

REPORT DOCUMENTATION PAGE				Form Approved OMB No. 0704-0188	
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PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ORGANIZATION.					
1. REPORT DATE (DD-MM-YYYY) 20-05-2012		2. REPORT TYPE Master's Thesis		3. DATES COVERED (From - To) DEC 2011 - MAY 2012	
4. TITLE AND SUBTITLE Use of Hearsay in Military Commissions				5a. CONTRACT NUMBER N00244-09-G-0007	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
				5d. PROJECT NUMBER	
6. AUTHOR(S) Arthur L. Gaston III				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) The George Washington University				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES) Naval Postgraduate School Monterey, CA 93943				10. SPONSOR/MONITOR'S ACRONYM(S) NPS	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT 1. DISTRIBUTION STATEMENT A. Approved for public release; distribution is unlimited.					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT Trial by military commission has been described as an "extraordinary measure" in the annals of American jurisprudence. In fact, such commissions and other military tribunals have been used repeatedly throughout U.S. history—over 2,000 times during the Civil War alone—to maintain order during periods of hostilities, to enforce martial law, and to prosecute war crimes in defense of the Nation. As explained by William Winthrop, whom the Supreme Court has dubbed the "Blackstone of Military Law," such commissions have functioned essentially as instrumentalities of the war powers vested in Congress and the President. Thus, as tools of war, military commissions are in many ways no more or less extraordinary than their historical context—i.e., the armed conflicts in which Congress and the President have called them into service.					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT		18. NUMBER OF PAGES
a. REPORT	b. ABSTRACT	c. THIS PAGE	UU		99
			19a. NAME OF RESPONSIBLE PERSON Julie Zack, Educational Technician		
			19b. TELEPHONE NUMBER (Include area code) (831) 656-2319		

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USE OF HEARSAY IN MILITARY COMMISSIONS

Lieutenant Commander Arthur L. Gaston III*

I. INTRODUCTION

Trial by military commission has been described as an “extraordinary measure” in the annals of American jurisprudence.¹ In fact, such commissions and other military tribunals have been used repeatedly throughout U.S. history—over 2,000 times during the Civil War alone²—to maintain order during periods of hostilities, to enforce martial law, and to prosecute war crimes in defense of the Nation.³ As explained by William Winthrop, whom the Supreme Court has dubbed the “Blackstone of Military Law,”⁴ such commissions have functioned essentially as instrumentalities of the war powers vested in Congress and the President.⁵ Thus, as tools of war, military commissions are in many ways no more or less extraordinary than their historical context—i.e., the armed conflicts in which Congress and the President have called them into service.

This article addresses one aspect of military commissions that has drawn criticism over the years: their more permissive approach to the consideration of hearsay evidence. In its decision in *Hamdan v. Rumsfeld*,⁶ which struck down the

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¹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (citing *Ex parte Quirin*, 317 U.S. 1, 19 (1942)).

² *In re Yamashita*, 327 U.S. 1, 66 n.31 (Rutledge, J., dissenting) (quoting Hearings Before the Committed on Military Affairs, House of Representatives, 62d Cong., 2d Sess. (Statement of Gen. Enoch Crowder)).

³ See John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH L. REV. 899, 902-13 (2003); JENNIFER ELSEA, CONG. RESEARCH SERV., RL31191, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS 18-25 (2001).

⁴ *Reid v. Covert*, 354 U.S. 1, 19 n.38 (1957).

⁵ See WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (rev. 2d ed. 1920).

⁶ 548 U.S. 557 (2006).

military commissions established under the 2001 Military Order of President George W. Bush,⁷ one of the tenets of the system the Supreme Court found “striking” was its permissive approach to hearsay.⁸ While the Bush Military Order was based largely on rules used in previous military commissions and other war crimes tribunals,⁹ a majority of the Justices in *Hamdan* found that the Order violated the Uniform Code of Military Justice and the Geneva Conventions.¹⁰

In light of the non-constitutional grounds for the Supreme Court’s ruling, however, Congress’ subsequent passage of the Military Commissions Act of 2006¹¹ effectively overruled the *Hamdan* decision.¹² Later amended in 2009,¹³ the current MCA has retained a rule that permits the use of otherwise inadmissible hearsay, based on a detailed set of preliminary considerations by the military judge.¹⁴ Since no other source of applicable law presents any impediment to its use,¹⁵ the only remaining question is whether the MCA’s permissive hearsay rule is constitutional.

⁷ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (November 16, 2001) (hereinafter “Bush Military Order”).

⁸ See *Hamdan*, 548 U.S. at 614 (addressing the Bush Military Order’s evidentiary rule that would allow the admission of “any evidence that, in the opinion of the presiding officer ‘would have probative value to a reasonable person’”) (emphasis deleted).

⁹ See *infra* notes 58-79 and accompanying text.

¹⁰ *Hamdan*, 548 U.S. at 567.

¹¹ Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. §§ 948a-950t (2012)) (hereinafter “MCA”).

¹² It is long settled that with respect to statutes and treaties, the last unambiguous enactment by Congress is what controls. See *Reid v. Covert*, 354 U.S. 1, 18 (1957) (stating “an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null”); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation . . . but, if the two are inconsistent, the one last in date will control the other.”); *Edye v. Roberston* (Head Money Cases), 112 U.S. 580, 599 (1884) (“[S]o far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal.”).

¹³ The Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574.

¹⁴ See 10 U.S.C. § 949a(b)(3)(D), *infra* note 81.

¹⁵ While the MCA’s hearsay rule is consistent with international practice, see *infra* notes 74-79 and accompanying text, such customary international law cannot in any event override an unambiguous congressional enactment. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (finding customary international law only relevant “where there is no treaty and no controlling executive or legislative act or judicial decision”); *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005) (“Never does customary international law prevail over a contrary federal statute.”); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) (“[C]lear congressional action trumps customary international law and previously enacted treaties.”); see also *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)

This article argues that the MCA's hearsay rule is indeed constitutional. Part II examines the rule against the backdrop of the development at common law of the traditional hearsay rule and the related right of confrontation.¹⁶ Part III places the rule in the context of other military commissions and international war crimes tribunals, which have also used flexible evidentiary rules to admit probative hearsay evidence for consideration.¹⁷ Based on these historical precedents, Part IV then discusses the constitutional implications the rule itself.¹⁸

The resulting analysis yields several conclusions, all supporting the view that the MCA's hearsay rule is in accordance with existing constitutional precedent. First, the traditional hearsay and confrontation rules are corollaries of the Anglo-American legal system's reliance on lay juries, which serve as a political protection of the governed against their government; hence, the justification for strict adherence to these rules has little application to law-of-war commissions convened to adjudicate war crimes against foreign enemies.¹⁹ Second, as part of the bulwark that provides for the national defense, military commissions have historically emphasized function over form in using flexible evidentiary rules and other trial procedures—an approach echoed by international war crimes tribunals even to this day.²⁰ The MCA's hearsay rule is fully in line with past precedent and current practice in this regard, and its provisions are aptly suited to the ends for which they are designed: the search for truth.²¹ Finally, as a mechanism joined in by both Congress and the President in discharging their constitutional powers to defend the Nation, military commissions convened under the MCA are entitled to the same constitutional deference as the military commissions that have preceded them, all of which have been based to some extent, like war itself, on practical considerations.²²

(holding that, to the extent it is ambiguous, a statute should be construed so as not to conflict with international law).

¹⁶ See *infra* notes 23-53 and accompanying text.

¹⁷ See *infra* notes 54-85 and accompanying text.

¹⁸ See *infra* notes 86-158 and accompanying text.

¹⁹ See *infra* notes 30-44 and accompanying text.

²⁰ See *infra* notes 54-79 and accompanying text.

²¹ See *infra* notes 80-85 and accompanying text.

²² See *infra* notes 146-58 and accompanying text.

II. ORIGINS AND HISTORY OF THE HEARSAY AND CONFRONTATION RULES

Hearsay, as the familiar definition holds, is an out-of-court statement offered to prove the truth of the matter asserted.²³ Subject to numerous exceptions, exclusions, and other definitional nuances,²⁴ hearsay is generally not admissible in U.S. civilian trials or courts-martial without an Act of Congress.²⁵ Having developed through over three centuries of common law, however, the traditional hearsay rule is by now so riddled with exceptions that even the Supreme Court has likened it to “an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists, and surrealists.”²⁶ Some exceptions are premised on the unavailability of the declarant; others apply regardless of the declarant’s availability.²⁷ And in addition to the over two dozen specific exceptions, a residual exception serves as a catch-all for yet other hearsay that may properly be admitted notwithstanding the traditional rule.²⁸ The presence of all these exceptions is, of course, founded on the fundamental idea that at least some hearsay is generally deemed reliable enough to be admitted into evidence for consideration by the fact finder.²⁹

²³ See Fed. R. Evid. 801(c).

²⁴ See Fed. R. Evid. 801, 803-807.

²⁵ Fed. R. Evid. 802; Mil. R. Evid. 802.

²⁶ *Ohio v. Roberts*, 448 U.S. 56, 62 (1980) (quoting Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937)).

²⁷ See generally Fed. R. Evid. 803-804.

²⁸ See Fed. R. Evid. 807. The residual exception provides as follows:

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Id.

²⁹ MICHAEL R. FONTHAM, TRIAL TECHNIQUE AND EVIDENCE 194 (3rd ed. 2008) (“The considerations of necessity, reliability, and adversarial fairness led to the creation of the hearsay exceptions.”)

A. Development of the Hearsay Rule

The traditional hearsay rule, derived from centuries of common law, is principally the result of the Anglo-American legal system's reliance on lay juries to serve as a protection of the governed against their government.³⁰ As Alexis de Tocqueville recognized in his early observations of the United States, the jury is "first and foremost, a political institution and must always be judged from that point of view."³¹ The Supreme Court has agreed with Tocqueville's view, shared by others at the time of the founding, that the right to trial by jury, preserved in the Sixth Amendment,³² is

no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.³³

Thus, as Tocqueville observed, the institution of the American jury was not only deemed an effective method of teaching citizens how to govern their new republic, but also "the most energetic method of asserting the people's rule."³⁴

Because of the power it placed in the hands of lay juries, however, the Anglo-American legal system produced a law of evidence that, as one

³⁰ See, e.g., Bickers, *supra* note 3, at 930 ("The most common rationale advanced for the hearsay prohibition in the common law is tied to the existence of the jury."); John H. Langbein, *Historical Foundations for the Law of Evidence: A View From the Ryder Sources*, 96 COLUM. L. REV. 1168, 1194 (1996) ("From the Middle Ages to our own day, the driving concern animating the Anglo-American law of evidence has been to protect against the shortcomings of trial by jury.").

³¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 317 (Gerald E. Began, trans., Penguin Classics 2003) (1835).

³² U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .").

³³ *Blakely v. Washington*, 542 U.S. 296, 306 (2004). Among the sources cited for this proposition in *Blakely*, the Court listed Letter XV by the Federal Farmer (Jan. 18, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 315, 320 (H. Storing ed. 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), *reprinted in* 2 WORKS OF JOHN ADAMS 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); and Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), *reprinted in* 15 PAPERS OF THOMAS JEFFERSON 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative").

³⁴ TOCQUEVILLE, *supra* note 31, at 322.

commentator has described it, is “imbued with a spirit of skepticism.”³⁵ The principal concern in the development of hearsay and other evidentiary rules at common law was that lay juries were not sophisticated enough to assess the probative worth of certain evidence and might overvalue evidence of questionable reliability.³⁶ Based on the view that out-of-court statements are inherently less trustworthy than in-court testimony, the hearsay rule seeks to decrease various potential risks for the fact finder: that the declarant misperceived the facts in question, that his memory is faulty, that he is being insincere or untruthful, or that the narrative itself is ambiguous.³⁷ The theory of the hearsay rule is that live witness testimony will help curb these risks by requiring an oath of truthfulness, by allowing the fact finder to observe the witness’ demeanor, and by exposing the statements to cross-examination.³⁸

Modern critics of the traditional hearsay rule, however, contend that the theory behind the rule does not necessarily match up with the reality. As one noted scholar of the law of evidence has summed up the argument,

[t]he theory is pernicious rubbish. It excludes some hearsay that should be admitted, fails to provide a sound justification for excluding hearsay that should be excluded, and gravely overcomplicates the entire area. It has no empirical foundation. The empirical evidence does not reveal over-valuation of hearsay and even suggests the possibility of under-valuation. *Bear in mind that much hearsay has very substantial value; if the jurors are giving it great weight, they are acting rationally.*³⁹

Such critics also point out that blanket restrictions on hearsay evidence have remained largely absent from non-jury-based legal systems—e.g., in the civil-law systems of many European countries—where emphasis is placed on receiving evidence and then evaluating its reliability rather than on prohibiting it from admission and consideration altogether.⁴⁰ Some commentators have suggested

³⁵ RONALD CARLSON ET AL., EVIDENCE IN THE NINETIES: CASES, MATERIALS, AND PROBLEMS FOR AN AGE OF SCIENCE AND STATUTES 203 (3d ed. 1991).

³⁶ Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1097 (1985).

³⁷ See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 721-22 (4th ed. 2009); Edmund M. Morgan, *Hearsay Dangers and Application of Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

³⁸ MUELLER & KIRKPATRICK, *supra* note 37, at 724-25.

³⁹ Richard D. Friedman, *Minimizing the Juror Over-Valuation Concern*, 2003 MICH. ST. L. REV. 955, 976 (emphasis added).

⁴⁰ Jeremy A. Blumenthal, *Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective*, 13 PACE INT’L L. REV. 93, 99-100 (2001)

that the practices of civil-law systems actually offer better alternatives to hard-and-fast evidentiary restrictions like the hearsay rule, arguing that “[t]he evolution of modern American jury practices has had an adverse impact on the jury’s ability to discover the truth and to arrive at just outcomes.”⁴¹

B. The Right of Confrontation

A parallel development related to the hearsay rule deals with the right of confrontation, preserved in the Sixth Amendment Confrontation Clause.⁴² Like the hearsay rule, the confrontation right also developed as a corollary to the Anglo-American jury system, which preferred live in-court testimony in adversarial trials.⁴³ In fact, as the Supreme Court has explained, the development of the confrontation right was a reaction to the very feature of continental European systems just discussed: “the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”⁴⁴

Like the traditional hearsay rule, the right of confrontation was embraced in the United States as a way to “enhance the accuracy of the truth-determining process in criminal trials.”⁴⁵ As explained in the Supreme Court’s decision in *Ohio v. Roberts*,⁴⁶ the right was justified along lines similar to the hearsay rule’s rationale of promoting the reliability of evidence.⁴⁷ Thus, under *Roberts*, out-of-court statements by unavailable witnesses could only be admitted if they

(“Generally, European courts do not use the complex body of evidentiary rules that the Anglo-American system has developed to prevent hearsay testimony.”); Mirjan Damaska, *Of Hearsay and Its Analogues*, 76 MINN. L. REV. 425, 456-67 (1992); *Hamdan*, 548 U.S. at 732-33 (Alito, J., dissenting) (“Rules of evidence differ from country to country, and much of the world does not follow aspects of our evidence rules, such as the general prohibition against the admission of hearsay.”).

⁴¹ Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 451 (1997) (advocating, among other things, the relaxation of hearsay rules).

⁴² U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).

⁴³ See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373-74 (1768).

⁴⁴ *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

⁴⁵ *United States v. Inadi*, 475 U.S. 387, 396 (1986) (quoting *Tennessee v. Street*, 471 U.S. 409, 415 (1985)). See also *Maryland v. Craig*, 497 U.S. 836, 845 (1990) (“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”); *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987) (“The right to cross-examination, protected by the Confrontation Clause, thus is essentially a ‘functional’ right designed to promote reliability in the truth-finding functions of a criminal trial.”).

⁴⁶ 448 U.S. 56 (1980).

⁴⁷ See *id.* at 66.

possessed “adequate ‘indicia of reliability,’” either by falling within a “firmly rooted hearsay exception” or by bearing “particularized guarantees of trustworthiness.”⁴⁸

In *Crawford v. Washington*,⁴⁹ however, the Supreme Court decided that allowing trial judges to make such reliability determinations under *Roberts* did not comport with the strict requirements of the Confrontation Clause.⁵⁰ Drawing from the history of the confrontation right, the Court found that while reliable evidence may ultimately be the theory behind the right, it is not the focus of the trial court’s inquiry.⁵¹ Under *Crawford*, so long as the out-of-court statement is “testimonial,” confronting the witness is a fixed procedural right that is an end in itself.⁵² After *Crawford*, if the Sixth Amendment confrontation right applies at all, then absent an ability to cross-examine the declarant, testimonial hearsay is excluded from consideration even if it is obviously reliable.⁵³

III. MILITARY COMMISSIONS AND OTHER WAR CRIMES TRIBUNALS

As these hearsay and confrontation rules have evolved in civilian court systems and then migrated into court-martial practice, military commissions have relied on rules and procedures, which, while patterned on those of general courts-martial, have tended to be less formalistic and more functional in their approach.⁵⁴ While Winthrop espoused typical common-law views, for example, on the use of hearsay and other evidentiary rules in courts-martial, his approach to military commissions was more pragmatic.⁵⁵ Realizing that military commissions were fundamentally creatures of the war powers, he also contemplated that their rules and procedures could be modified by statute or regulation.⁵⁶ As the historical

⁴⁸ *Id.*

⁴⁹ 541 U.S. 36 (2004).

⁵⁰ *See id.* at 61.

⁵¹ *See id.* at 42-62.

⁵² *See id.* at 61-62.

⁵³ *See id.* at 62 (“Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with the jury trial because a defendant is obviously guilty. This is not what the *Sixth Amendment* prescribes.”).

⁵⁴ *See* WINTHROP, *supra* note 5, at 841-42.

⁵⁵ *Compare id.* at 324-27 (discussing hearsay and exceptions to hearsay) *and id.* at 342-43 (discussing cross-examination and the use of *ex parte* statements) *with id.* at 842 (stating that military commissions are “in general even less technical than a court-martial”) *and id.* at 841 (stating that “[t]hese war-courts are indeed more summary in their action than are the courts held under the Articles of war, and . . . their proceedings . . . will not be rendered illegal by the omission of details required upon trials by courts-martial”).

⁵⁶ *See id.* at 842 (stating that court-martial rules are commonly used “[i]n the absence of any statute or regulation governing the proceedings of military commissions”).

precedents reveal, the rules and procedures that have been used in military commissions and other war crimes tribunals have reflected this same pragmatic approach to the admissibility of probative evidence, particularly hearsay.⁵⁷

A. World War II Precedents

While there are earlier precedents in U.S. history,⁵⁸ the military commissions and other war crimes tribunals convened in the World War II era in many ways set the benchmark for their use ever since.⁵⁹ In 1942, President Franklin D. Roosevelt convened a military commission to try war crimes charges against eight German saboteurs who had infiltrated the United States in order to mount clandestine attacks on U.S. targets.⁶⁰ In establishing the evidentiary rules to be used during the proceedings, President Roosevelt issued a broad rule of admissibility that would allow for the consideration of hearsay: “Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man.”⁶¹

In its review of the defendants’ convictions in *Ex parte Quirin*,⁶² the Supreme Court held that the military commission was lawfully constituted and denied the defendants’ motions for leave to file for writ of habeas corpus.⁶³ In reaching its decision, the Court found that violations of the law of war were not “crimes” or “criminal prosecutions” within the meaning of the Fifth and Sixth Amendments, and were therefore not subject to their protections.⁶⁴ After the *Quirin* decision denied constitutional applicability to the military commission he had convened, President Roosevelt adopted the same flexible rules for admissibility in establishing other military commissions during the war.⁶⁵

Subsequently, as World War II began to grow to a close in Europe and the Allies were resolving what forum would be used to prosecute major war crimes,

⁵⁷ See *infra* notes 58-79 and accompanying text.

⁵⁸ See ELSEA, *supra* note 3, at 18-23.

⁵⁹ See generally Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Practice?* 37 COLUM. J. TRANSNAT’L L. 851 (1999).

⁶⁰ See *Ex parte Quirin*, 317 U.S. 1, 20-23 (1942).

⁶¹ Military Order of July 2, 1942: Appointment of a Military Commission, 7 Fed. Reg. 5103 (Jul. 3, 1942) (hereinafter “*Quirin Order*”).

⁶² 317 U.S. 1 (1942).

⁶³ See *id.* at 48.

⁶⁴ See *id.* at 40.

⁶⁵ See Military Order of January 11, 1945: Governing the Establishment of Military Commissions for the Trial of Certain Offenders Against the Law of War and Governing the Procedures for Such Commissions, 10 Fed. Reg. 549 (Jan. 16, 1945).

the decision was made to use an International Military Tribunal at Nuremberg that would not rely on the procedural rules of any particular country's legal system.⁶⁶ The resulting London Charter of 1945 provided great flexibility in what evidence, including hearsay, could be received:

The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which it deems to be of probative value.⁶⁷

These and other procedural rules in the London Charter were thus a blend of the Continental European civil-law system and the Anglo-American adversarial system.⁶⁸

While there was some variation, the rules and procedures outlined in the London Charter, which resembled the earlier *Quirin* Order, set the course for the other post-World War II war crimes tribunals that followed.⁶⁹ The London Charter's flexible rule of admissibility was later expounded upon in 1946 to specify the types of hearsay that could be considered:

Without limiting the foregoing general rules, the following shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges: affidavits, depositions, interrogations and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any document or other secondary

⁶⁶ In the words of the U.S. representative at the discussions, Supreme Court Justice Robert H. Jackson, "[a]ll agreed in principle that no country reasonably could insist that an international trial should be conducted under its own system and that we must borrow from all and devise an amalgamated procedure that would be workable, expeditious and fair." Robert H. Jackson, *Nuremberg in Retrospect: Legal Answer to International Lawlessness*, 35 A.B.A. J. 813, 815 (1949).

⁶⁷ Charter of the International Military Tribunal Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Rules of Procedure, art. 19, August 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280, *available at* <http://avalon.law.yale.edu/imt/imtconst.asp>.

⁶⁸ Wallach, *supra* note 59, at 854 (citing VIRGINIA MORRIS & MICHAEL SCHARF, 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 9-10 (1995)). See also TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 63-64 (1992).

⁶⁹ Wallach, *supra* note 59, at 860.

evidence of the contents of any document, if the original is not readily available or cannot be produced without delay.⁷⁰

The Tokyo Charter, created in 1946 on the order of General Douglas MacArthur, adopted similar language in establishing evidentiary rules for the International Military Tribunal for the Far East.⁷¹ Various U.S. regulations also drew from this language in providing rules for the numerous, post-war military commissions held in Europe and Asia,⁷² which heard a total of approximately 900 cases involving over 3,000 defendants.⁷³

⁷⁰ Telford Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10, Appendix L: Ordinance No. 7, Organization and Power of Certain Military Tribunals, art. VII (Aug. 15, 1949), available at <http://avalon.law.yale.edu/imt/imt07.asp>.

⁷¹ See *In re Yamashita*, 327 U.S. 1, 48 n.9 (1946) (quoting Gen. MacArthur's order).

⁷² See 3 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIAL OF WAR CRIMINALS 109-10 (1948). Specifically, the reports of the War Crimes Commission provide the following information regarding the rules of evidence applicable to U.S. military commissions convened in connection with World War II:

The Mediterranean Regulations (Regulation 10) provide expressly that the technical rules of evidence shall not be applied but any evidence shall be admitted which, in the opinion of the president of the Commission, has any probative value to a reasonable man. Similar provisions are contained in paragraph 3 of the European Directive, in Regulation 16 of the Pacific September Regulations, in Regulation 5(d) of the SCAP Rules and in Regulation 16 of the China Regulations.

In the Mediterranean Regulations it is added that without limiting the scope of this rule the following in particular will apply:

- (a) If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the president of the commission, unable to attend without undue delay, the commission may receive secondary evidence of statements made by or attributed to such witness.
- (b) Any document purporting to have been signed or issued officially by any member of any allied or enemy force or by any official or agency of any allied, neutral or enemy government shall be admissible as evidence without proof of the issue or signature thereof.
- (c) Any report by any person when it appears to the president of the commission that the person in making the report was acting within the scope of his duty may be admitted in evidence.
- (d) Any deposition or record of any military tribunal may be admitted in evidence.
- (e) Any diary, letter or other document may be received in evidence as to the facts therein stated.
- (f) If any original document cannot be produced, or, in the opinion of the president of the commission, cannot be

B. Modern War Crimes Tribunals

International war crimes tribunals held since World War II have also generally allowed for the introduction and use of hearsay in their rules and practices.⁷⁴ The International Criminal Tribunal for the Former Yugoslavia (ICTY), for example, has used the following rule as its standard of admissibility:

- (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
- (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
- (C) A Chamber may admit any relevant evidence which it deems to have probative value.
- (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

produced without undue delay, a copy or translated copy of such document or other secondary evidence of its contents may be received in evidence. A translation of any document will be presumed to be a correct translation until the contrary is shown.

(g) Photographs, printed and mimeographed matter, and true copies of papers are admissible without proof.

(h) Confessions are admissible without proof of circumstances or that they were voluntarily made. The circumstances surrounding the taking of a confession may be shown by the accused and such showing may be considered in respect of the weight to be accorded it, but not in respect of its admissibility.

Similar but not identical provisions are contained in the other instruments.

Id. In the text, “Pacific September Regulations” refers to the Regulations issued by General MacArthur on September 24, 1945, which were used in the trial of General Yamashita, and “China Regulations” refers to those issued for the China Theatre on January 21, 1946. *See id.* at 105. The China Regulations were used in the military commission reviewed in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *See* Boumediene v. Bush, 553 U.S. 723, 767 (2008) (citing Memorandum by Command of Lt. Gen. Wedemeyer, Jan. 21, 1946 (establishing “Regulations Governing the Trial of War Criminals” in the China Theater), in Tr. of Record in *Johnson v. Eisentrager*, O. T. 1949, No. 306, pp. 34–40).

⁷³ Wallach, *supra* note 59, at 868 n.74 (citing Maximilian Koessler, *American War Crimes Trials in Europe*, 39 GEO. L.J. 18, 25 (1950)).

⁷⁴ ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 384 (2007).

(E) A Chamber may request verification of the authenticity of evidence obtained out of court.⁷⁵

Observers of ICTY proceedings have commented that in practice “the trial chambers have shown little tendency to exclude evidence, including hearsay evidence,”⁷⁶ and have admitted and considered hearsay evidence on such central topics as identification of the defendant.⁷⁷ The International Criminal Tribunal for Rwanda operates under nearly identical evidentiary rules.⁷⁸ The International Criminal Court in Rome also allows for the consideration of hearsay evidence along similar lines.⁷⁹

C. The MCA

The MCA’s hearsay rule is in line with the flexible rules used in these previous war crimes tribunals, many of which took place post-conflict, as opposed to the military commissions convened under the MCA, which are taking place in the middle of one. Indeed, under the current MCA, the rule is in many ways more restrictive than any of these precedents. While the 2006 MCA’s rule used broad language similar to the *Quirin* Order that “[e]vidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person,”⁸⁰ the rule was amended in 2009 to contain a much more nuanced approach:

⁷⁵ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, Rules of Procedure and Evidence, Rule 89, March 14, 1994, U.N. Doc. IT/32/Rev.39, 33 I.L.M. 484 (1994) (hereinafter “ICTY Rules”).

⁷⁶ Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 A.J.I.L. 57, 80 (1999) (“Thus, the basic rule of evidence applied by each trial chamber is to ‘admit any relevant evidence which it deems to have probative value’ (ICTY Rule 89(c)), unless there is a specific reason to question its reliability (ICTY Rule 95).”). ICTY Rule 95 provides that “[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.” ICTY Rules, *supra* note 75.

⁷⁷ Marsha V. Mills, *War Crimes in the 21st Century*, 3 HOFSTRA L. & POL’Y SYMP. 47, 56 (1999) (citing *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on Defense Motion on Hearsay (Aug. 5, 1996)).

⁷⁸ See International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, Rules of Procedure and Evidence, Rules 89 and 95, June 29, 1995, U.N. Doc. ITR/3/Rev.1 (1995).

⁷⁹ See Rome Statute of the International Criminal Court art. 69, P 4, July 17, 1998, 37 I.L.M. 999.

⁸⁰ 10 U.S.C. § 949a(b)(2)(A) (2006).

Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission only if—

(i) 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 proponent's intention to offer the evidence, and the particulars of the evidence (including information on the circumstances under which the evidence was obtained); and

(ii) the military judge, after taking into account all of the circumstances surrounding the taking of the statement, including the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne, determines that—

(I) the statement is offered as evidence of a material fact;

(II) the statement is probative on the point for which it is offered;

(III) direct testimony from the witness is not available as a practical matter, taking into consideration the physical location of the witness, the unique circumstances of military and intelligence operations during hostilities, and the adverse impacts on military or intelligence operations that would likely result from the production of the witness; and

(IV) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.⁸¹

Not only is the substance and complexity of this rule more akin to the residual hearsay exception,⁸² but it also places the burden on the proponent of the hearsay to demonstrate that it is reliable, to show that direct testimony either is not available or will adversely impact operations, and to establish that its admission will serve interests of justice.

It should also be noted that members of military commission panels under the MCA are not lay persons randomly drawn from society at large, but rather professional military officers “who, in the opinion of the convening authority, are

⁸¹ 10 U.S.C. § 949a(b)(3)(D) (2012). In addition, the MCA elsewhere prohibits the admission of any statement (irrespective of declarant) that was “obtained by the use of torture or by cruel, inhuman, or degrading treatment.” 10 U.S.C. § 948r(a) (2012).

⁸² See *supra* note 28.

best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”⁸³ As some commentators have pointed out, panels of fact finders that are so composed are more likely to reach reasoned decisions based on the evidence.⁸⁴ Indeed, other commentators have urged that in light of their military and combat experience, military service members should be considered as a matter of course for inclusion on humanitarian law tribunals.⁸⁵

IV. CONSTITUTIONALITY OF THE MCA’S HEARSAY RULE

The foregoing description of both the MCA’s hearsay rule and its historical precedents is enlightening to a discussion of the rule’s constitutionality, which breaks down into four central issues. First, as creatures of the war powers, military commissions in and of themselves do not give rise to the same implications under the Bill of Rights as civilian criminal trials or even courts-martial. Second, the alien enemy belligerents to whom the MCA is applicable, who are captured, held, and tried outside the United States, do not possess the same constitutional rights as persons with more substantial, voluntary connections to the United States. Third, the MCA’s hearsay rule does not pose the sort of fundamental constitutional concerns that apply outside the United States, particularly when the rule is consistent with historical precedent and rooted in appropriate, practical considerations to ensure reliable and fair proceedings. Finally, the MCA’s hearsay rule is precisely the sort of decision the Constitution leaves to the political branches, particularly during periods of ongoing hostilities, and is therefore entitled to great deference under the separation of powers.

A. Military Commissions Under the Constitution

To begin with, military commissions convened to adjudicate war crimes are not the sort of judicial proceedings that invoke the constitutional protections provided for in the Bill of Rights. As the Supreme Court held in *Ex Parte Quirin*, which reviewed the military commission convened by President Roosevelt to try the German saboteurs discussed earlier,⁸⁶ violations of law of war are not ordinary “crimes” and military commissions are not “criminal prosecutions” within the

⁸³ 10 U.S.C. § 948i(b) (2012).

⁸⁴ Michael T. McCaul & Ronald J. Sievert, *Congress’s Consistent Intent to Utilize Military Commissions in the War Against Al-Qaeda and Its Adoption of Commission Rules That Fully Comply with Due Process*, 42 ST. MARY’S L.J. 595, 644 (2011) (arguing that on panels of military officers there is a reduced likelihood of “rogue, irrational jurors too often found in civilian cases”).

⁸⁵ See Richard V. Meyer, *Following Historical Precedent: An Argument for the Continued Use of Military Professionals as Triers of Fact in Some Humanitarian Law Tribunals*, 7 J. INT’L CRIM. JUST. 43 (2009).

⁸⁶ See *supra* note 60 and accompanying text.

meaning of the Fifth and Sixth Amendments.⁸⁷ Thus, irrespective of the citizenship of the defendant,⁸⁸ the Court concluded in *Quirin* that “the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission.”⁸⁹

The *Quirin* decision is the single most important in this area. It not only underscores the inherent constitutionality of military commissions, but also confirms that they may be used try alleged war criminals even when prosecuting them in civilian court is also an option.⁹⁰ Moreover, after its discussion of the inapplicability of the Fifth and Sixth Amendments, the Court ultimately concluded that “[the President’s] Order convening the Commission was a lawful order and the Commission was lawfully constituted.”⁹¹ As we have seen, that Order broadly permitted that “[s]uch evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man.”⁹² Hence, in finding the Order to be lawful, the Court tacitly approved of the use of such flexible evidentiary rules in military commissions that allow for the admission of testimonial hearsay.⁹³

The Supreme Court’s holding in *Quirin* thus distinguishes military commissions from cases affording trial-related constitutional protections to foreign belligerents who are tried in U.S. civilian courts. The Second Circuit, for example, has held that the Fifth Amendment self-incrimination privilege protects nonresident aliens tried in U.S. federal court, even if the interrogation at issue occurred overseas.⁹⁴ *Quirin*, on the other hand, stands for the proposition that such Fifth and Sixth Amendment protections do not attach, even in military commissions convened inside the United States, much less those held overseas in places like Guantanamo Bay, Cuba. Hence, the evidentiary rules for military commissions convened under the MCA, including its hearsay rule, are not subject

⁸⁷ *Quirin*, 317 U.S. at 40 (finding that military commissions are also not within the meaning of Article III, § 2 of the Constitution).

⁸⁸ One of the *Quirin* conspirators alleged he was a U.S. citizen. *See id.* at 20.

⁸⁹ *Id.* at 45.

⁹⁰ *See id.* (distinguishing *Ex parte Milligan*, 7 U.S. (4 Wall.) 2 (1866)).

⁹¹ *Id.* at 48.

⁹² *See Quirin Order*, *supra* note 61 and accompanying text.

⁹³ *Quirin* has been followed in other cases, most notably *In re Yamashita*, 327 U.S. 1 (1946), which reviewed a military commission convened to prosecute a Japanese general for war crimes committed principally against the civilian population of the Philippines while under his command during World War II. *See id.* at 13-14. In *Yamashita*, which also involved the use of a permissive hearsay rule, the Supreme Court held, as in *Quirin*, that the military commission was lawfully constituted and “did not violate any military, statutory, or constitutional command.” *Id.* at 25.

⁹⁴ *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 177, 201 (2d Cir. 2008).

to any restrictions imposed by the Fifth Amendment Due Process Clause or the Sixth Amendment Confrontation Clause.

B. Alienage as a Function of Constitutional Protection

In addition, such protections under the Bill of Rights have specifically not been extended to *alien enemy belligerents*—to whom jurisdiction is limited under the MCA⁹⁵—who are captured, held, and tried by military commissions outside the United States. In *Johnson v. Eisentrager*,⁹⁶ the Supreme Court reviewed a U.S. military commission convened in China that tried and convicted twenty-one German nationals for conducting unlawful hostilities after the German surrender in World War II.⁹⁷ Upon their transfer to a U.S. military base in Germany to serve their sentences, the petitioners filed habeas actions alleging violations of various constitutional provisions, including the Fifth Amendment.⁹⁸ The Supreme Court denied the petitioners' claims, finding "no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses."⁹⁹

The Court in *Eisentrager* discussed that, far from being universally applicable, constitutional rights have always depended to a large degree on U.S. citizenship or some other degree of connection to, and presence in, the United States:

The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. . . . But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act.¹⁰⁰

⁹⁵ See 10 U.S.C. § 948c (2012) ("Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter [the MCA]"). The MCA defines "alien" as "an individual who is not a citizen of the United States." 10 U.S.C. § 948a(1) (2012).

⁹⁶ 339 U.S. 763 (1950).

⁹⁷ See *id.* at 765-66.

⁹⁸ See *id.* at 766-67.

⁹⁹ *Id.* at 783.

¹⁰⁰ *Id.* at 770.

In the absence of any connection to the United States by the German petitioners in *Eisentrager*, other than their capture, detention, and trial as enemy belligerents, the Court denied them any protection under the Bill of Rights, noting that to invest nonresident alien enemies with such rights would put them in “a more protected position than our own soldiers.”¹⁰¹

The Court went on to find that evidence of such connections to the United States is all the more compelling during periods of hostilities.¹⁰² At such times, the law of the United States “does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance.”¹⁰³ Nonresident aliens have historically had less standing under U.S. law during periods of armed conflict, and understandably so, since foreign enemies’ use of rights secured under the law could be used to undermine the security of the very Nation the law is designed to serve.¹⁰⁴ Finding that military authorities had long possessed jurisdiction to prosecute war crimes in connection with hostilities,¹⁰⁵ the Court in *Eisentrager* explicitly rejected the “doctrine that the term ‘any person’ in the Fifth Amendment spreads its protection over alien enemies anywhere in the world engaged in hostilities against us.”¹⁰⁶

Since *Eisentrager*, other Supreme Court decisions have reaffirmed the proposition that nonresident aliens without sufficient connection to and presence in the United States—let alone those who are enemy belligerents captured, held, and tried by military commissions—are not protected by the Bill of Rights. In *United States v. Verdugo-Urquidez*,¹⁰⁷ the Court confronted a similar issue under the Fourth Amendment when it analyzed the warrantless search by U.S. authorities of a suspected narcotics trafficker’s residences in Mexico.¹⁰⁸ At the time of the search, the defendant, a Mexican national, had been arrested in Mexico, brought to the U.S. border and delivered into U.S. custody, and was being held in detention inside the United States.¹⁰⁹

¹⁰¹ *Id.* at 783. The Court noted that “American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans.” *Id.*

¹⁰² *See id.* at 771 (“It is war that exposes the relative vulnerability of the alien’s status.”).

¹⁰³ *Id.* at 769.

¹⁰⁴ *See id.* at 776.

¹⁰⁵ *See id.* at 786.

¹⁰⁶ *Id.* at 782.

¹⁰⁷ 494 U.S. 259 (1990).

¹⁰⁸ *See id.* at 262.

¹⁰⁹ *See id.*

The Court in *Verdugo-Urquidez* held that the Fourth Amendment did not extend its protections to a nonresident alien whose property was located outside the United States and whose only connection to the United States was his detention for trial.¹¹⁰ Examining the history of the Amendment, the Court found that

the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.¹¹¹

While aliens per se do enjoy certain constitutional rights,¹¹² the Court echoed *Eisentrager* in explaining that such constitutional protections only attach when an alien has come within the sovereign territory of, and developed substantial voluntary connections with, the United States.¹¹³ Absent such substantial, voluntary connections to the United States by the defendant in *Verdugo-Urquidez*, the Court followed *Eisentrager*'s Fifth Amendment analysis in concluding that the Fourth Amendment's protections did not apply.¹¹⁴

In light of their own history and development, the traditional hearsay rule and confrontation right do not warrant any different treatment than the Fourth, Fifth, and Sixth Amendment rights that were held inapplicable in *Eisentrager* and *Verdugo-Urquidez*. As we have seen, both the hearsay and confrontation rules developed as corollaries to the Anglo-American system of adversarial jury trials, which developed as a political protection of the governed against their own

¹¹⁰ See *id.* at 261, 271.

¹¹¹ *Id.* at 266.

¹¹² See, e.g., *Plyler v. Doe*, 457 U.S. 202, 211-212 (1982) (illegal aliens protected by Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (resident alien is a "person" within the meaning of the Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (resident aliens have First Amendment rights); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (resident aliens entitled to Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (Fourteenth Amendment protects resident aliens).

¹¹³ See *Verdugo-Urquidez*, 494 U.S. at 272 (citing *Plyler*, 457 U.S. at 212 (finding the provisions of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction") (quoting *Yick Wo*, 118 U.S. at 369), and *Kwong Hai Chew*, 344 U.S. at 596 n.5 ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.")) (quoting *Bridges*, 326 U.S. at 161 (Murphy, J., concurring)) (emphasis added)).

¹¹⁴ See *Verdugo-Urquidez*, 494 U.S. at 274-75.

government.¹¹⁵ There is no indication that the founders intended such a political protection to extend to foreign enemy belligerents captured and tried overseas pursuant to the war powers. To the contrary, the history of military commissions reveals exactly the opposite conclusion: that such constitutional rights were never intended to apply to enemy combatants, particularly those tried in the middle of ongoing hostilities.¹¹⁶ And since *Eisentrager* explicitly rejected that the Sixth Amendment right to jury trial applies to military commissions—which are composed of panels of professional military officers rather than lay juries—there is no basis to apply corollary rules relating to that jury right.

The Supreme Court reaffirmed this view in *Boumediene v. Bush*,¹¹⁷ in which the Court held that the Suspension Clause¹¹⁸ applies to Guantanamo Bay and found that the status review process for detainees held there was not an adequate and effective substitute for habeas corpus.¹¹⁹ In discussing the deficiencies of the status review process, the Court pointed out that “unlike in *Eisentrager*, there has been no trial by military commission for violations of war.”¹²⁰ The Court then highlighted the procedures that it found lacking at Guantanamo by comparing them against the “rigorous adversarial process” afforded by the military commission in *Eisentrager*.¹²¹ As we have seen, the military commission in *Eisentrager* employed flexible evidentiary rules—originally used in *Quirin*, subsequently adopted and expounded upon for use at Nuremberg, and eventually used in U.S. military commissions throughout Europe and Asia—that were far more permissive in admitting hearsay than the MCA’s hearsay rule.¹²² Hence, in its approving treatment of such proceedings, as in *Quirin* and *Eisentrager* before it, the Court in *Boumediene* affirmed that rules allowing for the use of hearsay in military commissions are not in and of themselves constitutionally unsound.¹²³

¹¹⁵ See *supra* notes 30-44 and accompanying text.

¹¹⁶ See *supra* notes 54-73 and accompanying text.

¹¹⁷ 553 U.S. 723 (2008).

¹¹⁸ U.S. CONST. art. I, § 9, cl. 2 (“The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”).

¹¹⁹ See *Boumediene*, 553 U.S. at 732, 771.

¹²⁰ *Id.* at 767.

¹²¹ See *id.* at 767.

¹²² See *supra* note 72 and accompanying text.

¹²³ See *Boumediene*, 553 U.S. at 786 (noting that “on their own terms, the proceedings in *Yamashita* and *Quirin*, like those in *Eisentrager*, had an adversarial structure that is lacking here”) (citations omitted).

C. The Extraterritorial Reach of the Bill of Rights

Moreover, the Court's analysis in *Boumediene* supports the idea that flexible hearsay rules do not pose the sort of fundamental constitutional concerns that generally extend outside the United States. In concluding that the Suspension Clause runs to Guantanamo, the Court's discussion in *Boumediene* drew extensively from a series of cases now known as the "Insular Cases," which addressed the extent to which constitutional protections extend to unincorporated U.S. territories.¹²⁴ As the Court stated in *Verdugo-Urquidez*, the Insular Cases collectively held that "not every constitutional provision applies to governmental activity even where the United States has sovereign power."¹²⁵ Rather, "[o]nly 'fundamental' constitutional rights are guaranteed to inhabitants of those territories."¹²⁶ In fact, the Insular Cases repeatedly held that Fifth and Sixth Amendment rights affording the prototypical Anglo-American legal system's rights to grand jury and jury trial are *not* fundamental.¹²⁷ Hence, the traditional hearsay rule and confrontation right, which developed as corollaries to that adversarial jury system,¹²⁸ are not fundamental either.

In its discussion of the Insular Cases, the Court in *Boumediene* reinforced this point by addressing the very issue that we have discussed with respect to evidentiary rules in military commissions and other war crimes tribunals: the differences between of the European civil-law system and the Anglo-American jury system.¹²⁹ A principal issue in the Insular Cases was that many of the unincorporated territories had been former Spanish colonies and therefore operated under civil-law systems.¹³⁰ Viewing the displacement of operating legal systems as "not only disruptive but also unnecessary," and "noting the inherent practical difficulties of enforcing all constitutional provisions always and

¹²⁴ See *Boumediene*, 553 U.S. at 754-60.

¹²⁵ *Verdugo-Urquidez*, 494 U.S. at 268 (citing *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Sixth Amendment right to jury trial inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91 (1914) (Fifth Amendment grand jury provision inapplicable in Philippines); *Dorr v. United States*, 195 U.S. 138 (1904) (jury trial provision inapplicable in Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (provisions on indictment by grand jury and jury trial inapplicable in Hawaii); *Downes v. Bidwell*, 182 U.S. 244 (1901) (Revenue Clauses of Constitution inapplicable to Puerto Rico)).

¹²⁶ *Verdugo-Urquidez*, 494 U.S. at 268 (citing *Dorr*, 195 U.S. at 148; *Balzac*, 258 U.S. at 312-13).

¹²⁷ See *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Sixth Amendment right to jury trial); *Ocampo v. United States*, 234 U.S. 91 (1914) (Fifth Amendment grand jury); *Dorr v. United States*, 195 U.S. 138 (1904) (jury trial); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (indictment by grand jury and jury trial).

¹²⁸ See *supra* notes 30-44 and accompanying text.

¹²⁹ See *supra* notes 40-44 and 68 and accompanying text.

¹³⁰ See *Boumediene*, 553 U.S. at 757.

everywhere,” the Court adopted a flexible approach in the Insular Cases, which took such practical considerations into account.¹³¹ Upending the “wholly dissimilar traditions and institutions” of functioning legal systems—which were, of course, vastly more dissimilar to Anglo-American practice than the traditions and institutions of military commissions—was not viewed as one of the requirements that the Constitution imposed.¹³² Moreover, in holding that the Constitution did not require the dismantling of those civil-law systems, the Court tacitly approved of the use of hearsay evidence that is an inherent aspect of such systems,¹³³ which reinforces the conclusion that the traditional hearsay rule and confrontation right are not fundamental constitutional rights, even in U.S. sovereign territory.

Drawing from its analysis of both the Insular Cases and *Eisentrager*, the Court explained in *Boumediene* that ultimately, questions about what constitutional protections are fundamental enough to apply outside the United States “turn on objective facts and practical concerns, not formalism.”¹³⁴ Practical concerns, of course, are precisely why flexible hearsay rules exist. As the Court stated in *Hamdi v. Rumsfeld*¹³⁵ with respect to detention status reviews,

the exigencies of the circumstances may demand that . . . enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. *Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.*¹³⁶

No doubt it was for that reason that Congress saw fit to write such practical concerns into the face of the MCA’s hearsay rule, which as a predicate to the use of any hearsay requires the military judge to find, in addition to indicia of the statement’s reliability, that

direct testimony from the witness is not available *as a practical matter*, taking into consideration the physical location of the witness, the unique circumstances of military and intelligence operations during hostilities, and the adverse impacts on military or

¹³¹ See *id.* at 757-59 (internal quotation marks and citation omitted).

¹³² See *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

¹³³ See *supra* notes 40 and 44 and accompanying text.

¹³⁴ *Id.* at 764.

¹³⁵ 542 U.S. 507 (2004).

¹³⁶ *Id.* at 533-34 (emphasis added).

intelligence operations that would likely result from the production of the witness.¹³⁷

Much like the residual hearsay exception,¹³⁸ the MCA's hearsay rule is designed to provide a flexible and practical approach to admitting probative hearsay evidence, once its reliability is determined by the military judge.

Boumediene's emphasis on practical concerns also weighs against applying the Sixth Amendment Confrontation Clause to Guantanamo, since the confrontation right as construed under *Crawford* represents the very height of formalism that *Boumediene* eschews. As the Court held in *Crawford*, the Confrontation Clause is, at root, a procedural as opposed to a substantive right, which prohibits the use of even obviously reliable hearsay.¹³⁹ The rigidity of the Confrontation Clause under *Crawford* is linked directly to its history, which, like that of the traditional hearsay rule, was part of the Anglo-American adversarial jury system's protection of the governed against their government.¹⁴⁰ Unlike the history of the writ of habeas corpus, which the Court discussed at length in *Boumediene*,¹⁴¹ the history of neither the hearsay rule nor the Confrontation Clause supports finding any intention by the framers to apply such rights to captured alien enemy belligerents tried overseas during periods of armed conflict.¹⁴² To the contrary, the history of military commissions supports that their rules and procedures have always been based on practical considerations and have therefore tended to be more flexible than the rules applicable to civilian criminal trials and courts-martial.¹⁴³

The legacy of *Boumediene* is thus a reaffirmation of the principle that, consistent with the Constitution in general and the Bill of Rights in particular, traditional procedural rights can bow to appropriate practical considerations. Even if some aspect of the Constitution, such as the Suspension Clause, flows to the protection of alien enemy belligerents held at Guantanamo Bay, neither the traditional hearsay rule nor the Confrontation Clause is a part of any fundamental protection that is constitutionally required in their trial by military commission there.¹⁴⁴ In light of the myriad procedural protections that the MCA affords to

¹³⁷ 10 U.S.C. § 949a(b)(3)(D)(ii)(III) (2012) (emphasis added).

¹³⁸ See *supra* note 28.

¹³⁹ *Crawford*, 541 U.S. at 61-62.

¹⁴⁰ See *supra* notes 42-44 and accompanying text.

¹⁴¹ See *Boumediene*, 553 U.S. at 739-52.

¹⁴² See *supra* notes 30-44 and accompanying text.

¹⁴³ See *supra* notes 54-72 and accompanying text.

¹⁴⁴ In addition, while the confrontation right has been applied in both state criminal trials, see *Pointer v. Texas*, 380 U.S. 400, 403 (1965), and courts-martial, see *United States v. Strangstalien*,

accused alien enemy belligerents,¹⁴⁵ neither objective facts nor practical concerns under *Boumediene* justify breaking new constitutional ground by extending the Bill of Rights to Guantanamo Bay.

D. The Separation of Powers

Finally, inasmuch as the Supreme Court in *Boumediene* found that the constitutional separation of powers weighed in favor of holding the Suspension Clause applicable to Guantanamo Bay,¹⁴⁶ that argument weighs heavily against applying the Bill of Rights there. In this regard, the constitutionality of the MCA's hearsay rule is supported most by the *Hamdan* decision itself, in which the five-Justice majority noted from the outset that the fundamental issue surrounding military commissions is one of separation of powers.¹⁴⁷ Four of those Justices also subscribed to the view that while statutory grounds existed to overturn the military commissions established under the Bush Military Order, no such prohibition barred a similar military commission system from being established by congressional action:

The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary. . . . The Constitution places its faith in those democratic means. Our Court today simply does the same.¹⁴⁸

The President did exactly what the Court's ruling mandated: he went to Congress and worked with its leadership to secure passage of the MCA, in order to establish

7 M.J. 225, 241 (C.M.A. 1979), the Supreme Court has never held that such rights are an inherent aspect of fundamental due process. In *Pointer v. Texas*, for example, the Court held only that the Sixth Amendment Confrontation Clause applied to the States via the Fourteenth Amendment. See *id.* at 403. However, the majority did not join in Justice Harlan's concurring opinion that "a right of confrontation is 'implicit in the concept of ordered liberty,' reflected in the Due Process Clause of the Fourteenth Amendment independently of the Sixth." *Id.* at 408 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

¹⁴⁵ See generally MCA, *supra* note 11.

¹⁴⁶ See *Boumediene*, 553 U.S. at 764-66.

¹⁴⁷ See *Hamdan*, 548 U.S. at 567 (stating that "trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure.") (citing *Quirin*, 317 U.S. at 19); see also *Hamdan*, 548 U.S. at 638 (Breyer, J. concurring) ("Trial by military commission raises separation of powers concerns of the highest order.").

¹⁴⁸ *Id.* at 636 (Breyer, J., concurring).

military commissions that would, among other things, have greater flexibility to admit and consider probative evidence, including hearsay.¹⁴⁹ Since then, the MCA's hearsay rule was among the commission rules that were specifically considered and subsequently amended by a different Congress and a different President, in order to ensure that hearsay evidence was shown to be reliable prior to its admission and consideration.¹⁵⁰

There is no question, then, that the MCA's hearsay rule is the result of the concerted action of both political branches of government, which entitles it to great deference under the separation of powers. As Justice Douglas stated in his seminal concurrence in *Youngstown Sheet & Tube Company v. Sawyer*,

[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.¹⁵¹

The Federal Government as an undivided whole certainly does not lack the power to order a system of military commissions once again into the service of the Nation during a period of armed conflict, and to equip those commissions with rules and procedures that, based on proven historical precedents, are deemed most appropriate to meet the circumstances of the conflict at hand.

Indeed, the political branches are precisely those to whom the Constitution delegates power and responsibility over such matters. As the Supreme Court has held, due process in general "is flexible and calls for such procedural protections as the particular situation demands."¹⁵² Even so, "particular deference" must be given to the determination of Congress as to what process is due in the military context.¹⁵³ And beyond the military context in general, the Court has specifically

¹⁴⁹ See *supra* note 11 and accompanying text.

¹⁵⁰ See *supra* note 13 and accompanying text.

¹⁵¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Douglas, J., concurring).

¹⁵² *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

¹⁵³ See *Weiss v. United States*, 510 U.S. 163, 177 (1994) ("Judicial deference thus is at its apogee when reviewing congressional decisionmaking in this area.") (internal quotation marks and citations omitted).

held that with respect to periods of hostilities, “our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.”¹⁵⁴

Creating rules and procedures for the establishment and functioning of military commissions lies at the very heart of that warmaking power.¹⁵⁵ As the Supreme Court stated in *Quirin*:

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.¹⁵⁶

The congressional and presidential use of such core powers over such core matters is “so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”¹⁵⁷ Thus, even if some form of constitutional due process does reach the alien enemy combatants held at Guantanamo Bay, the MCA’s hearsay rule is entitled to the greatest deference offered under the constitutional separation of powers.

The MCA’s hearsay rule survives such scrutiny and then some. Given the over two dozen exceptions to the traditional hearsay rule, including a broad residual exception, it is clear that even in civilian trials there is general agreement that hearsay can indeed be both reliable and probative. In fact, as we have explored, modern criticism of the traditional hearsay rule suggests that the rule does not promote reliability any more than civil-law systems that have no such rule.¹⁵⁸ It is therefore not unreasonable that hundreds of previous military commissions and other war crimes tribunals have used evidentiary rules that are even more permissive toward admitting hearsay than the MCA’s rule.¹⁵⁹ In light of that history, the MCA’s hearsay rule strikes a fair balance between allowing

¹⁵⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) (citing *Dep’t of the Navy v. Egan*, 484 U.S. 518, 530 (1988), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).

¹⁵⁵ See WINTHROP, *supra* note 5, at 831.

¹⁵⁶ *Quirin*, 317 U.S. at 28-29. See also *Yamashita*, 327 U.S. at 11 (“The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war.”).

¹⁵⁷ *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976) (quoting *Harisiades v. Shaughnessy*, 342, U.S. 580, 588-89 (1952)).

¹⁵⁸ See *supra* notes 39-41 and accompanying text.

¹⁵⁹ See *supra* notes 54-79 and accompanying text.

probative hearsay evidence to be considered, yet restricting it to what the military judge has specifically determined to be reliable. Thus, while the standard mandated by the separation of powers is one of extreme deference to Congress and the President, the MCA's hearsay rule comports with fundamental fairness by any measure.

V. CONCLUSION

While capturing and trying enemy belligerents by military commission is certainly not the only means available to defend the Nation in the current conflict,¹⁶⁰ the military commissions convened under the MCA are in line with previous military commissions and other war crimes tribunals in providing for a "dispassionate inquiry on legal evidence."¹⁶¹ That such commissions may consider hearsay evidence, so long as it is previously determined to be reliable by the presiding military judge, is neither novel nor constitutionally unsound. Indeed, such an approach is eminently reasonable, particularly in light of the probing criticisms of the traditional hearsay rule itself, which is perhaps why the history of military commissions and other war-crimes tribunals is steeped in non-formalistic, pragmatic approaches to the administration of justice during times of war.¹⁶² Justice Cardozo once said, "The power of the precedent is the power of the beaten path."¹⁶³ Although the constitutionality of the MCA's hearsay rule may ultimately depend on how it is applied in a given case,¹⁶⁴ the path of

¹⁶⁰ See, e.g., Carol E. Lee & Adam Entous, *Obama Defends Drone Use*, WALL ST. J., Jan. 31, 2012, at A2 (reporting that "U.S. officials estimate the drone campaign has killed more than 1,500 suspected militants on Pakistani soil alone since Mr. Obama took office in 2009," which the President credited with "helping put the U.S. 'on the offense' against al Qaeda"); Julian E. Barnes & Evan Perez, *Holder Defends Antiterror Policies: Attorney General Makes Legal Case for Targeting American Citizens Who Pose Threats From Abroad*, WALL ST. J., Mar. 6, 2012, at A4 (reporting the Attorney General's view that "[i]t is constitutional for the U.S. government to kill a U.S. citizen posing an imminent terrorist threat to the country if capturing that person isn't feasible and the strike is conducted in accordance with the laws of war"); Adam Entous et al., *U.S. Relaxes Drone Rules: Obama Gives CIA, Military Greater Leeway in Use Against Militants in Yemen*, WALL ST. J., Apr. 26, 2012, at A1 (reporting a shift in U.S. policy on drone use that "includes targeting fighters whose names aren't known but who are deemed to be high-value terrorist targets or threats to the U.S.").

¹⁶¹ Robert H. Jackson, *Final Report to the President Concerning the Nurnberg War Crimes Trial*, 20 TEMP. L. Q. 338, 343 (1946) (referring to the International Military Tribunal at Nuremberg) (hereinafter "Jackson, *Final Report*").

¹⁶² See *supra* notes 39-41 and 54-79 and accompanying text.

¹⁶³ Jackson, *Final Report*, *supra* note 161, at 342 (quoting Justice Cardozo).

¹⁶⁴ See *Hamdan*, 548 U.S. at 733 (Alito, J., dissenting) ("If a particular accused claims to have been unfairly prejudiced by the admission of particular evidence, that claim can be reviewed in the review proceeding for that case. It makes no sense to strike down the entire commission structure based on speculation that some evidence might be improperly admitted in some future case.").

permitting hearsay evidence to be considered in military commissions is extraordinarily well-trodden.