

Pacific Council

ON INTERNATIONAL POLICY



**Observer
Dispatches**

OBSERVER DISPATCHES: GUANTÁNAMO BAY

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Background

In June 2013, the Pacific Council was invited to send an observer to a week of Military Commission hearings in the case of U.S. v. Khalid Sheikh Mohammed in Guantánamo Bay, Cuba. Khalid Sheikh Mohammed (KSM) is accused of masterminding the September 11 attacks on the World Trade Center and has been linked to many other attacks between 1993 and 2003.

On June 5, 2008, KSM and four co-defendants were arraigned in Guantánamo Bay to face a military commission for charges related to the 9/11 attacks, including: conspiracy, murder in violation of the law of war, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, destruction of property in violation of the law of war, terrorism, and material support of terrorism. KSM pleaded guilty to all charges. However, following an announcement made by the U.S. Justice Department in April 2009 that KSM had been waterboarded 183 times in March 2003, a struggle over the jurisdiction of the trial ensued. In November 2009, the Department of Justice announced the trial would take place in a U.S. District Court in New York City. Less than two years later, following the imposition of restrictions by Congress, in April 2011, it was announced that KSM would face trial by Military Commission in Guantánamo Bay, Cuba. This jurisdictional tug-of-war delayed the trial until May 5, 2012, when KSM was finally arraigned in Guantánamo along with his four co-accused: Walid Muhammad Salih Mubarak, Ramzi Bin Al Shibh, Ali Abdul-Aziz Ali, and Mustafa Ahmed Adam Al Hawsawi.

The Pacific Council asked Richard Goetz, a Council member and litigation partner at O'Melveny & Myers LLP, to serve as the Council's first designated observer to the pretrial hearings. What follows is a collection of observations and reflections Rich recorded during the trip from June 16 to June 21, 2013, shared here for the benefit of other Council members. The report Annex includes a brief legal memorandum prepared by O'Melveny & Myers intern and UCLA law student Tristan Bufete, which compares procedural rights in military commissions in Guantánamo to those in federal courts.

The Pacific Council will send additional member delegates to observe future hearings.

June 16, 2013: Arrival

I am in Guantánamo Bay, Cuba, for a week of pretrial hearings for Khalid Sheikh Mohammed. KSM is accused of, among other things, masterminding 9/11, personally killing Daniel Pearl, and plotting to attack Los Angeles's Library Tower and Chicago's Sears/Willis Tower. He actually has confessed to all of this and more, after 183 waterboardings. The Military Commission hearings in Guantánamo have a tortuous history, and seek the death penalty against KSM and his co-defendants (Walid Muhammad Salih Mubarak, known as Bin 'Attash; Ramzi Bin Al Shibh; Ali Abdul-Aziz Ali; and Mustafa Ahmed Adam Al Hawsawi).

As the representative of the Pacific Council on International Policy, I join representatives from 13 NGOs. Fellow NGO observers range from Human Rights Watch to Amnesty International to the National Institute for Military Justice to the American Bar Association. A diverse group of about a dozen members of the media/press are also here, including reporters for *Der Spiegel*, the *Irish Times*, *Rolling Stone*, and *Vice* (the media company that brought Dennis Rodman to North Korea).

You're going to GTMO?

Given the short notice I had for this trip and the demands of my day job, I did not quite know what to expect. We were warned of hot weather and the need to hydrate, and told dress would generally be business casual. Beyond that, the Travel Brief from the Office of Military Commissions gave few details. But reading between the lines, I could tell this would not be a normal business trip:

"Tents are kept very cold to keep insects/animals away. If you are prone to being cold, you may want to bring or purchase another blanket...."

"It is illegal to harm an iguana. Please exercise caution when driving or biking, as iguanas frequently lay under cars or in the road."

We flew to GTMO from Andrews Air Force Base, which I had known for years as the airport for presidents. The Andrews terminal was like one at any small town airport: the same warnings not to leave bags unattended, the same hurry-up (we needed to be there before 6 am) and wait (we boarded at 8 am).

Air Force One was not there for our early Sunday departure. A commercial plane from Miami Air was. It was an oddly normal flight – except that we were wheels up within moments of boarding, there were no seat assignments, and we had very few passengers on our 737-800. As we took off, flight attendants handed us hot towels, pillows and blankets. The pilot welcomed us to "our three hour flight to GTMO," and we were invited to settle in and watch the in-flight movie: *Argo*. About 45 minutes out of Cuba we began to descend and the pilot announced we would travel the remainder of the trip at low altitude because Cuban airspace near Guantánamo is "not controlled."

After a brief security check upon arrival, we took a ferry to Camp Justice, the secure area within Guantánamo that houses the courtroom.

Don't do that!

Observers have few rules. We agreed not to describe how prisoners are transported to or from the courtroom. We may not take pictures of or draw any of the participants in the proceedings. We may not travel outside of certain areas without an escort. Near the courtroom, we must stay on designated paths.

Sweet home Guantánamo

The Guantánamo Base is huge – about 45 square miles. Camp Justice is compact. The courthouse is in a smallish steel building in a compound behind barbed wire. My luxurious accommodations – in tent A10 – are only steps away.



Tent A10



Camp Justice welcome sign



Note the last warning, a security measure: “No hat/no salute zone”

June 17, 2013: Hearings begin

I was face to face with KSM today. I'm not sure whether he was really looking at me, but it was electrifying nonetheless. As a seatmate noted of the defendants, "you have to remind yourself not to give them celebrity status."

We joined KSM and his four co-defendants in a specially constructed Military Commission courtroom packed with defense and prosecution counsel. We watched from a rear observation room with huge windows that afforded unobstructed views. Our sound feed was delayed to allow interruption if sensitive national security information was revealed: no such cuts today.

KSM wore a camouflage vest. The courtroom sketch artist said that this is to signal he remains a warrior, even in court (perhaps of significance to KSM on the issue of his "combatant" status). Two other defendants wore similar vests.

The topic today: pretrial motions. The actual trial will not start until 2014 or later. Vice Admiral Bruce MacDonald was on the stand all day, by video feed from Washington State. MacDonald headed the "Convening Authority" that sent/referred the defendants to the Military Commission for prosecution – akin to an indictment. Defense counsel challenged him about intrusions into their attorney-client privilege, and the time limits he set for opposing the reference order (and the impact of those limits on their efforts to develop evidence of torture). There will be more on these issues tomorrow and argument later this week.

In addition to the press and NGOs, the gallery included those victims of 9/11 and their survivors, each of whom had won a gallery ticket by lottery. One New Yorker said she was riveted.

We were also joined by two witnesses the prosecution intends to call at trial: retired NYFD officers, both injured on 9/11. One stood at the beginning of the session and stared intently at KSM. I chatted with the other at a break. He saw the plane hit the North Tower. He said the Tower just seemed to suck the plane in. He knew then those at the top would not make it. He recalled later seeing parts fall from the building. Then he realized they were people. "They were falling," he said, "like rain drops."

On Tuesday the detainees skipped the hearings. Wednesday they were back.

Admiral MacDonald has finished his testimony, and a former GTMO commanding officer, Rear Admiral David Woods, began his. Both testified by video feed, and their examinations were repeatedly interrupted by technical difficulties. Those of us who have frustrations with videoconferences can take some comfort in the fact that the U.S. Government – which can collect data on all Verizon calls – has the same problems.

Both days focused on defense claims that there were procedural problems with the way the case was sent to the Military Commission – the court that sits here to try GTMO detainees. By way of background: the Military Commission was established by a 2009 statute, after prior military trial efforts failed to pass constitutional muster, and after Attorney General Holder’s efforts to try detainee cases in federal court in the U.S. were blocked by Congress. The Commission is presided over by a military judge. The lawyers are also military officers, though in response to the earlier constitutional challenges, four of the five defendants also now have a separate civilian capital case lawyer (the fifth has a military counsel with capital case experience).

The core defense argument these past two days is that an order from Admiral Woods put defense counsel to a Hobson’s choice: they either had to waive attorney-client privilege, or not discuss certain issues – such as torture – with their clients. The defense also has focused on their claim that they were not given enough time to prepare a “mitigation” defense to capital charges. Under military law, a mitigation defense can turn on a range of issues, including torture of a detainee, or his relative culpability. My take is the defense scored some significant points on the privilege issue, less so on the mitigation issue (there is no clear right to present mitigation issues prior to referral to the Military Commission), and that in any event it is unlikely that the judge will derail the trial.

The hearing also addressed two other interesting issues. First, the Red Cross opposed defense efforts to obtain a Red Cross report to Defense Department brass about the U.S.’ handling of these detainees. The Red Cross argued it has the unfettered right under international law to determine the scope of release of its reports, and that absent such control it might lose access to prisoners, including to U.S. soldiers held by other governments at times of war. The prosecution took the position that it has not seen the report, and thus is not in a position to turn it over to the defense. The judge seemed dubious of both the Red Cross and prosecution positions.

“It was an imperfect world we were living in at the time. That’s the difference between this system and the federal [court] system.”

Second, the parties debated over whether and when the detainees can be excluded from the proceedings. The debate turns on interpretation of the 2009 statute that established the Military Commissions, and on arguments under the U.S. Constitution’s confrontation, due process, and cruel and unusual punishment clauses. A core issue is the detainees’ rights to be present for pretrial proceedings that involve classified FBI reports on the handling of the detainees themselves.

Given that a core issue for the world press covering the proceedings is the fairness of the Military Commission system, I suspect we will hear more on this quote from Vice Admiral MacDonald (a three star admiral who was at one point the highest officer in the Commission system): “It was an imperfect world we were living in at the time. That’s the difference between this system and the federal [court] system.”

GTMO continues to provide sensory overload. Each morning before we walk to court the National Anthem plays over loudspeakers. Those assembled face the American flag that towers on a hill. In between stands the razor-wired courthouse compound.

At a dinner out last night some of us sat next to a long table of the prosecution team and families of 9/11 victims. One of those family members holds an 8.5 x 11 picture on her lap throughout the hearings, and at breaks she stands where the detainees can see her and it. I chatted with her earlier in the day. She spoke bluntly, "This is my husband. He was murdered on 9/11. That's our daughter standing with him. She was 8 in the picture."

Her husband was on flight 11, two days after the picture was taken. At dinner she sat near the firefighter who saw that flight "sucked into" the North Tower.

June 20, 2013: Hearings continue

More testimony today directed to the same legal issue – whether the defense had an adequate opportunity, prior to the reference to the Military Commission, to develop a “mitigation” case to avoid the death penalty. Admiral Woods finished his testimony, and Captain Thomas Welsh, the GTMO former staff Judge Advocate (akin to a general counsel), started his. Despite some excellent defense examinations, I still believe these motions will not derail a trial.

Part of the day was devoted to a hearing from which we – and the detainees – were excluded for national security reasons (the judge has ruled that the detainees may be excluded from certain pretrial proceedings). Today’s exclusion came shortly after a defense counsel, Commander Ruiz, referred to CIA involvement at GTMO. Tensions ran high before the exclusion. At a huddle of counsel, a prosecutor threatened Ruiz that he was “playing with fire.” Ruiz responded, on the record, “I will not be threatened by the prosecution.”

The good news is that the level of heat between the parties suggests this is truly an adversarial proceeding.

Ruiz also suggested that the audio feed to our gallery had been intentionally cut by the government (it turns out it was not). There’s some history to the flap. During a hearing some months ago, the audio feed was in fact cut to the gallery, and not by the judge. I’m told it was instead cut by an independent government agency that was monitoring the hearing. The judge was reportedly furious.

As I mentioned yesterday, Admiral Woods testified by video. Repeated technical problems continued today, making it difficult to question Woods about documents. Over defense objections, the judge has allowed some witnesses, including Woods, to testify by video, but said he would order them to appear in person if technical difficulties continue. Ironically, Woods testified from a conference room at the San Diego Naval Air Base, and the proceedings had to stop to wait for jet engine noise to die down. Given that this is the 9/11 case, under a worldwide microscope, perhaps the judge regrets not telling the Admiral to get on one of those planes and show up in person.

We met tonight for about an hour and a quarter with General Mark Martins, the lead prosecutor. He answered a wide range of questions, and we probed some of the differences between the Military Commission system and a federal court trial. By the way, differences include: (1) the Commission does not provide a detainee with a right to a speedy trial, (2) the Commission may allow the admission of coerced statements into evidence, and (3) the Commission allows more liberal use of hearsay evidence. *See Annex for a discussion of these and other differences.*

For the non-lawyers, “hearsay” is an “out of court statement offered to prove the truth of the matter asserted” – to make up an example, a statement made by an informant in Afghanistan that is then offered in court to prove KSM guilty, and KSM does not have the opportunity to cross-examine that informant at trial.

Today started with a toothache. Detainees are excused from hearings if they sign a form waiving their right to be present. Today, two were absent – one with the toothache. The judge worried the ailing detainee may not be viewed, on appeal, as “voluntarily” absent, so we adjourned for over an hour to allow the parties to address the issue. After the detainee confirmed he didn’t want to come, toothache or not, Captain Welsh completed his testimony, and the day wrapped up – after 8 pm – with argument over how best to balance national security and the attorney-client privilege in a protective order.

I write this on a chartered United Airlines flight to Andrews, crowded with defense and prosecution lawyers, families of 9/11 victims, the press, and fellow NGO representatives. It is a tired, relatively sober group. But serious times can have light moments, and this week was no exception. On Friday, Captain Welsh testified about an Al Qaida magazine, *Inspire*, that has featured articles such as “How to Make a Bomb in Your Mom’s Kitchen.” There was a debate over whether the defense should ever be permitted to show the magazine to the detainees. After intense questioning and argument, the translators announced that they had been telling the detainees that the debate was over access to *Esquire* magazine.

Later in the long day, Captain Welsh testified about translators the government supplies to the detainees outside of court. Military intelligence pays for those translators. In a Freudian slip, he testified, “The intelligence directorate supplied interrogators; I mean translators.” That was funny for the gallery, but not for the Captain.

My overall sense of the proceedings

KSM (and his co-defendants) are very attentive in court. And KSM, in particular, cares about his image. I’m told he has sought to limit use of the picture taken when he was captured – the one where he looks so disheveled. On our last day he sported a checkered shawl rather than his military jacket. Casual Friday? Not quite. The black checks on his “Keffiyeh” were the Fatah pattern Yasser Arafat made famous. KSM’s long beard is now a brilliant, unnatural red, which he reportedly colors with berries and Kool Aid (some report he uses fruit juice rather than Kool-Aid). The beard stands in sharp contrast to the pre-capture KSM. One writer, commenting on the difficulty of tracking KSM, labeled him the “James Bond of terrorists.” The book *The Hunt for KSM* opens with this: “Throughout the modern age of terror, [KSM] has had the eerie ability to be at its center yet glimpsed only in the margins. He’s been the ghost of our times.”

It is difficult to jump into litigation mid stream for only a few days – as I just did – and understand even major issues, let alone the nuances. That said, my impression is of a strong effort by the judge, and the lawyers on both sides, to conduct fair, vigorous, and truly adversarial proceedings. I also suspect, though, that we will not see a trial in 2014, and perhaps not in 2015. Trial will be followed by appeals (to the D.C. Circuit Court of Appeals). What that means to the families of 9/11 victims is difficult to say. For some I chatted with, the proceedings are already bringing closure. But the proceedings evoke diverse views. The New Yorker who was so riveted – her brother died in one of the towers – thinks the case should be tried in federal court, not a Military Commission. Many of our traditional allies have voiced the same opinion – indeed, it is hard to overstate how dimly those allies view GTMO and the Military Commission process. Foreign reporters I chatted with this week said that will be a hard view to shake, even as they noted their own surprise at the openness and adversarial nature of the hearings.

ANNEX

Comparison of Procedural Rights in Military Commission Trials and Criminal Trials in Federal Court

Prepared by Tristan Bufete, O'Melveny & Myers and UCLA

I. INTRODUCTION

This memorandum discusses differences between the procedural rights afforded to criminal defendants in federal court and the procedural rights of detainees prosecuted under the Military Commissions Act of 2009 (the "MCA").¹ Specifically, it examines the following differences: (1) the MCA does not provide a detainee with a right to a speedy trial, (2) the MCA may allow the admission of some coerced statements into evidence, and (3) the MCA may allow the admission into evidence of hearsay that would otherwise be inadmissible in federal courts.

This memorandum examines procedural differences that the author has identified as relevant to the audience of the Pacific Council on International Policy. Thus, this memorandum does not purport to provide a complete description of every substantive difference between procedures in federal court and procedures in military commissions.²

II. THE MILITARY COMMISSIONS ACT OF 2009

On November 13, 2001, President Bush issued a Military Order providing for the detention, treatment, and trial by military commission of certain non-citizens in the war against terrorism. *See* 66 Fed. Reg. 57833 (Nov. 16, 2001). In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court invalidated those military commissions. *Id.* at 567. The Court held that President Bush acted without legislative authority because the procedures to try Hamdan did not comply with the Uniform Code of Military Justice ("UCMJ") and the Geneva Conventions. *See id.* at 593–95, 613, 625. Congress responded to the *Hamdan* ruling by enacting the Military Commissions Act of 2006, which permitted military commissions to depart from the procedures in the UCMJ.³ After President Obama's election, Congress passed the MCA. The MCA amended, *inter alia*, prior procedures dealing with search and seizure, coerced confessions, and hearsay information. Although the MCA is "based upon the procedures for trial by general courts-martial under [the UCMJ]," it provides that "[t]he judicial construction and application of [the UCMJ], while instructive, is therefore not of its own force binding on military commissions established under [the MCA]." 10 U.S.C. § 948b(c).

III. DIFFERENCES BETWEEN PROCEDURAL RIGHTS AFFORDED TO CRIMINAL DEFENDANTS IN FEDERAL COURT AND DETAINEES PROSECUTED UNDER THE MCA

There are three principal differences between the procedural rights afforded to criminal defendants in federal court and detainees prosecuted under the MCA. Specifically, (1) the MCA does not provide a detainee with a right to a speedy trial, (2) the MCA may allow the admission of some coerced statements

¹ Unless otherwise noted, the term "Military Commissions Act" or "MCA" (without specifying the year enacted) refers to the Military Commissions Act of 2009.

² Other procedural differences not discussed in this memorandum include, but are not limited to: (1) the MCA may allow the admission of evidence seized without a warrant or other authorization and (2) the MCA does not require a unanimous vote for a finding of guilt for cases that do not involve the death penalty.

³ Courts-martial are governed by the Uniform Code of Military Justice and the Rules for Courts-Martial. *See generally* 10 U.S.C. §§ 801 *et seq.*

into evidence, and (3) the MCA may allow the admission into evidence of hearsay that would otherwise be inadmissible in federal courts. The principal criticisms of the MCA are based on these differences.

A. Under the MCA, a detainee does not have a right to a speedy trial

Under the MCA—unlike in federal court or a trial by general court-martial—a detainee has no right to a speedy trial.⁴ See 10 U.S.C. § 948b(d). The MCA expressly exempts military commissions from Article 10 of the UCMJ. Under that provision, “immediate steps shall be taken to inform [a defendant] of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.” *Id.* §§ 810, 948b(d).

In contrast to the MCA, a criminal defendant’s right to a speedy trial in federal courts has constitutional and statutory underpinnings. The Constitution provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. Const. amend. VI. The Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174, established time limits for completing the various stages of a criminal prosecution in federal courts. For example, the information or indictment must be filed within 30 days from the date of arrest or service of the summons. *Id.* § 3161(b). Also, trial must start within 70 days from the date the information or indictment was filed, or from the date the defendant appears before an officer of the court in which the charge is pending, whichever is later. *Id.* § 3161(c)(1). Of course, some pretrial delays are automatically excluded from those time limits, such as delays caused by pretrial motions. *E.g., id.* § 3161(h)(1)(D). In addition to the Speedy Trial Act, the federal statute of limitations ensures prompt prosecution of criminal charges. See *id.* § 3282(a) (providing a general five-year statute of limitations for non-capital federal crimes unless otherwise expressly provided by law).

B. Under the MCA, statements elicited through torture or cruel, inhuman, or degrading treatment are inadmissible. However, the MCA allows the admission of some coerced statements

The MCA exempts military commissions from the UCMJ’s requirement of providing a defendant with the statutory equivalent of a *Miranda* warning, which informs a defendant of his or her privilege against self-incrimination. See 10 U.S.C. § 948b(d). Moreover, under certain circumstances, the MCA permits admission of coerced statements. Confessions allegedly elicited through coercion or compulsory self-incrimination may be admissible if the proffered evidence complies with the provisions of § 948r. See *id.* § 949a(b)(3)(B). Section 948r bars the admission of statements obtained by torture or cruel, inhuman, or degrading treatment (“CIDT”). *Id.* § 948r(a). It also prohibits a defendant from testifying against himself at a military commission proceeding. *Id.* § 948r(b). Otherwise, out-of-court statements by the detainee may be admitted if a military judge finds that the statement is reliable, sufficiently probative, and either (1) was made at capture and the interests of justice would be best served by admitting the statement into evidence or (2) was voluntarily given.⁵ *Id.* § 948r(c). In some respects, the MCA brings the admissibility of

⁴ *But cf.* U.S. DEP’T OF DEF., MANUAL FOR MILITARY COMMISSIONS (Apr. 27, 2010), Rule 707(a) (“Within 30 days of the service of charges, the accused shall be brought to trial.”).

⁵ The text of the relevant provision states:

(c) Other statements of the accused. A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds—

(1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and
(2) that—

(A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or

(B) the statement was voluntarily given.

coerced statements in military commissions closer to the procedures in federal courts. For example, the MCA introduces the concept of voluntariness for determining the admissibility of confessions that are not elicited through torture or CIDT. *See id.* § 948r(d). In enacting § 948r, however, Congress departed from federal court procedure by allowing the admission of some coerced statements.

By contrast, the Constitution provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. Incriminating statements made by a defendant without prior *Miranda* warnings are inadmissible as evidence of guilt in a criminal trial. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Accordingly, *Miranda* requires that prior to any questioning, a person under custodial interrogation must be warned that “he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” *Id.* Similarly, under the UCMJ, coerced confessions or confessions made in custody without the equivalent of a *Miranda* warning are inadmissible at trials by court-martial. *See* 10 U.S.C. § 831.

C. Under the MCA, hearsay evidence that would otherwise be inadmissible in federal court may be admissible at trials by military commission

The MCA has also been criticized because it allows for the admission of hearsay evidence to a greater extent than allowed in federal court. Hearsay evidence consists of an out-of-court statement offered “to prove the truth of the matter asserted in the statement.” Fed. R. Evid. 801. Under the MCA, hearsay that would otherwise be inadmissible in federal court or at a trial by court-martial may be admitted if certain requirements are satisfied. *Id.* § 949a(b)(3)(D). First, the proponent of hearsay evidence must provide adequate notice to the opposing party. *Id.* Second, the military judge must find (1) that the statement is reliable and has probative value on a material fact, (2) that direct testimony from the witness is not available or would have an adverse impact on military or intelligence operations, and (3) that the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence. *Id.*

By contrast, the Constitution provides that, “the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. Accordingly, the Federal Rules of Evidence generally prohibit the admission of hearsay. *See* Fed. R. Evid. 801; *see also Crawford v. Washington*, 541 U.S. 36, 68 (2003) (“Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability [of the declarant] and a prior opportunity for cross-examination.”). Similarly, the Military Rules of Evidence, which borrow language from the federal rules, also restrict the introduction of hearsay at trials by court-martial. *See* Mil. R. Evid. 802.

In response to criticisms that the MCA’s rules regarding hearsay violate due process, Congressman Michael T. McCaul and Professor Ronald J. Sievert point out that the elements of the hearsay rule under the MCA are substantially similar to the elements of the residual hearsay exception under Rule 807 of the Federal Rules of Evidence.⁶ Michael T. McCaul and Ronald J. Sievert, *Congress’s Consistent Intent to Utilize*

10 U.S.C. § 948r(c).

⁶ Rule 807 of the Federal Rules of Civil Procedure provides:

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

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

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

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

Military Commissions in the War Against Al-Qaeda and Its Adoption of Commission Rules that Fully Comply with Due Process, 42 ST. MARY'S L.J. 595, 619–20 (2011). Under Rule 807, a federal court may admit statements that do not fall within one of the hearsay exceptions enumerated in the rules. *See* Fed. R. Evid. 803, 804, 807. McCaul and Sievert admit, however, that the military commission rule encourages the use of statements that would normally fall under the residual exception. McCaul & Sievert, *supra*, at 620. By contrast, Rule 807 is seldom applied in federal court practice. *Id.* In fact, Rule 807's legislative history indicates that the residual exception should be used "very rarely and only in exceptional circumstances." S. Rep. No. 93-1277, at 9 (1974). Nevertheless, McCaul and Sievert argue that because the substance of both rules is almost identical, "it is clearly false to suggest that the military commission rule is somehow a violation of due process." McCaul & Sievert, *supra*, at 621.

IV. CONCLUSION

The MCA—as a response to the criticisms of previous procedures under both President Bush's November 13, 2001, Military Order and the Military Commissions Act of 2006—has evolved and now prohibits the admission of statements elicited from cruel, inhuman, or degrading treatment regardless of when they were made. Also, under the Military Commissions Act of 2006, the burden of showing that hearsay was unreliable was placed on the party opposing the admission of evidence. The MCA appears to have shifted the burden of showing that hearsay is reliable to the proponent of the evidence. Critics of the MCA, however, point out that substantial differences remain between procedural rights afforded to defendants in federal court and detainees tried under the MCA. The Supreme Court has stated that the process due in any given instance is determined by balancing the individual's interest versus the government's asserted interest. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Thus, it is unclear if the Supreme Court—given the great governmental interest in combating terrorism—will invalidate any of the provisions discussed above.

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

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