

Evidence and Confrontation in the President's Military Commissions

by NICHOLAS W. SMITH*

I. Origins of the President's Military Order and Commissions

A. Terrorism, Capture and Rule-Making

On September 11, 2001, terrorists attacked New York City's World Trade Center and the Pentagon in Washington and killed thousands of Americans. Shortly thereafter, President George W. Bush and his administration began a vigorous offensive against the terrorist cells responsible for these and other attacks against Americans. President Bush issued a Military Order directing the Secretary of Defense, Donald Rumsfeld, to capture and take into custody anyone the President believes is a member of the al Qaida terror network, suspect of terrorism, or anyone who aids or conspires with terrorists.¹ The President holds limitless discretion over which

* J.D., University of California, Hastings College of the Law, 2005; External Managing Editor, *Hastings Constitutional Law Quarterly*, 2004-2005; B.A., Political Science, University of California, Santa Barbara, 2002. I would like to thank Professor Roger C. Park of Hastings for sparking my interest in this topic and for his wisdom and guidance during the note-writing process. I would also like to thank my wife, Allison, for her support, and the *Hastings Constitutional Law Quarterly* Editorial Board, 2005-2006, for bringing this project to fruition.

1. Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Military Order]. The Military Order covers anyone who the President has reason to believe:

- (i) is or was a member of the organization known as al Qaida;
- (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- (iii) has knowingly harbored one or more individuals described.

individuals fall under the jurisdiction of his order.² Those individuals captured are subject to trial by military commission under the order.

At the time of this writing, approximately 500 detainees of differing national origin remain at the United States Guantanamo Bay, Cuba detention facility. Since early 2003, many of the detainees have been released or transferred to the control of foreign governments. Prompted by the Supreme Court's decision in *Hamdi v. Rumsfeld*, Combatant Status Review Tribunals determine whether a detainee apprehended pursuant to the President's Military Order is an "enemy combatant."³ The Court in *Hamdi* held that a "citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."⁴ Following classification as enemy combatants, the detainees await a determination whether they are subject to the President's Military Order and trial by commission.

Under his executive Military Order,⁵ President Bush directed Secretary Rumsfeld to promulgate "rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys."⁶ On March 21, 2002, Secretary Rumsfeld and the Department of Defense issued Military Commission Order No. 1, which outlined the system of trial procedure to be used.⁷ In

Id. § 2(a)(1).

2. See Laurence Tribe & Neal K. Katyal, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1261 (2002).

3. 542 U.S. 507 (2004).

4. *Id.* at 533.

5. The Bush Administration has not been expressly authorized by Congress to create or execute the proposed military commissions. Tribe & Katyal, *supra* note 2, at 1266. Rather, the President's Military Order promulgates all rules governing jurisdiction over the detainees and announces the intention to try them by military commission. Military Order, *supra* note 1, § 3(b). Tribe and Katyal argue that the Bush Administration's creation of the commissions without congressional approval is "flatly unconstitutional." Tribe & Katyal, *supra* note 2, at 1266. They argue that President Bush creates, for himself, "tribunals inferior to the United States Supreme Court" when Congress is expressly granted that power in Article I of the Constitution. *Id.* In sum, they argue that President Bush's creation of the commissions "installs the executive branch as lawgiver as well as law-enforcer, law-interpreter, and law-applier, asserting for the executive branch the prerogative to revise the jurisdictional design of the system of criminal justice." *Id.* at 1265-66.

6. Military Order, *supra* note 2, § 4(c).

7. Dep't of Def., Military Commission Order No. 1 (Mar. 21, 2002) *available at*

addition, the Department issued Military Commission Instructions providing further guidance on the intricacies of the trials. The Bush Administration and the Department suffered severe American and international criticism from the press, interest groups, and scholars questioning the procedural protections included in the proposed trials. In response to these criticisms, the Department revised the Commission Order on August 31, 2005, to further comport with American civilian and military court standards of trial procedure.⁸

B. Ongoing Debate over Detainee Status and its Effects on the Military Commissions

Four detainees have been formally charged with crimes and preliminary hearings have been held in their cases.⁹ In *Hamdan v. Rumsfeld*, a federal district court of the District of Columbia enjoined those four proceedings on November 8, 2004.¹⁰ The court held that Hamdan could not be tried by military commission since no “competent tribunal” had determined that he was not a prisoner-of-war under the Geneva Convention of 1949.¹¹ The court decided that the aforementioned Combatant Status Review Tribunals created to determine whether detainees were enemy combatants did not properly decide whether the detainees were prisoners-of-war under the 1949 Geneva Convention.¹² Applying Article 102 of the 1949 Convention, the court reasoned that prisoners-of-war can be “validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power.”¹³ American soldiers must

<http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>; Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 68 Fed. Reg. 39,374 (July 1, 2003) [hereinafter Commission Order] (to be codified at 32 C.F.R. pt. 9)

8. Dep't of Def., Military Commission Order No. 1 (Aug. 31, 2005) *available at* <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>; Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 68 Fed. Reg. 39,374 (July 1, 2003) [hereinafter Commission Order] (to be codified at 32 C.F.R. pt. 9)

9. Press Release, Dep't of Def., “Fourth Military Commission Concludes Week of Trials” (Aug. 27, 2005) *available at* <http://www.defenselink.mil/releases/2004/nr20040827-1180.html>.

10. 344 F. Supp. 2d 152 (D.C. Dist. 2004)

11. *Id.* at 160-62. *See* Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316 (hereinafter 1949 Geneva Convention). The United States ratified this convention in 1955.

12. 344 F. Supp. 2d at 161-62.

13. 1949 Geneva Convention, *supra* note 11, Art. 102.

be tried for transgressions of military law by courts-martial, governed by the Uniform Code of Military Justice and its Manual for Courts-Martial.¹⁴ Under the lower court's rationale, the government would have to try detainees by equivalent procedure, and thus, its decision effectively precluded detainee trial by military commission.¹⁵

However, the Court of Appeals for the District of Columbia Circuit reversed the district court's decision in *Hamdan* July 15, 2005.¹⁶ A three-judge panel held that President Bush operated within the ambit of his presidential powers when creating the military commissions and that the 1949 Geneva Convention does not provide an "enemy combatant" a right to enforce its provisions in court.¹⁷ The court further held that even if the 1949 Geneva Convention does provide an enforceable right to combatants in court, the combatants at issue are not "prisoners-of-war" as defined by the convention.¹⁸ The United States Supreme Court granted *certiorari* to decide whether the provisions of the 1949 Geneva Convention apply to the detainees and will hear the case in March of 2006.¹⁹

The bases for the rulings in the various detainee cases, thus far, have been jurisdictional in nature. Only the district court in *Hamdan* took issue with the procedural provisions of the Commission Order as part of its rationale.²⁰ Even then, most of the language dealing with the procedural aspects of the commissions is dicta, and the basis for the court's rationale remains that the detainees are prisoners-of-war under the 1949 Convention.²¹ The Court of Appeals responded to the lower court's dicta by stating that the issue of proper procedural provisions in the military commissions cannot be raised by the detainee until after conviction by commission and all military appeals have been exhausted.²² Should the Supreme Court find that the 1949 Convention applies to the detainees, the military commissions will likely be modified to a system more reminiscent of the American courts-martial or completely cast aside. However, should the Court

14. See 10 U.S.C. § 801 et seq.

15. 1949 Geneva Convention, *supra* note 11, Art. 102.

16. 415 F. 3d 33, 40 (D.C. Cir. 2005)

17. *Id.* at 40.

18. *Id.* at 40-41. See 1949 Geneva Convention, *supra* note 11, Art. 4A.

19. *Hamdan v. Rumsfeld*, 2005 WL 2922488 (U.S. Nov. 7, 2005) (No. 05-184) *certiorari* granted.

20. 34 F. Supp. 2d 152, 1

21. See *id.*

22. 415 F. 3d at 42-43.

find that military commissions may properly try detainees, the Court may clarify the standards of procedural process it will require in the commissions for purposes of ruling on appealed convictions in the future.

C. Argument

This note will not attempt to argue whether or not the non-U.S. citizen detainees at Guantanamo Bay should have prisoner-of-war status. This note will contend that the best course of action for the Bush Administration is to adopt the same rules and procedures for the trial phase of the commission proceedings as a trial by courts-martial under the Uniform Code of Military Justice for all detainees at Guantanamo Bay. Although it may seem otherwise, this contention does not essentially intimate that the detainees are prisoners-of-war. The provisions of the Commission Order have been assailed by legal scholars and commentators since their creation and were already altered to meet some of those criticisms on August 31, 2005. This proposition would simply consist of further procedural alterations to restore public and international confidence in the American administration of justice for non-U.S. citizens.

This note will examine the current, updated provisions in the Commission Order and will compare those provisions with the rules of evidence and procedures followed in American criminal or military courts. It should be noted that the Uniform Code of Military Justice, 10 U.S.C., Ch. 47, including the Manual for Courts-Martial, governs criminal procedure in military trials.²³ It should also be noted that President Carter adopted the Federal Rules of Evidence into the Manual in 1980, styling them the Military Rules of Evidence.²⁴

Just as American criminal and military courts afford the accused a presumption of innocence, the Commission Order purports to do the same.²⁵ It promises to provide the accused a copy of the charges against him, an attorney for his defense, access to evidence that tends to exculpate him, the choice of testifying, compulsory process to call witnesses in his favor, and generally open proceedings.²⁶ In addition, the Commission Order provides an appeals process to review the

23. See Manual for Courts-Martial, United States, 1984. Exec. Order No. 12473 as amended by Exec. Order No. 12484.

24. See Exec. Order No. 12198 (1980).

25. Commission Order, *supra* note 8, § 5(a).

26. *Id.* § 5(a), (b), (d)-(i).

decisions made in the commissions, with the last stop for appeal to the President. On the other hand, members of a commission will be forced to weigh evidence, untested as to veracity and nearly unfiltered for prejudice, and even secret evidence. In addition, the ability of the accused to confront witnesses in court will be severely hampered.

Undoubtedly, these detainees should be tried for their crimes. However, the process by which they are tried will be scrutinized by the international community and should therefore set an international standard for the administration of justice in terror cases. The new system of trial procedure created by the Commission Order to try accused terrorists, at the time of this writing, is lacking some of the most important procedural safeguards for a criminal trial. These include the exclusion of hearsay evidence, screening evidence for undue prejudice, and providing the accused an extensive right to confront witnesses against him.²⁷ Re-evaluating the current provisions of the commissions against American standards will increase efficiency, fairness and the integrity of verdicts with the international community. Specifically, adopting the courts-martial approach would best cure the procedural and evidentiary departures from the American standard of criminal justice.

Courts-martial trials could still be held in a military setting to include the protection of witnesses, military officers and others present at the trial, as well as prevent escape. Applying principles from a time-honored, statute-based system of criminal justice that is reliable and lawful, both domestically and internationally, will prevent unforeseen issues with the admission of evidence, the confrontation of witnesses, and the validity of verdicts from arising. Because these trials have already been highly scrutinized by national leaders, legal scholars and the press, relying on the system of courts-martial would provide stability in the chaos involved in finding and bringing terrorists to justice.

Section II of this Note will summarize important personnel positions on the military commissions. Section III will compare the use of classified evidence in American courts with the proposed use of secret evidence in the military commissions. Section IV will discuss the Commission Order barriers to confrontation, including provisions admitting testimonial, hearsay evidence and expressly allowing anonymous witnesses to testify. Section V will discuss the proposed

27. See Commission Order, *supra* note 8, § 5(a), (b), (d)-(i).

use of character evidence against the accused without balancing safeguards for irrelevant and overly prejudicial evidence. Section VI will suggest reform that could increase the procedural fairness of the current military commissions while preserving the Bush Administration's national security concerns. Section VII will discuss alternate forums for the detainee cases and alternate options for the Bush Administration. Section VIII will conclude that it is in the best interest of the Bush Administration and the U.S. to adopt the court-martial proceeding to quell public criticism of the military commissions, take the high ground from the enemy and to demonstrate the America's commitment to the rule of law.

II. Military Commission Personnel

In order to understand the provisions and intricacies of the proposed military commissions, it is useful to examine some of the important personnel positions. President Bush sits atop the military commission structure, granting jurisdiction to the commissions over individuals subject to his Military Order.²⁸ Secretary Rumsfeld, deriving authority from the Military Order, promulgated the "rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures."²⁹ In addition, the Commission Order grants the Secretary the power to order commencement of a commission, pick its members and officers, and to designate his power over the detainees to another person.³⁰ In Military Commission Order No. 5, Secretary Rumsfeld chose John D. Altenburg, Jr., as the "Appointing Authority" and granted him extensive power over commission procedure and personnel.³¹

According to the Commission Order, the Appointing Authority chooses commission personnel, including Presiding Officers, Members, a Chief Prosecutor, and Chief Defense Counsel.³²

28. Military Order, *supra* note 1, § 2(a).

29. *Id.* § 4(c).

30. The Commission Order states: "In accordance with the President's Military Order, the Secretary of Defense or a designee ('Appointing Authority') may issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials." Commission Order, *supra* note 8, § 2.

31. See Dep't of Def., Military Commission Order No. 5, Designation of Deputy Secretary of Defense as Appointing Authority (Mar. 15, 2004). Thus, as a procedural matter, President Bush declares which individuals are subject to the order, while Secretary Rumsfeld and Altenburg can order the commencement of the commission and choose commission personnel.

32. See Commission Order, *supra* note 8, § 4. The Appointing Authority also chooses other personnel of commissions such as reporters, interpreters, security personnel,

Commission Members serve a jury-like function of determining the guilt of the accused in a military commission.³³ Each Member must be an officer in the U.S. Armed Forces.³⁴ The Appointing Authority must, at his discretion, choose at least three and no more than seven members for each commission.³⁵ The Appointing Authority must also designate a Presiding Officer, whom must be a judge-advocate of any of the Armed Forces, to preside over each commission.³⁶ The primary duties of the Presiding Officer include admitting and excluding evidence at trial, regulating commission attorneys, ensuring expeditious conduct of the trial, and certifying all interlocutory questions for the Appointing Authority.³⁷ The Presiding Officer supervises commission personnel in a quasi-judicial role during the proceeding.³⁸

In addition, the Appointing Authority must choose a Chief Prosecutor and Chief Defense Counsel to oversee the prosecution and defense of all commissions.³⁹ The Chief Prosecutor must be a judge advocate and must designate one or more judge advocates as Detailed Prosecutors to each commission.⁴⁰ Similarly, the Chief Defense Counsel must designate Detailed Defense Counsel for each commission.⁴¹ The accused receives no funding toward civilian attorneys, designated by the Commission Order as Civilian Defense Counsel, and any civilian counsel procured must pass "Secret" security clearance.⁴²

bailiffs, and clerks. *Id.*

33. *Id.* § 5(c).

34. *Id.* § 4(a)(3).

35. *Id.* § 4.

36. *Id.* § 4(a)(4). Judge Advocates are military lawyer-officers who work in all areas of law including prosecuting and defending trials by courts-martial, advising commanders of the laws of war, and general military business.

37. *Id.* § 4(a)(5). All issue certification is at the discretion of the Presiding Officer.

38. Commission Order, *supra* note 8, § 4(a)(5).

39. *Id.* §§ 4(b)(1), (c)(1).

40. *Id.* §§ 4(b)(1), (c)(1). Prosecutors must be either judge advocates or special trial counsel of the Department of Justice made available by the Attorney General of the United States. *Id.* § 4(b)(2).

41. *Id.* § 4(c)(2).

42. *Id.* § 4(c)(3)(a), (b).

III. Secret Evidence in the Military Commissions

A. Protected Information and Closure of Proceedings

In American courts, the government generally has the power to assert a privilege for military and state secrets.⁴³ Unlike absolute communications privileges such as the attorney-client privilege, the topical privileges for military and state secrets must be justified instrumentally.⁴⁴ The relevant inquiry is whether at the time of request for the information, the government has an essential secrecy interest in the information it seeks to repress.⁴⁵ If the government meets its burden, then it may withhold the information. The government may do so by making a showing that the subject matter of the information in question constitutes a military or state secret, that the government has maintained its secrecy to date, and public release of such information would have grave consequences for national security.⁴⁶ Examples of “military” secrets are specific combat operations, new weapons designs, and knowledge of enemy plans.⁴⁷ The “state” secrets privilege is much more nebulous and lends itself to abuse by the executive branch.⁴⁸ In fact, the Supreme Court has no definitive precedent on the issue.⁴⁹ As a safeguard to the opponent, a trial court can probe the government’s conduct between the time it acquired the information and the time of the request to determine its ruling.⁵⁰

Commission Order provisions aimed at limiting the admissibility of secure information make it likely that secret evidence will be used in the commissions.⁵¹ The Commission Order provides that the Presiding Officer may issue protective orders over certain information including:

“(i) information classified or classifiable . . . (ii) information protected by law or rule from unauthorized disclosure; (iii)

43. EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 8.1 (2002).

44. *Id.*

45. *Id.*

46. IMWINKELRIED, *supra* note 43, § 8.2.

47. James Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875, 884 (1966).

48. IMWINKELRIED, *supra* note 43, § 8.3.

49. *Id.*

50. CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5722 (1992).

51. *See* Commission Order, *supra* note 8, §§ 6(d)(2)(i), (iv).

information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses; (iv) information concerning intelligence and law enforcement sources, methods, or activities; or (v) information concerning other national security interests. . . .”⁵²

The methods of protecting evidence include: (1) deleting specific items of protected information from documents available to the accused; (2) substituting a portion or summary of the information for such protected information; and/or (3) substituting a statement of facts for the protected information.⁵³ In addition, the Presiding Officer may close any proceeding to the accused for the above reasons. None of this protected information can be admitted into evidence if not presented to Detailed Defense Counsel.⁵⁴ However, if the protected information is not shown to Civilian Defense Counsel or, more importantly, the accused, it can still be entered against the accused with the approval of the Presiding Officer and the Chief Prosecutor.⁵⁵

The exclusion of the accused from certain proceedings and from exposure to certain evidence constitutes a secret evidence provision.⁵⁶ Detailed Defense Counsel will be allowed to represent the accused in proceedings where protected evidence will be presented to Commission Members to weigh towards guilt to the extent possible without the assistance of the accused in the proceeding.⁵⁷ The accused will suffer a tremendous disadvantage by not knowing key evidence against him because Detailed Defense Counsel is sworn to secrecy on the information received in closed proceedings and protected information.⁵⁸ The accused is unable to explain himself to Detailed Defense Counsel and assist in his own defense.⁵⁹ On the one hand, Detailed Defense Counsel is abreast of all the evidence against her client. On the other hand, she cannot efficiently use the evidence by asking her client questions pertaining to the evidence. Although the evidence is not completely secret by definition, it seems to be creating a similar effect. Furthermore, this process could lead to confusion and

52. *Id.* § 6(d)(5)(i).

53. *Id.*

54. *Id.*

55. *Id.* § 9.6(d)(5)(ii)

56. *Id.* § 9.6(b)(3).

57. Commission Order, *supra* note 8, § 6(b)(3).

58. *Id.*

59. *See id.*

waste of time by both sides.

B. Military and State Secrets

The provisions restricting the disclosure of evidence invoke the military and state secrets privilege directly in the Commission Order.⁶⁰ In civilian or military courts, if the judge is moved by the government's showing and decides to allow the government to assert one of these privileges, it is absolute.⁶¹ However, American courts have almost unanimously held that in criminal trials the government must either disclose the information to the accused or dismiss the charges to which the information relates.⁶² Congress altered this rule in the Classified Information Procedures Act in favor of a more deferential position that allows the government to substitute statements of relevant facts or summaries of the classified information.⁶³ Thus, in American courts, evidence must be divulged to the accused in one form or another or the charges emanating from such evidence would be dismissed.

The Commission Order allows the type of evidence that is admissible under CIPA – declassified summaries of evidence or statements of relevant facts – but also allows secret evidence. The prosecution is given the dual advantage of being able to assert the state secrets privilege to keep sensitive information from the accused and admit the privileged evidence against the accused. Under CIPA, the prosecution can use summaries of evidence when the trial judge finds that the defense can adequately mount a defense to such evidence, but never allows the information to be used against the accused without knowledge.⁶⁴ Indeed, in the federal trial of one of the men accused of bombing the World Trade Center in 1993, the accused was given “declassified summaries of the accusations against him.”⁶⁵ The trial judge can also strike testimony and dismiss charges if the government loses the motion to use summary evidence and will not fully disclose to the defense.⁶⁶

60. *Id.* § 6(b).

61. IMWINKELRIED, *supra* note 43, § 8.5.1

62. *Id.*

63. *See* Classified Information Procedures Act, 10 U.S.C. § 435 (2005) [hereinafter CIPA].

64. IMWINKELRIED, *supra* note 43, § 8.5.2

65. Elizabeth Amon, A Battle against Secret Evidence, Nat'l L.J., Dec. 25, 2000, at A12.

66. *Id.*

There is no similar provision in the Commission Order giving the Presiding Officer power to dismiss charges if he or she decides to withhold evidence from the accused. The only standard for a Presiding Officer to make the decision to allow certain evidence to be released is “to the extent consistent with national security, law enforcement interests and applicable law.”⁶⁷ This standard is extremely vague and broad. It also raises the question of what “applicable law” means in a closed system of justice. Without the benefit of the law of Military and State Secrets privileges nor rule interpretations on Commission Order provisions, a Presiding Officer must make these important decisions without proper guidance on his or her boundaries, which could result in the withholding of too much evidence or too little evidence from the accused.

V. Military Commission Barriers to Confrontation of Witnesses

A. Alternative Forms of Testimony

The Sixth Amendment to the Constitution provides in pertinent part, that:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”⁶⁸

Since the Amendment was ratified, common law judges and lawyers have regarded the opportunity of cross-examination of all witnesses as an essential safeguard of the accuracy and completeness of testimony.⁶⁹ Thus, in addition to the right to compel and be confronted with witnesses, the Supreme Court has construed the Sixth Amendment to guarantee the right to cross-examine adverse witnesses in American courts.⁷⁰ As a policy matter, the right to confront witnesses gives the defense an opportunity to attack the credibility of the prosecution’s witnesses and the jury an opportunity to test the veracity of the statements they make in court. The hearsay rule protects the right to confront witnesses, forbidding out of court statements, unless there is an exception that would allow the evidence

67. Commission Order, *supra* note 8, § 6(b).

68. U.S. CONST. amend. VI.

69. MCCORMICK, EVIDENCE, § 19 (5th ed. 1999).

70. MCCORMICK, *supra* note 69, § 19

to be used for its truth.⁷¹

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court enhanced Confrontation Clause protection of the accused, holding that all testimonial evidence must face cross-examination in order to be admissible against the accused at trial.⁷² *Crawford* set forth a bright-line rule that construes the Confrontation Clause to protect the rights of the accused from testimonial evidence not tested as to veracity. This rule extends to police interrogations, grand jury testimony, and other testimonial devices.⁷³ The *Crawford* Court reasoned that testimony that was not cross-examined did not give the accused an adequate opportunity to confront his accusers, which the Constitution demands.⁷⁴ The Court reasoned further that the “principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”⁷⁵

The Commission Order provision allowing testimony by telephone, audiovisual or “other means” runs counter to the Supreme Court reasoning in *Crawford*.⁷⁶ First, allowing testimony by telephone makes it difficult for commission Members to adequately assess the veracity of statements made by witnesses. From counsel’s standpoint, it could be difficult or impossible for follow-up questions to be pursued by the parties. For instance, if the rules are construed to mean these types of testimony will not be cross-examined or will be pre-recorded, then neither party will have adequate opportunity to impeach testimony. In addition, the “other means” prong leaves a question mark on what other forms of testimony might be used.⁷⁷ The Commission Order does not clarify what forms of testimony this provision was intended to cover.⁷⁸ These rules will make it difficult for both sides to combat adverse testimony and to confront witnesses and evidence on both sides.

As a safeguard to the problems resulting from alternative forms of testimony, the Commission Order states that the Members must consider the ability to test the veracity of the testimony in giving the

71. See FED. R. EVID. 801, 802.

72. *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004).

73. *Id.* at 68.

74. *Id.* at 68-69.

75. *Id.* at 50.

76. *Id.*

77. Commission Order, *supra* note 8, § 6(d)(2)(iv).

78. *Id.*

evidence its weight.⁷⁹ However, a Member could find it extremely difficult to ignore compelling evidence in some unusual form that cannot be cross-examined. Asking Members to weigh evidence when its veracity cannot be tested places them in a difficult position. These problems may lead to convictions and acquittals supported by unreliable evidence.

B. Anonymous Witnesses

Both sides will face tremendous difficulty confronting witnesses testifying without knowing who the witnesses are. Anonymous witnesses present a problem the Confrontation Clause was designed to solve. That is, the Confrontation Clause protects the accused from the use of anonymous witnesses by limiting the admission of hearsay evidence at trial and by allowing for extensive cross-examination.⁸⁰ Non-disclosure of witness identity severely limits the breadth of cross-examination and the ability of the accused to test the veracity of the witness' statements.⁸¹ These principles should apply to any set of trial rules or criminal process because the underlying rationale as to why we have these procedures is the same in any system: to guarantee the trustworthiness and reliability of testimony.

American courts have rarely allowed even minor exercises of anonymity.⁸² In *Alford v. United States*, 282 U.S. 687, 692 (1931), the Supreme Court held that disclosure of a witness' identity and address were unequivocally required in a criminal trial, reasoning that "prejudice ensues from a denial of opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test."⁸³ Using dicta in *Smith v. Illinois*, some lower courts have loosened this requirement and refined it to allow witness anonymity in situations where the prosecution can show actual threat to the witness exists and fully discloses such threats to the trial judge.⁸⁴ In these courts, the trial judge must weigh the value of disclosure with witness safety.⁸⁵ Other trial courts remain fastened to the holding of *Alford*.⁸⁶

79. *Id.* § 6.

80. See Nora V. Demleitner, *Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?*, 46 AM. J. COMP. L. 641, 645 (1998).

81. *Id.* at 654-55.

82. *Id.* at 649.

83. *Alford v. United States*, 282 U.S. 687, 692 (1931).

84. Demleitner, *supra* note 80, at 652.

85. Commission Order, *supra* note 8, § 6

86. *Id.*

The Commission Order provides for the use of pseudonyms for testimony in order to protect witnesses and evidence.⁸⁷ Like secret evidence, however, anonymous witnesses cannot be adequately tested for veracity. The accused will not be able to assist counsel with context specific responses to adverse testimony. Similarly, the prosecution would have trouble finding out information about anonymous defense witnesses that may suffer some bias. In both cases, inquiries into the witness' true motivation for testifying would be limited.⁸⁸ Investigation into the background of the witness will be severely limited as well.⁸⁹ This includes finding facts like the witness' connection to the accused, his or her criminal record and affiliations. Thus, both attorneys would be limited in asking the witness questions pertaining to past history, his or her reasons for testifying, and other relevant questions that cut toward the veracity of his testimony.

VI. Evidence in the Military Commissions

A. Character Evidence

Under the Federal Rules of Evidence, trial judges admit only evidence that makes any "fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁹⁰ This type of evidence is considered relevant and generally admissible in court.⁹¹ However, not all relevant evidence is admissible.⁹² The Federal Rules of Evidence grant trial judges discretion to exclude even relevant evidence when its probative value is outweighed by the probability that the jury will use it prejudicially against the defendant, that its use will confuse the jury, or its use will waste an inordinate amount time.⁹³ The risks sought to be avoided by creating this balancing approach to relevance in the Federal Rules range from "inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other."⁹⁴ In addition to the balancing approach, there are also a number of specific rules of exclusion.

87. *Id.* § 6(d)(2)(iv).

88. Demleitner, *supra* note 80, at 652.

89. *Id.*

90. FED. R. EVID. 401.

91. *See* FED. R. EVID. 402.

92. *See* FED. R. EVID. 403.

93. *Id.*

94. FED. R. EVID. 403 advisory committee's note.

One time-honored exclusion is that of character evidence. Character evidence, generally, is not admissible to prove "action in conformity therewith."⁹⁵ As the following excerpt illustrates, there would be a great danger of injustice in trying the accused for evidence of his character and not evidence bearing more directly on the charges:

if the prosecution were allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and, as has been witnessed elsewhere, upon a trial for murder you might begin by shewing that when a boy at school the prisoner robbed an orchard, and so on through his whole life; and the result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted on that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity; because, although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice in the other ninety-nine.⁹⁶

Indeed, it would be difficult for jurors to objectively measure the guilt of the accused for the specific crime charged if courts could admit character evidence. Summing up this principle, the California Law Revision Commission suggests that character evidence "tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."⁹⁷

In spite of the foregoing pitfalls to the admission of character evidence, the Federal Rules of Evidence provide some limited exceptions to its exclusion.⁹⁸ The prosecution can enter evidence of the bad character of the accused or the good character of the alleged victim if the accused first enters evidence of his good character or the bad character of the alleged victim.⁹⁹ This allows the prosecution to rebut claims of self-defense and the victim's propensity for violence,

95. FED. R. EVID. 404(a).

96. WIGMORE, EVIDENCE § 57, at 1181 (quoting *R. v. Rowton*, Leigh & C., 169 Eng. Rep. 1497, 1506 (Cr. Cas. Res. 1865)).

97. FED. R. EVID. 404 advisory committee's note (quoting Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 657-658 (1964)).

98. See FED. R. EVID. 404.

99. FED. R. EVID. 404(a)(1), (2).

ensuring that such evidence is fairly viewed by the jury. In addition, the prosecution can enter evidence of other crimes, wrongs, or acts of the defendant to prove other purposes such as “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”¹⁰⁰ This allows the prosecution to use what generally is character evidence by definition to prove other elements of the crime charged so long as the trial judge finds that the probative value of such evidence outweighs its prejudicial effect on the defendant.¹⁰¹

The Commission Order, following the example of the trials of seven Nazi saboteurs caught on American soil during World War II,¹⁰² creates a much lower standard for the admission of evidence than the Federal Rules.¹⁰³ A Presiding Officer must admit evidence, regardless of prejudice or confusion, if he or she believes the evidence “would have probative value to a reasonable person.”¹⁰⁴ This test for admissibility removes the balancing approach to relevance, forcing the Presiding Officer to admit even highly prejudicial evidence.¹⁰⁵ With no counterweight to relevance like prejudice to the accused, jury confusion, or waste of time, it is difficult for a Presiding Officer to exclude any evidence in a commission because reasonable people would probably find many prejudicial forms of evidence probative.

The Commission Order's general provision to admit evidence that would have probative value to a reasonable person would expressly allow the admission of character evidence. Unlike the Federal and Military Rules of Evidence, which provide prosecutors with leeway to enter character evidence that illustrates other important aspects of the prosecution's case or to impeach defense testimony, the Commission Order simply allows all relevant character evidence into the trial.¹⁰⁶ Thus, the accused has no safeguard against character evidence entered by the prosecution except cross-examination. Since the Commission Order allows written statements and audiovisual testimony, cross-examination may frequently be impossible. Furthermore, in a trial governed by the Federal Rules of Evidence, the jury would rarely examine such character evidence and

100. FED. R. EVID. 404(b).

101. FED. R. EVID. 404(b) advisory committee's note.

102. See *Ex Parte Quirin*, 317 U.S. 1 (1942), where the Supreme Court upheld trials by military commission.

103. See Commission Order, *supra* note 8, § 6(d)(1).

104. *Id.*

105. See FED. R. EVID. 403.

106. See FED. R. EVID. 404(b) advisory committee's note.

certainly could not use the evidence for its forbidden purpose, that is, to weigh toward the guilt of the accused. Here, commission Members would use character evidence to weigh toward the guilt of the accused.

Attorney General John Ashcroft's argument that "we are at war" and "foreign terrorists who commit war crimes against the United States . . . are not entitled to the protections of the American Constitution" does not justify such striking departures from relevance determinations for several reasons.¹⁰⁷ First, the military necessity argument does not apply here. The U.S. Government has no pressing need to create procedurally thin trials like those of *Ex Parte Quirin* during World War II.¹⁰⁸ Having less structured rules of evidence could actually make trials longer because both sides will use such a wide range of evidence that the use of *ex parte* conferences will increase in order to justify safety and protection measures. In addition, more defense motions challenging the validity of rules such as the omission of a character evidence provision will increase the length of the trials. These motions will be difficult to decide without guiding standards that centuries of law have produced.

B. Balancing Approach, Character Evidence Rule and Member Power to Hear Evidence

Implementing a balancing approach to relevance in the Commission Order would provide a Presiding Officer an opportunity to balance the prejudicial effects of the evidence against its probative value.¹⁰⁹ No character evidence or other specific form of prejudicial evidence would be expressly excluded by the new provision.¹¹⁰ However, a Presiding Officer could exclude evidence that is too prejudicial, confusing, or time consuming.¹¹¹ The probative value to a reasonable person standard of admissibility would still present the threshold question, but would have one important counterweight to filter prejudicial, unneeded evidence.

Another measure that could improve the integrity of the commissions is imposing a basic character evidence rule and loosening it to allow character evidence in necessity situations. In

107. Robin Toner & Neil A. Lewis, *White House Push on Security Steps Bypasses Congress*, N.Y. TIMES, Nov. 15, 2001, at A1.

108. See generally, *Quirin*, 317 U.S. 1.

109. See generally, FED. R. EVID. 403.

110. See *id.*

111. See *id.*

other words, character evidence would generally be excluded unless the prosecution made a compelling showing that it is necessary. The rules for prosecution of sex crimes in the United States provide an example where “evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible.”¹¹² Under Federal Rules of Evidence 413 through 415, character evidence tending to show the accused’s past history as a sex criminal is not excluded. Thus, the character evidence ban is lifted, but the judge can still exclude highly prejudicial evidence under the balancing approach to relevance.¹¹³

According to Section 6(d)(1) of the Commission Order, Members can request a vote overriding the decision of the Presiding Officer to exclude evidence.¹¹⁴ If a majority of the Members vote to admit, then the evidence is admitted whether or not the Presiding Officer agrees.¹¹⁵ The Commission Order implies that all Members will be present at hearings governing the admission of evidence.¹¹⁶ This would mean that Members would have to ignore excluded prejudicial evidence when deciding guilt of the accused. This would be difficult for any person to do. For the same reasons the American courts keep prejudicial evidence from juries when excluding it, evidentiary decisions should always be made outside the presence of the commission Members.

VII. Reforming the Military Commissions

A. Reforming the Current Commission Order

The ambiguity of the Commission Order plagues many of its provisions. Unlike the Federal Rules of Evidence and American case precedent, the Commission Order provisions lack legislative intent and background information as to rationale for the provisions and their expected use. Both prosecutors and defense counsel possess tremendous leeway to enter prejudicial evidence and appeal to safety and security concerns during trial.¹¹⁷ The Commission Order does not limit or abridge this grant of power except through the discretion of

112. FED. R. EVID. 413(a).

113. *See generally, id.*

114. Commission Order, *supra* note 8, § 6(d)(1).

115. *Id.* § 6(d)(1).

116. *Id.*

117. *See id.* § 6(d)(2).

the Presiding Officer.¹¹⁸ However, the Commission Order fails to provide important standards for the Presiding Officer to use in making discretionary decisions. The task of admitting evidence becomes amorphous when there are unlimited types of evidence and unlimited substitutions for testimony without a framework of guiding principles.¹¹⁹ At the same time, Presiding Officers lack discretion to exclude prejudicial evidence.¹²⁰ The only test for admission is the probative value to reasonable person standard, which is subject to many interpretations.¹²¹ Finally, the Members of a commission can overrule nearly any evidentiary determination of a Presiding Officer, thereby undermining his or her authority and control over the case.

Setting more specific standards for when anonymous witnesses can be used would provide the Presiding Officer with guidelines to look to when deciding these issues. Presumably it would be highly difficult to balance the concerns set forth for safety and security of information and the need for confrontation of adverse witnesses. One possible standard could be that witnesses can remain anonymous when in the opinion of the Presiding Officer the witness's safety cannot be preserved or national security would be irreparably injured. This policy would provide the Presiding Officer a specific standard to apply in hearings regarding anonymous witnesses. These guidelines would create more consistent results where extremely high-risk witnesses remain anonymous while all others may be cross-examined.

B. Alternate Forums and Options for Trying Detainees

One alternate option is to hold the trials of suspected terrorists in the U.S. District Courts. District Court trials would provide American constitutional safeguards for the accused, but would also lack many of the national security protections sought by the Bush Administration. Additionally, the political climate and nature of the charges may weigh in favor of keeping these trials out of American courts for many reasons, including safety of courts and participants, protection of military secrets and juror bias. Furthermore, al Qaida detainees and their compatriots are not American citizens. For these reasons, such trials do not present a viable option.

Another solution is to modify the current commissions to include important protections for the accused without fully applying the rules of American courts. This solution is probably the most acceptable to

118. *See generally id.*

119. *Id.* § 6(d)(2).

120. Commission Order, *supra* note 8, § 6(d)(2).

121. *Id.* § 6(d)(1).

the Bush Administration, whose primary concern is national security. The Bush Administration could still maintain the commissions with their attendant security and information-gathering capabilities, but the commissions would have more legitimacy because they would be based on time-tested rules and procedures respected around the world for fairness. This solution could include a general prohibition of the use of character evidence in detainee trials without a compelling necessity. In addition, providing the Presiding Officer more standards to use in making discretionary decisions would limit the admission of untested evidence. Furthermore, a specific standard for when secret evidence and anonymous witnesses can be used would increase the procedural integrity of the trials.

The most effective solution for the Bush Administration is to adopt the courts-martial trial from the military courts. This solution would quell critics calling for international tribunals, which have major problems of their own, and media-hyped federal district court trials for the detainees. The Bush Administration could argue that it is providing more than what is required by international law, the 1949 Geneva Convention, since the detainees are arguably not prisoners-of-war. Furthermore, the Government could argue that although it cannot risk an international tribunal and its possible security repercussions, it has provided the enemy a time-honored "full and fair" trial.¹²² This option would demonstrate the Bush Administration's commitment to the rule of law in the face of inhumane and irrational terrorist behavior.

VIII. Conclusion

Over half a century after the trial of seven Nazi saboteurs in Washington, D.C., the Bush Administration created military commissions to try those responsible for the terror attacks. Though legal standards of justice have changed, the standards proposed for the commissions do not comport with some of the most important American standards for the admission of evidence and the confrontation of witnesses in trials. As a world leader in the administration of justice and the preservation of rights, the United States cannot afford to set this precedent.

American courts offer American citizens extensive safeguards in an attempt to ensure that innocent people are exculpated. Inevitably, some guilty of heinous crimes will walk free. And some innocent

122. Commission Order, *supra* note 8, § 6(b)(1).

people are unjustly incarcerated. However, what makes the American system of criminal justice exemplary and worthy of emulation is that it offers the same protections and procedures to each individual charged with a crime. Thus, to offer the detainees legal standards and process commensurate with the notions of justice that have made this country great would not weaken our mission to ferret out terrorism, but strengthen it. Countries would be less likely to denounce our treatment of these individuals and more likely to assist in their capture abroad. Extradition of terror suspects would occur more easily. Verdicts from these courts would be respected and celebrated rather than derided. The alternative, to conduct trials reminiscent of a past era, deals our reverence for the rule of law a major defeat.