

Inter Arma Enim Silent Leges, or, It's the American
Way: Hearsay in United States Military Commissions

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Abstract: The United States government and military have operated systems of military justice for the trial of enemy combatants for over a century, and such a system has been developed and is employed in the conflicts in Afghanistan and Iraq. The minimalist evidentiary rules governing the introduction of hearsay evidence before proceedings at these tribunals seriously jeopardize the rights of defendants to fairness and justice.

Key Words: Military, Commissions, Hearsay, Tribunals, Evidence, Combatants

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In armed conflicts, governments must establish procedural mechanisms to try enemy combatants entering into military custody while concordantly respecting those combatants' fundamental human rights. There exists a longstanding history of American military tribunals operating as organs of enforcement for the laws of war, but these have had at best a checkered history in terms of their protectiveness toward the accused.¹ Determining evidentiary rules for use in such tribunals amplifies the traditional tension in the law of evidence between exclusionary safeguards promoting veracity and reliability on the one hand and practical challenges encountered when

¹ CUTLER, L. (2005) *Rule of Law and the Law of War: Military Commissions and Enemy Combatants Post 9/11*, Edwin Mellen Press; ELSEA, J. (2009) *Military Commissions Act of 2006: Analyses*, Congressional Research Service.

attempting to obtain permissible evidence on the other.² The calculus of this tension has been demonstrably complicated by political sensitivities stemming from the temporal proximity and visible memorialization of the September 11 attacks³ and the uniquely venerated position of the Armed Forces in the collective American consciousness.⁴ Both the general prohibition on hearsay evidence and the Sixth Amendment's fundamental right of confrontation are seriously diluted by the current evidentiary rules of American military commissions.⁵ As such, the effectiveness and fairness of the military tribunal system as regards the rights of defendants are jeopardized by these evidentiary modifications. This essay examines the rules governing hearsay evidence at military commissions, paying special attention to the statutory framework enacted after *Hamdan v. Rumsfeld*. I will explain the contours of the hearsay rule, its employment in military commissions, and the systemically imperiled rights to confrontation and fair trials. I will also discuss the United States Supreme Court's holding in *Hamdan v. Rumsfeld* (including its beguiling deficiencies in terms of rights protection), and Congress' statutory responses. I will finally consider the wisdom, efficacy, and constitutionality of the Acts' minimalist hearsay rules, and encourage a readiness to exclude non-cross-examinable statements offered against military combatants for the sake of promoting a fair system of military justice.

The Hearsay Rule

Hearsay consists of "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."⁶ In common law jurisdictions, hearsay evidence is generally inadmissible before civilian juries due to grave concerns regarding the veracity of out-of-court, non-cross-examinable statements. The adversarial system places great weight not only on the availability of witnesses for cross-examination, but on the opportunity for the trier of

² HEWETT, M., "Hearsay at Guantanamo: A 'Fundamental Value' Determination," in *Georgetown Law Review*, Vol. 96, Issue 4, 2008, p. 1385. ("Military commissions, particularly those conducted during a state of armed conflict, pose unique challenges to the application of traditional hearsay law.")

³ CHOI, E., "Veritas, Not Vengeance: An Examination of the Evidentiary Rules for Military Commissions in the War Against Terrorism," in *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 42, No. 1, Winter 2007, pp. 139-140.

⁴ MAZUR, D. (2010) *A More Perfect Military*, Oxford University Press.

⁵ CHOI, E., *ibid*, pp. 154-166.

⁶ Federal Rule of Evidence 801(c) (2012) in *Federal Rules of Evidence*, West.

fact to evaluate the demeanor of the source providing testimony.⁷ Nevertheless, there are over twenty-five exceptions to the hearsay rule, typically justified by the absence of the classic misgivings concerning hearsay evidence and the correlative testimonial infirmities.⁸ The Supreme Court added a constitutional gloss to the hearsay rule in *Crawford v. Washington*, deeming “testimonial hearsay” inadmissible against criminal defendants as violative of the Sixth Amendment’s Confrontation Clause.⁹ While *Crawford* did not bring all hearsay within the ambit of the Confrontation Clause, the Court’s non-exhaustive definition of “testimonial hearsay” included “extrajudicial statements . . . in . . . testimonial materials, such as affidavits, depositions . . . or confessions.”¹⁰ This protects defendants from being convicted on the basis of ex parte affidavits from a non-cross-examinable declarant.¹¹

Members of the United States Armed Forces are subject to a unique judicial system,¹² a “rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience.”¹³ Differences notwithstanding, concerns about military-combat effectiveness undergirding the military justice system are generally animated by the same considerations as those which motivate the analogous civilian system.¹⁴ As such, evidentiary rules in the domestic military-judicial context largely track the Federal Rules, and differences between the two regarding hearsay are of no special consequence.¹⁵

⁷ Federal Rule of Evidence 802; Federal Rules of Evidence Introductory Note: The Hearsay Problem (Article VIII. Hearsay, Advisory Comm.’s Note).

⁸ See Federal Rules of Evidence 801-803. The provisions in 803 and 804 describe situations in which hearsay statements should not be excluded, where the declarant’s unavailability is either immaterial or material, respectively; conversely, Rule 801(d) provides a list of out-of-court statements offered for their truth which technically are “not hearsay” but which nevertheless function as hearsay “exceptions.” *Ibid.*; MORGAN, E., “Hearsay Dangers and the Application of the Hearsay Concept,” in *Harvard Law Review*, Vol. 62, No. 2, December 1948, pp. 189-205.

⁹ “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” United States Constitution, Amendment VI. See *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006).

¹⁰ *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004).

¹¹ TURNER, S., SCHULHOFER, S. (2005) *The Secrecy Problem in Terrorism Trials*, Brennan Center for Justice, p. 67.

¹² 10 U.S.C. §§ 816-829 (2006).

¹³ *Reid v. Covert*, 354 U.S. 1, 34-35 (1957).

¹⁴ CHOI, E., *ibid.*, p. 150.

¹⁵ EVERETT, R., “Military Rules of Evidence Symposium: Introduction,” in *Military Law Review*, Vol. 130, October 1990, p. 1. The primary differences between the civilian and military evidentiary rules involve expert and scientific testimony or the invocation of privileges, not hearsay.

Incongruities in the treatment of hearsay evidence between the Continental and Anglo-American systems reflect broader procedural differences between the two systems.¹⁶ Courts in Continental jurisdictions operate under an overarching charge to admit relevant evidence, hearsay not excluded. The primary justification for this lenient attitude toward hearsay evidence is that because in such system a panel of legally-trained judges sits in place of a lay, civilian jury, the dangers typically posed to reliability and credibility by the introduction of non-cross-examinable hearsay evidence are greatly reduced. International law governing hearsay evidence, including the Third Geneva Convention, tends to reflect this Continental tradition.¹⁷

The History of Hearsay at Military Commissions

Prior to 1916, proceedings at American military commissions tended to include similar evidentiary protections as did those before civilian criminal trials.¹⁸ Although such tribunals were “more summary in their action” than courts-martial, they generally adhered to “established rules and principles of law and evidence.”¹⁹ Prominent international tribunals, such as those at Nuremberg, Tokyo, and the Criminal Tribunal for the Former Yugoslavia have, as a rule, also permitted the admission of hearsay evidence.²⁰ As technological advances in the twentieth century engendered broader and more destructive military conflicts, they were accompanied by concomitant relaxations of evidentiary rules in subsequent military commissions.²¹ At tribunals convened for the trial of alleged war criminals at Nuremberg and Tokyo, Allied prosecutions enjoyed extremely lax evidentiary standards.²² As a result, hearsay

¹⁶ BLUMENTHAL, J., “Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective,” in *Pace International Law Review*, Volume 13, Issue 1, Spring 2001, pp. 93-94.

¹⁷ Geneva Convention III Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316. The Convention guarantees enemy combatants “all the judicial guarantees which are recognized as indispensable by civilized peoples.” *Ibid.*

¹⁸ Brief for Military Law Historians, Scholars, and Practitioners as Amici Curiae Supporting Petitioner, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184).

¹⁹ BARRY, K., “Military Commissions: Trying American Justice,” in *Army Law*, Nov. 2003, p. 2.

²⁰ MAY, R. & WIERDA, M., “Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha,” in *Columbia Journal of Transnational Law*, Vol. 37, pp. 745-748.

²¹ BARNOUW, D. (2005) *The War in the Empty Air*, Indiana University Press.

²² DIXON, R., “Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals,” *Transnational Law and Contemporary Problems*, Volume 7, Spring 1997, p. 83.

evidence was readily accepted at those proceedings, often resulting in palpable unfairness toward defendants.²³

The development of evidentiary rules was further internationalized by the UN's Criminal Tribunal for the Former Yugoslavia.²⁴ The Tribunal follows an amalgamated set of evidentiary rules which represents a hybrid of common and civil law systems, but lacks a specific hearsay provision.²⁵ Under the terms of Rule 89(C) the Tribunal may admit any evidence demonstrating relevance and probative value,²⁶ but Rule 89(D) demands exclusion if that evidence's "probative value is substantially outweighed by the need to ensure a fair trial."²⁷ Rule 89(D) affords judges discretion to perform a balancing test which might exclude even highly probative evidence.²⁸ This is similar to the protection given to parties before United States courts by Federal Rule of Evidence 403, pursuant to which judges administer a balancing test to determine admissibility.²⁹ The ICTY Trial Chamber has suggested it might consider hearsay exceptions like those found at common law, but is not thereby bound.³⁰ The Chamber also declared that ICTY Rules implicitly demanded consideration of evidentiary "reliability," serving as further protection against defective evidence.³¹ The tenor of the discretionary safeguard in Rule 89(D) combined with the reliability requirement mandated by the Trial Chamber combine to suggest that the ICTY has paid significantly more heed toward ensuring a

²³ MAY, R. & WIERDA, M., *ibid.*, p. 745. In an interesting twist, the admission of hearsay at Nuremberg and Tokyo often provided a tactical advantage for the accused, whose counsel was afforded the opportunity to criticize the evidence as lacking in probative value. *Ibid.*, 745-746.

²⁴ MAY, R. & WIERDA, M., *ibid.*, pp. 735-738.

²⁵ *Ibid.*, p. 747.

²⁶ 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).

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Federal Rule of Evidence 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of the 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").

³⁰ *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, Judgment (Oct. 7, 1997) ("Legal constructs and terms of art upheld in national law should not be automatically applied at the international level," despite their usefulness for occasional guidance, as the ICTY is "an international body based on the law of nations").

³¹ *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on Defense Motion on Hearsay, (Aug. 7, 1996).

just mechanism for the trial of wartime defendants than most of its predecessors and contemporaries.

The September 11 attacks led to a briskly enacted system of military commissions.³² President Bush's Presidential Military Order ("PMO") of November 2001 authorized the Secretary of Defense to create a system to try non-citizens associated with al-Qaeda.³³ Justifying its haste by invoking the specter of international terrorism, the White House summarily rejected suggestions to create an adjudicatory system involving civilian input, instead choosing one administered by the military alone.³⁴ The rules for these commissions were created in near-total secrecy by the Department of Defense.³⁵ The evidentiary procedures, which to no surprise allowed ex parte hearsay evidence to be admitted wholesale, were therefore *themselves* determined ex parte at the Pentagon, in stark contrast to typical administrative rulemaking processes. The very formulation of these procedures represents a near-total abrogation of sacrosanct features of transparency and fairness in the American criminal justice system.

The military commission system designed by the Bush administration eschewed procedural tradition in favor of military-deferential regulations, and conveniently allowed defendants tried by the commissions to pay the costs. The system denied legally-trained judges the right "to make independent decisions about the admissibility of evidence."³⁶ There was no protection against hearsay evidence in the procedural rules; evidence needed only exhibit "probative value to a reasonable person."³⁷ Most troublingly, the rules as first drafted established the preposterously unambitious requirement that only one member of the commission, the Presiding Officer, needed

³² Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

³³ *Ibid.*

³⁴ CHOI, E., *ibid.*, p. 144. This interagency group was led by then-White House Counsel Alberto Gonzales. *Ibid.*

³⁵ CHOI, E., *ibid.*, pp. 144-145. The responsibility of drafting specific regulations governing military commissions of enemy combatants in the Afghan conflict was delegated by the President to the Department of Defense. See 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).

³⁶ CHOI, E., *ibid.*, p. 151.

³⁷ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 § 4(c)(3) (Nov. 16, 2001).

any sort of legal training.³⁸ The Presiding Officer initially decided the admissibility of evidence, but if any other member of the commission objected to that decision, the entire commission then passed judgment on admissibility and evidence could be admitted by the vote of a bare majority of non-legally trained members on the commission at their whimsy.³⁹

***Hamdan v. Rumsfeld*, Separation of Powers, and the Paper Tiger**

Salim Hamdan, alleged driver and bodyguard for Osama bin Laden, was captured in Afghanistan in November 2001, transported to Guantánamo, and designated triable by the military commission for conspiracy and acts in furtherance thereof.⁴⁰ In challenging the legality of the commission, Hamdan contended that the procedures of the military commission violated the Uniform Code of Military Justice and Common Article 3 of the Third Geneva Convention, and his appeal reached the United States Supreme Court.⁴¹ The Court in *Hamdan v. Rumsfeld* eviscerated the procedural engine driving PMO-created military commissions.⁴² The Court evaluated the constitutive validity of the commissions by considering Article 36(a) of the UCMJ, which demands the application of general rules of evidence excepting cases of impracticability.⁴³ This provision vests in the Executive significant discretion to depart from traditional rules of evidence.⁴⁴ Nevertheless, Congress emphasized the impracticability provision tempering this discretionary element; Article 36(b) requires that rules enacted pursuant to Article 36(a) “be uniform insofar as practicable and ... reported to Congress.”⁴⁵ The Court read these provisions as legislative limitations on executive authority to promulgate procedural rules.⁴⁶ The Court acknowledged that Article 36(b) “does not preclude all departures from the procedures dictated for use by

³⁸ These rules were thereafter revised by the Department of Defense. See United States Department of Defense, Military Commission Order No. 1 (Aug. 31, 2005) (revised procedures) [hereinafter 2005 Regulations].

³⁹ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, *ibid.*

⁴⁰ *Hamdan v. Rumsfeld*, 548 U.S. 557, 566-569 (2006).

⁴¹ *Ibid.*

⁴² *Ibid.* Nevertheless, the Court let remain a significant loophole in its overall defendant-protective holding.

⁴³ Uniform Code of Military Justice § 36(a), 10 U.S.C. § 836(a) (2006).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Hamdan v. Rumsfeld*, 548 U.S. 557, 620 (2006).

courts-martial.”⁴⁷ The Court did maintain, though, that “any [such] departure must be tailored to the exigency that necessitates it.”⁴⁸ The Executive Branch also failed to demonstrate the necessary impracticability in Article 36(a) when it generously offered the “danger[s] of international terrorism” as supporting evidence for its decision to abandon traditional evidentiary rules at the Guantánamo tribunals; the Court could not discern “logistical difficulty in securing properly sworn and authenticated evidence.”⁴⁹

The *Hamdan* majority was without question manifestly uncomfortable with the minimalist rules of evidence employed before pre-*Hamdan* military commissions.⁵⁰ Despite such misgivings, the holding explicitly relied on the absence of legislative-executive cooperation in condemning the administration’s deviation from the congressionally-promulgated UCMJ.⁵¹ The political left believed *Hamdan* affirmed procedural constitutional guarantees, but the *Hamdan* holding “had nothing to do with due process in the constitutional sense of the term.”⁵² Instead, through its fixation on interbranch cooperation, the Court invited Congress to establish a commissions system replete with stripped-down evidentiary provisions, alien to both the UCMJ and the judicial system as a whole.⁵³

The Congress Strikes Back: The Military Commissions Acts

The ink of the *Hamdan* decision barely dried before the Bush administration and Republican-controlled Congress began collaborating to circumvent the exceedingly low hurdle erected by the *Hamdan* Court.⁵⁴ The military commissions created by Congress in the Military Commissions Act 2006 (“MCA”) differed in a few respects from Bush’s

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid. Justice Stevens even cited Justice Rutledge’s now-celebrated dissent in *Yamashita*, decrying the use of *ex parte* affidavits and emphasizing the dangers such evidence poses for witness confrontation. *Application of Yamashita*, 327 U.S. 1. 44 (1946) (Rutledge, J., dissenting).

⁵¹ Ibid.

⁵² HEWETT, M., *ibid.*, p. 1390. Justice Breyer made explicit the particularities of executive power motivating much of the *Hamdan* holding, stating that “Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (Breyer, J., concurring).

⁵³ KURLAND, A., “The Military Commissions Act of 2006: An Analysis of the Treatment of Hearsay Evidence and Witness Confrontation,” *International Journal of Punishing and Sentencing*, Vol. 3, No. 2, July 2007, p. 70.

⁵⁴ CHOI, E., *ibid.*, p. 148.

military commissions. The MCA delegated significant authority to the Secretary of Defense, including determination of elements and modes of proof.⁵⁵ Additional protections were neither numerous nor roundly significant.⁵⁶ At the very least, a legally-trained judge at such proceedings could “rule upon all questions of law, *including the admissibility of evidence*,” dispensing with the prior rule which allowed two non-legally trained members to overrule the legal opinion of the Presiding Officer.⁵⁷ Regardless, fundamental evidentiary problems and injustices persisted.

The Pentagon’s ability to promulgate evidentiary rules for military commissions included expansive latitude resulting in widespread admission of otherwise excludable hearsay evidence so long as the proponent of such evidence provided the adverse party with informed notice.⁵⁸ This disclosure requirement was further qualified by substantial limitations on the disclosure of classified information.⁵⁹ The rule required no separate inquiry into the reliability of hearsay evidence; it cabined the few protections it offered within its notice requirement, whose exclusionary element was swallowed by the introduction of otherwise inadmissible hearsay.⁶⁰ The “conspicuous” similarity between the structure of this rule and that of the residual exception in Federal Rule of Evidence 807 proves more superficial than substantive because hearsay under the MCA need exhibit no “circumstantial guarantees of trustworthiness” equivalent to other recognized exceptions.⁶¹ This undermines the intentionally non-inclusive nature of the residual exception, designed to operate in “exceptional circumstances where evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions.”⁶² Further, the party opposing

⁵⁵ 10 U.S.C. § 949a(a) (2006) (emphasis added). This subsection provides that it is within the discretion of the Secretary of Defense to prescribe rules and procedures reflecting “the principles of law and the rules of evidence in trial by general courts-martial.” *Ibid.*

⁵⁶ 10 U.S.C. § 949 (2006).

⁵⁷ 10 U.S.C. § 949l(b) (2006) (emphasis added).

⁵⁸ 10 U.S.C. § 949a(b)(2)(E) (2006).

⁵⁹ *Ibid.* See also 10 U.S.C. § 949j(c) (2006) (providing for the protection of classified information by way of either the deletion of specific, classified information, or the substitution of suitable alternatives for classified items).

⁶⁰ See 10 U.S.C. § 949a(b)(2)(E)(i) (2006).

⁶¹ HEWETT, M., *ibid.*, p 1391. See Federal Rule of Evidence 807.

⁶² S.Rep. No. 93-1277, as reprinted in 1974 U.S.C.C.A.N., 7066 (from the Senate Judiciary Committee Report to Federal Rule of Evidence 803(24) which was, together with Federal Rule of Evidence 804(b)(5), collapsed into Federal Rule of Evidence 807 in 1997).

admission was additionally saddled with the burden of demonstrating that it was unreliable or lacking in probative value.⁶³

In 2009, Congress passed a revised MCA which included some encouraging modifications of the hearsay rule.⁶⁴ While the 2006 MCA placed the burden of proving the unreliability of hearsay on such evidence's opponent, the 2009 MCA once more reverses the burden.⁶⁵ The proponent of hearsay evidence bears the burden of proving its reliability pursuant to the 2009 MCA.⁶⁶ Further, hearsay inadmissible in courts-martial is only admissible before a military commission if the judge, after considering whether the evidence is corroborated and reliable, determines the statement is evidence of a material fact and has sufficient probative value, the declarant is unavailable, and admission will serve the "general purposes of the rules of evidence and the interests of justice."⁶⁷ Shifting the burden of proof back to the proponent of such evidence makes the prospect of admitting unreliable and prejudicial hearsay less likely, but still possible in the absence of a generalized prohibition on hearsay evidence.

American Military Commissions and the Quest for Legitimacy

The rules governing trials of combatants have evolved significantly since the first tribunals in the months following September 11. The most dramatic improvement involves the modification of the role and purpose of the military judge at such proceedings. Nevertheless, it would be prudent for both the American government and military alike to further re-examine mechanical aspects of these military commissions because even procedural deficiencies at venues such as Guantánamo disproportionately affect human populations already seriously and systematically disadvantaged by profoundly unequal bargaining power as regards constitutional safeguards, adequacy of representation, and access to legal services. The admission of highly prejudicial hearsay evidence only serves to add fuel to the proverbial fire of the myriad of socio-cultural prejudices attending the post-September 11 military commissions system. It would be a grave and wholly unnecessary injustice should the

⁶³ Military Commissions Act of 2009, 10 U.S.C. § 949a(b)(2)(E)(ii).

⁶⁴ Military Commissions Act of 2009, 10 U.S.C.A. § 949a(b)(3) (2012).

⁶⁵ Military Commissions Act of 2009, 10 U.S.C.A. § 949a(b)(3)(D).

⁶⁶ Ibid.

⁶⁷ Ibid.

United States government and military, with all its power, pomp, and self-declared prestige, permit procedural inadequacies to masquerade as urgency or exigency at the expense of defendants already facing overwhelming institutional and tactical challenges.

Apologists for the PMO-created military commissions often favorably equate them with proceedings in Continental inquisitorial systems. This reductivist comparison oversimplifies the superficial similarities between the civil system and American military commissions.⁶⁸ The PMO-created military commissions were especially problematic, as non-legally trained “judges” could override judicial officers concerning questions of law.⁶⁹ Courts in civil jurisdiction are not hampered by similar concerns as regards the composition of the bench. Furthermore, Continental systems provide post-admission safeguards governing admitted hearsay by way of checks that demand judges’ caution given potential deficiencies in such evidence.⁷⁰ These protections were absent from PMO-created American military commissions and largely missing in military commissions created by the 2006 MCA. The burden-shifting provisions in the 2009 MCA, and the 2006 MCA provision delegating questions of law to judges alone, cure some shortcomings of the military commissions system.⁷¹

Comparisons between the ICTY and the American military commissions system, also occasionally used in defense of the latter, prove singularly uninformative. ICTY evidentiary rules contain Continental-style protective measures diluting potentially prejudicial effects of hearsay evidence.⁷² Furthermore, the hybrid structure of the ICTY rules has been met with less than universal acclaim, so likening American military commissions to them is not especially useful.⁷³ Equally unhelpful are frequent

⁶⁸ TURNER, S., SCHULHOFER, S. *ibid*, p. 68.

⁶⁹ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 § 4(c)(3) (Nov. 16, 2001).

⁷⁰ DAMASKA, M., “Of Hearsay and Its Analogues,” *Minnesota Law Review* Vol. 76, 1992, p. 425.

⁷¹ 10 U.S.C.A. § 949a(b)(3)(D) (2009); 10 U.S.C. §§ 948-949 (2006).

⁷² 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)-(D), U.N. Doc. IT/32/Rev.7 (1996) (entered into force Mar. 14, 1994, amendments adopted Jan. 8, 1996).

⁷³ CHOI, E., *ibid* pp. 187-188. There have been a series of critical assessments of ICTY procedures surrounding institutional differences between civil and common law systems, maintaining that many attitudinal and practical differences cannot merely be overcome by transcribing one’s set of rules to the other).

comparisons with military commissions conducted during the Second World War, all of which are plagued by documented procedural unfairness.⁷⁴

There remain constitutional concerns regarding hearsay rules. The Supreme Court has not been confronted with the question of the application of the Confrontation Clause to military commissions; however, the Court maintained in *Boumediene v. Bush* that the constitutional right to habeas corpus applies to non-United States citizens at Guantánamo.⁷⁵ The applicability of the Constitution to defendants before military commissions at Guantánamo indicates the relevance of the Sixth Amendment right to confrontation (particularly testimonial hearsay – a fixture at Guantánamo) asserted in *Crawford*.⁷⁶ The constitutionality of these proceedings is of serious concern for the government in attempting to foster any sense of fairness surrounding its wildly unpopular military interventions. Furthermore, the efficacy of the judicial system – predicated at Guantánamo, as everywhere, on parsing evidence for innocence or guilt – can only be aided by guarantees that evidence is reliable.

Conclusion

There are legitimate justifications supporting the existence of a more malleable system of adjudication in times of war. Such justifications seem largely inapplicable to current detainees, some of whom are entering their second decade without trial. Further, this paper is not intended to offer commentary on the overall legitimacy of the American military commissions system itself. The dangers posed by unverifiable hearsay evidence are no less serious at Guantánamo than in federal court, yet federal courts effectively operate under a general ban on hearsay. To provide persuasive justification for relaxed evidentiary standards in military commissions, the government must demonstrate a serious and heretofore unproved sense of exigency. Commission rules must at least approximate legal protections given civilian defendants because “the

⁷⁴ The most prominent example from that legal-military epoch, *Ex parte Quirin*, like the other black eye of Second World War jurisprudence, *Korematsu v. United States*, has tended either to receive somewhat negative treatment or has been acrobatically distinguished into questionable relevance. *Ex parte Quirin*, 317 U.S. 1 (1942); *Hamdan v. Rumsfeld*, 548 U.S. 557, 588-589; *Korematsu v. United States* 323 U.S. 214 (1944). The *Korematsu* Court held that an executive order for internment of Japanese-Americans passed the exacting constitutional standard of strict scrutiny despite classification based on race).

⁷⁵ *Boumediene v. Bush*, 553 U.S. 723, 797-798 (2008).

⁷⁶ *Crawford v. Washington*, 541 U.S. 36, 36 (2004).

laws and Constitution are designed to survive, and remain in force, in extraordinary times.”⁷⁷ There are several international military commissions systems and other criminal proceedings which operate under evidentiary standards which jeopardize the right to a fair trial far less frequently, such as the ICTY, the similar tribunal in Rwanda, and the International Criminal Court. Whether shifting procedural burdens will suffice to legitimize the American commissions system or to fully guarantee the fundamental rights of military defendants remains to be seen. In any case, modifications of the system to bring the commissions fully in line with international legal standards and the United States Constitution in furtherance of justice and equality before the law are emphatically and enthusiastically recommended.

⁷⁷ *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).