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Politics & Economics: Tribunal Lawyers Trade Shots --- Guantanamo Commissions Are Plagued by Legal Infighting

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Guantanamo Bay, Cuba -- IN THE WEEKS AFTER the Sept. 11, 2001, terror attacks, President Bush conceived of military commissions as a way to provide swift and severe punishment to foreign terrorists.

But last week's proceedings here, four years after the first prisoners arrived, showed the commissions mired in legal infighting. At the same time, defense attorneys have waged a concerted assault on the system's legitimacy, ranging from the heavily secured hearing room here to the Supreme Court.

"You don't have to go to London to attend a theatrical production. We had that right here," chief prosecutor, Air Force Col. Moe Davis, said about defense tactics.

Col. Davis said critics of the process made "ethical allegations the way Saddam Hussein lobbed Scud missiles" -- an apparent reference to, among other things, claims by Clive Stafford Smith, a British attorney for defendant Binyam Mohamed, that Col. Davis improperly read privileged correspondence between him and his client. "If you can't beat the facts, you can't defeat the process, you attack the participants," Col. Davis said.

He then listed anti-American comments, pulled from Web sites, that he said were made by Mr. Stafford Smith, who obtained U.S. citizenship "because that was the only way he could keep his wife from being deported."

Mr. Stafford Smith, who was educated in the U.S. and spent decades there fighting the death penalty, called Col. Davis's comments "pathetic." "When people at Guantanamo say that we are the enemy, they really don't understand what America is all about," Mr. Stafford Smith said.

Ten Guantanamo detainees captured after the U.S. invasion to topple the Taliban stand accused of conspiracy to commit terrorism and, in some cases, of attacking civilians or soldiers. They are represented by both U.S. military attorneys and lawyers from universities, left-leaning activist groups and some major law firms.

Federal courts have enjoined commission proceedings against some defendants, and the legality of the system is under review by the Supreme Court, which is expected to rule in June. In pretrial hearings last week, attorneys for three defendants disputed Mr. Bush's Nov. 13, 2001, military order stating that commission defendants had no rights other than those he gave them and denying the prisoners access to state, federal, foreign or international courts.

Conflicting visions of the law came into focus at Wednesday's hearing for Omar Khadr, a Canadian teenager accused of throwing a grenade that killed a U.S. soldier. A defense lawyer argued that the commission should follow traditional legal practice, and a military prosecutor responded by trying to introduce a video he said showed the defendant taking part in a firefight, rendering him a military combatant for whom such conventional rules didn't apply.

Muneer Ahmad, an American University law professor helping to represent Mr. Khadr, invoked familiar legal doctrines to argue that regardless of President Bush's order, the government was bound to afford his client the protections of the Fifth Amendment's Due Process clause.

In parallel litigation involving Mr. Khadr's detention as an "enemy combatant" -- although not the specific war-crimes charges before the commission -- U.S. District Judge Joyce Hens Green found that a 2004 Supreme Court opinion extended the Due Process clause to Guantanamo. Mr. Ahmad said under normal legal practice, when a higher court has decided an issue involving the same parties and facts, the loser may not reargue the matter. Thus, he contended, the military commission was bound to grant those protections to Mr. Khadr.

The trial prosecutor, a Marine major whose name can't be disclosed under Pentagon rules, hadn't cited Judge Green's opinion in his brief. The prosecutor said he ignored the ruling because he considered it wrong and expected it to be overruled in the government's pending appeal.

"Alien enemy combatants have no rights under the Constitution," the prosecutor said, and tried to get the presiding officer, Marine Col. Robert Chester, to watch a video described as showing Mr. Khadr committing "law of war violations." Col. Chester declined to watch the video, saying it was irrelevant to the legal question at hand. He put off a ruling.

On Friday, Army Maj. Thomas Fleener, appointed to represent accused al Qaeda propagandist Ali Hamza Ahmed Suleiman al-Bahlul, invoked federal and international court decisions to attack a rule of the military commissions: that defendants must have a military lawyer, whether they want one or not. Defense Secretary Donald Rumsfeld and his aides, who approved the requirement, "messed this thing up," Maj. Fleener said.

Mr. Bahlul, a Yemeni, has said he is a member of al Qaeda and demanded the right to represent himself or employ a Yemeni attorney rather than a U.S. military officer, whom he considers an enemy. Maj. Fleener cited the Supreme Court's 1975 ruling that defendants had a right to decline counsel and said the late Slobodan Milosevic, facing genocide and other charges, was allowed to represent himself before the United Nations war-crimes tribunal.

Maj. Fleener said the military prosecutors agreed with his position. But the head of the commission system, retired Army Maj. Gen. John Altenburg, has denied such requests, he said. In 2005, Gen. Altenburg found self-representation "impracticable," because Guantanamo prisoners lack security clearances needed to review evidence, rarely have legal training and may not have a good command of English.