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Guantanamo proceedings full of challenges

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GUANTANAMO BAY NAVAL BASE, Cuba As military officers, retired colonels Peter Brownback, Christopher Bogdan and Jack Sparks have spent years in command of men and women in uniform. But last week, as members of the first U.S. military tribunal since World War II, their command of legal concepts basic to U.S. justice was challenged.

During three days of hearings, defense attorneys for David Hicks, 29, an Australian accused of conspiring with al-Qaeda to commit terrorism, challenged the legality not just of the charges but of the tribunal itself.

Uncertainty was expected as the tribunal's members only one of whom is a lawyer dealt with the complexities of international law and the law of war.

But they also had trouble understanding that evidence in a trial comes from witnesses, not lawyers arguing their points of view. And they appeared to have difficulty grasping that defendants cannot be charged with a crime that was created by law after the misconduct allegedly occurred.

Hicks' defense attorneys offered complex, hypothetical battlefield scenarios to make their points. Bogdan, a retired Air Force officer, shot back with equally complicated scenarios of his own.

For the most part, prosecutors remained on the sidelines watching the often heated exchanges. Brownback, the panel's presiding officer and its only lawyer, allowed Bogdan and the defense attorneys to go at each other.

In August, Brownback, a former military judge in the Army, was criticized for misstating the tribunal's rules and overstating his authority. All of the tribunal's members have an equal say in deciding the law and facts.

Brownback's performance last week also drew criticism. Twice, he called Maj. Michael Mori a Marine lawyer who represents Hicks "Sunshine" while expressing skepticism over defense arguments.

Gary Solis, a retired Marine lieutenant colonel who teaches at the U.S. Military Academy at West Point, says Brownback's comment "demonstrates his lack of wisdom, judicial demeanor and unsuitability for his post."

Once, Brownback stopped Bogdan and Joshua Dratel, Hicks' civilian lawyer, from interrupting each other. Bogdan wanted to know why the tribunal could not assume that the prosecution meant, in its charges against Hicks, to say that Hicks had attempted to destroy "protected" property, such as a hospital. The charges do not specify the kind of property, and Dratel argued that prosecutors are "stuck" with the charges as written.

Brownback also kept Sparks, a retired Marine officer, from making what lawyers call a "reversible error."

Sparks wanted to see the transcript of a Pentagon administrative hearing that resulted in a finding that Hicks should remain in detention. The transcript refers to evidence that was not subject to judicial scrutiny and could prejudice Hicks.

Kevin Barry, a retired Coast Guard lawyer, says the lack of an independent judge is a fatal flaw of the tribunal system. "Instead of having a judge to rule, you have members who can get rambunctious and no one really to put them in their place," he says.

Navy Lt. Susan McGarvey, a spokeswoman for the tribunal, says the tribunal's "checks and balances" include defense attorneys and prosecutors. "The lawyers involved will continue to correct any misconceptions the other members have as to the formalistic legal issues," she says.

Dratel says Hicks cannot receive a fair trial if defense attorneys have to take time to teach the tribunal.

"I'm not disparaging them," Dratel says. "But this process is not consistent with giving Mr. Hicks a full and fair trial if this is going to be a legal laboratory."

Solis says currently sitting military judges should have been selected for the tribunal. He says Brownback, who retired in 1999, has been away from the courtroom too long.

"Does a pilot, grounded for years, effortlessly slide back into the seat of a 747?" Solis says. "Well, neither does a military judge."