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New tribunal for detainees faces challenge

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GUANTANAMO BAY NAVAL BASE, Cuba Starting today, a revamped military tribunal will get another chance to see whether the Bush administration's controversial new system of trying foreign terrorism suspects can withstand a barrage of legal challenges.

Military lawyers appointed to represent four suspects charged with war crimes won the opening round of hearings in August by knocking the tribunal or commission, as the Pentagon calls it off-balance by questioning the impartiality of most of the panel's original six members. Pentagon officials hope that removing three of the panelists will allow the hearings to go forward.

"It is imperative that what happens at Guantanamo over the next two weeks has a greater appearance of fairness and, dare I say, smoothness than what we saw in August," says Scott Silliman, a law professor at Duke University in North Carolina. "We have got to show that we have our act together."

Otherwise, the former Air Force lawyer says, the U.S. government may never be able to convince other nations that it can bring terrorism suspects to justice outside U.S. courts.

The pressure to conduct the first U.S. military tribunals since World War II is on the three panelists, who are officers of the Army, Air Force and Marines, and only one of which is a lawyer.

They face complicated legal questions that have arisen since President Bush declared war on terrorism after the 9/11 attacks and decided that protections of the 1949 Geneva Conventions do not apply to the 550 foreigners who have been held here since they were captured in Afghanistan and elsewhere.

Among the questions:

Can the war with al-Qaeda be considered "an armed conflict" under international law? Defense attorneys say the United States can engage in armed conflict with another nation, but not a terrorist network. They say the administration has elevated al-Qaeda's status instead of prosecuting its members like common criminals in federal courts.

Does Bush have the power to single out foreigners for trial by tribunals? Prosecutors say a president is most powerful when at war and exercising his duties as commander in chief. They say the Constitution provides more rights to Americans than foreigners.

What is the legal definition of terrorism? Defense attorneys say there is no consensus. Prosecutors say the concept of terrorism has been around for decades.

The tribunal's presiding officer is Army Col. Peter Brownback, who came out of retirement to serve. But all three panelists act as judge and jury. Each has equal say in ruling on the law and facts.

A key test will be whether the members will agree to defense requests to hear testimony from experts in international law and the laws of war.

In seeking testimony by several law professors, attorneys for David Hicks, 29, of Australia and Salim Ahmed Hamdan, 34, of Yemen hope to show that the tribunals are a throwback to the 1940s that ignore advances in military and international law.

Hicks' lawyer also is seeking a postponement of his client's Dec. 7 trial. He wants to wait for the outcome of negotiations between U.S. and British officials over the fates of several British detainees.

It's unclear when hearings on legal arguments will be held for Ibrahim Ahmed Mahmoud Al Qosi, 43, an alleged al-Qaeda bookkeeper from Sudan, and Ali Hamza Ahmad Sulayman Al Bahlul, 36, an alleged al-Qaeda propagandist.

Hicks, a former ranch hand, is accused of conspiring with al-Qaeda to attack civilians; attempting to murder American, British and Australian soldiers; and aiding the enemy. Hamdan, who acknowledges that he was a driver for Osama bin Laden, is charged with conspiring with the terror network to attack civilians. Each faces up to life in prison if convicted.

Marine Maj. Michael Mori, who represents Hicks, says the tribunal needs a crash course in international law. Navy Lt. Cmdr. Charles Swift, who represents Hamdan, wants the tribunal to force prosecutors to call interrogators and translators to testify, instead of having them submit investigative reports as evidence.

Swift says Hamdan has a right to confront his accusers and to determine whether detainees were coerced or tortured into providing evidence for the prosecution.