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The Usefulness of a Negative Example: What We Can Learn about Evidence Rules from the Government's Most Recent Efforts to Construct a Military Commissions Process

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THE USEFULNESS OF A NEGATIVE EXAMPLE: WHAT WE CAN LEARN ABOUT EVIDENCE RULES FROM THE GOVERNMENT'S MOST RECENT EFFORTS TO CONSTRUCT A MILITARY COMMISSIONS PROCESS

Victor Hansen[†]

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I. INTRODUCTION

The election of Barack Obama and the coming of a new administration in the White House are certain to mean a number of changes in the United States' approach to fighting terrorism and maintaining national security. Among the changes that have been at the top of many lists are the closing down of the detention facility at Guantánamo Bay, the repeal of the Military Commissions Act (MCA), and the cessation of prosecutions by military commission.¹ The detention, treatment, and prosecution of captured enemy combatants by the Bush administration have been

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1. See Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009); Exec. Order No. 13,493, 74 Fed. Reg. 4,901 (Jan. 22, 2009), *available at* http://www.whitehouse.gov/briefing_room/executive_orders/.

singled out for criticism as the worst aspects of that administration's program to fight terrorism.² In addition, the Bush administration has suffered a string of defeats in cases brought before the United States Supreme Court challenging various aspects of the military commissions.³

The criticisms of and the legal challenges to the military commissions fell along a broad spectrum, from arguments that the President lacked the authority to unilaterally create a military commissions system, to attacks on specific aspects of the military commissions system.⁴ Interestingly, some of the most pointed—and ultimately most effective—challenges to the Bush administration's program centered on various evidentiary issues.⁵

The initial military commissions program created controversial rules for the use of secret and protected evidence.⁶ These initial rules allowed for certain protected evidence to be used against a defendant even though the defendant and his civilian attorney could be denied access to this evidence at all stages of the proceeding.⁷ This rule was criticized not only by commentators and academics,⁸ but by many military lawyers, including the top lawyers of each military branch, as a violation of the basic protections afforded by Common Article 3 of the Geneva Conventions of 1949.⁹ In *United States v. Hamdan*, the Supreme Court struck down President Bush's initial military commissions

2. See Elizabeth M. Iglesias, *Article II: The Uses and Abuses of Executive Power*, 62 U. MIAMI L. REV. 181, 187 (2008).

3. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

4. See Tim Golden, *Threats and Responses: Tough Justice: After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 4, 2004, at A11.

5. See Eun Young Choi, *Veritas, Not Vengeance: An Examination of the Evidentiary Rules of Military Commissions in the War Against Terrorism*, 42 HARV. C.R.-C.L. L. REV. 139, 189 (2007).

6. See Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1973 (2005).

7. See *id.* at 1972; see also *Hamdan*, 548 U.S. at 614.

8. See, e.g., LAWRENCE FRIEDMAN & VICTOR HANSEN, *THE CASE FOR CONGRESS: SEPARATION OF POWERS AND THE WAR ON TERROR* (forthcoming 2009).

9. See Memoranda from Thomas J. Romig, Judge Advocate Gen., to Senator Lindsey Graham (July 25, 2005) (on file with author); see also Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, THE NEW YORKER, Feb. 27, 2006, at 32; Memorandum from William H. Taft, IV, Legal Advisor to the Dep't of State, to Counsel to the President, *Comments on Your Paper on the Geneva Conventions* (Feb. 2, 2002) (on file with author).

order.¹⁰ The Court held that the rules regarding secret evidence were unauthorized departures from the uniformity requirements between the rules and procedures for courts-martial and military commissions.¹¹

Another evidentiary criticism of Guantánamo and the military commissions system was that confessions and derivative evidence obtained by torture and coercion could possibly be used in military commissions.¹² Even after the Supreme Court struck down the Bush administration's system for military commissions in *Hamdan*, evidence obtained by coercion has nonetheless remained a part of the military commissions procedure under the Military Commissions Act.¹³

Still another criticism of detainee treatment at Guantánamo focused on the unlawful-enemy-combatant-status determination. Under the procedures established by the military, a Combat Status Review Tribunal (CSRT) made the initial factual determination as to whether a detainee was in fact an unlawful enemy combatant.¹⁴ An Administrative Review Board would then make annual reassessments to determine whether the detainee remained a continuing threat.¹⁵ The procedures, and particularly the evidence needed for the government to meet its burden for continued detention, have been criticized as lacking any semblance of fair process.¹⁶ The procedures were also created in such a way that it was very difficult for a detainee to introduce evidence to challenge

10. *Hamdan*, 548 U.S. at 634.

11. *Id.* at 624-25.

12. See, e.g., Press Release, Jen Nessel, Ctr. For Constitutional Rights, CRR Challenges Validity of Military Commissions and Use of Torture Evidence in New Death Penalty Case (Feb. 11, 2008), available at <http://ccrjustice.org/newsroom/press-releases/ccr-challenges-validity-military-commissions-and-use-torture-evidence-new-dea>.

13. See Military Commissions Act of 2006 § 948r, 10 U.S.C. § 948r (2006) [hereinafter MCA].

14. See Memorandum from Deputy Sec'y of Def. on the Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba 3 (Jul. 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

15. See Memorandum from Deputy Sec'y of Def. on Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba 6 (Jul. 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>.

16. See, e.g., ABA REPORT TO THE HOUSE OF DELEGATES, TASK FORCE ON TREATMENT OF ENEMY COMBATANTS (Feb. 10, 2003), available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/aba/abarpt21003cmbtnts.pdf>.

the factual basis for his detention.¹⁷ The Supreme Court recently ruled that the CSRT process was not an adequate substitute for habeas corpus.¹⁸

Even ardent supporters of this most recent use of military commissions to try enemy combatants must concede that the commissions were a failure. In the seven years since the first plan for the commissions was announced, only a few suspects have been prosecuted,¹⁹ and the outcome of these prosecutions hardly seems to justify the government's enormous effort and expense. The results in individual cases have proven to be much less than the government had asked for, and the Supreme Court has reviewed the legality of the commissions system on four occasions and found its structure wanting in every case.²⁰

At this writing, President Obama has signed an executive order directing that the Guantánamo Bay detention facility be closed within one year.²¹ The President also ordered that a study be conducted to examine the best way to detain and try terrorist suspects in a manner consistent with American national security and foreign policy interests and the interests of justice.²² As with any project this complex, there may not be an easy way to detain and try these terrorist suspects in any forum, and there is little doubt that the devil will be in the details.

Regardless of what ultimately happens to these suspects and irrespective of the fact that the dismantling of Guantánamo may close a sad chapter in the United States' fight against terrorism, the book on many of these very thorny evidence issues remains open. This will likely not be the last occasion the United States government and the military will choose to prosecute suspected war criminals under a military commissions paradigm. Military commissions have been a part of American legal history since the beginning of the Republic and have played a role in most major

17. See Memorandum from Sec'y of the Navy on Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, § G (Jul. 29, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

18. *Boumediene v. Bush*, 128 S. Ct. 2229, 2260 (2008).

19. See David J.R. Frakt, *An Indelicate Imbalance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 AM. J. CRIM. L. 315, 317–20 (2007).

20. *Boumediene*, 128 S. Ct. 2229; *Hamdan v. Rumsfeld*, 548 U.S. 577 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

21. Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009).

22. Exec. Order No. 13,493, 74 Fed. Reg. 4,901 (Jan. 22, 2009).

conflicts, including the Revolutionary War, Civil War, and World War II.²³ In addition, even with the closing of Guantánamo, there will be a number of terrorist suspects who will face trial in some forum. If this forum and any future commissions are to enjoy legitimacy, we must learn from the failures of this most recent attempt to use military commissions.

II. LESSONS LEARNED ABOUT THE RULES OF EVIDENCE

There are a host of issues that one could explore in search of lessons to learn from these recent military commissions. But this article will focus on the evidence rules that were initially developed for the military commissions, as well as the evidence rules that were ultimately adopted. From this focus, hopefully, one can better understand why the Bush administration and, ultimately, Congress settled on the rules that they did. Focusing on the evidence rules may also be instructive as politicians and policymakers consider what to do with the remaining terrorist suspects at Guantánamo.

The abandonment of the rules of evidence, which form the backbone of any military court-martial or criminal prosecution in federal court, remains one of the most striking aspects of the Bush administration's military commissions plan.²⁴ The very first order implementing the military commissions rejected this structure; instead, it implemented a general relevancy standard for the admissibility of all types of evidence. The rules of evidence stated simply that:

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.²⁵

23. See Kathleen T. Rhem, *Long History Behind Military Commissions*, AM. FORCES PRESS SERVICE, Aug. 19, 2004, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=25489>.

24. The Military Rules of Evidence model the Federal Rules of Evidence in most aspects. See *infra* notes 60–64 and accompanying text (noting similarities between the Military Rules of Evidence and the Federal Rules of Evidence in the rules for hearsay, character evidence, impeachment of witnesses, expert testimony, and authentication).

25. DEP'T OF DEF. MILITARY COMM'N ORDER NO. 1, PROCEDURES FOR TRIALS BY MILITARY COMM'NS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST

The Bush administration maintained this approach in later modifications to the military commissions order,²⁶ and, even under the Military Commissions Act, the rules of evidence followed this more open and loose relevance standard by crafting evidentiary rules that state:

(A) Evidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person.

...

(C) A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title.

(D) Evidence shall be admitted as authentic so long as—

(i) the military judge of the military commission determines that there is sufficient basis to find that the evidence is what it is claimed to be; and

(ii) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence.

(E) (i) Except as provided in clause (ii), 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 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). The disclosure of evidence under the preceding sentence is subject to the requirements and limitations applicable to the disclosure of classified information in section 949j(c) of this title.

(ii) Hearsay evidence not otherwise admissible under

TERRORISM 9 (Mar. 21, 2002), *available at* <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> [hereinafter ORDER NO. 1].

26. DEP'T OF DEF. MILITARY COMM'N ORDER NO. 1, PROCEDURES FOR TRIALS BY MILITARY COMM'NS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM (Aug. 31, 2005), *available at* <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf> [hereinafter REVISED ORDER NO. 1].

the rules of evidence applicable in trial by general courts-martial shall not be admitted in a trial by military commission if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value.

(F) The military judge shall exclude any evidence the probative value of which is substantially outweighed—

- (i) by the danger of unfair prejudice, confusion of the issues, or misleading the commission; or
- (ii) by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.²⁷

The magnitude of the initial military commissions approach to evidence was quite staggering in its scope. Gone were the hearsay rule and its recognized exceptions, the privilege rules, the prohibitions against character evidence, the requirements for authentication, the preferences for the defendant to have the opportunity to confront his accusers, and a host of other rules found in the Federal and Military Rules of Evidence.²⁸ In their place, the military judge was instructed that the fact finders can consider any evidence that a reasonable person would consider to have probative value.²⁹ As any new evidence student quickly learns, this standard is an extremely low one that greatly favors admissibility. Why was the government so quick to abandon these established rules of evidence?

One possibility is that many, if not most, of the rules governing military commissions were designed by the government for the primary purpose of making cases easier to prove, and that, without relaxing the rules, the government's ability to obtain convictions would be severely weakened. Boiling down the rules of evidence to a case-by-case relevancy analysis makes the government's job of satisfying its burden of proof much easier.

But this reason alone does not fully answer the question. After all, the defendant could also benefit from this new relaxed

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

28. It should be noted that the Manual for Military Commissions, which was created to implement the provisions of the MCA, restored several evidence rules in a manner consistent with the Federal and Military Rules of Evidence. Nonetheless, even under the Manual, hearsay evidence remains presumptively permissible, and the specific exception categories under the Federal and Military Rules of Evidence were replaced with a rule favoring broad admissibility. Likewise, the rules of authentication are significantly relaxed when compared to the federal or military rules. See *infra* notes 120–28 and accompanying text.

29. 10 U.S.C. § 949a(b)(2)(A).

standard. Nothing in the language of the commission rules suggests that an accused is held to a different standard. The defendant does have limited access to the compulsory process of the military commissions and may have more difficulty obtaining evidence to begin with.³⁰ But even so, that does not necessarily mean that these reduced evidence rules would only favor the government. A defendant who is unable to call a live witness may be able to admit a statement from that witness on his behalf, even though the statement is pure hearsay and does not fall under any recognized exception.³¹

So the question remains, why abandon the rules of evidence in the military commissions? One possible explanation could be that abandoning the rules is a tacit admission that the rules of evidence simply do not work, or at least do not work well. It may also be that the rules of evidence function well in the tidy courtrooms of a federal court or a peace time court-martial, but combat may impose a new level of complexity on the criminal process. Maybe the formal rules of evidence simply are not suited for combat. Or it may be that the rules of evidence do not accurately reflect our core values and fundamental notions of fairness. After all, many of the traditional evidence rules are a codification of an arcane common-law system that may be detached from twenty-first-century realities.

The military commissions give us an opportunity to explore some of these questions and to reflect on whether the procedures to try alleged foreign terrorists, or the procedures in future military commissions, should follow this same approach. Looking back on the evidentiary scheme of the military commissions also provides an opportunity to reflect on the application of the rules of evidence in military courts-martial and other criminal prosecutions.

This article will first discuss the Uniform Code of Military Justice (UCMJ) and the Military Rules of Evidence and explain why these provisions were created and how they were to be applied within the full spectrum of military operations.³² The article will then compare the Military Rules of Evidence to the various evidentiary rules in the military commissions to illustrate why the

30. See 10 U.S.C. § 949j (granting defendants the right to compel the production of witnesses and evidence, but restricting that right if classified information is sought).

31. See 10 U.S.C. § 949a(b)(2)(E) (allowing the admission of hearsay evidence after that evidence is first disclosed to the opposing party).

32. See *infra* Part III.

President ultimately settled on the approach reflected in the Manual for Military Commissions.³³ Are these reasons credible, and were there other, perhaps unstated, reasons for the rule changes?³⁴ Does our understanding of the change in evidentiary rules indicate that similar rationales can be applied to other criminal trials in the military context?³⁵

This article also seeks to determine if we are at an evidence crossroad. Are we at a point where we need to reexamine the way evidence is treated in military criminal cases tried under the UCMJ?³⁶ Should certain combat exceptions be written into the Military Rules of Evidence?³⁷ Or are recent efforts to depart from the established rules of evidence in military commissions nothing more than an attempt to give the government an advantage over a class of defendants who it deems is not worthy of enjoying the full protections of a fair trial?³⁸

III. A BRIEF HISTORY OF THE UCMJ AND MILITARY RULES OF EVIDENCE

A. *The UCMJ*

The conclusion of World War II saw a groundswell of support for reforms to the military justice system.³⁹ During the war, many in uniform were subjected to what they believed was an unfair and arbitrary system of justice.⁴⁰ In response, Congress held extensive hearings and ultimately drafted the UCMJ, which was signed into law by President Harry S. Truman in 1950.⁴¹ The UCMJ was seen as a compromise between proponents of individual rights and those who wanted to retain the commander as a source of virtually unlimited control over military justice.⁴² Since the enactment of

33. See *infra* Part IV.

34. See *infra* Part V.

35. See *infra* Parts IV–V.

36. See *infra* Part VI.

37. See *infra* Part V.B.

38. See *infra* Part V.A.

39. See James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 187–88 (2002).

40. *Id.*

41. Uniform Code of Military Justice, Pub. L. No. 506, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C. §§ 801–950).

42. Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629, 637 (1994).

the code in 1951, there have been two significant amendments, one in 1968⁴³ and one in 1983.⁴⁴

The 1951 UCMJ and its subsequent amendments provided individual soldiers with greater rights and protections than they previously possessed. Some of the significant systemic changes included the establishment of the Military Service Courts of Review,⁴⁵ the civilian Court of Appeals for the Armed Forces,⁴⁶ and, ultimately, review by the United States Supreme Court.⁴⁷ In particular, review by the civilian Court of Appeals for the Armed Forces was designed to be a check on the commander's operation of the military justice system. Other significant systemic reforms included the creation of the position of the military trial judge and the creation of the trial judiciary to appoint judges to individual courts-martial.⁴⁸ Under Article 37 of the UCMJ, safeguards were created to prevent those participating in the court-martial, including the military judge, the attorneys, and the members, from suffering adverse personnel actions based on their participation in the court-martial.⁴⁹ A number of other protections were put into place to prevent the risk of the commander attempting to unlawfully influence the court-martial process.⁵⁰

A clear policy preference which emerged from the UCMJ's

43. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (codified as amended in 10 U.S.C. §§ 801–950).

44. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (codified as amended in 10 U.S.C. §§ 801–950).

45. Uniform Code of Military Justice, 10 U.S.C. § 866 (2006) (establishing that a review by this court is automatic for any sentence that includes a punitive discharge or a sentence to confinement of one year or more).

46. *Id.* § 867.

47. *Id.* § 867(a).

48. *Id.* § 826.

49. *Id.* § 837 (stating that the precautions were put in place to ensure the quality of judgments).

50. *Id.* § 834 (requiring the convening authority to obtain advice from a staff judge advocate (legal advisor to the commander) before any charge is referred to a general court-martial); *see also* MANUAL FOR COURTS-MARTIAL UNITED STATES, R.C.M. 306(a) (2008), *available at* <http://www.jag.navy.mil/documents/mcm2008.pdf> (requiring that each commander exercise his or her own independent judgment as to the proper disposition of the case without influence from a superior authority). In spite of these protections, unlawful command influence continues to plague the military justice system. Many of the reported cases by the Court of Appeals for the Armed Forces and its predecessor, the Court of Military Appeals, have dealt with this issue. It is beyond the scope of this article to explore these issues in detail. Suffice it to say that as appellate courts have recognized, unlawful influence is the “mortal enemy of military justice.” *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

creation is that service members do not give up all of their individual rights when joining the military. For the military to maintain a disciplined, effective, and loyal force, a balance between individual rights and the needs of the military organization was sought. In attempting to reach that balance, the military turned to the civilian court system and adopted a number of its provisions.

With the codification of the UCMJ came the creation of the Manual for Courts-Martial.⁵¹ The manual was promulgated by the President under the authority of Article 36 of the UCMJ, which delegates to the President the authority to prescribe the rules and regulations governing trials by courts-martial and trials by military commission.⁵² As further proof that Congress looked to the civilian courts for guidance on how to strike a fair balance, Article 36 directs the President, as far as he deems practicable, to apply the principles of law and rules of evidence that are generally recognized in criminal cases in the United States district courts to trials by courts-martial and military commission.⁵³ This provision has particular relevance to the development of the Military Rules of Evidence.

From the time that the UCMJ was passed in 1951 until the Military Rules of Evidence were implemented in 1980, the rules of evidence in military courts-martial generally followed developments in the common law of evidence. Many of these common law rules and principles were codified, or at least commented on, in the accompanying Manual for Courts-Martial.⁵⁴

B. The Military Rules of Evidence

In 1975, President Ford signed legislation implementing the Federal Rules of Evidence. Because Article 36(a) of the UCMJ required the military's evidence rules to follow any federal rules as far as practicable,⁵⁵ efforts began to codify the Military Rules of Evidence after the creation of the federal rules. These efforts culminated in March 1980 when President Carter issued an

51. President Truman issued the first Manual for Courts-Martial in 1951. Exec. Order No. 10,214, 3 C.F.R. 408 (1949–1953). See MANUAL FOR COURTS-MARTIAL (2008), available at http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2008.pdf, for the current version.

52. 10 U.S.C. § 836.

53. *Id.*

54. Fredric Lederer, *The Military Rules of Evidence: Origins and Implementation*, 130 MIL. L. REV. 5, 7 (1990).

55. 10 U.S.C. § 836.

executive order amending the Manual for Courts-Martial and promulgating the Military Rules of Evidence.⁵⁶ The rules became effective on September 1, 1980.⁵⁷

The philosophy that guided the military rules' drafters was that military evidence law should be as consistent with civilian law as possible.⁵⁸ This philosophy is best reflected in Military Rule of Evidence 1102, which states that "[a]mendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence [eighteen] months after the effective date of such amendments unless the President takes action to the contrary."⁵⁹ The presumption is that the Federal Rules of Evidence should be equally applicable in the military context.

Contrary to what one might expect, when the Military Rules of Evidence were drafted, they did not contain any military or combat exceptions. For example, the hearsay exceptions under the Military Rules of Evidence read much like the federal rules with only a few minor changes.⁶⁰ This is equally true with expert testimony,⁶¹ the character rules,⁶² the rules of impeachment,⁶³ and the authentication rules.⁶⁴ One would think that, if there were any area where a combat or military contingency exception might have been written into the rules, it would be the rules admitting hearsay evidence and, perhaps, the rules setting out the authentication requirements. A loosening of the rules, at least in the context of ongoing military operations, would arguably reduce the adverse impact that a court-martial might have on these operations. Nevertheless, the Military Rules of Evidence did not adopt such an approach. Instead, the rules established that it is not impracticable for the military to follow the Federal Rules of Evidence, regardless of the context.

Not only did the drafters of the Military Rules of Evidence choose to follow the Federal Rules of Evidence, but in the area of

56. Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (Mar. 12, 1980).

57. *Id.* at pt. C.

58. Lederer, *supra* note 54, at 13.

59. MIL. R. EVID. 1102.

60. Compare FED. R. EVID. 803(6), (8) (business records and public records hearsay exceptions), with MIL. R. EVID. 803(6), (8) (creating a broader list of business records and public records hearsay exceptions to include a number of uniquely military documents).

61. Compare MIL. R. EVID. 702 with FED. R. EVID. 702.

62. Compare MIL. R. EVID. 404, 405, 608 with FED. R. EVID. 404, 405, 608.

63. Compare MIL. R. EVID. 609 with FED. R. EVID. 609.

64. Compare MIL. R. EVID. 901-02 with FED. R. EVID. 901-02.

privileges the Military Rules of Evidence went a step further. Rather than adopting the federal rules' approach, which was not to codify the privilege rules and instead allow the rules to develop by common law,⁶⁵ the Military Rules of Evidence specifically codified a number of privileges, including, for example, a spousal privilege,⁶⁶ an attorney-client privilege,⁶⁷ and a classified information privilege.⁶⁸

Since the implementation of the Military Rules of Evidence, military courts, like their federal counterparts, have proven adept at interpreting and applying the rules. One of the best examples of this ability is in the area of expert testimony. A question that vexed the federal courts after the passage of the Federal Rules of Evidence was the extent to which the *Frye*⁶⁹ test for determining the reliability of expert testimony had been replaced by Federal Rule 702.⁷⁰ Years before the Supreme Court announced its holding in *Daubert v. Merrell Dow*,⁷¹ the military courts grappled with this question and held that Military Rule of Evidence 702 had replaced *Frye* as the standard for admissibility of expert testimony.⁷²

In the years following the adoption of the Military Rules of Evidence, the military legal system embraced these rules and developed a rich and sophisticated body of case law interpreting and applying the rules in the military context. Over this time, the Military Rules of Evidence have provided a workable balance between the rights of the individual and the needs of the military, and there has not been any significant movement within the military legal establishment to repeal or substantially modify them. There are, however, some interesting caveats.

First, since the codification of the Military Rules of Evidence in

65. See FED. R. EVID. 501.

66. MIL. R. EVID. 504.

67. MIL. R. EVID. 502.

68. MIL. R. EVID. 505.

69. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (holding that scientific evidence "must be sufficiently established to have gained general acceptance in the particular field in which it belongs" to be admissible at trial).

70. FED. R. EVID. 702 (providing standards for the admission of expert testimony).

71. 509 U.S. 579 (1993) (holding that "general acceptance" is not a necessary precondition to admissibility of scientific evidence under the Federal Rules of Evidence and that a trial judge has the responsibility of ensuring that an expert's testimony rests on a reliable foundation and is relevant to the task at hand).

72. *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987) (permitting the result of a polygraph examination as evidence regarding statements of truthfulness).

1980 until the wars in Iraq and Afghanistan beginning in 2001, the United States military had not been in a protracted war. From 1980–2001, while the military was frequently engaged in a number of military operations running the spectrum from peacekeeping to active combat, the events themselves were of relatively short duration. Those operations that lasted for longer periods of time have generally been peacekeeping operations. This could mean that up to the time of the beginning of the wars in Afghanistan and Iraq, the Military Rules of Evidence were not really tested in the crucible of combat.

A development that has taken place over the past several years may also suggest that the UCMJ, in general, is less functional in a combat environment than intended. Much is made of the need for the commander to maintain control of the forces under his command to ensure a disciplined fighting force. It is a well-accepted axiom that a commander conducting combat operations needs to have control over the military justice system so that system can be used as a means of enforcing and maintaining discipline over his forces.⁷³ In reality, however, the practice is often quite different. There are many situations where the combat commander has in fact given up control of cases to another military authority outside the theater of combat.⁷⁴ The practice of moving service members out of the theater of combat during a criminal investigation and subsequent court-martial is quite common. The reason for this practice is understandable. A commander engaged in combat operations may not want to be distracted with a criminal investigation and subsequent trial, particularly in serious cases which may demand a great deal of time, attention, and resources.

73. Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 SW. U. L. REV. 481, 534–41 (1999).

74. Some recent examples of this practice include the *Akbar* case, the Haditha prosecutions, and the Abu Ghraib prosecutions. In the *Akbar* case, a soldier charged with the murder and attempted murder of a number of his comrades on the eve of the invasion of Iraq was immediately sent back to the United States for trial within days of the incident. See, e.g., Shaila Dewan, *Trial Opens for Sergeant Accused of Killing 2 Officers*, N.Y. TIMES, Apr. 12, 2005, at A15. The marines charged with the killings in Haditha have not been tried in the war theater but back at their home base in San Diego. See, e.g., Richard A. Oppel, Jr., *The Struggle for Iraq: Investigation: Iraqis' Accounts Link Marines to the Mass Killing of Civilians*, N.Y. TIMES, May 29, 2006, at A1. The soldiers charged with detainee abuse at Abu Ghraib prison were all removed from Iraq and were eventually tried in Fort Hood, Texas and other installations in the United States. See, e.g., Kate Zernike, *The Conflict in Iraq: Abu Ghraib Scandal: Ringleader in Iraqi Prisoner Abuse Is Sentenced to 10 Years*, N.Y. TIMES, Jan. 16, 2005, at 112.

Instead, the commander may elect to keep those resources focused on combat operations, allowing a commander out of the theater to determine the disposition of the case.

A second development over the past several years is that a great many offenses, particularly minor offenses that were previously prosecuted by a court-martial, are now resolved by other administrative means. These methods are referred to as non-judicial punishment and administrative actions, and these forums do not require the formal application of evidentiary rules.⁷⁵ This suggests that, for a large number of minor offenses, the military justice system operates outside of the formal rules of evidence.

Even with these two caveats in mind, it can be said of the Military Rules of Evidence that since their adoption in 1980, the military legal culture has embraced them and, like their federal counterpart, these rules form the backbone of every criminal case tried in courts-martial. When we look at the evidentiary rules put in place for the trial of enemy combatants under military commissions, we see a very different approach. Given the military's familiarity, competence, and experience with the Military Rules of Evidence, the President certainly could have simply transposed them over to the military commissions. He did not do that.

IV. MILITARY COMMISSIONS APPROACH TO EVIDENCE

As noted above, the President's initial order establishing the military commissions in March 2002 set out a general relevance standard as the only rule of evidence for the military commissions.⁷⁶ This standard did not require the presiding officer to conduct any balancing between admissibility and unfair prejudice, and relevance of the evidence would not be offset by other concerns. As long as the evidence had "probative value to a reasonable person," it was admissible.⁷⁷ In addition, if the presiding officer were to conclude that the evidence did not have probative value to a reasonable person, that decision could be overturned by a

75. In 2006, the Army imposed nonjudicial punishment in 42,814 cases for a rate of 74.53 per thousand service members; the Navy and Marine Corps imposed nonjudicial punishment in 26,080 cases for a rate of 4.9 per thousand service members; and the Air Force imposed nonjudicial punishment in 7,616 cases for a rate of 21.78 per thousand service members. See *Annual Report Submitted to the Committees on Armed Services*, CODE COMMITTEE ON MILITARY JUST., apps. 3–5 (2006), available at <http://www.armfor.uscourts.gov/annual/FY06AnnualReport.pdf>.

76. ORDER NO. 1, *supra* note 25, at 9.

77. *Id.*

majority of the commission, and the evidence would be considered.⁷⁸

The first modification to the commissions' process came in August 2005.⁷⁹ This order rescinded the initial commissions order and set out a new and somewhat different process for the trial of enemy combatants in military commissions. With respect to the evidence procedures, some minor modifications were made on how protected evidence would be treated. Otherwise, it left the general relevancy rule from the first order in place.⁸⁰ It was this order that the Supreme Court reviewed and ultimately struck down in *Hamdan*.⁸¹

In *Hamdan*, the Court noted that Article 36 of the UCMJ does not absolutely prevent military commissions from establishing procedures different from those in Article III courts, courts-martial, or other military tribunals.⁸² For those differences to comply with Article 36, however, certain conditions must be met.⁸³ First, the President must determine that it would be impracticable to apply the procedures of federal district courts to military commissions.⁸⁴ The Court found that the President had made that determination, and the Court gave him complete deference as to that decision.⁸⁵

Second, according to the Court, Article 36 requires another determination before military commissions procedures could depart from those used in courts-martial.⁸⁶ Under Article 36(b), the President must determine that it is impracticable for military commissions and courts-martial to have uniform procedures.⁸⁷ The historical reasons for the uniformity of procedures between military commissions and courts-martial are twofold.⁸⁸ The difference between military commissions and courts-martial was originally jurisdiction alone, and such a difference would not justify a separate set of procedural rules for each forum.⁸⁹ More importantly, uniformity was required to "protect against abuse and

78. *Id.*

79. Revised Order No. 1, *supra* note 26, at 11–12.

80. *Id.* at 10.

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

82. *Id.* at 620.

83. *Id.*

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

85. *Hamdan*, 548 U.S. at 623.

86. *Id.* at 623–24.

87. *Id.* at 620.

88. *Id.* at 617.

89. *Id.*

ensure evenhandedness under the pressures of war.”⁹⁰ The Court held that there is nothing in the record to demonstrate that it would be impracticable to apply court-martial rules to military commissions.⁹¹ The Court further concluded that the absence of any showing why the rules for courts-martial were impracticable was particularly disturbing in light of the clear and admitted failure to apply one of the most fundamental protections afforded by the Manual for Courts-Martial and the UCMJ—the right of the accused to be present.⁹² Accordingly, the Court ruled that the military commissions procedures violated Article 36 of the UCMJ.⁹³ The military commissions were invalid because the President and Congress had not determined that it was impracticable to follow court-martial rules and procedures, including the Military Rules of Evidence.

Following the *Hamdan* decision, Congress and the President acted quickly to create a military commissions system that reflected their collective determination as to which court-martial rules and procedures would be impracticable in the commissions’ context.⁹⁴ Out of this process came the evidentiary rules found in Section 949a(b) of the MCA.⁹⁵ For the most part, the evidence rules contained in the MCA are similar to the earlier commissions’ rules. The MCA rules continue to use general relevancy as the standard and, in addition, specifically articulate how to apply the general relevance standard with hearsay evidence and authentication.⁹⁶ The one additional feature of the MCA rules is that now the military judge conducts not only a relevancy analysis similar to Military Rule of Evidence 401, but also does a legal relevancy analysis very similar to a Rule 403 determination.⁹⁷ So while the MCA rules were more robust than the earlier commissions’ rules, they were still a far cry from what is contained in the Military Rules

90. *Id.*

91. *Id.* at 623.

92. *Id.* at 624.

93. *Id.* at 625.

94. *See id.* at 623–24 (stating that because the president failed to demonstrate that it would be impracticable to apply court-martial rules in the case at hand, court-martial rules applied). *Hamdan* was decided on June 29, 2006. *Id.* at 557. Congress enacted the Military Commissions Act of 2006 on October 17, 2006. Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948a (2006)).

95. 10 U.S.C. § 949a(b).

96. *Id.* § 949a(b)(2).

97. *Id.* § 949a(b)(2)(F).

of Evidence. These MCA rules, however, were not the last word on the subject.

After the MCA was passed, the Secretary of Defense promulgated the Manual for Military Commissions (MMC).⁹⁸ The MMC was written under the authority of Section 949a(a) of the MCA to establish a detailed set of rules to govern military commissions trials.⁹⁹ To the extent practicable and consistent with intelligence activities, section 949a(a) requires the Secretary of Defense to apply the principles of law and rules of evidence for trials by general courts-martial.¹⁰⁰ The consequence of this requirement was that the rules of evidence now contained in the MMC in many respects are a mirror image of the Military Rules of Evidence.¹⁰¹ Two key exceptions, however, remain. Hearsay evidence is still presumptively admissible, and the specific exception categories under the Federal and Military Rules of Evidence are replaced by a general rule of admissibility for hearsay evidence.¹⁰² The rules of authentication are also significantly relaxed when compared to the federal and military rules.¹⁰³

V. RATIONALES FOR THE MILITARY COMMISSIONS EVIDENCE RULES

From their initial inception until this final implementation, the rules of evidence for military commissions have undergone significant changes. In place of the initial skeleton rules of general relevance, the commissions ultimately have a set of rules, which,

98. MANUAL FOR MILITARY COMMISSIONS (2007) [hereinafter MMC], available at <http://www.defenselink.mil/news/MANUAL%20FOR%20MILITARY%20COMMISSIONS%202007%20signed.pdf>.

99. 10 U.S.C. § 949a(a) (2006).

100. *Id.*

101. Compare, e.g., MIL. COMM'N. R. EVID. 404 with MIL. R. EVID. 404 (admissibility of character evidence). The Military Commission Rules of Evidence are located in Part III of the Manual for Military Commissions. MMC, *supra* note 98, pt. III.

102. Compare MIL. COMM'N. R. EVID. 802 ("Hearsay may be admitted on the same terms as any other form of evidence except as provided by these rules or by any Act of Congress applicable in trials by military commissions.") with MIL. R. EVID. 802 ("Hearsay is not admissible except as provided by these rules or by any Act of Congress applicable in trials by court-martial.").

103. Compare MIL. COMM'N. R. EVID. 901 (allowing evidence to be admitted as authentic if military judge so determines and instructs commission members to consider authenticity of evidence when weighing the evidence) with MIL. R. EVID. 901-02 (requiring proponent of evidence to authenticate it before it can be admitted).

with two notable and significant exceptions,¹⁰⁴ look quite similar to the Military and Federal Rules of Evidence. If this is where we have ended up, why did the President initially order such an extreme departure from the Military Rules of Evidence, and why did the final military commissions evidence rules take a different approach to hearsay and authentication?

Finding a clear, consistent articulation from the Bush administration as to why it elected to try these enemy combatants by military commissions rather than courts-martial or in federal court is not an easy task to begin with, and it becomes even more difficult to find a clear explanation as to why the Military Rules of Evidence were initially thought to be unsuitable for military commissions. In his order on November 13, 2001, President Bush stated that “[g]iven the danger to the safety of the United States and the nature of international terrorism,”¹⁰⁵ non-citizens would be detained and, when tried, would be tried by military tribunals.¹⁰⁶ Subsequent statements by administration and Pentagon officials elaborated on this theme. One administration official stated that the President’s principal objective in using military commissions was to “set up a body of rules that will allow us to protect information to achieve additional intelligence gathering purposes that may lead to the capture of more terrorists.”¹⁰⁷ Other officials noted that the commission order “capitalize[s] on the flexibility needed because of the increased need to protect intelligence information that occurs during an armed conflict.”¹⁰⁸

Often, however, these statements lacked any specific articulation defining the necessity of particular rules dealing with protected information. John Altenburg, selected by the Secretary of Defense to serve as the Appointing Authority for the military commissions, articulated the rationale for the military commissions as follows:

104. See *supra* notes 102–03 and accompanying text. See generally Choi, *supra* note 5, at 157–58.

105. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), *reprinted in* 10 U.S.C. § 801 (2006) (notes).

106. See *id.*

107. News Transcript, Senior Defense Official, Background Briefing on Military Comm’n’s, U.S. Dep’t of Def. (Jul. 3, 2003), *available at* <http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=2797>.

108. News Transcript, Senior Defense Official, Background Briefing on the Release of Military Comm’n Instructions, U.S. Dep’t of Def. (May 2, 2003), *available at* <http://www.defenselink.mil/transcripts/2003/tr20030502-0144.html>.

[T]he government chose for many different reasons to use a military commission process. It doesn't mean that the others were wrong. It just means that the government chose on balance, given the nature of the allegations that were being made and I think especially national security interests, that they chose to use the commission process, thinking that that would meet the balanced needs.¹⁰⁹

This is hardly a clear and specific explanation of the rationale for military commissions, and it certainly allows one to question the administration's motives.

The explanations are even less clear when we ask more pointed questions. For example, how does the abandonment of the hearsay rules, or the character rules, or the impeachment rules, as was done under the initial commission orders, necessarily enhance national security or protect classified information? There does not seem to be any clear answer. If protecting classified information was not the primary or only motivation for replacing the evidence rules with one general relevance rule, then perhaps there are other reasons.

One explanation could be that the military commissions were intended to be courts of expediency. Quite literally, there was the possibility that these trials could occur on the battlefield and in the heat of battle. In such an environment, expediency and the need to protect our forces and interests against enemy threats may dictate a form of "rough justice" where all of the procedural niceties of the rules of evidence do not have a place.

Another possibility is that, even if the trial itself is not conducted in the heat of battle, those who may be asked to participate as witnesses and commission members may be engaged in combat or other important duties related to national defense. It could be that the more formal rules were replaced with a general rule of relevancy recognizing that there would be too great of an impact on national security if one required members of the military and others to be taken away from their important duties to serve as witnesses in military commissions.

Unfortunately, the President and Congress were no clearer in their reasoning behind the evidence rules put forth in the MCA

109. News Transcript, John Altenburg, Appointing Authority for the Office of Military Commissions, Def. Dep't Briefing on Military Comm'n Hearings, U.S. Dep't of Def. (Aug. 17, 2004), *available at* <http://www.defenselink.mil/transcripts/2004/tr20040817-1164.html>.

and the MMC. To claim that the evidence rules contained in the MMC reflect the President's and Congress's thoughtful determination as to why certain evidentiary rules would be impractical in the military commissions context is a stretch. When one looks at the actual rules contained in the MMC, I believe that there are primarily two possible explanations for the military commissions' departure from the Military Rules of Evidence. Neither of these explanations has been stated by any Bush administration official, member of Congress, or by anyone within the Defense Department. Nonetheless, I believe that both of these explanations serve as the underlying rationale for the military commissions' departure from the established Military Rules of Evidence.

One reason for the different evidence rules for military commissions was a belief by Bush administration officials that unlawful enemy combatants tried by military commission simply did not deserve the protections afforded by the full application of the Military Rules of Evidence. The other explanation for why the commissions rules reflected in the MMC expanded the use of hearsay evidence and rejected more formal authentication requirements is the belief that the Military Rules of Evidence have proven to be too cumbersome to apply during a time of war and in active theaters of combat. The military commissions simply presented the first opportunity to craft more flexible rules from a clean slate.

A. The National Security Rationale

The first explanation, that enemy combatants tried by military commission did not deserve the protections afforded by the full application of the Military Rules of Evidence, was alluded to in a number of different ways by the Bush administration. One such allusion was that, because the legal status of these enemy combatants is different from other individuals, the protections afforded them are also different. Initially, the Bush administration's view was that members of Al Qaeda and other enemy combatants did not enjoy the protections of Common Article 3 of the Geneva Conventions.¹¹⁰ While the administration's

110. See, e.g., *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152, 161 (D.D.C. 2004) (citing Press Release, Office of the White House Press Sec'y, Statement by the Press Sec'y on the Geneva Convention (May 7, 2003)).

stated policy was to treat these unlawful enemy combatants consistently with the spirit of the Geneva Conventions,¹¹¹ the administration would have the exclusive power to decide just how close to the spirit of Geneva that treatment would fall. The Supreme Court rejected this position in *Hamdan*.¹¹² But even if the Court had upheld the Bush administration's position and found the status of these enemy combatants to be legally unique, why does that different legal status necessarily result in a different and more relaxed application of the evidentiary rules? At a minimum, the government should have been required to make some showing that the difference in legal status would be meaningful in the context of the determinations the tribunals would have to make on evidentiary issues. The Bush administration never made that showing, relying instead upon the simple assertion that a difference in legal status is meaningful in the context of a tribunal's determination of a detainee's connection to terrorist activities.¹¹³

Another Bush administration contention focused on the identity of the detainees as alien enemy combatants sworn to support the terrorist cause.¹¹⁴ The horrific experience of September 11th and the possibility that terrorists would strike again with even more deadly means and methods may have driven the administration to conclude that these suspects, as the representatives of Al Qaeda we have in custody, simply did not deserve the evidentiary protections we afford defendants in criminal trials and military courts-martial. To afford them the full protections of the evidence rules, in other words, would be to dignify these individuals as somehow worthy of treatment above mere contempt.¹¹⁵

The problem, of course, is that adjusting the level of protection afforded these individuals in criminal and quasi-criminal contexts, based primarily upon the moral assessment of

111. See Memorandum from President George W. Bush to the Vice President, et al., *Humane Treatment of Al Qaeda and Taliban Detainees* (Feb. 7, 2002), available at <http://www.torturingdemocracy.org/documents/20020207-2.pdf>.

112. *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006).

113. *Id.* at 646.

114. See *supra* note 105 and accompanying text.

115. As the Middle East historian Bernard Lewis observed, "[w]e of the West have often failed catastrophically in respect for those who differ from us . . . But it is something for which we have striven as an ideal and in which we have achieved some success, both in practicing it ourselves and in imparting it to others." BERNARD LEWIS, *CULTURES IN CONFLICT: CHRISTIANS, MUSLIMS, AND JEWS IN THE AGE OF DISCOVERY* 78 (1995).

the individual's alleged actions, reflects a policy long abandoned, and rightly so, in Anglo-American jurisprudence.¹¹⁶ As in any case in which an act condemned by the community has occurred, neither the community nor its governmental representatives has a special moral claim with respect to a particular individual until that person has been determined through fair procedures to be guilty.¹¹⁷

The willingness to depart from the rules of evidence in the military commissions suggests that these rules, which the Bush administration was so quick to abandon, either do not reflect the core values of what it means to have a fair trial, or that this category of suspect does not deserve a fair trial. The rules of evidence, as reflected in both the federal and military rules, represent the collective wisdom of hundreds of years of experience, as well as specific policy choices established to help ensure a fair trial for all parties.¹¹⁸ It is fair to say that, at least to a certain extent, these rules reflect what Anglo-American jurisprudence establishes as essential components of a fair trial.

If the rules of evidence reflect our values of what it means to have a fair trial, then their rejection must mean that enemy combatants tried by military commissions do not deserve a fair trial. We should reflect very carefully on this rationale. If we adopt a similar rationale in trying suspected terrorists in future military commissions, then we would once again start down a very slippery slope. Suppose the President can significantly limit a defendant's fundamental right to a fair trial by abandoning the rules of evidence in favor of a general relevance standard because of who the defendant is, the defendant's alleged crimes, or the difficulty in obtaining a conviction without abandoning the rules. If the President is allowed this power, then these same steps may be taken to limit the protections provided by the rules of evidence to a service member or a citizen in a future situation where the President believes a similar justification exists. To believe that constitutional protections would prevent this from ever occurring

116. See, e.g., *Watts v. Indiana*, 338 U.S. 49, 54 (1949) (discussing repudiation in Anglo-American jurisprudence of the tactics of the Star Chamber and how, "[u]nder our system society carries the burden of proving its charge against the accused . . . not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation").

117. See Robert P. Mosteller, *Popular Justice*, 109 HARV. L. REV. 487, 488–89 & n.10 (1995) (book review).

118. See FED. R. EVID. 102.

does not address the issue: constitutional standards, in particular criminal procedure protections, have almost always been interpreted to mean different things in different contexts.

We should also understand that the abandonment of these rules in favor of a general standard of relevancy would not impact both sides equally in military commissions. First, because the government has the burden of proof and is responsible for introducing a sufficient quantum of evidence to obtain a conviction, it would benefit the most if the rules of admissibility are reduced to a standard of general relevance. Because the prosecution has at its disposal the full investigative resources of the government, it is also in a better position to develop and admit evidence whose relevance is minimal at best. This means that more evidence would be admitted and the fact finder would be able to make more tenuous inferences suggesting guilt. The defendant, whose access to compulsory process is limited under the military commissions, would often be at a disadvantage and unable to counter the government's evidence.

Perhaps those who were charged with drafting the rules of evidence that were ultimately incorporated into the MMC recognized the dangerous precedent that had been set by earlier Bush administration efforts. In response, they sought to restore some of the fundamental aspects of a fair trial by including many of the previously disregarded rules of evidence in the rules finally adopted for trial by military commission. Or perhaps after suffering one defeat by the Supreme Court over evidentiary rules, the drafters were simply unwilling to risk another defeat.

Whatever the reason for the final form of the MMC's evidence rules, they did not restore all of the Military Rules of Evidence. Notably, the rules regarding hearsay evidence and authentication were significantly modified.¹¹⁹ Considering these modifications carefully, there may be another possible explanation for the military commissions' departure from the Military Rules of Evidence. Perhaps some of the current restrictions in the Military Rules of Evidence should no longer apply in the military context, at least when the application of certain rules could disrupt ongoing combat and other important national-security operations. These specific modifications to the hearsay and authentication rules at least suggest this possibility.

119. See MMC, *supra* note 98, pt. III, §§ VIII–IX.

The evidence rules under the MMC create a presumption for the admissibility of hearsay evidence. The hearsay rules keep the same definitions for hearsay as set out in Military and Federal Rule of Evidence 801.¹²⁰ The MMC, however, reverses Military Rule of Evidence 802 by stating that hearsay evidence may be admitted on the same terms as any other evidence.¹²¹ MMC Rule 803 provides that hearsay evidence may be admissible in one of two ways.¹²² First, the evidence may be admissible on the same terms as it is admissible in trial by general courts-martial.¹²³ In other words, it is admissible under the exceptions now contained in rules 803 and 804. Second, even if the hearsay evidence does not meet a specific exception, the MMC makes hearsay admissible so long as adequate notice is provided to the opposing party.¹²⁴ If the party opposing admissibility can demonstrate by a preponderance of the evidence that the hearsay evidence is unreliable, it is not admissible.¹²⁵ This change makes all forms of hearsay presumptively admissible.

With respect to the rules of authentication, the MMC rules also reflect a major change. The sections of the Military Rules of Evidence governing authentication and identification¹²⁶ are replaced by one simple rule.¹²⁷ Rule 901 of the MMC states that “[e]vidence shall be admitted as authentic if the military judge determines that there is sufficient basis to find that the evidence is what it is claimed to be,” and if the “judge instructs the [commission panel] that they can consider any issue [of] authentication in determining the weight to give that evidence.”¹²⁸

That the drafters of the MMC restored many of the Military Rules of Evidence in the military commissions with the exception of these two major modifications suggests that they felt that the traditional hearsay and authentication rules have no place in the military commissions. It should be noted here, too, that the MMC does allow for use of classified evidence, and the rules allow the

120. See MIL. COMM’N. R. EVID. 801. Compare *id.* with FED. R. EVID. 801 (hearsay definition in Federal Rules of Evidence) and MIL.R. EVID. 801 (hearsay definition in Military Rules of Evidence).

121. MIL. COMM’N. R. EVID. 802. Compare *id.* with MIL. R. EVID. 802 (disallowing admission of hearsay evidence unless rules provide otherwise).

122. See MIL. COMM’N. R. EVID. 803(a)–(b).

123. *Id.* 803(a).

124. *Id.* 803(b).

125. *Id.* 803(c).

126. See MIL. R. EVID. 901–03.

127. See MIL. COMM’N. R. EVID. 901.

128. *Id.*

defendant to view and have access to that evidence on terms very similar to Military Rule of Evidence 505.¹²⁹ This would suggest that national security and protecting sensitive evidence are not the primary motivations behind the major modifications to the hearsay and authentication rules.

B. The Combat Rationale

If national security is not the primary reason behind the significant relaxation of the hearsay and authentication rules in military commissions, and if the drafters of the MMC restored other evidentiary rules, many of which will help to ensure a fundamentally fair trial, it seems that these particular rule changes were made out of a belief that it would be too burdensome to require first-hand testimony and specific authentication procedures in military commissions.

As used historically, and perhaps as initially envisioned in this most recent instance, military commissions often took place on the battlefield in the midst of ongoing combat operations. In such an environment, formal requirements of authentication may have proven to be too burdensome and unnecessary since the fact finder is free to evaluate the evidence and give it whatever weight he or she determines is appropriate. Likewise, the rules favoring direct testimony over hearsay evidence may not work in the heat of battle, where it is unreasonable and unrealistic to literally pull witnesses off the battle lines in order to testify, especially when their testimony can be obtained by less burdensome, if somewhat less reliable means.

The most recent military commissions, however, did not take place on the battlefield or even in an active combat zone. They took place thousands of miles away in the very secure detainee compound at Guantánamo Bay, far removed from the exigencies of battle. That is not to say, however, that battlefield considerations are no longer a factor. In military commissions cases, the evidence needed to convict a detainee of violations of the MCA would likely often come from people who are unavailable to testify, either because they cannot be located or because they are unwilling to testify. Additionally, those witnesses who may be members of the military or other government agents and employees may be

129. Compare MIL. COMM'N. R. EVID. 505 (protection of classified information) with MIL. R. EVID. 505 (protection of classified information).

working in essential missions, and it would pose a major disruption if they were required to testify personally at a military commissions proceeding. Similar disruptions to ongoing operations may also occur if more formal authentication procedures were required by the rules of evidence.

In considering the modifications the drafters of the MMC made to the final rules of evidence applicable to military commissions, it can be argued that they took a pragmatic approach, modifying the hearsay and authentication rules so that trials by military commission could proceed without disrupting other ongoing military operations. In essence, the MMC created a type of combat exception allowing for greater admissibility of both hearsay evidence and other evidence that may not meet the current standards of authentication set out in the Military Rules of Evidence. Neither the President, nor Congress, nor the drafters of the MMC stated that the reason for these changes was to create a combat exception to the rules of evidence. Nevertheless, this seems to be one practical consequence of the commissions' evidence rules.

The two-part question, then, is: (1) are these modifications to the hearsay and authentication rules necessary or desirable; and (2) should similar rules be adopted in future trials of suspected terrorists or future military commissions? Intuitively, perhaps these changes make some sense. The problem is that these changes do not seem to be based on any solid data or information. In addition, since the Military Rules of Evidence were adopted in 1980, there has not been any strong movement within the military legal community or within the larger military community for the creation of combat exceptions to the rules of evidence. Creating these combat exceptions to the hearsay and authentication rules without giving the question more detailed study and analysis may have a number of unintended consequences.

One such consequence is the impact that such a change might have on other trials. If the need to create a combat exception to the Military Rules of Evidence is one possible rationale behind these final MMC rules, that same rationale for a relaxation of the hearsay and authentication rules can be made to virtually any court-martial conducted on the battlefield or to any trial where live testimony and authentication procedures could disrupt other important governmental activities. After all, it is not only trials conducted by military commission which could potentially disrupt

on-going military operations. In fact, since many courts-martial are conducted much closer to the battlefield than the military commissions at Guantánamo Bay, the impact on on-going military operations by court-martial trials could potentially be even greater than the impact caused by military commissions.

To date, few military legal experts, academics, or practitioners have suggested that the hearsay rules and the rules of authentication contained in the Military Rules of Evidence have proven to be unworkable in a battlefield environment. The wars in Iraq and Afghanistan are the first prolonged engagements that the military has been involved in since the Military Rules of Evidence were codified. When the dust settles on these wars and there is time for reflection and evaluation, some may argue for a kind of combat exception to the military rules along the lines of the commissions' rules. Certainly, the military commissions' modification of the hearsay and authentication rules establishes a precedent for changes to the Military Rules of Evidence in the future. To create such a precedent, however, without more careful and detailed study than has occurred to date is unwise.

In considering the lessons we can learn from this most recent round of military commissions, we should be very cautious about turning to the commissions' evidence rules as a precedent for changes to the Military Rules of Evidence. The history of the UCMJ and the Military Rules of Evidence suggests that these rules and procedures were intended to be used across the entire spectrum of military operations because no combat exceptions were included. This approach reflected the view that the Federal Rules of Evidence, which served as the basis for the military rules, struck an appropriate balance between the needs of the military and the rights of the individual soldier. This determination was the product of debate and deliberation among the drafters of the military rules.

By contrast, it is hard to say that the rules of evidence for military commissions have enjoyed such careful deliberation. As we have seen, the commissions' evidence rules began with a basic relevancy rule in the President's initial orders. The rules contained in the MCA reflect that same basic approach and were drafted in haste after the Supreme Court invalidated the President's unilateral military commissions process. When the drafters of the MMC set out their final version of the rules of evidence for military commissions, they did not include an explanation or discussion as

to why the hearsay and authentication rules were so different from the military and federal rules. Additionally, the promulgation of these rules for military commissions was not the product of public debate, and there is nothing to suggest that these changes are a response to legitimate concerns about the impact that the current hearsay and authentication rules have on on-going combat operations. In short, the hearsay and authentication rules now contained in the MMC should have little, if any, precedential value to any future consideration of whether there is a need to create a combat exception to the Military Rules of Evidence. For this same reason, if suspected terrorists are to be tried in some forum other than federal district court or military courts-martial, or if the creation of military commissions is contemplated again in the future, the evidence rules developed in this most recent military commissions system should have little precedential value. If a combat exception to the Military Rules of Evidence is considered, then the consideration should be based on how effective these rules proved to be in the wars in Iraq and Afghanistan and how disruptive their application was to on-going combat operations. To date, no study has been undertaken to explore this question.

VI. CONCLUSION: THE ROAD AHEAD

The recent experience with the rules of evidence in military commissions has given us an opportunity to reflect on whether procedures to try alleged foreign terrorists, as well as future military commissions procedures, should adopt rules of evidence consistent with the federal and military rules or if we should follow a different approach. Looking back on the evidentiary scheme created for the most recent military commissions also gives us an opportunity to reflect on the application of the rules of evidence in military courts-martial and other criminal prosecutions.

Maybe the Federal and Military Rules of Evidence keep too much information from the fact finders, and perhaps the fact finder would reach more accurate and more just results if they had access to information that is often excluded under formalistic evidentiary rules. Maybe many of these rules are not a reflection of our core values and are not necessary for a fair trial. And maybe the rules have proven to be unworkable in a military or combat environment. Perhaps the creation of the military commissions presented the first opportunity for us to start with a clean slate. Rather than forcing the trial process to be tied to arcane rules,

perhaps it is better to simply abandon the rules and in their place adopt a common-sense approach.

Looking at the initial evidence rules proposed by the Bush administration as well as the rules ultimately settled on for military commissions, what is most striking is, first, how quickly the government abandoned well-recognized federal and military rules and in their place adopted a general rule of relevance. It is also striking that no explanation or rationale accompanied these dramatic changes to the rules.

Considering the haste with which these changes were made, and because there was virtually no explanation accompanying them, we are left on our own to try and piece together the reasons for the changes and ask whether they should serve as a useful precedent for the trial of suspected terrorists, for some future military commission, or as precedent for broader changes to the Federal and Military Rules of Evidence. Much can be learned from this experience, and the most important lesson is what not to do in the future.

This article argues that the reasons behind the Bush administration's efforts at re-writing the rules of evidence for military commissions were twofold. First, there was the belief that, to the extent the Federal and Military Rules of Evidence reflect core components of a fair trial, enemy combatants who were facing trial by military commission simply did not deserve these fundamental protections because of their actions. The folly of this approach can be seen from the fact that the military commissions process has lacked legitimacy from its inception, and at every turn the Bush administration's efforts were frustrated both by the judicial branch and in the court of public opinion.¹³⁰ Any efforts to create a separate tribunal process for the trial of suspected terrorists and any efforts to create a military commissions system in the future must not repeat this error. The Obama administration or some future administration must engage in an honest and clear examination of the rationale for creating a separate tribunal process. If the motivation is to deny these suspects the basic protections of a fair trial because of who they are or what they are

130. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); Jackie Northam, *Obama Said Ready to Close Guantanamo*, NAT'L PUB. RADIO, Jan. 21, 2009, <http://www.npr.org/templates/story/story.php?storyId=99713003> (stating the lack of public support for military commissions is one reason why President Obama is unlikely to retain them).

suspected of having done, then it is best not to even start down that road.

This article maintains that the second reason for the changes to the evidence rules reflected in the MMC was the belief that some of the evidence rules are simply unworkable in a combat environment and that some combat or military exceptions to the rules of evidence should be created. There may be some merit to this argument. But here again the efforts of the Bush administration to create battlefield exceptions to the hearsay and authentication rules lack legitimacy, because these changes were not the result of careful study or analysis. Rather, they seemed to be based on a hunch that these exceptions were needed. Rule changes of this magnitude, based on hunches and assumptions that lack thorough and thoughtful consideration, should not enjoy any precedential value for future military commissions or in proposing changes to the Military Rules of Evidence.

There is no question that in the efforts to try suspected foreign terrorists and other enemy combatants, the Bush administration faced a number of very complex legal issues. As the Obama administration considers the best approach for the future, the way ahead is still difficult. With respect to the rules of evidence that should apply to any future tribunal, there are some lessons from the past that can help point the way. Any changes to the rules of evidence used in these proceedings must not be motivated by a belief that the suspects do not deserve a fair trial; nor should the rules be based on unsupported assumptions that the current rules of evidence are unworkable.