

Veritas, Not Vengeance: An Examination of the Evidentiary Rules for Military Commissions in the War Against Terrorism

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This nation's very honor, as well as its hopes for the future, is at stake. Either we conduct such a trial as this in the noble spirit and atmosphere of our Constitution or we abandon all pretense to justice, let the ages slip away and descend to the level of revengeful blood purges. Apparently the die has been cast in favor of the latter course. But I, for one, shall have no part in it, not even through silent acquiescence

[N]either clearer proof of guilt nor the acts of atrocity . . . could excuse the undue haste with which the trial was conducted or the promulgation of a directive containing such obviously unconstitutional provisions as those approving the use of coerced confessions or evidence and findings of prior mass trials. To try the petitioner in a setting of reason and calm, to issue and use constitutional directives and to obey the dictates of a fair trial are not impossible tasks. Hasty, revengeful action is not the American way.

—Justice Murphy, dissent in denial of certiorari in
Homma v. Patterson, 327 U.S. 759 (1946).

I. INTRODUCTION

The events of September 11, 2001, affected American society and the national consciousness in ways that have yet to be fully realized. In the aftermath of the attacks, President George W. Bush issued an executive order authorizing the use of military commissions in the War Against Terrorism.¹ President Bush created these alternative tribunals despite the

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¹ Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Presidential Military Order No. 1].

historically limited jurisdiction of military commissions. Military courts were traditionally regarded as courts of necessity, only to be convened temporarily by commanders in war zones during active military operations to try war crimes or to enforce justice in occupied territories where no other courts were open or had jurisdiction.² Prior to President Bush's decision to employ the military commissions, the Supreme Court had acknowledged that "the Framers harbored a deep distrust of executive military power and military tribunals,"³ and that "[f]ree countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."⁴ The Court held this ground in *Hamdan v. Rumsfeld*,⁵ where it found that President Bush's use of military commissions and their departures from traditional penal tribunals as prescribed by the Constitution had not been authorized expressly by any congressional act.⁶ It further found the military commissions' deviations from traditional procedures of military tribunals violative of the Uniform Code of Military Justice.⁷ The Court's 5 to 3 decision in *Hamdan*⁸ has been heralded as a "sweeping and categorical defeat" of the Bush administration's military commissions system.⁹ However, one aspect of the military commissions has not received sufficient attention: their prescribed evidentiary rules.¹⁰ Instead of adopting either

² 2 WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 831 (2d ed. 1920).

³ *Loving v. United States*, 517 U.S. 748, 760 (1996).

⁴ *United States ex rel. Toth v. Quarels*, 350 U.S. 11, 22 (1955).

⁵ 126 S. Ct. 2749 (2006).

⁶ *Id.* at 2772–75. Justice Stevens's decision for the majority pointed out that the Court's decision in *Ex parte Milligan*, 71 U.S. 2, 16 (1866), noted the necessity of congressional sanction of military tribunals established by the President "unless in cases of a controlling necessity;" and that neither the Authorization for Use of Military Force ("AUMF") nor the Detainee Treatment Act ("DTA") expanded the President's authority to establish military commissions. *Hamdan*, 126 S. Ct. at 2772–75.

⁷ *Id.* at 2786–93.

⁸ Justice Stevens delivered the opinion of the Court, joined by Justices Souter, Ginsburg, and Breyer. *Id.* at 2759. Justice Kennedy concurred with the majority in ruling that the establishment of the military commissions was illegitimate and that the commissions were in violation of both the Uniform Code of Military Justice and the Geneva Conventions, but declined to reach the issues of whether Common Article 3 required the accused to be present at all stages of trial, and whether Hamdan could be charged with conspiracy before the commission. *Id.* at 2799–809. Justices Scalia, Thomas, and Alito dissented. *Id.* at 2810. Chief Justice Roberts did not take part, as he was a member of the D.C. Circuit panel that had heard the case below. *Id.* at 2799.

⁹ Linda Greenhouse, *The Ruling on Tribunals: The Overview; Justices, 5-3, Broadly Reject Bush Plan to Try Detainees*, N.Y. TIMES, June 30, 2006, at A1.

¹⁰ For example, in the *Hamdan* decision itself, the majority opinion makes note of the adoption of a different evidentiary standard by the Executive: admissibility if the Presiding Officer believes that a particular piece of evidence "would have probative value to a reasonable person." *Hamdan*, 126 S. Ct. at 2807–08. However, in deciding that the President had not properly justified the deviations of the military commission procedures from those of courts-martial, the majority did not specifically address evidentiary standards, but instead spoke generally of the procedural distinctions. *See id.* at 2791–93 (discussing the insufficient showing by the Bush administration of the "impracticability" of applying court-martial procedural rules in this context to justify the procedural deviations of the

the Federal or Military Rules of Evidence—two parallel sets of rules that apply to federal district courts and courts-martial respectively¹¹—the President chose to resurrect a standard that has been viewed with disfavor in American jurisprudence since the conclusion of the Second World War: the admissibility benchmark of “probative value to a reasonable person.”¹²

The *Hamdan* Court’s decision sent a clear message that the executive branch may not adopt an aberrant set of procedures for military commissions without congressional approval. Central to the Court’s ruling was its determination that “[n]othing in the record . . . demonstrates that it would be impracticable to apply court-martial rules in this case.”¹³ In the wake of *Hamdan*, the Bush administration worked with Congress to craft a set of legislatively endorsed procedures for military commissions designed to try detainees. The resulting legislation, while providing for military commissions different in significant ways from those originally contemplated, adopts many of the Bush administration’s previously prescribed evidentiary rules. As a result, Congress and the President established rules for military commissions which deviate unnecessarily from traditional American rules of evidence.

The search for truth drives the rules of evidence governing judicial proof of guilt in penal systems. While accuracy in the search for truth is not the sole purpose of a set of evidentiary rules, truth rightfully is paramount among the competing values reflected in criminal jurisprudence and its evidentiary rules. As described by William Twining:

[T]here is undoubtedly a dominant underlying theory of evidence in adjudication, in which the central notions are truth, reason, and justice under the law. . . . [T]he primary end of adjudication is rectitude of decision, that is the correct application of rules of substantive law to facts that have been proved to an agreed standard of truth or probability. The pursuit of truth in adjudication must at times give way to other values and purposes, such as the preservation of state security or of family confidences; disagreements may arise as to what priority to give to rectitude of decision as a social value and to the nature and scope of certain competing values But the end of the enterprise is clear: the establishment of truth.¹⁴

military commissions vis-à-vis traditional judicial fora).

¹¹ The Military Rules of Evidence, applicable in military courts-martial, are for the most part based on the Federal Rules of Evidence. See James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 209 (2002).

¹² 32 C.F.R. § 9.6(d)(1) (2006).

¹³ *Hamdan*, 126 S. Ct. at 2792.

¹⁴ William Twining, *Evidence and Legal Theory*, 47 MOD. L. REV. 261, 272 (1984).

If the purpose of military commissions is to ensure that those who helped perpetrate an atrocious and despicable attack on American soil are brought to justice, the rules of evidence should play an essential truth-seeking role in ensuring that only those responsible are punished.

Much has been made of the other differences between military commissions and traditional criminal trials or courts-martial; the majority of these criticisms lie beyond the scope of this Article. However, evidentiary rules are “sensitive to shifts in prevailing ideology,” as changes in political climate influence “the way in which truth values are balanced against other values and needs of a procedural system.”¹⁵ Evidentiary rules embodying traditional values of criminal justice are hence particularly susceptible to sacrifice in the name of necessity and expediency. Although the Federal and Military Rules of Evidence are not without flaws, they are reliable and familiar and have evolved through common law and statutory adaptation. Thus, deviations from their use deserve examination.

The Bush administration has proffered a variety of rationales, all of which may be reasonable justifications, to support the use of different evidentiary rules to try terrorist suspects currently detained at Guantanamo Bay. Evidentiary rules are not necessarily rendered suspect when they differ from the rules which govern most American tribunals. However, when comparing such systems, one must identify those values that are collateral to the pursuit of truth in each. This allows for an assessment of whether alternative evidentiary procedures compromise their truth-seeking capacity needlessly, or instead do so to uphold those collateral values that are most prized.

Absent such an evaluation, we cannot know whether the proffered rationales for different rules of evidence truly justify differential treatment or are instead pretext for tipping the balance too far in favor of the government when adjudicating terrorism crimes. For example, Vice President Dick Cheney in the aftermath of the attacks described the purpose behind the military commissions as follows:

The basic proposition here is that somebody . . . who conducts a terrorist operation, killing thousands of innocent Americans—men, women, and children—is not a lawful combatant They don’t deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process. They will have a fair trial, but it will be under the procedures of a military tribunal, under rules and regulations to be established in connection with that. We think it’s the appropriate way

¹⁵ Mirjan Damaska, *Epistemology and Legal Regulation of Proof*, 2 LAW, PROBABILITY & RISK 117, 123 (2003).

to go. *We think it guarantees that we'll have the kind of treatment of these individuals that we believe they deserve.*¹⁶

The logical circularity of this statement is readily apparent. Affording individuals the kind of treatment that “we believe they deserve” presupposes certainty about their participation in terrorist operations. Suppositions about prior actions do not justify disparate treatment in proceedings designed to test those assumptions. Statements such as these, made by public officials in the wake of an enormous tragedy, do not alone render an alternative tribunal scheme for terrorism suspect. However, these remarks do suggest that appeals to emotion may override calls to reason in this context.

With this concern in mind, this Article compares the efficacy of the evidentiary rules adopted for use in trials of terrorism suspects to traditional criminal law procedures for both civilians in federal district court and military defendants before courts-martial. Part II reviews the origins of the regulations promulgated by President Bush and the Department of Defense to govern the military commissions and their procedures and describes the effects of the *Hamdan* decision on these rules. In addition, it provides a brief legislative overview of various bills that were introduced prior to the ultimate adoption of the Military Commissions Act of 2006 (“MCA”). Part III explains several notable distinctions between the military commissions’ evidentiary standards and those of the Federal and Military Rules of Evidence. In so doing, there are two caveats with regard to the conclusions drawn herein. First, the Military Commissions Act delegates the authority to prescribe many aspects of the rules of evidence for military commissions to the Secretary of Defense.¹⁷ As of the time at which this Article goes to press, the Pentagon has yet to establish a set of evidentiary rules for post-MCA military commissions. However, one can reasonably rely on the rules originally promulgated by the Department of Defense prior to the passage of the Act to draw inferences about what standards the Pentagon will implement pursuant to its discretion under the

¹⁶ Vice President Dick Cheney, Remarks to the U.S. Chamber of Commerce (Nov. 14, 2001) (transcript available in LEXIS, Federal News Service File) (emphasis added).

¹⁷ The MCA’s provisions for procedures and rules of evidence are found in Section 949a, entitled “Rules.” Military Commissions Act of 2006, 10 U.S.C.A. § 949a (2006). Section 949a(a) authorizes the Secretary of Defense, in consultation with the Attorney General, to prescribe the pretrial, trial, and post-trial procedures for the commissions. The procedures are to apply the principles of law and rules of evidence used in courts-martial to the extent that “the Secretary considers practicable or consistent with military or intelligence activities.” *Id.* § 949a(a). Section 949a(b) is divided into subsection 949a(b)(1), which lists provisions that “shall” be included in the procedures and rules of evidence of military commissions by congressional mandate, and subsection 949a(b)(2), which lists provisions the Secretary of Defense “may prescribe” if she so chooses. *Id.* § 949a(b). As discussed below, some of the rules of evidence that were originally promulgated by the Executive upon the establishment of the military commissions are found in subsection 949a(b)(2), which means Congress has now explicitly approved of its use through their passage of the MCA. *See infra* Part II.A.2.

MCA. Second, since no military commission has completed a trial in the four years since the commissions' establishment, this Part focuses on the rules themselves and how they might be used in practice. Part IV examines the justifications offered by the Bush administration and others to support using a distinct set of evidentiary rules and other procedures in military commissions to try terrorism suspects in lieu of those used in district courts and courts-martial. This Part aims to show that the evidentiary standards of military commissions and departures from the Federal and Military Rules of Evidence cannot be sufficiently justified by the rationales put forth by supporters of military commissions. Part V concludes.

II. THE ORIGINS OF MILITARY COMMISSIONS FOR DETAINEES, THEIR PROCEDURES, AND THEIR RULES OF EVIDENCE

A. *Presidential Rulemaking*

Before discussing how the military commissions' aberrant evidentiary standards may not be justified by their alleged rationales, it is worthwhile to take a look at the genesis of the military commissions and the origins of their procedural rules. Normally the Department of Defense, pursuant to the Uniform Code of Military Justice, adopts military justice procedures through an open and deliberative process, during which those with relevant interest and expertise may participate.¹⁸ Since the end of World War II, most major national-security initiatives have been implemented after extensive interagency debate. However, the post-September 11 sense of urgency led then-White House Counsel Alberto Gonzales to establish an interagency group to generate options for terrorist prosecutions just a week after the attacks.¹⁹ The White House rejected the interagency group's alternative suggestions of criminal trials, military courts-martial, and tribunals with mixed civilian and military composition—similar to those used at Nuremberg to try war criminals—and instead moved forward with military commissions.²⁰ The executive branch then proceeded without the notice-and-comment process usually followed by the Department of Defense.²¹ The original Defense Department regulations governing military commission procedures, “for the most part, [were] drafted behind closed doors, without any hearings or other input from scholars, legal

¹⁸ See U.S. DEP'T OF DEF., DIRECTIVE NO. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JCS) ON MILITARY JUSTICE (May 3, 2003), available at http://www.dtic.mil/whs/directives/corres/pdf/550017_050303/550017p.pdf; see also Judith Resnik, *Invading the Courts*, LEGAL TIMES, Jan. 14, 2002, available at <http://www.law.yale.edu/news/3339.htm>.

¹⁹ Tim Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1.

²⁰ *Id.*

²¹ See PHILIP B. HEYMANN & JULIETTE N. KAYYEM, PROTECTING LIBERTY IN AN AGE OF TERROR 55 (2005).

organizations, human rights groups, or others with relevant expertise or points of view . . . and [were] adopted with no congressional input.”²² The result was that the military commission “procedures and rules of evidence were decided *ex parte* and for the particular defendants and not on the basis of legislation, open administrative process or precedent.”²³ Presidential Military Order Number One and the Defense Department’s regulations, issued in 2002 and revised in 2005,²⁴ ensured that the military commissions’ procedures and appeal provisions “all depart[ed] sharply from the corresponding features of the court-martial system already in place to try our own service members, enemy prisoners, and those accused of violating the laws of war.”²⁵ Once the decision was made to use military commissions, “[w]hole agencies were left out of the discussion. So were most of the government’s experts in military and international law.”²⁶

The lack of interagency vetting and the haste with which these rules were adopted do not *per se* render them incapable of surviving scrutiny. However, the origins of the military commissions’ rules suggest that they were adopted without sufficient deliberation. It seems unlikely that truth-seeking and collateral values were weighed in a neutral or reflective manner when the commissions’ evidence rules were created, in light of the exclusion of different points of view from the crafting of the commissions. Decisionmakers weigh competing values against each other, and their determination of the relative importance of these values frames the procedures and the substantive framework of the trials themselves. As a result, the outcomes of these trials are likely to reflect the political considerations that contributed to their procedural design.

The federal criminal justice system and its structure reflect the relationship between values, procedures, and substance. Congress debates and passes substantive laws that detail elements of crimes, as well as procedures that govern civilian criminal trials. The executive branch prosecutes criminal suspects, and Article III courts adjudicate the trials, where politically insulated judges answer questions of law and members of the

²² SERRIN TURNER & STEPHEN J. SCHULHOFER, BRENNAN CTR. FOR JUSTICE, *THE SECRECY PROBLEM IN TERRORISM TRIALS* 55 (2005), available at <http://brennancenter.org/secrecyproblem.pdf>.

²³ HEYMANN & KAYYEM, *supra* note 21, at 55.

²⁴ The original regulations to govern military commissions were promulgated in 2002. See U.S. DEP’T OF DEF., *MILITARY COMMISSION ORDER NO. 1: PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM* (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> [hereinafter *MILITARY COMMISSION ORDER NO. 1 (2002)*] (the original Military Commission Order No. 1); see also 32 C.F.R. §§ 9.1–9.12 (2006) (“Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism,” as found in the Code of Federal Regulations). These were subsequently revised in August 2005. See U.S. DEP’T OF DEF., *MILITARY COMMISSION ORDER NO. 1 (Aug. 31, 2005)* [hereinafter *MILITARY COMMISSION ORDER NO. 1 (2005)*] (revised procedures), available at <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>.

²⁵ TURNER & SCHULHOFER, *supra* note 22, at 55–56.

²⁶ Golden, *supra* note 19, at 12.

public, in the form of a jury, make determinations about questions of fact. Although procedure and substance are determined by Congress, which is believed to be the best institutional representative of societal values, Article III courts may review both for constitutional integrity. The executive branch, which prosecutes the crimes, does not dictate the procedures followed in the courts and must operate within the constraints imposed by the other two branches.

In contrast to this balanced system, initially the executive branch alone designed the set of procedural protections, including evidentiary standards, which would be afforded to terrorism suspects. In addition, the executive branch defined the substantive crimes to be charged, rather than using pre-existing federal crimes found in the United States Code.²⁷ The result was an advancement of the Executive's agenda with little accounting for competing concerns. As Justice Souter noted in his opinion in *Hamdi v. Rumsfeld*:

In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.²⁸

Executive decisions to depart from traditional norms of adjudication should be evaluated with caution. These decisions, for the most part, function to aggrandize executive control, without statutory regulation by the Congress and absent independent Article III control. The *Hamdan* Court clearly recognized this problem in the Bush administration's establishment of military commissions.

B. Implications of Hamdan v. Rumsfeld

Hamdan put a halt to the Executive's monopoly on dictating the rules by which detainees would be tried. According to the Court, Article 36 of the Uniform Code of Military Justice ("UCMJ") functioned as a legislative restriction on the President's capacity to promulgate procedural rules for both courts-martial and military commissions in two ways. First, pro-

²⁷ See Crimes and Elements for Trials by Military Commission, 32 C.F.R. § 11 (2006).

²⁸ 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

cedural rules must not be “contrary to or inconsistent with” the UCMJ, “however practical [they] may seem.”²⁹ Second, rules applied to military commissions must be identical to those applied to courts-martial “unless such uniformity proves impracticable.”³⁰ The Court concluded that the “‘practicability’ determination the President has made is insufficient to justify variances from the procedures governing courts-martial.”³¹ The Court acknowledged that under Article 36(a) of the UCMJ, the President was to be afforded “complete deference” in his determination that it was “impracticable to apply the rules and principles of law that govern ‘the trial of criminal cases in the United States district courts’”³² However, the Court determined that the President had not “made a similar official determination that is impracticable to apply the rules for courts-martial”³³ to military commissions pursuant to Article 36(b), which requires that rules applied in courts-martial, provost courts, and military commissions be “uniform insofar as practical,” irrespective of whether they differ from Article III courts.³⁴ Further, even if such an official determination was not required to meet the standards under subsection (b), the Court found that the President had not sufficiently justified the military commissions’ departures from the rules of courts-martial.³⁵ At best, the President’s only proffered reason was the “danger posed by international terrorism,” the same justification used to explain why federal courts could be not used to try suspects. However, the Court concluded, “[w]ithout for one moment underestimating that danger, it is not evident to us why it should require . . . any variance from the rules that govern courts-martial.”³⁶

The cabining of executive discretion through the Court’s interpretation of Article 36 ensured that there would be legislative input in the military commissions’ procedures. In the words of Justice Kennedy’s concurrence:

Congress’ chosen language [in Article 36] . . . is best understood to allow the selection of procedures based on logistical constraints, the accommodation of witnesses, the security of the proceedings,

²⁹ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2790 (2006) (interpreting Article 36 of the Uniform Code of Military Justice).

³⁰ *Id.*

³¹ *Id.* at 2791.

³² *Id.* (citing 10 U.S.C. § 836(a) (2000) (requiring that the rules the President promulgates for courts-martial, provost courts, and military commissions conform with Article III courts “so far as *he* considers practical”) (emphasis added)).

³³ *Id.*

³⁴ Uniform Code of Military Justice § 36(b), 10 U.S.C. § 836(b) (2000).

³⁵ *Id.* at 2791–92 (“Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case.”); *see also id.* at 2791 n.51 (noting that such a presidential determination would be entitled to some deference, and agreeing with Justice Kennedy’s assessment that the President’s determination of the impracticality of the military commissions’ procedural conformity with the rules for courts-martial would be accorded less deference than such a determination with regard to federal courts).

³⁶ *Id.* at 2792.

and the like. Insofar as the “[p]retrial, trial, and post-trial procedures” for the military commissions at issue deviate from court-martial practice, the deviations must be explained by some such practical need.³⁷

In this framework, the Executive may only establish military commission procedures distinct from those of traditional courts-martial without legislative approval when it identifies the pragmatic reasons motivating the adoption of the alternative procedure. However, the *Hamdan* decision did not preclude the adoption of these alternative evidentiary rules for military commissions so long as Congress had approved them. As Justice Breyer explained in his concurrence, “[t]he Court’s conclusion ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check’ Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”³⁸

The requirement of legislative approval provides a degree of legislative oversight in the adoption of rules, which is preferable to exclusive executive decisionmaking because “[t]he Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.”³⁹ However, this benefit can only be realized if Congress carefully scrutinizes each deviation from standard procedure, particularly those regarding evidentiary rules.

In the wake of the *Hamdan* decision, the executive branch began to work with Congress to implement procedures with legislative approval. On September 7, 2006, the Bush administration transmitted a proposed version of the Military Commissions Act of 2006, noting that the procedures contained in the draft legislation “reflect[ed] the result of an extended deliberation both within the executive branch and between representatives of [the Bush] Administration and Members of Congress.”⁴⁰ Senate Republicans met the proposal with opposition.⁴¹ Senators John Warner, John McCain, and Lindsey Graham of the Armed Services Committee crafted a separate version of the bill, which required military commissions to function more like regular courts-martial, barred convictions on the basis of classified materials the accused would not be able to see, and featured stronger prohibitions against the use of coerced testimony.⁴² The

³⁷ *Id.* at 2801 (Kennedy, J., concurring).

³⁸ *Id.* at 2799 (Breyer, J., concurring).

³⁹ *Id.* (Kennedy, J., concurring).

⁴⁰ Proposed Legislation: Military Commissions Act of 2006, Message from The President of the United States transmitting A Draft of Proposed Legislation Entitled the “Military Commissions Act of 2006,” 109 H.R. Doc. No. 133 (2006). The text of the Bush proposal is available at <http://www.law.georgetown.edu/faculty/nkk/documents/MilitaryCommissions.pdf> (last visited Oct. 22, 2006).

⁴¹ Kate Zernike, *Lawyers and G.O.P. Chiefs Resist Proposal on Tribunal*, N.Y. TIMES, Sept. 8, 2006, at A1.

⁴² See Editorial, *A Solution for Trials: Senators Have the Makings of a Fine Bill on*

Senate Armed Services Committee voted 15 to 9 to send this version of the bill to the full Senate.⁴³ This resulted in a standoff⁴⁴ and negotiations between the Senate and the Bush administration.⁴⁵ While the Senate and administrative officials struggled to arrive at an acceptable compromise, the House Armed Services Committee voted to ratify the White House's version of the bill.⁴⁶ The final version of the MCA was passed by the Senate on September 29, 2006,⁴⁷ and signed into law by President Bush on October 17, 2006.⁴⁸

II. DIFFERENCES IN PROCEDURE: MILITARY COMMISSIONS IN LIEU OF CRIMINAL TRIALS OR COURTS-MARTIAL

This Part will highlight several of the structural and procedural differences between traditional tribunals, the original military commission plan as promulgated by the Bush administration, and the military commissions ultimately structured by the MCA, as well as their potential impact of these differences on military commission trials. Departing from traditional criminal trials and military courts-martial affords the executive branch increased flexibility to prosecute suspected enemy combatants. However, this move may also undermine the capacity of the military commissions to ascertain the truth of whether the detainees indeed committed the atrocities of which they are accused.

Military Commissions—if they Have the Backbone to Stick with it, WASH. POST, Sept. 9, 2006, at A16.

⁴³ See Charles Babington & Jonathan Weisman, *Senators Defy Bush on Terror Measure: Panel Backs Rival Bill on Interrogations*, WASH. POST, Sept. 15, 2006, at A1; Holly Manges Jones, *Senate Committee Approves Military Commissions Bill Over Bush Objections*, JURIST, Sept. 15, 2006, available at <http://jurist.law.pitt.edu/paperchase/2006/09/senate-committee-approves-military.php>. The text of the Senate Armed Forces Committee bill is available at <http://natseclaw.typepad.com/natseclaw/files/WarnerMcCainGrahamFINAL.pdf> (last visited Oct. 22, 2006).

⁴⁴ See Peter Baker, *GOP Infighting on Detainees Intensifies: Bush Threatens to Halt CIA Program if Congress Passes Rival Proposal*, WASH. POST, Sept. 16, 2006, at A1; Jonathan Weisman, *Battle Over Tribunals Could Ruin GOP Strategy: Bush-McCain Standoff Upstages Electoral Fight*, WASH. POST, Sept. 17, 2006, at A1.

⁴⁵ See Charles Babington and Jonathan Weisman, *Dissidents' Detainee Bill May Face Filibuster: Frist Warns GOP Opponents of Bush's Proposal They Must Accept Two Key Provisions*, WASH. POST, Sept. 20, 2006, at A4; Adam Liptak, *Detainee Deal Comes with Contradictions*, N.Y. TIMES, Sept. 23, 2006, at A1; R. Jeffrey Smith, *White House Gains Concessions in Senate Measure on Tribunals*, WASH. POST, Sept. 12, 2006, at A17; Kate Zernike, *Crucial Senator Says a Few Problems Remain in Bill on Terror Tribunals*, N.Y. TIMES, Sept. 9, 2006, at A10.

⁴⁶ Jonathan Weisman, *GOP Leaders Back Bush on Wiretapping, Tribunals*, WASH. POST, Sept. 14, 2006, at A13.

⁴⁷ Kate Zernike, *Senate Approves Broad New Rules to Try Detainees*, N.Y. TIMES, Sept. 29, 2006, at A1.

⁴⁸ Press Release, White House, *President Bush Signs Military Commissions Act of 2006* (Oct. 17, 2006), available at <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html>.

*A. The Unique Military Commission Structure**1. Traditional Criminal Trials and Courts-Martial*

“The right to trial by jury in criminal cases, enshrined in Article III and the Sixth Amendment, is one of the most revered civil liberties guaranteed by the United States Constitution.”⁴⁹ Federal civilian criminal trials are usually conducted before a jury of twelve individuals⁵⁰ and an Article III judge. In comparison, courts-martial are the traditional form of American military court, and “their procedures are comprehensively regulated by statute.”⁵¹ The historical purpose of courts-martial was to accommodate the military’s need to enforce strict discipline amongst its soldiers.⁵² After World War II and accusations of excessive procedural severity, Congress passed the UCMJ to overhaul the courts-martial and bring military justice in line with civilian procedures.⁵³ As one military judge has noted, the UCMJ is based on the “precept that military effectiveness depends on justice and that, by and large, civilian forms and principles are necessary to ensure justice” in military trials.⁵⁴

Structurally, courts-martial resemble civilian criminal trials and are constituted by a military judge and court-martial “members,” who are members of the armed services either equal or senior to the defendant in rank or grade.⁵⁵ The military judges in courts-martial function in ways similar to civilian judges, ruling on all questions of law over the course of trial, including admissibility of evidence.⁵⁶ The military judge is a commissioned officer designated by the Judge Advocate General of the relevant branch of the armed forces; however, Article 26 of the UCMJ ensures that military judges retain independence from the chain of command that has convened a trial.⁵⁷ Much like her civilian counterpart, a military judge may not consult with the other members of the court except in the pres-

⁴⁹ RONALD J. ALLEN, JOSEPH L. HOFFMAN, DEBRA A. LIVINGSTON & WILLIAM J. STUNTZ, *COMPREHENSIVE CRIMINAL PROCEDURE* 1311 (2d. ed 2005); *see also* U.S. CONST. art. III, § 2 (“[T]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the state where the said Crimes shall have been committed.”); U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.”).

⁵⁰ *See* FED. R. CRIM. P. 23(b)(1).

⁵¹ TURNER & SCHULHOFER, *supra* note 22, at 49.

⁵² *See supra* note 4 and accompanying text.

⁵³ TURNER & SCHULHOFER, *supra* note 22, at 50; *see also* Uniform Code of Military Justice §§ 1–146, 10 U.S.C. §§ 801–946 (2000).

⁵⁴ John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 8–9 (1998).

⁵⁵ 10 U.S.C. § 825(d)(1).

⁵⁶ *See id.* § 851(b).

⁵⁷ *Id.* § 826(c).

ence of the accused, trial counsel, and defense counsel, nor does she vote with the court.⁵⁸

While a federal criminal trial requires twelve jurors,⁵⁹ the number of members on a court-martial may be no less than twelve in capital cases and no less than five for non-capital charges.⁶⁰ Much like their civilian counterparts, however, members of the court-martial act as a jury, deciding the facts of the case and determining the defendant's guilt or innocence.⁶¹ Still, the members are not as independent as their civilian counterparts because they are picked by the "convening authority"—the individual bringing charges against a particular defendant.⁶² The defendant has the right to challenge members for cause as well as the right to one peremptory challenge.⁶³ In addition, there are provisions for appellate review entirely outside of the chain of command in the Court of Appeals for the Armed Forces; this court is staffed by five civilian judges whose fifteen-year terms provide a degree of insulation from political pressure.⁶⁴ In serious cases before a court-martial, a three-fourths vote is required for conviction and sentencing.⁶⁵ Capital cases before a court-martial require a unanimous vote by the twelve members.⁶⁶

2. *Military Commissions*

Unlike courts-martial and civilian criminal trials by jury, the Bush administration's original plan for military commissions did not allow judges to make independent decisions about the admissibility of evidence. Evidence was to be admissible if it had probative value to a reasonable person either: (1) in the opinion of the Presiding Officer, or (2) in the opinion of the majority of the commission, if any of the members of the commission requested to have the commission make the determination in lieu of relying upon the view of the Presiding Officer.⁶⁷ In addition, military commission members, including the Presiding Officer, were to determine cooperatively all legal questions as well as all issues of fact.⁶⁸ Furthermore,

⁵⁸ *Id.* § 826(e).

⁵⁹ FED. R. CRIM. P. 23(b)(1).

⁶⁰ 10 U.S.C. §§ 816(1)(A), 825(a).

⁶¹ *Id.* § 851(a).

⁶² *Id.* § 825(d)(2).

⁶³ *Id.* § 841(a)(1), (b)(1).

⁶⁴ *Id.* §§ 941–942(a), (b)(2). Defendants have an automatic right to appeal to an intermediate appellate court staffed by military judges. The Court of Appeals for the Armed Forces is required to review any capital case and any case whose review is requested by the prosecution. Review as a result of a defendant's request is discretionary. *Id.*

⁶⁵ *Id.* § 852(a)(2), (b)(2).

⁶⁶ *Id.* § 852(a)(1).

⁶⁷ See Presidential Military Order No. 1, *supra* note 1, § 4(c)(3); MILITARY COMMISSION ORDER NO. 1 (2002), *supra* note 24, § 6(D)(1).

⁶⁸ See Presidential Military Order No. 1, *supra* note 1, § 4(c)(2) (military commissions as a whole shall sit "as triers of both facts and law").

the Presiding Officer would have been the only member of the military commission required to be a lawyer.⁶⁹ Thus, despite the novelty of the proceedings before the military commissions, all new issues of law were to be determined by a body with only one member who was guaranteed to have any legal training.

President Bush's original system was thus distinct in its evidentiary rules in that it eschewed the protections of epistemic paternalism that commentators say characterize our traditional evidentiary rules.⁷⁰ As Allen and Leiter explain:

[E]pistemic paternalism entails designing rules of evidence that are epistemically best for jurors, i.e., that lead them to form true beliefs about disputed matters of fact. Doing so requires, of course, taking into account *both* the epistemic frailties of jurors, *and* the epistemic limits of the rule-appliers [the "gatekeepers"], namely judges.⁷¹

Since the original military commission procedures would have allowed commission members to overrule the evidentiary determinations of the Presiding Officer, the only legally trained individual on the military commission, they did not create a system where epistemic paternalism might work to induce more accurate factfinding. In recognition of the serious questions concerning the competence of commissioners to rule on matters of law that affect both the procedural and substantive fairness of the proceedings, the provisions were later changed to require the Presiding Officer to rule on all questions of law so as to mirror more closely the division of labor between a judge and jury.⁷² However, the revised regulations maintained the capacity for military commission members to override a Presiding Officer's determinations as to the admissibility of evidence.⁷³

The MCA structures proceedings to more closely conform to court-martial, requiring military judges, as opposed to Presiding Officers, to oversee the commissions. Under the new law, military judges must be commissioned officers who are qualified to serve as military judges under

⁶⁹ MILITARY COMMISSION ORDER NO. 1 (2002), *supra* note 24, §§ 4(A)(3)–(4) (qualifications for military commission officers include that member be commissioned officer of armed forces, whereas presiding officers are to be judge advocates).

⁷⁰ Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1502 (2001) (citing Brian Leiter, *The Epistemology of Admissibility: Why Even Good Philosophy of Science Would Not Make for Good Philosophy of Evidence*, 1997 BYU L. REV. 803, 914–15).

⁷¹ *Id.* (second emphasis added).

⁷² See U.S. DEP'T OF DEF., CHANGES TO MILITARY COMMISSION PROCEDURES (2005), available at <http://www.dod.mil/news/Aug2005/d20050831fact.pdf>; MILITARY COMMISSION ORDER NO. 1 (2005), *supra* note 24, § 4(A)(5)(a).

⁷³ See MILITARY COMMISSION ORDER NO. 1 (2005), *supra* note 24, §§ 4(A)(5), 6(D)(1).

the general rules of courts-martial.⁷⁴ These judges are to resolve all questions of law, including those relating to admissibility of evidence.⁷⁵ The military judge is not allowed to vote with members of the commission, further conforming the judge's role to that of jurists presiding over traditional criminal trials and military courts-martial.⁷⁶

President Bush's original regulations did not allow for trial by civilian jury. Under the administration's original plan, three to seven commissioned officers of the United States military, all appointed directly by the Secretary of Defense or the Appointing Authority, would have determined questions of guilt.⁷⁷ Conviction by military commission could have occurred with a two-thirds vote,⁷⁸ although a capital sentence would have required seven members and unanimity.⁷⁹ The burden of proof beyond a reasonable doubt and the presumption of innocence applied to military commissions; however, the lower voting threshold for conviction mitigated the efficacy of these traditional procedural safeguards against wrongful conviction. Since, under the original regulations, commissions could have consisted of as few as three members, and convictions and sentences would be rendered by only a two-thirds vote, "the government need[ed] only [to] be able to persuade two persons hand-picked by the Secretary of Defense in order to prevail."⁸⁰

The MCA allows the Secretary of Defense or any officer designated by the Secretary to convene a military commission, and any commissioned officer of the armed forces is eligible to serve as a military commissioner.⁸¹ The Act increases the minimum number of jurors required from three to five.⁸² The two-thirds concurrence for conviction, however, remains.⁸³ For death-qualifying offenses, twelve commissioners are required for a conviction,⁸⁴ and all of them must concur in a sentence of death before it may be imposed.⁸⁵ Although these are slight improvements upon the original form of military commissions, the fundamental concerns about the small number of commissioners and non-unanimity of verdicts remain.

⁷⁴ Military Commissions Act of 2006, 10 U.S.C.A. § 948j(b) (2006).

⁷⁵ *Id.* § 949l(b).

⁷⁶ *See id.* § 948j(d).

⁷⁷ 32 C.F.R. §§ 9.2, 9.4.

⁷⁸ *Id.* § 9.6(f).

⁷⁹ *Id.* § 9.6(f)-(g).

⁸⁰ TURNER & SCHULHOFER, *supra* note 22, at 58.

⁸¹ 10 U.S.C.A. §§ 948h-948i.

⁸² *Id.* § 948m(a)(1).

⁸³ *Id.* § 949m(a).

⁸⁴ *Id.* § 949m(c).

⁸⁵ *Id.* § 949m(b)(2).

B. “*Probative Value to a Reasonable Person*”

The most startling difference between traditional evidentiary rules and military commission procedures is the standard for admissibility of evidence. The original regulations stated that:

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission) the evidence would have *probative value* to a *reasonable person*.⁸⁶

Aside from this blanket standard of “probative value” as the only prerequisite for admissibility, the original regulations established a lax standard for admissibility with regard to specific types of evidence. Commissioners were to consider a broad spectrum of witness testimony⁸⁷ and “other evidence,” such as testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, and scientific or other reports.⁸⁸ At times the regulations specified that the commission should consider potential infirmities with the evidence when it weighed evidence during deliberation. For example, testimony from any witness would be received “if found to be admissible and not cumulative,” and could be delivered via “telephone, audiovisual means, or other means,” although the regulations noted that the commission “shall consider the ability to test the veracity of that testimony in evaluating the weight” of said evidence.⁸⁹ In addition, witness testimony need not be given under oath or affirmation, as long as the commission considered the refusal of a witness to “swear an oath or give an affirmation in evaluating the weight to be given to the testimony”⁹⁰ However, this instruction was only stipulated for witness-based evidence, and not for the “other evidence” referred to in section 9.6(d)(3), such as prior testimony, written statements, physical evidence, and reports.⁹¹

The MCA, at first glance, seems to conform with the UCMJ in that it allows for the Secretary of Defense to promulgate procedural rules which, so far as the Secretary considers practicable or consistent with military or intelligence activities, shall apply the principles of law and the rules of evidence in trial by general courts-martial.⁹² Thus, it uses the Military

⁸⁶ 32 C.F.R. § 9.6(d)(1) (2006) (emphasis added).

⁸⁷ *Id.* § 9.6(d)(2).

⁸⁸ *Id.* § 9.6(d)(3).

⁸⁹ *Id.* § 9.6(d)(2)(i).

⁹⁰ *Id.* § 9.6(d)(2)(ii).

⁹¹ Compare *id.* § 9.6(d)(2) with *id.* § 9.6(d)(3).

⁹² Military Commissions Act of 2006, 10 U.S.C.A. § 949a(a) (2006).

Rules of Evidence as an explicit referent, as did the UCMJ before it.⁹³ However, the Act also prescribes a list of provisions which “the Secretary of Defense may prescribe,” including the rule that “[e]vidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person.”⁹⁴ Given that this was the admissibility standard originally promulgated by the Executive, and it is now officially sanctioned by Congress, it seems likely that the Secretary of Defense will continue to use this standard in military commissions.

C. Security Concerns

The original regulations instituted a plethora of measures to protect the security interests of individuals participating in the trial as well as the intelligence gathered in the broader war on terror. The Presiding Officer was to “consider the safety of witnesses and others, as well as the safeguarding of Protected Information . . . in determining the appropriate method of receiving testimony and evidence.”⁹⁵ To further these efforts, the Presiding Officer was authorized to hear “any presentation by the Prosecution or the Defense, including an *ex parte*, *in camera* presentation, regarding the safety of potential witnesses before determining the ways in which witnesses and evidence will be protected,” and could “authorize any methods appropriate for the protections of witnesses and evidence,” including but not limited to “testimony by telephone, audiovisual means, or other electronic means; closure of proceedings; introduction of prepared declassified summaries of evidence; and use of pseudonyms.”⁹⁶ In addition, the Presiding Officer could issue “protective orders as necessary to carry out the Military Order . . . including to safeguard ‘Protected Information,’” which included: classified information; information protected by law or rule from unauthorized disclosure; information whose disclosure may endanger the physical safety of participants in commission proceedings; information concerning intelligence and law enforcement sources, methods or activities; and information “concerning other national security interests.”⁹⁷ The Presiding Officer could choose to limit the disclosure of certain items by, for example, deleting Protected Information from documents and substituting summaries and other similarly redacted documents for originals.⁹⁸ Likewise, the Presiding Officer could choose to close proceedings to the public to protect security interests.⁹⁹ The regulations placed primary emphasis on protecting state secrets, noting that

⁹³ See *supra* notes 29–36 and accompanying text.

⁹⁴ 10 U.S.C.A. § 949a(b)(2).

⁹⁵ 32 C.F.R. § 9.6(d)(2)(iv).

⁹⁶ *Id.*

⁹⁷ *Id.* § 9.6(d)(5)(i).

⁹⁸ *Id.* § 9.6(d)(5)(ii).

⁹⁹ *Id.* §§ 9.6(b)(3), 9.6(d)(5)(iii).

“[n]othing in this part shall be construed to authorize disclosure of state secrets to any person not authorized to receive them.”¹⁰⁰ The original regulations thus explicitly placed the value of secrecy above the truth-seeking function in the context of evidentiary rules.

The MCA continues the emphasis on secrecy in its protection of classified information, by stating that “[c]lassified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security.”¹⁰¹ The Act mandates that military judges, to the extent possible, protect classified information through a series of actions, including the deletion of specified items of classified information from documents that are to be made available to the accused, and the substitution of redacted, summarized, or admitted relevant facts in documents in lieu of classified information.¹⁰² In addition, military judges are to authorize trial counsel, upon motion, to protect disclosure of sources, methods, or activities by which the government acquired evidence if these constitute classified information.¹⁰³ Accordingly, even when the origin of a piece of evidence directly implicates its truth-seeking value, defense counsel may be barred from knowing how the evidence was elicited, thus placing secrecy above truth in the rules of evidence.

D. Distinction in the Structure of Evidence Rules

In the federal system, the Federal Rules of Evidence embody the law’s epistemology, or “the set of rules and institutions that determine what, from a legal point of view, can be believed with sufficient justification for the purposes of the legal system.”¹⁰⁴ The Federal Rules of Evidence have been described as reflecting four major tenets: relevance, admissibility, weight, and sufficiency of evidence.¹⁰⁵ These four tenets help highlight how evidence serves a purpose in the federal system of justice different from that in the military commissions. As an overarching theme, Rule 102 of both the Federal and Military Rules of Evidence notes that the rules “shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”¹⁰⁶ Thus, the rules themselves explicitly specify the hierarchy of competing evidentiary values; “truth” ascertainment from just proceedings sits at the apex of the various goals of

¹⁰⁰ *Id.* § 9.9.

¹⁰¹ Military Commissions Act of 2006, 10 U.S.C.A. § 949d(f)(1) (2006).

¹⁰² *Id.* § 949j(c)(1).

¹⁰³ *Id.* § 949j(c)(2).

¹⁰⁴ Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 *YALE L.J.* 1535, 1540–41 (1998).

¹⁰⁵ *Id.* at 1542.

¹⁰⁶ *FED. R. EVID.* 102; *MIL. R. EVID.* 102.

evidentiary systems. This presumably is a reflection of the belief, expressed by Professor Susan Haack, that “justice requires not only just laws, and just administration of those laws, but also factual truth—objective factual truth; and that in consequence the very possibility of a just legal system requires that there be objective indications of truth, i.e., objective standards of better or worse evidence.”¹⁰⁷

Such a holistic theme did not, however, govern the commissions’ rules of evidence as originally constituted. The closest the original Department of Defense regulations came to such a sentiment is the principle that all of the specified procedures governing military commissions “shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission, as required by the President’s Military Order.”¹⁰⁸ Thus, unlike Federal Rule 102’s explicit and specific reference to the collateral goals to be considered when applying the rules of evidence, there were no such overarching referents in the case of pre-MCA military commissions; the commissions had only a general aspiration for procedural fairness as guidance. Whether the regulations to be implemented by the Secretary of Defense pursuant to the MCA will include such an overarching theme remains to be seen.

1. Rules Governing Admissibility and Relevance

The Federal and Military Rules of Evidence regulate admissibility through a requirement of relevance, governed by Rules 401, 402, and 403.¹⁰⁹ Scott Brewer has described relevant evidence under the federal rules as consisting of two main types: logically relevant evidence—evidence that has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”;¹¹⁰ and pragmatically relevant evidence—evidence whose probative value is not “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”¹¹¹ The Federal and Military Rules of Evidence incorporate these two concepts into their standards for admissibility of evidence by making both logical relevance and pragmatic relevance prerequisites to admissibility; thus, evidence may be excluded even if it is logically relevant.

Admissibility of evidence considered by a military commission under the original procedures, on the other hand, was to be governed by a

¹⁰⁷ Susan Haack, *Epistemology Legalized: Or, Truth, Justice, and The American Way*, 49 AM. J. JURIS. 43, 43 (2004).

¹⁰⁸ 32 C.F.R. § 9.1 (2006).

¹⁰⁹ See FED. R. EVID. 401–403; MIL. R. EVID. 401–403.

¹¹⁰ Brewer, *supra* note 104, at 1544 (quoting FED. R. EVID. 401).

¹¹¹ *Id.* (quoting FED. R. EVID. 403).

different standard entirely. Unlike the necessary prerequisites of both logical and pragmatic relevance under the federal rules, the original standard for admissibility was “probative value to the reasonable person.”¹¹² “Probative value” is not modified in any particular way, which suggests it is likely to be a low standard, similar to that of logical relevance; any evidence which may “tend[] to prove or disprove”¹¹³ the proposition for which it is used would most likely have been admissible. Thus the military commissions’ rules, as originally written, would have allowed for logically relevant evidence to be considered by factfinders; however, they lacked any rule to exclude evidence not deemed pragmatically relevant. Under the MCA, this standard for admissibility is likely to be preserved.¹¹⁴ However, among the list of possible provisions the Secretary of Defense “may prescribe” is a provision that “the military judge shall exclude any evidence the probative value of which is substantially outweighed—(i) by the danger of unfair prejudice, confusion of the issues, or misleading the commission; or (ii) by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”¹¹⁵ This text mirrors that of Rule 403 of both the Federal and Military Rules of Evidence, which work to exclude evidence deemed pragmatically irrelevant from trial.¹¹⁶

Whether the Secretary of Defense decides to promulgate a rule to exclude pragmatically irrelevant evidence is critical. An evidentiary system lacking evidentiary exclusion appeals to “the epistemological desideratum of completeness,”¹¹⁷ which is in some tension with the values espoused in the current federal and military systems. As Bentham expressed in his treatise, for “[t]he theorem to be proved . . . merely with a view to rectitude of decision, . . . no species of evidence whatsoever . . . ought to be excluded.”¹¹⁸ However, probative value depends upon both the correctness and completeness of the set of evidence at hand. Admitting evidence that has probative force individually but omits some essential point may be misleading. Accordingly, it is unclear that the elimination of all exclusionary rules in pursuit of the elusive goal of completeness of evidence is prudent. As Professor Haack notes, it does not necessarily follow that more evidence is always preferable to less, because “additional-but-still-incomplete evidence *may* lead us in the wrong direction, while the previously available even-more-incomplete evidence would have led

¹¹² 32 C.F.R. § 9.6(d)(1) (2006).

¹¹³ BLACK’S LAW DICTIONARY 1240 (8th ed. 2004) (defining “probative”).

¹¹⁴ See *supra* note 94 and accompanying text.

¹¹⁵ Military Commissions Act of 2006, 10 U.S.C.A. § 949a(b)(2)(F) (2006).

¹¹⁶ Compare *id.*, with FED. R. EVID. 403, and MIL. R. EVID. 403.

¹¹⁷ Haack, *supra* note 107, at 56.

¹¹⁸ JEREMY BENTHAM, 1 RATIONALE OF JUDICIAL EVIDENCE 1 (Garland Publishing, Inc. 1978) (1827); see also JEREMY BENTHAM, 4 RATIONALE OF JUDICIAL EVIDENCE 490 (Garland Publishing, Inc. 1978) (1827) (“Evidence is the basis of justice: to exclude evidence, is to exclude justice.”).

us in the right direction.”¹¹⁹ Bentham’s argument for inclusiveness presupposes that advocates in an adversarial system would self-regulate to do a “decent job of seeking out relevant evidence and of revealing the flaws in the dubious stuff admitted along with everything else”;¹²⁰ however, in practice, this may not be possible given our limited cognitive resources.¹²¹ Indeed, as Craig Callen suggests, low standards of minimal relevancy for admissibility may be problematic as “[t]here is a significant risk that jurors,” or, in this case, military commissioners, “will understand admission of evidence to reflect a judicial opinion that the evidence is worthwhile, which may cause [them] to alter their opinion of the value of the evidence or their understanding of applicable law.”¹²² As a result, admission of evidence by a minimal probative value standard “does not simply waste time, or make sorting through evidence more difficult for jurors Instead, to the extent that trial courts admit evidence that is not worthwhile, jurors rationally relying on strategies from everyday life may be misled, resulting in inaccurate judgments of fact or law.”¹²³

At the outset, there will be no precedent that military commission judges might follow when applying the reasonable person standard to probative value. This makes the use of “reasonable person” as the benchmark somewhat problematic, since unlike the various other contexts in which the term is used,¹²⁴ there will be no similar background to help determine what a reasonable person might find probative.¹²⁵ In addition, the individuals chosen to apply the standard circumscribe the scope of what is “reasonable”; this renders the definition both subjective and unstable in meaning. Consensus over what would be “probative” to a “reasonable person” may not form. As Thomas Nagel has elucidated, “reasonable persons

¹¹⁹ Haack, *supra* note 107, at 58 (emphasis added).

¹²⁰ *Id.* at 61.

¹²¹ See, e.g., Craig R. Callen, *Rationality and Relevancy: Conditional Relevancy and Constrained Resources*, 2003 MICH. ST. L. REV. 1243, 1244, 1259–66 (2003); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1523–24 (1999) (noting that there are two types of costs in a factfinder’s assessment of evidence, in addition to waste of time and material resources: (1) “emotionality,” “cognitive illusions and emotional distractions, the domain of irrational thinking”; and (2) “cognitive overload,” or “confusion”).

¹²² Callen, *supra* note 121, at 1278.

¹²³ *Id.*

¹²⁴ See, e.g., BLACK’S LAW DICTIONARY 1294 (8th ed. 2004) (defining “reasonable person” as “[a] hypothetical person used as a legal standard . . . who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and others’ interests”).

¹²⁵ Others have discussed the problems with the use of “reasonableness” as a standard. See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1415 (tentative ed. 1958) (“[The court] should assume . . . that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”); Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, SOC. PHIL. & POL’Y, Spring 1990, at 84, 85 (“The concept of the [reasonable person] . . . is a morally arbitrary and morally empty construct.”).

may however fail to converge on a solution that is reasonable *tout court*, without finding one another unreasonable.”¹²⁶ This problem was readily apparent when this standard was deployed in a different context: the Tokyo Tribunals in the aftermath of World War II.¹²⁷ The President of the Tribunals, William Webb, explained that, “you cannot say, I cannot say, that on the question of whether any particular piece of evidence has probative value you will always get the same decision.”¹²⁸ The answer might vary depending on the number of panelists and the composition of the tribunal on any given day.¹²⁹ Thus, far from an objective standard for evidentiary admissibility, the flexibility of the term “reasonable person” may result in different outcomes for similarly situated defendants. Evidence that is found to be admissible in one trial may be identical to evidence excluded in another, with the only difference being the happenstance of different officers sitting in any given commission trial.

2. Hearsay

The military commission rules of evidence differ starkly from those of the Federal and Military Rules of Evidence in prescribing the admissibility of hearsay evidence. If the pretrial proceedings in the *Hamdan* case (prior to a federal court order halting all military commission proceedings) are any indication, the inclusion of hearsay in military commission trials will be significant. In the *Hamdan* pretrial proceedings, the prosecution gave notice that it intended to introduce fifty-five reports of interrogations conducted by military and law enforcement personnel at Guantanamo Bay and Bagram Air Base in Afghanistan.¹³⁰

In the civilian criminal context, defendants are afforded safeguards against hearsay in both the Confrontation Clause¹³¹ of the Sixth Amendment and the Federal Rules of Evidence. The Confrontation Clause counteracts the government’s power to collect and present evidence against the accused by requiring that witnesses giving testimony be produced in court for cross-examination. As the Court noted in *Crawford v. Washington*, the

¹²⁶ THOMAS NAGEL, EQUALITY AND PARTIALITY 172 (1991).

¹²⁷ See discussion *infra* text accompanying notes 256–266.

¹²⁸ 2 The Tokyo Judgment, Opinion by Judge Pal 654–55 (Amsterdam Press 1977) [hereinafter Pal Opinion] (quoting President Webb).

¹²⁹ See *id.*

¹³⁰ See Motion to Pre-Admit Evidence, United States v. Hamdan, No. CIVA.A.04-1519 JR. (D.D.C. Oct. 1, 2004), available at <http://www.defenselink.mil/news/Oct2004/d20041006motion.pdf>; Defense Response to Government’s Motion to Pre-Admit Evidence, United States v. Hamdan, No. CIVA.A.04-1519 JR. (D.D.C. Oct. 18, 2004), available at <http://www.defenselink.mil/news/Oct2004/d20041022admit.pdf>.

¹³¹ The Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI. The Clause has been described by the Supreme Court as a “bedrock procedural guarantee” in both federal and state prosecutions. *Crawford v. Washington*, 541 U.S. 36, 42 (2004).

“principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused,”¹³² including written reports of accusations made by witnesses during governmental interrogation outside the context of the trial.¹³³ In the words of Justice Scalia, “[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant of inquisitorial practices.”¹³⁴

The protections afforded by the Sixth Amendment and the Federal Rules of Evidence’s regulation of hearsay are concurrent but not identical. As Justice Scalia explained:

An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.¹³⁵

Along those lines, the Court in *Crawford* held that “where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”¹³⁶ Although it declined to “spell out a comprehensive definition of ‘testimonial,’” the Court noted that at a minimum the term included “testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations,” since these are “the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.”¹³⁷ *Crawford* suggests a constitutionally preferred means of evaluation for evidential reliability: “[t]he Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined,” under the “crucible of cross-examination.”¹³⁸

It is still an open question as to whether noncitizens captured and held abroad have enforceable rights under the U.S. Constitution,¹³⁹ including

¹³² *Crawford*, 541 U.S. at 50.

¹³³ *Id.* In *Crawford*, Justice Scalia noted the historical origins of the common-law right to confrontation and noted that the practice of *ex parte* examination was the one “that the Crown deployed in notorious treason cases like Raleigh’s; that the Marian statutes invited; that English law’s assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.” *Id.*

¹³⁴ *Id.* at 50–51.

¹³⁵ *Id.* at 51.

¹³⁶ *Id.* at 68.

¹³⁷ *Id.*

¹³⁸ *Id.* at 61.

¹³⁹ Compare *United States v. Verdugo-Urriquez*, 494 U.S. 259, 269 (1990) (extraterrito-

rights under the Confrontation Clause. However, the Constitution and the Federal Rules of Evidence apply to any individual tried in a federal court, thus affording defendants protection from testimonial statements rendered *ex parte*. Furthermore, Rule 802 of the Federal and Military Rules of Evidence creates blanket prohibitions against the admission of hearsay, unless the evidence falls into prescribed exceptions.¹⁴⁰

Military commissions procedures do not provide for similarly stringent restrictions on hearsay. The original regulations did not explicitly use the term “hearsay,” but allowed for the consideration of any evidence, “including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements,” as long as such evidence met the admissibility standard of “probative value to a reasonable person.”¹⁴¹ The MCA notes that the Secretary of Defense may prescribe a rule that allows for hearsay evidence not otherwise admissible under the Federal or Military Rules of Evidence if the person seeking to admit the evidence makes her intent known to the adverse party sufficiently in advance so as to provide “a fair opportunity to meet the evidence,” and “the particulars of the evidence (including . . . the circumstances under which the evidence was obtained)” are disclosed.¹⁴² The evidence may be excluded if the opposing party can prove it is unreliable or lacks probative value.¹⁴³ However, the disclosure of the methods by which the evidence was generated is subject to the MCA’s regulations on classified information, whereby the military judge may restrict disclosure of “the sources, methods, or activities by which the United States acquired evidence if the military judge finds that the source, methods, or activities by which the United States acquired such evidence is classified.”¹⁴⁴ Hence, there may be instances where the opponent of admission of hearsay evidence will not be able to ascertain the methods used in the production of hearsay.

Supporters of the military commissions justify the use of hearsay by noting that such evidence is used by criminal justice systems across continental Europe. Given that the exclusion of hearsay seems to be an anoma-

rial application of Fifth Amendment has been “emphatic[ally] rejected”) *with Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004) (“Petitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’”).

¹⁴⁰ See FED. R. EVID. 802; MIL. R. EVID. 802 & Analysis (“Rule 802 is taken generally from the Federal Rule but has been modified to recognize the application of any applicable Act of Congress.”)

¹⁴¹ See 36 C.F.R. § 9.6(d) (2006).

¹⁴² Military Commissions Act of 2006, 10 U.S.C.A. § 949a(b)(2)(E)(i) (2006). As noted above, the Secretary of Defense has yet to promulgate evidentiary rules for military commissions, but this provision is endorsed by Congress.

¹⁴³ *Id.* § 949a(b)(2)(E)(ii).

¹⁴⁴ *Id.* § 949j(c)(2).

lous practice, proponents posit that there is nothing fundamentally unjust or suspect about admitting hearsay in a military commission.¹⁴⁵ This argument unduly simplifies the comparison that should be made between the U.S. system and other legal systems. In the United States, the factfinder may not consider hearsay unless it fits within one of the exceptions to the rule. Continental-style systems, by contrast, regulate hearsay after admitting the evidence; although the factfinder may consider hearsay, there are several checks to ensure that the evidence is weighed properly and with caution.¹⁴⁶ Thus, although there is no blanket prohibition on hearsay, regulation of hearsay is prevalent.¹⁴⁷ However, unlike its civilian and foreign counterparts, the MCA does not explicitly instruct commissioners to treat hearsay with caution, and opponents to the admission of a particular piece of hearsay may be precluded from knowing the methods by which the evidence was procured.

Although the hearsay doctrine as it exists in the Federal Rules of Evidence and the Military Rules of Evidence is not without its critics, even staunch opponents of exclusion do not propose that hearsay should be admitted without any regulation whatsoever.¹⁴⁸ A broad “rule of free admissibility would pave the way for partisan statements proved by proxy witnesses, statements of unknown origin, and statements made under ex-

¹⁴⁵ TURNER & SCHULHOFER, *supra* note 22, at 68.

¹⁴⁶ As described by Damaska:

[S]trictures against the use of derivative proof are by no means unique to the common law culture; restriction on its use existed on the Continent of Europe long before Anglo-American law of evidence first made its appearance. Even today, although continental justice is conducive to the admission of hearsay, courts recognize the weaknesses of derivative proof and generate restrictions on its free use.

Mirjan Damaska, *Of Hearsay and Its Analogues*, 76 MINN. L. REV. 425, 456–57 (1992).

¹⁴⁷ Damaska further notes that:

[C]ontinental attitudes to derivative proof [i.e., hearsay] were shaped by the confluence of factors pertaining to the structure of the tribunal, the episodic style of proceedings, and control over factfinding. As a result of the synergetic operation of these factors, the weaknesses of derivative proof and the best hygiene for combating them are still seen on the Continent in a somewhat different light than in Anglo-American countries.

Id. at 434.

¹⁴⁸ For example, Eleanor Swift suggests that courts should admit hearsay if parties can present “foundational facts” that allow factfinders to evaluate the evidence intelligently. Under her proposal, a party may introduce hearsay through a “process foundation witness” who describes the circumstances in which the declarant “perceived, remembered, and spoke,” in order to allow the factfinder to evaluate the candor, ambiguity, perception, and memory of the declarant. See Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339, 1355–57 (1987). Roger Park suggests that given the informational asymmetries and process-based concerns of statements derived through the exercise of state power, “interstitial change” and not “radical reform” is appropriate in the criminal context. See Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 88–104 (1987).

traordinary pressure or other circumstances almost certain to distort,” and would have a “negative impact on important procedural mechanisms and invite fabrication of statements that would be hard to detect.”¹⁴⁹ These concerns are particularly relevant in the context of military commissions.

The first risk associated with a highly permissive hearsay rule is that of translation error. In *Hamdan*, for example, the prosecution presented reports documenting interrogations that were conducted in English, with translators reproducing the questions in the detainee’s language and then translating answers back into English.¹⁵⁰ However, these reports are not nearly as comprehensive as a full transcript with questions and answers in their original and translated forms would be.¹⁵¹ The reports only contain paraphrased summaries provided by the agent who was present during the interrogation.¹⁵² Thus, there is no means of verifying whether the questions asked of the detainee were accurately translated, nor is there any way of ensuring that the agent’s description of the interrogation was correct. Compounding this problem is the fact that interpreters used in *ex parte* interrogations and those used during the course of the trial are not subject to Federal Rule of Evidence 604, which requires an interpreter to be “subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.”¹⁵³ The only MCA provision mentioning translation notes simply that the Secretary of Defense may prescribe rules by which the convening authority for the military commission “may detail to or employ for the military commission interpreters who shall interpret for the commission and, as necessary, for trial counsel and defense counsel and for the accused.”¹⁵⁴ Thus, the competence of the interpreter is difficult to assess within the context of the military commissions.

The second problem is that there is no detail within the interrogation reports about the circumstances surrounding the detainee’s statements. This suggests two related concerns. As explained by Gordon Van Kessel, hearsay “easily can be created by the parties through unregulated witness interviews,”¹⁵⁵ and unless the capacity of the parties to generate admissible hearsay is controlled, admission of “party-produced” hearsay could easily result in a trial wholly dependent on paper and documents, limiting opportunities for rigorously testing the veracity of the statements on cross-examination, or of contemporaneous determinations of credibility as testimony

¹⁴⁹ Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 382 (1992).

¹⁵⁰ TURNER & SCHULHOFER, *supra* note 22, at 66.

¹⁵¹ See Defense Response to Government’s Motion to Pre-Admit Evidence, *supra* note 130, at 3.

¹⁵² TURNER & SCHULHOFER, *supra* note 22, at 66.

¹⁵³ FED. R. EVID. 604.

¹⁵⁴ Military Commissions Act of 2006, 10 U.S.C.A. § 9481(b) (2006).

¹⁵⁵ Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 477, 503 (1998).

is given.¹⁵⁶ While a blanket prohibition of hearsay evidence is not the sole means of regulating the risk that party-generated evidence will subvert the truth-seeking function of the trial,¹⁵⁷ military commission trials may lack alternative mechanisms. This creates a significant potential to rely excessively on documentary evidence to distort the truth-seeking function of the trial, not only because there is no hearsay prohibition but also because the commissioners are explicitly authorized to consider such evidence and are not warned to account for unreliability.

In addition, an important function of hearsay in civilian criminal trials is to check the governmental capacity to pressure, coerce, or induce witness statements or testimony by wielding the power of the state. As Christopher Mueller notes, “[i]n criminal cases, the hearsay doctrine reflects concerns over the exercise of government power [T]he court is a government institution and the prosecutor a government agent. The doctrine prevents prosecutions and convictions based on remote statements gathered by police, perhaps in secret, and untested in open court.”¹⁵⁸ Threats of prosecution and promises of relief from substantial prison terms for witnesses who cooperate with officials and testify against others create incentives for distortions in testimony; cross-examination counters these factors by allowing the factfinder to evaluate the declarant’s credibility.¹⁵⁹ Even in civilian criminal trials featuring sworn oral statements, testimony for the prosecution made by former accomplices and informants is viewed with suspicion. It is generally assumed that such people are involved in criminal activities, seek some benefit from cooperation with authorities, and thus will “conform their statements to what they believe the listener, usually a police officer or prosecutor, would like to hear and what would bring them greatest rewards.”¹⁶⁰ In the words of Lord Abinger, “[t]he danger is that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others.”¹⁶¹ The hearsay doctrine works to exclude evidence of this kind when the declarant is not readily available for cross-examination.

The third issue raised by a permissive rule is that the regulation of hearsay reflects a concern about the epistemic competency of jurors and their capacity to account accurately for the reliability of derivative evidence:

¹⁵⁶ *Id.* at 503–04.

¹⁵⁷ For example, Van Kessel notes that the Supreme Court, “[e]xcept in limited contexts such as police-conducted, post-accusation eye-witness identifications and in-custody interrogations of suspects,” has not “imposed even minimal Constitutional protections governing the creation of witness statements.” The burden of regulation of this concern is thus placed upon the prohibition of hearsay and other related evidentiary rules. *Id.* This suggests that enhancing constitutional guarantees would be one possible way to regulate this concern.

¹⁵⁸ Mueller, *supra* note 149, at 394.

¹⁵⁹ Van Kessel, *supra* note 155, at 507.

¹⁶⁰ *Id.* at 509.

¹⁶¹ *Id.* (quoting Lord Abinger).

[Hearsay rules at common law] were calculated to exclude various kinds of testimony and tangible evidence from a lay jury's consideration during its fact-finding deliberations. The notion underlying many, although not all, of these categorical negative rules was that jurors in a less sophisticated time were ill-equipped accurately to assess the relevance and reliability (the probative worth) of some classes of evidentiary material. Jurors, it was speculated, might assign substantial weight to some forms of evidence without pausing to focus on their questionable trustworthiness and the ready availability of stronger, or at least more thoroughly tested, proofs.¹⁶²

Military commissioners are not legally sophisticated actors¹⁶³ and probably suffer from the same epistemic fallibility as civilian jurors. This renders the absence of regulation of hearsay in military commissions problematic. The commissions' procedures, in sharp contrast to those provided in the Federal and Military Rules of Evidence, do not contain primary epistemic rules necessary to account for the commissioners' shortcomings.¹⁶⁴

The fourth concern is that rules which restrict hearsay incentivize lawyers to provide the most "immediate and reliable evidence available."¹⁶⁵ Without an exclusion of hearsay, lawyers are easily tempted "to produce more written evidence in sanitized form on which prosecutors could place greater reliance, and . . . to fabricate exculpatory hearsay statements of absent declarants."¹⁶⁶ The original military commission rules created no corroboration or sufficiency standards to ensure that the hearsay evidence bears indicia of reliability; nor did they encourage commissioners to consider how hard it is to test the veracity of prior testimony or written statements when weighing this evidence.¹⁶⁷ Thus, prosecutors in military commissions had less of an incentive to produce the most reliable evidence possible than their civilian and military counterparts. Although the MCA sanctions the admission of hearsay conditioned on the opposing party's inability to show that the evidence is unreliable or lacking in probative value, this mitigation of the lawyers' incentive to produce the most reliable evidence possible persists.

¹⁶² Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1097 (1985).

¹⁶³ See *supra* note 69 and accompanying text.

¹⁶⁴ See Allen & Leiter, *supra* note 70, at 1502 ("Primary epistemic rules take into account the epistemic shortcomings of jurors, such as their susceptibility to confusion and prejudice or their generally modest level of intellectual ability. Secondary epistemic rules take into account the epistemic shortcomings of judges, such as their general lack of expertise in scientific matters.").

¹⁶⁵ Van Kessel, *supra* note 155, at 512.

¹⁶⁶ *Id.* at 512-13.

¹⁶⁷ See *supra* notes 87-91 and accompanying text.

3. *Two Trials, Two Sets of Evidence Rules*

The cases of Jose Padilla and Salim Hamdan highlight the consequences of different standards of evidence. The government has decided to try Padilla in Federal District Court in Miami, where he was indicted by a grand jury on November 17, 2005, and the Supreme Court has granted the Bush administration's request to transfer Padilla from military to civilian custody.¹⁶⁸ Thus, the Padilla trial is taking place in federal court, not in a military commission.¹⁶⁹ In comparison, the trial of Salim Hamdan, a noncitizen captured on the battlefields of Afghanistan, had already reached pre-military commission hearings when a habeas petition challenging his detention and the commission's jurisdiction over the case began making its way through the federal courts, ultimately resulting in the Supreme Court's decision in *Hamdan v. Rumsfeld*. An examination of the readily available evidence that has been presented in these two cases yields interesting results.

a. Padilla

In defending the detention of Jose Padilla as an "enemy combatant," the Defense Department relied primarily upon the "Mobbs Declaration," a six-page document signed by Michael H. Mobbs, the Special Advisor to the Under Secretary of Defense for Policy at the Pentagon.¹⁷⁰ The affidavit states that as part of Mobbs' official duties, he reviewed the government documents relevant to the determination that Jose Padilla was an enemy combatant, including his alleged plans to detonate a "dirty bomb," and then proceeds to list information "derived from multiple intelligence sources, including reports of interviews with several confidential sources, two of whom were detained in locations outside of the United States."¹⁷¹

¹⁶⁸ Linda Greenhouse, *Justices Let U.S. Transfer Padilla to Civilian Custody*, N.Y. TIMES, Jan. 5, 2006, at A22.

¹⁶⁹ The government has run into problems in its prosecution of Padilla in Miami. United States District Court Judge Marcia Cooke has dismissed the most serious conspiracy count against Padilla as being impermissibly duplicative of the other two conspiracy charges, and in so doing took the death penalty off the table. Judge Cooke, who was appointed to the bench by President George W. Bush, has characterized the government's case as "light on facts." See *United States v. Jose Padilla*, No. 04 Cr. 60001, 2006 WL 2415946 (S.D. Fla. Aug. 18, 2006) (dismissing count 1 of the indictment, which charged Padilla with a conspiracy to murder, kidnap, and maim persons in a foreign country in violation of 18 U.S.C. § 956(a)(1) (2000)); Dan Eggen, *Padilla Case Raises Questions About Anti-Terror Tactics*, WASH. POST., Nov. 19, 2006, at A3; see also Jay Weaver, *Terror Conspiracy Trial Faces Delay*, MIAMI HERALD, Sept. 15, 2006, available at <http://www.miami.com/mld/miami-herald/news/local/15522682.htm>.

¹⁷⁰ *Padilla v. Bush*, 233 F. Supp. 2d 564, 572 (S.D.N.Y. 2002) (citing the Mobbs Declaration as a source that the government argued was sufficient to establish enemy combatant status); see Declaration of Michael H. Mobbs, Special Advisor to the Under Sec'y of Def. for Policy (Aug. 27, 2002), available at <http://www.cnss.org/Mobbs%20Declaration.pdf>.

¹⁷¹ Mobbs, *supra* note 170, at 1–3.

The affidavit further notes that “[t]he confidential sources have direct connections with the Al Qaeda terrorist network and claim to have knowledge of the events described,” although it acknowledges that “[i]t is believed that these confidential sources have not been completely candid about their association with Al Qaeda and their terrorist activities.”¹⁷² Mobbs continues: “Much of the information from these sources, has, however been corroborated and proven accurate and reliable. Some information provided by the sources remains uncorroborated and may be part of an effort to mislead or confuse U.S. officials.”¹⁷³ In addition, although one of the two sources “in a subsequent interview with a U.S. law enforcement official recanted some of the information he had provided . . . most of this information has been independently corroborated by other sources.”¹⁷⁴ The affidavit also concedes that, “at the time of being interviewed by U.S. officials, one of the sources was being treated with various types of drugs to treat medical conditions.”¹⁷⁵ These conditions suggest that the evidence has serious epistemic infirmities and that the probative value of the statements may be quite low.

Although the Mobbs Declaration does not explicitly acknowledge the identities of its sources, government officials have stated that the main sources linking Padilla to the dirty bomb plans were Khalid Shaikh Mohammed, who is widely thought to be the mastermind behind the September 11 attacks, and Abu Zubaydah, a top Al Qaeda recruiter.¹⁷⁶ The *New York Times* has reported, on the basis of statements made by current and former governmental officials, that the Bush administration decided to charge Jose Padilla with less serious crimes “because it was unwilling to allow testimony from [these two individuals] who had been subjected to harsh questioning” that might expose classified information and prompt inquiries into the circumstances surrounding the taking of the statements.¹⁷⁷ According to various media accounts, “one of the interrogation tactics used on Zubaydah—who had been shot three times in a gun battle during his capture in Pakistan—was to withhold pain medication in order to induce him to talk”;¹⁷⁸ as one source recounts, “[f]or nearly forty-eight hours, around the clock, Zubaydah’s condition went from complete relief when the [narcotic] drip was on to utter agony when it was off.”¹⁷⁹

¹⁷² *Id.* at 2, n.1.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Douglas Jehl & Eric Lichtblau, *Shift on Suspect is Linked to Role of Qaeda Figures*, N.Y. TIMES, Nov. 24, 2005, at A1.

¹⁷⁷ *Id.*

¹⁷⁸ TURNER & SCHULHOFER, *supra* note 22, at 6.

¹⁷⁹ See GERALD POSNER, WHY AMERICA SLEPT 185–87 (2003) (describing the “reward-and-punishment” technique of interrogation); see also David Johnston, *At a Secret Interrogation, Dispute Flared over Tactics*, N.Y. TIMES, Sept. 10, 2006, at 1 (describing how CIA interrogators used “aggressive” and coercive interrogation techniques on terrorism suspects, over the objection of FBI agents).

If Padilla was charged and tried in a military commission, the reports would be admissible as probative to a reasonable person. Such information, elicited through unknown tactics of interrogation and presented in the sanitized form of an affidavit bearing the imprimatur of the government, would be admitted for evaluation by military commissioners who possess little legal training and are subject to influence within the chain of command. Interrogation methods could simply be deemed classified and remain unknown.¹⁸⁰ In addition, although statements obtained through torture are excluded under the MCA,¹⁸¹ as are those elicited by cruel, inhuman, or degrading treatment as defined by the Detainee Treatment Act of 2005,¹⁸² statements obtained before the enactment of the Detainee Treatment Act on December 30, 2005, are admissible as long as a military judge finds that “the totality of circumstances renders the statement reliable and possessing sufficient probative value; and . . . the interests of justice would best be served by admission of the statements into evidence.”¹⁸³ Thus, the Mobbs Affidavit in its entirety could be admissible, despite its epistemic flaws, if the military judge determined that its admission best served the ends of justice and found it to have sufficient reliability and probative weight.

b. Hamdan

Like the Padilla case, *Hamdan* illustrates the consequences associated with chosen evidentiary standards. The defense in *Hamdan* alleged that interviews with detainees revealed that interrogations in Afghanistan involved “physical and mental abuse, including exposure to extreme cold, physical beating, sensory deprivation, prolonged solitary confinement, threats of death, and/or indefinite imprisonment without trial.”¹⁸⁴ Similarly, interviews of individuals who were questioned at Guantanamo Bay, according to the defense, indicated that authorities “stressed that cooperation was paramount to release and that detainees that did not cooperate would be subject to indefinite incarceration without benefit of trial.”¹⁸⁵ Reports of abuse at Guantanamo Bay during interrogations are widespread;¹⁸⁶ they cast a shadow upon the veracity and reliability of any evidence derived from such techniques. When government witnesses anticipate leni-

¹⁸⁰ Military Commissions Act of 2006, 10 U.S.C.A. §§ 949a(b)(2)(E)(i), 949j(c) (2006).

¹⁸¹ *Id.* § 948r(b).

¹⁸² *Id.* § 948r(d).

¹⁸³ *Id.* § 948r(c).

¹⁸⁴ See Defense Response to Government’s Motion to Pre-Admit Evidence, *supra* note 130, at 2.

¹⁸⁵ *Id.*

¹⁸⁶ See, e.g., Neil A. Lewis, *Broad Use of Harsh Tactics is Described at Cuba Base*, N.Y. TIMES, Oct. 17, 2004, at A1; Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantanamo*, N.Y. TIMES, Jan. 1, 2005, at A11; FBI Reports Guantanamo “Abuse,” CNN, Dec. 8, 2004, <http://www.cnn.com/2004/US/12/08/guantanamo.abuse/>.

ency in exchange for cooperation, it is common to suspect epistemic infirmities.¹⁸⁷ The incentive to conform statements to interrogators' desires must be stronger when those interrogated are, as has been alleged, physically and psychologically abused. Since the statements described in the case against Hamdan were all made prior to December 30, 2005, they are all potentially admissible if a military judge finds that their admission furthers the interests of justice and they are sufficiently probative and reliable.¹⁸⁸

In addition, during pretrial military commission proceedings in November 2004, the quality of interpretation provided by the commission in Hamdan's case was described as equivalent to "listening to a distant radio transmission that cut in and out. The commission proceedings had to be stopped several times because the translation was so poor that the defendant could not follow the proceeding."¹⁸⁹ Although the Office of Military Commissions replaced these interpreters, an interpreter for another trial who listened to the proceedings reported that the quality of interpretation, though improved, was still inadequate, likening it to "Swiss cheese (i.e., full of holes) instead of shredded cheese."¹⁹⁰ Without a provision like Rule 604 to ensure the qualification of translators, there is no regulation of the quality of the translation ultimately submitted to those adjudicating military commissions. Indeed, the change in translators only occurred because the defendant in this case could not follow the proceedings. Subtler deficiencies may escape detection and, absent required checks, proceedings may move forward with inaccurate translations.

It cannot be said for certain that the evidence relied upon by prosecutors in actual military commissions, when they begin, will be of the same sort as that which has already been presented in the terrorist cases discussed here. However, these sources of evidence raise serious questions about the efficacy of the military commissions' evidentiary standards relative to the higher thresholds required by the Federal and Military Rules of Evidence. Military commissioners are unlikely to be infallible evaluators of evidence; perhaps a system with more guidance as to relevance, admissibility, weight, and sufficiency of evidence¹⁹¹ might enhance the epistemic capacities of military commissions.

¹⁸⁷ See Van Kessel, *supra* note 155, at 509.

¹⁸⁸ See *supra* text accompanying notes 181–183.

¹⁸⁹ Public Statement, Amnesty Int'l,

Guantánamo: Military commissions—Amnesty International observer's notes, No. 3—Proceedings suspended following order by US federal judge (Nov. 9, 2004), available at <http://web.amnesty.org/library/index/engamr511572004>.

¹⁹⁰ *Id.*

¹⁹¹ See *supra* text accompanying note 105.

III. OFFICIAL JUSTIFICATIONS FOR THE EVIDENTIARY STANDARDS: THE COLLATERAL RATIONALES

The Bush administration has offered several justifications to explain why the evidentiary standards applicable to military commissions deviate from those used in the Federal Rules of Evidence and the Military Rules of Evidence. First, the Department of Defense has justified the distinctive trial procedures used in military commissions as an effort to provide safeguards for classified information.¹⁹² Second, the administration has suggested that it would be impractical to rely upon the evidentiary standards of the Federal and Military Rules of Evidence, as such standards embrace public policy concerns which do not apply to terrorism trials and would unduly impede upon the prosecution of terrorism suspects.¹⁹³ Lastly, the administration has pointed to similarly lenient admissibility standards that have been used in other tribunals, such as those used in the Trials of the Nazi Saboteurs, the Nuremberg and Tokyo Trials, and other international tribunals. The first two of these justifications are collateral values to be reflected in the military commissions' rules of evidence,¹⁹⁴ and the third is a historical referent. This Part will examine each of these rationales in turn.

¹⁹² News Release, U.S. Dep't of Def., Secretary Rumsfeld Announces Military Commission Rules (Mar. 21, 2002), *available at* http://www.defenselink.mil/releases/2002/b03212002_bt140-02.html; *see also* Donald H. Rumsfeld & Paul Wolfowitz, U.S. Sec'y of Def., Prepared Statement: Senate Armed Services Committee "Military Commissions" (Dec. 12, 2001), *available at* <http://www.defenselink.mil/speeches/2001/s20011212-depsecdef2.html> ("[B]y using military commissions, we can better protect civilian judges, jurors and courts from terrorist threats and assure the security of the trial itself."). Rumsfeld further explained:

[M]ilitary commissions can allow the use of classified information without endangering sources and methods. This point is critical. During the course of a civilian trial, prosecutors could be faced with a situation where, in order to secure a conviction, they would have to use classified information that would expose how the U.S. monitors terrorist activities and communications. They could be forced to allow terrorists to go free, or offer them lighter sentences, in order to protect a source that is critical to our national security.

Do we really want to be in the position of choosing between a successful prosecution of an al-Qaeda terrorist, and revealing intelligence information that, if exposed, could reduce our ability to stop the next terrorist attack—at a cost of thousands more American lives?

A military commission can permit us to avoid this dilemma. We can protect national security, including ongoing military operations in Afghanistan, while at the same time ensuring a full and fair trial for any individuals designated by the President.

Id.

¹⁹³ Rumsfeld & Wolfowitz, *supra* note 192.

¹⁹⁴ *See supra* Part I.

A. In the Name of Security

President Bush's rejection of the Federal Rules of Evidence for military commissions seems to stem from his view that procedural adjustments are necessary "[g]iven the danger to the safety of the United States and the nature of international terrorism."¹⁹⁵ Indeed, the debate over the efficacy of military commissions as a means of trying suspected terrorists centers around the degree to which security concerns necessitate providing such suspects less evidentiary access than standard criminal defendants would be afforded. As described by Turner and Schulhofer:

The chief objection to prosecuting accused terrorists in federal court has been that the defendant's rights in that forum—to confront the evidence against him, to obtain evidence in his favor, and to be tried in a public proceeding—jeopardize secret information vital to counterterrorism efforts. The chief objection to the new military commissions, in turn, has been that secret and un-rebutted evidence will play a major part in the process, unfairly depriving the defendant of the means to defend himself and opening the door to error and executive abuse.¹⁹⁶

Throughout the history of military commissions, the government has relied upon security concerns to establish the necessity of adopting procedures distinct from those traditionally used. Political leaders evoke the image of "extraordinary criminals, extraordinary times, and extraordinary situations" to justify treating terrorism suspects differently than other criminal suspects; "[t]hey are, after all, supposedly dealing with rogue states, hidden enemies, and never-ending battles."¹⁹⁷ There is reason to be concerned, however, about the liberties afforded to the executive branch in its determination of what a security threat may be. As Harvey C. Mansfield has explained in the context of the War on Terror, "[t]he trouble of speaking about necessity is that concept is elastic, and it can be stretched to include many things that aren't really necessary."¹⁹⁸

Among these "many things" is the establishment of a separate set of military commissions to allay security concerns. The necessity of establishing distinct tribunals and procedures in the name of security is suspect for several reasons. First, federal courts are equipped to handle classified information. Prior to September 11, the government successfully prosecuted dozens of high-profile terrorism cases involving classified or simi-

¹⁹⁵ Presidential Military Order No. 1, *supra* note 1, § 1(f).

¹⁹⁶ TURNER & SCHULHOFER, *supra* note 22, at 2.

¹⁹⁷ MAROUF HASIAN, JR., IN THE NAME OF NECESSITY: MILITARY TRIBUNALS AND THE LOSS OF AMERICAN CIVIL LIBERTIES 5 (2005).

¹⁹⁸ Jeffrey Rosen, *The Nation: What Price Security; Testing the Resilience of American Values*, N.Y. TIMES, Nov. 18, 2001, § 4, at 1 (quoting Mansfield).

larly sensitive information in federal court.¹⁹⁹ Terrorism experts Philip Heymann and Juliette Kayyem suggest that amending the Classified Information Procedures Act (“CIPA”) to reflect new national security interests would allow for transparent legislative procedures that would be “consistent with the fairness that is traditional in the United States before imposing punishment, particularly with severe penalties.”²⁰⁰ Second, Rule 505 of the Military Rules of Evidence, applicable to courts-martial, mirrors CIPA in many respects and thus could similarly be adjusted to accommodate the unique security concerns posed by the War Against Terrorism. Third, the military commissions regulations, promulgated by the Department of Defense prior to the MCA, and the MCA itself draw heavily from the language and structure of CIPA. These similarities call into question whether different rules and a different tribunal are truly needed to try terrorism suspects.

CIPA finds its origins in the criminal prosecutions of Cold War spies. Prior to its enactment, the defense and intelligence establishments opposed such prosecutions because they feared that trials in federal court would expose intelligence assets and could reveal to political adversaries the extent of the government’s knowledge of their activities.²⁰¹ CIPA was designed to address the problem of “graymail,” the risk that defendants would expose classified intelligence through otherwise lawful procedural means during trial.²⁰² However, CIPA also applies to instances where a defendant seeks discovery of classified information from the government.²⁰³ CIPA functions as a filter, creating comprehensive procedures to regulate classified information disclosure over the course of a criminal case. It mitigates the “disclose or dismiss” dilemma by allowing classified evidence to be shielded from consideration whenever it is unnecessary for the defense or when unclassified “substitutions” may be used.²⁰⁴ CIPA, which largely grew from procedures first tested in two federal court cases, is understood as the product of iterative and interactive efforts by the courts and Congress to develop a statutory solution, as well as Carter-era Attorney General Griffin Bell’s desire to prosecute cases while accounting for security concerns.²⁰⁵

¹⁹⁹ TURNER & SCHULHOFER, *supra* note 22, at 1.

²⁰⁰ HEYMANN & KAYYEM, *supra* note 21, at 53; *see also* Classified Information Procedures Act of 1980, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C.A. app. 3 (2006)).

²⁰¹ TURNER & SCHULHOFER, *supra* note 22, at 19.

²⁰² Joshua E. Kastenberg, *Analyzing the Constitutional Tensions and Applicability of Military Rule of Evidence 505 in Courts-Martial over United States Service Members: Secrecy in the Shadow of Lonetree*, 55 A.F. L. REV. 233, 237–38 (2004).

²⁰³ *See* Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1964–65 (2005).

²⁰⁴ TURNER & SCHULHOFER, *supra* note 22, at 18.

²⁰⁵ *Id.* at 19.

Under section 3 of CIPA, the court, on motion by the government, may issue a protective order prohibiting the defendant from disclosing classified information revealed over the course of discovery.²⁰⁶ The judge reviews evidence containing classified information in a closed hearing to determine its relevance, and whether it is material, or “helpful to the defense of the accused.”²⁰⁷ If the judge finds the information at issue to be relevant and material, and thus discoverable, section 4 allows the court, upon a sufficient showing of necessity by the government, to “delete specified items of classified information from documents to be made available to the defendant through discovery,” or to offer defendants an unclassified “substitution.”²⁰⁸ Such a substitution may consist of a redacted version of the original, an unclassified summary of classified materials, or a statement admitting relevant facts that the sensitive material would tend to prove.²⁰⁹ However, section 4 balances the discovery rights of a defendant against the government’s security concerns,²¹⁰ and would allow defense counsel to inquire into interrogation methods. The government would be required to provide to the court, *in camera*, a complete copy of the evidence in order to effectuate the defendant’s discovery rights; the court, in turn, would redact or delete classified items that were not relevant to the question at hand.²¹¹ Thus, the application of CIPA would allow for an investigation of the conditions under which the information in the Mobbs Declaration was collected as relevant to an assessment of its veracity and reliability. CIPA has “proven effective,” and the Senate Select Committee on Intelligence acknowledged shortly before September 11 that the Act “has proven to be a very successful mechanism for enabling prosecutions that involve national security information to proceed in a manner that is both fair to the defendant and protective of the sensitive national security intelligence information.”²¹² CIPA has also been used successfully when prosecuting terrorists, though not in the major terrorism cases brought in the 1990s. This, however, was not due to any infirmities in its provisions, but rather because security concerns in these cases did not require significant protection.²¹³

In addition, the Military Rules of Evidence, used in courts-martial, have specific provisions to protect security interests in the context of a trial. Rule 505, which is modeled after CIPA,²¹⁴ creates a general privilege protecting classified information from disclosure “if disclosure would be

²⁰⁶ 18 U.S.C.A. app. 3, § 3 (2006).

²⁰⁷ *See* United States v. Yunis, 867 F.2d 617, 621–22 (D.C. Cir. 1989).

²⁰⁸ 18 U.S.C.A. app. 3, § 4.

²⁰⁹ *Id.*

²¹⁰ *Id.* § 3; Kastenberg, *supra* note 202, at 239.

²¹¹ Kastenberg, *supra* note 202, at 239.

²¹² TURNER & SCHULHOFER, *supra* note 22, at 22 (citation omitted).

²¹³ *Id.* at 22–23.

²¹⁴ *See* Note, *supra* note 203, at 1966.

detrimental to the national security.”²¹⁵ Justice Kennedy, when discussing evidentiary rules for military commissions in his concurrence in *Hamdan v. Rumsfeld*, noted that “while some flexibility may be necessary to permit trial of battlefield captives like Hamdan, military statute and rules already provide for . . . use of classified information” under Rule 505.²¹⁶ The head of the executive or military department or government agency concerned may assert the privilege “based on a finding that the information is properly classified and that disclosure would be detrimental to the national security”; in addition, the agency head may delegate the assertion of privilege to trial counsel or to a witness.²¹⁷ If the privilege is invoked prior to the referral of charges, the convening authority may delete specific items of classified information, substitute a portion or summary of information for classified documents, substitute a statement admitting relevant facts that the classified information would tend to prove, or provide the document subject to conditions that would guard against compromising the information disclosed. The information may only be withheld from disclosure if the other options would cause “identifiable damage to national security.”²¹⁸ If the claim of privilege is invoked after the referral of charges, the convening authority may institute an action to obtain classified information for use by the military judges, dismiss all charges, dismiss charges or specifications to which the information relates, or take other action as may be required in the interest of justice.²¹⁹ Over the course of the trial, the military judge serves as a gatekeeper to regulate the introduction of classified information in ways similar to CIPA.²²⁰ If the government agrees to disclose classified information to the accused, the military judge may enter a protective order to guard against compromise, specifying the scope of information that may be used and regulating access to the information.²²¹ Since courts-martial are typically used to try U.S. military personnel, security concerns may not be as severe as those that exist in trials of noncitizen enemy combatants. However, there is no reason why the governmental privilege system could not be adjusted in the courts-martial context to accommodate the trial of foreign nationals, particularly since the participants in the trial, with the sole exception of the defendant himself, are military officers of the U.S. Armed Forces.

Finally, what is particularly curious about the Bush administration’s insistence that security necessitates a separate set of evidentiary rules and procedures is that the original military commission regulations and the MCA both draw heavily from the security provisions found in CIPA. The

²¹⁵ MIL. R. EVID. 505(a).

²¹⁶ 126 S. Ct. 2749, 2808 (2006) (Kennedy, J., concurring).

²¹⁷ MIL. R. EVID. 505(c).

²¹⁸ *Id.* 505(d).

²¹⁹ *Id.* 505(f).

²²⁰ *See id.* 505(g)–(k).

²²¹ *Id.* 505(g).

original version of the military commissions' regulations authorized the presiding officer to issue protective orders as necessary to safeguard "protected information," and counsel for either side were to notify the presiding officer of any intent to offer evidence involving protected information.²²² Further, drawing language directly from section 4 of the CIPA, the original regulations allowed the presiding officer to direct the deletion of specified items of protected information from documents made available to the defense, the substitution of a portion or summary of the information for protected information, or the substitution of a statement of relevant facts that the protected information would tend to prove.²²³ The motion for a protective order and relevant materials were to be considered by the presiding officer *ex parte*, *in camera*, and no protected information was to be admitted into evidence for consideration by the commission if not also presented to detailed defense counsel.²²⁴

The MCA allows the head of the executive or military department or governmental agency to invoke privilege to restrict disclosure of information if she finds that the information is properly classified and the disclosure of that information would be detrimental to national security.²²⁵ However, this authority may be delegated to a representative, witness, or trial counsel.²²⁶ The MCA allows military judges, upon motion of trial counsel, to authorize, to the extent possible, deletion and substitution of items of classified information, using the same language found in the original commission rules and CIPA.²²⁷ However, the MCA, in a change from the original commission regulations, has a provision authorizing the military judge to permit trial counsel to introduce otherwise admissible evidence while "protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence" if the judge finds that the sources, methods, or activities are classified and the evidence is reliable.²²⁸ In addition, the judge may require trial counsel to present to the commission and the defense an unclassified summary of the sources, methods, or activities by which the government acquired the evidence, as long as doing so is consistent with national security concerns.²²⁹ Objections made over the course of the trial may be resolved by the military judge through

²²² 32 C.F.R. § 9.6(d)(5)(ii) (2006). "Protected information" is defined as including: (1) classified or classifiable information; (2) information protected by law or rule from unauthorized disclosure; (3) information the disclosure of which may endanger the physical safety of participants in commission proceedings, including prospective witnesses; (4) information concerning intelligence and law enforcement sources, methods, or activities; and (5) information concerning other national security interests. *Id.* § 9.6(d)(5)(i).

²²³ *Id.* § 9.6(d)(5)(ii).

²²⁴ *Id.* § 9.6(d)(5)(ii)(c).

²²⁵ Military Commissions Act of 2006, 10 U.S.C.A. § 949d(f)(1)(A)–(B) (2006).

²²⁶ *Id.* § 949d(f)(1)(C).

²²⁷ Compare *id.* § 949d(f)(2)(A) (MCA "Alternatives to Disclosure" of classified information) with 18 U.S.C.A. app. 3, § 4 (section 4 of CIPA).

²²⁸ 10 U.S.C.A. § 949d(f)(2)(B).

²²⁹ *Id.*

ex parte, in camera review of the claim and delay of proceedings in order to consult with the department or agency who invokes the privilege.²³⁰

Given that CIPA and Rule 505 of the Military Rules of Evidence (“MRE”) have been implemented in the past to successfully protect national security interests, there is no apparent reason they could not work in the context of post–September 11 terrorism trials, were they to occur in federal courts or in courts-martial. Although the military commissions’ rules explicitly emphasize the importance of protecting the sources, methods, and activities by which information is obtained if they implicate national security, these concerns could be protected in existing CIPA section 4 and MRE 505 provisions which are designed to generally protect security concerns. In the alternative, there is no reason why CIPA or MRE 505’s provisions could not be amended to also explicitly note the importance of the protection of the procurement of information. In light of the fact that the MCA’s classified information provisions draw from CIPA and MRE 505, a persuasive case has yet to be made that national security justifies the implementation of wholly different rules of evidence for military commissions.

B. For Pragmatic and Public Policy Reasons

Secretary of Defense Donald Rumsfeld and Deputy Secretary of Defense Paul Wolfowitz argued in testimony before the Senate Armed Services Committee:

Federal rules of evidence often prevent the introduction of valid factual evidence for public policy reasons that have no application in a trial of a foreign terrorist. By contrast, military tribunals can permit more inclusive rules of evidence—a flexibility that could be critical in wartime, where it is often difficult, for example, to establish chains of custody for documents or to locate witnesses. Military commissions allow those judging the case to hear all probative evidence—including evidence obtained under conditions of war—that could be critical to obtaining a conviction.²³¹

Colonel Frederic L. Borch III, former chief prosecutor for the Department of Defense’s Office of Military Commissions, noted that such inclusive standards

not only take[] into account the unique battlefield environment in which much evidence will be obtained, but explicitly recog-

²³⁰ *Id.* § 949d(f)(2)(C).

²³¹ Rumsfeld & Wolfowitz, *supra* note 192.

nize[] that what happens in a war setting is markedly different from traditional peacetime law enforcement practices in the United States. Soldiers cannot be expected to complete a chain-of-custody document when under fire from an enemy combatant in a cave.²³²

Although these considerations are legitimate, they seem to be limited for the most part to circumstances surrounding active conflict.²³³ In contrast, the scope of the current military commissions, which cover all potential unlawful enemy combatants, is too broad to be justified by such considerations. It is unclear why evidence collected far from the battlefield, where such chain-of-custody concerns are not pressing, should be treated in the same manner as evidence gathered in the midst of combat. A simple provision that recognizes problems with chain-of-custody and witness availability could be integrated into either the Federal or Military Rules of Evidence. As they stand, the evidentiary standards governing military commissions are overinclusive in this regard. Thus, the need to maintain flexibility in evidence gathering during active combat does not adequately justify the need for an entirely distinct set of evidentiary rules for military commissions.

C. *Mirroring Other Tribunals—Past Precedent*

Supporters of military commissions point to our nation's history to show that the use of tribunals in lieu of civilian criminal trials and courts-martial is not unprecedented. It is true that in the past, the government has relied upon the evidentiary standard of "probative value to a reasonable person." However, unlike their predecessors, military commissions as currently constituted present unique concerns. As Heymann and Kayyem point out:

What is at stake here today . . . is the existence of an alternative tribunal—the military commission tribunal—that may for the indefinite future serve as an easy alternative to the more rigorous demands of criminal or court-martial tribunals, based merely on a presidential finding that the person had some relationship to the war on terror.²³⁴

The adoption of the "probative value to a reasonable person" standard ignores the fact that it was previously used in cases now remembered as blemishes upon the American system of justice, or in international

²³² Frederic L. Borch III, *Why Military Commissions Are the Proper Forum and Why Terrorists Will Have "Full and Fair" Trials: A Rebuttal to "Military Commissions: Trying American Justice,"* 2003 ARMY LAW. 10, 13 (2003).

²³³ See HEYMANN & KAYYEM, *supra* note 21, at 54.

²³⁴ *Id.* at 54.

courts with structures that do not mirror those of our adversarial legal system. Attempts to justify the evidentiary standard by analogy are thus defeasible for ignoring the plethora of historical and political factors distinguishing the current military commissions both from tribunals of eras past and from international criminal tribunals. Such claims also presuppose that these alternative fora have evidentiary standards that are worthy of esteem and comparison.

1. Military Commissions of Eras Past

Supporters of the military commissions frequently point to the use of the “probative value to a reasonable person” evidentiary standard in past military commissions. However, reductionist reliance upon the prior use of this evidentiary standard in other circumstances is problematic, as it ignores the fact that even at the height of World War II, the efficacy of this standard was contested. As a positive description, it is true that military commissions have used the standard. However, when “empowered civilian and military leaders can use select precedents from particular historical situations as analogous instances that demanded our immediate attention,” the result can be “false analogies, hasty generalizations, and self-serving argumentation.”²³⁵ Using historical parallels as justification without investigation of context is problematic when, to borrow the words of William Safire, such reliance results in “fiat turn[ing] back the clock on all advances in military justice, through three wars, in the past half-century.”²³⁶

The first adoption of the standard of “probative value in the mind of a reasonable man” was anomalous to previous practice. Until 1916, courts-martial generally used the same rules of evidence that federal courts applied in criminal cases.²³⁷ After 1916, the President prescribed the evidentiary rules in the successive editions of the *Manuals for Courts-Martial*.²³⁸ The evidentiary standard of “probative value to a reasonable man” first appeared in President Franklin D. Roosevelt’s military tribunal order to govern the trial of eight would-be Nazi saboteurs who landed in the United States in 1942.²³⁹ The two groups of four arrived six months after the attack on Pearl Harbor, when Nazi expansion was at its peak and a major U-boat offensive was taking place along America’s shores. The visitors brought with them explosives, incendiaries, fuses, and timing devices, which they buried; they changed into civilian clothing before traveling to Amer-

²³⁵ HASIAN, *supra* note 197, at 10–11.

²³⁶ William Safire, *Kangaroo Courts*, N.Y. TIMES, Nov. 26, 2001, at A17.

²³⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 198 (1917).

²³⁸ Kevin J. Barry, *Military Commissions: Trying American Justice*, ARMY LAW., Nov. 2003, at 1, 4.

²³⁹ See Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 7, 1942) [hereinafter President Roosevelt’s Order]; David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2053 (2003).

ica's largest cities.²⁴⁰ President Roosevelt's response echoed the sentiments of the public at large. He considered the saboteurs to be guilty and believed that application of the death penalty was both justified by the "the extreme gravity of the war aim" and necessary to ensure "the very existence of our American Government."²⁴¹

Less than a week after the capture of the saboteurs, President Roosevelt issued two key proclamations: one that outlined the procedures establishing military tribunals in accordance with the laws of war, and another that created the military commissions.²⁴² The procedures that would be utilized in the World War II-era military commissions were distinct from those employed in courts-martial in two important respects: conviction and sentencing would occur by a two-thirds vote, even in capital cases,²⁴³ and the aforementioned evidentiary standard would be used. The employment of this evidence standard was a "drastic departure"²⁴⁴ from the rules of evidence that were applicable at the time.

Although the Supreme Court held in *Ex parte Quirin*²⁴⁵ that enemy combatants could be tried by military commissions for violations of the laws of war, the Court's approval of both the commission and Roosevelt's authority to establish the associated procedures has been described as "extremely narrow" in scope.²⁴⁶ Chief Justice Stone noted in *Quirin* that "a majority of the full Court are not agreed on [the] appropriate grounds for decision."²⁴⁷ Some of the Justices believed that the military commission was bound by the Articles of War but also maintained that "the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President."²⁴⁸ Others were "of the opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders."²⁴⁹ These two points of contention within the majority's approach strongly suggest that *Quirin* may not sufficiently justify the military commissions' evidentiary rules.

Further, the choice of the evidentiary standard in the Nazi Saboteurs' Case had practical consequences that do not bode well for its adoption in contemporary military commissions. In his memoirs, Attorney General

²⁴⁰ President Roosevelt's Order, *supra* note 239; Marouf A. Hasian Jr., *Franklin D. Roosevelt, Wartime Anxieties, and the Saboteurs' Case*, 6 RHETORIC & PUB. AFF. 233, 234 (2003).

²⁴¹ Glazier, *supra* note 239, at 2054 (quoting Memorandum from President Franklin D. Roosevelt to Attorney Gen. Francis Biddle (June 30, 1942) (Franklin D. Roosevelt Library)).

²⁴² Hasian, *supra* note 240.

²⁴³ President Roosevelt's Order, *supra* note 239.

²⁴⁴ Barry, *supra* note 238, at 4.

²⁴⁵ 317 U.S. 1 (1942).

²⁴⁶ TURNER & SCHULHOFER, *supra* note 22, at 54.

²⁴⁷ *Quirin*, 317 U.S. at 47.

²⁴⁸ *Id.* at 47-48.

²⁴⁹ *Id.* at 47.

Francis Biddle noted that if the same indictments against the saboteurs had been made in the civilian criminal courts, the prosecutors would have had a difficult time establishing that the preparations and landings were “close enough to the planned act of sabotage to constitute attempt.”²⁵⁰ The Roosevelt administration chose a military commission to try the saboteurs because such commissions “would give [the administration] a freer hand in crafting *ad hoc* procedures of its choosing.”²⁵¹ However, these lax evidentiary standards took their toll on the tribunals, causing “routinely argumentative questions by counsel, questions of judicial notice, the admission of affidavits by witnesses whom there was no opportunity to cross-examine, and the exclusion of evidence that was arguably relevant to the defense.”²⁵²

Quirin holds a number of lessons for those who champion the use of military commissions and lenient evidentiary standards. According to Evan Wallach:

Chief among them is that no matter how good-willed the commission and its members, when “technical rules of evidence” go by the wayside, and evidence is admitted based solely upon the opinion of the commission that it has probative value to a reasonable person; there is an open invitation to misconduct, unfairness, and what Justice Murphy characterized as “judicial lynchings.”²⁵³

In addition, it is widely acknowledged that *Quirin* was not the most meritorious of Supreme Court opinions. Evoking Cicero, former Chief Justice William H. Rehnquist referenced the trial of the Nazi saboteurs as evidence that there is “some truth to the maxim *inter arma silent leges*”:²⁵⁴ in times of war, the law is silent. Justice Scalia, in his dissent in *Hamdi v. Rumsfeld*, described *Quirin* as “not this Court’s finest hour.”²⁵⁵ Thus, drawing analogy to the Nazi Saboteurs’ Case and *Quirin* may not provide much support for the use of lenient evidentiary standards in the military commissions.

2. Nuremberg and Tokyo

Those who support adopting standards used in the Nuremberg and Tokyo tribunals ignore the differences between the present military commissions and the past tribunals, and the historical context of each. The Nurem-

²⁵⁰ FRANCIS BIDDLE, IN BRIEF AUTHORITY 328 (1962).

²⁵¹ TURNER & SCHULHOFER, *supra* note 22, at 53.

²⁵² Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?*, ARMY LAW., Nov. 2003, at 18, 38–39.

²⁵³ *Id.* at 39.

²⁵⁴ WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 221 (1998).

²⁵⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting).

berg and Tokyo trials have been described as “exceptional, ‘once off’ proceedings” which should be afforded little precedential weight.²⁵⁶ Designing evidentiary standards applicable to specific tribunals requires an understanding of the unique legal and factual circumstances thereof and the aims and objectives of these rules.²⁵⁷ Both the Nuremberg and Tokyo trials “were conducted after the termination of hostilities by, essentially, the unconditional surrender of the defendants to the prosecutors.”²⁵⁸ They have been described as ad hoc and “predicated upon the right of the victors to try the vanquished.”²⁵⁹ The prosecuting allied powers had evidence, witnesses, and defendants “all firmly within their control.”²⁶⁰

Accordingly, the use of the probative value evidentiary rule for admissibility in the Nuremberg and Tokyo Trials should not be regarded as an admirable standard worthy of replication. For example, section 16 of the Charter for the International Military Tribunal for the Far East (“IMTFE”) allowed for the “reception of documents, reports, affidavits, depositions, diaries, letters, copies of documents or other secondary evidence of their contents, hearsay, opinion evidence and conclusions, in fact of anything which in the commission’s opinion ‘would be of assistance in proving or disproving the charge,’ without any of the usual modes of authentication.”²⁶¹ In the words of Justice Rutledge in his dissent in *In re Yamashita*, “[a] more complete abrogation of customary safeguards relating to the proof, whether in the usual rules of evidence or any reasonable substitute and whether for use in the trial of crime in the civil courts or military tribunals, hardly could have been made.”²⁶² He continued:

²⁵⁶ Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 *TRANSNAT’L L. & CONTEMP. PROBS.* 81, 83 (1997).

²⁵⁷ *Id.* at 82.

²⁵⁸ Kim Carter, *Proof Beyond a Reasonable Doubt?: Collecting Evidence for the International Criminal Tribunal for the Former Yugoslavia*, 31 *CAN. Y.B. INT’L L.* 235, 239 (1993).

²⁵⁹ Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 *WAKE FOREST L. REV.* 509, 511 (1994).

²⁶⁰ Carter, *supra* note 258, at 239.

²⁶¹ *In re Yamashita*, 327 U.S. 1, 49 (1945) (Rutledge, J., dissenting). The prosecution of General Tomoyuki Yamashita, the last Japanese commander in the Philippines, was one of the earliest U.S. prosecutions in the Pacific. In the words of David Glazier, “[t]he prosecution never demonstrated that Yamashita even knew of, let alone encouraged, any of the offenses committed, but instead took the unprecedented approach of simply charging that he failed to exercise his command responsibilities to prevent these atrocities.” Glazier, *supra* note 239, at 2064.

²⁶² *Yamashita*, 327 U.S. at 49 (Rutledge, J., dissenting). Rutledge noted:

Our tradition does not allow conviction by tribunals both authorized and bound by the instrument of their creation to receive and consider evidence which is expressly excluded by Act of Congress or by treaty obligation; nor is it in accord with our basic concepts to make the tribunal, specially constituted for the particular trial, regardless of those prohibitions the sole and exclusive judge of the credibility, probative value, and admissibility of whatever may be tendered as evidence.

So far as the admissibility and probative value of evidence was concerned, the directive made the commission a law unto itself.

It acted accordingly. As against insistent and persistent objection to the reception of all kinds of “evidence,” oral, documentary and photographic, for nearly every kind of defect under any of the usual prevailing standards for admissibility and probative value, the commission not only consistently ruled against the defense, but repeatedly stated it was bound by the directive to receive the kinds of evidence it specified, reprimanded counsel for continuing to make objection, declined to hear further objections, and in more than one instance during the course of the proceedings reversed its rulings favorable to the defense, where initially it had declined to receive what the prosecution offered. Every conceivable kind of statement, rumor, report, at first, second, third or further hand, written, printed or oral, and one “propaganda” film were allowed to come in²⁶³

As Evan Wallach explains, the permissive standards for admitting evidence in the post–World War II tribunals “raised concerns well beyond mere technical quibbles.”²⁶⁴ First, as noted previously, admissibility standards varied depending upon the constitution of the tribunal for that particular day, both in terms of who was on the panel of judges and in terms of the number of people on the bench. In the words of William Webb, the President of the IMTFE:

All we can do on each piece of evidence as it is presented is to say whether or not it has probative value, and the decision on that question may depend on the constitution of the court. Sometimes we have eleven members; sometimes we have had as low as seven. And you cannot say, I cannot say, that on the question of whether any particular piece of evidence has probative value you can always get the same decision from seven judges as you would get from eleven. I know that you would not You cannot be sure what decision the court is going to come to on any piece of evidence—not absolutely sure—because the constitution of the court could vary from day to day and I would be deceiving you if I said decisions did not turn on how the court was constituted from time to time. They do. On the other day in court on an important point I know the decision would have been different if a Judge who was not here was present. How are we to overcome that?²⁶⁵

²⁶³ *Id.* at 49.

²⁶⁴ Wallach, *supra* note 252, at 37.

²⁶⁵ Pal Opinion, *supra* note 128, at 654–55 (quoting President Webb).

This concern poses a significant problem with the military commissions as originally constituted, since the particular constitution of the commission will change from trial to trial at the discretion of the Appointing Authority,²⁶⁶ and questions of admissibility were to be jointly determined by the Presiding Officer and military commissioners.²⁶⁷ Although this concern would be mitigated if the Secretary of Defense were to adopt the MCA sanctioned rule that military judges alone would make the probative value determination,²⁶⁸ the general point persists: the meaning of the standard for admissibility is likely to change depending upon who is sitting as a military judge, particularly since there is no body of precedent to cabin her discretion in making evidentiary decisions.

In addition, the Nuremberg prosecutors relied heavily on the “Teutonic penchant for meticulous record keeping” and thus framed their prosecution heavily on documentation.²⁶⁹ The quality, quantity, and nature of the documents were overwhelming, and the prosecution benefited from “the scope and significant detail of the captured documents There were numerous documents from the highest level of the Reich government.”²⁷⁰ Thus, evidentiary rules were crafted “directly to encourage a prosecution that relied more on documentary evidence than on witnesses” and that was based on functionally “self-generated, irrefutable, incriminating documentation.”²⁷¹ In contrast, the documents used in the military commissions to prosecute alleged enemy combatants are unlikely to consist of records kept meticulously by the Al Qaeda organization. Documents relied on in the prosecution of terrorist suspects most probably will lack such detailed information, and are not likely to exist in quantities that suggest a similar level of reliability through corroboration. Rather, many of these documents will be summaries of *ex parte* interrogations at the hands of government officials. One could draw an analogy between the records relied upon in Nuremberg and Rule 803(6) and (7) regarding business records,²⁷² especially since a certificate for authentication was offered for each captured document at Nuremberg.²⁷³ However, the documentary evidence that seems to be at the center of the government’s cases against terrorism suspects will be testimonial in nature and thus subject to the infirmities discussed above with regard to hearsay. They do not have the same assurances of reliability that were characteristic of the Nuremberg documents.

²⁶⁶ See 32 C.F.R. § 9.4 (2006).

²⁶⁷ See *supra* note 68 and accompanying text.

²⁶⁸ See Military Commissions Act of 2006, 10 U.S.C.A. § 949a(b)(2)(A) (2006).

²⁶⁹ TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 57 (1992).

²⁷⁰ BRADLEY F. SMITH, *REACHING JUDGEMENT AT NUREMBERG* 82 (1977).

²⁷¹ Carter, *supra* note 258, at 239.

²⁷² See FED. R. EVID. 803(6)–(7).

²⁷³ See 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 894 (1946–49).

3. *The International Criminal Tribunals for the Former Yugoslavia and Rwanda*

While the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) feature evidentiary standards that allow a fact finder to admit “any relevant evidence which it deems to have probative value,”²⁷⁴ an evaluation of the veracity of evidence is built into the rules. Regulations governing the ICTY and ICTR provide that “[a] Chamber may request verification of the authenticity of evidence obtained out of court.”²⁷⁵ The ICTY follows an explicit standard allowing for exclusion, similar to Federal Rule of Evidence 403,²⁷⁶ found in ICTY Rule 89(D): “A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.”²⁷⁷ Considered as a whole, the evidentiary standards that govern the ICTR and ICTY, when compared to those of the military commissions, suggest that “the *Quirin* rules of evidence are unacceptable for a trial under current international law.”²⁷⁸

Although hearsay is admissible, the ICTY has accounted for the weaknesses of such sources by adjusting its assessment of the evidence’s probative value.²⁷⁹ For example, in the case against Dusko Tadic, the first trial before the ICTY, the Trial Chamber noted that that in deciding whether to admit hearsay, it would “determine whether the proffered evidence is relevant and has probative value, focusing on its reliability The Trial Chamber may be guided by, but not bound to, hearsay exceptions generally recognized by some national legal systems, as well as the truthfulness, voluntariness, and trustworthiness of the evidence, as appropriate.”²⁸⁰ The Trial Chamber found that the Rules of the ICTY implicitly required evidence to be reliable in order for it to be admissible; if unreliable, evidence

²⁷⁴ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, Rules of Procedure and Evidence, Rule 89(C), U.N. Doc. IT/32/Rev.7 (1996) (entered into force Mar. 14, 1994, amendments adopted Jan. 8, 1996), <http://www1.umn.edu/humanrts/icty/ct-rules7.html> [hereinafter ICTY Rules]; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 89(C), U.N. Doc. ITR/3/REV.1 (1995) (entered into force June 29, 1995), <http://www1.umn.edu/humanrts/africa/RWANDA1.htm> [hereinafter ICTR Rules].

²⁷⁵ ICTY Rules, *supra* note 274, Rule 89(E); ICTR Rules, *supra* note 274, Rule 89(D).

²⁷⁶ FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”) & Advisory Committee’s Note (“Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission.”).

²⁷⁷ ICTY Rules, *supra* note 274, Rule 89(D).

²⁷⁸ Wallach, *supra* note 252, at 44 (footnote omitted).

²⁷⁹ Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on Defense Motion on Hearsay, ¶ 16 (Aug. 5, 1996) [hereinafter Tadic Hearsay Motion].

²⁸⁰ *Id.* ¶ 19; Prosecutor v. Tadic, Case No. IT-94-1, Opinion and Judgment, ¶ 555 (May 7, 1997).

would lack probative value and accordingly would be excluded. “In evaluating the probative value of hearsay evidence, the Trial Chamber is compelled to pay special attention to indicia of its reliability. In reaching this determination, the Trial Chamber may consider whether the statement is voluntary, and trustworthy, as appropriate.”²⁸¹ Thus, although hearsay evidence is not excluded at the admissibility stage, the ICTY judges have been careful to evaluate the context in which evidence is obtained and in determining what weight the evidence deserves. In addition, the ICTY judges relied both on the capacity to exclude evidence under Rule 89(D) and on their self-assessed epistemic competence to assign appropriate weight to hearsay evidence. In the Tadic case, the Trial Chamber relied on these two rationales in evaluating the testimony of prosecution witness Hanne Sophie Greve:

As a member of the U.N. Commission of Experts, [Greve] had initiated an independent study of the Prijedor region, about which the Prosecutor had sought her testimony. The Defense challenged her evidence on the basis that it was a summary of numerous witness interviews, statements, and other reports, and was therefore irrelevant and without probative force.²⁸²

The Trial Chamber held that Greve’s testimony had probative value and thus was admissible under Rule 89(C), but noted:

Under Rule 89(D), the Chamber may exclude evidence if its probative value [is] substantially outweighed by the need to ensure a fair trial. So that our determination at this time that the testimony is relevant, and that it appears to have probative value, does not in any way bind the Trial Chamber from excluding testimony, should we make such a determination after hearing the testimony and hearing the context in which it is given. We are very cognizant of the fact that we are judges, experienced judges. We are not a jury. We believe we can listen to this testimony that we consider to be relevant and appears to have probative value, and give it the appropriate weight that is necessary.²⁸³

²⁸¹ Tadic Hearsay Motion, *supra* note 279.

²⁸² See Dixon, *supra* note 256, at 94. Kellye L. Fabian noted that the Greve testimony “should disturb even those with no training regarding the laws of evidence. She predicated her opinion almost entirely on witness interviews and newspaper articles . . . [U]nder the guise of ‘expert,’ Greve testified repeatedly to what other people said and the way other people (the victims) felt.” Kellye L. Fabian, Notes and Comments, *Proof and Consequence: An Analysis of the Tadic & Akayeso Trials*, 49 DEPAUL L. REV. 981, 1024 (2000) (emphasis removed).

²⁸³ Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Transcript (May 20, 1996), at 923.

Thus, the Trial Chamber expressed considerable confidence in its ability to assign appropriate weight to derivative evidence, citing its own expertise and epistemic competency. Central to this confidence was the Trial Chamber's recognition that Tribunals are not courts that rely upon juries: "[T]rials are conducted by Judges who are able, by virtue of their training and experience, to hear the evidence in the context in which it was obtained and accord it appropriate weight."²⁸⁴ This view discounts the value of what Allen and Leiter describe as secondary epistemic rules—those that account not for the epistemic shortcomings of juries, but rather for the limitations of judges.²⁸⁵ The need for secondary epistemic rules is arguably reflected in the decision of the drafters of the Federal and Military Rules of Evidence to incorporate categorical bans on hearsay. This view does, however, recognize that primary epistemic rules are useful when the division of labor between judge and jury renders juries the primary factfinders, implying that the hearsay provisions applying to military commissions are deficient.²⁸⁶

In addition, the ICTR and ICTY, unlike the military commissions, do not grow from an adversarial tradition.²⁸⁷ Although the lines between common law and civil law systems are not as clear as they perhaps once were,²⁸⁸ the distinction between adversarial and inquisitorial systems remains meaningful. Although the rules of the Tribunals "have an adversarial inclination, they simultaneously reflect certain civil law characteristics which permit the Judges to become more actively involved in the examination of witnesses."²⁸⁹

Evidentiary scholar Mirjan Damaska has warned of the dangers inherent in adopting amalgams of civil and common law evidentiary rules. Damaska writes:

[I]nstitutional differences between the two Western legal families capable of affecting the factfinding style are quite considerable. In criminal procedure, a few good lessons have already been learned about problems that arise when factfinding arrangements from one family are incorporated into the institutional milieu of another. Here experience has shown how easily an imported evi-

²⁸⁴ Tadic Hearsay Motion, *supra* note 279, ¶ 17.

²⁸⁵ See Allen & Leiter, *supra* note 70, at 1502.

²⁸⁶ See *id.*

²⁸⁷ See, e.g., Dixon, *supra* note 256 at 97 ("Lawyers and commentators should guard against too readily assuming that the Judges adopted a modified adversarial system for the Tribunals.").

²⁸⁸ Françoise Tulken, *Criminal Procedure: Main Comparable Features of the National Systems*, in *THE CRIMINAL PROCESS AND HUMAN RIGHTS* 5, 8–9 (Mireille Delmas-Marty ed., 1995) ("[D]istinguishing [the common law and civil law systems] is almost a 'metaphysical question' which is now sterile and obsolete. If continental law was once classified as inquisitory and common law as accusatory, today those boundaries are blurred . . . [W]e can't confine ourselves to these categories which no longer correspond to reality.").

²⁸⁹ Dixon, *supra* note 256, at 98.

dentiary doctrine, or practice, alters its character in interaction with the new environment. Even textually identical rules acquire a different meaning and produce different consequences in the changed institutional setting. The music of the law changes, so to speak, when the musical instruments and the players are no longer the same.²⁹⁰

If the military commissions use a hybrid standard of evidence, cobbled together from civil and common law court procedures, lawyers who come before the commissions and judges who preside over them may not be able to adapt easily to the new rules. Years of commitment to an adversarial system may be an obstacle. As Damaska notes:

In each system, the attitude constitutes an engrained habit of procedural participants—a habit that cannot be altered overnight in response to a lawgiver's fiat. Prudent reformers must therefore include inertia in their calculations. After the alien mode of developing evidence has been introduced, old attitudes to evidence are likely to linger, causing dislocations and a measure of disorientation in factfinding practice.²⁹¹

He warns that this has been the experience in the international criminal tribunals' experimentation of mixed systems of factfinding:

[I]t is difficult to find a virtuous equilibrium In their natural habitat, each set of practices is part of a larger procedural whole, with its own internal coherence, layers of motivational horizons, and ingrained habits of principal actors. Creating a successful mixture is not like shopping in a boutique of detachable procedural forms, in which one is free to purchase some and reject others.²⁹²

Damaska's observation suggests that analogizing international courts to the U.S. system without accounting for differences in factfinding structures is ill-advised. Reliance upon the use of the "probative value to a reasonable person" standard in international tribunals does not itself offer a persuasive justification for their use in the military commissions context.

²⁹⁰ Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 839–40 (1997) (footnote omitted).

²⁹¹ *Id.* at 845.

²⁹² Damaska, *supra* note 15, at 121.

IV. CONCLUSION

An examination of the truth-seeking function and collateral values reflected in the military commission's rules of evidence suggests that the rationales supplied by the Bush administration do not justify the commissions' departures from traditional civilian and military criminal trials. Although the attacks of September 11 have had a profound impact on many aspects of American society, we should be wary of allowing the war on terror to lead us to abandon practices of American jurisprudence that have evolved over generations. It is a precarious endeavor to replace our existing system of evidentiary rules with a standard for the prosecution of terrorism suspects that has been applied only in domestic cases now viewed with disfavor or in systems of law quite distinct from our own. Despite the flaws of the Federal and Military Rules of Evidence, they have been deliberately crafted to help ascertain the truth in the adjudication of guilt and innocence; affording suspected enemy combatants any lesser standard casts a shadow over the legitimacy of their trials. As Justice Jackson said just prior to his appointment as Chief Prosecutor at Nuremberg:

Farcical judicial trials conducted by us will destroy confidence in the judicial process as quickly as those conducted by any other people

. . . [A]ll experience teaches that there are certain things you cannot do under the guise of judicial trial. Courts try cases, but cases also try courts

You must put no man on trial before anything that is called a court . . . under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect to courts that are organized merely to convict.²⁹³

We should take heed of what President Bush said in the aftermath of September 11: "Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done."²⁹⁴ However, in striving for justice, not any form will do. Vengeance should not replace truth in our pursuit of those who have done us wrong, for victor's justice is no justice at all.

²⁹³ Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, Address at the Washington Meeting of the American Society of International Law (Apr. 13, 1945), *in* 39 AM. SOC'Y INT'L L. PROC. 10, 15-16 (1945).

²⁹⁴ *See, e.g.*, President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

