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*Gregory S. McNeal**

INTRODUCTION

The Obama Administration's decision to release the Office of Legal Counsel (OLC) memos that authorized abusive interrogation techniques has shed new light on what occurred at CIA black sites in an effort to extract intelligence information from high-value detainees.[1] Much commentary has focused on accountability for interrogators and those who authorized their specific techniques.[2] Similarly, many scholars have discussed the problems with the current military com-

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1. *See Obama Publishes "Torture" Memos*, BBC, Apr. 16, 2009, http://news.bbc.co.uk/2/hi/americas/8003023.stm.

2. *See, e.g.*, CHRISTOPHER L. BLAKESLEY, TERRORISM AND ANTI-TERRORISM: A NORMATIVE AND PRACTICAL ASSESSMENT (2006); HAROLD H. BRUFF, BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR (2009); DAVID COLE, TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 3 (2009); THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005); TORTURE: A COLLECTION xviii (Sanford Levinson ed., 2004); JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR ix–x (2007); MARJORIE COHN, COWBOY REPUBLIC (2007); PHILIPPE SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES (2008); José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175 (2006); Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2087–88 (2005); M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389, 390 (2006); Benjamin G. Davis, *Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 ST. JOHN'S J. LEGAL COMMENT. 503, 503 (2008); David E. Graham, *The Dual U.S. Standard for the Treatment and Interrogation of Detainees: Unlawful and Unworkable*, 48 WASHBURN L.J. 325, 352 (2009); Scott Horton, *Kriegsraison or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War*, 30 FORDHAM INT'L L.J. 576, 576–78 (2007); Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 89–93 (2007); Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT'L L. & POL'Y 33, 55–56 (2006); Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1231 (2005); Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT'L L. 309, 309–11 (2006); Marlise Simons, *Spanish Court Weighs Criminal Inquiry on Torture for 6 Bush-Era Officials*, N.Y. TIMES, Mar. 29, 2009, at 6; Ctr. for Constitutional Rights, Impeach Torture Architect Jay Bybee, http://ccrjustice.org/get-involved/action/impeach-torture-architect-jay-bybee.

missions and the problems with transitioning to Article III courts.[3] Far less commentary, however, has focused on the impact those abusive and coercive interrogation techniques had on statements derived from non-abusive, non-coercive interviews. Were subsequent, legal, and humane interviews indelibly impacted by the "taint of torture," regardless of how they were conducted? Accordingly, are statements made in those subsequent noncoercive settings inadmissible on voluntariness grounds? The latter question is particularly salient because Congress is considering modifying provisions of the Military Commissions Act of 2006[4] and is specifically considering using a voluntariness standard to test the admissibility of statements made by detainees.[5] This Article highlights the fact that such a standard requires a complex, fact-intensive inquiry which may mean that some inculpatory statements made by high-value detainees will need to be excluded either to protect the rights of the detainee or to protect the integrity of the judiciary.

This Article explores some, but certainly not all, of the issues associated with seemingly voluntary statements that followed earlier statements derived from coercion, abuse, or even torture. In light of the goals of this Article, a few disclaimers are in order. First, the secrecy associated with specific interrogation techniques and the possibility of criminal liability for those who engaged in such techniques makes writing about these issues with specificity particularly difficult. The facts regarding how detainees were interrogated, what environment they were in, the surrounding circumstances, and what was going through their minds and the minds of their interrogators are left to speculation at worst, and inferences drawn from selectively released documents at best. Therefore, much of this Article will focus on what is "known," based on snippets from released documents, selective quotations, and allegations made by alleged terrorists. Second, the

3. *See, e.g.*, BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 164–66 (2008); Amos Guiora & John T. Parry, Debate, *Light at the End of the Pipeline? Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. PENNUMBRA 356, 359–61 (2008), http://www.pennumbra.com/debates/pdfs/terrorcourts.pdf; Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. 967, 967 (2009). Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 1, 5 (2003); Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19; Andrew C. McCarthy & Alykhan Velshi, We Need a National Security Court 1–2 (2007) (unpublished manuscript), http://www.defenddemocracy.org/images/stories/national%20security%20court.pdf.

4. *See Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009), *available at* http://judiciary.senate.gov/hearings/hearing.cfm?id=4002.

5. *See id.* (testimony of David Kris, Assistant Attorney General for National Security), *available at* http://judiciary.senate.gov/hearing s/testimony.cfm?id=4002&wit_id=8156.

U.S. law of interrogations generally—and voluntariness specifically—is extremely complicated, and as one commentator argued, it can best be described as incoherent.[6]

This Article proceeds in three parts. First, I briefly tell the story of one high-value detainee, Khalid Sheikh Mohammed (KSM), the alleged mastermind of the September 11th attacks.[7] Combining authorized practices from the OLC memos examining the legality of certain interrogation techniques (sometimes referred to as "torture memos") with released (ostensibly confidential) reports from the International Committee of the Red Cross (ICRC), I corroborate the widely asserted fact that KSM and other detainees were subjected to coercive interrogation, abuse, and perhaps torture.[8] While I take the time to engage in some preliminary corroboration in Part II, corroborating these allegations is not central to this Article's purpose and has been more thoroughly explored by others. The purpose of painting this picture of alleged abuses is to set the stage for a discussion of whether such earlier abuses, if believed, will invalidate subsequent statements made by the victims of that abuse. Therefore, in Part II.B, I explain the changed circumstances that the high-value detainees experienced when they were transferred to Department of Defense custody in Guantanamo Bay, Cuba.[9] I also explain how the U.S. government recognized that its earlier interrogation tactics may have jeopardized its legal case against the detainees and how it therefore decided to counter those earlier mistakes by establishing "clean teams."[10] These clean teams were groups of interrogators who used non-abusive techniques to extract inculpatory statements from detainees. The combination of these two fact patterns—the earlier pattern of abuse and the subsequent non-abusive interrogations—are central to understanding the complicated issues involved in trying Guantanamo detainees. The central questions are these: Were the subsequent voluntary statements indelibly impacted by the earlier abuses?; How far does the taint of torture run?; And will it impact military commissions (or even Article III court trials) of alleged terrorists?

In Part III, I attempt to synthesize which juridical tests a judge will need to apply in order to answer these questions. I explain the voluntariness and totality of the circumstances tests that courts have applied

6. *See* M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319, 321 (2003) (noting that "the Court's broader confessions jurisprudence can best be described as incoherent").

7. *See infra* notes 19–27 and accompanying text.

8. *See infra* notes 28–38 and accompanying text.

9. *See infra* note 45 and accompanying text.

10. *See infra* notes 42–46 and accompanying text.

in a variety of interrogation circumstances. I also highlight how factors—such as the time in between statements, whether there was a change in the place of interrogations, whether the identity of the interrogators changed, what the nature of the previous unlawful interrogation methods was, and whether the illegally procured statement was used to leverage the subsequent statement—can impact this question.[11] I also discuss the U.S. Supreme Court's "cat out of the bag rule," which posits that once a defendant has revealed information in an earlier statement, all subsequent statements are detrimentally impacted by that revelation. I summarize courts' treatment of this rule through the lens of a recent federal case involving extraterritorial statements that were elicited by FBI agents after abuses by foreign officials.[12]

In Part IV, I combine the tests detailed in Part III and apply them to the facts outlined in Part II.[13] Given the murkiness of the factual details, this Part highlights the salient points derived from the public disclosures regarding KSM and other high-value detainees. Part IV also highlights the unique jurisprudential approach that a military tribunal judge will need to follow under specific provisions of the Military Commissions Act of 2006.[14] Finally, I conclude the Article with some thoughts about what impact pending legislation intended to reform military commissions may have on the government's ability to try high-value al Qaeda detainees.[15]

II. FROM COERCIVE INTERROGATION TO CLEAN TEAMS

A. The Coercive Interrogation Phase

The literature is replete with stories of interrogation abuses in the war on terrorism.[16] In a statement on April 16, 2009, in conjunction with the release of the OLC interrogation memos, President Barack Obama referred to the secret prisons and enhanced interrogation era

11. *See infra* notes 57–204 and accompanying text.

12. *See infra* notes 205–222 and accompanying text.

13. *See infra* notes 229–244 and accompanying text.

14. *See infra* notes 240–244 and accompanying text.

15. *See infra* notes 245–246 and accompanying text.

16. The list of articles numbers in the hundreds. A Google Scholar search conducted by the author for articles featuring the terms interrogation, abuse, and terrorism returned 2,740 articles. *See also supra* note 2; Jenny Brooke-Condon, *Extraterritorial Interrogation: The Porous Border between Torture and U.S. Criminal Trials* 60 RUTGERS L. REV. 647 (2007); John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 U. PITT. L. REV. 743 (2001); Ronald J. Rychlak, *Interrogating Terrorists: From Miranda Warnings to Enhanced Interrogation Techniques*, 44 SAN DIEGO L. REV. 451 (2007).

as "a dark and painful chapter in our history."[17] Moreover, a May 7, 2004 report by the CIA Inspector General, released in redacted form, describes waterboarding, mock executions, threats to kill or sexually assault family members of detainees, and other interrogation methods the CIA Inspector General labeled "inhumane."[18] For the purposes of this Article, I accept that reports of abuse are true and instead turn my attention to what impact prior abuses may have had on the admissibility of later statements that were not derived from torture or abusive techniques.

To explore this issue, I will briefly summarize the case of KSM, one of the most prominent detainees held by the U.S. government. His case highlights some of the problems prosecutors and courts will face when attempting to try Guantanamo detainees.[19] KSM is the alleged mastermind of the September 11th attacks, and his case exemplifies the challenges associated with using evidence that has been tainted by torture.[20]

KSM was captured in Rawalpindi, Pakistan on March 1, 2003 by Pakistani Inter-Services Intelligence (ISI), possibly with the support of U.S. personnel.[21] Reports indicate that KSM was held and interrogated in CIA secret prisons around the world until being brought to the Guantanamo Bay detention facility in September 2006.[22] While in custody at Guantanamo Bay, KSM was not immediately interrogated, and in March 2007, he testified before a military panel in a Combatant Status Review Tribunal (CSRT) hearing.[23] In his CSRT hearing, KSM made a number of inculpatory statements, including claiming that he was "responsible for the 1993 World Trade Center operation" and "re-

17. Press Release, The White House, Statement of President Barack Obama on Release of OLC Memos (Apr. 16, 2009), http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/.

18. CENTRAL INTELLIGENCE AGENCY, SPECIAL REVIEW: COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001 – OCTOBER 2003) 44 (May 7, 2004), http://www.aclu.org/torturefoia/released/052708/052708_Special_Review.pdf.

19. I say "some" of the problems because in many respects the amount of public information and evidence available for use against KSM makes his case an easier prosecution than the cases of the lesser-known detainees. Nonetheless, KSM's prominence and the public information about him make him a useful case study for this discussion.

20. Intel Dump, After the Waterboarding, http://voices.washingtonpost.com/inteldump/2008/06/after_the_waterboarding.html (June 22, 2008, 10:59 EST). Phillip Carter is now the Deputy Assistant Secretary of Defense for Detainee Affairs, and he is responsible for the Guantanamo detainees, among other detention-related issues.

21. *See* Andrew O'Selsky, *Khalid Sheikh Mohammed's Own Words Provides Glimpse into a Terrorist's Mind*, BEAUFORT GAZETTE, Mar. 15, 2007, http://news.google.com/newspapers?nid=1998&dat=20070315&id=YI4iAAAAIBAJ&sjid=maoFAAAAIBAJ&pg=2756,2730446.

22. *See id.*

23. *See* Dep't of Def., Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10024, http://www.defenselink.mil/news/transcript_ISN10024.pdf.

sponsible for the 9/11 operation, from A to Z."[24] The Pentagon's transcript of the hearing also noted that KSM complained that he had been tortured while in CIA custody.[25] According to the transcript, KSM was asked if he made statements because of the torture. He responded, "I ah cannot remember now," but the rest of his sentence and other remarks on that point were redacted.[26] Later in the hearing, KSM said he and other prisoners had made false statements during interrogation, apparently under torture.[27] He submitted a written statement about his alleged torture, but that statement has not been cleared for release by the U.S. government.

The release of the OLC memos examining the legality of certain interrogation techniques and confidential ICRC reports has shed new light on the type of abuse inflicted on KSM while in custody. Specifically, these documents confirm earlier reports that indicated that KSM was subjected to various forms of physical coercion, including waterboarding. Waterboarding consists of immobilizing an individual and pouring water over his face to simulate drowning, which produces a severe gag reflex. The technique makes the subject believe that death is imminent. Some debate whether this tactic amounts to torture, but it nonetheless rises to the level of abuse, which would call into question the voluntariness of any statement that followed the technique.[28]

The OLC memos detail specific techniques that were authorized for use by CIA interrogators.[29] These memos, when compared with confidential ICRC documents that detail the treatment of detainees (as told by them), indicate the type of conduct authorized by the U.S.

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24. *Id.* at 18.

25. *See id.* at 7, 14.

26. *Id.* at 15.

27. *See id.* at 14–15.

28. *See supra* note 2 (collecting sources).

29. These memos are archived at the ACLU's website, http://www.aclu.org/accountability/olc.html. *See* Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 30, 2005), http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_05302005_bradbury.pdf [hereinafter May 30 Memo]; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005), http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_05102005_bradbury_20pg.pdf; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005), http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_05102005_bradbury46pg.pdf [hereinafter First May 10 Memo]; Memorandum from Jay Bybee, Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Acting General Counsel, Central Intelligence Agency (August 1, 2002), http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_08012002_bybee.pdf.

government, and the ICRC documents corroborate the fact that the authorized conduct was actually engaged in by interrogators.[30] Two specific techniques—"stress positions" and "waterboarding"—have been corroborated by ICRC documents.[31]

The OLC authorized stress positions as described below:

> There are three stress positions that may be used. You have informed us that these positions are not designed to produce the pain associated with contortions or twisting of the body. Rather, like wall standing, they are designed to produce the physical discomfort associated with temporary muscle fatigue. The three stress positions are (1) sitting on the floor with legs extended straight out in front and arms raised above the head, (2) kneeling on the floor while leaning back at a 45 degree angle, and (3) leaning against a wall generally about three feet away from the detainee's feet, with only the detainee's head touching the wall, while his wrists are handcuffed in front of him or behind his back, and while an interrogator stands next to him to prevent injury if he loses his balance. As with wall standing, we understand that these positions are used only to induce temporary muscle fatigue.[32]

The ICRC describes the claims of detainees generally, and KSM specifically, as it related to the implementation of this legal policy as being

> subjected to prolonged stress standing positions, during which their wrists were shackled to a bar or hook in the ceiling above the head for periods ranging from two or three days continuously, and for up to two or three months intermittently. All those detainees who reported being held in this position were allegedly kept naked throughout the use of this form of ill-treatment.
>
> . . . .
>
> While being held in this position some of the detainees were allowed to defecate in a bucket. A guard would come to release their hands from the bar or hook in the ceiling so that they could sit on the bucket. None of them, however, were allowed to clean themselves afterwards. Others were made to wear a garment that resembled a diaper. . . .
>
> Many of the detainees who alleged that they had undergone this form of ill-treatment commented that their legs and ankles swelled as a result of the continual forced standing with their hands shackled above their head. They also noted that while being held in this position they were checked frequently by US health personnel.[33]

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30. INT'L COMM. OF THE RED CROSS, REPORT ON THE TREATMENT OF FOURTEEN "HIGH VALUE DETAINEES" IN CIA CUSTODY [hereinafter ICRC REPORT], http://www.nybooks.com/icrc-report.pdf.

31. *Id.* at 8–10.

32. First May 10 Memo, *supra* note 29, at 34.

33. ICRC REPORT, *supra* note 30, at 11–12.

Similarly, according to the ICRC report,

> [KSM] alleged that, apart from the time when he was taken for interrogation, he was shackled in the prolonged stress standing position for one month in his third place of detention (he estimates he was interrogated for approximately eight hours each day at the start of the month gradually declining to four hours each day at the end of the month).[34]

Stress positions were not the only type of conduct authorized by the OLC; interrogators also were authorized to use the waterboarding technique, and released documents confirm that the technique was used hundreds of times:

> In this technique, the detainee is lying on a gurney that is inclined at an angle of 10 to 15 degrees to the horizontal, with the detainee on his back and his head toward the lower end of the gurney. A cloth is placed over the detainee's face, and cold water is poured on the cloth from a height of approximately 6 to 18 inches. The wet cloth creates a barrier through which it is difficult or in some cases not possible to breathe. A single application of water may not last for more than 40 seconds, with the duration of an application measured from the moment when water of whatever quantity is first poured onto the cloth until the moment when the cloth is removed from the subject's face.[35]

A May 30, 2005 memo found,

> The CIA used the waterboard "at least 83 times during August 2002" in the interrogation of Zubaydah, IG Report at 90, and 183 times during March 2003 in the interrogation of [KSM].[36]

ICRC documents confirm the information contained in the OLC memos generally, and their use against KSM specifically. According to the ICRC, KSM stated,

> [I] would be strapped to a special bed, which can be rotated into a vertical position. A cloth would be placed over my face. Water was then poured onto the cloth by one of the guards so that I could not breathe. This obviously could only be done for one or two minutes at a time. The cloth was then removed and the bed was put into a vertical position. The whole process was then repeated during about 1 hour.[37]

The ICRC documents then provide,

> The procedure was applied during five different sessions during the first month of interrogation in [KSM's] third place of detention. He also said that injuries to his ankles and wrists occurred during the suffocation as he struggled in the panic of not being able to breathe.

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34. *Id.* at 11.

35. First May 10 Memo, *supra* note 29, at 15.

36. May 30 Memo, *supra* note 29, at 37.

37. ICRC REPORT, *supra* note 30, at 10.

> As during other forms of ill-treatment he was always kept naked during the suffocation. Female interrogators were also present during this form of ill-treatment, again increasing the humiliation aspect.[38]

The legitimacy of KSM's confessions is in question because many of his statements are the product of torture or abusive treatment.[39]

B. The "Clean Team" Phase

As noted earlier, KSM was transferred to Guantanamo from CIA custody. In a speech on September 6, 2006, President George W. Bush stated,

> I'm announcing today that [KSM], Abu Zubaydah, Ramzi bin al-Shibh, and 11 other terrorists in CIA custody have been transferred to the United States Naval Base at Guantanamo Bay. They are being held in the custody of the Department of Defense. As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice.[40]

A key question that faced prosecutors at the Office of Military Commissions[41] in light of these transfers was, "Do we question the detainees again using a 'clean team' of law enforcement personnel in an effort to obtain admissions independent of what they said in CIA custody, or do we preserve the status quo in hopes the military judges might admit some of their earlier admissions?"[42] Prosecutors believed that

> the methods employed to elicit information from the high value detainees prior to their transfer to Department of Defense (DOD) custody caused the prosecution team to doubt that any of their post-capture statements would be admissible at trial, even though the evidentiary rules in military commissions are more lenient than the rules in federal courts and courts-martial.[43]

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38. *Id.* (emphasis omitted).

39. *See* O'Selsky, *supra* note 21.

40. President George W. Bush, Trying Detainees: Address on the Creation of Military Commissions (Sept. 6, 2006), http://www.presidentialrhetoric.com/speeches/09.06.06.html.

41. In the interest of full disclosure, I should note that from 2006 to 2007 I was a legal consultant to Morris D. Davis, the Chief Prosecutor for the Department of Defense Office of Military Commissions.

42. Morris D. Davis, *Historical Perspective on Guantanamo Bay—The Arrival of the High Value Detainees*, 42 CASE W. RES. J. INT'L. L. 115, 118 (2009).

43. *Id.* at 117–18.

> Because military commissions must try crimes based on evidence collected everywhere from the battlefields in Afghanistan to foreign terrorist safe houses, we believe that the Code of Military Commissions should provide for the introduction of all probative evidence, including hearsay evidence, where such evidence is reliable. . . . Court-martial

Former Assistant Attorney General for National Security, Kenneth Wainstein, described the situation after the transfer of these detainees as one of "building cases and anticipating the challenges down the road."[44] Once KSM and others were charged with capital crimes, a "clean team" of FBI and military law enforcement agents was deployed to obtain admissions from some of the high-value detainees "without the use of coercive interrogation tactics."[45] According to the former chief prosecutor,

> The decision to create the "clean teams" and initiate fresh interviews was made after much discussion and debate, but it was our collective belief that we did not have much to lose by trying.
>
> We anticipated three potential outcomes to the clean team effort. In the best case, the detainee would agree to talk and voluntarily provide the same or similar information as that provided while in CIA custody. We hoped "clean" admissions would allows us to introduce the statements made to law enforcement personnel, using them as witnesses at trial, and eliminate or at least minimize CIA involvement in courtroom proceedings. The status quo outcome was the detainee would refuse to talk and we would proceed with what we already had in hand. The worst-case scenario was the detainee would agree to meet with the clean team, but would only talk about alleged mistreatment while in the CIA program. Rather than bolstering the prosecution's case, allegations of abuse required further investigation and might leave the prosecution in a weaker position.[46]

Scholars and human rights advocates have noted the problems with using these clean teams and other evidence against the detainees.[47]

> rules of evidence track those in civilian courts, reflecting the fact that the overwhelming majority of court-martial prosecutions arise from every-day violations of the military code of conduct, far from the battlefield. By contrast, military commissions must permit the introduction of a broader range of evidence, including hearsay statements, because many 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. In this respect, the Code of Military Commissions follows the practice of international war crimes tribunals, which similarly recognize the need for broad evidentiary rules when dealing with evidence obtained under conditions of war.

Id. at 118 n.5 (quoting *Hearing on Military Commissions and Standards Utilized in Trying Detainees Before the H. Armed Servs. Comm.*, 109th Cong. 56 (2006) (prepared statement of Acting Assistant Att'y Gen. Stephen J. Bradbury), *available at* http://armedservices.house.gov/comdocs/schedules/9-7-06BradburyStatement.pdf (last visited Oct. 16, 2009)).

44. Scott Shane & David Johnston, *U.S. Acts to Avert Tactic Expected in Qaeda Trial: Prisoners Reinterviewed by "Clean Teams,"* N.Y. TIMES, Feb. 13, 2008, at A16.

45. Josh White, Dan Eggen & Joby Warrick, *U.S. to Try 6 on Capital Charges over 9/11 Attacks*, WASH. POST, Feb. 12, 2008, at A1.

46. Davis, *supra* note 42, at 120–21.

47. *See* Alan Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT'L L. REV. 1, 41 (2008) (noting that "so-called 'clean' teams are now re-interrogating detainees who have been tortured, so as to try to paint their confessions as having been obtained humanely").

For example, Kenneth Roth, the Executive Director of Human Rights Watch, has noted that his review of the CSRT transcripts reveals that "the government has actually gone out of its way to introduce evidence that is not interrogation related because it knows that is has an interrogation problem."[48] Examples of such evidence include information from seized computers, cell phones, cell phone numbers, and other physical objects.[49] According to Roth, the government

> has established what it is calling "clean teams." These are brand new interrogators that come into Guantanamo and are reinvestigating these suspects without ever looking at their original interrogation. The idea is they are supposedly not tainted by that coerced interrogation and therefore the evidence that they come up with can be used to prosecute the suspect.[50]

From those who have witnessed the clean team interviews, two things are clear. First, the detainees were not Mirandized.[51] Second, the environment was intended to be comfortable and collegial, not threatening and abusive. "[T]he FBI[ ] went to extraordinary lengths to explain to each detainee that his decision to talk or not talk was a purely voluntary choice and there would be no punishment nor reward tied to the decision."[52] As a result of these efforts, most of the high-value detainees chose to cooperate with the clean teams that "used a non-confrontational, rapport-building approach to facilitate

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> During an examination of Brig. Gen. Thomas Hartmann regarding the allegations of unlawful command influence, John Adams Project lawyer Jeff Robinson pressed him on the review of evidence obtained by torture when he was the legal advisor to the Convening Authority. Gen. Hartmann introduced a new phrase into the lexicon of absolution from torture. Speaking of the evidence obtained by so-called "clean teams" (as opposed to the same evidence earlier obtained by torture), Gen. Hartmann embraced this evidence as acceptable under the attenuation analysis.

Jack King, *NACDL Sends Criminal Justice Advice to Obama Transition Team*, 32 CHAMPION, Jan. 2009, at 12, 14; *see also* Marjorie Cohn, *Injustice at Guantanamo: Torture Evidence and the Military Commissions Act*, JURIST, Feb. 15, 2008, http://jurist.law.pitt.edu/forumy/2008/02/injustice-at-guantanamo-torture.php; Benjamin G. Davis, *No Third Class Processes for Foreigners*, 103 NW. U. L. REV. COLLOQUY 88, 98 (2008) (commenting on "clean teams" and arguing that courts should more openly examine the claim that the combination of "interrogators who had no knowledge or participation in torture coming after other interrogators had tortured," and that a "lack of judicial toughness with regard to the Fifth Amendment and coercion in the military judge's exercise of discretion" seals the fate of many detainees); Gregory S. McNeal, *Beyond Guantánamo, Obstacles and Options*, 103 NW. U. L. REV. COLLOQUY 29, 47–50 (2009) (discussing problems with admissibility of statements, classified information, and challenges transitioning from military commissions to Article III courts).

48. Kenneth Roth, *Why the Current Approach to Fighting Terrorism Is Making Us Less Safe*, 41 CREIGHTON L. REV. 579, 587 (2008).

49. *See id.*

50. *Id.*

51. *See* Davis, *supra* note 42, at 122; *see also* Miranda v. Arizona, 384 U.S. 436 (requiring pre-interrogation warnings for criminal suspects).

52. Davis, *supra* note 42, at 121.

dialogue with those that decided to talk."[53] Generally, the discussions continued for days, or in some cases, for months.[54] The environment was, according to Colonel Davis, one of collegiality, with occasional laughter and no intimidation or fear.[55] "The dynamic was one of mutual respect, like soldiers from opposite sides sitting down over coffee after the war is over to reflect on their past battles."[56]

The facts detailed above demonstrate that there were two phases of the interrogation of high-value Guantanamo detainees such as KSM. In the first phase, the detainees were subjected to coercive interrogation techniques that bordered on abuse or even torture. In the second phase, detainees were interviewed in the environment that was likened to a conversation over a cup of coffee. The question these facts raise is whether a subsequent voluntary statement, even over a cup of coffee, can ever be fully separated from an earlier coerced involuntary statement, thus rendering the subsequent statement admissible.[57]

III. WHAT TESTS GOVERN WHETHER THE CLEAN STATEMENTS ARE ADMISSIBLE AT TRIAL?

As the facts detailed above illustrate, some Guantanamo detainees were subjected to unlawful interrogation, followed by subsequent lawful interrogations. Public accounts indicate that earlier coercive interrogations were followed by "clean teams" that presumably conducted interrogations in compliance with constitutional and Common Article 3 safeguards.[58] A task for a reviewing court will be to determine the admissibility of these subsequent "clean" statements on voluntariness grounds, based on the totality of the circumstances surrounding the interrogation and the detainee's statement.[59] Under the totality of the

53. *Id.*

54. *See id.*

55. *See id.*

56. *Id.* (noting that "[t]he question of whether the high value detainees would be willing to talk was soon answered and I began to wonder if they would ever stop").

57. This Article does not address the important issue of the abuse itself, but rather focuses on the admissibility of voluntary statements that follow abuse. See Norman Abrams et al., *Ten Questions on National Security*, 34 WM. MITCHELL L. REV. 5007, 5016 (2008), noting that

> [i]n *Karake*, non-U.S. citizens interrogated by non-U.S. police in a foreign country were given the benefit of the protection of the Fifth Amendment's Due Process Clause in a U.S. courtroom. But, as the *Bin Laden* court pointed out, that protection operates when the statements are offered into evidence in a U.S. courtroom, not at the time the coerced statements are obtained.

58. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

59. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (holding that, under the "totality of circumstances" test, a statement made by a suspect after unlawful interrogation by state agents, followed by interrogation by FBI agents in compliance with proper procedures, should be

circumstances, a court "must determine whether the subsequent statement is sufficiently removed from the milieu of the coerced statement so as to preclude any lingering taint."[60] In other words, for a court to find a subsequent statement admissible, the court must be adequately satisfied that the coercive setting that tainted the preceding statement has "sufficiently dissipated so as to make the second statement voluntary."[61] To fully understand the gravamen of this question, it is necessary to examine the complex and inconsistent U.S. jurisprudence dealing with the voluntariness of statements following earlier involuntary statements.[62]

The Supreme Court held in *Lyons v. Oklahoma* that no per se rule of exclusion applies to statements that are given after an earlier involuntary statement has been made.[63] In *Lyons*, the petitioner was arrested and subjected to an overnight interrogation during which a confession was obtained.[64] Later that afternoon, he gave and signed a subsequent confession.[65] The Court held that although the first confession was involuntary and therefore could not be used at trial, the subsequent confessions did not necessarily violate Fourteenth Amendment due process.[66] The test for voluntariness is whether the accused at the time he confesses is in possession of mental freedom to confess or to deny a suspected participation in a crime.[67]

In *Lyons*, the petitioner was arrested and immediately interrogated at a jail for approximately two hours.[68] After he had been in jail for eleven days, he was questioned again in the prosecutor's office.[69]

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suppressed in federal court because as far as the defendant was concerned it was one interrogation process).

60. United States v. Marenghi, 109 F.3d 28, 32 (1st Cir. 1997).

61. United States v. Lopez, 437 F.3d 1059, 1066 (10th Cir. 2006). The *Lopez* court held that the defendant murder suspect's second confession was involuntary—because the coercion that produced his first confession had not dissipated, even though his second confession came almost twelve hours after his first, following a night's sleep and meal—where his first confession was induced primarily by an agent's improper promise of leniency, the same agent was the interrogator during the next interview, the second interview took place in the same location as the earlier interrogation, and the defendant had not spoken to an attorney or a family member during the twenty-four hours that he had been in custody. *See id.* at 1060–62.

62. Importantly, this Article only provides a brief sketch of one aspect of the jurisprudence on voluntariness. For a more detailed exploration, see generally JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW ch. 4 (1993); Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417 (1985); Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195 (1996).

63. *See* Lyons v. Oklahoma, 322 U.S. 596, 603 (1944).

64. *Id.* at 598.

65. *Id.* at 600.

66. *Id.* at 605.

67. *Id.* at 602.

68. *See id.* at 598.

69. *See id.*

"This interrogation began about six-thirty in the evening," and the petitioner confessed "between two and four" the following morning.[70] After the early morning confession, the petitioner "was taken to the scene of the crime and subjected to further questioning about the instruments used to commit the murders."[71] A second confession was obtained and signed later in the day.[72] The overnight questioning was "the basis of the objection to the introduction [of] evidence of [the] second confession."[73] "There was also a third [oral] confession . . . admitted at trial without objection by petitioner."[74] Counsel was not provided to the petitioner until after his confessions.[75] At trial, the petitioner testified about "physical abuse by the police officers at the time of his arrest[,] . . . first interrogation[,]" and second interrogation.[76] Although the beating was denied by the officers who were accused of participating in it,[77] disinterested witnesses testified to the use of force against the petitioner.[78] The petitioner challenged the overnight questioning and argued that the events alleged showed that his later confession was involuntary.[79]

Citing *Lisenba v. California*,[80] the Court noted that "[t]he mere questioning of a suspect while in the custody of police officers is not prohibited either as a matter of common law or due process,"[81] and that there is no set formula for determining whether a confession violates the Fourteenth Amendment.[82] In *Lyons*, improper methods were used to obtain the early morning confession, but that confession was not used at trial.[83] However, the Court noted that

> involuntary confessions, of course, may be given either simultaneously with or subsequently to unlawful pressures, force or threats. The question of whether [a subsequent confession is] voluntary depends on the inferences as to the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances. The voluntary or involuntary character of a confession is

70. *Id.*
71. *Id.* at 600.
72. *See id.* at 598.
73. *Id.*
74. *Id.*
75. *See id.* at 599.
76. *See id.*
77. *See id.*
78. *See id.*
79. *See id.* at 600.
80. 314 U.S. 219 (1941).
81. *Id.* at 601 (citing Lisenba v. California, 314 U.S. 219, 239–41 (1941); Ziang Sung Wan v. United States, 266 U.S. 1, 14 (1924)).
82. *See Lyons*, 322 U.S. at 600.
83. *See id.* at 599–600.

> determined by a conclusion as to whether the accused, at the time he confesse[d], [was] in possession of "mental freedom" to confess to or deny a suspected participation in a crime.[84]

In short, the admissibility of a later confession depends on whether it was voluntary, and the effect of earlier abuse may render the subsequent confession involuntary. However, if the relation between the earlier and later confession is not so close that it must be said that the facts of one control the character of the other, the inference is for the triers of fact. If the trier of fact finds that the confession should be admitted as voluntary, such a decision cannot be a denial of due process.[85] In *Lyons*, "[t]here was evidence from others present that Lyons readily confessed without any show of force or threats," and that the confession came "within a very short time of his surrender to [the] [w]arden . . . ."[86] Based on this evidence, the Court held that Lyons's second confession was voluntary and therefore admissible at trial.[87]

The lesson of *Lyons* for voluntary statements is that the existence of a statement obtained under circumstances that preclude its admissibility does not *perpetually* disable a defendant from making an admissible statement once the coercive conditions have been removed.[88] On the other hand, that a defendant has already made an involuntary statement "is a strong indication that later statements were not the product of his free will."[89] "The admissibility of the later confession [ultimately] depends upon the same test-is it voluntary."[90] Two juridical approaches to determining voluntariness are particularly apt with regard to Guantanamo detainees. The first is the "totality of circum-

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84. *Id.* at 600 (citations omitted) (citing Ashcraft v. Tennessee, 323 U.S. 143, 154 (1944)). In *Ashcraft*, the Court held 6–3 that a confession was "compelled" under circumstances that didn't involve physical force, but rather involved psychological pressure. *Ashcraft*, 322 U.S. at 153. The Court stated that "[f]or thirty-six hours after Ashcraft's seizure during which period he was held incommunicado, without sleep or rest, relays of officers, experienced investigators, and highly trained lawyers questioned him without respite." *Id.* Such circumstances rendered the situation "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear." *Id.* at 154.

85. *See Lyons*, 322 US at 603.

86. *See id.* at 604.

87. *Id.* at 605.

88. *See generally, e.g.*, United States v. Karake, 443 F. Supp. 2d 8, 94 (D.D.C. 2006) (holding that defendants' confessions to U.S. officials were involuntary where the defendants—who were charged with murdering two U.S. tourists in Uganda—confessed to Rwandan officials after a period of abuse and subsequently confessed to U.S. officials; the second confessions were deemed involuntary because the Rwandan officials continued to be involved in interrogations, the defendants remained in Rwandan custody during interrogations, and there was no relief from repeated beatings prior to interrogation by U.S. officials).

89. Holleman v. Duckworth, 700 F.2d 391, 396 (7th Cir. 1983).

90. *Lyons*, 322 U.S. at 602.

stances" rule; the second is the "cat out of the bag" rule.[91] These tests are grounded in the notion advanced in *Lyons* that prior illegal questioning can influence a defendant's subsequent statements during what amounts to an otherwise legal interrogation.

A. Voluntariness and the Totality of the Circumstances

When inquiring into whether the initial coercion has "sufficiently dissipated," a court is looking to find out if, in providing the subsequent statement, "the defendant's will has been overborne and his capacity for self-determination critically impaired."[92] Several determining factors that contribute to this "totality of circumstances" analysis include (1) the amount of time between statements; (2) whether there was a change in the place of interrogations; (3) whether the identity of the interrogators changed; (4) the nature of the previous unlawful interrogation methods; and (5) whether the illegally procured statement was used to leverage the subsequent statement.[93] Other relevant factors may include the youth or advanced age of the defendant, his level of education, or even his low intelligence.[94] The government bears the burden of proving a subsequent statement's voluntariness by a preponderance of the evidence.[95] And in the absence of a clear record indicating that the coercive atmosphere during the first statement has been dispelled, courts are inclined to find succeeding statements involuntary.[96]

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91. *See, e.g.*, Fikes v. Alabama, 352 U.S. 191, 197–98 (1957) (noting that the test to be applied requires "a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."); United States v. Bayer, 331 U.S. 532, 540–41 (1947).

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.

Bayer, 331 U.S. at 540–41.

92. *Karake*, 443 F. Supp. 2d at 50, 87.

93. *Id.*

94. *See id.* at 51.

95. *See id.* at 52.

96. *See, e.g.*, Harney v. United States, 407 F.2d 586 (5th Cir. 1969); Brewer v. State, 386 So. 2d 232 (Fla. 1980); State v. Kase, 344 N.W.2d 223 (Iowa 1984) (holding a second confession inadmissible, even though the defendant consulted with counsel between the two confessions because the promise not to prosecute, which had induced the defendant's first confession, had not been retracted prior to the second confession, thereby rendering it involuntary); People v. Champion, 711 N.Y.S.2d 650 (N.Y. App. Div. 2000) (noting that to be effective, *Miranda* warn-

B. Dissipation

Dissipation is another factor to consider. For example, in *Brewer v. State*, the Florida Supreme Court found that the coercion inherent in the defendant's first confession was not dissipated by the defendant's appearance before a magistrate who advised the defendant of his rights.[97] In *Brewer*, police officers arrested the defendant after a body was discovered with a knife that was later identified as belonging to the defendant.[98] After advising the defendant of his rights, "the officers raised the [possibility] of the electric chair [and] suggested that they had the power to" affect the leniency of the appellant's punishment if he confessed to the murder.[99] "It was under the influence of these threats and promises that the appellant made an oral confession [to the murder]."[100] After the initial interrogation by the officers, "the [defendant] had his first appearance before a county court judge" who informed him of his rights.[101] "After [the] first appearance, the [defendant] went back into the custody of the same officers who performed the initial, tape-recorded interrogation. They told him they wanted a written statement. The [defendant] wrote out a confession and signed it. The written confession was admitted into evidence over [defendant]'s objection."[102]

The court examined the totality of the circumstances surrounding the written confession and found that the confession was not voluntary:[103]

> In a state prosecution, the standard by which the voluntariness of a confession is to be determined is the same as that which applies to federal prosecutions . . . .
>
> . . . [T]he inquiry is whether the confession was "free and voluntary . . . [I]t must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight . . . ."[104]

Furthermore, the court stated that at the time of the confession, "the mind of the defendant [must] be free to act uninfluenced by either

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ings must precede custodial interrogation of a suspect: "Later is too late, unless there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning.").

97. *See Brewer*, 386 So. 2d at 237.

98. *See id.* at 233.

99. *Id.* at 235.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 237.

104. *Id.* at 235 (quoting Bram v. United States, 168 U.S. 532, 542–43 (1897)).

hope or fear."[105] And the confession should be excluded if at the time it was made, the defendant was "delude[d] . . . as to his true position," or his mind was under "improper and undue influence."[106] Here, the court held "that the intervention of [the] appearance before a" trial judge between the two confessions "was not sufficient to break the stream of events and dissipate the coercive influences exerted on the appellant."[107]

Similarly, in *Harney v. United States*, the Fifth Circuit examined whether a prior custodial interrogation without proper warnings makes inadmissible subsequent in-custody statements that were given during interrogation and after appropriate warning, and the court resolved this question with reference to the surrounding facts and circumstances. In *Harney*, the appellant was stopped in the early morning for a traffic violation.[108] Before leaving the scene and after being questioned by the police officer, the appellant confessed that he was a felon.[109] The officer thought that the car driven by the appellant was stolen and took the appellant into the police station where he read him insufficient *Miranda* warnings and subjected him to further interrogation.[110] The appellant was held in jail overnight and questioned the following morning by a detective who also read him insufficient *Miranda* warnings.[111] The appellant orally confessed and signed a typewritten statement prepared by the detective.[112] Later that afternoon, after the appellant had eaten lunch, he was again interrogated, this time by an FBI agent who gave him sufficient *Miranda* warnings.[113] The appellant made a full confession to the FBI agent, which the agent wrote out and the appellant signed.[114]

In examining these facts, the court reasoned that the first written statement obtained by the police officer "was violative of appellant's constitutional rights because it arose from . . . coercive . . . . custodial interrogation without constitutionally required warnings."[115] The court noted "that prior custodial interrogation without proper warnings does not automatically make inadmissible subsequent in-custody

105. *Id.* (quoting Frazier v. State, 107 So. 2d 16, 21 (Fla. 1958)).
106. *Id.* at 235–36 (quoting *Frazier*, 107 So. 2d at 21).
107. *Id.* at 237.
108. *See* Harney v. United States, 407 F.2d 586, 587 (5th Cir. 1969).
109. *See id.*
110. *See id.* at 587–88.
111. *See id.*
112. *See id.*
113. *See id.*
114. *See id.* at 589.
115. *Id.*

statements given during interrogation after appropriate warning."[116] Rather, the facts and circumstances must be examined to determine the existence and extent of the relationship between the unconstitutional conduct and the subsequent confession.[117] In this case, eleven hours passed between the investigation by the second police officer and the commencement of the FBI investigation.[118] In that time, the appellant was questioned by two different officers, and he gave "one full oral and one full written and signed confession."[119] Each interrogation took place in the same police headquarters and each drew from its predecessors.[120] The FBI agent began "his interrogation 'armed with defendant's earlier admissions.'"[121] The statement given to the FBI agent was based on the prior illegal confessions, and therefore, should not have been admitted at trial.[122]

The lapse in time between the illegal and legal interrogation may be enough to render the initial coercive environment sufficiently dissipated.[123] However, the temporal proximity of the two statements, while significant, is not determinative. Courts generally require that any lapse in time between statements be coupled with other mitigating factors.[124]

In *Taylor v. Alabama*, the U.S. Supreme Court held that the fact that a petitioner was taken to a police station, given *Miranda* warnings, fingerprinted, questioned, and placed in a lineup was insufficient to break the connection between his illegal arrest and his confession. The Court therefore reversed the ruling of the Alabama supreme court and held that the confession was not purged of the primary

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116. *Id.* (citing Westover v. United States, 384 U.S. 436 (1966)).

117. *See id.*

118. *See id.*

119. *Id.*

120. *See id.*

121. *Id.* (quoting United States v. Pierce, 397 F.2d 128, 131 (4th Cir. 1968)).

122. *See id.* at 590.

123. *See* Leon v. Wainwright, 734 F.2d 770, 770 (11th Cir. 1984).

124. *See, e.g.*, Leyra v. Denno, 347 U.S. 556, 589 (1954). The Court held that when a promise of leniency is made,

> a presumption arises that it continues to operate on the mind of the accused. But a showing of a variety of circumstances can overcome that presumption. The length of time elapsing between the promise and the confession, the apparent authority of the person making the promise, whether the confession is made to the same person who offered leniency, and the explicitness and persuasiveness of the inducement are among the many factors to be weighed.

Id.; United States v. Merenghi, 109 F.3d 28, 33 (1st Cir. 1997) (noting that to determine the issue of lingering coercion from a prior statement a court must "compare and contrast the circumstances surrounding each of the two statements. In so doing, we look to several factors: the change in the place of the interrogations; the time that passed between the statements; and the change in the identity of the interrogators.").

taint.[125] The petitioner, Taylor, was arrested on charges that he robbed a grocery store; the arrest was conducted without a warrant or probable cause and was based merely on an informant's tip.[126] The petitioner "was fingerprinted, readvised of his *Miranda* rights, questioned, and placed in a lineup."[127] He was told "that his fingerprints matched those on grocery items handled by one of the participants in the robbery."[128] Following a brief visit with his girlfriend, he signed a written confession.[129]

The U.S. Supreme Court had previously held "that a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'"[130] The "Court identified several factors that should be considered in determining whether a confession has been purged of the taint of the illegal arrest [including] 'the temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct.'"[131]

In terms particularly relevant to debates over the Guantanamo detainees, the U.S. Supreme Court noted that because "the confession may be 'voluntary' for purposes of the Fifth Amendment, in the sense that *Miranda* warnings were given and understood, [this] is not by itself sufficient to purge the taint of the illegal arrest."[132] In *Taylor*, "the petitioner was arrested without probable cause in the hope that something would turn up, and he confessed shortly thereafter without any meaningful intervening event."[133] The Court reasoned that "a difference of a few hours," during which the "petitioner was in police custody, unrepresented by counsel, . . . questioned on several occasions, fingerprinted, and subjected to a lineup" is not a sufficient break in the chain of events.[134] The Court held that the "petitioner's confession was the fruit of his illegal arrest" and was therefore inadmissible."[135]

125. *See* Taylor v. Alabama, 457 U.S. 687 (1982)
126. *See id.* at 689.
127. *Id.* at 689.
128. *Id.*
129. *Id.* at 689.
130. *Id.* at 690 (quoting Brown v. Illinois, 422 U.S. 590, 602 (1975)).
131. *Id.* (quoting *Brown*, 422 U.S. at 603–04).
132. *Id.*
133. *Id.* at 691.
134. *Id.*
135. *Id.* at 694.

In an Eleventh Circuit case, *Leon v. Wainwright*, a defendant's second confession was deemed voluntary, even when given only five hours after a confession that was induced by police officers who repeatedly shoved and abused the defendant.[136] In the five-hour interim, the defendant was brought to the police station, advised of his rights, then moved to a different room and questioned by different officers.[137] The Court noted that the applicable standard for determining whether a subsequent confession is voluntary is whether, taking into consideration the totality of the circumstances, the statement is the product of the accused's free and rational choice, and is not extracted by any sort of threats of violence.[138] Here, the necessity of saving the victim's life in the first confession, the different physical setting, the different group of questioning officers, and the explanation to the defendant of his rights were held to constitute a break in the stream of events, thereby dissipating the effects of the first coercion.[139]

In another case, *United States v. Marenghi*, the First Circuit noted some of the considerations that would demonstrate a dissipation of the taint of an earlier coercion.[140] In *Marenghi*, the defendant was pulled over and police officers used questionably coercive techniques to obtain a statement without advising her of her *Miranda* rights.[141] The defendant later confessed at the police station. In evaluating the case, the court noted that the test for voluntariness of a subsequent statement is the totality of the circumstances.[142] The specific facts of *Marenghi* involved police officers and agents of the Maine Drug Enforcement Agency (MDEA) who pulled over the appellant while she was driving a car that was occupied by five others.[143] The officers were investigating the distribution of crack cocaine in Portland, Maine.[144] The agents searched the vehicle, handcuffed the defendant, and placed her in the back of one of the police cars.[145] One police officer told the defendant that her vehicle would be taken to the Portland police station and searched for drugs, and that her person and vehicle would be searched by dogs.[146] After several warnings about

136. *See* Leon v. Wainright, 734 F.2d 770, 771–72 (11th Cir. 1984).
137. *See id.*
138. *Id.* at 772.
139. *Id.* at 771.
140. *See* United States v. Marenghi, 109 F.3d 28, 33 (1st Cir. 1997).
141. *Id.* at 30.
142. *Id.* at 33.
143. *Id.* at 30.
144. *See id.*
145. *See id.*
146. *See id.*

the dogs and their ability to find any evidence hidden in the vehicle, the defendant said that their presence would not be necessary and that she did possess crack cocaine.[147] The defendant stated that she needed to use the bathroom on several different occasions, but she was never read her *Miranda* rights.[148] Eventually she was transported to a police station where she was read her *Miranda* rights.[149] While there, she dictated an oral confession detailing her involvement in the cocaine ring in Maine.[150] She then signed a written statement affirming the same.[151] The district court suppressed her roadside statements at trial because they were made while she was in custody and unadvised of her *Miranda* rights.[152] She challenged the admission of the written statement that she made at the police station.[153]

The court, in analyzing her challenge, stated that the circumstances under which the earlier roadside statements were made and whether the police conduct was coercive impacted the admissibility of the subsequent written statement.[154] The court noted that "[w]hen law enforcement officials do not deliberately engage in coercive or improper tactics in obtaining an initial statement, but rather only fail to advise a defendant of his or her *Miranda*" rights, the statement is admissible if it meets a two-prong test.[155] Under this test, the subsequent "statement is admissible if it was obtained after the defendant: (1) was advised of his or her *Miranda* rights; and, (2) [the defendant] knowingly and voluntarily waived those rights."[156] If neither the initial nor subsequent admissions were coerced, the finder of fact may reasonably conclude that the suspect waived his rights.[157] When the problem with the admission of the underlying statements is greater than a failure to advise the defendant of his *Miranda* rights, the admissibility of the subsequent statement is more difficult.[158] In this case, the court noted that it could not determine the admissibility of the subsequent statement solely by examining the circumstances surrounding that statement.[159] "Instead, it must determine whether the subsequent

147. *See id.*
148. *See id.*
149. *See id.*
150. *See id.* at 31.
151. *See id.*
152. *See id.*
153. *See id.*
154. *See id.*
155. *Id.* at 31–32.
156. *Marenghi*, 109 F.3d at 32.
157. *See id.* (citing Oregon v. Elstad, 470 U.S. 298, 312 (1985)).
158. *See id.*
159. *See id.*

statement is sufficiently removed from the milieu of the coerced statement so as to preclude any lingering taint."[160]

The court began its analysis "by examining the voluntariness of the written statement independent of any potential taint from the roadside."[161] The court then compared and contrasted "the circumstances surrounding each statement."[162] Several factors aided the court's analysis in determining the voluntariness of the second statement under the totality of the circumstances, including, "the change in the place of the interrogations; the time that passed between the statements; and the change in the identity of the interrogators."[163] The factors in *Marenghi* suggested to the court "that the written statement was sufficiently attenuated from any [roadside] coercion so as to ensure [ ] it was not tainted."[164] First, several hours passed between the statements made at the roadside and the statements made at the police station.[165] "Second, the appellant dictated the written statement in a lunch room at the police station."[166] Third, there was "no suggestion that any of the 'possibly' coercive elements from the roadside . . . were present at [the police station]."[167] Finding that the statements made at the police station were not tainted by those made at the roadside, the court held that the subsequent statement was voluntary and therefore admissible.[168]

In the U.S. Supreme Court case of *United States v. Bayer*, the lapse of time between confessions was several months, as opposed to hours or days.[169] The defendant in *Bayer* was placed under arrest and confined to the psychiatric ward of a military hospital.[170] The defendant was interrogated while in custody and was denied communication with counsel and family; he was also deprived of basic hospital facilities.[171] Seemingly in response to the coercive circumstances, the defendant confessed.[172] Six months later, the defendant confessed a second

160. *Id.*
161. *Id.* at 33.
162. *See id.* at 33–34.
163. *Id.* at 33.
164. *Id.*
165. *See id.* at 33–34.
166. *Id.* at 34.
167. *Id.*
168. *See id.*
169. *See* United States v. Bayer, 331 U.S. 532, 539–40 (1947).
170. *See id.* at 539.
171. *See id.*
172. *Cf. id.* at 539. The Court described how the defendant

> was placed under arrest and confined in the psychopathic ward in the station hospital. Here, for some time, he was denied callers, communication, comforts and facilities which it is needless to detail. Charges . . . were not promptly served on him . . . nor was

time.[173] The Court held that the second confession was not involuntary and therefore admissible because the defendant was given fair warning that his statements might be used against him. Additionally, the Court found that during the six-month interval, it was clear that the coercive conditions surrounding the first confession had been removed.[174]

C. *Identity of Interrogators, Physical Coercion, and False Promises*

The cases cited above demonstrated that changing interrogation locations, allowing for the passage of time, and changing interrogators can remove the taint of earlier unlawful interrogations. Accordingly, a court may find that the presence of the same official who conducted the preceding illegal interrogation may suggest that the earlier coercive environment has not sufficiently dissipated.[175] Specifically, if the interrogator in the second interrogation also participated in the preceding illegal interrogation or was aware of the contents produced from the earlier interrogation, the court is more likely to find statements garnered from the second interrogation to be involuntary.[176]

A change in the interrogator's identity was one of the focal points in the case of *United States v. Karake*.[177] The defendants in *Karake* were Rwandan nationals charged with the murder of two U.S. tourists in Uganda.[178] After suffering repeated beatings and other abuses at the

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> he taken before a magistrate for arraignment on any charges . . . . Meanwhile, under such restraint, he made a first confession . . . . Without more, we will assume this confession to be inadmissible . . . .

Id.

173. *See id.* at 540.

174. *See id.* at 541.

175. *See* People v. Heron, 657 N.Y.S.2d 694, 695 (N.Y. App. Div. 1997) (holding that the coercive conditions had sufficiently dissipated partly because a different officer conducted the second round of questioning without the presence of the officer who conducted the first interrogation).

176. *See* United States v. Karake, 443 F. Supp. 2d 8, 88 (D.D.C. 2006).

177. *See id.*

> [S]uspects interrogated by U.S. officers overseas should receive greater Fifth Amendment protections than those envisioned by the *Bin Laden* court. These should include: extending Fifth Amendment protections to suspects interrogated by U.S. agents overseas, whether those suspects are tried in the United States or in United States courts located abroad; placing a burden on the government to show that a lawyer was not reasonably available at the time of interrogation; and increasing the scrutiny of allegations of waiver.

Fred Medick, *Exporting* Miranda*: Protecting the Right Against Self-Incrimination When U.S. Officers Perform Custodial Interrogations Abroad*, 44 HARV. C.R.-C.L. L. REV. 173, 188 (2009); *See* Jenny-Brooke Condon, *Extraterritorial Interrogation: The Porous Border Between Torture and U.S. Criminal Trials*, 60 RUTGERS L. REV. 647, 650–652 (arguing that *Karake* stands as an example of the U.S. government's efforts to rely on extraterritorial confessions derived from torture).

178. *See Karake,* 443 F. Supp. 2d at 12.

hands of Rwandan officials, the defendants involuntarily confessed to the murders.[179] Importantly, the defendants' subsequent confessions to U.S. officials who did not physically abuse them were also deemed involuntary.[180] The court focused specifically on the fact that Rwandan officials continued to be involved in the interrogations by U.S. officials, and that the defendants remained in Rwandan custody during the U.S. interrogations.[181] Perhaps most salient for purposes of this Article is the fact that there was no break—from the viewpoint of the defendants—in the repeated beatings prior to the U.S. officials' interrogations of the defendants.[182] The court noted that because such factors were present, viewed in the aggregate, the defendants reasonably could have believed that the Rwandan and U.S. officials were engaged in a joint venture of coercive abuse.[183] Accordingly, the court held that the coercive influences created by the Rwandan officials had not sufficiently dissipated.[184]

The *Karake* case is not only an example of changed interrogators, but it also stands as a particularly brutal example of physical abuse. When physical coercion or threats of physical harm induce the first confession, the U.S. Supreme Court has held that such an atmosphere may render all subsequent statements to be considered coerced and therefore inadmissible.[185] The Supreme Court in *Lyons* explained that "[t]he effect of earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary."[186] It can be inferred from this language that the more severe the abuse, the higher the likelihood of its continued influence on subsequent statements. Thus, abuse rising to the level of torture or cruel, inhumane, or degrading treatment will have a greater chance of perpetually tainting later statements than milder forms of physical abuse such as shoving, pushing, or poking.

One example of how even the threat of abuse can render a subsequent statement involuntary is found in *People v. Mayorga*.[187] In that case, a New York court found that the coercion had not sufficiently

179. *Id.*

180. *See id.* at 87–88.

181. *See id.* at 26.

182. *See id. passim* (describing in detail the extensive beatings).

183. *See id.* at 78.

184. *See id.* at 89.

185. *See* Lyons v. Oklahoma, 322 U.S. 596, 603 (1944); People v. Mayorga, 474 N.Y.S.2d 99, 101 (N.Y. App. Div. 1984).

186. *Lyons*, 322 U.S. at 603.

187. *See Mayorga*, 474 N.Y.S.2d at 101.

dissipated when police arrested the defendant in a car at gunpoint and, without giving him his *Miranda* warnings, interrogated him while making additional threats of violence.[188] Agents assigned to the Long Island Drug Enforcement Task Force removed him from his vehicle at gunpoint, patted him down, and asked if he knew what was going on.[189] "During the trip, Miranda warnings were administered and the defendant stated that" he would have made $500 on the drug transaction that the agents had interrupted.[190] After he arrived at the station, detectives told the defendant that he could help himself if he would tell them and show them who was engaged in selling cocaine.[191] The defendant was again advised of his *Miranda* rights, and he subsequently initialed a waiver form.[192] He proceeded to make a detailed oral confession that was reduced to writing and signed.[193] At trial, the defendant objected to the admission of the oral confession into evidence,[194] but the admission was admitted, and the defendant was convicted of the criminal sale of a controlled substance in the second degree.[195] The appellate court considered a "practical 'assessment of external events'" and "conclude[d] that the defendant was 'subjected to such a continuous interrogation' that the *Miranda* warnings subsequently administered 'were insufficient to protect his rights.'"[196] "[T]he record indicated that the defendant's purported agreement to help the officers was neither spontaneous nor the result of an independent, voluntary act by the defendant."[197] Rather, "[i]t was initiated by the arresting officers and . . . was part of [the interrogation]."[198] Thus, there was no break in the interrogation of the defendant, and the confession should not have been admitted in court.[199] The appellate court also found that the defendant's statements were not made of the defendant's own free will, but they were instead the product of the initial threats of violence.[200] It is important to note, however, that not all involuntary statements are the product of threats of physical violence. The Supreme Court has noted that

188. *See id.* at 100.
189. *See id.*
190. *See id.*
191. *See id.*
192. *See id.*
193. *See id.* at 100–01.
194. *See id.* at 101.
195. *See id.* at 100.
196. *Id.* (quoting People v. Chapple, 38 N.Y.2d 112, 115 (1975)).
197. *Id.*
198. *Id.*
199. *Id.*
200. *See id.*

> coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of "persuasion."[201]

For example, in *United States v. Lopez*, a murder suspect's initial confession was induced by improper promises of leniency.[202] The defendant's second confession came twelve hours later, after he slept overnight and ate a meal. Despite the absence of physical abuse and the length of time between confessions, the Tenth Circuit found the second confession to be involuntary.[203] The court explained that in giving the subsequent confession, the defendant was still relying upon the previous promise of leniency. The court also noted that the same agent was the primary interrogator during the second interview, lending credence to the idea that the earlier coercion influenced the voluntariness of the second statement.[204]

D. The "Cat out of the Bag" Rule

While the "totality of the circumstances" can inform a court as to the voluntariness of a statement subsequent to an earlier involuntary statement, the possibility also exists that a defendant who involuntarily confessed may make other incriminating statements in the belief that nothing more he says can cause him any additional damage. Stated more colloquially, the "cat is out of the bag" and no additional harm (in the defendant's eyes) can flow from a reaffirmation of the earlier statement. Courts have developed a rule to account for this situation: the "cat out of the bag" rule. This rule developed because, in the words of the Supreme Court, the "traditional totality-of-the-circumstances test" posed an "unacceptably great" risk that some involuntary confessions would escape detection.[205]

The Supreme Court first acknowledged this rule in *Bayer*, stating that "after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag."[206] In such circumstances, a subsequent statement is always influenced by the first and "may be

201. Blackburn v. Alabama, 361 U.S. 199, 206 (1960).
202. *See* United States v. Lopez, 437 F.3d 1059, 1065 (10th Cir. 2006).
203. *See id.*
204. *See id.* at 1066.
205. Dickerson v. United States, 530 U.S. 428, 442 (2000).
206. United States v. Bayer, 331 U.S. 532, 540 (1947).

looked upon as fruit of the first."[207] Admissibility under the "cat out of the bag" rule depends on whether the defendant felt "so committed" by a prior statement that "he believe[d] it futile to assert his right[ ]" to remain silent prior to making a subsequent statement.[208]

The U.S. Supreme Court has had a few opportunities to examine the "cat out of the bag" rule. In *Oregon v. Elstad*, a witness to a burglary tipped off police as to the defendant Elstad's commission of the crime, and they went to Elstad's home with a warrant and arrested him.[209] Without administering *Miranda* warnings, police questioned Elstad alone.[210] The defendant acknowledged that he had heard about the burglary, and after an officer stated that he thought Elstad was involved, the defendant admitted that he was there.[211] Based on this inculpatory statement, Elstad was taken to the police station and read his *Miranda* rights. The defendant waived his rights, gave police a signed confession, and was charged with first-degree burglary.[212] On appeal, the Oregon appellate court relied on the cat-out-of-the-bag theory and concluded that both Elstad's confession after the *Miranda* warnings and the statements made prior to the warnings should have been excluded.[213] Upon review, the U.S. Supreme Court ruled that the Fifth Amendment does not require the "suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the defendant."[214] A natural consequence of this holding was that police and other agents may have an incentive to initially question suspects without Mirandizing them, then read them their rights and subsequently question them again.

More recently, the U.S. Supreme Court in *Missouri v. Seibert*, acknowledging the potential consequences of *Elstad*, sought to reestablish the "cat out of the bag" doctrine.[215] In *Seibert*, the Court struck down the police practice of first obtaining an inadmissible confession without *Miranda* warnings and then issuing warnings to obtain subsequent cleaned up confessions.[216] According to the Court, the threshold question in the face of such practices is "whether it would be

207. *Id.*
208. People v. Tanner, 292 N.E.2d 98, 99–100 (1972).
209. *See* Oregon v. Elstad, 470 U.S. 298, 300 (1985).
210. *See id.* at 301–02.
211. *See id.* at 301.
212. *See id.* at 301–02.
213. *See id.* at 302–03.
214. *Id.* at 298, 303, 314.
215. Missouri v. Seibert, 542 U.S. 600, 627 (2004).
216. *See id.* at 612–14.

reasonable to find that in these circumstances the warnings could function 'effectively.'"[217] The Court hypothetically asked, "Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier?"[218] The Court concluded that "unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the [subsequent] formal warnings" as sufficient to satisfy the requirements for admissibility of the subsequent statement.[219] Therefore a court should not treat the subsequent interrogation "as distinct from the first, unwarned and inadmissible segment."[220]

The Court qualified its language, stating that simply failing to administer *Miranda* warnings "unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will" does not perpetually taint subsequent voluntary statements.[221] "[A] suspect who has once responded to unwarned, yet uncoercive questioning" is not precluded from waiving his rights and providing admissible statements after he has been given the requisite warnings.[222]

E. Summary of Juridical Tests for Admissibility and Voluntariness

Taken together, what do these various juridical tests tell us about what test to apply to the statements of Guantanamo detainees? The *Karake* court faced a similar issue, and it had to synthesize many of the precedents discussed in this Article in order to analyze a factual setting that was similar to those that face courts reviewing statements obtained from Guantanamo detainees.

In *Karake*, the court began with the presumption that voluntariness is the "cornerstone of the due process analysis."[223] The court stated,

> When a confession challenged as involuntary is sought to be used against a criminal defendant at his trial . . . the prosecution must prove by at least a preponderance of the evidence that the confession was voluntary. To meet its burden, the government must demonstrate that each of defendants' confessions was the product of an essentially free and unconstrained choice. If the defendant's will

217. *Id.* at 611–12.
218. *Id.* at 612.
219. *Id.*
220. *Id.*
221. *Id.* at 612 n.4.
222. *Id.*
223. United States v. Karake, 443 F. Supp. 2d 8, 49 n.72 (D.D.C. 2006).

> has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. Whether a confession was made freely, voluntarily, and without compulsion or inducement of any sort, is distinct from the question of whether the confession is accurate or reliable. Indeed, the probable truth or falsity of a confession is not a permissible standard under the Due Process Clause on the question [of] whether the confession was voluntary and admissible.[224]

Rather, as a long line of U.S. Supreme Court precedent makes clear,

> confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.[225]

The *Karake* court highlighted not only the importance of suppressing coerced confessions due to the coercive impact on the victim, but also highlighted the institutional impact on the judiciary of admitting such statements: "A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt."[226] The court noted that

> [t]his is not to say that the exclusionary rule under the Fifth Amendment does not serve a judicial interest in assuring reliable evidence. Beyond the general goal of deterring improper police conduct, the Fifth Amendment serves to protect the fairness of the trial itself. [T]he Fifth Amendment goal of assuring trustworthy evidence exists independent of any deterrent effect the exclusionary rule might have under some circumstances. Thus, while a confession obtained by means of torture may be excluded on due process grounds as [in]consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, another legitimate reason to suppress it is the likelihood that the confession is untrue.[227]

As the *Karake* court explained,

> The Court's role when faced with an allegedly coerced confession is to enforce[ ] the strongly felt attitude of our society that important

224. *Karake*, 443 F. Supp. 2d at 49–50 (citations omitted) (quotation marks omitted) (synthesizing precedent).

225. Rogers v. Richmond, 365 U.S. 534, 540–41 (1961) (collecting cases).

226. *Karake*, 443 F. Supp. 2d at 50 (quoting *Lyons*, 322 U.S. at 605).

227. *Id.* at 50–51 (citations omitted) (quotation marks omitted).

> human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will. To do this without unduly impairing the acknowledged need for police questioning as a tool for effective enforcement of criminal laws, the Court must conduct an examination of all the attendant circumstances surrounding the confession. This totality of circumstances inquiry requires consideration of both the characteristics of the accused and the details of the interrogation. . . .
>
> . . . .
>
> A finding of coercion, however, need not depend upon actual violence by a government agent; a credible threat is sufficient. For, as recognized by the Supreme Court, the blood of the accused is not the only hallmark of an unconstitutional inquisition. Thus, less traditional forms of coercion, including psychological torture, as well as the conditions of confinement have been considered by courts in their assessment of the voluntariness of the statements. . . . Both for purposes of assessing the voluntariness of a statement under principles of due process and for judging the adequacy of a waiver of one's Fifth Amendment privilege against self-incrimination under *Miranda*, a court must consider the circumstances surrounding the interrogation, as well as the length of the detention and the conditions of confinement.[228]

IV. IMPLICATIONS OF THESE TESTS

The Obama Administration's disclosure of the OLC memos examining certain interrogation techniques, combined with the statements of former officials and the ICRC documents, corroborate the fact that KSM was subjected to waterboarding and other physical coercion by the CIA.[229] The next question is whether his subsequent statements to "clean teams" or public statements in his CSRT hearing were voluntary or were tainted by the CIA's previous coercive conduct. Under both the "totality of circumstances" and the "cat out of the bag" analyses detailed above, KSM's statements may be deemed involuntary. However, under the Military Commissions Act of 2006 (MCA), involuntariness is not enough.[230] MCA § 948r requires further analysis to determine whether the statement should be suppressed.[231] In order to find KSM's statements admissible, the coercive setting that tainted his previous statements to the CIA must have been sufficiently dissipated. The primary determining factors in this circumstance will be the nature of the previous unlawful interrogation,

228. *Karake*, 443 F. Supp. 2d at 51–52 (quotation marks omitted) (collecting cases).

229. *See supra* notes 21–39 and accompanying text.

230. Military Commissions Act of 2006, 10 U.S.C. § 948 (2006).

231. *Id.* § 948r.

the lapse of time between statements, whether there was a change in location, and whether there was a change in the identity of the interviewer.[232]

The U.S. Supreme Court has stated that whenever physical coercion or threats of physical harm induces the first confession, the atmosphere may be perpetually coercive, thus rendering all subsequent statements involuntary. The CIA's alleged repeated use of the waterboarding technique on KSM to simulate drowning and to make him believe that his life was in danger was likely to have an irreparable impact on his will, thereby creating an environment of coercion. An individual who is subjected to such measures may at some point say whatever he thinks the interrogator wants to hear, without regard to truth or accuracy. Many of KSM's confessions appear to fall into that category. For instance, he confessed to being responsible for thirty-one different terrorist plots worldwide, including the failed "shoe bomb" operation, the night club bombing in Bali, Indonesia, and even the murder of journalist Daniel Pearl. However, several intelligence experts have openly criticized the veracity of these confessions.[233] On the other hand, some CIA officials cautioned that "many of [KSM's] claims during interrogation were 'white noise' designed to send the U.S. on a wild goose chase,"[234] and he in fact has admitted to lying to CIA officials.[235] Nevertheless, in light of the prolonged abusive nature of the interrogations of KSM, a court may find that all subsequent statements were tainted by the earlier torture.

However, the time between his statements and the change in location and identity of his interrogators may render his subsequent statements voluntary. Recall that KSM was transferred to Guantanamo in September 2006 and that he gave his subsequent statements to the "clean team" weeks later, and to the CSRT panel six months later, in March 2007. If one assumes that KSM was not subjected to any un-

232. See *supra* notes 92–96 and accompanying text, regarding circumstances which can dissipate taint.

233. For a collection of quotes from military and intelligence officials concluding that enhanced techniques do not yield reliable intelligence, see http://thinkprogress.org/why-enhanced-interrogation-failed/#Ia (quoting General David Petraeus, Major General Thomas Romig, FBI Memoranda, and other sources). For a contrary view, see MARC A. THIESSEN, COURTING DISASTER: HOW THE CIA KEPT AMERICA SAFE AND HOW BARACK OBAMA IS INVITING THE NEXT ATTACK (2010).

234. *See* Robert Baer, *Why KSM's Confession Rings False*, TIME, Mar. 15, 2007; Posting of Robert to Jihad Watch, Officials: Khalid Sheikh Muhammad Exaggerated Claims, http://www.jihadwatch.org (Mar. 15, 2007, 7:06 PM); Posting of Jonathan Stein to Mojo, Mainstream Media Catching UP on KSM Doubts, http://motherjones.com/mojo (Mar. 16, 2007, 2:22 PM PDT).

235. *See* Transcript of Combatant Status Review Tribunal Hearing for ISN 10024, *supra* note 23, at 15.

lawful coercion during this six-month period, the *Bayer* precedent may aid the government's case. Recall that in *Bayer* the Supreme Court found that six months was sufficient to fully dispel a coercive atmosphere.[236] However, in *Bayer*, the defendant was not subjected to torture; rather, he was deprived of basic hospital services and denied access to counsel, family, and friends.[237] In those circumstances, six months was sufficient time to cure the coercive environment. In KSM's case, however, he was subjected to extremely abusive conduct for over two years. Under these circumstances, a court may find that a few months time may not be sufficient to fully mitigate the coercive effects of the earlier abuse.

Similarly, while the transfer of KSM from CIA custody to Department of Defense custody—with interrogations conducted by the FBI in a non-coercive setting—may serve to lessen the impact of KSM's earlier abuse, it is possible that from his perspective, this was just another ploy by the CIA. In fact, in his CSRT statement, KSM seemed to indicate that he believed he was still in the custody of the CIA.[238] In his CSRT hearing, KSM referenced the term "enemy combatant," the label and status the CSRT panel was adjudicating, and he noted how he believed it was a term the CIA invented.[239] This fact, combined with the fact that KSM's earlier treatment probably involved frequent changes in location and interrogators, suggests that the new circumstances in Guantanamo did not indicate better treatment to KSM; rather, changes in personnel and surroundings may have actually reinforced KSM's belief that no matter where he went, he would be subject to physical abuse.

If a military tribunal judge determines that KSM's statements were involuntary, the judge will need to apply the framework established in MCA § 948r.[240] Torture is the first issue addressed under § 948r. The Section provides that a statement produced by torture is inadmissible, regardless of its probative value.[241] There is debate as to whether waterboarding constitutes torture. Organizations, such as Human

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236. 331 U.S. 532, 541 (1947).

237. *See id.* at 541–542.

238. *See* Transcript of Combatant Status Review Tribunal, Hearing for ISN 10024, *supra* note 23, at 23.

> So this language of the war. Any people who, when Usama bin Laden say I'm waging war because such such reason, now he declared it. But when you said I'm terrorist, I think it is deceiving peoples. Terrorists, enemy combatant. *All these definitions as CIA you can make whatever you want.*

Id. (emphasis added).

239. *See id.*

240. *See* Military Commissions Act of 2006, 10 U.S.C. § 948r (2006).

241. *See id.*

Rights Watch, maintain that the use of this technique is indeed torture.[242] The Bush Administration denied that waterboarding rose to the level of torture, but the current Administration has repeatedly stated that it believes that waterboarding is torture.[243] In light of this fact, such a challenge may be a moot point. However, if challenged, and if a military tribunal judge finds that waterboarding constitutes torture, KSM's statements would be suppressed as involuntary statements derived from torture. If, however, the tribunal determines that waterboarding or other tactics used—such as stress positions—are not torture, then the statements will be subjected to further scrutiny.

When a military tribunal judge determines whether KSM's involuntary statements were extracted through non-torturous measures, the admissibility of the statements will hinge on three factors: whether they were given before the Detainee Treatment Act of 2005 (DTA); whether the statements have probative value; and if the interest of justice requires their admission.[244] KSM has been in custody since 2003. His involuntary statements span the temporal limits established by the DTA and were likely elicited both prior to and after the DTA's effective date of December 30, 2005. Any statements obtained after December 30, 2005 will thus be subject to an analysis under constitutional law principles grounded in the Fifth, Eighth, and Fourteenth Amendments to the Constitution, suggesting that most subsequent involuntary statements will be excluded. KSM's pre-DTA statements will be analyzed based on their probative value. For example, a judge may seek to corroborate the statements against other evidence such as the information contained on his hard drive or provided by other detainees. If this evidence corroborates KSM's statements, then the military judge may find that his statements are sufficiently probative. Finally, a military tribunal judge must determine whether the interest of justice requires admitting the statements. Factors that the judge will likely consider are the integrity of the judiciary, the fact that KSM is alleged to be the mastermind of the September 11th attacks, the persuasive value of the evidence, and whether alternative evidence can reasonably establish guilt.

The MCA does not directly address the admissibility of voluntary post-abuse statements. However, jurisprudence on voluntariness does

242. *See U.S. Vice President Endorses Torture*, HUMAN RIGHTS WATCH, Oct. 25, 2006, http://www.hrw.org/english/docs/2006/10/26/usdom14465.htm.

243. *See* Associated Press, *Obama's AG Pick Earns Praise, GOP Support*, MSNBC, Jan. 16, 2009, http://www.msnbc.msn.com/id/28672011/ ("Holder declared waterboarding to be a form of torture, and he outlined numerous ways in which the incoming Obama administration will break sharply with the Bush administration's counterterrorism policies.").

244. *See* Military Commissions Act of 2006, 10 U.S.C. § 948r (2006).

provide a useful analytical framework for determining the admissibility of subsequent voluntary statements. In particular, the "totality of circumstances" test and the "cat out of the bag" test both provide useful lenses for analyzing voluntary statements procured after earlier coercive, abusive, or even torturous conduct. Under the totality of circumstances test, a subsequent statement will be suppressed unless the government can show that the coercive setting that tainted the preceding statement has sufficiently dissipated so as to make the second statement voluntary. Alternatively, the "cat out of the bag" rule is applied to account for instances in which a defendant who involuntarily confessed makes other incriminating statements in the belief that nothing more he says can cause him any additional harm. Under this analysis, admissibility will depend on whether the defendant felt so committed to his prior statement that he believed it futile to invoke his right to remain silent prior to making the subsequent statement. If either test reveals that a statement was involuntary, then a court must apply MCA § 948r to determine admissibility.

V. CONCLUSION

KSM and other high-value detainees were subjected to coercive interrogation, abuse, and perhaps torture at the hands of U.S. investigators who for ill or for good were seeking intelligence information from him and his co-conspirators. While these detainees may not have been protected from the collection of such intelligence by abusive means, those means of collection may have perpetually impacted the admissibility of subsequent statements—including those derived by non-coercive means. Fully analyzing the admissibility of such subsequent statements requires an analysis of the voluntariness and totality of the circumstances tests, which courts have applied in a variety of interrogation circumstances. Many factors—such as the time in between statements; whether there was a change in the place of interrogations; whether the identity of the interrogators changed; the nature of the previous unlawful interrogation methods; and whether the illegally procured statement was used to leverage the subsequent statement—can impact a court's judgment and are by their very nature difficult to assess by commentators without access to information regarding the facts and circumstances surrounding the subsequent and earlier interrogations.

When this Article went to press, the U.S. Congress was considering modifying provisions of the MCA.[245] In particular, members of the Obama Administration were specifically concerned with the types of statements described in this Article, focusing their attention on requiring "a voluntariness standard for the admission of other statements of the accused—albeit a voluntariness standard that takes account of the challenges and realities of the battlefield and armed conflict."[246] If this standard is adopted by congressional reformers, courts will likely find that the application of a voluntariness standard to subsequent voluntary statements is a complex, fact-intensive inquiry, which may mean that some inculpatory statements made by high-value detainees will need to be excluded either to protect the rights of the detainee, or to protect the integrity of the judiciary.

245. *See Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009), *available at* http://judiciary.senate.gov/hearings/hearing.cfm?id=4002.

246. *Id.* (testimony of David Kris, Assistant Att'y Gen. for Nat'l Sec.), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=4002&wit_id=8156.