Hearsay at Guantanamo: A “Fundamental Value Determination”

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INTRODUCTION

Does the government’s interest in successfully prosecuting the War on Terrorism justify rules of evidence that make it easier to determine that captured persons are terrorists? The Supreme Court of the United States seems to have answered this question in the affirmative, at least when the military is determining whether a captured person may be detained as an “enemy combatant.” Applying the *Mathews v. Eldridge* due-process balancing test, the Court in *Hamdi v. Rumsfeld* concluded that the Constitution would “not be offended” by the introduction of and reliance on hearsay evidence in detention proceedings for persons captured in Afghanistan, which “may need to be accepted as the most reliable available evidence from the Government in such a proceeding.” That is, when evidence that meets traditional standards of reliability is unavailable—perhaps because reliable evidence is “buried under the rubble of war”—the government has an overriding interest in being less sure than would be required in a civilian criminal trial that individuals held as possible terrorist threats are indeed who they are feared to be.

Does the threat of terrorism also justify the replacement of traditional hearsay

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4. *Id.* at 532.
5. See Katharine Q. Seelye, *A Nation Challenged: Captives; Detainees Are Not P.O.W.’s, Cheney and Rumsfeld Declare*, N.Y. Times, Jan. 28, 2002 (quoting Vice President Dick Cheney as suggesting that the detainees at Guantanamo Bay are “‘the worst of a very bad lot. They are very dangerous. They are devoted to killing millions of Americans, innocent Americans, if they can, and they are perfectly prepared to die in the effort.’”). Of the 759 individuals held at Guantanamo between 2002 and 2006, however, only 275 remain. See Press Release, U.S. Dep’t of Def., Detainee Transfer Announced (Dec. 28, 2007), http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=11591; U.S. Dep’t of Def., List of Individuals Detained by the Department of Defense at Guantanamo Bay, Cuba from January 2002 through May 15, 2006, http://www.defenselink.mil/news/May2006/d20060515%20List.pdf (last visited Feb. 16, 2008). Of the approximately 245 individuals who have been transferred to the custody of other governments, roughly 200 subsequently have been released. See Most Gitmo Detainees Freed After Transfer, ASSOCIATED PRESS, Dec. 16, 2006, http://www.msnbc.msn.com/id/16227791. The Department of Defense has defended such statistics on the grounds that it is better to “send more, rather than fewer, men to Guantanamo.” Corine Hegland, *Empty Evidence*, Nat’l J., Feb. 4, 2006, at 28, 30, available at http://nationaljournal.com/about/njweekly/stories/2006/0205nj4.htm (quoting Mark Jacobson, Assistant for Detainee Policy for the Department of Defense, as arguing that “[i]f it’s the other way around, then you’re doing it wrong”). The Department of Defense alleges that at least thirty former Guantanamo detainees have rejoined hostilities against United States forces after being released. See U.S. Dep’t of Def., Former Guantanamo Detainees Who Have Returned to the Fight, http://www.defenselink.mil/news/d20070712formergtmo.pdf (last visited Dec. 23, 2007) (“As the facts surrounding the ex-GTMO detainees indicate, there is an implied future risk to US and allied interests with every detainee who is released or transferred.”).
law in criminal trials against detainees? This Note argues that the due-process requirement that criminal guilt be proven beyond a reasonable doubt embodies a moral value that must be considered when determining whether the government may constitutionally abandon bedrock reliability-based rules of evidence in military commission trials. In the famous words of Justice Harlan, the reasonable-doubt requirement is based on the “fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”

Rules of evidence designed primarily to influence the relative frequency of erroneous convictions and erroneous acquittals, rather than to ensure the reliability of the proceeding or in service of other goals collateral to its outcome, however, run afoul of this value determination in a fundamental way. The abandonment in military commissions of traditional hearsay law implicates the reasonable-doubt requirement in a way that a government concerned with rendering justice when punishing the commission of crimes should not ignore.

Part I of this Note examines the use of hearsay evidence against detainees at Guantanamo Bay and the limits on the use of hearsay generally applied in criminal trials in the United States under the Federal Rules of Evidence and the Confrontation Clause of the Sixth Amendment. Part II analyzes and compares the hearsay rules that historically have been applied in military commissions, including the use of hearsay in the trial of a World War II Japanese general in In re Yamashita, the military commission of Salim Ahmed Hamdan in Hamdan v. Rumsfeld, and the new hearsay scheme established by the Military Commissions Act of 2006 and the Department of Defense’s new Military Commission Rules of Evidence. Part III attempts to rationalize the Court’s approval of the free use of hearsay evidence in detention proceedings in Hamdi v. Rumsfeld and

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7. Cf. President George W. Bush, Remarks upon Departure for Camp David (May 16, 2003) (transcript available at http://www.whitehouse.gov/news/releases/2003/05/20030516-15.html) (“[T]he war on terror continues, [and] we’ve still got a big task to protect the American people and others who love freedom from the designs of—and the will of these purveyors of hate. And we’ll find them. We’ll bring them to justice.”). There is troubling evidence, however, that achieving justice has not necessarily been the military’s primary goal when conducting military commissions. Air Force Colonel Morris Davis, the former chief military prosecutor at Guantanamo Bay, resigned his post in October 2007 over alleged political interference in the military-commissions process and has now agreed to be a witness for the defense at a hearing for Salim Ahmed Hamdan, the petitioner in Hamdan v. Rumsfeld (discussed infra section II.B). See Ben Fox, Ex-Prosecutor at Gitmo to Aid Defense, ASSOCIATED PRESS, Feb. 21, 2008, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/02/21/AR2008022102176.html. Colonel Davis has quoted the General Counsel of the Department of Defense, William Haynes, as arguing that “[w]e can’t have acquittals [at Guantanamo Bay], we’ve got to have convictions.” Id.
8. 327 U.S. 1 (1946).
argues that the rationale underlying this decision cannot justify a similar result in the context of military commissions. Unlike preventative detention incident to an ongoing conflict, criminal punishment implicates greater liberty interests of accused persons, including not only the possible loss of physical liberty but also the moral opprobrium of society. While the government’s interest in making the erroneous release of enemy combatants more infrequent than their erroneous detention may be sufficient to justify the use of hearsay evidence in detention proceedings, the due process requirement that criminal guilt be proven beyond a reasonable doubt forecloses this “interest” as a basis for abandoning traditional hearsay law in military commissions.

I. HEARSAY AT GUANTANAMO

This Part considers the policy rationales for the traditional hearsay rules applied in civilian proceedings, including the application of the Confrontation Clause of the Sixth Amendment to the admission of hearsay in criminal trials. As this Part explains, traditional hearsay law and the Confrontation Clause are designed to establish the reliability of out-of-court statements before permitting their admission at trial. While interests of necessity also underlie certain exceptions to the hearsay rule, necessity alone is generally an insufficient justification for the introduction of hearsay or the recognition of an exception to the hearsay rule. This Part also reviews the information currently available concerning the hearsay evidence held by the United States military against the detainees at Guantanamo Bay and the extent to which such evidence would be admissible under traditional hearsay law.

A. THE POLICY RATIONALES FOR THE HEARSAY RULE AND ITS EXCEPTIONS

"‘Hearsay’ is 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."\(^{12}\) Hearsay statements are generally inadmissible because their reliability cannot be ascertained by the normal tools of the adversarial process. As Dean Wigmore explains: “The theory of the hearsay rule... is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination.”\(^{13}\) The truthfulness and veracity of in-court testimony are judged through several important mechanisms of the adversarial system—not only the opportunity for cross-examination, but also the opportunity to evaluate the demeanor of the witness who is placed under oath and is thus aware of the seriousness of the proceeding.\(^ {14}\) Thus, the hearsay rule is designed to exclude a particular kind of evidence—and

\(^{12}\) Fed. R. Evid. 801(c).


to prevent the jury from ever hearing the evidence—because its reliability cannot be established sufficiently.\textsuperscript{15}

The Federal Rules of Evidence, like the Military Rules of Evidence (the rules of evidence employed in courts-martial\textsuperscript{16}), recognize several exceptions to the general ban on hearsay evidence.\textsuperscript{17} The exceptions are generally premised on the theory that the statements they encompass are sufficiently reliable for use in trial, despite the lack of an opportunity to cross-examine the declarant.\textsuperscript{18} A classic example is the exception for “excited utterances”—the law presumes that declarants are more likely to be truthful when under the “stress of excitement” caused by a startling event.\textsuperscript{19}

Sufficient reliability is not the only theory behind the traditional exceptions to the hearsay rule. The Federal Rules of Evidence recognize five exceptions to the hearsay rule that apply when the declarant is “unavailable.”\textsuperscript{20} These exceptions are premised, to a certain degree, on necessity—“[t]he rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant.”\textsuperscript{21} Even the exceptions that are justified in part by necessity, as the advisory committee’s note makes clear, must be of a “specified quality”\textsuperscript{22}—that is, they also must be of a specified degree of reliability.\textsuperscript{23} These

\textsuperscript{15.} \textit{Cf.} Fed. R. Evid. 802 (stating that hearsay is “not admissible except as provided by these rules or other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress”). The Advisory Committee’s Note to Rule 802 gives examples of such “other Rules” that permit the admission of hearsay—all of which have to do with proceedings prior to or ancillary to a criminal or civil proceeding. Fed. R. Evid. 802 advisory committee’s note (listing rules under the Federal Rules of Civil Procedure that permit the introduction of hearsay, such as affidavits for temporary restraining orders).


\textsuperscript{17.} Some of these “exceptions” classify statements that would otherwise be hearsay as “not hearsay,” see Fed. R. Evid. 801(d) (acknowledging that admissions by party-opponents “literally fall within the definition [of hearsay, but are expressly excluded from it]”), while the other exceptions are divided into two groups: those that apply whether or not the declarant is unavailable, and those that apply only where the declarant is unavailable. Fed. R. Evid. 803, 804.

\textsuperscript{18.} See Fed. R. Evid. 803 advisory committee’s note (stating that Rule 803, which permits the introduction of some types of hearsay even where the declarant is available, “proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant . . . even though he may be available”).

\textsuperscript{19.} See Fed. R. Evid. 803(2).

\textsuperscript{20.} See Fed. R. Evid. 804(b)(1)–(6).

\textsuperscript{21.} Fed. R. Evid. 804(b) advisory committee’s note.

\textsuperscript{22.} Id.

\textsuperscript{23.} Particularly illustrative is the unavailability exception for former testimony, which permits admission of testimony given in a previous hearing or deposition if the party against whom the hearsay
exceptions, while partly justified by the impossibility of producing the witness to testify in the present proceeding, also, in theory, meet a higher standard of reliability than other kinds of hearsay statements.

The same is true for the residual exception to the hearsay rule in Rule 807—apparently the model for the Military Commissions Act’s hearsay rule—\(^{24}\) which permits introduction of hearsay that does not fall into the other exceptions but has “equivalent circumstantial guarantees of trustworthiness.”\(^{25}\) The statement must be evidence of a material fact, must be more probative of that fact than “any other evidence which the proponent can procure through reasonable efforts,” and introduction of the evidence must serve “the general purposes of [the Federal Rules of Evidence] and the interests of justice.”\(^{26}\) The residual exception also has a notice requirement—a hearsay statement may not be admitted under Rule 807 unless the proponent discloses to the adverse parties the hearsay’s “particulars,” including the name and address of the declarant, sufficiently in advance of the proceeding such that the adverse party has a “fair opportunity to prepare to meet it.”\(^{27}\)

The limited scope of the residual exception is made clear by its legislative history. The House of Representatives rejected a proposed version of the rule that would have permitted introduction of hearsay statements with “comparable circumstantial guarantees of trustworthiness” because legislators feared that such a rule would inject “too much uncertainty” into the law of evidence.\(^{28}\) The Advisory Committee suggested the current version of Rule 807, which requires reliability “equivalent” to the hearsay exceptions, as a compromise, and as one of “much narrower scope and applicability.”\(^{29}\) The Senate Judiciary Committee also made clear that the exception was intended to be used infrequently and with great care to prevent “emasculat[i]on of the hearsay rule and the recognized exceptions or vitiat[i]on of the rationale behind codification of the rules.”\(^{30}\)

The Sixth Amendment of the United States Constitution also restricts the introduction of hearsay against a criminal defendant. The Confrontation Clause is admitted “had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” FED. R. EVID. 804(b)(1).

24. See infra notes 109–12 and accompanying text.
25. FED. R. EVID. 807.
27. FED. R. EVID. 807.
28. See FED. R. EVID. 803, advisory committee’s note (emphasis added).
29. Id.

It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances . . . . It is intended that in any case in which evidence is sought to be admitted under [this rule], the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

Id.
provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”\(^{31}\) As recently re-interpreted in *Crawford v. Washington*,\(^{32}\) the right of confrontation requires that “testimonial” hearsay be excluded unless the adverse party has had a previous opportunity to cross-examine the declarant and the declarant is unavailable.\(^{33}\) Although the Court has not yet definitively defined the term “testimonial,”\(^{34}\) it generally includes statements that “declarants would reasonably expect to be used prosecutorially.”\(^{35}\) The Confrontation Clause, as construed in *Crawford*, ensures that the reliability of statements by “witnesses against” the criminal defendant,\(^{36}\) whose statements are particularly susceptible to bias and self-interested deception, be evaluated through the adversarial process.

The Confrontation Clause thus identifies a particular kind of hearsay and denies it an exception from the hearsay rule\(^ {37}\) on the grounds that it is insufficiently reliable and its introduction violates the constitutional right of an accused to test its reliability through cross-examination.\(^ {38}\) And, at least in the Court’s view, the centrality of the right of confrontation to a fair trial cannot be overstated.\(^ {39}\) The Confrontation Clause of the Sixth Amendment thus further compliments the protections offered by traditional hearsay law, together ensuring the reliability of evidence introduced at trial.

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33. *Id.* at 68.
35. *Crawford*, 541 U.S. at 51 (internal quotation marks omitted).
36. See U.S. CONST. amend. VI (emphasis added).
37. In some circumstances, due process may require admission of hearsay by a criminal defendant, even where the hearsay does not qualify under a traditional exception. Although a defendant’s right to present evidence must “comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence,” where evidence bears “persuasive assurances of trustworthiness” and is “critical” to an accused’s defense, due process may require its admission despite a rule of evidence to the contrary. See *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (holding that due process required introduction of the sworn confession of a witness to the shooting for which defendant was convicted, despite a state hearsay rule requiring its exclusion). While this Note focuses on the government’s use of hearsay in military commissions, these cases demonstrate that different constitutional concerns may be relevant where the defendant seeks to introduce otherwise inadmissible hearsay.
38. See *Crawford*, 541 U.S. at 61. As Justice Scalia explained in *Crawford*:

To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The 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.

*Id.* (emphasis added).
39. Justice Scalia’s quotation in *Crawford* of an early state-common-law case shortly after ratification of the Sixth Amendment is telling: in *State v. Webb*, the Superior Court of North Carolina lauded the right of confrontation as a “rule of common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.” *Crawford*, 541 U.S. at 49 (quoting State v. Webb, 2 N.C. (1 Hayw.) 103, 104 (1794) (per curiam)).
B. THE EVIDENCE AGAINST THE DETAINEE

As of this writing, criminal charges have been brought against only twelve of the approximately 275 detainees who remain incarcerated at Guantanamo Bay—among them Salim Ahmed Hamdan (the petitioner in *Hamdan v. Rumsfeld*), and most recently, six detainees allegedly involved in planning the September 11 attacks, including Khalid Shaikh Mohammed, the confessed mastermind of the attacks. By contrast, a total of 558 detainees have gone through the “Combatant Status Review” process, through which the military determines if a detainee has correctly been designated as an “enemy combatant.” The Department of Defense has released redacted transcripts of the testimony of detainees before the Combatant Status Review Tribunal (CSRT) and the Administrative Review Board (ARB), which in most cases continue to constitute the only publicly available information about the alleged crimes of individual detainees. These records do not identify the detainees being questioned by name, but only by identification number. In each transcript, the government’s conclusions are presented to the detainee, and the detainee’s responses are recorded. The source of the information is never provided to the


detainee in the hearing—nor is it provided in the unclassified “summary” of the evidence against him.48

Transcripts of both the CSRT and ARB proceedings are replete with examples of the frustrations of accused detainees who are asked to defend themselves against a specific allegation, but are not provided with any information regarding the source of the information—even for such primary issues as the detainee’s true identity. For example, a detainee designated as 894 was extensively questioned by the ARB board members regarding an allegation that he had possessed an illegal passport and had used fifty different aliases.49 The detainee claimed his real name was Lutfi bin Ali, and not Mohammed Abdul Rahman, which the Department of Defense had listed as his true name.50

Detainee: I’ll give [my name] to you . . . I don’t have a problem. The problem is [that] here in the interrogations any information they get on you, they write it down as an accusation. This is not right!

Board Member: Mr. Rahman, we are not interrogators. This is an Administrative Review Process. We would like to have your true name.

Detainee: These accusations . . . all of them . . . where did you get them?

Board Member: From a compilation of interviews and interrogations and outside sources.

Detainee: What are these sources that brought these charges?

Board Member: I don’t want to disclose those. I can’t. We need to hear your true name.51

The centrality of hearsay evidence to the government’s case against each detainee is undisputed and understandable. Only five percent of the detainees now or previously held at Guantanamo Bay were captured by American forces—eighty-six percent were captured by either Pakistan or the Northern Alliance and subsequently turned over to the United States military.52 The actual member of the Northern Alliance who encountered a detainee on the battlefield bearing arms and accompanying Taliban or al Qaeda forces will typically be unavailable to testify, and most likely unidentifiable. In addition, detainees are often the sources of allegations against each other53—the government is understandably

48. See Mark Denbeaux & Joshua Denbeaux, Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data 6, available at http://law.shu.edu/aaafinal.pdf (explaining that the “‘summary of evidence’ released by the Government is not the Government’s ‘allegations’ against each detainee but a summary of the Government’s ‘proofs’ upon which the Government found that each detainee, is in fact, an enemy combatant”).


50. Id.

51. Id. at 452 (first alteration added).

52. See Denbeaux & Denbeaux, supra note 48, at 5.

53. A draft bill circulated by the White House prior to the passage of the Military Commissions Act admitted that hearsay statements from “fellow terrorists are often the only evidence available in this
concerned that revealing the identity of a detainee providing intelligence could implicate the worth of that intelligence in other circumstances.

The Bush Administration concedes that most cases against detainees hinge on the admission of hearsay evidence. Former Attorney General Alberto Gonzales admitted this reality in testimony before the Armed Services Committee, arguing that it is “imperative” that hearsay evidence be admitted in military commissions, which “must try crimes based on evidence collected everywhere from the battlefields in Afghanistan to foreign terrorist safehouses.”54 The evidence to be presented against detainees in military commissions is presumably the same as that presented in CSRTs,55 which, according to one judge advocate general who acted as a legal advisor to the CSRTs, are “‘made up almost entirely of hearsay evidence recorded by unidentified individuals with no firsthand knowledge of the events they describe.’”56

The law of hearsay to be applied in military commissions is therefore of central importance to the government’s ability to successfully prosecute detainees for alleged crimes. It is unclear whether the majority of the hearsay evidence against the detainees—out-of-court statements by unidentified persons, including other detainees whose statements may very well qualify as “testimonial” hearsay because they are obtained during interrogations57—would qualify under any exception or violate the Confrontation Clause if admitted in a criminal trial in a United States court.58 Perhaps the classified summaries do

54. Id. In an editorial about the government’s transfer of Jose Padilla, a United States citizen and suspected terrorist, to military custody in 2002, now-Attorney General Michael Mukasey cited the problem of hearsay evidence as one justification for creating a special judicial system to try suspected terrorists. See Michael B. Mukasey, Jose Padilla Makes Bad Law: Terror Trials Hurt the Nation Even When They Lead to Convictions, WALL ST. J., Aug. 22, 2007, at A15 (suggesting that the “most obvious reason” the government transferred Jose Padilla to military custody was that the evidence against him primarily consisted of hearsay evidence and would thus have been inadmissible in a civilian court).

55. As a recent decision by the D.C. Circuit suggests, however, the evidence introduced against detainees in detention proceedings may not represent the entirety of relevant evidence in the government’s possession. See Bismullah v. Gates, 501 F.3d 178, 180, 185 (D.C. Cir. 2007) (ordering the Government to disclose all evidence held against detainees for in camera review in order to determine whether exculpatory evidence was withheld from CSRT proceedings).


57. See Crawford v. Washington, 541 U.S. 36, 52 (2004) (“Statements taken . . . in the course of interrogations are . . . testimonial under even a narrow standard.”).

58. The infamous trial of Sir Walter Raleigh for treason in 1603—the outcry from which spawned creation of the right of confrontation in England—bears troubling similarities to the transcripts of detention proceedings at Guantanamo Bay. At Sir Raleigh’s trial, statements by Lord Cobham before the Privy Council implicating Raleigh were read to the jury; Raleigh objected, demanding that Cobham be examined at trial. See Crawford, 541 U.S. at 44 (“The Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . .” (quoting 1 D. JARDINE, CRIMINAL TRIALS 435 (1832))). The court refused, and Raleigh was convicted and sentenced to death. Id. The transcripts of CSRT and ARB proceedings are also rife with examples of detainees frustrated by their inability to learn the names of, and confront, their accusers or the sources of accusations against
contain a dying declaration here\textsuperscript{59} and an excited utterance there,\textsuperscript{60} or the government has discovered, in some circumstances, a statement by one detainee, who is a co-conspirator of the detainee being tried, made “during the course and in furtherance of” a conspiracy to commit terrorism.\textsuperscript{61} This Note assumes, however, that the absence of any such indication by the government speaks loudly—it is likely that almost all of the hearsay evidence used against detainees at Guantanamo Bay would be inadmissible under the Federal Rules of Evidence, the Military Rules of Evidence, and/or the Confrontation Clause.

In sum, as this Part has attempted to demonstrate, the traditional exceptions to the hearsay rule are primarily justified on the grounds that the exceptions, although permitting the introduction of statements technically qualifying as hearsay, have unique characteristics establishing the reliability of the types of statements they encompass. Although necessity is an important policy justification for some categories of exceptions, a correspondingly high degree of reliability is also required of these exceptions. Traditional hearsay law thus rejects the proposition—partly relied upon by the Bush Administration to support the centrality of its use in detainee proceedings—that necessity, standing alone, can ever be a sufficient justification for the introduction of out-of-court statements, or for the recognition of a new exception to the general ban on hearsay evidence.

II. HEARSAY IN MILITARY COMMISSIONS

Military commissions, particularly those conducted during a state of armed conflict, pose unique challenges to the application of traditional hearsay law. Part II examines past approaches to the admission of hearsay in military tribunals: first, in the infamous trial of a Japanese general in World War II, considered by the Supreme Court in \textit{In re Yamashita},\textsuperscript{62} and second, in the military commission rules originally promulgated by President Bush for application in trials of detainees at Guantanamo Bay, recently rejected by the Court in \textit{Hamdan v. Rumsfeld}.\textsuperscript{63} This Part then compares these approaches to the Military Commissions Act of 2006 and concludes that the practical effect of the Act,

\textit{In re Guantanamo Detainee Cases}, 355 F. Supp. 2d 443, 470 (D.D.C. 2005). The court quoted a particularly illustrative response given by a detainee in a CSRT:

\begin{quote}
[T]hese are accusations that I can’t even answer. I am not able to answer them. You tell me I am from Al Qaida, but I am not an Al Qaida. I don’t have any proof to give you except to ask you to catch Bin Laden and ask him if I am a part of Al Qaida. . . . I don’t have proof regarding this. What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it.
\end{quote}

\textit{Id.}

\textsuperscript{59} See FED. R. EVID. 804(b)(2).

\textsuperscript{60} See FED. R. EVID. 803(2).

\textsuperscript{61} See FED. R. EVID. 801(d)(2)(E).

\textsuperscript{62} 327 U.S. 1 (1946).

\textsuperscript{63} 126 S. Ct. 2749 (2006).
like the rules of evidence at issue in *Yamashita* and *Hamdan*, is to freely permit the introduction of hearsay by the government without an independent inquiry into the reliability of such evidence.

A. *IN RE YAMASHITA*

The most famous, and arguably egregious, use of hearsay evidence in a military commission occurred in the trial of General Tomoyuki Yamashita, a general in the Japanese army, who was tried by military commission in 1945 following his capture by American forces in the Philippines.\(^64\) Mere weeks after his capture, he was charged with and tried for violations of the law of war before a military commission convened by the United States military in the Philippines.\(^65\) General Yamashita was convicted of violating the laws of war by unlawfully breaching his duty “to control the operations of the members of his command by ‘permitting them to commit’ . . . extensive and widespread atrocities.”\(^66\) The government alleged 123 acts of atrocity against the people of the Philippines by officers under General Yamashita’s command, amounting to a “deliberate plan and purpose to massacre and exterminate a large part of the civilian population . . . as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed.”\(^67\) During the trial, the commission heard testimony from 286 witnesses, whose testimony filled over 3000 pages.\(^68\)

The procedures for General Yamashita’s trial were established by a directive of General Douglas MacArthur. Section 16 of these procedures prescribed the rules of evidence for the trial, the first of which directed that the “‘commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission’s opinion would have probative value in the mind of a reasonable man.’”\(^69\) This section also permitted the introduction of “‘any document’” signed by a member of the armed forces or “‘any’” government, without proof of its authenticity; any affidavit, deposition, or statement taken by an officer pursuant to “‘military authority’”; and any diary, letter, or “‘other document appearing to the commission to contain information relating to the charge.’”\(^70\) These rules thus required the admission of any document, regardless of whether it contained hearsay and regardless of whether it could be authenticated, as long as the commission determined that it had probative value.

Following his conviction and death sentence, General Yamashita applied for a

\(^{64}\) See *Yamashita*, 327 U.S. at 5.

\(^{65}\) See id.

\(^{66}\) Id. at 14.

\(^{67}\) Id.

\(^{68}\) See id. at 5.

\(^{69}\) Id. at 48 n.9 (Rutledge, J., dissenting) (emphasis added) (quoting Order of Gen. MacArthur, Section 16, Sept. 24, 1945).

\(^{70}\) Id.
writ of habeas corpus in federal court. The Supreme Court denied his application, holding that he was not entitled to the protections of the Articles of War or the Geneva Convention. Although Justice Stone’s opinion for the Court did not reach the question of the constitutionality of the procedures used in General Yamashita’s trial, Justice Rutledge’s dissent denounced them at length. Justice Rutledge noted that proof of General Yamashita’s knowledge that atrocities were being committed by those under his command was an essential element to proving guilt. Most of the 286 “eyewitnesses” who testified at trial, however, testified only to the atrocities committed, and not General Yamashita’s knowledge. The only evidence presented by the government proving knowledge was in the form of ex parte affidavits, depositions, and other hearsay statements. The end result was that General Yamashita had been convicted of “a crime in which knowledge is an essential element, with no proof of knowledge other than what would be inadmissible in any other capital case or proceeding under our system, civil or military.”

Justice Rutledge vehemently condemned the military commission’s rules of evidence and the result of their application:

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

Almost sixty years after Yamashita, however, the rules of evidence so passionately rebuked by Justice Rutledge were resurrected for use in the first military commissions of detainees held at Guantanamo Bay. As section II.B explains, although the Supreme Court in Hamdan v. Rumsfeld ultimately invalidated the rules, the narrow grounds on which it did so invited a legislative reaction that would again permit the free admission of hearsay evidence in military commissions.

B. HAMDAN V. RUMSFELD

In Hamdan v. Rumsfeld, the Supreme Court considered the legality of military commissions authorized by a Military Order of President George W.

71. See id. at 19, 24 (majority opinion).
72. Having concluded that the Court lacked jurisdiction to review the proceedings against Yamashita, Justice Stone found it unnecessary to consider whether the military commission’s procedures violated any standard of due process. See id. at 23.
73. See id. at 53 (Rutledge, J., dissenting).
74. See id.
75. Id.
76. Id. at 49.
77. 126 S. Ct. 2749 (2006). Hamdan, a Yemeni national, was captured by members of the Northern Alliance in Afghanistan, transferred to U.S. military custody, and then relocated to Guantanamo Bay. Id. at 2759.
Bush\textsuperscript{78} (Military Order) shortly after the September 11, 2001 attacks. In a
decision heralded by opponents of the commissions as a “victory for the rule of
law,”\textsuperscript{79} the Court held that the commission’s procedures were unlawful because
they failed to comply with the Uniform Code of Military Justice (UCMJ) and
the Geneva Conventions.\textsuperscript{80}

Article 36(a) of the UCMJ grants the President the authority to promulgate
“the procedures, including modes of proof,” in cases before military courts-
martial and military commissions.\textsuperscript{81} The rules promulgated under Article 36
must be “uniform insofar as practicable”\textsuperscript{82}—“[t]hat is, the rules applied to
military commissions must be the same as those applied to courts-martial unless
such uniformity proves impracticable.”\textsuperscript{83} Article 36(a) thus requires the application
of the Military Rules of Evidence in military commissions unless “impractic-
cable.”

In Article 36, section 4 of the 2001 Military Order, the President authorized
the Secretary of Defense to issue orders and regulations governing military
tribunals of enemy combatants.\textsuperscript{84} Pursuant to this authority, the Department of
Defense issued Military Commission Order 1 (Commission Order) on March
21, 2002.\textsuperscript{85} Section 6(D) set forth the sparse rules of evidence applicable in
military commissions, which permitted the admission of any evidence “if in the

\textsuperscript{78} Bush, Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the
Military Order].


\textsuperscript{80} Hamdan, 126 S. Ct. at 2793.

\textsuperscript{81} 10 U.S.C. § 836(a) (2000). This grant of authority includes the authority to promulgate the
proof, as referred to by Article 36, according to the legislative history of the Act, mean only rules of
evidence.”).

\textsuperscript{82} 10 U.S.C. § 836(b).

\textsuperscript{83} Hamdan, 126 S. Ct. at 2790. Article 36(a) also requires the President to apply the “principles of
law and the rules of evidence generally recognized in the trial of criminal cases in the United States
district courts,” but only so far as the President considers practicable. 10 U.S.C. § 836(a) Because the
text of Article 36 grants this determination solely to the President, the majority “assume[d] that
complete deference” was owed to the President’s determination that use of the procedures and rules of
evidence applied in the federal district courts was impracticable in military commissions. Hamdan, 126
S. Ct. at 2791. However, three weeks before Hamdan was decided, the President publicly expressed a
preference for prosecuting detainees in United States courts, seemingly contradicting his Administration’s
position in Hamdan regarding the impracticability of using federal district court procedures in
military commissions. See President George W. Bush, Remarks During Joint Press Availability with
Prime Minister Rasmussen of Denmark (June 9, 2006) (transcript available at http://www.whitehouse.gov/
news/releases/2006/06/20060609-2.html) (“[W]e would like to end the [sic] Guantanamo . . . . But
there are some that, if put out on the streets, would create grave harm to American citizens and other
citizens of the world. And, therefore, I believe they ought to be tried in courts here in the United
States.”).

\textsuperscript{84} 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),
der].
opinion of the Presiding Officer...the evidence would have probative value to a reasonable person." Not only could testimony by witnesses be admitted under this standard, but "any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports." Notably, these rules are almost identical to those criticized by Justice Rutledge in *Yamashita*.

Although the Court was obviously concerned with the Commission Order’s abandonment of traditional rules of evidence—Justice Stevens’s majority opinion described the rule permitting all probative evidence as “striking” and approvingly quoted from the dissents in *Yamashita* decrying similar rules—it was the President’s failure to make a showing of impracticability as required by Article 36 that was the grounds for the decision. According to the Court, the government offered no argument supporting the impracticability of applying the Rules for Courts-Martial and the Military Rules of Evidence in military commissions other than the general “danger posed by international terrorism.” Justice Stevens suggested he was aware of “no...logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility.” Because impracticability had not been established, the Court needed to point to only one example of non-uniformity between the Commission Order and the Rules for Courts-Martial that it considered the most egregious—the Commission Order’s denial of the right of the detainee to be present during the trial—to strike down the Commission Order’s rules.

The Court’s decision in *Hamdan* was immediately heralded as an immensely important decision limiting presidential power, and as a step towards fair trials for individuals detained in the War on Terrorism. Some interpreted the ruling as a decision affirming due process rights for detainees. *Hamdan*’s rejection of
the Commission Order’s evidentiary rules, however, had nothing to do with due process in the constitutional sense of the term. As critics of Hamdan quickly realized, the decision was not a constitutional precedent about the rights of individuals, and avoiding its consequences only required replacing Article 36 with a provision more deferential to Executive Branch determinations. 98 Four months later, Congress did precisely this when it passed the Military Commissions Act of 2006.

C. THE MILITARY COMMISSIONS ACT OF 2006

The United States Military Commissions Act of 2006 (MCA), 99 signed on October 17, 2006 by President Bush, was passed in response to Hamdan. 100 At the signing ceremony, President Bush argued that military commissions authorized by the Act would “provide a fair trial, in which the accused are presumed innocent, have access to an attorney, and can hear all the evidence against them.” 101 As this section explains, however, the Act’s approach to hearsay in military commissions effectively overrules Hamdan, and through a notice and burden-shifting scheme continues to freely permit the introduction of hearsay in military commissions.

Section 949a of the MCA replaces, for purposes of military commissions, Article 36(a) of the UCMJ. 102 The Act abandons Article 36(a)’s requirement that the rules of procedure and evidence in military commissions be uniform with those applied in courts-martial “insofar as practicable”—a standard that the Hamdan majority, along with Justice Kennedy, determined could not be established simply by presidential determination. 103 Instead, rules of procedure and

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98. Cf. David Fontana, Pyrrhic Victory, TNR ONLINE, May 4, 2007, http://www.tnr.com/doc.mhtml?i=20070430&s=fontana050407 (“Because the Court in Hamdan and elsewhere has had so little to say about exactly what kind of solution is constitutionally acceptable, our political leaders can stand in front of the cameras and say that they are just doing what the Court said—even while they neglect many civil liberties concerns.”).


100. Senator Bill Frist introduced the President’s proposed bill in the Senate on September 7, and a final version was passed in both chambers of Congress by September 28. See 152 CONG. REC. S9113, S9122 (daily ed. Sept. 7, 2006) (bill introduced); 152 CONG. REC. H7522 (daily ed. Sept. 27, 2006) (bill passed House); 152 CONG. REC. SIO, 420 (daily ed. Sept. 28, 2006) (bill passed Senate); Carlos Manuel Vazquez, Agora: Military Commissions Act of 2006: The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide, 101 AM. J. INT’L. L. 73, 74–75 (2007) (suggesting that debate was limited “because of the [Bush] administration’s desire to address the matter before Congress adjourned for the midterm elections, apparently to provide Republicans with an electoral advantage over the Democrats in those elections”).


102. Military Commissions Act § 949a(a) (granting the Secretary of Defense the authority to prescribe “[p]retrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter”).

103. See supra note 83 and accompanying text.
evidence must be consistent with those applied in courts-martial only insofar as the Secretary of Defense “considers practicable or consistent with military or intelligence activities.” Thus, the Secretary may refuse to apply any procedure or rule of evidence, including the Military Rules of Evidence, if he considers its application inconsistent with “military . . . activities.”

Pursuant to this new authority, the Act mentions several evidentiary rules that the Secretary “may” prescribe. Most importantly, the MCA grants the Secretary of Defense authority to promulgate a sweeping rule permitting the introduction of hearsay not otherwise admissible under the Military Rules of Evidence “if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence.” Essentially, this rule permits the introduction of any hearsay evidence, regardless of its context or other facts establishing its reliability, as long as the proponent of the evidence, presumably almost always the government, gives notice to the detainee.

The MCA’s notice requirement is not without precedent—it conspicuously tracks the structure of the residual exception to the hearsay rule in Federal Rule of Evidence 807, which also requires notice to the adverse party with sufficient time to defend against its admission. Notably absent, however, is any requirement that the military judge determine that proffered hearsay statements have guarantees of trustworthiness that are “equivalent” to the recognized hearsay exceptions in the Federal Rules of Evidence. Whereas the residual exception in Rule 807 was intended to be used infrequently and only where the reliability of proffered hearsay evidence can be shown to be “equivalent” to that of the other excepted categories, the MCA’s new hearsay rule for military commissions grants military judges broad permission to admit hearsay irrespective of its reliability.

104. Military Commissions Act § 949a(a).
105. See id.
106. See id.
107. Id. § 949a(b)(2)(E)(i).
108. Notably, under the recently promulgated Military Commission Rules of Evidence, even sufficient notice is not an absolute requirement for the admission of otherwise-inadmissible hearsay. Rule 803 provides that, even where the proponent fails to give sufficient notice, “the military judge shall determine whether the proponent has provided the adverse party with a fair opportunity under the totality of the circumstances.” M.C.R.E. 803(b)(2).
110. Compare Military Commissions Act § 949a(b)(2)(E)(i), with Fed. R. Evid. 807. Also absent are Rule 807’s requirements that the hearsay be more probative of the fact of which it is evidence than any other evidence that can be obtained through reasonable efforts and its requirement that admission serve “the interests of justice.” Fed. R. Evid. 807(A)–(B).
111. See supra notes 28–30 and accompanying text.
112. The MCA’s appellate review provisions, by contrast, are extremely limited. Detainees are granted an appeal as of right to the Court of Military Commission Review (CMCR), which has jurisdiction to review only matters of law. See Military Commissions Act § 950f(d). The United States Court of Appeals for the District of Columbia Circuit is granted “exclusive jurisdiction to determine the
The Department of Defense has promulgated new Military Commission Rules of Evidence that precisely track those contained in the MCA, thus adopting the notice and burden-shifting scheme.\textsuperscript{113} Daniel Dell’Orto, the Defense Department’s Deputy General Counsel, has defended the hearsay rules on the ground that they are necessary given “the unique conditions under which evidence will be obtained on the battlefield.”\textsuperscript{114} At the same time, the Defense Department has defended the new hearsay rules on the ground that they permit both sides, the government and the detainee, to “attack the credibility of the witnesses or the reliability of that evidence” and has suggested that under its rules “the only evidence that will be submitted before the members ultimately will be evidence that the judge determines to be reliable and probative.”\textsuperscript{115}

To the contrary, the new military commission rules never require the military judge to determine the reliability of hearsay evidence before permitting its introduction. Under the MCA, as long as notice is provided by the government, the military judge is granted unfettered discretion to permit the introduction of hearsay. The only recourse detainees are given under the MCA, when given notice of the government’s intention to introduce hearsay that would be inadmissible under the Military Rules of Evidence, is to affirmatively demonstrate its unreliability. Under the Act, hearsay may still be excluded by the military judge, even when the detainee is given notice of its intended use, “if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value.”\textsuperscript{116} Thus, as long as the government has given the detainee notice of its intention to use hearsay and has described the “particulars” of the hearsay evidence, the burden shifts to the detainee, rather than the proponent.\textsuperscript{117}

\textsuperscript{113.} See M.C.R.E. 803.


\textsuperscript{117.} Notably, this hearsay scheme is even more disposed in favor of permitting the introduction of hearsay evidence than a preliminary draft of the bill circulated by the White House. See Enemy Combatant Military Commissions Act of 2006 § 213(b), available at http://balkin.blogspot.com/PostHamdan.Bush.Draft.pdf (last visited Nov. 8, 2007) (“Hearsay evidence shall be admissible in the discretion of the military judge unless the circumstances render it unreliable or lacking in probative value.”); see also Editorial, \textit{A Flawed Proposal}, Wash. Post, July 29, 2006, at A18. Thus, this provision
The MCA’s provisions are not precisely those imposed by General MacArthur in *Yamashita*, to which the rules of evidence under the original Commission Order in *Hamdan* were nearly identical, but they are not far off. Although the Military Rules of Evidence are putatively applicable in military commissions at Guantanamo Bay, they are easily circumvented by this notice-and-burden-shifting scheme. The chart below summarizes the different hearsay rules considered in *Yamashita* and *Hamdan*, the Residual Exception in Rule 807, and the new hearsay rules adopted in the MCA:

<table>
<thead>
<tr>
<th>Standard of Admissibility</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>General McCarthur’s Directive in <em>Yamashita</em></td>
<td>Required introduction of “such evidence as in [the commission’s] opinion would be of assistance in proving or disproving the charge, or such as in the commission’s opinion would have probative value in the mind of a reasonable man.”</td>
</tr>
<tr>
<td>Military Commission Order 1 (<em>Hamdan</em>)</td>
<td>Permitted introduction of “any” evidence if “in the opinion of the presiding officer [the evidence] would have probative value to a reasonable person.”</td>
</tr>
<tr>
<td>Federal Rule of Evidence 807 (The Residual Exception)</td>
<td>Permits introduction of hearsay evidence not qualifying under an exception in the Federal Rules of Evidence if it has “equivalent circumstantial guarantees of trustworthiness.” The hearsay must be evidence of a material fact, more probative of that fact than “any other evidence which the proponent can procure through reasonable efforts,” and admission of the hearsay must serve “the general purposes of [the Federal Rules of Evidence] and the interests of justice.” Requires the proponent of the hearsay to disclose its “particulars” to the adverse party sufficiently in advance of the proceeding to give the adverse party a “fair opportunity to prepare to meet it.”</td>
</tr>
</tbody>
</table>

118. *In re Yamashita*, 327 U.S. 1, 48 n.9 (1946).
120. FED. R. EVID. 807.
### Standard of Admissibility

<table>
<thead>
<tr>
<th>The Military Commissions Act of 2006 and the Military Commission Rules of Evidence</th>
<th>Permits introduction of hearsay evidence not qualifying under an exception in the Military Rules of Evidence “if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained).”¹²¹ Where notice is given, the hearsay may be excluded if the adverse party “demonstrates that the evidence is unreliable or lacking probative value.”¹²²</th>
</tr>
</thead>
</table>

Essentially, the MCA and the new Military Commission Rules of Evidence ensure the same practical result as General MacArthur’s directive and the original military commission rules rejected by the Court in *Hamdan*: the introduction of traditionally inadmissible hearsay statements without an independent evaluation of their reliability, either according to the facts surrounding the statements or in light of the extent to which the statements share characteristics of those admissible under other recognized exceptions. By its terms, the MCA permits the introduction of almost any hearsay statement, regardless of whether it falls under a traditional exception, has “equivalent” guarantees of trustworthiness as those exceptions, or constitutes “testimonial” hearsay where the declarant has not previously been cross-examined, except where the detainee is able to prove the hearsay is unreliable—an impossible task in most circumstances.¹²³

¹²¹ Military Commissions Act § 949a(b)(2)(E)(i).
¹²² Id. § 949a(b)(2)(E)(ii).
¹²³ To the extent that some of the hearsay statements to be used against detainees are based on the declarations of Northern Alliance members or Pakistani authorities upon turning them over to United States forces, there is particular reason to doubt a detainee’s ability to disprove their reliability. Upon invasion of Afghanistan, the United States military promised large monetary rewards for the capture of members of Al Qaeda and the Taliban. See Denbeaux & Denbeaux, supra note 48, at 15. One such flyer distributed in Afghanistan promised “wealth and power beyond your dreams . . . [You] can receive millions of dollars helping the anti-Taliban forces catch al-Qaida and Taliban murders [sic]. This is enough money to take care of your family, your village, your tribe for the rest of your life.” Id. While the effort was relatively successful, the use of rewards in exchange for captured suspects made later identification of a detainee’s captors almost impossible. See id. The report explains that: Bounty hunters or reward-seekers handed people over to American or Northern Alliance soldiers in the field, often soon after disappearing; as a result, there was little opportunity on the field to verify the story of an individual who presented the detainee in response to the bounty award. Where that story constitutes the sole basis for an individual’s detention in
III. HEARSAY, MILITARY NECESSITY, AND REASONABLE DOUBT

With the replacement of Article 36(a) of the UCMJ following Hamdan, there is no longer any statutory restriction on the President’s authority to apply rules of evidence that conflict with those applicable in courts-martial. The question now presented is whether the new hearsay rules, authorized under the MCA by the Secretary of Defense’s assessment of what is consistent with “military . . . activities,” comporte with due process. Assuming the Due Process Clause applies to non-citizen detainees in military commissions authorized under the MCA and that detainees will be able to challenge the constitutionality of their trials in federal court, whether due process requires the application of traditional hearsay law appears to be a question the Court may resolve under the Mathews v. Eldridge test, applied by the Supreme Court in Hamdi v. Rumsfeld to approve the use of hearsay evidence in detention proceedings.

This Part attempts to rationalize the decision in Hamdi and argues that a similar rationale cannot justify the free use of hearsay evidence when the government seeks to convict detainees of crimes. Section A examines the Hamdi Court’s use of the Mathews test, and argues that the Court failed to correctly conceptualize the burden on the government of applying traditional hearsay law and unduly ignored the importance of the application of that body of law to reaching reliable results. Section B suggests that the actual basis of the Court’s decision was its tacit acceptance that, because of the lesser liberty interests at stake, it is constitutionally permissible to base detention decisions on

Guantanamo, there would be little ability either for the Government to corroborate or a detainee to refute such an allegation.

Id. (internal footnotes omitted); see also Eun Young Choi, Note, Veritas, Not Vengeance: An Examination of the Evidentiary Rules for Military Commissions in the War Against Terrorism, 42 HARV. C.R.-C.L. L. REV. 139, 162 (2007) (noting that the MCA’s restrictions on the disclosure of methods by which evidence was collected will also be an obstacle to a detainee’s ability to prove that proffered hearsay evidence is unreliable).

124. See supra text accompanying notes 104–05.

125. See Rasul v. Bush, 542 U.S. 466, 483 n.15 (2004) (stating that the detention of non-citizens at Guantanamo Bay “unquestionably [constitutes] custody in violation of the Constitution or laws or treaties of the United States”); see also Ronald Dworkin, What the Court Really Said, N.Y. REV. BOOKS, Aug. 12, 2004, available at http://www.nybooks.com/articles/17293 (suggesting that the “plain implication” of Rasul is that “[t]he historical core of due process, and its most fundamental point, is the right of individuals not to be arbitrarily and indefinitely imprisoned; if noncitizens across the world have any due process protection against our government at all, they have that right”). But see Boumediene v. Bush, 476 F.3d 981, 992 (D.C. Cir. 2007) (“The law of this circuit is that a foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.” (quotations omitted)).

126. The question of whether the MCA’s denial of habeas relief to non-citizen detainees at Guantanamo Bay is constitutional will apparently be resolved by the Court this Term in Boumediene v. Bush, 127 S. Ct. 3078 (2007) (granting petition for writ of certiorari), and Al Odah v. United States, 127 S. Ct. 3067 (2007) (same). In any event, whether detainees may challenge the constitutionality of their military-commission trials through habeas review, or rather are required to exhaust their remedies under the MCA—which ends with review by the D.C. Circuit, see supra note 112—the constitutionality of the MCA’s procedures themselves must eventually be addressed by the federal courts.

less reliable evidence than that normally required in criminal trials. Finally, section B explores the legal and moral difference between detention and punishment, and argues that the abandonment in military commissions of traditional hearsay law, as well as the right of confrontation, cannot be justified under Mathews in service of the government’s “interest” in ensuring that convictions occur more frequently than acquittals. In a criminal proceeding, rules of evidence designed solely to ensure a greater number of convictions violate the due-process requirement that guilt be proven beyond a reasonable doubt.

A. HAMDI V. RUMSFELD AND THE MATHEWS TEST

In Hamdi v. Rumsfeld, the Supreme Court considered the process due Yaser Esam Hamdi, a United States citizen,128 in proceedings to determine whether he was an “enemy combatant.” Recognizing the “tension that often exists” between a person’s liberty interests and “the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal,” the Court utilized what it characterized as the “ordinary mechanism” for balancing such interests: the Mathews v. Eldridge test.129 Under the Mathews test, the Court balances the interests of the private person affected by the governmental action against the government’s interest in that action and the burdens required to provide greater process.130 The “calculus” by which these interests are balanced is through “an analysis of the risk of an erroneous deprivation of the private interest if the process were reduced and the probable value, if any, of additional or substitute procedural safeguards.”131

1. Hamdi’s Application of the Mathews Test

Hamdi’s liberty interest was “the most elemental of liberty interests—the interest in being free from physical detention by one’s own government.”132 Importantly, the Court rejected the suggestion that the weight of this interest was in any way affected by the mere fact that Hamdi had been accused of participation with the Taliban—the Mathews test considers the weight of the liberty interest to be that of an individual assumed to be erroneously detained.133 That is, the government’s interest in detaining terrorists who pose a threat to national security does not lessen the private interest of one who is being detained, even if it is relevant to the ultimate outcome of the due-process balance.134 In contrast, the government’s interest is, in general, ensuring the safety of the nation and its citizens—a goal that requires victory in the War on

128. Id. at 509–10.
129. Id. at 528–29 (discussing Mathews v. Eldridge, 424 U.S. 319 (1976)).
130. See id. at 529.
131. Id. (quotations omitted).
132. Id.
133. See id. at 530.
134. See id.
Terrorism, in which the invasion of Afghanistan was a central front. An extremely weighty component of this general interest is the specific interest in detaining persons who are, “in fact,” enemy combatants for the duration of the conflict in which they were captured.\textsuperscript{135}

Having recognized the weighty interests on both sides, the Court went about working the \textit{Mathews} “calculus”—analyzing the level of risk of erroneous detention presented by existing procedures and the “probable value” compared with the additional burdens imposed by adoption of additional or different procedures.\textsuperscript{136} The Court concluded that several additional procedures were required under this balance: (1) notice of the factual basis for the classification as enemy combatant; (2) a fair opportunity to rebut those facts; and (3) a neutral decisionmaker.\textsuperscript{137} This classic triumvirate of procedural due process rights embody the general opportunity “to be heard”—an opportunity which must be “meaningful.”\textsuperscript{138} Two other procedural guarantees were not required under this balance, however, given “the exigencies of the circumstances [that] may demand . . . enemy-combatant proceedings . . . be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”\textsuperscript{139} The Court gave its blessing to the use of hearsay in these proceedings, which “may need to be accepted as the most reliable available evidence from the Government in such a proceeding.”\textsuperscript{140} In addition, “the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.”\textsuperscript{141}

2. Criticism

The \textit{Hamdi} Court’s use of the \textit{Mathews} balancing test to resolve the conflict between the weighty interests of detainees and the government has been widely criticized.\textsuperscript{142} Precisely how the private and governmental interests, burdens, and probable value of additional procedures were balanced against one another is a mystery, as the Court offered no explanation of how it did so.\textsuperscript{143}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{135} See \textit{id.} at 531 (“On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have \textit{in fact} fought with the enemy during a war do not return to battle against the United States.” (emphasis added)); \textit{id.} at 518 (concluding that the detention of enemy combatants for the duration of a conflict is a “fundamental and accepted . . . incident to war”).
\item \textsuperscript{136} \textit{Id.} at 532–33.
\item \textsuperscript{137} \textit{See id.} at 533.
\item \textsuperscript{138} \textit{Id.} (quoting Fuentes v. Shevin, 407 U.S. 67, 80, 92 (1972)).
\item \textsuperscript{139} \textit{Id.} at 533–34.
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} \textit{Id.} at 534.
\item \textsuperscript{142} See, e.g., Tung Yin, \textit{Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism}, 73 \textit{Tenn. L. Rev.} 351, 400 (2006) (“The \textit{Mathews} balancing test is especially unsuitable for use in the war on terrorism, since the clash of individual and national security interests allows the judicial decisionmaker to reach any plausible outcome.”).
\item \textsuperscript{143} The \textit{Mathews} test has previously been criticized on the grounds that it provides no guidance on how to balance the factors. See, e.g., Edward L. Rubin, \textit{Due Process and the Administrative State}, 72 \textit{Cal. L. Rev.} 1044, 1138 (1984).
\end{enumerate}
\end{footnotesize}
This section criticizes, and attempts to rationalize, the Court’s *Mathews* analysis in relation to its approval of the use of hearsay evidence in detention proceedings. First, the Court failed to distinguish between two types of governmental interests in detainee proceedings—its interest in avoiding the collateral consequences of additional procedures and its interest in the relative frequency of particular outcomes of the proceedings themselves. Only this second interest, this section argues, potentially justifies the rejection of traditional hearsay laws. Second, the Court failed to consider the “probable value” of hearsay law to decreasing the risk of erroneous convictions. Although this value may ultimately be outweighed by the governmental interest, the importance of the hearsay rules to criminal proceedings, as opposed to the administrative proceedings from which the *Mathews* test originated, was unduly ignored.

a. The Burden on the Government of Applying Traditional Hearsay Law. The *Hamdi* Court considered three potential governmental burdens that may weigh against requiring additional procedures in detention proceedings. First, the Executive Branch and the military have an interest in making war autonomously and without interference—an interest the judiciary has always been careful to avoid intruding upon.144 Granting detainees greater process for detention proceedings may require military officers “engaged in the serious work of waging battle” to be “dangerously distracted by litigation half a world away.”145 Second, process approaching a typical trial could grant detainees rights of discovery that could “intrude on the sensitive secrets of national defense.”146 Third, the Court accepted (without elaboration) the government’s assertion that increased procedural rights, and specifically discovery rights, could “result in a futile search for evidence buried under the rubble of war.”147

The exclusion of hearsay evidence, however, implicates only the third of these burdens. The *exclusion* of sensitive evidence in a detention proceeding, whether hearsay or of another type, does not involve any “interference” with the war-making function of the military, even if *discovery* rights for detainees may constitute such a burden. Neither will the exclusion of sensitive evidence by application of hearsay rules intrude on national security secrets or reveal intelligence-gathering methods. Concerns about national security secrets arise only after sensitive evidence has been admitted and generally raise the issue of the extent to which the detainee should be permitted to see such evidence, including its source.148 The hearsay rules are exclusionary rules of evidence and

144. *See Hamdi*, 542 U.S. at 531.
145. *See id.* at 531–32.
146. *See id.* at 532.
147. *See id.*
neither grant discovery rights nor bear on the extent to which detainees must be allowed to view the evidence against them.

The third burden identified by the Court, however—that a search for more reliable evidence would be futile—suggests that a relevant burden under the Mathews test is the unavailability of reliable evidence. The Court seemed to accept that, for purposes of due process, the burden of producing evidence against a detainee that simply does not exist or would be extremely difficult to obtain justifies permitting the government to classify persons as enemy combatants on the basis of less reliable evidence than in a civilian criminal trial in a United States court.

The unavailability of admissible evidence, unlike the burdens of discovery or disclosure of national security secrets, implicates the government’s interest in the outcome of the proceeding itself, and not the collateral consequences external to the proceeding that the procedures might cause. As Professor Tung Yin explains, the government has an interest, in the context of detention proceedings, in preventing the relative frequency of “an erroneous windfall of liberty—that is, a false negative”—as opposed to the detained person’s interest in reducing the risk of his erroneous detention (a “false positive”). Because the relaxation of traditional rules of evidence will help ensure that false negatives (erroneous releases) occur less frequently than false positives (erroneous detentions), the government apparently has a weighty interest in doing so under Hamdi. Because the consequences of a false negative—the potential that the detainee could rejoin the battlefield, and if he is associated with terrorist organizations, cause or provide material support to the infliction of mass death—are greater than the consequences of a false positive—possible erroneous detention—the government is arguably justified in using procedural rules to ensure that there are fewer false negatives than false positives.

The difference between these two kinds of governmental interests is exemplified by the replacement of Article 36(a) of the UCMJ with the MCA. Under Article 36(a), the Military Rules of Evidence must be applied insofar as “practicable”—a standard which asks whether their application is “reasonably capable of being accomplished” or “feasible.” The MCA, by contrast, requires only the Secretary of Defense’s determination that application of the Military Rules of Evidence is not “consistent” with “military activities.”

While the former standard is concerned with the external burdens of applying procedures—akin to the “logistical difficulties” that Justice Stevens was “unaware of” in Hamdan—consistency with “military activities” is broad enough

149. Yin, supra note 142, at 397.
150. See id.
152. BLACK’S LAW DICTIONARY 1210 (8th ed. 2004).
154. See supra note 93 and accompanying text.
to encompass the government’s interest in influencing the actual outcomes of military commissions.

b. The “Probable Value” of the Application of Hearsay Law to Reducing the Risk of Erroneous Deprivation of Liberty. Although the Hamdi Court did not explicitly apply this factor of the Mathews test, the nature of the proceeding and the types of evidence the factfinder relies upon to make decisions are crucially important to the test and were the deciding factors in Mathews v. Eldridge. Mathews held that an evidentiary hearing was not required prior to the termination of disability benefits because, unlike the welfare benefits at issue in Goldberg v. Kelly, disability-benefit decisions are typically based on review of medical records—a “more sharply focused and easily documented decision than the typical determination of welfare entitlement.” Thus, issues of “witness credibility and veracity” are not central to the decision of whether to terminate disability benefits. The same is emphatically untrue of criminal proceedings against the detainees (and criminal proceedings in general), however, in which the credibility, sincerity, and veracity of a detainee’s accusers are crucial issues. Hearsay law addresses these very issues, and thus is far more important to the accuracy of results than the Hamdi Court acknowledged.

The American system is not the only legitimate way to address the hearsay problem, of course. European legal systems routinely admit hearsay evidence, albeit with important safeguards that attempt to regulate its use by factfinders. It is always open to the government to argue that the hearsay rules applied in civilian jurisdictions promote the accuracy of results less than previously thought and that categorical application of the exceptions, rather than an approach that considers the reliability of hearsay on a case-by-case basis, actually results in the suppression of reliable evidence more frequently than it prevents the introduction of unreliable evidence. For many reasons, these
would be hard arguments to make—hearsay law is not only generally uniform among the states but is also applied in civil trials, in which liberty interests are less frequently at stake. In the absence of such arguments, however, the Court should acknowledge the importance of hearsay law to the reliability of detainee proceedings, even if its probable value is ultimately outweighed by governmental interests.

In sum, this reading of the Court’s application of the *Mathews* test in *Hamdi* suggests that hearsay evidence should be admissible in enemy-combatant proceedings because the existence of ongoing hostilities in a theater of war makes avoidance of false negatives more important than avoidance of false positives. Put another way, this balance represents the conclusion that it is worse to release a suspected enemy combatant who is in fact an enemy combatant than to detain a suspected terrorist who is in fact innocent.

**B. HEARSAY AND THE WAR ON TERRORISM: PUNISHING GUILT BEYOND A REASONABLE DOUBT**

Even assuming that this relaxation of evidentiary rules, and specifically the hearsay rule, is justified when adjudicating the status of enemy combatants, is it also justified as a matter of due process for military commissions? This Note concludes by exploring this proposition, and argues that it is not justified under due-process norms. To the extent the Court’s application of the *Mathews* test would validate the MCA’s wholesale abandonment of traditional hearsay law in military commissions because other reliable evidence is unavailable, it runs afoul of a central protection of due process in criminal proceedings—the requirement that guilt be proven beyond a reasonable doubt. When the government is punishing persons for crimes, as opposed to detaining them incident to ongoing hostilities, this requirement may not be circumvented by rules of evidence primarily designed to influence the frequency of successful prosecutions.

1. Different Evidentiary Standards for Different Deprivations of Liberty

The proposition that offenses by detained persons should be easier to prove, through relaxed evidentiary standards, because of the burden on the government to produce more reliable evidence has roots in other cases that have utilized the *Mathews* test. Particularly illustrative is *Superintendent, Massachusetts Correctional Institution at Walpole v. Hill*,160 the case from which the government drew the “some evidence” standard that it argued in *Hamdi* should be applied by the federal courts when reviewing enemy-combatant status determinations that a fair trial requires the exclusion of hearsay evidence that, although qualifying under an exception, is nonetheless demonstrably unreliable. See R. v. Starr, [2000] 2 S.C.R. 144, 2000 SCC 40 (Can.) (“It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception.”).

tions.161 In Hill, the Supreme Court considered the standard of proof required in prison disciplinary hearings, and held that prisoners being held in state prisons may be denied credits for good behavior, consistent with due process, so long as that determination is supported by “some evidence.”162 Review under this standard need not independently assess the credibility of evidence, or weigh the evidence.163 The Court balanced the liberty interest of the prisoner in receiving good-time credits, the loss of which extended his detention, against the government’s interest in “assuring the safety of inmates and prisoners, avoiding burdensome administrative requirements that might be susceptible to manipulation, and preserving the disciplinary process as a means of rehabilitation.”164

The Court’s struggle in Hill to explain why a relaxed standard of evidence was justified for disciplinary hearings is similar to the Court’s failure to explain why military necessity justifies the use of hearsay and a presumption in favor of the government’s evidence in Hamdi. The Hill Court’s only explanation for why the government’s interest necessitated the “some evidence” standard was its general observation that “[p]rison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances.”165 The Court did not explain how the “some evidence” standard was necessitated by this “charged atmosphere,” or examine the extent to which disciplinary-hearing boards actually operate in such an atmosphere. The Court also did not explain why the determination of good-behavior credits—which relate to extensions or reductions of incarceration, not the steps that prison officials may take to subdue or secure a badly behaving prisoner—was the type of decision that required swift action on the basis of less sufficient evidence.166 Rather, the real burden on the government seems to have been the unavailability of evidence meeting traditional evidentiary standards in the large majority of prison disciplinary cases.167

The only apparent basis for both decisions seems to be the perhaps uncontroversial proposition that lesser degrees of deprivations of liberty should require lesser standards of proof. In both instances, the relevant burden on the government is not the collateral consequence of additional procedures (harm to the prison’s ability to act in a “charged atmosphere” or the military’s need to act

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162. Hill, 472 U.S. at 455.
163. Id. at 455–56.
164. Id. at 454–55.
165. Id. at 456.
166. See id.
167. The only evidence offered in support of the board’s determination that the respondents in Hill had assaulted another inmate was the testimony of a prison guard who had witnessed the two respondents and one other “jogging away” from a walkway where a fourth inmate was lying bleeding and apparently beaten. The Court assumed this was a typical rather than unusual scenario. Id. at 447–48. Given this reality, the Court seemed to worry that a greater standard of proof would unacceptably burden the prison disciplinary system. See id. at 454–55 (noting the importance of “preserving the disciplinary process” and the “threat of undue administrative burdens” as justifications for a lower evidentiary standard).
autonomously during a conflict), but a burden on the government’s interest in influencing the relative frequency with which erroneous deprivations or erroneous grants of liberty take place. In Hill, the Court seemed satisfied with this result because the liberty interest affected was much less weighty than that at stake in a criminal trial. Although recognizing that an inmate’s interest in receiving good-behavior credits is one protected by the Fourteenth Amendment, the Court found it “not comparable” to the liberty interests implicated by a criminal conviction.168 It was not that the application of a greater standard of proof was impracticable because of the “charged atmosphere” of prisons in general—rather, the lesser liberty interest implicated, in light of the unavailability of more sufficient evidence, made the abandonment of these standards less offensive to due process.

2. Detention Versus Punishment

Criminal trials implicate a wholly different liberty interest than preventative detention proceedings. The purpose of detention incident to war “is neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.”169 Detention is thus forward-looking only—its purpose is to incapacitate the person detained so long as a threat of harm exists, and its justification ends when the threat of harm ends.170 By contrast, punishment is retrospective, and implicates greater liberty interests of the accused than a person preventatively detained; not only may the criminal defendant lose his liberty upon being convicted of a crime, but he will suffer a corresponding “certainty that he would be stigmatized by the conviction.”171 Although punishment also serves forward-looking goals such as incapacitation, deterrence, and rehabilitation—it fundamentally differs from detention because of its retributive character. Retributivism justifies punishment “by the moral culpability of those who receive it.”172

168. Id. at 456.

169. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (emphasis added) (internal quotations omitted) (quoting Yasmin Naqvi, Doubtful Prisoner-of-War Status, 84 INT’L REV. RED CROSS 571, 572 (2002)); see also id. at 593 (Thomas, J., dissenting) (“[T]he Government does not detain Hamdi in order to punish him . . . .”). Although the prospect of indefinite detention blurs the line between detention and punishment, the Court in Hamdi assumed that it was deciding the requirements of due process in the context of detention incident to ongoing hostilities, and not indefinite detention. See id. at 521; see also Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (“A statute permitting indefinite detention of an alien would raise a serious constitutional problem.”).

170. See Brief of General David Brahms and General James Cullen as Amici Curiae in Support of Petitioner at 8, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184) (“Detention is traditionally prospective in nature. Its sole purpose is the prevention of future harm. Once the threat of harm has passed, detention is no longer justified and the detainee must be freed.”); see also Kansas v. Hendricks, 521 U.S. 346, 363 (1997) (“Far from any punitive objective, the confinement’s duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others.”).


172. Michael S. Moore, The Moral Worth of Retribution, in Responsibility, Character and the Emotions 179 (Ferdinand Schoeman ed., 1987); see also Joel Feinberg, Doing and Deserving 98
That different rules should apply when the government is punishing someone, as opposed to preventatively detaining them, is uncontroversial. Core constitutional rights often depend on whether governmental confinement can be classified as preventative detention or punishment, and the Court presumes a difference. For example, the Double Jeopardy and Ex Post Facto Clauses of the Fifth Amendment only protect confined persons when they are being “punished.” Importantly, the Supreme Court has previously recognized that the procedures due in criminal trials in the United States—at least when defendants are United States citizens and in times of peace—should not be susceptible to the Mathews balancing test as would other kinds of private interests. The rights granted by the Fourth, Fifth, and Sixth Amendments, including the right of confrontation, represent “a careful balance . . . between liberty and order” that do not flex in an individual case where the burdens on the government are abnormally great or its interest in conviction particularly weighty.

Because of the liberty interests at stake, proceedings for the purpose of punishment are traditionally accompanied by a higher standard of proof. Furthermore, this tradition has been putatively embraced by both the Executive and Legislative Branches throughout the evolving military commission procedures. Section 5 of the original Commission Order provided that detainees must be presumed innocent, and directed Commission members to find guilt “if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial,” that the detainee is guilty of the offense. Likewise, section 949 of the MCA requires the military judge to instruct the commission members that the detainee is presumed innocent, that a reasonable doubt as to the guilt of the accused must result in a vote of acquittal, and that it is the

(1970) (“[P]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation . . . . Punishment, in short, has a symbolic significance largely missing from other kinds of penalties.”).

173. Professor Tung Yin has suggested that military commissions do not “punish” detainees as the term is traditionally conceived, because some of the traditional goals of a criminal trial—deterrence and rehabilitation—are not implicated when convicting enemy combatants of war crimes in connection with the War on Terrorism. See Tung Yin, Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Detainees, 29 HARV. J.L. & PUB. POL’Y 149, 165–70 (2005).

174. See United States v. Salerno, 481 U.S. 739, 746 (1987) (“[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.”).


177. See id.

178. See Commission Order, supra note 85, § 5(B)–(C). The Department of Defense frequently emphasizes these rules as evidence of the fairness of commission proceedings. See, e.g., Glaberson, supra note 42 (quoting Brigadier General Thomas Hartmann as emphasizing that the six detainees recently charged with planning the September 11, 2001 attacks “‘are, and will remain, innocent unless proved guilty beyond a reasonable doubt’”).

The Supreme Court did not explicitly recognize proof of guilt beyond a reasonable doubt in a criminal trial as an essential component of due process until 1970 in \textit{In re Winship}.\footnote{397 U.S. 358 (1970).} According to Justice Harlan, “only because of the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials” had the issue not previously come before the Court.\footnote{Id. at 372 (Harlan, J., concurring).} The Court’s approbation of the reasonable-doubt requirement in \textit{Winship} could not be more fervent: it is “implicit in ‘constitutions which recognize the fundamental principles that are deemed essential for the protection of life and liberty’”\footnote{Id. at 362 (majority opinion) (alteration omitted) (quoting Davis v. United States, 160 U.S. 469, 488 (1895)).}, it provides “concrete substance for the presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law’”;\footnote{Id. at 363 (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).} and is “indispensable to command the respect and confidence of the community in applications of the criminal law.”\footnote{Id. at 364.} It is as critical, in the \textit{Winship} Court’s view, as other constitutional safeguards, including notice of the charges, the right to counsel, the right to confrontation, and the privilege against self-incrimination.\footnote{Id. at 368.}

The universality of the rule aside, Justice Harlan’s concurring opinion explains the legal and moral calculus behind the rule. In any proceeding, there is the risk of two kinds of error—an erroneous judgment in favor of the plaintiff or prosecutor or an erroneous judgment in favor of the civil or criminal defendant where the true facts justify the opposite judgment.\footnote{See id. at 370–71 (Harlan, J., concurring).} The standard of proof “influences the relative frequency of these two types of erroneous outcomes,” based on the “comparative social disutility of each.”\footnote{Id. at 371–72; see also Katherine Goldwasser, \textit{Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence}, 86 GEO. L.J. 621, 634–35 (1998).} The reasonable-doubt rule is thus founded on a utilitarian calculus that judges the social costs of erroneous conviction to be higher than the costs of erroneous acquittal,\footnote{See Erik Lillquist, \textit{Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability}, 36 U.C. DAVIS L. REV. 85, 104 (2002).} based on the “fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”\footnote{Winship, 397 U.S. at 372 (Harlan, J., concurring).}

The reasonable-doubt rule itself is thus a balance between the risk of erroneous conviction and the risk of erroneous acquittal—it intentionally seeks to
influence, on utilitarian grounds, the relative frequency with which the moral condemnation of society, and its corresponding effect on the liberty of the accused, is brought to bear on persons accused of crimes. When the government is punishing confined persons for criminal acts, that is, the reasonable-doubt rule embodies a “fundamental value determination” that the harms of false positives are greater than the harms of false negatives.

3. The Relationship Between Rules of Evidence and the Reasonable Doubt Standard

The reasonable-doubt standard of proof means little without procedural rules designed to implement it. The most visible of these rules is the reasonable-doubt jury instruction—required under both the President’s original Military Order as well as the MCA. The rules relevant to the effectiveness of the reasonable-doubt requirement, however, are much broader than jury instructions. As the Court explained in *Brinegar v. United States*:

Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

This passage eloquently emphasizes the connection between a standard of proof and the rules of evidence relevant to applying that standard. Moreover, *Brinegar* clearly had the law of hearsay in mind when it spoke of the reasonable-doubt requirement “crystallizing” into bedrock rules of evidence—the Court was distinguishing between the admissibility of hearsay to establish probable cause for a search under the Fourth Amendment and the admissibility of the same hearsay at the defendant’s trial. The policies underlying the different standards for each are instructive. Probable cause is required to support a search under the Fourth Amendment—but this standard of proof is less than that required for a criminal conviction because the risks of error and the private interests implicated are different in kind. The Fourth Amendment’s probable-cause standard seeks to “safeguard citizens from rash and unreasonable interferences with privacy . . . . [but] also seeks to give fair leeway for enforcing the

190. The reasonable doubt requirement is also a standard of review by courts for the sufficiency of evidence in criminal trials. See *Jackson v. Virginia*, 443 U.S. 307, 318 (1979) (“After *Winship* the critical inquiry . . . must be . . . whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.”); Jon O. Newman, *Beyond “Reasonable Doubt,”* 68 N.Y.U. L. Rev. 979, 986–87 (1993) (arguing that this sentence “applies the traditional test for determining sufficiency of evidence—namely, whether the law’s ubiquitous reasonable person, in this case a reasonable jury, could find the matter proven by the requisite degree of persuasion, in this case beyond a reasonable doubt”).


192. See id. at 174.
law in the community’s protection.”\textsuperscript{193} Because the private interest in being free from wrongful incarceration is much greater than the interest in being free from unreasonable searches and seizures, different standards are appropriate. Hearsay is admissible to answer the latter, but not the former, because the harms bound up in the risk of error are greater when deciding guilt than when deciding whether to issue a search warrant.

The protections afforded not only by traditional hearsay law, but also by the Confrontation Clause of the Sixth Amendment, are indispensable in our legal system for the provision of reliable and fair trials to defendants.\textsuperscript{194} The Sixth Amendment applies to all “criminal prosecutions,”\textsuperscript{195} and although courts have historically refused to apply certain protections of the Bill of Rights in the military context,\textsuperscript{196} the right of confrontation applies in courts-martial and is recognized in the President’s Manual for Courts-Martial.\textsuperscript{197} Regardless of whether non-citizen detainees directly enjoy the protections of the Sixth Amendment,\textsuperscript{198} if the government is constrained by the Due Process Clause when acting abroad, then rules permitting the introduction of hearsay in military commissions that would violate the Confrontation Clause, when imposed for the sole purpose of obtaining more convictions, should also implicate the reasonable-doubt requirement.

This is not to suggest that divergences in the evidence rules for military commissions violate the reasonable-doubt requirement merely because they have the \textit{effect} of making it easier for the prosecution to secure convictions. As Justice O’Connor argues in her dissent in \textit{Montana v. Egelhoff}:\textsuperscript{199}

\begin{quote}
The purpose of the familiar evidentiary rules is not to alleviate the State’s burden, but rather to vindicate some other goal… [such as] to ensure the reliability and competency of evidence… . Such rules may or may not help the prosecution, and when they do help, do so only incidentally. While due process does not “bar[] States from making changes… that have the \textit{effect} of making it easier for the prosecution to obtain convictions,” an evidentiary rule
\end{quote}

\textsuperscript{193} Id. at 176.
\textsuperscript{194} See supra notes 31–39 and accompanying text.
\textsuperscript{195} U.S. \textit{Const.} amend. VI.
\textsuperscript{196} For example, defendants before military tribunals have no right to trial by a jury of their peers, and the protections of the Fourth Amendment warrant requirement are circumscribed. See \textit{Able v. United States}, 155 F.3d 628, 633 (2d Cir. 1998).
\textsuperscript{197} See \textit{United States v. Strangstalien}, 7 M.J. 225, 241 (C.M.A. 1979) (“No one has suggested, nor could they, that the men and women of the armed services of the United States do not enjoy this basic right when accused before courts-martial of having committed criminal offenses.”).
\textsuperscript{198} Cf. \textit{Reid v. Covert}, 354 U.S. 1, 8 (1956) (holding that the Sixth Amendment guarantee of a trial by jury applied to the extraterritorial prosecution of an American citizen by military tribunal, in part based on the Sixth Amendment’s “all inclusive” and “sweeping references” to “‘no person’ and to ‘all criminal prosecutions’”).
\textsuperscript{199} 518 U.S. 37 (1996). \textit{Egelhoff} involved a state rule prohibiting the introduction of evidence of voluntary intoxication in order to prove that a defendant did not have the mental state required for murder. See \textit{id.} at 40–41.
whose sole purpose is to boost the State’s likelihood of conviction distorts the adversary process.\textsuperscript{200}

Traditional hearsay law and the right of confrontation, both “familiar” evidentiary rules recognized as fundamental to the reliability of both civilian and military criminal trials, are significant parts of the body of evidence law designed to ensure that criminal guilt is proven beyond a reasonable doubt. The abandonment of these protections is not constitutionally justified by a governmental “interest” in creating a system that ensures that false acquittals occur less frequently than false convictions. The reasonable-doubt requirement embodies a moral judgment regarding the relative frequency of these two types of erroneous results in the context of criminal punishment, and the replacement of bedrock procedural rules for the sole purpose of reversing this balance violates due process.

**CONCLUSION**

This Note has argued that the decision to apply or abandon traditional hearsay law in military commissions involves a “fundamental value determination” regarding the relative frequency with which suspected enemy combatants are either erroneously imprisoned or erroneously freed. If the traditional law of hearsay is abandoned in military commissions, as the Military Commissions Act permits, it is because our elected branches of government have resolved this balance in favor of erring on the side of fewer “false negatives” than “false positives,” and not on the basis of a belief that traditional hearsay law is administratively impracticable when prosecuting suspected terrorists. For this reason, the future convictions imposed by military commissions under the MCA will importantly diverge from the punishment meted out by our civilian criminal justice system. Indeed, criminal prosecutions under the MCA may be more accurately characterized as a means to continue to preventatively detain persons held at Guantanamo Bay in the face of political pressure to charge them with crimes or release them.

The challenges posed by the War on Terrorism to traditional definitions of war and crime certainly require new legal approaches to detention and punishment. Many of these approaches are legitimate and build upon rather than replace existing components of our criminal justice system, such as the codifica-

\textsuperscript{200} Id. at 67–68 (O’Connor, J., dissenting) (citation omitted) (alteration to the original in the quoted text); see also Goldwasser, supra note 187, at 635–36:

\[\text{If we take seriously our commitment to the values embodied in the proof beyond a reasonable doubt requirement, the reasons for exclusion cannot be ignored. Many such reasons pose no threat to reasonable doubt values. . . . In contrast, when viewed through the lens of the reasonable doubt rule, to exclude defense evidence (and thereby increase the risk of an erroneous conviction) solely out of concern about the risk of an erroneous acquittal is flatly unacceptable.}\]
tion of new crimes reaching dangerous conduct, and the imposition of more serious penalties for offenses related to terrorism. Reasonable citizens, legislators, judges, and military commanders can disagree on whether the threat posed by terrorism also necessitates rules of evidence that are designed to ensure security rather than justice and whether the principle that criminal guilt should be proven beyond a reasonable doubt remains morally coherent in the context of this new struggle. At the very least, however, we should acknowledge when rules of evidence are selected or abandoned based on their success at securing convictions rather than their effectiveness at determining truth. In the final analysis, honesty on this point will better allow us to evaluate the costs the War on Terrorism has assessed against the moral authority of our legal system.


202. See id. § 950v(25)–(26) (permitting such punishment for material support of terrorism and wrongful aid of the enemy “as a military commission under this chapter may direct”); id. § 949m(b) (permitting the imposition of life imprisonment by concurrence of three-fifths of the members of the military commission).


204. Justice Murphy, a dissenter in Yamashita, explains the stakes aptly:

That just punishment should be meted out to all those responsible for criminal acts of this nature is . . . beyond dispute. But these factors do not answer the problem in this case. They do not justify the abandonment of our devotion to justice in dealing with a fallen enemy . . . . To conclude otherwise is to admit that the enemy has lost the battle but has destroyed our ideals.

In re Yamashita, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting).