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# Military Justice as Justice: Fitting Confrontation Clause Jurisprudence into Military Commissions

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# Military Justice as Justice: Fitting Confrontation Clause Jurisprudence into Military Commissions

Christina M. Frohock*

## ABSTRACT

The Guantánamo prosecution of Abd al-Rahim al-Nashiri, the alleged mastermind behind the deadly *USS Cole* bombing, highlights an unresolved issue in military commissions: whether the Confrontation Clause of the Sixth Amendment to the Constitution applies to bar hearsay statements of unavailable witnesses. While al-Nashiri's counsel recently moved for the military judge to take judicial notice that the Confrontation Clause applies, it is worth considering that the question may be framed differently. Rather than ask whether the Confrontation Clause applies in a military commission, we may ask whether a "testimonial statement"—the only kind of hearsay evidence that triggers the Confrontation Clause—is a concept consistent with wartime tribunals. This Article proposes that a testimonial statement is a uniquely civilian concept, situating military commissions outside the scope of the Confrontation Clause. The military commission trying al-Nashiri nonetheless preserves the constitutional value of reliability while offering different procedural protections than are offered in federal courts, such as admitting hearsay statements from witnesses made unavailable by war.

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## I. Introduction

The prosecution of Abd al-Rahim al-Nashiri, the alleged mastermind behind the deadly *USS Cole* bombing, is underway in a secure, air-conditioned courtroom at the U.S. Naval Base in Guantánamo Bay, Cuba. Withstanding both the Antilles heat and the media glare, this capital trial is testing a frequent criticism of Guantánamo military commissions. The military commissions system has been criticized for abandoning constitutional values, leaving detainees to languish for years and trial defendants to fend for themselves in a parallel judicial system without procedural protections afforded in federal courts.[1] Al-Nashiri recently moved for the court to take judicial notice that the Confrontation Clause of the Sixth Amendment to the Constitution applies to his upcoming trial. The question is significant, the answer is unclear, and the precedent is compelling in military commissions going forward.

Defense counsel's pre-trial motion posed the question: Does the Confrontation Clause apply in a military commission, specifically to future issues involving hearsay statements of unavailable witnesses?[2] The military

[1] *See, e.g.*, Jane Sutton, *Defendant Excluded from Secret Session in Guantánamo Court*, REUTERS (June 14, 2013, 4:35 PM), http://www.reuters.com/article/2013/06/14/us-usa-guantanamo-idUSBRE95D0YZ20130614 (reporting that al-Nashiri's lead counsel, Rick Kammen, "wears tiny kangaroo lapel pins to illustrate his belief that the Guantánamo tribunals are a kangaroo court" and quoting Kammen that "[r]eal justice occurs in the sunshine, not in secret"); Marjorie Cohn, *Guantánamo Prisoner Al-Nashiri's Case Demonstrates Unfairness of Military Commissions*, TRUTHOUT (June 18, 2013, 1:13 PM), http://truth-out.org/news/item/17058-guantanamo-prisoner-al-nashiris-case-demonstrates-unfairness-of-military-commissions?tmpl=component&print=1 (identifying "the basic unfairness of the military commissions for adjudicating criminal cases" and noting that "[p]eople can be put to death after a trial that affords a reduced level of due process").

[2] The motion sought the following relief: "The defense requests that the Commission hold that the Confrontation Clause . . . applies to this capital Military Commission . . . [and] that all

judge overseeing al-Nashiri's trial denied the motion as premature, leaving the answer for another day.[3] For now, it is worth considering that the question may be framed differently. This Article presents a different formulation of the Confrontation Clause issue raised in the *al-Nashiri* case. Rather than ask whether the Confrontation Clause applies in a military commission, we may ask whether a "testimonial statement"—the only kind of hearsay evidence that triggers the Confrontation Clause—is a concept consistent with military commissions. If it is not, then a military commission trial may be constitutional even under a different procedural regime.

This Article rejects the false choice of applying or abandoning a constitutional clause, proposing instead that a testimonial statement is a uniquely civilian concept, and, thus, military commissions are outside the scope of the Confrontation Clause. The military commission trying al-Nashiri preserves Sixth Amendment values even as it offers different procedural protections than are offered in federal courts, such as admitting hearsay statements from witnesses made unavailable by war.

The Article first describes procedural protections for defendants in the United States' system of military commissions, focusing on *al-Nashiri* as a case study and tracking hearsay rules through three iterations of the military commissions system since September 11, 2001. Next, the Article examines the Supreme Court's concepts of testimonial statements and nontestimonial statements under the Confrontation Clause in *Crawford v. Washington* and subsequent decisions. The Article then argues that nontestimonial statements are the only kind of hearsay evidence at issue in military commissions. Finally, returning to the *al-Nashiri* case, the Article argues that the military commissions system preserves the constitutional value of reliability in the distinctive setting of a wartime tribunal.

## II. Procedural Protections in Military Commissions

### A. *Charges Against Al-Nashiri*

Abd al-Rahim al-Nashiri was born in Mecca, Saudi Arabia, in 1965 to Yemeni parents.[4] He holds both Saudi and Yemeni citizenship.[5] Al-Nashiri

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future issues involving Sixth Amendment confrontation rights will be determined on the basis that the Sixth Amendment . . . applies to this capital Military Commission." Defendant's Motion to Take Judicial Notice at 1, United States v. Al-Nashiri, AE 109 (Military Comm'n Trial Judiciary Sept. 12, 2012), *available at* http://www.mc.mil/Portals/0/pdfs/alnashiriz/Al%20Nashiri%20II%20(AE109).pdf.

[3] Order on Defense Motion to Take Judicial Notice at 2–3, United States v. Al-Nashiri, AE 109C (Military Comm'n Trial Judiciary Aug. 22, 2013) (denying motion both as an improper request for an advisory opinion and on the basis of constitutional avoidance).

[4] Patrick E. Tyler, *Threats and Responses: Terror Trail; Qaeda Suspect Was Taking Flight*

first encountered Osama bin Laden in the mid-1990s, and their relationship developed into personal meetings, instructions for attacks, and thousands of dollars in money transfers.[6] In 1998, after learning of his cousin's suicide bombing of the United States embassy in Nairobi, Kenya, al-Nashiri joined al Qaeda.[7] The United States considers al-Nashiri, now detained and facing trial in Guantánamo, to be "one of al-Qaida's most skilled, capable, and prolific operational coordinators" and "a ruthless operator."[8]

According to his detainee file, al-Nashiri planned and carried out several high-profile attacks on United States and other western targets. On January 3, 2000, following directions from bin Laden, he plotted to detonate explosives against the *USS The Sullivans* as it refueled in the Yemeni Port of Aden, the entry to a major waterway for oil shipments from the Middle East to Europe.[9] The attempted bombing failed.[10] A small boat filled with explosives, which was intended to hit the ship, capsized and sank soon after launching.[11] Despite this failure, plans to strike a United States naval ship continued.

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*Training Last Month*, N.Y. TIMES, Dec. 23, 2002, at A17, *available at* 2002 WLNR 4428704.

[5] Memorandum from Dep't of Def. for Commander, United States S. Command, Subject: Combatant Status Review Tribunal Input and Recommendation for Continued Detention Under DoD Control (CD) for Guantanamo Detainee, ISN: US9SA-010015DP (S), at 1 (Dec. 8, 2006) [hereinafter Status Review Tribunal Memorandum], *available at* http://projects.nytimes.com/guantanamo/detainees/10015-abd-al-rahim-al-nashiri (last visited Mar. 10, 2014) ("Citizenship: Yemen"); *The Guantánamo Docket: Abd al Rahim al Nashiri*, N.Y. TIMES, http://projects.nytimes.com/guantanamo/detainees/10015-abd-al-rahim-al-nashiri (last visited Mar. 10, 2014) ("Citizen of Saudi Arabia").

[6] Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10015 at 19, 26, United States v. Al-Nashiri (March 14, 2007) [hereinafter Status Review Hearing Transcript], *available at* http://www.defense.gov/news/transcript_isn10015.pdf.

[7] *Id.* at 6. At the time of al-Nashiri's capture in 2002, the United States government viewed his al Qaeda membership as pre-dating, and even influencing, the Kenyan attack. *See* Philip Sheldon, *Threats and Responses: Terror Network; A Major Suspect in Qaeda Attacks Is in U.S. Custody*, N.Y. TIMES, Nov. 22, 2002, at A1, *available at* 2002 WLNR 4051180 ("Another American official said Mr. Nashiri was so dedicated to Al Qaeda's cause that he recruited a cousin to be one of the suicide bombers in the attack on the American Embassy in Nairobi, Kenya, in August 1998.").

[8] Status Review Tribunal Memorandum, *supra* note 5 ("Detainee is one of the highest-ranking, most skilled, and dangerous al-Qaida operatives captured to date."); Sheldon, *supra* note 7.

[9] Status Review Tribunal Memorandum, *supra* note 5, at 3; Press Release, Dep't of Defense, DOD Announces Charges Referred Against Detainee Al Nashiri (Sept. 28, 2011) [hereinafter Press Release, Dep't of Def. 1], *available at* http://www.defense.gov/release /release.aspx?re leaseid=14821; *see* Margaret Coker, *Warning Turns Focus to Yemen-Based al Qaeda Branch*, WALL STREET JOURNAL, Aug. 3, 2013, at A8.

[10] Status Review Tribunal Memorandum, *supra* note 5, at 3.

[11] *Id.*

The *USS Cole* became the next target, as bin Laden again supplied the idea for an attack.[12] Funding this operation himself, al-Nashiri bought a vehicle and explosives in Yemen, concealing the explosives in fishing coolers.[13] He instructed his operatives "to carry out an attack on the next US warship that entered the port" and then travelled to Afghanistan.[14] On October 12, 2000, a small boat filled with bombs approached the *USS Cole*.[15] The boat appeared to be a garbage barge, with two men dressed in civilian clothes at the helm.[16] The men gestured amiably to *USS Cole* crewmembers.[17] They then detonated the bombs.[18] The explosion killed seventeen sailors, wounded approximately forty sailors, and ripped a thirty-by-thirty-foot hole in the side of the ship.[19]

Almost exactly two years later, on October 6, 2002, al-Nashiri orchestrated an attack on the French civilian oil tanker *Merchant Vessel (M/V) Limburg* in the Gulf of Aden.[20] The explosion caused both loss of life and environmental damage, killing one crewmember and spilling approximately 90,000 barrels of oil into the Gulf.[21]

In late October 2002, soon after the *M/V Limburg* bombing, al-Nashiri was captured in the United Arab Emirates carrying several false passports with different aliases and from different countries.[22] He was placed in

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[12] *Id.*

[13] Memorandum from Dep't of Def. to Personal Representative, Subject: Summary of Evidence for Combatant Status Review Tribunal - Al Nashiri, Abd Al Rahim Hussein Mohammed 2 (Feb. 8, 2007) [hereinafter Al Nashiri Evidence Summary], *available at* http://www.defense.gov/news/ISN10015.pdf.

[14] Status Review Tribunal Memorandum, *supra* note 5, at 3.

[15] Status Review Hearing Transcript, *supra* note 6, at 6.

[16] Press Release, Dep't of Def., Charges Sworn Against Detainee Al-Nashiri (June 30, 2008) [hereinafter Press Release, Dep't of Defense 2], *available at* http://www.defense.gov/releases /release.aspx?releaseid=12031.

[17] *Id.*

[18] *Id.*

[19] Status Review Hearing Transcript, *supra* note 6, at 6; Press Release, Dep't of Defense 2, *supra* note 16; Press Release, Dep't of Defense 1, *supra* note 9; Press Release, Dep't of Def., DOD Announces Charges Sworn Against Detainee Nashiri (April 20, 2011) [hereinafter Press Release, Dep't of Defense 3]; Sheldon, *supra* note 7. In September 2004, a Yemeni court sentenced al-Nashiri to death in absentia for the *USS Cole* bombing. *See Abd al-Rahim al-Nashiri*, HUMAN RIGHTS WATCH (Oct. 26, 2002), http://www.hrw.org/news/2012/10/26/abd-al-rahim-al-nashiri.

[20] Al Nashiri Evidence Summary, *supra* note 13, at 2; Press Release, Dep't of Defense 1, *supra* note 9; Press Release, Dep't of Defense 3, *supra* note 19 .

[21] *New Charges Filed Against Suspect in U.S.S. Cole Bombing*, N.Y. TIMES, Apr. 21, 2011, at A8, *available at* 2011 WLNR 7760698; Press Release, Dep't of Defense 1, *supra* note 9; Press Release, Dep't of Defense 3, *supra* note 19.

[22] Status Review Tribunal Memorandum, *supra* note 5, at 6; Al Nashiri Evidence Summary,

United States custody and interrogated by the CIA until September 2006, when he was transferred to Guantánamo.[23] The Department of Defense then categorized al-Nashiri as an enemy combatant.[24]

During a hearing in Guantánamo to review his enemy combatant status, al-Nashiri proclaimed his innocence.[25] He is not a member of al Qaeda, but simply a fisherman who, like many young men, happens to travel and spend time in various countries including Yemen, the United Arab Emirates, Saudi Arabia, Dubai, Afghanistan, Pakistan, and Chechnya.[26] He did buy explosives, but only as a common practice for digging wells in Yemen.[27] He knows the individuals involved in the bombings of the *USS Cole* and the *M/V Limburg*, but solely as business associates in the fishing industry.[28] After all, he was in Afghanistan when those explosions occurred.[29] Osama bin Laden's money transfers paid for "personal expenses" and a "fishing project," not bombs: "I left the people and I have no idea what they did afterwards."[30] At one point he requested forged passports, but never received them.[31]

Most powerful among al-Nashiri's proclamations of innocence was his explanation for prior confessions. Al-Nashiri stated that he had been tortured by Americans "from the time I was arrested five years ago."[32] His

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*supra* note 13, at 2.

[23] Status Review Tribunal Memorandum, *supra* note 5, at 6; Al Nashiri Evidence Summary, *supra* note 13, at 2. The CIA destroyed videotapes of the interrogations. *See* Adam Liptak, *Detainee Says Torture Led to Confessions*, N.Y. TIMES, Mar. 31, 2007, at A10, *available at* 2007 WLNR 6102193 (reporting that al-Nashiri was held by the CIA in undisclosed locations until his transfer to Guantánamo); Mark Mazzetti, *U.S. Says C.I.A. Destroyed 92 Tapes of Interrogations*, N.Y. TIMES, Mar. 2, 2009, at A16, *available at* 2009 WLNR 4058714 (identifying Thailand as interrogation location).

[24] For al-Nashiri's combatant status review, the Department of Defense defined an enemy combatant as "an individual who was part of or supporting the Taliban or al Qaida [sic] forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." Al Nashiri Evidence Summary, *supra* note 13, at 1.

[25] Status Review Hearing Transcript, *supra* note 6, at 11–14.

[26] *Id.* at 11–12, 25, 27–28.

[27] *Id.* at 19.

[28] *Id.* at 13, 24.

[29] *Id.* at 31.

[30] *Id.* at 26, 31.

[31] Status Review Hearing Transcript, *supra* note 6, at 14.

[32] *Id.* at 15. Al-Nashiri's descriptions of the torture he endured are redacted on the hearing transcript. *Id.* at 16. *See also* Associated Press, *supra* note 21 ("Mr. Nashiri was captured in Dubai in November 2002 and flown to a C.I.A. prison in Afghanistan known as the Salt Pit before being moved to a clandestine C.I.A. facility in Thailand, where he was waterboarded

confessions after capture were a product of that torture rather than truth.[33] Less than a year after al-Nashiri's status review hearing, the CIA confirmed the fact of his mistreatment. Director General Michael V. Hayden admitted that three al Qaeda prisoners had been subjected to waterboarding, the interrogation method that replicates drowning.[34] One was al-Nashiri.[35]

In addition to accusations of bombing both the *USS Cole* and the *M/V Limburg* and attempting to bomb the *USS The Sullivans*, al-Nashiri allegedly played a pivotal role in planning numerous other terrorist attacks against United States interests on land and water.[36] For these alleged crimes, he will be tried by military commission in Guantánamo on charges of treachery, murder, attempted murder, terrorism, conspiracy, intentionally causing serious bodily injury, attacking civilians, attacking civilian objects, and hijacking a vessel.[37] Prosecutors seek the death penalty.

In a sense, al-Nashiri is fortunate. He has endured detention for over a decade, CIA interrogation, waterboarding, and two rounds of capital charges. Military officers first swore charges against al-Nashiri in 2008 under the Bush Administration, which charges were subsequently withdrawn.[38] Officers reswore charges in 2011 under the Obama

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twice. In December 2002, he was moved again to a C.I.A. prison in Poland and subjected to a series of interrogation techniques that included some not authorized by Justice Department guidelines.").

[33] Status Review Hearing Transcript, *supra* note 6, at 10, 15.

[34] Richard Esposito & Jason Ryan, *CIA Chief: We Waterboarded*, ABC NEWS (Feb. 5, 2008), http://abcnews.go.com/Blotter/TheLaw/story?id=4244423&page=1.

[35] *Id.*

[36] Charge Sheet at 3–5, U.S. v. Abd Al Rahim Hussayn Muhammad Al Nashiri (Sept. 15, 2011) [hereinafter Nashiri Charge Sheet 2011], *available at* http://media.miamiherald.com/smedia/2011/09/23/19/43/I6phN.So.56.pdf; Status Review Tribunal Memorandum, *supra* note 6, at 7 (stating that attacks included "a plot to sink a US warship or tanker in the Strait of Hormuz (SoH) intended to block the Strait; a plot using an explosives-filled airplane against western warship at Port Rashid, Dubai, United Arab Emirates (UAE); a plot to blow up the US Embassy in Sanaa, YM; maritime attacks in the Red Sea and off the coasts of al-Hudaydah and Aden, YM; and a disrupted maritime operation targeting US, United Kingdom (UK), and other NATO ships and submarines in the Strait of Gibraltar (SoG)").

[37] Nashiri Charge Sheet 2011, *supra* note 36, at 3–4; *see* Al-Nashiri v. MacDonald, No. 11-5907 RJB, 2012 WL 1642306, at *3 (W.D. Wash. May 10, 2012) (describing three events in Yemen as basis for charges).

[38] *See* Press Release, Dep't of Defense 2, *supra* note 16; *see* William Glaberson, *Guantánamo Detainee Faces War Crimes Charges in Attack on Destroyer*, N.Y. TIMES, July 1, 2008, at A15, *available at* 2008 WLNR 12317603; Charlie Savage, *U.S. Prepares to Lift Ban on Guantánamo Cases*, N.Y. TIMES, Jan. 20, 2011, at A1, *available at* 2011 WLNR 1184100 [hereinafter Savage – Guantanamo Cases]. Upon taking office, President Obama halted all Guantánamo military commissions pending a detainee review. *Compare* Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009), *available at* 2009 WL 166956, *with infra* text accompanying notes 60–65.

Administration, and al-Nashiri's case is presently in pre-trial litigation.[39] The many years since al-Nashiri's capture have brought difficulty, to be sure, but also have conferred a benefit: military procedures to try him are enhanced and refined in meaningful ways. In fact, al-Nashiri is being tried under the third iteration of the military commissions system in Guantánamo, each iteration offering greater protections for the accused.

### B. *Three Iterations of Military Commissions System*

Soon after the attacks of September 11, 2001, the United States adopted military commissions as tribunals to try individuals involved in the "extraordinary emergency" of international terrorism.[40] Congress quickly authorized the President "to use all necessary and appropriate force" against those responsible for the attacks in order to prevent future terrorist acts.[41] On this congressional authorization, then-President Bush instituted a system of detention, treatment, and trial in the age of terrorism.[42] On November 13, 2001, President Bush signed an executive order prescribing military justice for non-citizens: military commissions as courts to try al Qaeda members and other international terrorists threatening the United States.[43] The order does not mention Guantánamo nor specify a location for military commission trials.[44]

President Bush based his order on the immediate danger of international terrorism.[45] The September 11th attacks had demonstrated to everyone "that a threat once thought hypothetical is all too real: there are groups of persons with the organization, resources, and will to cause mass death and destruction in the United States and elsewhere."[46] Accordingly,

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[39] *See* Press Release, Dep't of Defense 3, *supra* note 19.

[40] *See* Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 § 1(g) (Nov. 13, 2001) [hereinafter Military Order].

[41] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note).

[42] *See* Hamdan v. United States, 696 F.3d 1238, 1242–43 (D.C. Cir. 2012) ("Consistent with the 2001 Authorization for Use of Military Force, President Bush directed the use of force to kill or capture and detain al Qaeda operatives, and where appropriate to try unlawful al Qaeda combatants who had committed war crimes.").

[43] Military Order, *supra* note 40, §§ 1, 2.

[44] *See id.* §§ 3(a), 4(c)(1) (providing for detention "at an appropriate location designated by the Secretary of Defense outside or within the United States" and for "military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide").

[45] *See* Proclamation No. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks, 66 Fed. Reg. 48199 (Sept. 18, 2001) [hereinafter Proclamation] (acknowledging the "continuing and immediate threat of further attacks").

[46] AM. BAR ASS'N TASK FORCE ON TERRORISM AND THE LAW, REPORT AND

the President declared it "not practicable to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[47] Military commissions need only provide a "full and fair trial," admitting any evidence that would have "probative value to a reasonable person."[48] Practical advantages of a military commission included heightened security and protection of sensitive intelligence,[49] and the Secretary of Defense could specify appropriately full and fair procedures.[50]

While military commissions have a long history in the United States,[51] this first post-9/11 system offered minimal protections for defendants. The Department of Defense established "procedures accorded the accused" for military commission trials under President Bush's order.[52] The Department's list was concise but exclusive, as "the procedures prescribed

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RECOMMENDATIONS ON MILITARY COMMISSIONS 1 (2002), *available at* http://www.americanbar.org/content/dam/aba/migrated/leadership/military.authcheckdam.pdf; *see also* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note) ("Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens . . . .").

[47] Military Order, *supra* note 40, § 1(f).

[48] *Id.* § 4(2)–(3).

[49] *See* AM. BAR ASS'N, *supra* note 46, at 16; Military Order, *supra* note 40, § 4(c)(4) (providing for protection of classified information and closure of proceedings).

[50] Military Order, *supra* note 40, § 4(b)–(c).

[51] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 590 (2006) ("Though foreshadowed in some respects by earlier tribunals like the Board of General Officers that General Washington convened to try British Major John Andre for spying during the Revolutionary War, the commission 'as such' was inaugurated in 1847."); Madsen v. Kinsella, 343 U.S. 341, 346 (1952) (dating military commissions back to "our nation's earliest days"); Barack Obama, President of the United States, Remarks by the President on Nat'l Sec. at the Nat'l Archives (May 21, 2009) ("[M]ilitary commissions have a history in the United States dating back to George Washington and the Revolutionary War. They are an appropriate venue for trying detainees for violations of the laws of war."), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09.

[52] DEP'T OF DEF., MILITARY COMM'N ORDER NO. 1: PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM § 5 (2002) [hereinafter MILITARY COMM'N ORDER NO. 1], *available at* http://www.defense.gov/news/Mar2002/d20020321ord.pdf. The Department of Defense later issued a revision of this Order. *See* DEP'T OF DEF., MILITARY COMM'N ORDER NO. 1: PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM (2005) [hereinafter REVISED MILITARY COMM'N ORDER NO. 1], *available at* http://www.defense.gov/news/Sep2005/d20050902order.pdf. The Department also issued a list of ten instructions for military commissions. *See* Military Comm'n Instructions Nos. 1-10, DEP'T OF DEF., http://www.defense.gov/news/Aug2004/commissions _instructions.html (last visited Mar. 10, 2014) (a hyperlink appears on the page for a PDF version of each instruction). The provisions discussed herein are consistent in both the 2002 Order and 2005 revision.

herein and no others shall govern such trials."[53] These procedures allowed exclusion of a defendant from his own trial,[54] prohibition on defense counsel's revealing to his client any information presented during a closed session,[55] admission of all probative evidence without consideration of prejudicial effect,[56] and witness testimony "by telephone, audiovisual means, or other means," even if given without an oath.[57] To the extent procedures did benefit the defendant, including a presumption of innocence and a requirement that the prosecution furnish a copy of all charges in the defendant's native language, they did not create any enforceable rights.[58] Nor was the list secure, as it could be amended "from time to time" by the Secretary of Defense.[59]

The Department of Defense failed to mention hearsay in its list of procedures. *Hearsay* is a prior out-of-court statement offered to prove the truth of the matter asserted.[60] Silence in the Department's list suggests an indifference to hearsay admission; there were certainly no exclusions or limits on the use of hearsay evidence in military commission trials.[61] Such evidence would be admissible under the same standard as any other evidence: so long as the presiding officer determines that it would have "probative value to a reasonable person."[62]

Not surprisingly, a prominent criticism of this post-9/11 military commissions system focused on its procedural thinness and unilateral creation. As quickly mandated by executive decree, military commissions

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[53] MILITARY COMM'N ORDER NO. 1, *supra* note 52, § 1.

[54] *Id.* §§ 5(K), 6(B)(3) ("A decision to close a proceeding or portion thereof may include a decision to exclude the Accused . . . .").

[55] *Id.* § 6(B)(3) ("Defense Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof.").

[56] *Id.* § 6(D)(1) ("Evidence shall be admitted if, in the opinion of the Presiding Officer . . . the evidence would have probative value to a reasonable person.").

[57] *Id.* § 6(D)(2)(a); *see id.* § 6(D)(2)(b) ("The Commission may still hear a witness who refuses to swear an oath or make a solemn undertaking; however, the Commission shall consider the refusal to swear an oath or give an affirmation in evaluating the weight to be given to the testimony of the witness.").

[58] *Id.* § 10; *see also* DEPT. OF DEF., MILITARY COMMISSION INSTRUCTION NO. 1 § 6 (2003), *available at* http://www.defense.gov/news/May2003/d20030430milcominstno1.pdf ("Neither this Instruction nor any Military Commission Instruction issued hereafter, is intended to and does not create any right . . . .").

[59] MILITARY COMM'N ORDER NO. 1, *supra* note 52, § 11.

[60] *See* MIL. COMM'N R. EVID. 801(c); Tennessee v. Street, 471 U.S. 409, 413 (1985).

[61] Hearsay is also absent from the revised Order and Military Commission Instructions. *See* REVISED MILITARY COMM'N ORDER NO. 1, *supra* note 52, at 11–12.

[62] MILITARY COMM'N ORDER NO. 1, *supra* note 52, § 6(D)(1); *see* Hamdan v. Rumsfeld, 548 U.S. 557, 614 (2006) (describing this standard for evidence admission as a "striking feature" of military commissions).

had abandoned constitutional safeguards, jettisoning fundamental protections for criminal defendants in the name of expediency and practicability. Scholars were appalled, with hundreds of law professors signing a letter to Congress decrying military commissions as "legally deficient, unnecessary, and unwise."[63] President Bush's order did not comply with basic due process, permitting "indefinite detention, secret trials, and no appeals."[64] Further, the broken system seemed unfixable: the more military commissions improved to respect constitutional principles and resemble civilian courts, the less these alternative tribunals offered a practical advantage over civilian courts to try international terrorists.[65]

Over all objections, military commissions began in November 2004 at the Guantánamo naval station.[66] The location had advantages. On the Southeast coast of Cuba, Guantánamo is close to the United States for easy access and has been under the United States' complete jurisdiction and control for more than a century.[67] But it lies outside United States territory for purposes of denying rights to non-citizens.[68] Military detentions at the naval station proceeded apace, eventually reaching a detainee population of approximately 800.[69] Soon, however, other branches of government

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[63] Letter from Law Professors and Lawyers to Hon. Patrick J. Leahy, Chairman, Sen. Judiciary Comm., at 1 (Dec. 5, 2001), *available at* http://www.law.yale.edu/ documents/pdf/ Leahy.pdf (list of original signers of letter available at http://www.law.yale.edu/ documents/pdf/OrigSig.pdf); *see* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1260 (2002) ("[T]he President's Order establishing military tribunals for the trial of terrorists is flatly unconstitutional.").

[64] Letter from Law Professors and Lawyers to Hon. Patrick J. Leahy, Chairman, Sen. Judiciary Comm., *supra* note 63.

[65] Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 342 (2002).

[66] JENNIFER ELSEA, CONG. RESEARCH SERV., THE MILITARY COMMISSIONS ACT OF 2006: ANALYSIS OF PROCEDURAL RULES AND COMPARISON WITH PREVIOUS DOD RULES AND THE UNIFORM CODE OF MILITARY JUSTICE, at Summary (2007) [hereinafter ELSEA 2007], *available at* http://www.fas.org/sgp/crs/natsec/RL33688.pdf.

[67] *See* Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 23, 1903, T.S. No. 418 ("[D]uring the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control."); *see also* Lease of Certain Areas for Naval or Coaling Stations, U.S.-Cuba, art. I, July 2, 1903, T.S. No. 426; Treaty Defining Relations with Cuba, U.S.-Cuba, art. III, May 29, 1934, 48 Stat. 1683.

[68] *See, e.g.*, Cuban Am. Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1430 (11th Cir. 1995) (concluding Cuban migrants in Guantánamo "are without legal rights that are cognizable in the courts of the United States"); Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1513 (11th Cir. 1992) (explaining Haitian migrants interdicted at sea and brought to Guantánamo "have no recognized substantive rights under the laws or Constitution of the United States").

[69] *See* Exec. Order No. 13492, 74 Fed. Reg. 4897 § 2 (Jan. 22, 2009).

intervened to rein in the executive.

In 2006, ruling on a Guantánamo detainee's petition for habeas corpus, the Supreme Court in *Hamdan v. Rumsfeld* rejected President Bush's military commissions system as unconstitutional.[70] The Court respected the practical advantages of military commissions,[71] but found the procedures to be wanting, lacking support from Congress, the Uniform Code of Military Justice, or the Geneva Conventions.[72] While military commissions need not duplicate federal court procedures, they must guarantee a minimal sense of justice and basic trial protections, including the "right to be tried in [one's] presence"[73] and the right to have "information used to convict a person . . . disclosed to him."[74] The first iteration of the United States' post-9/11 military commissions system could not stand.

Only a few months after the Supreme Court decided *Hamdan*, Congress responded by enacting the Military Commissions Act ("MCA") of 2006[75]—ushering in the second iteration of the post-9/11 military commissions system. The MCA of 2006 supplied congressional authority for the President to establish military commissions that the Supreme Court had found lacking. Further, the MCA legislated away any need for support from either the Uniform Code of Military Justice or the Geneva Conventions.[76] Congress maintained military commissions as alternative

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[70] Hamdan v. Rumsfeld, 548 U.S. 557, 635 (2006).

[71] *See id.* at 620 ("The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it."); *id.* at 634 ("[T]he procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any 'evident practical need,' . . . and for that reason, at least, fail to afford the requisite guarantees.").

[72] *See id.* at 624 ("Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections."); *see also id.* at 567, 594–95, 624–25, 634–35.

[73] *Id.* at 633 (quoting Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, June 8, 1977, 1125 U.N.T.S. 3).

[74] *Id.* at 635 (rejecting provisions of Military Commission Order No. 1, *supra* note 52, while accepting that "the Government has a compelling interest in denying Hamdan access to certain sensitive information").

[75] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 948a note) [hereinafter MCA of 2006]. Because Congress enacted separate Military Commissions Acts in 2006 and 2009, references herein to the MCA include the year. References to military commission rules reflect the MCA year discussed in the text.

[76] The MCA removed military commissions from under the jurisdiction of the Uniform Code of Military Justice. *See id.* § 948b(c) ("The judicial construction and application of that chapter are not binding on military commissions established under this chapter."). While a military commission would afford "all the necessary 'judicial guarantees which are

tribunals to federal courts, but attempted to remedy the deficiencies identified by the Supreme Court, guaranteeing greater protections for defendants than had either President Bush or the Department of Defense.

Under the MCA of 2006, a defendant continued to enjoy the presumption of innocence[77] and receive charges in his native language.[78] In addition, a defendant now had the right to be present for his own trial and, so, to hear all information presented during proceedings.[79] Oaths were required of witnesses,[80] and the military judge could exclude any evidence for which unfair prejudice substantially outweighed probative value.[81] Moreover, the MCA was controlling; the Secretary of Defense retained authority to prescribe "[p]retrial, trial, and post-trial procedures," but could not contravene Congress' provisions.[82]

While President Bush's order and accompanying Department of Defense procedures had been silent on hearsay, the MCA of 2006 introduced rules on the topic. Hearsay evidence admissible in a trial by general courts-martial would be similarly admissible in a trial by military commission.[83] But military commissions cast a wider net, also admitting hearsay evidence that would be excluded in a court-martial trial. Congress invited the Secretary of Defense to prescribe provisions consistent with the MCA, and new hearsay rules came into effect.[84]

Under the Military Commission Rules of Evidence, hearsay was admissible "on the same terms as any other form of evidence except as

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recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions," the Act made clear that the Geneva Conventions would not be a source of rights for anyone subject to trial by military commission. *Id.* § 948b(f)–(g).

77 *Id.* § 949l(c).

78 *Id.* § 948s.

79 *Id.* § 949a(b)(B). A defendant could be excluded during deliberation or voting of the military commission members, or if he persisted in dangerous or disruptive conduct. MCA of 2006, §§ 949d(a)(2), d(b), d(d); *see* ELSEA 2007, *supra* note 66, at 20 ("The MCA does not provide for the exclusion of the accused from portions of his trial, and does not allow classified information to be presented to panel members that is not disclosed to the accused.").

80 MCA of 2006 § 949g(b).

81 *Id.* § 949a(b)(2)(F); MIL. COMM'N R. EVID. 403, *published in* MANUAL FOR MILITARY COMMISSIONS (2007) [hereinafter MIL. COMM'N R. EVID.], *available at* http://www.defense.gov/pubs/pdfs/the%20manual%20for%20military%20commissions.pdf (last visited Mar. 10, 2014). Evidence has probative value if it makes the existence of a consequential fact more or less probable. *Id.* at 401.

82 MCA of 2006 § 949a(a).

83 MIL. COMM'N R. EVID. 803(a); *see also* MCA of 2006 § 949a(a) (explaining military commission trials generally follow rules for court-martial trials).

84 *See* MCA of 2006 § 949a(b); *see generally* MIL. COMM'N R. EVID. 801–07.

provided by these rules or by any Act of Congress."[85] As with any other form of evidence, a proponent must show that a reasonable person would regard the hearsay as having probative value, and that value must not be substantially outweighed by the danger of unfair prejudice, confusion, waste of time, or redundancy.[86] The "except as provided" language amounted to little. Congress had already spoken in the MCA, and the Rules of Evidence simply fleshed out those legislative provisions. Accordingly, a military commission trial could admit hearsay evidence, otherwise excluded in a court-martial trial, if the proponent alerted the adverse party of his intention to offer the evidence and the particulars of the evidence, all "sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence."[87] Notice should contain "any materials regarding the time, place, and conditions under which the statement was produced" and be given thirty days in advance.[88]

In the MCA, Congress provided for the exclusion of hearsay evidence if the adverse party "demonstrates that the evidence is unreliable or lacking in probative value."[89] Following this lead, the Rules of Evidence excluded otherwise admissible hearsay only if the adverse party "demonstrates by a preponderance of the evidence that the evidence is unreliable under the totality of the circumstances."[90] Thus, the sole burden concerning reliability fell squarely on the shoulders of the party opposing admission, and that burden was to disprove reliability.[91]

The upshot is clear: military commission rules favored hearsay admission. Indeed, the discussion notes in the Rules of Evidence concede as much. The rationale for admitting hearsay evidence on the same terms as any other evidence is grounded in the grim realities of war: witnesses "are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death."[92] For any testifying witness, a defendant certainly had the right to confrontation and cross-examination.[93] But

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[85] MIL. COMM'N R. EVID. 802.

[86] *Id.* 401, 403.

[87] MCA of 2006 § 949a(b).

[88] MIL. COMM'N R. EVID. 803(b). Even if the proponent failed to meet these guidelines, the evidence could still be admitted, as the judge would determine whether the adverse party had received "a fair opportunity under the totality of the circumstances." *Id.*

[89] MCA of 2006 § 949a(b).

[90] MIL. COMM'N R. EVID. 803(c).

[91] *See id.* 803, discussion note.

[92] *Id.* 802, discussion note.

[93] *See* MCA of 2006 § 949c; *see also* R. MIL. COMM'N 910(c) (2007) (requiring judge to advise a defendant pleading guilty that he has the trial right to confront and cross-examine witnesses who testify against him).

hearsay from unavailable witnesses was welcome. Because a military commission trial is a creation of war, so too are its governing rules.

Military commissions under the Bush Administration resulted in three convictions.[94] The election of Barack Obama in 2008 introduced the third iteration of the post-9/11 military commissions system. Following up on a campaign promise to close the Guantánamo detention center, two days after inauguration President Obama took a first step and halted military commissions pending a review of all Guantánamo detainees.[95] On May 15, 2009, President Obama announced the resumption of military commissions, ensuring that this time "they are properly structured and administered."[96] Detainee reviews continued.[97] Meanwhile, reforms would

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[94] David Hicks pleaded guilty in 2007 to providing material support for terrorism; Salim Hamdan was tried and convicted in 2008 of providing material support for terrorism; and Ali Hamza Ahmad Suliman al-Bahlul was tried and convicted in 2008 of conspiracy, solicitation to commit murder, and providing material support for terrorism. *See The Guantánamo Trials*, HUMAN RIGHTS WATCH, http://www.hrw.org/features/Guantánamo (last visited Mar. 11, 2014); JENNIFER ELSEA, CONG. RESEARCH SERV., THE MILITARY COMMISSIONS ACT OF 2009 (MCA 2009): OVERVIEW AND ISSUES 2 (2013) [hereinafter ELSEA 2013]. The U.S. Court of Appeals for the D.C. Circuit vacated the convictions of both Hamdan and al-Bahlul. Hamdan v. United States, 696 F.3d 1238, 1241 (D.C. Cir. 2012); Al Bahlul v. United States, No. 11-1324, 2013 WL 297726, at *1 (D.C. Cir. Jan. 25, 2013), *vacating as moot* No. 11-1324, 2013 U.S. App. Lexis 8120 (D.C. Cir. April 23, 2013). The D.C. Circuit Court then granted rehearing en banc in *Al Bahlul* and ordered al-Bahlul's counsel to "obtain a letter from the petitioner stating whether he wishes to continue to pursue his case in this court." Order Granting Respondent's Petition for Rehearing En Banc, at 1–2, No. 11-1324 (D.C. Cir. Apr. 23, 2013); Order Demanding Letter From Petitioner, at 1, No. 11-1324 (D.C. Cir. May 14, 2013).

[95] *See* Exec. Order No. 13492, 74 Fed. Reg. 4897 § 7 (Jan. 22, 2009) ("The Secretary of Defense shall immediately take steps sufficient to ensure that . . . all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted."). Some observers denounced President Obama's failure to close the Guantánamo detention center. *See, e.g.*, Jackie Northam, *Obama's Promise to Close Guantanamo Prison Falls Short*, NPR (Jan. 23, 2013), http://www.npr.org/2013/01/23/169922171/obamas-promise-to-close-guantanamo-prison-falls-short.

[96] Press Release, White House Office of the Press Secretary, Statement of President Barack Obama on Military Commissions (May 15, 2009), *available at* http://www.whitehouse.gov/the-press-office/statement-president-barack-obama-military-commissions. Observers continued to denounce President Obama's decisions regarding Guantánamo detentions and military commissions. *See* William Glaberson, *Obama to Keep Tribunals; Stance Angers Some Backers*, N.Y. TIMES, May 15, 2009, at A1, *available at* http://www.nytimes.com/2009/05/16/us/politics/16gitmo.html?_r=0 (quoting ACLU executive director Anthony D. Romero that he would call "an inferior legal system to try detainees 'the Bush-Obama doctrine'"). For his part, President Obama continues to press Congress to allow detainee transfers from Guantánamo to the United States. *See* Barack Obama, President of the United States, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-

enhance the legitimacy of military commissions "while bringing them in line with the rule of law," including limiting the admissibility of hearsay evidence "so that the burden will no longer be on the party who objects to hearsay to disprove its reliability."[98]

With his eye on the rule of law, President Obama was no doubt mindful of the Supreme Court's decision in *Boumediene v. Bush*,[99] issued just five months before his election. The Court in *Boumediene* held that the Suspension Clause of Article I of the Constitution applies to Guantánamo Bay, entitling non-citizen detainees to file writs of habeas corpus in federal court "to challenge the legality of their detention."[100] While Cuba holds *de jure* sovereignty over Guantánamo, "the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory."[101] Considering the detainees' foreign citizenship and insufficient status review, their apprehension on distant battlefields and detention at the Guantánamo naval base, and the minimal practical obstacles in allowing detainees to file habeas writs, the Court found the United States' *de facto* sovereignty sufficient for application of the Suspension Clause.[102] Although limited on its facts to constitutional habeas relief, the *Boumediene* opinion introduced a new way of thinking about Guantánamo: not as an overseas outpost devoid of non-citizen rights, but as quasi-American territory within reach of the Constitution.

In the wake of these pronouncements from both the Supreme Court and the new President, Congress enacted the Military Commissions Act of 2009 as part of the National Defense Authorization Act for Fiscal Year

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university) ("I have asked the Department of Defense to designate a site in the United States where we can hold military commissions.").

[97] *See* GUANTÁNAMO REVIEW TASK FORCE, FINAL REPORT 1 (2010) ("An essential component of the President's order calling for the closure of the detention facilities at the Guantánamo Bay Naval Base was the initiation of a new and rigorous interagency review of all individuals detained there. . . . This review is now complete."); *see also id.* at 9–15 (reporting results of review, including detainee transfer approvals and security risks).

[98] Press Release, White House Office of the Press Secretary, *supra* note 96. Other enhancements included exclusion of statements obtained through "cruel, inhuman and degrading interrogation methods," greater latitude for a defendant to select his counsel, protections for those who refuse to testify, and permission for military commission judges to "establish the jurisdiction of their own courts." *Id.*

[99] 553 U.S. 723 (2008).

[100] *Id.* at 771 ("We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay.").

[101] *Id.* at 755; *see also* Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 23, 1903, T.S. No. 418.

[102] *Boumediene*, 553 U.S. at 766–71.

2010.[103] Military commissions resumed in Guantánamo and led to four additional convictions.[104] Under the MCA of 2009, as under the MCA of 2006, a defendant has the right to attend his own trial and may be removed from court only if he persists in dangerous or disruptive conduct.[105] He may cross-examine witnesses who testify against him.[106] Again the Secretary of Defense was tasked with setting procedures for military commissions, consistent with Congress' provisions.[107]

As announced by President Obama, the hearsay rules in military commissions became more robust, no longer setting hearsay on a par with other forms of evidence.[108] Like the MCA of 2006, the MCA of 2009 provides that hearsay evidence admissible in a trial by general court-

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[103] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2574 (2009) (codified as amended at 10 U.S.C. § 948a note (2012)) [hereinafter MCA of 2009].

[104] ELSEA 2013, *supra* note 94. Ibrahim Ahmed Mahmoud al-Qosi pleaded guilty in 2010 to conspiracy and providing material support for terrorism; Omar Khadr pleaded guilty in 2010 to conspiracy to commit terrorism, providing material support for terrorism, murder, attempted murder, and spying; Noor Uthman Mohamed pleaded guilty in 2011 to conspiracy and providing material support for terrorism; and Majid Shoukat Khan pleaded guilty in 2012 to conspiracy, providing material support for terrorism, murder in violation of the laws of war, and spying. *See* HUMAN RIGHTS WATCH, *supra* note 94 (for information on each individual detainee, follow the hyperlink under the detainee's name).

[105] MCA of 2009 § 949d(d)(2); *cf.* FED. R. CRIM. P. 43(c)(1)(C) (stating that defendant waives the right to be present when he persists in disruptive behavior). The military judge may protect classified information from disclosure, but any information admitted into evidence must be provided to the defendant. *See* MIL. COMM'N R. EVID. 505(a)(2), *published in* MANUAL FOR MILITARY COMMISSIONS (2010); MCA of 2009 § 949p-4 (specifying procedure for defendant to discover classified information); *see also* Mark Martins, Chief Prosecutor, Remarks at Guantánamo Bay 5 (June 14, 2013), (transcript available at http://www.lawfareblog.com/wp-content/uploads/2013/09/Statement-for-15-September-2013.pdf) (describing narrow exceptions to defendant's right to be present, consistent with Federal Rule of Criminal Procedure 43).

[106] MCA of 2009 § 949a(b)(2)(A); *see generally id.* §§ 949a–n (setting rules for trial procedure); *id.* §§ 950f–g (establishing right of appeal, first to U.S. Court of Military Commission, then to U.S. Court of Appeals for District of Columbia Circuit, and finally to U.S. Supreme Court).

[107] *Id.* § 949a(a); *see* David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SEC. L. & POL'Y 1, 34–36 (2011) (listing similarities between prosecutions in Article III court and in military commission).

[108] Under the MCA of 2006, Military Commission Rule of Evidence 802 provided for the admission of hearsay "on the same terms as any other form of evidence." MIL. COMM'N R. EVID. 802. By contrast, under the MCA of 2009, there is no such rule of evidence. *Compare* MCA of 2006 § 949a(b)(2) (admitting all evidence that would have probative value to a reasonable person, and including broader admission for hearsay), *with* MCA of 2009 §§ 949a(b)(2)–(3) (giving the accused the right to suppress evidence that is not reliable or probative, and shifting hearsay to a separate rule).

martial is similarly admissible in a trial by military commission.[109] Hearsay excluded from a court-martial trial may be admitted in a military commission trial only if the proponent gives sufficient notice and details of the evidence, including the circumstances under which it was obtained.[110]

Unlike its predecessor, the MCA of 2009 places no burden on the adverse party to disprove reliability.[111] Although the new Act does not specify any burdens regarding reliability, the hearsay proponent would do well to demonstrate to the military judge the *bona fides* of its proffered evidence.[112] For admission, the judge must determine that a hearsay "statement is offered as evidence of a material fact," the statement is probative on that fact, direct testimony from the witness is not a practical option, and admission would best serve "the general purposes of the rules of evidence and the interests of justice."[113] In making this determination, the judge may consider the totality of circumstances, including corroboration of the statement, "indicia of reliability within the statement itself," and whether the declarant's will was overborne, that is, overcome by physical force or emotional pressure.[114]

By its terms, this new hearsay rule is forged in the context of armed conflict. The practical considerations behind witness availability in a military commission trial are specific to a wartime tribunal. The military judge must take into account not only a witness' location, but also "the unique circumstances of military and intelligence operations during hostilities, and the adverse impacts on military or intelligence operations that would likely result from the production of the witnesses."[115] The judge is left to decide admissibility of hearsay evidence on a statement-by-statement basis, reflecting on grand considerations of justice not typically at play in a hearsay analysis in civilian court.[116]

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[109] *See* MIL. COMM'N R. EVID. 803; MCA of 2009 § 949a(a) (applying procedures in court-martial trials to military commission trials, except as provided in MCA).

[110] MCA of 2009 § 949a(b)(3).

[111] *Compare id., with* MCA of 2006 § 949a(b)(2).

[112] *See* ELSEA 2013, *supra* note 94, at 28 ("The current rules do not expressly allocate the burden of proof as to reliability of hearsay evidence. Presumably it falls on the proponent of the evidence.").

[113] MCA of 2009 § 949a(b)(3); *see* MIL. COMM'N R. EVID. 803 (restating elements of judge's determination).

[114] MCA of 2009 § 949a(b)(3); *see* MIL. COMM'N R. EVID. 803.

[115] MCA of 2009 § 949a(b)(3); *see* MIL. COMM'N R. EVID. 803; *cf.* MCA of 2009 § 949a(b)(1) (allowing Secretary of Defense to create exceptions to court-martial rules for use in military commissions "as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities").

[116] *See* Robert M. Gates, *Foreword* to MANUAL FOR MILITARY COMMISSIONS (2010) (applying procedures and rules of evidence from court-martial trials except as provided in the MCA "or

So it goes in the prosecution of Abd al-Rahim al-Nashiri. Al-Nashiri is being tried by military commission under the MCA of 2009, benefiting from procedures and rules unavailable in prior military commissions systems. Yet, despite these enhanced protections, al-Nashiri is not in federal court, not before an Article III judge, and not facing a verdict from civilian jurors. Even as reformed, military commissions remain an alternative tribunal with distinct protections for the accused—and remain exposed to criticisms of elevating "political expediency over considerations of justice,"[117] offering "less transparency and muddled rules,"[118] and granting "greater leniency for hearsay."[119] Al-Nashiri's trial is a test case of the current hearsay rules.[120]

## III. Confrontation Clause from Federal Courts to Military Commissions

The stakes are high in the al-Nashiri trial. On the defense side, al-Nashiri has been detained since 2002 and capital punishment looms. On the prosecution side, al-Nashiri represents one of only four military commission trials in Guantánamo despite the detention of hundreds of alleged terrorists.[121] On all sides, al-Nashiri's case has potentially far-

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where required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need").

[117] Marjorie Cohn, *Guantánamo Prisoner Al-Nashiri's Case Demonstrates Unfairness of Military Commissions*, TRUTH-OUT (June 18, 2013), http://truth-out.org/news/item/17058-guantanamo-prisoner-al-nashiris-case-demonstrates-unfairness-of-military-commissions?tmpl=component&print=1.

[118] Adam Hudson, *Contention and Confusion in Guantánamo Pre-Trial Hearings for Al-Nashiri Military Commissions*, TRUTH-OUT (June 18, 2013, 1:56 PM), http://truth-out.org/news/item/17038-guantanamopre-trial-hearings-for-al-nashiri-demonstrate-issues-with-use-of-military-commissions (describing complaints from al-Nashiri's defense counsel).

[119] John Knefel, *Justice at Guantánamo: From the Profound to the Absurb*, ROLLING STONE (June 13, 2013, 3:55 PM), http://www.rollingstone.com/politics/news/justice-at-guantanamo-from-the-profound-to-the-absurd-20130613.

[120] *See* Charlie Savage, *Accused Al-Qaeda Leader Arraigned in 2000 Cole Attack*, N.Y. TIMES, Nov. 10, 2011, at A21, *available at* 2011 WLNR 23259073 [hereinafter Savage - Cole Attack] ("It could also test the legality of tribunal rules that allow greater flexibility than in the traditional criminal justice system for prosecutors to introduce 'hearsay' evidence—testimony about statements and other evidence collected outside of the courtroom, giving the defendant no opportunity to cross-examine the person who provided them."); Savage - Guantanamo Cases, *supra* note 38.

[121] Guantánamo detainees Hamdan and al-Bahlul were both tried and convicted. *See* ELSEA 2013, *supra* note 94, at 2. In addition to the al-Nashiri prosecution, there is a separate prosecution ongoing in Guantánamo against Khalid Shaikh Mohammad and four co-defendants allegedly responsible for the September 11th attacks. *See* Press Release, Dep't of Justice, Justice Department Refers Five Accused 9/11 Plotters to Military Commissions (Apr. 4, 2011), *available at* http://www.justice.gov/opa/pr/2011/April/11-ag-421.html. Other convictions

reaching impact, as it brings into focus a constitutional issue for military commissions generally: Does the Confrontation Clause of the Sixth Amendment apply in a military commission? The defense and prosecution recently litigated this issue on a defense motion for judicial notice that the Confrontation Clause applies. The motion was styled as a request for judicial notice because the issue is prospective, seeking a trial right for a trial that has not yet begun.[122]

The parties argued the motion with an emphasis on hearsay statements from a certain individual, Fahd al-Quso, that will likely be proffered in al-Nashiri's trial.[123] Al-Quso, one of several witnesses who have implicated al-Nashiri in terrorist activities,[124] was an alleged co-conspirator in the *USS Cole* bombing and planned to videotape the attack for al Qaeda propaganda.[125] He is unavailable to testify because he was killed in May 2012 by a United States drone strike in Yemen.[126] According to al-Nashiri's counsel, al-Quso is "the most dramatic example" of an unavailable witness.[127] The prosecution relied heavily on "the al-Quso material" in its referral of capital charges against al-Nashiri: "the government must have regarded that evidence as important to its case. And we know that he is dead."[128]

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were obtained by plea bargain. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GUANTÁNAMO BAY DETAINEES: FACILITIES AND FACTORS FOR CONSIDERATION IF DETAINEES WERE BROUGHT TO THE UNITED STATES 8 nn.17, 18 (2012), *available at* http://www.gao.gov/assets/660/650032.pdf.

[122] Government Response to Defense Motion to Take Judicial Notice That the Confrontation Clause of the Sixth Amendment to the Constitution of the United States, As Interpreted by the United States Supreme Court, Applies to This Capital Military Commission at 6–14, United States v. Al-Nashiri, AE 109 (Mil. Comm'n Trial Judiciary Sept. 25, 2012) (arguing that defense motion is unripe), *available at* http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20%28AE109A%29.pdf.

[123] *See* Unofficial/Unauthenticated Transcript of Hearing on Defendant's Motion to Take Judicial Notice at 1880, United States v. Al-Nashiri (Mil. Comm'n Trial Judiciary June 11, 2013) [hereinafter Unofficial/Unauthenticated Transcript], *available at* http://www.mc.mil/portals/0/PDFs/alnashiri2/al%20Nashiri%20II%20(TRANS11June2013-PM1).PDF (recording defense counsel describing al-Quso as a "central" witness); *see also id.* at 1886 (recording defense counsel stating that "I'm just using al-Quso as an example. There's probably countless others.").

[124] *See* Al Nashiri Evidence Summary, *supra* note 13, at 1–2 (identifying witnesses Jamal Mohammad Ahmad al-Badawi and Mohammed Rashid Daoud al-Owhali).

[125] *See* Phil Hirschkorn, *Who Was Fahd al-Quso?*, CBS NEWS (May 7, 2012), http://www.cbsnews.com/8301-503543_162-57429253-503543/who-was-fahd-al-quso/. Al-Quso later told an FBI agent that he overslept and failed to videotape the attack. *Id.*

[126] Eric Schmitt, *Militant Linked to Bombing of U.S. Warship Is Said to Be Killed in Yemen*, N.Y. TIMES, May 7, 2012, at A6, *available at* 2012 WLNR 9571155.

[127] Unofficial/Unauthenticated Transcript, *supra* note 123, at 1905.

[128] *Id.* at 1909.

While the defendant's hearsay concerns are now tabled by an order denying his motion,[129] this motion is not the first time the topic of unavailable witnesses has emerged in al-Nashiri's Guantánamo proceedings.[130] Al-Nashiri himself raised it years earlier, in 2007 during the hearing to review his status as an enemy combatant. At that hearing, the government identified a statement from a witness named Mohammed Rashid Daoud al-Owhali that al-Nashiri helped him obtain a false Yemeni passport.[131] Al-Nashiri claimed to have "no idea how that thing happened" and not to remember al-Owhali.[132] In al-Owhali's absence, al-Nashiri lamented that "I wish I had the chance to speak with and ask him how he claims that. I have no idea where he brought this stuff from."[133] Toward the end of the hearing, al-Nashiri asked the tribunal, "If you want you can bring the Al-Owhali and I would like to know. How he's, he is able to say what he is claiming?"[134] The tribunal president rejected this question as an untimely request for a witness.[135]

With his motion for judicial notice, al-Nashiri's counsel filed an untimely request for application of the Confrontation Clause. The issue is sure to emerge again at trial. According to defense counsel, hearsay statements from al-Quso would not be outlier evidence. Of the ample discovery received thus far from prosecutors, "[i]t's all hearsay."[136] The al-Nashiri trial, then, meets the Confrontation Clause head-on.

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129 Order on Defense Motion to Take Judicial Notice at 3, United States v. Al-Nashiri, AE 109C (Military Comm'n Trial Judiciary Aug. 22, 2013).

130 Hints of a Confrontation Clause issue arose in other detainee cases, as well. *See* Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit, Hamdan v. Rumsfeld, No. 04-702, 2004 WL 2678664, at *17 (Nov. 22, 2004) (citing *Crawford* and arguing that "the confrontation rights of courts-martial must extend to military commissions").

131 Status Review Hearing Transcript, *supra* note 6, at 6. Al-Owhali confessed and was convicted in U.S. District Court for the Southern District of New York of participating in the 1998 bombing of the United States embassy in Nairobi. *See* Al Nashiri Evidence Summary, *supra* note 13, at 1. He is serving a life sentence in a federal maximum security prison in Florence, Colorado. *See* Phil Hirschkorn, *Convicted al Qaeda Soldiers ask for Jury Probe*, CNN (Jan. 17, 2003), http://www.cnn.com/2003/LAW/01/17/embassy.bombings.appeal/.

132 Status Review Hearing Transcript, *supra* note 6, at 30.

133 *Id.*

134 *Id.* at 34.

135 *Id.*

136 Unofficial/Unauthenticated Transcript, *supra* note 123, at 1912Mil. Comm'n; *see* Savage–Cole Attack, *supra* note 120; Savage – Guantanamo Cases, *supra* note 38 ("Much of the evidence against Mr. Nashiri consists of witness interviews and documents gathered by the F.B.I. in Yemen after the bombing. Prosecutors may call the F.B.I. agents as witnesses to describe what they learned during their investigation—hearsay that would be admissible under tribunal rules, but not in federal court.").

### A. *Testimonial Statements in Civilian Tribunals*

The Confrontation Clause of the Sixth Amendment to the Constitution restricts the admission of hearsay statements in a criminal prosecution. An "accused shall enjoy the right . . . to be confronted with the witnesses against him," thus erecting a barrier against testimony from unavailable witnesses whom the criminal defendant cannot cross-examine.[137] While the Confrontation Clause's prohibitions are not identical to prohibitions against hearsay statements, the Supreme Court has recognized that "hearsay rules and the Confrontation Clause are generally designed to protect similar values"[138] and "stem from the same roots."[139]

The Supreme Court has interpreted the extent of the Confrontation Clause's hearsay barrier through years of case law, articulating its modern view in the 2004 case of *Crawford v. Washington*.[140] There, the petitioner had been convicted of assault for stabbing a man who allegedly attempted to rape his wife.[141] The prosecution played for the jury a recording of the wife's statement to police, seeking to refute the petitioner's claim of self-defense.[142] The trial court admitted her statement even though the petitioner could not cross-examine his wife because the marital privilege precluded her testimony.[143] The Washington Supreme Court evaluated the circumstances of the wife's statement, determined the statement to be reliable, and upheld the conviction.[144] On appeal, the Supreme Court held that the state court's method for determining reliability violated the Confrontation Clause.[145]

Justice Scalia, writing for the majority, laid out a new test for application of the Confrontation Clause: consistent with the Sixth Amendment, "testimonial statements" from absent witnesses are admissible "only where the declarant is unavailable, and only where the

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[137] U.S. CONST. amend. VI.

[138] California v. Green, 399 U.S. 149, 155 (1970); *see also* Idaho v. Wright, 497 U.S. 805, 814 (1990) ("[W]e have also been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements.").

[139] Dutton v. Evans, 400 U.S. 74, 86 (1970); *see also* White v. Illinois, 502 U.S. 346, 352–53 (1992); *cf.* Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011) (When determining the primary purpose of a statement for Confrontation Clause analysis, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant.").

[140] *See generally* 541 U.S. 36 (2004).

[141] *Id.* at 38, 41.

[142] *Id.* at 38, 40.

[143] *See id.* at 40 (explaining that the Washington marital privilege generally prohibits one spouse from testifying without the other spouse's consent).

[144] *Id.* at 41.

[145] *Id.* at 65–69.

defendant has had a prior opportunity to cross-examine."[146] This test diverges from the Supreme Court's decision nearly a quarter century earlier in *Ohio v. Roberts,* which allowed juries to hear any hearsay statement "based on a mere judicial determination of reliability."[147] While Justice Scalia agreed with the *Roberts* Court that the Confrontation Clause's "ultimate goal is to ensure reliability of evidence," he cast this constitutional guarantee as procedural rather than substantive.[148] Reliability of testimonial hearsay must "be assessed in a particular manner: by testing in the crucible of cross-examination."[149] The facts before the Court involved testimonial hearsay.[150] Because the petitioner's wife had made her statement to police during interrogation, the marital privilege had rendered her unavailable to testify, and there had been no opportunity for cross-examination, admission of the wife's statement violated the petitioner's Sixth Amendment right to confrontation.[151]

Significantly, *Crawford* took a stand only on the treatment of testimonial hearsay, leaving open the proper treatment of nontestimonial hearsay.[152] For nontestimonial statements, courts were welcome to apply *Roberts'* malleable standard of judicially determined reliability or to "exempt[] such statements from Confrontation Clause scrutiny altogether."[153] Unfortunately, the Supreme Court offered minimal guidance on defining "testimonial," as it expressly declined to do so in *Crawford* and instead discussed a handful of examples.[154] Statements given during police interrogations and in prior testimony are testimonial; business records and

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146 *Id.* at 59. Of course, the defendant may not procure a witness' unavailability in order to prevent that witness from testifying. *See* Giles v. California, 554 U.S. 353, 361 (2008) (clarifying the "forfeiture by wrongdoing" exception to Sixth Amendment that "unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying").

147 *Crawford,* 541 U.S. at 62; *see id.* at 60 ("This malleable standard often fails to protect against paradigmatic confrontation violations."); Ohio v. Roberts, 448 U.S. 56, 66 (1980) (explaining that an unconfronted statement may be admitted so long as the statement "bears adequate 'indicia of reliability,'" and that reliability may be inferred where the statement falls under a "firmly rooted hearsay exception" or has "particularized guarantees of trustworthiness").

148 *Crawford,* 541 U.S. at 62.

149 *Id.*

150 *Id.* at 68.

151 *Id.* at 68–69 (reversing and remanding the judgment of the Washington Supreme Court).

152 *See id.* at 59, 68.

153 *Id.* at 68.

154 *See Crawford,* 541 U.S. at 68 & n.10.

statements in furtherance of a conspiracy are not.[155] The Court's later opinions offer additional illustrations and proposed definitions of "testimonial." These later opinions also clarify that the Confrontation Clause—along with *Crawford*'s procedural guarantee of cross-examination—reaches no further than testimonial statements.[156]

In *Davis v. Washington*,[157] another opinion authored by Justice Scalia, the high court parsed certain types of statements made to police—distinguishing between statements seeking emergency assistance and statements recording events "potentially relevant to later criminal prosecutions."[158] The former are nontestimonial, the latter testimonial.[159] Applying this distinction, the Court found that a victim's answers to a 911 emergency operator's questions were nontestimonial because they were informal and "necessary to be able to *resolve* the present emergency."[160] The victim's statements were outside the scope of the Confrontation Clause.[161] In the companion case of *Hammon v. Indiana*, by contrast, the Court found that a domestic battery victim's statements in an affidavit to police were testimonial because they were "formal enough" and "neither a cry for help nor the provision of information enabling officers immediately to end a

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[155] *Id.* at 53, 55, 68; *see* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009) ("Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.").

[156] *See* Michigan v. Bryant, 131 S. Ct. 1143, 1153, 1157 (2011) (identifying *Crawford* as source of Confrontation Clause limit and noting that the Confrontation Clause does not require nontestimonial statements "to be subject to the crucible of cross-examination"); Davis v. Washington, 547 U.S. 813, 821 (2006) ("It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."); *see also* United States v. Charles, 722 F.3d 1319, 1323–24 (11th Cir. 2013) (finding an interpreter's statements to be testimonial, and noting that "in clarifying the appropriate test under the Confrontation Clause for admitting *testimonial* out-of-court statements of a declarant, the Court in *Crawford* overruled the test that it previously laid out in *Ohio v. Roberts*"); United States v. Holmes, 406 F.3d 337, 348 (5th Cir. 2005) ("Because the categorical rule adopted in *Crawford* is triggered only with respect to 'testimonial' evidence, whether a challenged statement falls within the class of evidence deemed 'testimonial' will generally be outcome-determinative.").

[157] 547 U.S. 813 (2006).

[158] *Davis*, 547 U.S. at 822; *see also id.* (noting that the opinion was not "attempting to produce an exhaustive classification of all conceivable statements").

[159] *Id.*; *see Bryant*, 131 S. Ct. at 1155 (stating that admissibility of a statement made to resolve an emergency "is the concern of state and federal rules of evidence, not the Confrontation Clause").

[160] *Davis*, 547 U.S. at 827.

[161] *See id.* at 828.

threatening situation."[162] That victim's statements were within the scope of, and excluded by, the Confrontation Clause.[163]

The subsequent case of *Michigan v. Bryant* provoked a dissent from Justice Scalia, with Justice Sotomayor writing a majority opinion that hones—or in Scalia's view, distorts—the criteria for testimonial statements suggested in *Davis* and *Hammon*.[164] *Bryant* introduced an objective two-part test for applying the Confrontation Clause. First, a statement must be made with "a primary purpose of creating an out-of-court substitute for trial testimony,"[165] that is, proving past events relevant to future prosecution.[166] Second, the statement should display a measure of formality.[167] While not outcome-determinative, formality suggests that the purpose of the statement was to create a trial record.[168]

In *Bryant*, the Supreme Court considered whether the Confrontation Clause barred admission of statements to police from a gunshot victim, lying fatally wounded in a gas station parking lot.[169] Viewing the circumstances objectively, the Court determined that the primary purpose of the victim's statements was to enable police to address the ongoing emergency of an armed and at-large assailant.[170] The statements were also informal, made in the "fluid and somewhat confused" context of police assistance to a dying man.[171] Accordingly, the victim's "identification and

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[162] *Id.* at 830, 832.

[163] *See id.* at 829–30, 834.

[164] *See id.* at 822, 829; *Bryant*, 131 S. Ct. at 1153–56; *cf. id.* at 1173, 1175 (Scalia, J., dissenting) (rejecting the majority's "resurrected interest in reliability" and "distorted view").

[165] *Bryant*, 131 S. Ct. at 1155.

[166] *Id.* at 1154 (quoting *Davis*, 547 U.S. at 822).

[167] *Id.* at 1160 (noting that "informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent"); *see also* Williams v. Illinois, 132 S. Ct. 2221, 2242 (2012) (stating that the Confrontation Clause addresses "formalized statements such as affidavits, depositions, prior testimony, or confessions"); Bullcoming v. New Mexico, 131 S. Ct. 2705, 2710–11 (2011) (finding that, in a DWI case, the Confrontation Clause excluded a lab analyst's certificate that defendant's blood-alcohol level exceeded the legal limit); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310–12 (2009) (finding that, in a cocaine distribution and trafficking case, the Confrontation Clause excluded an analysis certificate regarding substance in defendant's possession).

[168] *See Bryant*, 131 S. Ct. at 1160.

[169] *See id.* at 1150.

[170] *Id.* The Court added that "the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Id.* at 1156.

[171] *See id.* at 1166; *Bullcoming*, 131 S. Ct. at 2721 (Sotomayor, J., concurring) ("[F]ormality or informality can shed light on whether a particular statement has a primary purpose of use at trial.").

description of the shooter and the location of the shooting were not testimonial statements," and their admission in the defendant's murder trial did not violate the Confrontation Clause.[172]

The Supreme Court's latest addition to the Confrontation Clause landscape is *Williams v. Illinois*, a case that obscures more than it illuminates. With a plurality opinion, two concurrences, and a four-justice dissent, *Williams* fails to offer a consensus view of testimonial statements—or anything at all. Writing for the plurality, Justice Alito presented two criteria: a testimonial statement has "the primary purpose of accusing a targeted individual of engaging in criminal conduct" and involves "formalized statements such as affidavits, depositions, prior testimony, or confessions."[173] Only four justices subscribed to this formulation.[174] It certainly shifts from *Bryant*, which established that a testimonial statement's primary purpose is to create a trial record and that formality is a helpful supplement.[175]

The plurality in *Williams* discussed testimonial statements only in hypothetical terms after concluding that the out-of-court statements at issue were not offered for the truth of the matter asserted.[176] At the petitioner's rape trial, an expert had testified that a DNA profile from an outside laboratory matched a profile from the state police laboratory using petitioner's blood.[177] The expert referred to the report not to prove that it contained an accurate DNA profile, but "only for the 'distinctive and limited purpose' of seeing whether it matched something else."[178] Because the expert's testimony was not offered for its truth and the laboratory report itself was not admitted into evidence, the Confrontation Clause simply did not apply.[179]

Further, the plurality found that even if the laboratory report had been admitted into evidence, still there would have been no Confrontation

[172] *Bryant*, 131 S. Ct. at 1150.

[173] *Williams*, 132 S. Ct. at 2242.

[174] *See id.* at 2265 (Kagan, J., dissenting) (describing plurality opinion as essentially a dissent because "[f]ive Justices specifically reject every aspect of its reasoning and every paragraph of its explication").

[175] *See Bryant*, 131 S. Ct. at 1154, 1160; Davis v. Washington, 547 U.S. 813, 822 (2006).

[176] 132 S. Ct. at 2228. "Even if the . . . report had been introduced for its truth, we would nevertheless conclude that there was no Confrontation Clause violation." *Id.* at 2242. *See* Crawford v. Washington, 541 U.S. 36, 59–60 n.9 (2004) (stating that the Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted").

[177] *Williams*, 132 S. Ct. at 2227.

[178] *Id.* at 2240 (quoting Tennessee v. Street, 471 U.S. 409, 417 (1985)).

[179] *See id.* at 2235, 2240.

Clause violation.[180] While scientific reports generally satisfy the requirement of formality,[181] an objective view of the report in *Williams* shows that it fails the requirement of primary purpose. The laboratory received DNA samples in order "to catch a dangerous rapist who was still at large."[182] Because its primary purpose was "not to accuse petitioner or to create evidence for use at trial" but instead to confront a public threat, the laboratory report did not constitute a testimonial statement.[183]

In the end, the Supreme Court has constructed an interpretation of the Sixth Amendment that limits a criminal defendant's right of confrontation to out-of-court statements provided, often in a formal setting, for the primary purpose of giving incriminating trial testimony.[184] This case law development may be incomplete and confusing, even to the Justices themselves.[185] But for now it yields a surprising result: the concept of testimonial hearsay appears consistent only with the civilian tribunals in which it was developed. The Supreme Court's Confrontation Clause jurisprudence invites an understanding of testimonial hearsay as uniquely civilian and, thus, inconsistent with military commissions as wartime tribunals.

### B. *Nontestimonial Statements in Wartime Tribunals*

*Crawford* breaks down the elements of a Confrontation Clause analysis: a testimonial statement, unavailability, and cross-examination. Grafting this analysis from an Article III court onto a military commission, the key element remains the testimonial character of a hearsay statement. Many witnesses will be unavailable at a military commission trial, and many defendants will lack any opportunity for cross-examination. Indeed, this is

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180 *Id.* at 2228, 2242.

181 *See id.* at 2243; Bullcoming v. New Mexico, 131 S. Ct. 2705, 2710–11 (2011); Melendez-Diaz v. Massachusetts 557 U.S. 305, 310–12 (2009). *But see Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring) (reasoning that the lab report was admissible as a nontestimonial statement because it "lack[ed] the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact").

182 *Williams*, 132 S. Ct. at 2243.

183 *Id.* at 2243–44.

184 *See, e.g.*, Michigan v. Bryant, 131 S. Ct. 1143, 1168–69 (2011) (Scalia, J., dissenting) (reasoning that an out-of-court statement is testimonial only if the declarant both "intend[s] the statement to be a solemn declaration rather than an unconsidered or offhand remark" and "make[s] the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused").

185 *See Williams*, 132 S. Ct. at 2265, 2277 (Kagan, J., dissenting) (describing the plurality's decision as "fractured," complaining that the five Justices who agreed on the case result "agree on very little" and "have left significant confusion in their wake," and that prior "decisions apparently no longer mean all that they say").

precisely the situation that prompted al-Nashiri's motion for application of the Confrontation Clause in his Guantánamo prosecution, with statements from deceased witness al-Quso illustrating the defendant's hearsay concerns. So attention must be paid to testimonial statements, the only kind of hearsay evidence that implicates the Confrontation Clause.

In deciding *Davis* and *Hammond* jointly and *Bryant* and *Williams* subsequently, the Supreme Court moved from the narrow context of domestic violence to the wider context of nondomestic violence—respectively, attacks from a gunman and a rapist. The Court tailored the concept of a testimonial statement to fit the new context.[186] In the latter cases, the ongoing emergency "extends beyond an initial victim to a potential threat to the responding police and the public at large."[187] As the zone of danger expands, nearly all statements may be interpreted objectively as confronting the threat.[188]

Both *Bryant* and *Williams* support a categorical approach, as each contains a thread that is subtle in the majority and plurality opinions but highlighted in the dissents. Specifically, testimonial statements vanish in the context of public danger, regardless of a statement's purpose or formality.[189] The Court in *Bryant* proclaimed that "the existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry," but only "among the most important circumstances that courts must take into account."[190] This proclamation proves stronger in theory than in practice.

When faced with specific statements from the gunshot victim in *Bryant*, the Court treated as nontestimonial everything the victim told police.[191] Without the aid of a transcript, the Court learned that the police asked "what had happened, who had shot him, and where the shooting had

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[186] *See id.* at 2243 (considering nontestimonial statements used to match DNA profile of rapist); *Bryant*, 131 S. Ct. at 1156 (considering nontestimonial statements used to identify and locate gunman).

[187] *Bryant*, 131 S. Ct. at 1156.

[188] *See id.* at 1163–66. Like an excited utterance, "[a]n ongoing emergency has a similar effect of focusing an individual's attention on responding to the emergency." *Id.* at 1157; *see also Williams*, 132 S. Ct. at 2274 (Kagan, J., dissenting) (stating that the plurality extends the "ongoing emergency" precedents); *Bryant*, 131 S. Ct. at 1163–65 (finding nontestimonial a victim's direct identification of the assailant).

[189] By contrast, in two cases of non-violent crimes, the Court declined to carve out a categorical exception under the Confrontation Clause for forensic evidence. *See* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2717–18 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 317–22 (2009).

[190] *Bryant*, 131 S. Ct. at 1165, 1162.

[191] *Id.* at 1167.

occurred."[192] The victim answered "I was shot" or "Rick shot me," quickly identified the gunman as "Rick," and gave a physical description.[193] He added that "Rick had shot him through the back door of Rick's house."[194] These identifying statements could fit squarely under the heading of "providing incriminating trial testimony" for Rick's future prosecution.[195] Regardless, the danger of an at-large gunman transformed all out-of-court statements into nontestimonial hearsay.

In his dissent, Justice Scalia revealed the upshot of the majority opinion: it "creates an expansive exception to the Confrontation Clause for violent crimes."[196] From the victim's perspective, "his statements had little value except to ensure the arrest and eventual prosecution" of his assailant.[197] Other than confirming a rather obvious gunshot wound, the statements had nothing to do with tending to the victim.[198] Accordingly, the police could gather witness accounts against any defendant, and conviction could rest "solely on the officers' recollection at trial of the witnesses' accusations."[199] Given "a continuing threat to public safety," all statements made in the context of that threat are deemed nontestimonial.[200]

A similar view emerged in *Williams*. There, the plurality treated as nontestimonial a laboratory report that matched DNA from a rapist.[201] Like the dissent in *Bryant*, the dissent in *Williams* revealed the effect of the plurality's opinion: "to stretch . . . our 'ongoing emergency' test."[202] Nontestimonial statements may now be made outside the immediacy of an attack, even after a suspect is in custody.[203] Indeed, the opinion cast as

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192 *Id.* at 1163.

193 *Id.* at 1163, 1165.

194 *Id.* at 1163 n.14.

195 *Id.* at 1167.

196 *Bryant*, 131 S. Ct. at 1173 (Scalia, J., dissenting); *id.* at 1176 (Ginsburg, J., dissenting) (quoting *id.* at 1173 (Scalia, J., dissenting)).

197 *Id.* at 1170 (Scalia, J., dissenting).

198 *See id.* at 1171.

199 *Id.* at 1173.

200 *Id.*

201 *See* Williams v. Illinois, 132 S. Ct. 2221, 2242–44 (2012).

202 *Id.* at 2274.

203 While the DNA match in *Williams* was produced before the petitioner was suspected of rape, he had in fact already been arrested on unrelated charges. *See id.* at 2229 (describing the rape in February 2000, then the provision of DNA samples to the laboratory, then the arrest of the suspect in August 2000, then the identification of the suspect as the rapist in April 2001, and noting that the "computer showed a match to a profile produced by the lab from a sample of petitioner's blood that had been taken *after* he was arrested on unrelated charges on August 3, 2000") (emphasis added). *But see id.* at 2243 (distinguishing testimonial statements in the *Melendez-Diaz* DWI case and the *Bullcoming* cocaine case, where "[t]here was nothing

nontestimonial the statements from "laboratory analysts conducting routine tests far away from a crime scene"; laboratory reports that did not begin until nine months after the crime nor conclude until thirteen months after; and laboratory reports prepared for the express "purpose of producing evidence, not enabling emergency responders."[204] As in *Bryant*, the Court considered statements that were "in every conceivable respect . . . meant to serve as evidence in a potential criminal trial" and, in the context of a threat to public safety, deemed all statements to be nontestimonial.[205]

This categorical approach to nontestimonial statements finds support in other Confrontation Clause cases, even sympathy from Justice Scalia. Writing for the Supreme Court in *Giles v. California*, Justice Scalia considered the doctrine of "forfeiture by wrongdoing" as a Confrontation Clause exception.[206] The exception applies "only when the defendant engaged in conduct *designed* to prevent the witness from testifying."[207] The facts of *Giles* involved domestic violence, and there Justice Scalia described the *entire category* of a victim's "[s]tatements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment" as nontestimonial and outside the concern of the Confrontation Clause.[208] Such statements "would be excluded, if at all, only by hearsay rules."[209]

Thus, the Supreme Court has invited a categorical exception under the Confrontation Clause for public danger. Treating all statements proffered in a wartime tribunal as nontestimonial is consistent with these precedents because a military commission provides an even more extreme context than domestic violence or an assailant on the loose. In a military

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resembling an ongoing emergency, as the suspects in both cases had already been captured").

[204] *Id.* at 2274 (Kagan, J., dissenting). The dissent also rejects the plurality's view that the expert's testimony about the laboratory report was not offered for its truth: "[a]dmission of the out-of-court statement in this context has no purpose separate from its truth." *Id.* at 2269.

[205] *Id.* at 2275. Justice Breyer's concurring opinion also opened the door to a categorical approach, as he "would consider reports such as the DNA report before us presumptively to lie outside the perimeter of the Clause as established by the Court's precedents." *Id.* at 2251 (Breyer, J., concurring).

[206] 554 U.S. 353, 357 (2008).

[207] *Id.* at 359. The Court held that California's forfeiture doctrine, which did not consider a defendant's intent, was not an exception to the Confrontation Clause because it was "unheard of at the time of the founding or for 200 years thereafter." *Id.* at 377; *see also* Davis v. Washington, 547 U.S. 813, 833 (2006) ("But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce.").

[208] *Giles*, 554 U.S. at 376.

[209] *Id.*

commission trial, the ongoing emergency stretches from the immediate public to an "extraordinary threat" to the entire United States.[210] Beyond a danger arising from the actions of one individual, the threat from international terrorism arises from the actions of many individuals, both in custody and at large.[211] Extending the logic of *Bryant* and *Williams* to the terrorism context, all hearsay in a military commission trial may be viewed objectively as nontestimonial because a military commission exists—by design—only in the context of war.

The wartime creation and purpose of military commissions situate these courts outside the scope of the Confrontation Clause.[212] A military commission is convened before a military judge to try individuals accused of offenses during war, acting as a "constitutionally recognized agenc[y] for meeting many urgent governmental responsibilities related to war."[213] Under the Military Commissions Act, only an "alien unprivileged enemy belligerent" is subject to trial by military commission.[214] Jurisdiction is limited to foreign citizens who have "engaged in hostilities against the United States," "supported hostilities against the United States," or

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210 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note) (stating that September 11th "acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States"); *see* AM. BAR ASS'N, *supra* note 46 (discussing a real threat of "mass death and destruction in the United States and elsewhere"); Military Order, *supra* note 40 (describing the "extraordinary emergency"); Proclamation, *supra* note 45 ("A national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States."); *cf.* Michigan v. Bryant, 131 S. Ct. 1143, 1158 (2011) (noting that "duration and scope of an emergency may depend in part on the type of weapon employed").

211 *See* Williams v. Illinois, 132 S. Ct. 2221, 2229 (2012) (admitting nontestimonial statements after suspect in custody on unrelated charges).

212 Even Article III courts have recognized the need to accommodate hearsay for wartime testimony. *See, e.g.*, United States v. West, No. 08 CR 669, 2010 WL 3951941, at *5 (N.D. Ill. Oct. 4, 2010) (admitting entire declaration obtained from unavailable witness in distant war zone, and noting that "the Court believes that the circumstances of this case warrant some flexibility" and that "[c]ourts can relax the rules of hearsay under some circumstances"); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 533–34 (2004) (considering writ of habeas corpus filed by father of Guantánamo detainee, and observing that "enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding"). *But see* Bostan v. Obama, 662 F. Supp. 2d 1, 5–6 (D.D.C. 2009) (rejecting *Hamdi* interpretation that "suggests that hearsay should be routinely admitted into evidence" in habeas cases).

213 *See* Madsen v. Kinsella, 343 U.S. 341, 346 (1952); ELSEA 2013, *supra* note 94, at 4.

214 MCA of 2009 § 948c; *see* Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011) (describing a class of persons subject to military commission trials under the MCAs).

belonged to al Qaeda.[215] Moreover, an offense is triable by military commission "only if the offense is committed in the context of and associated with hostilities."[216] Just as an ongoing emergency "focuses the participants on something other than 'prov[ing] past events potentially relevant to later criminal prosecutions,'"[217] ongoing hostilities focus the mind elsewhere: on the national emergency.[218] The greater the threat, the greater the focus. Justice Scalia's dissent in *Bryant* exposed the Court's new exception to the Confrontation Clause for violent crimes, and a military commission simply applies this exception *writ large*: for crimes related to international terrorism.[219]

Treating all statements in a wartime tribunal as nontestimonial is also consistent with the canon of constitutional avoidance, as it sidesteps the thorny issue of whether the Sixth Amendment reaches Guantánamo.[220] Interpreting the statutory term "hearsay" in the Military Commissions Act to mean only nontestimonial statements allows the MCA hearsay

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[215] MCA of 2009 §§ 948a(7), 948c.

[216] *Id.* § 950p(c); *see also id.* § 948d (limiting jurisdiction to offenses made punishable by the MCA, statutes against aiding the enemy and espionage, or the law of war, whether committed before or after September 11, 2001).

[217] Michigan v. Bryant, 131 S. Ct. 1143, 1157 (2011) (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)).

[218] *See id.*; Proclamation, *supra* note 45.

[219] Given the wartime creation and purpose of military commissions, all cases before these courts should fit within the *Bryant* and *Williams* Confrontation Clause exception regardless of the eventual contours of that exception in federal courts. *See, e.g.*, Marc McAllister, *Evading Confrontation: From One Amorphous Standard to Another*, 35 SEATTLE U. L. REV. 473, 519–26 (2012) (proposing bright-line test under which "any statements obtained from a would-be witness to a crime during the crime's *res gestae* would be deemed per se nontestimonial"); Sloan A. Heffron, Note, *Resuscitating Roberts? How Courts Should Construe the "Emergency" Exception to the Sixth Amendment's Confrontation Clause*, 39 HASTINGS CONST. L.Q. 861, 886–90 (2012) (proposing six factors for determination of ongoing emergency); Jason Widdison, Comment, *Michigan v. Bryant: The Ghost of Roberts and the Return of Reliability*, 47 GONZ. L. REV. 219, 238–39 (2012) (proposing state constitutions as source of confrontation protection); William Reed, Comment, *Michigan v. Bryant: Originalism Confronts Pragmatism*, 89 DENV. U. L. REV. 269, 295–99 (2011) (proposing rule to narrow "ongoing emergency" exception); *see Al-Bihani*, 590 F.3d at 879 (stating that the Confrontation Clause does not apply in habeas corpus cases).

[220] *See* Boumediene v. Bush, 553 U.S. 723, 787 (2008) ("[W]e are obligated to construe the statute to avoid [constitutional] problems if it is 'fairly possible' to do so."); United States v. Rumely, 345 U.S. 41, 45 (1953) (noting that the canon is a decisive guide "in the choice of fair alternatives"); Hamdan v. United States, 696 F.3d 1238, 1248 (D.C. Cir. 2012) ("[C]ourts interpret ambiguous statutes to avoid serious questions of unconstitutionality."); *see also* Order on Defense Motion to Take Judicial Notice at 2–3, United States v. Al-Nashiri, AE 109C (Military Comm'n Trial Judiciary Aug. 22, 2013) (denying motion in part based on constitutional avoidance).

provisions to govern Guantánamo prosecutions without risking a Confrontation Clause violation.[221] Applying *Bryant* and *Williams* to the vast "continuing threat to public safety" that is international terrorism,[222] this analysis of hearsay evidence renders an analysis of constitutional reach unnecessary.

At least one part of the Constitution does have full effect at Guantánamo. The Supreme Court's opinion in *Boumediene v. Bush* established that the Suspension Clause of Article I applies to Guantánamo, protecting the privilege of habeas corpus for foreign detainees.[223] Indeed, this opinion likely influenced President Obama's heightened emphasis on the rule of law in reforming military commissions.[224] While *Boumediene* speaks to the general question of constitutional reach, the opinion did not decide the application of other constitutional clauses.[225] In the *al-Nashiri* case, defense counsel has relied on *Boumediene* to argue that the Confrontation Clause applies, and prosecution counsel has relied on it to argue the opposite.[226] A categorical approach to hearsay statements in military commission trials avoids this constitutional question.[227]

Simply put, categorizing all hearsay evidence in a military commission trial as nontestimonial statements takes the Confrontation Clause out of play. Even if the Sixth Amendment reaches Guantánamo, still the Confrontation Clause does not bar out-of-court statements in a wartime prosecution because those statements are not the kind of hearsay evidence that implicates the Confrontation Clause. Outside the concern of the Confrontation Clause, "the admissibility of a statement is the concern of

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[221] *See* MCA of 2009 § 949a; MIL. COMM'N R. EVID. 803.

[222] *See Bryant*, 131 S. Ct. at 1173.

[223] *See Boumediene*, 553 U.S. at 771.

[224] *See* discussion *supra* pp. 268–271.

[225] *See Boumediene*, 553 U.S. at 732 ("We hold these petitioners do have the habeas corpus privilege."); *id.* at 771 (applying Article I, Section 9, Clause 2 of the Constitution).

[226] *Compare* Defendant's Motion to Take Judicial Notice that the Confrontation Clause of the Sixth Amendment to the Constitution of the United States, as Interpreted by the United States Supreme Court Applies to this Capital Military Commission at 9–13, United States v. Al-Nashiri, AE 109 (Mil. Comm'n Trial Judiciary Sept. 12, 2012), *with* Government Response to Defense Motion to Take Judicial Notice that the Confrontation Clause of the Sixth Amendment to the Constitution of the United States, as Interpreted by the United States Supreme Court Applies to this Capital Military Commission at 11–13, United States v. Al-Nashiri, AE 109 (Mil. Comm'n Trial Judiciary Sept. 25, 2012).

[227] *See* Order on Defense Motion to Take Judicial Notice at 3, United States v. Al-Nashiri, AE 109C (Mil. Comm'n Trial Judiciary Aug. 22, 2013) (expressing willingness to rule on constitutional questions "only where it is necessary to confront the constitutional issue squarely").

state and federal rules of evidence."[228]

A military commission has its own rules of evidence to fill the void, and those rules are consistent with Confrontation Clause values. Al-Nashiri's trial is a fine example.

## IV. Hearsay Reliability in Al-Nashiri Trial

Consider the motion for judicial notice filed in the *al-Nashiri* case. Defense counsel argued that the Confrontation Clause should apply to "all future issues" regarding hearsay evidence from unavailable witnesses, including al-Quso.[229] In al-Nashiri's view, the military judge should apply the same "rules that would apply in every other American criminal prosecution or criminal proceeding," and that way "the parties know the rules."[230] In fact, the parties already know the rules: the provisions of the Military Commissions Act and the Military Commission Rules of Evidence, including rules on hearsay.[231]

Under the MCA of 2009 and accompanying evidence rules, a military commission judge decides admissibility of hearsay evidence by examining each statement for probative value and promotion of justice.[232] The judge must consider "all of the circumstances surrounding the taking of the statement,"[233] look within the statement for "indicia of reliability,"[234] search for "guarantees of trustworthiness,"[235] and make the "mere judicial

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228 Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011); *see also* Arthur L. Gaston III, *Use of Hearsay in Military Commissions*, 62 NAVAL L. REV. 76, 90–101 (2013) (providing historical justification for constitutionality of the MCA's flexible hearsay rules).

229 Defendant's Motion to Take Judicial Notice that the Confrontation Clause of the Sixth Amendment to the Constitution of the United States, as Interpreted by the United States Supreme Court Applies to this Capital Military Commission at 1, United States v. Al-Nashiri, AE 109 (Mil. Comm'n Trial Judiciary Sept. 12, 2012); *see* Unofficial/Unauthenticated Transcript, *supra* note 123, at 1905 Mil. Comm'n(complaining of unpredictability for purposes of resource allocation by defense counsel).

230 Unofficial/Unauthenticated Transcript, *supra* note 123, at 1876, 1881 Mil. Comm'n (quoting defense counsel that "[h]ere we don't know what the rule is. We have no idea . . . .").

231 *Id.* at 1902 (quoting the Judge's statement that "[i]t seems to me that on this issue there is a clear rule that currently you have to operate under. So when you say that you don't have a rule, you do have a rule, it's a rule you don't like."); *see* discussion *supra* Part II.B.

232 MCA of 2009 § 949a(b)(3); *see* MIL. COMM'N R. EVID. 803; *see also* Unofficial/Unauthenticated Transcript, *supra* note 123, at 1903 Mil. Comm'n("The government provides you notice and summary of what it says of all witnesses that it's going to rely on this rule, and then we litigate them one at a time under the standards of this rule.").

233 MCA of 2009 § 949a(b)(3).

234 *Id.*; *see* Roberts v. Ohio, 448 U.S. 56, 66 (1980) (recognizing a statement as admissible "only if it bears adequate 'indicia of reliability'").

235 *Roberts*, 448 U.S. at 66.

determination of reliability"[236] extolled in *Roberts* and disparaged in *Crawford*. For the nontestimonial hearsay at issue in a military commission trial, this rule makes sense—and is consistent with the Confrontation Clause values recognized in *Crawford*.

Even while replacing the *Roberts* standard of judicial determination with a procedural guarantee of cross-examination for testimonial statements, the Supreme Court in *Crawford* acknowledged that the Confrontation Clause's "ultimate goal is to ensure reliability of evidence."[237] For nontestimonial hearsay, courts achieve this goal by methods other than cross-examination. Hearsay laws can be flexible, permitting courts to follow *Roberts* and examine nontestimonial statements for guarantees of trustworthiness.[238] For an entire category of nontestimonial hearsay, such judicial examination becomes the norm.

Justice Scalia's dissent in *Bryant* is again instructive. There, the Court's treatment of all victim statements as nontestimonial resurrected reliability to guide Confrontation Clause analysis, at least in the context of "emergencies and faux emergencies."[239] The United States faces a real emergency in terrorist attacks and hostilities from al Qaeda and associated forces,[240] and Guantánamo is the venue for prosecution of offenses during this war. Military commission rules governing Guantánamo prosecutions ensure that reliability guides hearsay analysis. Those rules realize the Confrontation Clause value of reliability through the substantive guarantee of judicial evaluation.

For al-Nashiri, there is no doubt that his military commission case exists in the context of war. He faces capital charges for allegedly bombing both the *USS Cole* and the *M/V Limburg* and attempting to bomb the *USS The Sullivans*, all terrorist acts that occurred in Yemen in 2000 and 2002.[241] His trial is unfolding against the backdrop of the September 11th attacks,

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[236] Crawford v. Washington, 541 U.S. 36, 62 (2004).

[237] *Id.* at 61.

[238] *See id.* at 51, 60, 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts* . . . .").

[239] Michigan v. Bryant, 131 S. Ct. 1143, 1174 (2011) (Scalia, J., dissenting).

[240] *See* Hamdan v. United States, 696 F.3d 1238, 1240 (D.C. Cir. 2012) ("The United States is at war against al Qaeda, an international terrorist organization."); Proclamation, *supra* note 45; Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to Sec'y of the Navy re: Order Establishing Combatant Status Review Tribunal 1 (July 7, 2004) (defining "enemy combatant" as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners"), *available at* www.defense.gov/news/jul2004/d20040707review.pdf.

[241] *See* Al-Nashiri v. McDonald, No. 11-5907, 2012 WL 1642306, at *3 (W.D. Wash. May 10, 2012).

armed conflict, international terrorism, CIA waterboarding, enemy combatant status, military detention, and, finally, prosecution under the latest MCA.

Despite this backdrop, al-Nashiri tried to persuade a federal judge that a military commission could not be convened to try him because no hostilities existed in Yemen until 2003 at the earliest.[242] Accordingly, "the underlying allegations did not occur in the context of and were not associated with hostilities."[243] Filing a lawsuit against the convening official in U.S. District Court for the Western District of Washington, al-Nashiri sought a declaration that the military commission lacked jurisdiction to hear charges against him.[244] The district court dismissed al-Nashiri's lawsuit, finding that it lacked subject-matter jurisdiction under the MCA to make such a declaration.[245] Whether the events giving rise to al-Nashiri's charges occurred in the context of hostilities relates to "a core aspect of the trial," and a military commission is competent to make its own "finding sufficient for jurisdiction."[246] Tellingly, the military commission prosecution of al-Nashiri proceeds.

Given the wartime context for al-Nashiri's case, all hearsay evidence should fall under the Supreme Court's "public danger" exception to the Confrontation Clause.[247] Statements from al-Quso and other witnesses implicate al-Nashiri in terrorist activities, constituting "single-level hearsay or double-level hearsay" in the form of FBI reports from witness interviews years ago.[248] In light of the capital charges and the Guantánamo tribunal, these statements were made in the context of a threat far more severe than

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[242] *See id.* at *3–*4.

[243] *Id.* at *4.

[244] *Id.* at *1.

[245] *Id.* at *6. The court also dismissed on sovereign immunity grounds. *See id.* at *8–*10.

[246] *Id.* at *6 (quotingMCA of 2009 § 948d); *see also* Al-Nashiri v. Obama, Civ. No. 08-1207 (RWR)(EGS), 2012 WL 5382730, at *2–*3 (D.D.C. Oct. 11, 2012) (stating that a district court overseeing habeas proceeding has no jurisdiction to supervise military commission proceeding).

[247] *See* Williams v. Illinois, 132 S. Ct. 2221, 2243 (2012); Michigan v. Bryant, 131 S. Ct. 1143, 1156 (2011).

[248] Unofficial/Unauthenticated Transcript, *supra* note 123, at 1912 Mil. Comm'n(quoting defense counsel that evidence is "all FBI agent reports taken after the witnesses were sanitized by the Yemenis"); *see id.* at 1881 (quoting defense counsel that "the people who say we saw him do this, we heard this, we did that, will in large measure be FBI or other agents who interviewed people in Yemen 13, 14 years ago, who will be reading reports or worse it will be FBI agents reading reports of other FBI agents"); *see also* MIL. COMM'N R. EVID. 805 (allowing admission of hearsay within hearsay "if each part of the combined statements would be admissible in a military commission").

the "emergencies and faux emergencies"[249] in *Davis, Hammon, Bryant,* and *Williams* that transformed all out-of-court statements into nontestimonial hearsay.

For now, the parties continue pre-trial litigation, and the military judge will consider the concerns raised in al-Nashiri's motion for judicial notice at a later date. Because the motion sought an order applying the Confrontation Clause to future issues concerning hearsay evidence, the judge denied the motion as premature.[250] Trial is scheduled for September 2014.[251] Once trial begins and the prosecution introduces statements from al-Quso and other unavailable witnesses, defense counsel may raise its Confrontation Clause objection styled as a motion to exclude.[252] At that time, the judge may reasonably and objectively notice another feature of the case, namely, that all hearsay in al-Nashiri's military commission trial is nontestimonial.

## V. Conclusion

Therefore, Confrontation Clause jurisprudence fits into military commissions as an exercise in determining reliability. Because a testimonial statement is a civilian concept, military commission treatment of hearsay evidence is outside the scope of the Confrontation Clause and properly elevates substantive evaluation over procedural guarantees. On a statement-by-statement analysis, a military judge preserves the constitutional value of reliability while admitting or excluding hearsay evidence from witnesses made unavailable by war. For al-Nashiri, his protection against unreliable hearsay evidence lies not in the Sixth Amendment, but in the military commission rules establishing that

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[249] *Bryant*, 131 S. Ct. at 1174 (Scalia, J., dissenting).

[250] Order on Defense Motion to Take Judicial Notice at 2–3, United States v. Al-Nashiri, AE 109C (Mil. Comm'n Trial Judiciary Aug. 22, 2013); *see also* Unofficial/Unauthenticated Transcript, *supra* note 123, at 1893 Mil. Comm'n(noting the Judge's statement to lead prosecutor that "[n]ow, under your ripeness argument, if I understand it correctly, until you were to provide said notice to the defense, and they responded with a normal—with a motion to suppress, the issue is not ripe before me").

[251] *See* Order on Gov't Motion for Scheduling Order at 3, United States v. Al-Nashiri, AE 045H (Mil. Comm'n Trial Judiciary Aug. 21, 2013) (scheduling a trial date of Sept. 2, 2014).

[252] In a reverse "forfeiture by wrongdoing" setting, defense counsel may also contend that the United States is responsible for killing al-Quso, and so should not benefit from its misdeeds by introducing the deceased's statements without cross-examination. *See* Giles v. California, 554 U.S. 353, 377 (2008). Defense counsel raised this contention at the hearing on its motion for judicial notice. *See* Unofficial/Unauthenticated Transcript, *supra* note 123, at 1881 Mil. Comm'n("[I]f the right of confrontation doesn't apply, then we reach the rather perverse question: Can the United States kill witnesses and then still use their evidence, their hearsay evidence?").

statement-by-statement analysis.