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Reliability and the Interests of Justice: Interpreting the Military Commissions Act of 2006 to Deter Coercive Interrogations

Peter Margulies* **and**
Laura Corbin**

INTRODUCTION

Vice President Dick Cheney recently agreed with a radio talk show host that dunking a suspected terrorist in water to extract information was a "no-brainer."[1] Cheney hastened to note that the United States does not torture, later adding that he was not referring to waterboarding[2] as a method of interrogation because

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*Professor of Law, Roger Williams University. I have benefited from conversations with Mike Ritz, a former United States Army interrogator, who regularly speaks about interrogation techniques and runs Team Delta, an organization that offers training on interrogation issues.
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1. *See* Neil A. Lewis, *Furor Over Cheney Remark on Tactics for Terror Suspects*, N.Y. TIMES, Oct. 26, 2006, at A8. For more graphic background information on interrogation techniques, see Team Delta, *We Can Make You Talk*, at http://teamdelta.net/HistoryChannel.htm.

2. Waterboarding is a technique that simulates drowning by covering the suspect's mouth and pouring water over his face making it difficult for the suspect to breathe. Mike Ritz participates in a demonstration of the waterboarding technique at http://www.current.tv/pods/controversy/PD04399. *See* David Johnston and James Risen, *The Interrogations; Aides Say Memo Backed Coercion Already in Use*, N.Y. TIMES, June 27, 2004, at sec.1. The

he does not discuss those techniques publicly.[3] Despite these caveats, the Vice President's comments suggest that he does not view waterboarding as torture. Others with more experience might disagree with his assessment.[4] The Vice President was, however, correct that definitions matter, particularly under the Military Commissions Act of 2006 (MCA), which governs proceedings involving suspected terrorists detained at Guantanamo Bay. The MCA would permit a judge to allow statements obtained by coercion short of torture under certain circumstances.[5] The better approach, however, is to interpret the MCA and other sources of law to exclude such evidence.

Trends in domestic and international law run against the MCA's distinction between torture and other forms of coercion. The Supreme Court has ruled that the Constitution bars evidence obtained through coercion from use in criminal trials.[6] International law has also eroded this distinction.[7] Indeed, even the MCA does not distinguish between torture and coercion in ongoing interrogations, but maintains the distinction only for interrogations that preceded the effective date of legislation.[8] Moreover, the MCA's distinction hinges on a finding that evidence from those interrogations is reliable and serves the interests of

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technique reportedly was used on Khalid Shaikh Mohammed, mastermind of the attacks on September 11, 2001. *See id.*

3. *See* Lewis, *supra* note 1, at A8.

4. Waterboarding is now explicitly prohibited as an interrogation technique in the Army field manual for interrogations. *See* FM 2-22.3 (FM 34-52), ¶ 5-75, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, (2006), *available at* http://www.fas.org/irp/doddir/army/fm 2-22-3.pdf.

5. 10 U.S.C.A. § 948r(c), (d) (West Supp. 2007). *See infra* notes 19-20 on specific MCA provisions; *see also* Peter Margulies, *The Military Commissions Act, Coerced Confessions, and the Role of the Courts*, CRIM. JUST. ETHICS (2006), *available at* http://www.ssrn.com/abstract=954415 (hereinafter *The MCA and Coerced Confessions*); *cf.* Peter Margulies, *Beyond Absolutism: Legal Institutions in the War on Terror*, 60 U. MIAMI L. REV. 309, 311-18 (2006) (discussing legal, philosophical, and policy issues regarding torture).

6. Dickerson v. United States, 530 U.S. 428, 434 (2000).

7. *See infra* notes 26 and 29.

8. The MCA bars evidence from interrogations on or after December 30, 2005 that involved "treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States." *See* 10 U.S.C.A. § 948r(c), (d) (West Supp. 2007); *see also* THE MANUAL FOR MILITARY COMMISSIONS, Rule 304(b)(4), (Jan. 18, 2007), *available at* http://www.defenselink.mil/pubs/pdfs/the%20 Manual%20for%20Military%20Commissions.pdf.

justice.[9]

This Article argues that the conditions on admissibility imposed by the MCA give a court ample interpretive space to exclude evidence obtained through coercion. Nevertheless, the exigencies of apprehending terror suspects abroad and seeking to prevent new attacks require some flexibility in the scope and context of questioning. For example, government officials should not have to provide *Miranda* warnings to suspects apprehended abroad and charged in military commissions. Moreover, officials seeking information about pending attacks from a suspect should have a reasonable but not open-ended period of time to question a detainee outside the presence of a lawyer.[10] A court should, however, exclude evidence obtained through specific coercive techniques, including hooding, temperature extremes, and stress positions.[11] This pragmatic approach provides safeguards against government overreaching while also facilitating the prevention of harm to the public.

This Article is in seven parts. Part I explains the impetus for the MCA and the evidentiary standard relevant to this discussion. Part II explores the sociology of interrogation and its uncertainties. Part III examines case law from Britain and Israel that provides useful examples of where international courts have distinguished torture and unlawful coercion and the definition of torture in the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment. Part IV surveys the Anglo-American legal traditions eschewing torture. Part V describes how the United States Supreme Court has applied the protections of the Constitution abroad and how that precedent may be read to extend constitutional protections to detainees at Guantanamo Bay. Part VI considers how the MCA itself may be interpreted to exclude evidence obtained by coercive interrogations, especially in light of the prohibition of cruel, inhuman, and degrading treatment codified in the Detainee Treatment Act of 2005.

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9. 10 U.S.C.A. § 948r(c) (West Supp. 2007).

10. Current case law recognizes that it may be impracticable to require the immediate provision of a lawyer for a defendant in a civilian criminal court who has been apprehended abroad, where lawyers may not be readily available on-site. *See* United States v. Bin Laden, 132 F. Supp. 2d 168, 188 (D.N.Y. 2001).

11. See *infra* note 29 (discussing interrogation tactics used by the British government on suspected IRA terrorists).

Finally, this Article suggests that courts may exercise their authority under the Constitution to exclude evidence obtained by coercion even if this evidence was admissible under the MCA.

MILITARY COMMISSIONS ACT OF 2006

The MCA allows for the trial by military commission of unlawful enemy combatants held at the United States Naval Base at Guantanamo Bay, Cuba. Congress passed the MCA in October, 2006, in response to the Supreme Court's ruling in *Hamdan v. Rumsfeld,* decided four months earlier.[12] *Hamdan* held, in part, that military commissions previously created by President Bush to try "unlawful enemy combatants" were illegal because their procedures did not comply with provisions of the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.[13] *Hamdan* also declared that the United States must provide the minimum protections under Common Article 3 to enemy combatants by trying them in a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[14] Congress countered *Hamdan* by establishing procedures for military commissions, specifically removing courts' habeas corpus jurisdiction over enemy combatant detainees, exempting the commissions from certain UCMJ requirements, declaring the commissions to be "regularly constituted court[s]" with the "judicial guarantees" called for under Common Article 3, and withdrawing the Geneva Conventions as a source of right at trial.[15]

The MCA also addresses the admissibility of evidence obtained through coercion. First, the MCA prohibits the admission of evidence obtained by torture, defined as "an act specifically intended to inflict severe physical or mental pain or suffering."[16] The act then establishes two separate tests where

12. 126 S. Ct. 2749 (2006). This subsection is based on *The MCA and Coerced Confessions, supra* note 5.

13. *Hamdan*, 126 S. Ct. at 2759.

14. *Id.* at 2796 (citing 6 U.S.T. 3316, 3320 (Art. 3, ¶ 1(d)).

15. 10 U.S.C.A. §§ 948b(f),(g) and 950j(b) (West Supp. 2007).

16. *Id.* at § 948r(b); *see also* THE MANUAL FOR MILITARY COMMISSIONS, Rule 304(b)(3), *supra* note 8. The manual further defines severe mental pain or suffering as

> prolonged mental harm caused by or resulting from: (a) the

there is no torture but where the degree of coercion is disputed. The Detainee Treatment Act of 2005 (DTA), which proscribed "cruel, inhuman, or degrading treatment or punishment," as defined by reference to the Fifth, Eighth, and Fourteenth Amendments, is the dividing line between the two approaches.[17]

If the statement at issue was given after passage of the DTA, the judge may allow the statement if she finds it is reliable and sufficiently probative under the "totality of the circumstances," if the evidence serves the interests of justice, and if the statement was *not* the product of "cruel, inhuman, or degrading" interrogation methods.[18] If the statement was obtained prior to the DTA, the judge is not required to consider the third prong of the test.[19] The coercive character of the interrogation methods may be overlooked, so long as those methods fall short of torture.[20]

THE UNCERTAINTIES OF INTERROGATION

Evidence obtained by coercion has consequences that

> intentional infliction or threatened infliction of severe physical pain or suffering; (b) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (c) the threat of imminent death; or (d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

THE MANUAL FOR MILITARY COMMISSIONS, *supra* note 8, at IV-9. This mirrors the language of Article 1 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which the United States ratified in 1994.

17. Detainee Treatment Act of 2005, Pub. L. No. 109-163, §§ 1401 to 1406, 119 Stat. 3474 (2005).

18. 10 U.S.C.A. § 948r(d) (West Supp. 2007); *see also* Detainee Treatment Act of 2005, Pub. L. No. 109-163, § 1403, 119 Stat. 347 (2005) (provision of the DTA popularly known as the McCain Amendment declaring that "no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment").

19. 10 U.S.C.A. § 948r(c) (West Supp. 2007).

20. *Id.* Further, it is unclear whether a detainee will be able to present the evidence of coercion necessary to prove his case; the proof would necessarily depend on the accuracy or availability of government records pertaining to the interrogation methods used. *See id.* at §§ 949d(f) and 949j(c) (describing the restrictions that control access to classified information).

Congress may have overlooked in passing the MCA. First, even assuming that coercion is sometimes justified, interrogators' imperfect knowledge will result in coercion that is either futile or unnecessary.[21] Second, for the same reason, information obtained through torture is often unreliable. Third, torture and coercion create a culture among interrogators that is destructive and contagious.[22]

Utilitarians might argue that torture or other forms of coercion are justifiable to prevent a greater evil. Consider the "ticking bomb" scenario, in which government officials need information immediately to prevent catastrophe.[23] Terrorists have proved capable of catastrophic harm at Oklahoma City and on September 11, 2001. On this view, if the government had apprehended Mohammed Atta, leader of the 9/11 hijackers, prior to September 11, torture would have been a necessary evil to prevent the harm that resulted from the attacks. Unfortunately, although the threat of a catastrophic harm can reasonably be imagined, the remainder of the "ticking bomb" equation is frequently unknowable.

The ticking bomb scenario is most compelling ex post – that is, after the fact of catastrophe. However, officials must make the decision to torture ex ante – before the fact. Before the fact, an official typically cannot determine whether torture or other coercive practices are necessary because the official does not know what information the subject possesses. The subject may be a "false positive," whom the government picked up mistakenly. Alternatively, the subject may have some knowledge, but not the information the government needs. The interrogator with imperfect information may, however, misinterpret the subject's claims of ignorance. Rather than view the subject as truthful, the

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21. For information on professional interrogation and the limits of empirical information on the topic, see generally Intelligence Science Board, *Educing Information: Interrogation: Science and Art*, (Dec. 2006) at http://www.fas.org/irp/dni/educing.pdf.

22. *See* Andrew Sullivan, *The Abolition of Torture*, *in* TORTURE: A COLLECTION 317, 323 (Sanford Levinson ed., 2004) (discussing the spread of a culture of coercion to Abu Ghraib Prison).

23. *See, e.g.*, TORTURE: A COLLECTION 183, 229, 257, 291, 307 (Sanford Levinson ed., 2004) (Essays by Miriam Gur-Arye, Oren Gross, Alan Dershowitz, Richard A. Posner, and Charles Krauthammer all address the "ticking bomb.").

interrogator may assume that the subject is exhibiting resistance. This may lead the interrogator to apply more coercive tactics. Out of desperation, the subject may give the interrogator the story the subject thinks the interrogator wants to hear.

The introduction of such flawed statements into evidence in legal proceedings also erodes the truth-seeking function of tribunals. Once the government introduces tainted evidence, it has a stake in covering up information that might lead an adversary or the court to doubt the evidence's reliability. Deception is piled upon deception, to avoid embarrassment or defeat. The ethics of government lawyers and the integrity of the tribunal take a beating.[24]

Finally, torture is contagious. As Mark Twain observed, "[t]o a man with a hammer, everything looks like a nail."[25] Once coercive tactics are permitted, they take on a viral quality.[26] From a last resort, coercion can quickly become the interrogator's tool of choice, even when other methods are more effective.[27]

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24. *Cf.* PETER IRONS, JUSTICE AT WAR 290-91, 299-300 (1983) (discussing lack of candor of government attorneys in *Korematsu* litigation regarding legality of Japanese-American internment during World War II).

25. *See* Alan Dershowitz, *Tortured Reasoning*, *in* TORTURE: A COLLECTION, *supra* note 23, at 257, 271.

26. *See* Amos N. Guiora & Erin M. Page, *The Unholy Trinity: Intelligence, Interrogation and Torture*, 37 CASE W. RES. J. INT'L L. 427, 434 (stating that petitions filed after the Landau Commission approved the use of coercive methods on Palestinian terror suspects showed "virtually every Palestinian detainee" was subject to duress regardless of the presence of a "ticking bomb" scenario) (citing B'Tselem, *The Israeli Information Center for Human Rights in the Occupied Territories Report* (report estimates 85% of Palestinians interrogated were subject to interrogation techniques amounting to torture), *available at* http://www.btselem.org/English/Publications/Summaries/199802_Routine_Torture.asp); *see also* David Luban, *Liberalism, Torture and the Ticking Bomb*, 91 VA. L. REV. 1425, 1446-47 (stating that prior to a 1999 Israeli Supreme Court decision calling for a halt to coercive interrogation techniques, two-thirds of Palestinians were interrogated using coercive methods) (citing Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51, 65-68).

27. Even when high value terrorists, those who presumably know about al-Qaida plots in general, have been interrogated using "alternative" coercive methods such as waterboarding, the information gleaned has been of questionable value. *See* Mark Mazzetti, *Threats and Responses: The Intelligence Agency; Questions Raised About Bush's Primary Claims in Defense of Secret Detention System*, N.Y. TIMES, Sept. 8, 2006, at A24. After President Bush cited a chain of arrests and disrupted plots sparked by information from CIA interrogations, the New York Times asserted some of

INTERNATIONAL EXAMPLES OF TORTURE AND CRUEL, INHUMAN, OR DEGRADING TREATMENT

Because the MCA explicitly excludes evidence obtained through torture while permitting some evidence obtained through cruel, inhuman or degrading treatment, discussion of the Act necessarily requires an examination of which interrogation methods might amount to torture or coercion. International case law arising in Britain and Israel supplies useful examples of coercion. Both democracies have faced the threat of terrorism on home soil and have employed coercive interrogation techniques to combat it.

In 1999, the Supreme Court of Israel held that interrogation techniques used by the Israeli General Security Services to interrogate Palestinian terrorism suspects were illegal and coercive.[28] These techniques included shaking, stress positions such as "frog" crouching on the tips of one's toes, covering the head with a cloth sack (hooding), interrogation while handcuffed in a painful position to a low chair tilted forward, and the playing of "powerfully loud music."[29] The court also found that sleep deprivation was reasonable if merely a side effect of interrogation rather than an intentional tool meant to break the suspect.[30]

Similarly, in a case brought before the European Court of Human Rights, the Republic of Ireland claimed interrogation techniques used by British security forces against IRA terrorism

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the key information cited was known prior to the interrogations. *Id.* Further, some information obtained by coercive methods has been proven false. *Id.* After being subjected to harsh interrogation techniques, Ibn al-Shaykh al-Libbi reportedly told interrogators that al-Qaida had been trained to use chemical and biological weapons in Iraq. *Id.* This information was later used to justify the United States decision to go to war in Iraq, but al-Libbi reportedly fabricated his statements to avoid further ill treatment. *Id.*; *see also* Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005, http://abcnews.go.com/WNT/Investigation/story?id=1322866.

28. Supreme Court of Israel: *Judgment Concerning the Legality of the General Security Service's Interrogation Methods*, 38 I.L.M. 1471, 1482-84 (1999) (alternative cite at HCJ 5100/94 Public Committee Against Torture in Israel v. The State of Israel 1, 24-27 (1999), at http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf).

29. *Id.*

30. *Id.* at 1484.

suspects amounted to torture.[31] The European Court held that "the five techniques" amounted to inhuman and degrading treatment under the European Convention on Human Rights.[32] The five techniques included a stress position known as "wall standing," in which the suspect stood spread-eagle against a wall balancing his weight on his toes and fingertips; hooding; sleep and food deprivation; and subjection to a continuous hissing noise.[33] In determining that these methods did not rise to the level of torture, the committee put substantial weight on "suffering of the particular intensity and cruelty implied by the word torture as so understood."[34]

The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment (CAT), which the United States ratified in 1994, defines torture as "severe pain or suffering whether physical or mental" that is intentionally inflicted by a state.[35] The CAT further states that "no exceptional circumstances whatsoever" may justify torture.[36] Cruel, inhuman, or degrading treatment, however, is left undefined and is not subject to the categorical prohibition. Instead nations simply agree to "undertake to prevent" such treatment.[37]

As a condition to ratifying the CAT the United States limited the definition of cruel, inhuman or degrading treatment to that treatment already unconstitutional under the Fifth, Eighth, and Fourteenth Amendments.[38] The now infamous and repudiated

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31. Ireland v. United Kingdom, 2 Eur. Ct. H.R. (ser. A) 25 (1978).
32. *Id.* at 80.
33. *Id.* at 59.
34. *Id.* at 80. Fionnuala Ni Aolain argues that the methods found to fall short of torture in this case would likely be considered torture under the European Court's standards today. *See* Fionnuala Ni Aolain, *The European Convention on Human Rights and Its Prohibition on Torture, in* TORTURE: A COLLECTION, 213, 216-17 (Sanford Levinson ed., 2004) (stating Ireland v. United Kingdom was a politically sensitive decision and subsequent cases have called into question whether the European Court will continue to avoid finding a participating government has used torture).
35. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 1, ¶ 1, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *available at* http://www.un.org then documents, general assembly, resolutions, 39th-1984, A/RES/39/46.
36. *Id.* at pt. 1, art. 2, ¶ 2.
37. *Id.* at pt. 1, art. 16, ¶ 1.
38. SEN. EXEC. REP. NO. 101-30, at 8 (1990).

Torture Memos—which suggested, among other refinements, that pain inflicted during interrogation which fell short of that causing organ failure was permissible to protect the national security—were rejected as an attempt to redefine torture under the CAT.[39] The Department of Justice later said it did not intend to adhere to the memo's suggested definition of torture and Congress passed the DTA, extending the reach of the torture and coercion standards ratified in the CAT.[40] Moreover, the tradition of Anglo-American courts is hostile to statements obtained by torture or coercion.

UNITED STATES LEGAL TRADITION – COERCIVE INTERROGATIONS

Coercive interrogations corrode the reliability of the statements obtained and therefore preclude its admissibility when viewed through the lens of historical judicial skepticism and democratic values.[41] The permissive evidentiary standard of the MCA allows judges to reject coerced statements based on Anglo-American traditions that dubiously view confessions not "voluntarily and freely made."[42]

39. Memorandum from Daniel Levin, Acting Asst. Atty. General to James B. Comey, Deputy Atty. General, Legal Standards Applicable Under 18 U.S.C. 2340-2340A, Dec. 30, 2004, http://www.usdoj.gov/olc/18usc23402340a2.htm.

40. *Id.*; *see also* Neil A. Lewis, *U.S. Spells Out New Definition Curbing Torture*, N.Y. TIMES, Jan. 1, 2005, at A1.

41. The notion that confessions born of coercion are "inherently untrustworthy" is rooted in British and American law. Dickerson v. United States, 530 U.S. 428, 433 (2000) (citing King v. Rudd, 168 Eng. Rep. 160, 161, 164 (K.B. 1783) (Lord Mansfield). But the true tension in the balance between national security and democratic values in the rule of law is presented when the veracity of statements obtained by torture or coercion is corroborated by other evidence. The Supreme Court has invoked the doctrines of inevitable discovery and independent source to allow evidence that is the fruit of a constitutional violation. *See* Nix v. Williams, 467 U.S. 431, 447 (1984); *see also* Murray v. United States, 487 U.S. 533, 537, 544-45 (1988) (Marshall, J., dissenting) ("The independent source exception, like the inevitable discovery exception, is primarily based on a practical view that under certain circumstances the beneficial deterrent effect that exclusion will have on future constitutional violations is too slight to justify the social cost of excluding probative evidence from a criminal trial."). Where circumstances permit, these doctrines should give courts leeway to admit evidence that would otherwise be the fruit of a coercive interrogation even when the coerced statements themselves are excluded.

42. Bram v. United States, 168 U.S. 532, 544 (1897).

Judicial distrust of coerced statements is deeply rooted. The classic elucidation of this distrust derives from an 18th century English case that praised voluntary confessions born of a guilty conscience but declared, ". . .a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it. . . ."[43] The framers undoubtedly were aware of the dangers of coerced confessions and the courts' entrenched skepticism of such statements while drafting both the Constitution and the Bill of Rights.[44]

Our Fifth Amendment jurisprudence, protecting against compelled self-incrimination and requiring due process, and the later adopted Fourteenth Amendment Due Process Clause therefore embody the prohibition against coercion. Coercion cases have recognized two underlying rationales for the prohibition: the actual unreliability of the confession and the probability that the confession is unreliable because of undue government pressure.[45] Because precedent has evolved to emphasize unconstitutional

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43. *Dickerson*, 530 U.S. at 433 (citing King v. Warickshall, 168 Eng. Rep. 234, 235 (K.B. 1783). *Dickerson* went on to hold that *Miranda* warnings were a constitutional requirement that could not be modified by Congressional statute. *Miranda*, itself, was an expression of judicial skepticism over the coercive nature of custodial interrogations. Miranda v. Arizona, 384 U.S. 436, 444 (1966). This Article argues that, while every constitutional right of a citizen, in particular the requirement of *Miranda* warnings, may not practically be extended to a detainee, the fundamental right to have statements born of physical or extreme psychological coercion excluded from a criminal prosecution should inhere in all those made to participate in our adversarial process. *Miranda*, however, is still useful to demonstrate the importance and long reach of constitutional protections in our criminal justice system. The fact of custodial interrogation should continue to inform the MCA's "totality of the circumstances" test for coercion, but should not be a per se bar to admission.

44. *Bram*, 168 U.S. 532 at 548 ("The well-settled nature of the rule in England at the time of the adoption of the constitution and of the fifth amendment, and the intimate knowledge had by the framers of the principles of civil liberty which had become a part of the common law, aptly explain the conciseness of the language of that amendment."). The rule in England referred to in *Bram* was broad, and focused on the confessor's state of mind no matter the conduct that led to the confession. The modern rule has been narrowed to focus exclusively on state conduct leading to the confession. *See* Colorado v. Connelly, 479 U.S. 157, 165-67 (1986).

45. Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 112 (1997).

coercive state action as the primary indication of an unreliable confession, examples of improper government tactics both before and after conviction will be informative.[46]

An October 2006 report to Congress on the implications of the McCain Amendment's prohibition of "cruel, inhuman, or degrading treatment or punishment," listed the following as unconstitutional violations in United States criminal cases: "handcuffing an individual to a hitching post in a standing position for an extended period of time. . . maintaining temperatures and ventilation systems in detention facilities that fail to meet reasonable levels of comfort; and prolonged interrogation over an unreasonably extended period of time, including interrogation of a duration that might not seem unreasonable in a vacuum, but becomes such when evaluated in the totality of the circumstances."[47] Confessions provoked by an offer of protection from threats of violence from other prisoners would also be prohibited.[48]

While it is not clear that these criminal precedents will apply strictly to find "cruel, unusual or degrading treatment" of detainees in the ongoing "War on Terror," courts *should* apply these precedents to do so. Unlike prophylactic warnings and the generally coercive environment of custodial interrogation, tactics that produce physical and mental pain are affirmatively coercive and pose a threat to the credibility of both the statements and the tribunal that uses them to prosecute.

46. Lego v. Twomey, 404 U.S. 477, 485 (1972) (citing Rogers v. Richmond, 365 U.S. 534, 540-541 (1961) ("The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles.").

47. Michael John Garcia, *Interrogation of Detainees: Overview of the McCain Amendment*, CRS Report for Congress, 5 (Jan. 24, 2006) (citing Hope v. Pelzer, 536 U.S. 730 (2002); Haynes v. Washington, 373 U.S. 503 (1963); Greenwald v. Wisconsin, 390 U.S.
519 (1968); Davis v. North Carolina, 384 U.S. 737 (1966); Leyra v. Denno, 347 U.S. 556 (1954); Johnson v. New Jersey, 384 U.S. 719 (1966); Ashdown v. Utah, 357 U.S. 426 (1958); Chandler v. Crosby, 379 F.3d 1278 (11th Cir. 2004)), *available at* http://www.fas.org/sgp.crs/intel/RS22312.pdf.

48. Arizona v. Fulminante, 499 U.S. 279 (1991) (upholding an Arizona judgment that a child murderer's confession was coerced under the totality of the circumstances when, under fear for of physical violence from other prisoners he was promised protection from the prison population in return for his murder confession).

Judges have been guardians of the integrity of the judicial process and have refused to admit evidence illegally or unconstitutionally procured for fear of tainting the integrity of the courts. As Justice Frankfurter so aptly declared in *McNabb v. United States*, "the history of liberty has largely been the history of observance of procedural safeguards."[49] While terrorism has had deadly consequence for Americans – the bombing of the USS Cole and the United States embassies in Kenya and Tanzania, and the attack on September 11, 2001 – a double standard in prosecuting those suspected of supporting or engaging in terrorism threatens notions of liberty at the core of our identity at home and abroad.

Moreover, these coercive tactics have an impact beyond the courtroom. Perceived tolerance of coercive tactics from the highest members of the executive to the soldier on the ground is arguably what led to the abuses at Abu Ghraib and to the felt need for the McCain Amendment's prohibition of "cruel, inhuman, and degrading treatment" now incorporated into the evidence rules of the MCA.[50] Although the MCA's application of the "cruel" treatment prohibition from December 30, 2005 onward would seem to deter any ongoing or future coercive interrogation tactics since those tactics will no longer produce admissible evidence, the sanctioning of prior coercive techniques implicit in the MCA's bifurcated rule continues the harm inflicted on the detainee and supports the interrogator's justification for her techniques, ultimately undermining the prohibition.[51]

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49. McNabb v. U.S., 318 U.S. 332, 347 (1943). In exercising its supervisory administrative authority over federal courts, the Supreme Court held that confessions secured by federal law enforcement officers must be excluded from the defendant's murder trial because of the circumstances under which the suspects were held and interrogated. *Id.* The Court acknowledged Constitutional Due Process claims might exist, but declined to reach the constitutional issue. *Id.*

50. 152 CONG. REC. S10,250 (daily ed. Sept. 27, 2006) (statement of Sen. Graham) ("Abu Ghraib was about policies that cut legal corners, that migrated from one side of the Government to the other, that got everybody involved confused as to what you could and could not do.").

51. The MCA's amendment of the War Crimes Act (WCA) also threatens to undermine deterrence of some coercive interrogation. The MCA amends the WCA, defining nine offenses considered "grave breaches" of the Geneva Conventions Common article 3 and punishable under the WCA. Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b)(1)(B) (2006). The MCA also grants the President power to define conduct and promulgate regulations

The Supreme Court itself observed that the prohibition on coercion went beyond the unreliability of involuntary confessions, citing the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government. . .wrings a confession out of an accused against his will."[52] The Court further acknowledged "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."[53]

The Court's warning reminds us that there are likely to be innocent people held among the true terrorists. This is especially true in the war on terror, where it is difficult to sort civilians from enemy combatants and where innocents[54] are turned in as terrorists for a bounty.[55] The burden that our prosecution of this

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for actions that fall outside the enumerated "grave breaches." *Id.* at § 6(a)(3)(A). The enumerated offenses include torture, intentional infliction of "serious bodily injury," and cruel and inhuman treatment, but not degrading treatment. *Id.* at § 6(b)(1)(B). Cruel and inhuman treatment is defined as an act "intended to inflict severe or serious physical or mental pain or suffering" without reference to the constitutional standard adopted in the CAT and DTA. *Id.* This gap between what is a punishable offense under the WCA and impermissible conduct toward detainees under the DTA leaves a grey zone where the interrogator is forbidden to use cruel, inhuman, or degrading treatment as constitutionally defined but only faces criminal punishment under the WCA for conduct that constitutes a lower standard: a "grave breach." *See* John Duberstein, *Excluding Torture: A Comparison of the British and American Approaches to Evidence Obtained by Third Party Torture*, 32 N.C. J. INT'L L. & COM. REG. 159, 177-78 (2006).

52. Jackson v. Denno, 378 U.S. 368, 386 (1964) (citing Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960)).

53. *Id.* (citing Spano v. New York, 360 U.S. 315, 320-21 (1959)).

54. John Yoo, a professor at Berkeley's Boalt Law School and a former Justice Department lawyer involved in drafting at least one of the repudiated Torture Memos, recently criticized focusing on the great risk of detaining the innocent, because the risk of harm from releasing a truly guilty terrorist is potentially a greater harm to society. Further, he argued, the balance of risk should ultimately be left to the political branches which are responsible for the conduct of war. John Yoo, *The Military Commissions Act Restored the President's Proper Command over the War on Terror*, LEGAL TIMES, Feb. 5, 2007, at 44-45. Yoo's argument soundly describes the dilemma but ignores the fundamental presumption of innocence and the judiciary's professional responsibility to preserve the integrity of the courts. Further, the logical extension of Yoo's argument would exact a heavy toll on the innocent based primarily on an indefinite harm.

55. Mark Denbeaux, et al., *Report on Guantanamo Detainees: A Profile of*

war places on the shoulders of those who are innocent should be tempered by a fair judicial process that refuses evidence obtained through coercion without regard to the date that coercion took place.

HOW THE COURT HAS APPLIED CONSTITUTIONAL PROTECTIONS ABROAD

A benchmark for what amounts to coercion can be found in our legal traditions and in case law that has interpreted the Fifth, Eighth and Fourteenth Amendments.[56] However, the Supreme Court has refused to apply the guarantees of the Constitution abroad with the same force with which they are applied at home. Since the enactment of the McCain Amendment to the DTA, which prohibits "cruel, inhuman, or degrading treatment or punishment" as defined by the Fifth, Eighth and Fourteenth Amendments regardless of the nationality or location of the detainee, it appears that at least some protections now apply beyond our borders without regard to citizenship.[57]

Current protections extended by the amendment, however, do not resolve the question of whether detainees already possessed fundamental constitutional rights before the amendment was enacted, therefore protecting their interests in a trial free of evidence derived from coercive interrogations which took place before the DTA. At a minimum, the standard governing the admissibility of evidence obtained by agents of a *foreign* government should represent the floor by which coercive statements elicited by agents of the United States government are judged. When considering the admissibility in United States courts of evidence obtained by foreign governments, courts have applied the "shock the conscience" test, first articulated in *Rochin*

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517 Detainees through Analysis of Department of Defense Data, *available at* http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf. Among the report's conclusions, the authors state "[o]nly [five percent] of the detainees were captured by United States forces. [Eighty-six percent] of the detainees were arrested by either Pakistan or the Northern Alliance and turned over to United States custody." *Id.*

56. U.S. CONST. amend. V; *id.* at amend. VII; *id.* at amend. XIV, § 1.

57. *See* Garcia, *supra* note 47, at 4. Garcia also cautions that the prohibition of "cruel, inhuman and degrading treatment or punishment" may continue to defy strict adherence to constitutional precedent within the United States because of the inherent difficulty of comparing criminal interrogations to military interrogations prosecuting the "War on Terror."

v. California.[58] The "shock the conscience" test, when applied to foreign governments, has been interpreted to mean "appalling abuses, such as torture" which violate "fundamental international norms of decency."[59]

The idea that non-citizens with no presence in the United States might have the protection of the fundamental rights of our Constitution is a debate between pragmatic concerns and democratic ideals. Justice Black with the support of two other dissenters opined in *Johnson v. Eisentrager*, "[c]onquest by the United States, unlike conquest by many other nations, does not mean tyranny. . .Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies. Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live."[60] But Justice Jackson, writing for the majority, stood firm that the Fifth Amendment stops short of spreading its protection "over alien enemies anywhere in the world engaged in hostilities against us" given the text of the amendment and the knowledge that our own military members are subject to military trials.[61]

Arguments advanced for the extension of fundamental constitutional rights to detainees – generally foreign citizens captured in foreign lands and held outside the "territory" of the United States – have been unavailing. *Eisentrager* has become

58. 342 U.S. 165 (1952) (forced pumping of a drug suspect's stomach to obtain evidence violated the suspect's Fourteenth Amendment due process rights).

59. *See* United States v. Angulo-Hurtado, 165 F. Supp. 2d 1363, 1370 n.7 (N.D.Ga. 2001) (citing United States v. Mitro, 880 F.2d 1480, 1483-84 (1st Cir. 1989) ("conduct of foreign government in refusing to allow defendant to inspect wiretap application and affidavit did not shock the conscience so as to require exclusion; to invoke 'very limited' exception, defendant must show not only violation of his due process rights but of 'fundamental international norms of decency'").

60. 339 U.S. 763, 798 (1950).

61. *Id.* at 782-83. This debate occurred in the context of a habeas petition. The Fifth Amendment issue implicated by this Article is perhaps different since military members retain the right to trials free from evidence elicited from coercive interrogation. Uniform Code of Military Justice, 10 U.S.C. § 831 (1956).

the executive trump card.[62] The *Eisentrager* Court rejected the habeas petition of a German soldier tried by military commission for supplying intelligence about United States military movements to the Japanese after Germany's surrender in World War II.[63] The Court held that "the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States."[64] The Supreme Court, in *Rasul v. Bush*, distinguished the Guantanamo detainees from the *Eisentrager* detainees, but did not explicitly consider whether the distinction allows the Guantanamo detainees to claim a constitutional right to due process.[65]

Although the *Rasul* Court kept the door closed, it did seem to open a window. The Court's characterization in *Rasul* of the United States. Naval Base at Guantanamo Bay as a "a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty'" and its conclusion that the circumstances in which the detainees had been held "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States'" cast into doubt the assertion that fundamental constitutional protections do not extend to Guantanamo detainees.[66]

A United States territory has an uncommon relationship with the Constitution. If Guantanamo is in essence equivalent to a territory, the Constitution may have some application to its inhabitants. The Court considered the territorial relationship in

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62. *See, e.g.*, Boumediene v. Bush, 476 F.3d 981, 990-91 (D.C. Cir. 2007).

63. Johnson v. Eisentrager, 339 U.S. 763 (1950).

64. *Id.* at 785; *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 269 ("our rejection of extraterritorial application of the Fifth Amendment [in *Eisentrager*] was emphatic").

65. Rasul v. Bush, 542 U.S. 466, 476 (2004) ("Petitioners in these cases differ from the *Eisentrager* detainees in important respects: [t]hey are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.").

66. *Id.* at 484 (2004) (holding that Guantanamo detainees had a statutory right to file habeas claims in federal courts).

Downes v. Bidwell, one of the *Insular Cases*.[67] In *Downes*, the Court did not extend all of the protections of the Constitution to the territory of Puerto Rico, instead upholding a shipping duty that would not have passed constitutional muster in the United States.[68] Nevertheless, the Court suggested that "natural rights," including due process, may cover residents of United States territories.[69] Guantanamo Bay, it will be argued, although territory-like in important respects, is not Puerto Rico. The residents of Guantanamo Bay are chiefly United States military personnel and terrorist suspects imported by the United States, not an acquired indigenous population. But the situation in which Guantanamo detainees find themselves perhaps counsels for greater constitutional application. These are not people governed by the United States, but prisoners under the absolute unfettered control of its government.

Similarly, Justice Kennedy, in his concurrence to *United States v. Verdugo-Urquidez*, concluded that a Fifth Amendment due process right applied to the United States trial of a nonresident alien arrested in Mexico.[70] Kennedy agreed with the majority that a warrantless search of suspect's Mexican residence did not violate the Fourth Amendment,[71] but explained his separate reasoning that the Fourth Amendment could not apply given the practical exigencies of law enforcement actions in a foreign country. However, Kennedy explicitly disclaimed the idea that no constitutional protections extend extraterritorially.[72] Because Fifth Amendment protection attached to the trial of Verdugo-Urquidez, it would follow that, had evidence been obtained by unconstitutionally coercive methods, it could not be introduced into evidence at trial.

In 2005, a district court judge considering multiple habeas petitions filed on behalf of Guantanamo detainees interpreted the Supreme Court's decision in *Rasul* to implicitly confer Fifth Amendment due process rights upon detainees held at

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67. 182 U.S. 244 (1901).
68. *Id.* at 287.
69. *Id.* at 283.
70. 494 U.S. 259 (1990).
71. *Id.* at 278.
72. *Id.*

Guantanamo Bay.[73] Her decision recently was reversed by the federal appeals court in *Boumediene v. Bush*, which adhered to *Eisentrager*. The constitutional point may be destined for reconsideration by the Supreme Court.[74]

INTERPRETING THE MCA IN LIGHT OF THE DTA'S PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT

The MCA's reduced evidentiary test for coerced statements made prior to the DTA gives military judges the discretion to exclude statements that are unreliable or statements that do not serve the interests of justice.[75] Navy Judge Advocate General Rear Admiral Bruce MacDonald wrote in a letter to Senator Carl Levin that military judges should be given the "discretion and authority to inquire into the underlying factual circumstances and exclude any statement derived from unlawful coercion, in order to protect the integrity of the proceeding."[76] The MCA, by providing a discretionary test for the admission of coerced statements, seems to grant that authority giving military judges the opportunity to follow Admiral MacDonald's direction to "protect the integrity of the proceeding."[77]

In addition, even if one looks only to reliability and the interests of justice, the unreliable and unjust nature of coerced statements should preclude the possibility that evidence of this

73. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 433 (D.D.C. 2005), *overruled by* Boumediene v. Bush, 476 F.3d 981 (D.D.C. 2007).

74. *See Boumediene*, 476 F.3d 981.

75. *See* 10 U.S.C.A. § 948r(d) (West Supp. 2007).

76. 152 CONG. REC. S10,253 (daily ed. Sept. 27, 2006) (correspondence dated Sept. 26, 2006). Admiral MacDonald's sentiments are in line with an institutional military opposition to torture. Although this ideal is not always followed in practice, as the torture at Abu Gharaib demonstrated, the ethic has been demonstrated by the vigorous and vocal defense of detainees by their appointed military defense counsel, one military prosecutor's refusal to prosecute because he believed the defendant had been tortured, and the Army Field Manual's instruction to interrogators to follow a version of the "golden rule." *See* Jess Braven, *The Conscience of the Colonel*, WALL ST. J., Mar. 31, 2007, at A1; FM 2-22.3 (FM 34-52),¶ 5-76, Human Intelligence Collector Operations, Sept. 2006, *available at* http://www.fas.org/irp/doddir/army/fm 2-22-3.pdf ("If the proposed approach technique were used by the enemy against one of your fellow soldiers, would you believe the soldier had been abused?").

77. 152 CONG. REC. S10,253 (daily ed. Sept. 27, 2006) (correspondence dated Sept. 26, 2006).

kind could pass even the MCA's less rigorous test for statements obtained prior to Dec. 30, 2005.

Only a very narrow class of coerced statements may be considered reliable, but even if reliable, the test also requires that admission of the statements serve the interests of justice. Justice has two implications: that the proceeding results in a correct outcome (the truly guilty are convicted and the truly innocent go free) and that the proceeding is fair.[78] A confession wrung from an accused against his will[79] cannot comport with a fair proceeding and is therefore unjust.

The MCA's incorporation of the DTA's prohibition of "cruel, inhuman, or degrading" coercive tactics suggests an additional interpretation. The DTA's prohibition represents Congress's decision that "cruel, inhuman, or degrading treatment or punishment" is antithetical to American ideals and potentially harmful to American soldiers who may be captured and subjected to similar treatment.[80] The amendment further restricts military interrogators to only those tactics listed in the Army Field Manual.[81]

Although, the idea that coercive tactics are harmful to America's image, ideals, and security is not new – given the judicial history outlined above as well as our international obligations under the CAT[82] – Congress felt the need to further

78. WEBSTER'S NEW WORLD DICTIONARY 795 (12th ed. 1968).

79. *See* Jackson v. Denno, 378 U.S. 368, 386 (1964) (citing Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960)).

80. *See Statement of Senator John McCain: Statement on Detainee Amendments on (1) The Army Field Manual and (2) Cruel, Inhumane, Degrading Treatment,* (Nov. 4, 2005), *available at* http://mccain.senate.gov/press_office/view_article.cfm?id=128.

81. Detainee Treatment Act, Pub. L. No. 109-148, Title X, § 1002 (2005); Pub. L. No. 109-163, Title XIV, § 1402 (2006). For more information on the McCain Amendment see Garcia, *supra* note 47.

82. *Statement of Senator John McCain, supra* note 80 (McCain states, "If [the prohibition against cruel, inhumane, and degrading treatment] doesn't sound new, that's because it's not - the prohibition has been a longstanding principle in both law and policy in the United States"); *but see* 152 CONG. REC. S10,250 (daily ed. Sept. 27, 2006) (statement of Sen. Graham) (Senator Graham stated that the reason the MCA does not incorporate the DTA's prohibition as an evidentiary rule prior to the passage of the DTA is because "no one had recognized the 5th, 8th, and 14th amendment concepts applying to enemy combatants").

codify the prohibition.[83] Any military commission subsequently allowing coerced confessions to be admitted into evidence would be continuing the harm Congress set out to stop. While it is true that the MCA also represents Congress's decision that coerced confessions obtained prior to enactment of the DTA may not be subject to the standards of the DTA, this decision comes at a price.

The McCain amendment contains a subsection limiting the ability of past and future legislation to modify its mandates. The subsection states, "[t]he provisions of this section shall not be superseded, except by a provision of law enacted after January 6, 2006, which specifically repeals, modifies, or supersedes the provisions of this section." The MCA includes the DTA's prohibition of coercive treatment as an evidentiary restriction, but does not specifically repeal, modify, or supersede the DTA's prohibition. A court viewing the MCA evidentiary rule on coerced testimony this way could, in the interests of justice, extend the prohibition on "cruel, inhuman, or degrading treatment" to exclude the introduction of coerced statements into hearings conducted after passage of the DTA. In addition, it seems contrary to the spirit of the CAT and the DTA to create such an inequity between the trials of detainees, some of whom may be convicted based on coerced statements while others are explicitly protected from introduction of those statements. These inconsistencies must be remedied, both to ensure the equitable application of justice and to keep unreliable statements out of the court room.

CONCLUSION

The shift of power in Congress to a Democratic majority has spurred political efforts to amend the MCA.[84] Whether or not such efforts are successful, courts will continue their mandate to oversee the administration of justice. Courts' discretion under the

83. The Torture Statute, 18 U.S.C. § 2340 (2005), had already codified the prohibition against torture, but did not further codify restrictions on "cruel, inhuman, or degrading treatment."

84. *See* News Release, *Sens. Dodd, Leahy, Feingold, Menendez Introduce Bill to Restore Habeas Corpus Rights, Ban Torture, Uphold Geneva Conventions*, U.S. FEDERAL NEWS (Feb. 12, 2007) (discussing the "Restoring the Constitution Act of 2007," which proposes to exclude all evidence obtained by coercion and reinstate habeas corpus rights to detainees among other initiatives).

MCA regarding evidence obtained by coercion opens at least five avenues to exclude such evidence in accord with the enduring values of the law. First, a broad reading of the meaning of "torture" would categorically exclude evidence obtained by the worst forms of coercion. Second, a narrow reading of the meaning of "reliable" would walk in step with traditional judicial skepticism of coerced confessions. This narrow reading coupled with a view of "interests of justice" that favors the interest in a fair proceeding untainted by suspect evidence obtained by coercion would serve to preclude admission of coerced statements. Third, courts may apply the minimum "shocks the conscience" standard to preclude the use of statements procured through coercive methods that fall short of torture. Fourth, courts can hold that fundamental rights apply to detainees under the exclusive control of the United States and exclude coerced statements as constitutional violations. Fifth, courts can find coerced confessions contravene the interests of justice and the DTA, because introduction of coerced statements is an extension of the harm Congress sought to prevent. Taking any of these paths will ensure that the United States is traveling in the right direction – away from the use of torture or coercion to extract evidence in legal proceedings.