Use and Misuse of Evidence Obtained During Extraordinary Renditions: How Do We Avoid Diluting Fundamental Protections?

Victor Hansen*
USE AND MISUSE OF EVIDENCE OBTAINED DURING EXTRAORDINARY RENDITIONS: HOW DO WE AVOID DILUTING FUNDAMENTAL PROTECTIONS?

VICTOR HANSEN*

I. INTRODUCTION ................................................................. 281
II. TRIAL IN FEDERAL COURT .............................................. 284
III. TRIAL IN MILITARY COURTS-MARTIAL ............................ 293
IV. TRIAL BY MILITARY COMMISSION ..................................... 294
V. THE FUNDAMENTAL PROBLEM WITH MILITARY COMMISSIONS 300
VI. CONCLUSION ................................................................. 302

1. INTRODUCTION

We are well into President Obama’s second year in office and long past the deadline set out in his executive order directing the closure of the Guantanamo Bay detention facility by January of 2010. Meanwhile, the debate continues to rage over where the masterminds of the 9/11 attacks should be tried. Initial efforts to move the 9/11 co-conspirators to New York and try them in federal district court have been rebuffed, and President Obama and Attorney General Holder have been roundly criticized by some for their initial efforts to move these cases to federal court. These, and other cases that originated under military commissions proceedings, remain in legal limbo and the question of where to try these suspects has become a sort of “third rail” that no politician wants to touch, lest they are accused of being soft on terrorists.

* Professor Victor Hansen is a Professor of Law at New England Law in Boston where he teaches Criminal Law, Criminal Procedure, Evidence and National Security Law. The author wishes to thank Elizabeth Funk for her invaluable research assistance.

4. In December Congress passed legislation significantly restricting the ability of the President to move people from Guantanamo by prohibiting funding of those efforts. Also, on March 7th the President signed an Executive Order, which among other things, allows for the resumption of military commissions at Guantanamo, expresses a desire to close Guantanamo, establishes a system of periodic review of those detainees at Guantanamo who will not face
Many in legal academia—including myself—have criticized this current debate as being superficial and unprincipled. Nevertheless, it is clear that those opposed to trying suspected terrorists in federal court have tapped into a genuine and powerful force, and there is no question that this opposition raises legitimate and important questions about national security and the role the law should play in balancing the need for security against individual rights and freedoms.

Up to this point, the question has been framed as: What is the best forum for trying these suspected terrorists? Perhaps it is time to re-frame the question. Instead of asking what forum is best suited to try the 9/11 co-conspirators and others currently detained at Guantanamo, maybe we should be asking what legal accommodations must be made if we try these suspects at all, and whether one choice offers an alternative that will be less corrosive to our system of justice.

Later generations will look back at our legal responses to terrorism just as we have looked at our own history—sometimes with pride and other times with shame and regret. In times of trial, the legitimacy of our legal system is upheld by close adherence to principles upon which that system is based. If we only adhere to those principles in times of peace and abandon them in times of trouble, or when difficulties arise, there is little justification for preserving such a system. Reframing the debate to ask what compromises and accommodations must be made to our system of justice in order to bring accused terrorists to justice might allow us to get closer to this fundamental question.

Reframing the debate in this way also allows us to better see the motives behind many government programs such as extraordinary renditions, enhanced interrogation techniques, and the formation of military commissions. Once we see these motives more clearly, we can better determine their legitimacy.

By reframing the question to focus on the legal accommodations needed to bring these suspects to justice, I believe two inescapable conclusions follow. First, our decision to use extraordinary renditions, "black sites," and

---

military commission of federal trial but will still be detained, and preserves the right to try certain individuals in federal court. See Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011). Neither this legislation nor the Executive Order resolves this question of where to try suspected terrorists like KSM. On April 4, 2011, Attorney General Eric Holder reversed an earlier decision and announced that the so called "9/11 co-conspirators" would be tried by military commission, not in federal court as had been previously announced. Attorney General Holder said that while he believed that trial in federal court was the better option, recent congressional action had made that option virtually impossible. Statement of the Attorney General on the Prosecution of the 9/11 Conspirators, U.S. Dep't of Justice, Apr. 4, 2011, http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html.
enhanced interrogation techniques has had far reaching implications on our system of justice, and has affected that system in very specific ways that were likely unanticipated by the proponents of these programs. Second, with respect to the evidence obtained by coercion, the greatest corrosion to our system of justice will occur if we opt to try these suspects by the current formulation of the military commissions system, though ultimately the adverse effects of these programs will be realized in any forum these terrorist suspects are tried.

It is useful to go back and ask what the government hoped to achieve by holding suspected terrorists like Khalid Sheikh Mohammed in CIA “black sites” located in third countries, subjecting them to water boarding and other interrogation techniques that are certainly cruel, inhumane, and degrading, even if not classified as torture. The concern here is not the legality or illegality of these practices, but the “products” that the government hoped to obtain by using these practices.

There were at least two primary products the government hoped would come from these practices: First, to gain usable, actionable intelligence to detect and disrupt terrorist networks and prevent future attacks against the United States’ interests; and second, to use information obtained in subsequent prosecutions of specific terrorist suspects. I believe it is fair to assume the reason the United States sought to achieve these objectives by means of extraordinary rendition is because the government wanted to employ techniques of questionable legality, if not outright torture to obtain this information.

There is clearly an inherent tension in seeking useful intelligence to prevent future terrorist attacks and simultaneously collecting information for subsequent prosecution. That tension is nothing new and compromises must

5. In military terminology, a “black site” is a location at which an unacknowledged black project is conducted. Recently, the term has gained notoriety in describing secret prisons operated by the United States (U.S.) Central Intelligence Agency (CIA), generally outside of U.S. territory and legal jurisdiction. It can refer to the facilities that are controlled by the CIA used by the U.S. government in its War on Terror to detain alleged unlawful enemy combatants. U.S. President George W. Bush acknowledged the existence of secret prisons operated by the CIA during a speech on September 6, 2006. See Bush Admits to CIA Secret Prisons, BBC News, (Sept. 7, 2006, 4:18 AM), http://news.bbc.co.uk/2/hi/americas/5321606.stm.


be made if information is going to be used for both purposes. Moreover, there is an ongoing debate whether information obtained by torture or other coercive interrogation techniques really provides useful intelligence. While both of these issues are important, they are not the focus of this essay.

The primary concern here is with the use of coerced statements in any subsequent criminal prosecution of suspected terrorists. I seek to examine how schemes of rights infringements, such as extraordinary renditions and coercive interrogations, translate into specific and corrosive questions of accommodation. If accommodations are made now to bring these suspects to justice, does choosing one system over another at least reduce, if not eliminate the accommodations that must be made, so as to limit the corrosive impact on our system of justice?

Currently, there are three proffered alternatives for prosecuting individuals who were subject to extraordinary rendition and coercive interrogations. The first alternative is trying them in federal district court. The second alternative is trying them via a court-martial proceeding under the Uniform Code of Military Justice. The third option is to try them by military commission. What are the consequences of embarking on a practice of extraordinary renditions, torture, and coercive interrogations when the government later wants to prosecute those suspects? Specifically, how would each of these forums address the admissibility of coerced statements?

II. TRIAL IN FEDERAL COURT

Prior to the creation of military commissions, trying terrorists in federal court was the norm and despite the existence of military commissions, the vast majority of terrorist cases are still being tried in federal district courts.9 Even so, the cases that have been tried in federal courts are different in nature than the cases we are talking about. With the exception of Ghailani case recently tried in a New York federal court,10 the cases tried in federal courts involved terrorist acts, attempts, or plots by suspects apprehended within the United States.11 These cases did not involve issues of extraordinary rendi-

---


tion, allegations of torture, or other coercive interrogations, and therefore the
more complicated questions involved in the possible trial of Khalid Sheikh
Mohammed and the other 9/11 co-conspirators have not yet been addressed
by the federal courts.

Nevertheless, trial in federal court provides the most familiar method
for prosecuting even these more complex cases. So, if we move forward
with a federal court trial, potential questions are: How are the federal courts
going to address the admissibility of coerced confessions? What accommo-
dations would have to be made in order for this evidence to be admitted and
considered? And what type of impact would that have on the more run-of-
the-mine cases?

Before addressing these questions, one fundamental issue needs to be
considered: To what extent, if any, do the constitutional protections against
coerced confessions even apply to cases where the alleged crimes, capture,
rendition, and interrogations took place outside of the United States? This is
not an easy question and while it is not the primary focus here, some thought-
s about it are important.12

There is much dispute over if and how constitutional protections that
are a routine part of domestic criminal prosecutions would apply to criminal
prosecutions of these suspected terrorists, whose connection to the United
States is tenuous at best.13 While the Supreme Court of the United States has
not addressed this issue directly, past cases do provide some guidance. The
two most recent cases where the Court addressed the extraterritorial applica-
tion of the Constitution are United States v. Verdugo-Urquidez14 and Boume-
diene v. Bush.15 From these cases, we can glean principles that may provide
guidance in the trial of cases that involved extraordinary renditions and coer-
cive interrogations.

Verdugo-Urquidez dealt with the warrantless search of the defendant’s
home in Mexico by DEA agents and Mexican law enforcement officials.16

---

12. These issues are relevant to some degree regardless of the forum used to try these
suspects. If certain constitutional protections are available to terrorist suspects in federal
court, there is the possibility that these protections should also apply to military commissions.
Even though the Court in In re Yamashita, 327 U.S. 1 (1946), limited its review in that case to
questions of jurisdiction of the military commission appointed to try General Yamashita, that
Court noted that while it does not make the laws of war, it respects them “so far as they do not
conflict with the commands of Congress or the Constitution.” In re Yamashita, 327 U.S. at 7–
8, 16.
16. Verdugo-Urquidez, 494 U.S. at 263.
Although the defendant was a Mexican citizen, the Supreme Court addressed the issue of whether the Fourth Amendment’s warrant requirement applied to this search outside of the U.S. border. Applying a social contract theory, a plurality reasoned that since the defendant was not a citizen or legal alien, and because he had no significant contacts with the United States, the Fourth Amendment did not apply to this search.

Justice Kennedy provided the fifth vote upholding the search, but took a different approach to the extraterritorial application of the Fourth Amendment. Adopting the Court’s earlier test in what has become known as the Insular Cases, Justice Kennedy asked whether the application of the Fourth Amendment in this situation was “impracticable and anomalous.” Justice Kennedy reasoned it was and determined the Fourth Amendment’s warrant requirements did not apply. Justice Kennedy did seem to suggest, however, that other constitutional protections that relate to fundamental due process might apply.

Later, in Boumediene, Justice Kennedy wrote for the majority, holding the constitutional right to habeas corpus applied to the detainees being held on a military base in Guantanamo Bay, Cuba. As in his concurrence in Verdugo-Urquidez, Justice Kennedy took a practical approach to the extraterritorial application of the Constitution. In Boumediene, Justice Kennedy listed three primary factors relevant to determining the extraterritorial application of the right to habeas corpus. These factors are: “(1) the [detainees’] citizenship and status . . . and the adequacy of the process through which that status [was determined]; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.” These factors reject formalism and instead take a pragmatic view of the Constitution’s extraterritorial application.

17. Id. at 261.
18. Id. at 274–75.
19. Id. at 275 (Kennedy, J., concurring).
20. The Insular Cases, as they are referred to, are the following cases: Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Downes v. Bidwell, 182 U.S. 244 (1901).
22. Id.
23. Id.
25. Id. at 766–71.
26. Id. at 766.
27. Id.
While this approach is driven by context and lacks the clarity of bright line rules, it does provide some guidance for questions of whether, and to what extent, due process requirements would apply to confessions obtained overseas by government agents using coercive interrogation techniques. In light of these cases, it seems likely that fundamental due process protections against the admissibility of coerced confessions will apply, even though the confessions were obtained outside of the United States. This is particularly true, since these trials would most likely be conducted in the United States. It is much less certain whether the Court-created *Miranda* rights warnings would be required. This is so for a number of reasons, not the least of which is that the Court has never held that *Miranda* warnings are an independent constitutional requirement.\(^{28}\)

One concern of those opposed to trying these suspects in federal court is a “watered down” constitutional effect.\(^{29}\) If these constitutional protections are applied to the confessions and any derivative evidence obtained from these confessions, the evidence will either be suppressed completely, or the courts will have to “water down” certain constitutional protections. The effect will be a risk to the rights of ordinary non-terrorist citizens.

Assuming that, at a minimum, due process prohibitions against coerced confessions would apply to statements obtained while these suspects were being held at overseas locations, what might these cases look like? We can assume from public statements about the interrogation methods used that some of these suspects were subjected to water boarding, sleep deprivation, slapping, shoving, and long periods of isolation and uninterrupted interrogations.\(^{30}\) So what are the courts likely to say about the confessions and derivative evidence that were the products of these interrogations?

Nearly eighty years ago, the Supreme Court in *Brown v. Mississippi*\(^{31}\) invalidated the confessions of three black defendants because those confessions were the product of whipping, hanging, and other physical torture.\(^{32}\) The Court ruled that:

> The due process clause requires “that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil

---

29. See, e.g., McNeal, supra note 5, at 954.
32. Id. at 281–82.
and political institutions.” It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process. 33

In subsequent cases, the Court looked at other forms of coercion short of physical torture, such as long hours of uninterrupted isolation and interrogation, and ruled that these techniques can also violate due process. 34 The Court’s concern is with both the reliability of the confessions that followed from coercion, and that confessions obtained via this degree of coercion violate basic principles of fundamental fairness. 35

With these principles as a backdrop, it is difficult to see how a court could admit the statements obtained by water boarding, extreme sleep deprivation, and various other interrogation techniques the government has publicly acknowledged. These techniques seem to be intended to overbear the will of the detainees and to obtain confessions. 36 It can be said of water boarding, extreme sleep deprivation, slapping, pushing, and other such techniques as was said by the Court in Brown, “the use of the confessions thus obtained as the basis for conviction and sentence [would be] a clear denial of due process.” 37

This is not, however, the end of the matter. In past years, the Court developed a number of exceptions to excluding evidence so as to allow the admissibility of some evidence even when a suspect’s constitutional rights were violated. 38 How might these exceptions apply to confessions obtained in cases involving the extraordinary rendition of terrorist suspects? The three most likely exceptions the courts may look to apply are: (1) the independent source, (2) inevitable discovery, and (3) the attenuation exception to the exclusionary rule. 39 Each of these exceptions was created by the Court to avoid giving the criminal defendant an undeserved windfall from the application of the exclusionary rule. 40 These exceptions were also created to ensure that law enforcement is not placed in a worse position by the exclusionary rule.

33. Id. at 286 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).
35. See generally id.
37. Brown, 297 U.S. at 286.
39. See id. at 536–39.
40. Id. at 537.
than they would have had they complied with the constitutional requirements.41

The first of these exceptions, the independent source exception, states if lawful evidence was obtained independent of the illegal police conduct, that evidence should not be excluded from trial.42 There are two variations to the independent source exception.43 In the first variation, police misconduct leads to certain facts X and Y.44 However, if fact Z is discovered by independent legal methods, courts will say that fact Z was obtained by an independent legal method and not subject to the exclusionary rule.45 In the second variation, both legal and illegal methods led to the same facts.46 So long as the legal methods for discovering the facts are completely separated from the illegal methods, the evidence was obtained by an independent legal source and the evidence will not be excluded.47

The Court has applied this exception to searches conducted in violation of the Fourth Amendment.48 Could it also apply to confessions obtained by coercion and torture? Publicly available information suggests that after a number of terrorist suspects were subjected to extraordinary renditions and coercive interrogations, the government subsequently developed “clean teams” to interrogate these suspects.49 These “clean teams” would re-interrogate the terrorist suspects without using coercion, torture or other questionable interrogating methods but would instead gain the detainee’s trust and establish rapport as a precursor to obtaining statements.50 It seems that the government is hoping that some version of the independent source doctrine might apply to statements obtained by these “clean teams.”

It is uncertain whether this approach will work. The critical aspect of the independent source doctrine is that the evidence was obtained free of any illegality.51 The government will have a difficult time making this predicate showing since the questioning by these clean teams followed the coercive interrogations and it cannot be said that these statements are free of the initial taint. The Court has addressed this issue in the context of Miranda viola-

41. Id.
42. Id. at 537–38.
43. Murray, 487 U.S. at 537.
44. Id. at 538.
45. Id.
46. See id at 538–39.
47. See id. at 537–39.
48. E.g., Murray, 487 U.S. at 542–43.
50. See id. at 954–55.
51. See Murray, 487 U.S. at 537–38.
tions and held that when the initial violation involved a *Miranda* violation that was not otherwise coercive, the subsequent questioning was free from the initial *Miranda* taint.\(^{52}\)

The Supreme Court in *Oregon v. Elstad* was careful to point out that the only constitutional violation was a failure to read the suspect his *Miranda* warnings and that the interrogation was not otherwise coercive.\(^ {53}\) In the case of terrorist suspects rendered to third countries where they were tortured and coerced, we have much more than a mere *Miranda* issue. As currently formulated, it is very unlikely that a federal court could apply the independent source doctrine to statements obtained by these so called “clean teams.”

In order for the independent source doctrine to apply to these statements, the doctrine would have to be modified and diluted. Courts might reason that after a certain amount of time has passed, statements that were initially obtained by torture and coercion can be discovered independently so long as that subsequent discovery did not involve coercion. Another possibility is that courts might create some kind of terrorist exception to the normal application of the independent source doctrine. This exception might allow for evidence that may still contain the taint of the initial illegality to be admitted. This might be because the evidence is crucial to the prosecution, and because the nature of the crimes charged are so serious that we simply cannot afford to exclude this evidence from the trial.

Modifying and diluting the independent source doctrine in either of these ways would be problematic because once the doctrine is diluted in this context, what is to prevent the courts from diluting it in other more ordinary cases? There is also the larger problem of creating lesser protections for certain kinds of crimes or criminal suspects before guilt has been established. Such an approach harkens back to a system that was long ago rejected-and rightly so-by our legal system.

Inevitable discovery is another exception to the exclusionary rule.\(^ {54}\) Under this exception, courts may admit evidence that was illegally obtained if the government can show it would have inevitably found the evidence by legal means.\(^ {55}\) This exception differs from the independent source exception because under the inevitable discovery exception, the government will not be able to show that it actually obtained the evidence by legal means.\(^ {56}\) Instead,
the government must demonstrate that hypothetically, if given enough time, it would have inevitably discovered the evidence legally.\textsuperscript{57}

As with the independent source exception, the government will be hard-pressed to show that the evidence obtained by coercive interrogations would have eventually been discovered by legal means, at least as the inevitable discovery exception is currently formulated. This is primarily because the very justification most often used for employing coercive interrogation techniques was the difficulty of obtaining necessary information any other way. Other than getting the suspected 9/11 terrorists themselves to divulge information about past and future plots, it is unlikely the government could demonstrate the evidence contained in the 9/11 terrorist confessions was about to be discovered by lawful means. This is so, based on our intelligence failures leading up to the 9/11 attacks, and the fact that terrorist cells tend to be compartmentalized and isolated.

If the inevitable discovery exception were to work, courts would be forced to modify and most probably dilute the exception. Modifications might come by expanding the time between the illegal discovery and the inevitable discovery. Or courts possibly might find that once the information from a coercive confession is verified, it is possible the government could have put the pieces together without the tainted evidence. Either of these or some other modifications to the exception would be problematic and once used in this context, there is always the possibility that they would be expanded to other types of cases.

The third, and quite possibly the most likely exception to the exclusionary rule is the attenuation exception being applied not to the statements obtained by torture and coercion, but to other evidence derived from those interrogations.\textsuperscript{58} This differs from the independent source exception because with attenuation there is no legal source for the evidence.\textsuperscript{59} It differs from inevitable discovery in that the government is not required to show a potential legal source for the evidence existed.\textsuperscript{60} The rationale for the attenuation doctrine is that at some point, the consequences of the government’s illegal conduct are so removed from the evidence that the effect of deterrence is outweighed by the interests in admitting relevant evidence.\textsuperscript{61}

\textsuperscript{57.} See id.
\textsuperscript{58.} See Brown v. Illinois, 422 U.S. 590, 602 (1975).
\textsuperscript{59.} Wong Sun v. United States, 371 U.S. 471, 485 (1963) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).
\textsuperscript{60.} Id. at 487.
\textsuperscript{61.} See Brown, 422 U.S. at 612 (quoting Michigan v. Tucker, 417 U.S. 433, 447 (1974)).
In Brown v. Illinois, the Court noted three factors to help determine if there is sufficient attenuation between the constitutional violation and the evidence which the government seeks to admit. The first factor is the temporal proximity between the illegal conduct and the evidence that is being offered. The second factor considers what intervening circumstances, if any, occurred which might sever the connection between the government's illegality and the evidence. The third factor is the flagrancy of the government's conduct.

Applying these factors to the confessions obtained by torture and coercion during extraordinary rendition, one can hardly say the confessions were attenuated from the illegality since the confessions were the very product of the illegality. But one should ask about the information that was subsequently developed from these interrogations. Is it possible that some of this derivative information is so attenuated from the coercion that the loss of this evidence at trial is too high of a cost to pay? It is hard to formulate specific factual situations where the attenuation exception might apply, but it is possible to see how such a potential might exist which would allow the government to offer evidence derived from the confession even if it is not allowed to offer the confession itself. Depending on the quality and quantity of this evidence, the government might determine that it has sufficient evidence to convict these terrorist suspects in federal court. While the government has not made the evidence publicly available it would use if Khalid Sheikh Mohammed and the other 9/11 conspirators were tried in federal court, it is very likely to rely in part on the attenuation doctrine to get this evidence before a federal jury.

Courts applying the attenuation exception have recognized that the application of this doctrine is contextual, requiring a very specific factual application. As a result, there may be less likelihood that if the attenuation exception were applied to the evidence derived from these confessions, it would have a bleed over diluting effect on other cases outside of the terrorism realm. Nevertheless, that concern still exists, particularly in light of the government's initial decision to ignore basic constitutional protections was

63. Id. at 603–04.
64. Id. at 603.
65. Id. at 603–04.
66. Id. at 604.
hardly inadvertent. 68 If derivative evidence from these blatant violations can be attenuated, when would the attenuation exception not apply?

III. TRIAL IN MILITARY COURTS-MARTIAL

Prosecuting suspected terrorists who have been subjected to extraordinary renditions, torture, and coercion in federal court presents enormous evidentiary challenges if the government hopes to admit either the evidence of their confessions or evidence derived from those confessions. These challenges may not be insurmountable, but there is a very legitimate concern that courts would have to so dilute some fundamental constitutional protections in order for the evidence to be admitted that basic protections enjoyed by all citizens would be placed at risk. For some, this is the strongest argument against trying these suspects in federal court and instead using some alternate process so that our fundamental protections would remain intact. How might this type of evidence fare in an alternative system, and would fundamental protections outside of the terrorism context remain viable?

Other than federal court, the next most obvious and readily available system would be trial of these terrorist suspects in a military court-martial. Military courts have jurisdiction to try these suspects. 69 Article 18 of the Uniform Code of Military Justice Congress specifically grants jurisdiction to military courts to try violations of the law of war. 70 While there is debate over exactly which offenses fall under the law of war, there is little doubt that murder of innocent, civilian non-combatants is a war crime. As principles and accessories to murder, Khalid Sheikh Mohammed and others who had been held at CIA sites in foreign countries could come under court-martial jurisdiction. How would the admissibility of coerced confessions be treated in this forum?

The protections against self-incrimination and the prohibition of coerced confessions in the military follow virtually the same constitutional framework as in federal court. There are no special exceptions or allowances for coerced confessions in the military system. 71 The due process protections are equally applicable. 72 This means that the litigation and resolution of confes-

69. UNIF. CODE OF MILITARY JUSTICE art. 18; 10 U.S.C.A § 818 (West 2009).
70. See UNIF. CODE OF MILITARY JUSTICE art. 18.
71. See Burns v. Wilson, 346 U.S. 137, 140 (1953).
sions obtained by torture and coercion are likely to be the same in the court-martial system as they are in federal court.

Likewise, the application of the exclusionary rule works much the same in military courts-martial as in federal court. Statements that are obtained by coercion are not admissible.\(^7\) Like their federal counterparts, military courts also reason that even if a subsequent statement was free of coercion, if the initial statement was the product of coercion, the independent source and inevitable discovery exceptions to the exclusionary rule are not likely to apply.\(^4\)

In addition to these protections, military law imposes greater requirements for rights warnings than the requirements imposed by the Court in *Miranda* and subsequent cases. Article 31(b) of the UCMJ requires that any person suspected of committing an offense be warned of his right against self-incrimination.\(^5\) This protection is broader than *Miranda* warnings in two ways. First, the warnings are not contingent on the suspect being placed in custody. Second, the warnings are a statutory requirement, not a court-created protection. The warnings are required by statute, and therefore, courts have much less flexibility to create exceptions to the rule’s requirements than the Supreme Court has done in limiting *Miranda*.

IV. TRIAL BY MILITARY COMMISSION

What this means is that those who are concerned that federal courts may prove to be too difficult of a forum in which to try terrorist suspects are not likely to see military courts-martial as a better option, or as good of an option. In order for these confessions and other derivative evidence to be admitted, military courts would have to dilute constitutional protections in much the same way as federal courts.

Creating a completely separate system to try only these terrorist suspects seems, for many, to be the better approach. Because the system would be cabined off from the rest of the criminal justice system, decisions by these courts as to the admissibility of confessions would have no precedential value in the regular court system, so the argument goes.

The Bush administration was never completely clear as to why it initially opted for military commissions.\(^6\) John Altenburg, who was selected by


\(^{75}\) UNIF. CODE OF MILITARY JUSTICE art. 31(b); see also 10 U.S.C. § 831 (2006).

the then Secretary of Defense Rumsfeld to serve as the Appointing Authority for the military commissions, articulated the rationale for the military commissions as follows:

[T]he government chose for many different reasons to use a military commission process. It doesn’t mean that the others were wrong. It just means that the government chose on balance, given the nature of the allegations that were being made and I think especially national security interests, that they chose to use the commission process, thinking that, that would meet the balanced needs.77

This is hardly a clear and specific explanation of the rationale for military commissions.

The government’s brief in Hamdan v. Rumsfeld78 likely offers the most specific justification for the military commissions. According to the government, military commissions have a long history under United States and international law.79 Under United States law, military commissions are the military’s “‘common-law war courts.”80 These commissions are not bound by an established set of rules or procedure. Rather, the commissions and their procedures are created and “‘adapted in each instance’” to meet the needs of that specific occasion.81 Certainly, one of the needs in this specific occasion is the challenge of getting confessions and derivative evidence before a fact finder that was the product of torture and coercion.

Looking to the evolution of the military commissions process from its initial inception in 2002 to its current form in 2009, how the commissions treat coerced confessions has been a particular point of focus. The initial rule regarding the admissibility of evidence stated broadly:

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the


77. Id.
80. Brief for Respondent, supra note 78, at 44.
81. Id. at 45 (quoting Madsen v. Kinsella, 343 U.S. 341, 347–48 (1952)).
opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person. 82

Under this broad rule coerced confessions, like any other evidence could be admitted and considered if a majority of the commission believed the confessions had probative value. This would be true for derivative evidence as well.

Since this first attempt at military commissions, there have been at least four major modifications. 83 The latest version is reflected in the Military Commissions Act as amended in 2009. 84 This version of the commissions system is unquestionably a much more sophisticated and robust criminal justice system than what was first proposed in 2002. 85 In spite of the clear advancements in the process, even this latest version of military commissions carves out special rules designed to allow for greater admissibility of coerced confessions than would be permissible either in federal court or in a military court-martial. 86 These rules are reflected most clearly in both the act itself and the Manual for Military Commissions, which sets out the specific procedural rules that govern the commissions. 87

Commissions Rule of Evidence 304 titled “Confessions, admissions, and other statements” set out the current rules as follows:

(a) “General Rules . . .

(1) Exclusion of Statements Obtained by Torture or Cruel, Inhumane, or Degrading Treatment. No statement, obtained by the use of torture or by cruel, inhumane, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a [trial by] military commission . . . except against a person accused of torture or such treatment as evidence that the statement was made.

84. See id.
87. See U.S. DEP’T OF DEFENSE, MANUAL FOR MILITARY COMM’NS (2010) [hereinafter MANUAL FOR MILITARY COMM’NS].
(2) Other Statements of the Accused. A statement of the accused may be admitted in evidence in a military commission only if the military judge finds—

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

(B) that—

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

(ii) the statement was voluntarily given.”

(3) Statements from persons other than the accused allegedly produced by coercion. When the degree of coercion inherent in the production of a statement from a person other than the accused, offered by either party, is disputed, such statement may only be admitted if the military judge finds that—

(A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;

(B) the interests of justice would best be served by admission of the statement into evidence; and

(C) the statement was not obtained through the use of torture or cruel, inhumane, or degrading treatment as defined in section 1003(d) of the Detainee Treatment Act, Pub. L. 109-148 (2005) (codified at 42 U.S.C. 2000dd(d)).

(4) “Determination of Voluntariness. In determining for purposes of [(a)(2)(B)(ii)], whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following:

(A) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities[;]

(B) [t]he characteristics of the accused, such as military training, age, and education level[; and]
(C) the lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.”

(5) Derivative Evidence.

(A) Evidence Derived from Statements Obtained by Torture or Cruel, Inhumane, or Degrading Treatment. Evidence derived from a statement that would be excluded under section (a)(1) of this rule “may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection,” unless the military judge determines by a preponderance of the evidence that—

(i) “the evidence would have been obtained even if the statement had not been made” or

(ii) use of such evidence would otherwise be consistent with the interests of justice.

(B) Evidence Derived from Other Excludable Statements of the Accused. Evidence derived from a statement that would be excluded under section (a)(2) of this rule may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection, unless the military judge determines by a preponderance of the evidence that—

(i) “the totality of the circumstances renders the evidence reliable and possessing sufficient probative value; and”

(ii) use of such evidence would be consistent with the interests of justice.88

A close examination of these rules shows that they are designed to allow for admission of the very kind of confession evidence, which is likely to be excluded in federal court and military courts-martial. First, the section provides for a uniform definition of torture, cruel, inhumane, and degrading treatment. Second, it establishes a per se exclusion of confessions obtained by these methods. Of course the devil is in the details, and there continues to

---

88. The statutory analysis is compiled from MIL. COMM. R. EVID. 304, MIL. R. EVID. 304, and 10 U.S.C. § 948r (2006), with quoted material primarily from the United States Code, Title 10, section 948r and rule 304 MIL. COMM. R. EVID.
be debate over whether specific techniques, such as water boarding and other coercion, fall within this definition.

Coercion that does not rise to the level of torture or cruel, inhumane, or degrading may still be coercive, but the rules do not establish a per se exclusion. If statements taken from an accused were obtained by some lower level of coercion, those statements may be admitted against the accused if the military judge determines the evidence is reliable, probative, and was either obtained in circumstances closely related to combat operations, or was voluntary. The real issue is whether such statements are voluntary. In considering whether the statement was voluntary, Rule 304(c) sets out three factors: (1) the context under which the statement was taken; (2) the personal characteristics of the accused/declarant; and (3) the attenuation between the alleged coercion and the statement. The attenuation factor seems to have been created for the express purpose of allowing statements to be admitted and considered even if coercion was involved. As noted above, federal courts and military courts-martial have typically taken a much more restrictive view of attenuation. It is certainly possible and foreseeable that a commissions judge would determine that a statement given under these circumstances might be voluntary in a military commission, even if it would not be voluntary or admissible in federal court or a court-martial.

If the statements were made by someone other than the accused and allegations are made that the statements were coerced, those statements can be admitted if: (1) they are reliable and probative; (2) they were not obtained by coercion that rises to the level of torture, cruel, inhumane, or degrading treatment; and (3) the admission would satisfy the vague standard of being in the interests of justice. This rule potentially allows for greater admissibility of statements than would be permissible in the other two forums.

Finally, the rule defines the standards for admitting evidence that was derived from confessions obtained by torture, cruel, inhumane, or degrading treatment. If derivative evidence is being offered against the accused, the

89. See 10 U.S.C. § 948r(c).
90. The government of course might argue that given the nature of the unique threat posed by terrorism, the battlefield and combat operations are not limited by space and time and thus exist at all times and in all places.
91. See 10 U.S.C. § 948r(d)(1)-(3).
93. See MIL. COMM. R. EVID. 304(b).
94. See id.; see also 10 U.S.C. § 948(r)(a) 2009.
government must show an independent source for the evidence, prove inevitable discovery, or prove that admission of the derivative evidence would be in the interests of justice.\textsuperscript{95} It is this “interests of justice” prong that is a significant departure from established practice in federal court and military courts-martial. As detailed above, the independent source and inevitable discovery doctrines are well recognized.\textsuperscript{96} Even though these exceptions may be difficult to establish in situations where the evidence was derived from coercive interrogations, that possibility exists. But this second, much broader “interests of justice” basis is not recognized as an independent exception to the exclusionary rule. Since this standard is so vague and malleable, it might be much easier for a judge to admit evidence under this standard that was derived from torture—particularly given the emotionally and politically charged nature of the offenses with which the terrorism suspect is accused.

If the derivative evidence came from coercive statements but did not rise to the level of torture, or cruel, inhumane, or degrading treatment, the admissibility of this derivative evidence is even easier. The evidence need only be relevant and probative, and admission must satisfy the interests of justice.\textsuperscript{97} Looking at these rules in light of the challenges for admitting coerced statements and derivative evidence in federal court and military courts-martial, the rules seem to be specifically crafted to get around many of those difficulties.

V. THE FUNDAMENTAL PROBLEM WITH MILITARY COMMISSIONS

One might ask, is this a better approach? It could be argued that creating this separate system to deal with problematic evidence is a better approach because it allows for some form of justice, while not as protective as what would be found in federal court or military courts-martial, but protective enough. One could also argue it has the added advantage of creating a completely separate system, so that there is little risk that any dilution of protections would bleed over into those other forums.

But these arguments warrant close scrutiny. It is important to remember the problem of admitting confessions and other evidence obtained by torture and other coercive methods is a problem of our own making. Neither the suspected terrorists nor the crime of terrorism created the dilemma that we now face. Our response to the attacks of September 11th, combined with our

\textsuperscript{95} See MIL. COMM. R. EVID. 304(b)(3); MIL. COMM. R. EVID. 304(c).
\textsuperscript{97} 10 U.S.C. § 948(r)(c).
fear that more attacks might follow, led the government to employ extraordinary renditions and harsh interrogation methods. It is critical to keep this point in mind as we consider whether creating a separate system allowing for greater admissibility of this evidence is really the best way to maintain fundamental protections against coercive questioning in the regular criminal justice system.

A system created for the purpose of allowing the government to avoid the consequences that come from obtaining information in violation of basic due process protections is morally suspect. This is even more so for the very reason that the problem was one of the government’s own making. The government had a choice not to go down this road and instead to follow a well-established precedent for the treatment of detainees. In choosing to disregard that option, the government was certainly aware of the risks. Can a system of justice be legitimate when, at its core, it is designed to allow the government to avoid these consequences?

I would argue that a justice system created under this premise is a system that has the greatest potential to dilute fundamental protections not only for suspected terrorists, but for ordinary citizens who will never face the possibility of being tried in a military commission. This is so for several reasons.

Concepts of terrorism, terrorist acts, terrorist organizations, unlawful enemy combatants, unprivileged belligerents, and a host of other terms used to identify the category of crimes and suspects selected for trial by military commission, are not clear or precise. If today members of Al Qaeda fit this category because of the threat they pose to our security, what is to prevent members of a drug cartel operating on the border of the United States from being defined as terrorists at some future date and subjected to trial by military commission as part of a “war on drugs?” The precedent set by these military commissions could certainly allow for that.

Second, there is the risk of establishing a precedent that, whenever the government finds the current protections too restrictive, it will simply create an alternative means of trying defendants. In reality, this is the unfortunate legacy of many past military commissions. While military commissions have a long history in our legal system, it is not necessarily a proud history. Creating a special set of rules for the current situation creates a new incentive for the government to both disregard important protections and then avoid the consequences of those violations.

The government undoubtedly looked to this dubious legacy when it created the initial commission’s procedures. Even though the current round of military commission’s rules are a vast improvement from the first procedures created in early 2002, many of the changes have come only after involvement by the courts and later, by Congress. Even after involvement by
the courts and Congress, in the end many of the commission procedures were created for the very purpose of denying—or at least avoiding—fundamental protections. It is difficult to imagine how a system with such a bad pedigree could not have a corrosive impact on the protections against coerced testimony. The corrosive impact of creating a completely separate system that avoids basic protections is not easy to measure, but it is likely not any less corrosive than some possible dilution of protections that might occur if these cases are tried in federal court or in a court-martial.

In addition to these problems, trying terrorist suspects in military commissions puts this entire legal system in untested waters. Under this system, there is no controlling precedent to turn to. Commission judges are required in the first instance to determine if evidence derived from torture should be admitted in the “interests of justice.” There is no telling what this even means, or how a judge could ever find that such evidence satisfies the interests of justice. Because there is no precedent for these decisions, judges will be on their own, and given the broad standard that they are applying, it is doubtful that these decisions will have consistency or transparency.

Contrast that process with how judges in federal court or a court-martial would decide the admissibility of confessions. These judges have an established body of case law before them on which to base their decisions. Because of that established precedent, these judges will also be less likely to take extreme positions, and because their decisions are subject to review under a well established process, those decisions have the important added value of transparency. All of these protections will help to ensure that basic due process protections will not be stretched to the breaking point, either for those suspected terrorists or for citizens accused of other crimes. No similar limitations or protections exist if these cases are tried by military commission.

VI. CONCLUSION

The government under the Bush administration started down a very troubling path when it opted to engage in extraordinary renditions, torture, and cruel, inhumane, and degrading treatment in hopes of getting confessions from suspected terrorists. Beyond the important moral and legal issues raised by engaging in this conduct, there are the second and third order effects that we are now left to deal with. Whether these effects were fully contemplated or anticipated at the time is unknown, but now, as we debate which forum is best suited for trying terrorism suspects, the problems and challenges have come into focus. If it was not clear before, it certainly is now that introducing evidence obtained by these means can have a corrosive effect on our broader legal system.
When we ask what forum for these trials would have the least corrosive impact on our system of justice, we see the unfortunate, if not unsurprising, answer is that introducing evidence that is a product of coercion in any forum is likely to dilute fundamental protections that all citizens enjoy. One conclusion might be that the problems of admitting confessions and derivative evidence that are the products of torture and coercion are intractable and there is no forum suitable for these cases. That seems to me to be an extreme and unrealistic position. That fact is that, for several reasons, the government and the public in general expect these suspects to be brought to justice. If we are going to try them, then we must ask which forum really is best suited to ensure that they can be brought to justice without jeopardizing fundamental protections against coerced confessions.

At first blush, trying terrorist suspects who have been subjected to torture and other coercive questioning in a separate military commissions system seems like a good answer. It compartmentalizes these cases and arguably protects against compromises which are made in this system from bleeding over to more mainstream cases. Closer examination of this issue leads to a different conclusion. First, the category of who can be tried by military commission is hardly airtight. Today's criminals can easily become tomorrow's terrorists if the government sees the threat as serious enough to broaden the category.

A system so subject to manipulation is not protective of fundamental due process rights. There is also the problem that those making the decisions on questions of admissibility in the military commissions system are without the guidance of precedent. They are left to their own determinations to apply concepts so broad as to lack any real meaning. This does not bode well for the kind of careful and reasoned opinions we have come to expect from judges in our criminal justice system.

More corrosive than this is the illegitimacy of a system that was created for the purpose of watering down fundamental protections. The decision to torture and coerce confessions in order to obtain evidence was wrong. These are interrogation methods that have long been rejected, and rightly so, in our system of justice. The errors in resorting to these discarded methods should not be compounded by creating a system that specifically seeks an end-run around basic protections in order for this evidence to be admitted. A system such as this lacks fundamental legitimacy. It is a system that puts the rights of everyone at risk.

Those who argue that we need to move these cases to military commissions in order to protect the rights of ordinary citizens ignore these even greater risks of corrosion and dilution. In other words, moving these cases to military commissions as presently constituted would cause the very result
that the proponents of that choice claim they want to prevent. On this basis, military commissions are not the better option.

Introducing or attempting to introduce coerced confessions or derivative evidence in federal court is problematic. As noted above, even if the court applied exceptions to the exclusionary as currently formulated, it will be difficult for much of this evidence to be admitted. Some accommodations will likely have to be made if this evidence is to be considered. While creating such accommodations is not ideal, it is certainly less extreme than completely revamping a justice system for the express purpose of eliminating fundamental protections altogether.

Even if accommodations are made to admit this evidence in federal court, there are added protections within the system that will limit the corrosive effects of these accommodations. Federal court proceedings are more transparent than the proceedings we have thus far seen from military commissions. By transparency, I am referring to both the courtroom procedures and the development of the evidentiary and other rules governing those procedures. I also include the rulings and opinions of federal court judges. Because of the transparency of both the process and the decisions, federal judges are bound to more clearly identify and explain when and why they might be modifying established protections found in the exclusionary rule in order to admit certain evidence. Moreover, consistency and following established precedent are critical aspects of judicial decision-making. Transparency and consistency thus serve as important checks that are likely to limit any diluting and corrosive impacts that might otherwise occur from trying these terrorist suspects in federal court.

In addition to these protections, there are multiple levels of review of any trial court’s decisions and rulings. This review process also helps to ensure consistency, as well as prevent trial courts from ignoring or diluting the law in order to reach a desired outcome.

These protections have a double benefit. First, in the trial of the actual terrorist suspects, these protections will limit the possible corrosive impacts from occurring. Second, in other, more ordinary trials not involving terrorist suspects, these checks will limit any accommodations made under the unique facts of a terrorist case from encroaching into these more ordinary cases.

These various structural protections, anchored in the values of consistency and transparency, would not be nearly as robust in a military commissions system created for the express purpose of watering down fundamental rights. Put simply, trial in federal court is preferable because the dilution of rights is less likely in that system than it would be in a military commissions system.