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Hearsay Convictions at Guantanamo

by Jacob G. Hornberger

The Pentagon's decision to [admit hearsay evidence](#) at its military tribunals at Guantanamo Bay flies in the face of one of the most important principles in the administration of criminal justice — the right to confront one's accuser and cross-examine him in the presence of the jury. In fact, our American ancestors deemed the principle so important that they included it in the [Sixth Amendment](#): "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

What's the effect of the Pentagon's hearsay rule?

Let's assume that the Pentagon is prosecuting a person for setting off a bomb at a U.S. embassy overseas. Assume that the military takes into custody another suspected terrorist who tells a military interrogator that he saw the defendant set off the bomb.

If the trial were being held in federal district court, the judge would be bound by both the U.S. Constitution, which guarantees the defendant the right to confront and cross-examine his accuser, and the federal rules of evidence, which bar the use of hearsay except in a very few long-established circumstances. The hearsay prohibition means that prosecutors would have to bring the suspected terrorist into court to testify as a witness against the defendant.

After the witness has testified on direct examination as part of the prosecution's case, the defendant's attorney would have the right to cross-examine him to impeach his credibility by, for example, showing prior inconsistent statements, challenging his version or recollection of the critical events, showing he was tortured into making his accusation, or demonstrating that he has a motive to lie arising out of leniency promised by the government. The jury would have the opportunity to closely watch and examine the demeanor of the witness as he is testifying to determine whether he is telling the truth and how much weight to give his testimony.

Thus, the vital importance of the right to confront adverse witnesses and cross-examine them in a criminal proceeding cannot be understated. It is one of the primary means by which the defendant in a criminal proceeding is able to show that government witnesses are either lying or failing to disclose the entire truth about important aspects of the government's case.

In the Cuban military tribunals, the situation is completely different. At trial the Pentagon will permit military prosecutors to call to the witness stand the military interrogator to whom the accuser made his accusation and have the interrogator relay to the jury what the accuser has said. The defendant's attorney would be free to cross-examine the interrogator but obviously that's a far cry from cross-examining the person who has made the accusation.

Thus, under the Pentagon's hearsay rule, a person can be convicted of terrorism by out-of-court statements offered for "the truth of the matter stated" (e.g., that the defendant committed a terrorist act) — statements that might not even have been made under oath, might well be false, or might have been induced by duress or threats of violence, bribery, or blackmail. While the jury could watch and examine the demeanor of the military interrogator and honestly conclude that he was telling the truth about what he was told by the suspected terrorist, the jury would be precluded from closely watching and examining, under the pressure of a rigorous cross-examination, the demeanor of the person who has actually made the accusation.

Is it fair or just to convict and punish a person on the basis of hearsay testimony? Our ancestors believed not, which is why they insisted on the passage of the Sixth Amendment. Unfortunately, the Pentagon feels differently, which is why it is permitting hearsay evidence in its Guantanamo Bay military tribunals.

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This article was originally published in September 2004.