



## NIMJ BRIEFS ON THE GUANTÁNAMO MILITARY COMMISSIONS

### *Hearsay*

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Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. These statements are generally excluded in American courts because, among other factors, they violate the Sixth Amendment right of an accused to confront the witnesses against him. The federal rules of evidence, which the rules of evidence for courts-martial closely mirror, allow numerous specifically defined exceptions and exemptions to the hearsay rule. The system of exceptions and exemptions found in regularly constituted United States federal courts do not apply in military commissions. The Military Commissions Act (“MCA”) of 2006 provides a rule broadly allowing for the admission of hearsay evidence.

(E)(i) Except as provided in clause (ii), hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained). The disclosure of evidence under the preceding sentence is subject to the requirements and limitations applicable to the disclosure of classified information in section 949j(c) of this title. (ii) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial shall not be admitted in a trial by military commission if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value.

10 U.S.C. §949a.

Of the three military commission convictions secured to date, only Salim Hamdan contested his guilt at trial, and hearsay did not play a significant role. However, the admission of hearsay against several detainees will be an issue of contention for this system of justice.

One of President Obama’s proposed changes to the military commissions is to Military Commission Rule of Evidence 803(c). The change would reverse the burden of proof. The burden of proving reliability would be placed on the proponent of the evidence. Under the current rule, the opponent must prove the unreliability of the statement. Even with this change, admissibility of hearsay will remain significantly broader than in civilian courts or courts-martial. Congress may include further changes in the hearsay rule as it considers amendments to the MCA.