed through a plan securing legislative endorsement of the commissions system. At the White House's behest, the Senate narrowly defeated a proposal to give detainees the right to seek habeas corpus review of their imprisonment in federal courts.

Even then, the White House was warned that a lack of habeas corpus protections for detainees would be struck down by the Supreme Court -- as it was last week. "The court is going to knock it out," Sen. Arlen Specter (R-Pa.), then chairman of the Judiciary Committee, said in a September 2006 interview with The Washington Post.

In a concurring opinion last week, Justice David H. Souter pointed out that a majority of the court had long made it clear how it might rule on the matter. He said the decision in another detainee case, *Rasul v. Bush* in 2004, "put everyone on notice that habeas process was available to Guantanamo prisoners."

"Whether one agrees or disagrees with today's decision, it is no bolt out of the blue," he wrote.

Staff writer Robert Barnes and staff researcher Julie Tate contributed to this report.