EXTRATERRITORIAL INTERROGATION: THE POROUS BORDER BETWEEN TORTURE AND U.S. CRIMINAL TRIALS

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I. INTRODUCTION

The conviction of Ahmed Omar Abu Ali, a twenty-two-year-old U.S. citizen from Virginia, for conspiring to commit terrorist attacks within the United States[1] exposes a potential crack in a long-assumed bulwark of U.S. constitutional law: that confessions obtained by torture will not be countenanced in U.S. criminal trials.[2]

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1. *See* News Release, U.S. Dep't of Justice (Nov. 22, 2005), *available at* http://www.usdoj.gov/usao/vae/Pressreleases/2005/1105.html (last visited Feb. 13, 2008) (noting that a jury in Eastern District of Virginia found Abu Ali guilty on November 22, 2005 of nine counts, including conspiracy to provide material support and resources to al Qaeda, providing material support to terrorists, conspiracy to assassinate the president of the United States, and conspiracy to commit air piracy and to destroy aircraft).

2. District Judge Gerald Bruce Lee stated in *United States v. Abu Ali*, 395 F. Supp. 2d 338, 378 (E.D. Va. 2005), that "[n]owhere was the role of the United States judiciary as a bulwark against the tyranny of torture and extreme government coercion more clearly illustrated than in the case of *Brown v. Mississippi*, 297 U.S. 278 (1936)," a case firmly establishing due process as a safeguard against evidence obtained by torture. Scholars and government officials alike have assumed that this prohibition on evidence obtained by torture would thwart the government from successfully prosecuting many terrorism cases in U.S. courts. *See* Kim Lane Scheppele, *Evidence from Torture: Dilemmas for International and Domestic Law*, 99 AM. SOC'Y INT'L L. PROC. 271, 276 (2005) ("Because of the taint of torture, it may be very difficult for the Bush administration—or for that matter, for any of America's allies—to get clean convictions of Al-Qaeda suspects for any terrorism offenses."); Jane Mayer, *Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program*, NEW YORKER, Feb. 14, 2005, at 106 (quoting Jamie Gorelick, former deputy attorney general and 9/11 Commission member, who suggested that the use of coercive interrogation tactics would leave the Department of Justice in a "no man's land" where the government cannot successfully prosecute, nor let a suspected terrorist go free).

In 2003, Saudi secret police arrested Abu Ali in Medina, Saudi Arabia and detained him without charges for nearly two years.[3] Abu Ali claims that during his detention, the Saudis detained him in solitary confinement for prolonged periods and:

> (1) "whipped" him on his back; (2) slapped him . . . ; (3) kicked him in the stomach; (4) subjected him to sensory deprivation by placing him in a cell that was fully and continually lit . . . ; (5) chained him to the ground so that he was forced to stay in a crouching position; and (6) chained him with his hands above his head for a long period of time.[4]

According to Abu Ali, after forty-five days of incessant interrogation, incommunicado detention, and torture, he falsely declared in a videotaped confession that he plotted to hijack civilian planes and conspired to assassinate President Bush.[5]

In 2004, nearly a year after their son's arrest without charges, Abu Ali's parents filed a habeas corpus petition on their son's behalf, which charged that the U.S. government orchestrated Abu Ali's detention in Saudi Arabia with the goal of interrogating him through torture beyond the constraints of U.S. law.[6] The petition sought, among other relief, Abu Ali's release and return to the United States.[7] On the eve of discovery commencing in that case,[8] the United

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3. *See Abu Ali*, 395 F. Supp. 2d at 343 (noting that Saudi national security police, known as Mabahith, arrested Abu Ali on June 8, 2003 and held him until his indictment in the Eastern District of Virginia on February 3, 2005).

4. *Id.* at 343-44.

5. *See id.* at 343. Mabahith agents videotaped Abu Ali reading a handwritten confession on July 24, 2003. *Id.*

6. *See* Abu Ali v. Ashcroft, 350 F. Supp. 2d 28 (D.D.C. 2004); *see also* Rachel L. Swarns, *Parents of American Held by Saudis Sue*, N.Y. TIMES, Jul. 29, 2004, at A14. The Saudis never charged Abu Ali, and several officials publicly commented that he could be returned to the United States at any time upon the U.S. government's request. *Abu Ali*, 350 F. Supp. 2d at 32-33.

7. *Abu Ali*, 350 F. Supp. 2d at 37.

8. *Id.* at 31 (denying government's motion to dismiss and ordering jurisdictional discovery to determine whether the United States played a role in Abu Ali's detention abroad); *see also* Michael Isikoff, *A Tangled Web; He's Accused of Plotting To Assassinate Bush*, NEWSWEEK, Mar. 7, 2005, at 32 (reporting that Abu Ali's "confession, which occurred shortly after his arrest in June 2003, was videotaped by the Saudis and immediately turned over to the FBI" but that his "nearly two-year-old criminal case remained unaddressed in U.S. courts . . . [because] the case presented an agonizing dilemma for top Justice Department officials"); Dana Priest & Caryle Murphy, *U.S. Asks Saudi Arabia to Indict or Return Terrorism Suspect*, WASH. POST, Feb. 3, 2005, at A05 (noting comments by unnamed Bush administration official that the U.S. "government had hoped the Saudis would find a way to hold" Abu Ali, but was now seeking to make a civil lawsuit filed by Abu Ali's parents disappear "because it risked forcing the government to disclose sensitive or embarrassing information"); Jerry Markon & Dana Priest, *Terrorist Plot to Kill Bush Alleged; Suspect a Va. Man, was Held by Saudis Nearly Two Years*, WASH. POST, Feb. 23, 2005, at A01 (noting that

States indicted Abu Ali on terrorism charges in the Eastern District of Virginia and secured his return to the United States, mooting his habeas case.[9] Following twenty months of detention without charges in a Saudi prison, Abu Ali appeared in a U.S. courtroom for the first time in February 2005.[10] At that hearing, he claimed that Saudi interrogators tortured him and coerced him to falsely confess; he volunteered to show the judge the scars on his back.[11]

The court later denied Abu Ali's motion to suppress his incriminating statements, holding that his confession was voluntary and thus admissible, and finding that U.S. officials did not substantially participate in his interrogations in Saudi Arabia.[12] In rejecting Abu Ali's claim of torture, the court excluded evidence of Saudi Arabia's systemic use of torture during interrogation[13] and credited the testimony of Saudi witnesses, who claimed that they treated Abu Ali humanely, that Saudi Arabia "has a policy against torture," and that the policy "is enforced."[14]

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according to unnamed law enforcement sources, the U.S. government had hoped the Saudis would charge Abu Ali "in part because of the lack of evidence linking him to any al Qaeda activities").

9. Abu Ali v. Gonzales, 387 F. Supp. 2d 16, 19 (D.D.C. 2005) (reasoning that Abu Ali "essentially obtained the redress that he was seeking—namely, release from Saudi custody and repatriation to the United States" and that the court lacked habeas jurisdiction in light of the fact that Abu Ali was in "pre-trial custody based on federal criminal charges in another federal district").

10. *See Abu Ali*, 395 F. Supp. 2d at 343.

11. Markon & Priest, *supra* note 8.

12. *Abu Ali*, 395 F. Supp. 2d at 343-44, 378.

13. *See* AMNESTY INTERNATIONAL, THE TRIAL OF AHMED ABU ALI—FINDINGS OF AMNESTY INTERNATIONAL'S TRIAL OBSERVATION (2005), *available at* http://web.amnesty.org/library/index/engamr511922005 (last visited Feb. 13, 2008). Amnesty noted concern "that during the trial, defence lawyers for Ahmed Abu Ali were not allowed to present any evidence pertaining to Saudi Arabia's human rights record, its record on torture and even particularly on the record of the Mabahith al-Amma." *Id.* at 5. Amnesty contended that Judge Lee, who presided over the Abu Ali trial, denied the defense an "opportunity to present relevant evidence, including from two UK nationals who were held in al-Ha'ir prison at the same time as Ahmed Abu Ali and claim to have been tortured into confessing to terrorist offences." *Id.* The court ruled that only evidence "related directly to Ahmed Abu Ali's interrogation would be admissible." *Id.* Though the court noted that it was "mindful that there have been news reports accusing the Saudi government of engaging in and condoning torture or human rights violations," it dismissed those accounts as irrelevant to evaluating the credibility of Abu Ali. *Abu Ali*, 395 F. Supp. 2d at 386. For an analysis of Saudi Arabia's systemic use of torture during interrogation, see *infra* note 229.

14. *Abu Ali*, 395 F. Supp. 2d at 345. The court noted that one Saudi interrogator's testimony was questionable. *Id.* at 347. That witness claimed that "he has never had a suspect refuse to be questioned by him or to sign a written confession statement log . . . [and that] each person he questions confesses or gives a statement." *Id.* Nevertheless, the court found the interrogator to be credible with respect to the treatment of Abu Ali. *Id.*

In the subsequent case-in-chief, the government's evidence against Abu Ali consisted almost entirely of Abu Ali's Saudi-obtained confession.[15] The government's heavy reliance on that extraterritorial confession was not an anomaly. In recent terrorism cases, the United States has prosecuted suspected terrorists based on confessions obtained by foreign governments widely acknowledged—even by the U.S. Department of State—to routinely engage in torture. For example, in *United States v. Marzook*,[16] a recent prosecution of a Palestinian American for providing material support to Hamas, the prosecution admitted statements obtained through allegedly abusive interrogations by Israeli security agents during the early 1990s.[17] Israel's use of stress and duress techniques to interrogate terrorism suspects during that period is well-documented and widely acknowledged.[18]

Similarly, in *United States v. Karake*,[19] four members of a Rwandan terrorist group were tried for the kidnapping and murder of two U.S. citizens in Uganda. The prosecution's case rested on confessions obtained by U.S. and Rwandan interrogators over the course of a year, while Rwandan officials held the defendants in a military camp notorious for its torture and inhumane conditions.[20]

Moreover, prosecutors have also sought to rely on confessions obtained by U.S. interrogators from terrorism suspects detained

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15. In fact, on appeal to the United States Court of Appeals for the Fourth Circuit, the defendant claimed that the trial court erred because the "evidence at trial was insufficient as a matter of law because the government failed to corroborate Mr. Abu Ali's alleged confession." *See* Brief for Defendant-Appellant-Cross-Appellee at 10, United States v. Abu Ali, No. 06-4334 (4th Cir. Sept. 11, 2006), 2006 WL 2934239. The Fourth Circuit affirmed the district court in all respects, except Abu Ali's sentence. United States v. Abu Ali, 528 F.3d 210, 221 (4th Cir. 2008).

16. 435 F. Supp. 2d 708 (N.D. Ill. 2006).

17. *Id.* at 712.

18. In 1987, former Supreme Court of Israel president Moshe Landau led a commission of inquiry that reviewed Israel's use of torture during interrogation of terrorism suspects and concluded that the use of moderate force by the Israeli General Security Service (GSS) was permissible in light of the law of necessity. *See* Miriam Gur-Arye, *Can the War Against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience*, *in* TORTURE: A COLLECTION 183 (Sanford Levinson ed., 2004). Following the commission's report, an antitorture group published reports detailing the methods used by the GSS and filed suit against the government challenging those methods. *Id.* That case eventually reached the Supreme Court of Israel, which ruled that the techniques approved by the commission, and used throughout the 1990s, were illegal. *See* HCJ 5100/94 Pub. Comm. Against Torture in Israel v. Israel [1999] IsrSC 53(4) 817 (describing the stress and duress techniques used by the GSS against terrorism suspects, including sleep deprivation, shaking, sensory deprivation, and the "Shaback" stress position, which involves placing an individual in a small, forward-slanted chair with his arms tied behind his back).

19. 443 F. Supp. 2d 8 (D.D.C. 2006).

20. *Id.* at 12-13.

under arguably coercive conditions abroad. For example, in the trial of American John Walker Lindh on charges of aiding the Taliban,[21] prosecutors sought to rely on a confession that the FBI extracted from Lindh over the course of fifty-four days in Afghanistan.[22] Immediately preceding those interrogations, representatives of Afghanistan's Northern Alliance shot Lindh in the leg and nearly drowned him during a prison uprising, which left him trapped without food or water for a week.[23]

In all of these cases, the defendants claimed that their confessions were extracted through torture and coercion abroad—accounts thoroughly consistent with the respective foreign nation's human rights record. Significantly, these allegations of torture have surfaced in criminal trials during a period when the United States—through policy and practice—has pushed for "flexibility" in terrorism interrogations,[24] while government lawyers have sought to reinvent legal definitions of torture to permit methods of interrogation and treatment widely considered illegal under domestic and international

21. *See* United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002).

22. *See* Jane Mayer, *Lost in the Jihad*, NEW YORKER, Mar. 10, 2003, at 50.

23. *Id.* Journalist Jane Mayer described in the *New Yorker* the treatment of Lindh that preceded his interrogations and the conditions of his confinement during FBI interrogations. *Id.* During the siege of the Qala-i-Jangi prison, a wounded Lindh became trapped in the prison's basement with 350 Taliban prisoners. After the Northern Alliance tried to drive out the prisoners "with gunfire, grenades, ignited diesel fuel, and then freezing water," Lindh tried to keep himself from drowning. At one point, he slipped on a body and swallowed water "contaminated with human remains and waste." *Id.* After a week without food or water, Lindh crawled out of the prison with eighty-five other survivors and was then taken into U.S. custody and later interrogated. *Id.* According to a declassified account from a Navy physician, during Lindh's subsequent interrogations he was underfed, housed in a metal shipping container for close to two months, and "sometimes kept blindfolded, naked, and bound to a stretcher with duct tape." *Id.* The judge presiding over John Walker Lindh's trial never determined whether his statements were admissible; at the start of a suppression hearing in the case, Lindh pled guilty to two felony charges in exchange for a twenty-year prison sentence to avoid a life sentence. *See* Neil A. Lewis, *Traces of Terror: The Captive; Admitting He Fought in Taliban, American Agrees to 20-Year Term*, N.Y. TIMES, Jul. 16, 2002, at A1.

24. *See, e.g.*, Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51, 56 (reporting testimony before Congress of Department of State Coordinator for Counterterrorism Cofer Black that after September 11 "the gloves came off"); Jane Mayer, *The Black Sites*, NEW YORKER, Aug. 13, 2007, at 46 (discussing a July 2007 executive order by the White House permitting the CIA to continue to hold foreign terror suspects indefinitely, incommunicado, without charges and without access to family or counsel, and preserving the use of "'enhanced interrogation techniques' that would likely be found illegal if used by officials inside the United States").

law.[25] Simultaneously, reports and evidence of torture have emerged at U.S. facilities in Guantanamo Bay, Iraq, and Afghanistan.[26]

In response, numerous scholars and advocates have denounced torture under any circumstances,[27] while one renowned professor has proposed the use of torture warrants to extract information from terrorists.[28] Within that ongoing debate, however, scholars and government officials alike have universally assumed the strength of constitutional protections to prevent the admission of evidence obtained by torture in U.S. criminal trials. In fact, many have predicted that the constitutional prohibition on torture would thwart the government from prosecuting based on evidence obtained through abusive interrogations during the war on terror.[29] One

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25. *See, e.g.*, Memorandum from John Yoo, Deputy Assistant Att'y Gen. & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def. 1 (Jan. 9, 2002); Memorandum from Off. of the Assistant Att'y Gen. to Alberto R. Gonzales, Counsel to the President 1-2 (Aug. 1, 2002) [hereinafter Aug. 2002 DOJ Memo]. In 2006, the Bush administration pushed for a version of the Military Commission Act of 2006, Pub. L. No. 109-366, § 948r(d)(3), 120 Stat. 2600, that would have exempted the government from compliance with Common Article 3 of the Geneva Conventions and allow the executive to determine on a case-by-case basis whether to subject detainees to cruel, inhuman, or degrading treatment. The final version of the Act "permits the use of evidence extracted under cruel, inhuman or degrading treatment or punishment" and the use of classified evidence against a defendant, frustrating a defendant's ability to effectively challenge the "sources, methods or activities" through which the government obtained the evidence. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA MILITARY COMMISSIONS ACT OF 2006—TURNING BAD POLICY INTO BAD LAW (2006), *available at* http://web.amnesty.org/library/index/ENGAMR511542006 (last visited Feb. 7, 2008).

26. *See infra* Part II.B.

27. *See, e.g.*, Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1731 (2005); Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89 (2007); José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 175-77 (2006).

28. ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002); *see also* Alan Dershowitz, *Tortured Reasoning*, *in* TORTURE, *supra* note 18, at 257 (arguing that torture warrants will limit the use of torture, while increasing visibility and accountability for torture).

29. *See, e.g.*, Scheppele, *supra* note 2, at 275; Mayer, *supra* note 2, at 108; Jerome H. Skolnick, *American Interrogation: From Torture to Trickery*, *in* TORTURE, *supra* note 18, at 105, 122 ("[T]he rise of racial equality norms, coupled with those of procedural jurisprudence, have virtually eliminated interrogatory torture in the United States, where the interrogator's goal is a criminal conviction."); Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 76-77 (2005) ("[T]he constitutional safeguards of the criminal justice process will ensure that when policymakers view interrogation as the overriding priority they will be inclined to elect an option other than prosecution."). The government has also taken the position in litigation that compliance with constitutional requirements during interrogations abroad would undermine its efforts to secure convictions of terrorism suspects. *See* United States v. Bin Laden, 132 F.

official has suggested that the government's interrogation practices abroad have left the Department of Justice in a "no man's land," where the government cannot successfully prosecute, but cannot let suspected terrorists go free.[30] That concern has been echoed by a number of veteran FBI and CIA agents, who have reportedly questioned whether "the Administration has jeopardized its chances of convicting hundreds of suspected terrorists, or even of using them as witnesses in almost any court in the world."[31]

Contrary to that conventional wisdom, however, in both *Abu Ali*[32] and *United States v. Marzook*,[33] U.S. prosecutors pursued convictions based almost exclusively on confessions obtained by foreign governments that routinely torture. And both courts sanctioned the use of those extraterritorial confessions, rejecting claims by the defendants that abusive tactics and coercive conditions abroad produced their statements.[34] Abu Ali, convicted on the basis of his confession, is now serving a sentence in federal prison.[35] In both cases, the courts' analysis of the voluntariness of the defendants' confessions was less searching than the scrutiny of domestic stationhouse interrogation, belying the presumption that

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Supp. 2d 168, 189 (S.D.N.Y. 2001) (rejecting the government's arguments that compliance with *Miranda* abroad with respect to interrogation of nonresident aliens in foreign custody "will impose intolerable costs to both international investigatory cooperation and America's own ability to deter transnational crime").

30. Mayer, *supra* note 2 (quoting Jamie Gorelick, former deputy attorney general and 9/11 Commission member). In response to Abu Ali's indictment after his prolonged detention in Saudi Arabia, many observers, including U.S. government officials, questioned the likelihood of a successful prosecution. *Newsweek* reported that "even the top aides to the then Attorney General John Ashcroft didn't think they had anything resembling a solid criminal case" against Abu Ali, quoting a former Department of Justice official as stating the government "didn't know what to do with this guy" and another veteran official as stating, "I was amazed they did this . . . I don't know how [the prosecution] can be done successfully." Isikoff, *supra* note 8 (alteration in original). *Newsweek* also reported that Department of Justice sources "fretted" that if the Saudis returned Abu Ali to the United States, his confession, a key piece of evidence in the case against him, "would likely get tossed out of court, and Abu Ali would walk." *Id.*

31. Mayer, *supra* note 2.

32. 395 F. Supp. 2d 338 (E.D. Va. 2005).

33. 435 F. Supp. 2d 708 (N.D. Ill. 2006).

34. *Id.* at 712; *Abu Ali*, 395 F. Supp. 2d at 341.

35. United States v. Ali, No. CRIM.A. 1:05-53, 2006 WL 1102835, at *1 (E.D. Va. Apr. 17, 2006). The district court sentenced Abu Ali to thirty years in prison, departing from the applicable federal sentencing guidelines range of life imprisonment. Abu Ali appealed his conviction to the Fourth Circuit, and the government cross-appealed the sentence. United States v. Abu Ali, 528 F.3d 210, 221 (4th Cir. 2008). The Fourth Circuit affirmed Abu Ali's conviction, but vacated the district court's sentence, concluding its "significant downward deviation" from a life sentence was not justified. *Id.* at *46.

courts would be highly skeptical of confessions elicited during interrogation by foreign governments that routinely torture.

Significantly, those prosecutions have occurred against a backdrop of markedly increased transnational cooperation in the prosecution of crimes, particularly those related to terrorism and during a period when the United States has acknowledged pursuing partnerships with foreign governments willing to detain and interrogate terrorism suspects through torture beyond the extraterritorial United States.[36] Practices such as "extraordinary rendition" and detention at secret "black site" prisons abroad[37] have blurred sovereign responsibility for abusive interrogation techniques, arguably as a matter of strategy. Although much scholarship has focused on whether the fight against terrorism should be governed by the war or criminal law paradigm,[38] few have analyzed the actual implications for domestic criminal trials of the United States' increased reliance on foreign interrogations in the war on terror.[39]

This Article argues that recent terrorism prosecutions reveal that U.S. courts may not be poised to adequately address this emerging phenomenon. In recent examples, courts assessing defendants' claims of abuse by foreign interrogators in terrorism cases have failed to conduct a sufficiently rigorous inquiry into the voluntariness of confessions obtained through foreign interrogation and have failed to set a sufficiently exacting standard for

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36. *See Mayer*, *supra* note 2 (quoting former CIA and FBI officials familiar with the United States' extraordinary rendition program); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1 (reporting statements by U.S. and foreign officials confirming the existence of secret prisons in Eastern Europe, Afghanistan, and Thailand).

37. *See* Carol D. Leonnig & Eric Rich, *U.S. Seeks Silence on CIA Prisons: Court is Asked to Bar Detainees From Talking About Interrogations*, WASH. POST, Nov. 4, 2006, at A1.

38. *See, e.g.*, Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1 (2003) (arguing that armed conflict is proper paradigm to govern the war on terror); Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307 (2003) (arguing that in fighting the war on terror, the "primary focus in the immediate future should be on the military"); Greg Travalio & John Altenburg, *Terrorism, State Responsibility, and the Use of Military Force*, 4 CHI. J. INT'L L. 97, 98-100 (2003) (discussing pros and cons of both approaches); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 209-15 (2003) (arguing that armed conflict paradigm should govern because the conflict with al Qaeda qualifies as war); Harold Hongju Koh, Op-Ed., *We Have the Right Courts for Bin Laden*, N.Y. TIMES, Nov. 23, 2001, at A39 (arguing that American courts are capable of prosecuting terrorists "fairly, efficiently, and openly").

39. *See* Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along?*, 39 HOUS. L. REV. 307, 308 (2002) (noting that "much of the discussion of a defendant's constitutional rights in a globalized law enforcement setting has been dwarfed by proposals to try persons in settings from which many of the Constitution's protections have been subtracted").

determining whether U.S. actors play a constitutionally significant role in extraterritorial investigations.[40] For example, in assessing the admissibility of Abu Ali's confession, the court disregarded unrefuted evidence that the defendant was held incommunicado and in solitary confinement for several months throughout his twenty-month detention—conditions found to be unconstitutionally coercive in the domestic stationhouse setting.[41] In addition, courts evaluating extraterritorial confessions have diluted constraints on U.S. law enforcement agents operating abroad by narrowly construing the "joint venture" doctrine. That doctrine determines whether *Miranda v. Arizona*[42] applies to interrogations by foreign officials abroad by assessing whether U.S. actors "actively participate" in the interrogation.[43] In evaluating alleged "joint ventures," courts tend to restrict their inquiry to the extent of U.S. involvement in discrete interrogations, while ignoring evidence of broader transnational cooperation—and the incentives to circumvent U.S. law—in the particular case.[44]

Should these recent decisions signal a trend, they would represent a turning point in U.S. criminal procedure: diminished protections against investigation through torture. That potential crack in the constitutional bulwark against torture would create a perverse incentive for the United States to export interrogation to

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40. The protections of *Miranda v. Arizona*, 384 U.S. 436 (1966), apply to foreign interrogations where a "joint venture" exists between the United States and foreign law enforcement officials. Due process, on the other hand, requires that any incriminating statement, even those obtained by foreign actors, must be made voluntarily in order to be admissible. *See* Brown v. Mississippi, 297 U.S. 278 (1936); U.S. v. Karake, 443 F. Supp. 2d 8 (D.D.C. 2006).

41. Traditionally, in the domestic context, courts have suppressed statements elicited from defendants subjected to solitary confinement and incommunicado detention, finding those conditions to be coercive. *See, e.g.*, Davis v. North Carolina, 384 U.S. 737, 744-46 (1966); Ashcraft v. Tennessee, 322 U.S. 143, 153 (1944). In *Abu Ali*, a consular official from the Department of State, who had visited Abu Ali in prison in Saudi Arabia, testified for the government that Abu Ali remained in solitary confinement from September 2003 to January 2004. United States v. Abu Ali, 395 F. Supp. 2d 338, 354 (E.D. Va. 2005). Abu Ali also claimed he was subjected to solitary confinement and incommunicado detention from the first day of his arrest until he provided his videotaped confession forty-five days later. *Id.* at 353-54. The court's voluntariness analysis did not consider the evidence of Saudi Arabia's use of solitary confinement during Abu Ali's detention. *See id.* at 381.

42. 384 U.S. 436 (1966).

43. *See, e.g.*, United States v. Yousef, 327 F.3d 56, 145-46 (2d Cir. 2003); United States v. Bagaric, 706 F.2d 42, 69 (2d Cir. 1983); United States v. Trenary, 473 F.2d 680 (9th Cir. 1973).

44. *See. e.g.*, United States v. Bin Laden, 132 F. Supp. 2d 168, 187 (S.D.N.Y. 2001) (citing line of cases "uniformly recogniz[ing]" that a lack of *Miranda* warnings provided by foreign officials "will still lead to suppression if U.S. law enforcement themselves actively participated in the questioning").

foreign entities that torture in order to obtain "flexibility" in interrogation, while insulating interrogation practices from the scrutiny applied to domestic law enforcement activities. As a result, the ability of domestic courts to deter government misconduct would be circumscribed and the prospect of torture increased.

This critique of recent extraterritorial-confessions jurisprudence recognizes that factual determinations relating to credibility of suppression-hearing witnesses are difficult in any setting.[45] As domestic and international tribunals that regularly rule on torture claims recognize, determining whether an individual has been tortured in detention can be an exceedingly difficult task.[46] Yet, by eroding the standards of voluntariness legally relevant in the domestic setting (that is, ignoring factors such as incommunicado detention and solitary confinement) and failing to consider relevant evidence bearing on the credibility of foreign witnesses (for example, the foreign country's human rights records), courts have increased the risk of error in voluntariness determinations and diminished protections against the taint of torture in U.S. criminal trials.[47]

Part II analyzes the historic prohibition on evidence obtained by torture in U.S. criminal prosecutions and the use of torture in the war on terror. This Part also examines how the internationalization of law enforcement has complicated the ability of courts to regulate

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45. *See* Mark A. Godsey, Miranda's *Final Frontier—The International Arena: A Critical Analysis of* United States v. Bin Laden, *and a Proposal for a New* Miranda *Exception Abroad*, 51 DUKE L.J. 1703, 1736-37 (2002) (noting that the Supreme Court created the *Miranda* doctrine in response to its belief that "the due process voluntariness test was largely ineffective because it was too difficult, after the fact, to reconstruct the totality of the circumstances surrounding an interrogation to determine if a confession was voluntary").

46. *See* Mammadov v. Azerbaijan, App. No. 34445/04, ¶ 74 (Eur. Ct. H.R. Jan. 11, 2007), *available at* http://www.echr.coe.int/echr ("[A]llegations of torture in police custody are extremely difficult for the victim to substantiate if he or she has been isolated from the outside world, without access to doctors, lawyers, family or friends who could provide support and assemble the necessary evidence.") (citation omitted); *see also* Stein v. New York, 346 U.S. 156, 181 (1953) ("It is common courtroom knowledge that extortion of confessions by 'third-degree' methods is charged falsely as well as denied falsely. The practical problem is to separate the true from the false.").

47. For example, in *Stein*, the Supreme Court noted the importance of considering the practice of incommunicado detention without charges when determining the voluntariness of confessions, stating that the practice typically facilitates the use of force during interrogation. *See* 346 U.S. at 187 ("To delay arraignment, meanwhile holding the suspect incommunicado, facilitates and usually accompanies use of 'third-degree' methods."). Thus, the Court "regard[ed] such occurrences as relevant circumstantial evidence in the inquiry as to physical or psychological coercion." *Id.* In contrast, the court in *Abu Ali* never mentioned the significance of Abu Ali's twenty-month detention without charges and the lengthy periods of his solitary confinement and incommunicado detention in evaluating the credibility of his claim that the Saudis coerced him to confess.

confessions coerced through abusive conduct abroad. Part III addresses the law governing extraterritorial confessions. Part IV analyzes trends in recent terrorism prosecutions and argues that the insufficiently skeptical analysis of extraterritorial confessions by U.S. courts exposes a potential crack in the bulwark of constitutional protections against evidence obtained by torture in U.S. criminal trials. Here, the Article points to several factors and practices that domestic courts should consider when evaluating extraterritorial confessions to ensure that evidence obtained by torture is never countenanced in U.S. criminal trials.

II. TORTURE, TERRORISM, AND THE CHALLENGE OF GLOBALIZED LAW ENFORCEMENT

A. The Constitutional Prohibition on Torture

The prohibition on investigation through torture and coercion is well-settled in U.S. constitutional law.[48] In contrast to the United Kingdom, which recently addressed whether evidence obtained through extraterritorial torture may be admitted as evidence in British terrorism cases,[49] in the United States the prohibition on evidence obtained by torture—even torture exacted by foreigners—is rarely revisited by the courts.[50] As the district court stated in *Abu Ali*, "[T]orture of any kind is legally and morally unacceptable, and . . . the judicial system of the United States will not permit the taint of torture in its judiciary proceedings."[51] Although *Abu Ali* affirmed that foundational principle of U.S. law, the court's decision admitting Abu Ali's Saudi-obtained confession while excluding

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48. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 285-86 (1936); *see also* Waldron, *supra* note 27.

49. *See* A v. Sec'y of State for the Home Dep't, [2005] UKHL 71 (U.K.) (upholding unanimously the rule prohibiting the use of torture evidence in all proceedings, including cases involving terrorism, regardless of the origin of the evidence).

50. One federal court, however, has recently questioned whether the prohibition on torture is, in fact, absolute. In *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 274 (E.D.N.Y. 2006), Judge Trager suggested that "whether torture always violates the Fifth Amendment under established Supreme Court case law prohibiting government action that 'shocks the conscience' . . . remains unresolved from a doctrinal standpoint." Judge Trager also opined that "the constitutionality of torture to prevent a terrorist attack" remains an open question. *Id.* at 274 n.10.

51. United States v. Abu Ali, 395 F. Supp. 2d 338, 379 (E.D. Va. 2005). The court noted that it:

> [T]akes very seriously its solemn duty and unwavering responsibility to ensure that the human rights guarantees of the United States Constitution and of those international documents on human rights to which the United States is a signatory, including the U.N. Convention Against Torture, are upheld in word, deed, and spirit.

Id.

evidence of Saudi Arabia's record of routine torture, nevertheless exposes the risk that the taint of torture may creep into domestic trials.

The U.S. criminal justice system inherited its prohibition against torture from England, which had a relatively minimal experience with torture as a tool of evidence-gathering.[52] Although England investigated crime (mostly treason) through torture for a short period of time, it did so through warrants issued by the Privy Council, rather than the civil courts used in continental Europe.[53] Less than a hundred cases of torture warrants were recorded from 1540–1640 in England, before nations throughout Europe abolished torture during the next century.[54] As Professor John Langbein has noted, "Because the English never lodged the power to investigate under torture with ordinary law enforcement officers or courts, this century of experiment with torture left hardly a trace in Anglo-American criminal procedure."[55]

At the founding of the United States, several Framers regarded the Fifth Amendment privilege against compelled self-incrimination as a safeguard against torture.[56] Scholars have since debated the

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52. John H. Langbein, *The Legal History of Torture*, *in* TORTURE, *supra* note 18, at 93. Langbein notes that England's crude criminal procedure had no need for torture because it relied on juries who were largely witnesses to the crime.

53. *Id.* at 100. England's experience contrasted with other European systems that had institutionalized torture and experimented with it for more than five hundred years. *Id.* at 93-94. Those states embraced a system of "judicial torture" in their civil law systems: judges decided who would be tortured and how. *Id.* at 94. In the European context, states depended upon torture to obtain confessions in order to supplement their law of evidence and proof, which prohibited conviction based on circumstantial evidence. *Id.* at 95. Thus, the "law of torture grew up to regulate this process of generating confessions." *Id.* European legal systems tested a range of safeguards, such as requiring corroborating witnesses and other proofs to guard against the inherent danger that torture would produce unreliable evidence. *Id.* at 95-96. By the end of the eighteenth century, however, most European systems abolished torture, concluding that no safeguard could protect against the overwhelming risk that torture produced unreliable confessions with severe costs to the innocent. *Id.* at 93-96.

54. *Id.* In England, "[t]orture was condoned in the secret ecclesiastical courts, which had jurisdiction over religious crimes; and in 'prerogative' courts . . . with jurisdiction over treason and breaches of the 'King's Peace.'" Skolnick, *supra* note 29, at 111.

55. Langbein, *supra* note 52, at 100 (footnote omitted).

56. *See* Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 865 n.20 (1995). Amar and Lettow note that "[d]uring the debates over ratification of the Federal Constitution, several participants expressed fears that the Constitution failed to provide common law protection against torture to extract confessions." *Id.* As Amar & Lettow recount, Patrick Henry expressed concern in Virginia that Congress would "introduce the practice of the civil law [to torture], in preference to that of the common law." *Id.* He stated:

origin of the privilege and some have concluded that its inclusion in the Fifth Amendment was animated by other goals.[57] Irrespective of the privilege's historic origins, the Supreme Court has consistently identified the privilege against compelled self-incrimination with a norm prohibiting torture.[58] For example, the Court has repeatedly stated that the privilege "was designed primarily to prevent 'a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.'"[59]

In early criminal procedure jurisprudence, courts applied two common law justifications for excluding confessions: the recognition that (1) "evidence extracted through pain or promises was unreliable"[60] and (2) the value of individual autonomy animating the protection of citizens from compelled self-incrimination by the state.[61] In the 1897 case *Bram v. United States*,[62] the Supreme Court reasoned that the Fifth Amendment prohibits the use of coerced confessions under both rationales.[63] For the next fifty years, however,

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> They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. . . . [T]hey will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity.

Id. In response, George Mason, the drafter of Virginia's Bill of Rights, expressed the view that the Fifth Amendment privilege against self-incrimination addressed Henry's concern: "[O]ne clause expressly provided that no man can give evidence against himself; and . . . must know that, in those countries where torture is used, evidence was extorted from the criminal himself." *Id.* (citation omitted).

57. *See* Ronald J. Allen, Miranda's *Hollow Core*, 100 NW. U. L. REV. 71, 73 (2006) (noting that the right to be free from compelled self-incrimination was also rooted in "concerns that one's religious duty to confess not result in civic harm," and that "uncounseled laymen" would be unable to "withstand interrogation by skilled professionals"); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2626-27 (1996).

58. *See* Waldron, *supra* note 27, at 1731 n.227; *see also* United States v. Balsys, 524 U.S. 666, 701-02 (1998) (Ginsburg, J., dissenting) ("The privilege against self-incrimination, 'closely linked historically with the abolition of torture,' is properly regarded as a 'landmar[k] in man's struggle to make himself civilized.'") (alteration in original) (quoting ERWIN N. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955)).

59. *See* Waldron, *supra* note 27, at 1731 (citing Pennsylvania v. Muniz, 496 U.S. 582, 596 (1990)).

60. *See* Allen, *supra* note 57, at 73.

61. *Id.* at 73-74.

62. 168 U.S. 532, 543-49 (1897).

63. Richard A. Leo, Steven A. Drizin, Peter J. Neufeld, Bradley R. Hall & Amy Vatner, *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 492-93. In *Bram*, the Court made clear for the first time that the admission of out-of-court confessions at trial could violate the Fifth Amendment privilege against self-incrimination. 168 U.S. at 542 ("[W]herever a question arises whether [an out-of-court] confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to

when physical coercion was at issue, courts continued to analyze the admissibility of confessions under the Due Process Clause—in both state and federal cases—rather than under the Self-Incrimination Clause.[64]

In 1936, prior to incorporation of the privilege against compelled self-incrimination against the states, the Supreme Court, in the landmark case of *Brown v. Mississippi*,[65] addressed torture by state officials under the Due Process Clause. In *Brown*, a deputy sheriff in Mississippi, aided by a mob, extracted a confession from three black tenant farmers through methods that can only be characterized as torture.[66] As described in detail by the Court, the sheriff and others hanged and whipped one defendant numerous times until he "confessed."[67] In reversing the defendants' convictions, the Court rejected the state's argument that the privilege against self-incrimination was the sole source of protection against coerced confessions.[68] Noting that "[c]ompulsion by torture to extort a confession is a different matter" than nonphysical legal compulsion prohibited by the privilege against self-incrimination, the Court declared that the authority of the state is "limited by the requirement of due process of law" and the "rack and torture chamber may not be substituted for the witness stand."[69] Thus, the Court firmly established the Due Process Clause as a protection

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the constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"). The Court also pointed to reliability concerns as a justification for excluding coerced confessions. *Id.* at 546 ("[P]ain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on." (quoting GILBERT, EVIDENCE 139 (2d ed. 1760)).

64. *See* Allen, *supra* note 57, at 74. Courts necessarily relied on the Due Process Clause of the Fourteenth Amendment when addressing coercion by state officials until the Supreme Court incorporated the Fifth Amendment privilege against self-incrimination against the states through the Due Process Clause of the Fourteenth Amendement. *See* Malloy v. Hogan, 378 U.S. 1 (1964).

65. 297 U.S. 278 (1936).

66. *See Brown*, 297 U.S. at 281-82. Jerome Skolnick points out that the Supreme Court described the police action in *Brown* as "revolting methods" and notes that the "incendiary label" of torture is rarely used by the Court in reference to the interrogation. *See* Skolnick, *supra* note 29, at 109. The Court's justification for invoking the Fourteenth Amendment Due Process Clause did suggest, however, that it considered the case to involve torture. *Brown*, 297 U.S. at 285 (describing case as involving "[c]ompulsion by torture to extort a confession").

67. *Brown*, 297 U.S. at 281-82.

68. *Id.* at 285.

69. *Id.* at 285-86. The Court reasoned 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 and political institutions." *Id.* at 286 (quoting Hebert v. Lousiana, 272 U.S. 312, 316 (1926)).

against confessions elicited by torture and other extreme abuse and adopted a "voluntariness" requirement for all confessions sought to be admitted at trial.

That due process test has endured even after the Supreme Court held in *Malloy v. Hogan*[70] that the Fifth Amendment privilege against compelled self-incrimination applies to the states.[71] Following *Brown*, the Court struggled to define the meaning of the "due process voluntariness" requirement for confessions in a series of cases shaping the boundaries of permissible police coercion.[72]

Thirty years later, when the Supreme Court decided *Miranda v. Arizona*,[73] the brutal interrogation methods at issue in *Brown* were less common.[74] In *Miranda*, the Court recognized that it was responding to a new paradigm: "the advent of modern custodial police interrogation" and the inherent coercion of custodial interrogation.[75] *Miranda* suggested that law enforcement's reliance on "physical brutality—beatings, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions," were "the exception now," rather than the norm.[76] The Court stressed "that the modern practice of in-custody interrogation is psychologically rather than physically oriented."[77]

At the end of the last century, much of the confessions-law scholarship reflected *Miranda*'s assessment that physical coercion during interrogation was largely obsolete[78] and grappled with legal

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70. 378 U.S. 1 (1964).

71. *See* Colorado v. Connelly, 479 U.S. 157, 163 (1986).

72. *See* Skolnick, *supra* note 29, at 113-14 (citing Ashcraft v. Tennessee, 322 U.S. 143 (1944); Malinski v. New York, 324 U.S. 401 (1945); Rogers v. Richmond, 365 U.S. 534 (1961)).

73. 384 U.S. 436 (1966). *Miranda* reasoned that the "inherently compelling pressures" of custodial interrogations thwart a suspect's ability to exercise his or her Fifth Amendment rights. *Id.* at 467. Thus, the Court held that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Id.* at 458.

74. While brutal interrogation methods may have dissipated by the time *Miranda* was decided in 1966, in the first half of the twentieth century, southern blacks endured rampant abuse and torture at the hands of the police or white vigilante mobs operating in concert with—or with the tacit approval of—the police. *See* Skolnick, *supra* note 29, at 105-06. These abuses did not disappear "until the beginning of the civil rights movement of the 1960s and the demise of legal segregation." *Id.* at 106.

75. United States v. Dickerson, 530 U.S. 428, 434-35 (2000) (citing *Miranda*, 384 U.S. at 445-58).

76. *Miranda*, 384 U.S. at 446-47.

77. *Id.* at 448.

78. Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 153 (1998) ("To be sure, police no longer conduct week-long incommunicado interrogations. Likewise, physical abuse rarely occurs . . . ."); Richard J. Ofshe & Richard A. Leo, *The*

limits on psychological pressure during interrogation, rather than the use of force.[79] Given that a U.S. stationhouse, however, is no longer the paradigmatic setting of modern custodial interrogation in the context of the war on terror, and the fact that U.S. counterterrorism agents regularly partner—for the purpose of detention and interrogation—with foreign governments that routinely employ torture, the notion that torture is not used to extract confessions admitted in U.S. criminal prosecutions is no longer safe to assume.[80]

B. Torture in the War on Terror

In spite of the historic prohibition on torture, a pattern of torture during interrogation has emerged at U.S. detention facilities in Iraq, Afghanistan, and Guantanamo Bay, Cuba, and at undisclosed CIA "black sites" and prisons throughout the world. At Guantanamo, detainees allege that interrogators beat and kicked them before and during interrogation, sometimes while they were hooded and

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Decision to Confess Falsely: Rational Choice and Irrational Action, 74 DENV. U. L. REV. 979, 983 (1997) (noting that the "'third degree' has virtually disappeared"); Skolnick, *supra* note 29, at 117, 122 (arguing that "the rise of racial equality norms, coupled with those of procedural jurisprudence, have virtually eliminated interrogatory torture in the United States, where the interrogator's goal is a criminal conviction" and that "physical force is rarely, if ever, used when the police are seeking evidence that can be introduced at trial"); *see also* Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME, L. & SOC. CHANGE 35 (1992).

Jerome H. Skolnick has suggested that a recent *Miranda* case, *Missouri v. Seibert*, 542 U.S. 600 (2004):

> [R]eminds us that the domestic American interrogation issue is not about police torture—the "third degree" or whippings—as it was in the 1930s. The question has for some years been the meaning of *Miranda* rights in police interrogation rooms, especially the limits of police trickery and deception for producing evidence.

Skolnick, *supra* note 29, at 123.

79. *See, e.g.*, Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998); Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168 (2001). As the Chicago police torture cases illustrate, however, torture has not entirely disappeared from U.S. stationhouses. *See* discussion *infra* notes 248-55 and accompanying text.

80. *Compare* Jesselyn Radack, *Discussing a Taboo—A Review of* Torture: A Collection, 14 TEMP. POL. & CIV. RTS. L. REV. 609, 619 (2005) (arguing that while there may no longer be "'any torture by American police detectives who are seeking evidence to be introduced at a trial' . . . prosecutors have sought to introduce the fruits of . . . military torture at criminal trial, as in [the] case . . . of 'American Taliban' John Walker Lindh"); *with* United States v. Bin Laden, 132 F. Supp. 2d 168, 187 (S.D.N.Y. 2001) (noting that "the taint of compulsion—is equally prescient, if not more so, when U.S. agents are conducting custodial interrogations in foreign lands").

shackled.[81] United States officials also reportedly tormented detainees with extreme temperatures, shackled them in painful stress positions for extended periods of time, stripped them naked while military police photographed them, taunted them sexually, and subjected many to prolonged isolation.[82] Similar allegations of detainee abuse emerged at Bagram Airbase and other locations in Afghanistan, prompting one independent panel to report, "Interrogation techniques intended only for Guantanamo came to be used in Afghanistan and Iraq."[83] Objective evidence, including the infamous Abu Ghraib prison photographs and reports and memoranda from the FBI[84] and Red Cross[85] corroborate detainee claims of torture by the United States.

Internal reports and memoranda produced by representatives of the United States government indicate that the Bush administration sought legal justification for torture in prosecuting the war on terror. Officials at the Department of Defense, Department of Justice, and White House Counsel's office have all endorsed the principle that torture may be justified in order to extract information from

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81. *See* Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A1. The Red Cross observed that the U.S. government created a system of abusive and degrading conditions of confinement at Guantanamo that aimed to overcome the will of its prisoners. *Id.* According to the Red Cross, "[t]he construction of such a system, whose stated purpose is the production of intelligence, cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture." *Id.*

82. *See id.*

83. Carlotta Gall & David Rohde, *The Reach of War: The Prisons; Afghan Abuse Charges Raise New Questions on Authority*, N.Y. TIMES, Sept. 17, 2004, at A10.

84. Internal FBI memoranda released pursuant to a Freedom of Information Act lawsuit filed by the ACLU provide further corroboration of torture at Guantanamo. Dan Eggen & R. Jeffrey Smith, *FBI Agents Allege Abuse of Detainees at Guantanomo Bay*, WASH. POST, Dec. 21, 2004, at A01 (noting reports by FBI agents that detainees were "chained hand and foot in a fetal position to the floor, with no food or water" for up to twenty-four hours); Paisley Dodds, *FBI Agents Allege Prisoner Mistreatment in Guantanamo*, ASSOCIATED PRESS, Dec. 7, 2004 (noting report by FBI agent of dog being used "in an aggressive manner to intimidate a detainee" and subjection of detainees to "intense isolation for over three months," including at least one who was "totally isolated in a cell that was always flooded with light").

85. *See* REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION § 3.2 (2004); GEN. ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004). In July 2004, the International Committee of the Red Cross issued a confidential report to the U.S. government after a month-long visit to the Guantanamo Bay detention facility, in which it complained that prisoners at Guantanamo were subjected to intentional psychological and physical coercion "tantamount to torture." That report corroborated Guantanamo detainees' accounts of torture and cruel, inhuman, or degrading treatment or punishment. Lewis, *supra* note 81.

suspected terrorists and that the executive is not bound by domestic and international law prohibiting torture when national security is at stake. For example, an August 1, 2002 Department of Justice memo concluded that torture against suspected terrorists "may be justified" and laws prohibiting torture "may be unconstitutional if applied to interrogations" undertaken pursuant to the president's authority as commander-in-chief.[86] An April 2003 Department of Defense memorandum posited the same argument.[87]

The exhaustively debated, so-called "torture memo" created by the Department of Justice also sought to narrow the definition of torture set forth by the Convention Against Torture and U.S. laws implementing that treaty.[88] The memo argued for a definition of torture limited to extreme harm, such as "organ failure, impairment of a bodily function, or even death."[89] The Department of Justice retreated from that memo on December 30, 2004, adopting a revised, broader definition of torture.[90] Each of these memos, as articulations of official policy and thinking, illustrate the government's willingness to circumvent legal prohibitions on torture in the interests of national security.

The government's torture memos do not represent an ephemeral reaction to the events of September 11. Four years later, in the fall of 2006, the administration sought to redefine U.S. obligations under Common Article 3 of the Geneva Conventions, which bars inhumane

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86. Aug. 2002 DOJ Memo, *supra* note 25; Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2004, at A01; *see also* John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 228 (2003).

87. Memorandum, Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, from Pentagon Working Group, to Donald Rumsfeld, U.S. Sec'y of Defense (Mar. 6, 2003); Jess Bravin, *Pentagon Report Set Framework for Use of Torture*, WALL ST. J., June 7, 2004, at A1.

88. *See* Aug. 2002 DOJ Memo, *supra* note 25. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Opened for signature Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

89. *See* Aug. 2002 DOJ Memo, *supra* note 25.

90. R. Jeffrey Smith & Dan Eggen, *Justice Expands 'Torture' Definition*, WASH. POST, Dec. 31, 2004, at 1.

treatment of detainees during armed conflict.[91] The Military Commission Act of 2006, as originally proposed, sought to grant the executive greater flexibility to determine on a case-by-case basis whether to subject detainees to cruel, inhuman, or degrading treatment.[92] After objection from retired military leaders and human rights groups, the Senate Armed Services Committee passed an alternative bill, sponsored by Senators McCain, Warner, and Graham, which generally preserved Common Article 3.[93] Although the final compromise bill, signed into law in October 2006, rejected the original proposal's most extreme affronts to the Geneva Conventions, the final law undermined the prohibition on torture in a number of important ways. The law grants expansive executive power, removes protections against abuse and wrongful detention of prisoners,[94] and purports to preserve the CIA's authority to engage in what the president has euphemistically referred to as "an alternative set of procedures"[95]—i.e., extraordinary rendition and torture in secret detention facilities abroad. In June 2008, the Supreme Court declared unconstitutional that part of the Act that attempted to strip the federal courts of habeas jurisdiction over the claims of Guantanamo detainees.[96]

Significantly, the law also permits the U.S. government in military commissions to rely on evidence obtained by coercion.[97] The

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

92. S. Doc. No. 3929 (2006).

93. S. Doc. No. 3930 (2006); Democratic Talk Radio Blog, http://www.democratictalkradio.com/wordpress/?p=181 (Oct. 24, 2006, 19:12).

94. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (eliminating habeas review).

95. *See* President George W. Bush, Address in the East Room of the White House (Sept. 6, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html. President Bush stated:

> We knew that Zubaydah had more information that could save innocent lives, but he stopped talking. As his questioning proceeded, it became clear that he had received training on how to resist interrogation. And so the CIA used an alternative set of procedures. These procedures were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations. The Department of Justice reviewed the authorized methods extensively and determined them to be lawful. I cannot describe the specific methods used—I think you understand why—if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks on our country. But I can say the procedures were tough, and they were safe, and lawful, and necessary.

Id.

96. Boumediene v. Bush, 128 S. Ct. 2229 (2008).

97. The Act treats coerced statements differently depending upon whether the interrogation occurred prior to or after the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680. If the interrogation occurred before enactment of the

government's willingness to rely on coerced confessions in this setting demonstrates that the United States has not benefited from the mistakes of history. Professor John H. Langbein, in an analysis of European judicial systems' failed experiment with judicially sanctioned torture, has suggested that "[h]istory's most important lesson is that it has not been possible to make coercion compatible with truth."[98]

C. The Internationalization of Law Enforcement and the Threat of Torture Abroad

Courts evaluating extraterritorial confessions must be responsive to how law enforcement agents operate abroad and obtain evidence in extraterritorial settings.[99] The number of U.S. law enforcement agents working in foreign countries proliferated after World War II[100] and has increasingly expanded since the 1960s, in response to transnational drug trafficking, organized crime, and legislation[101] designating extraterritorial offenses as falling within the jurisdiction of the United States.[102]

Detainee Treatment Act, the Military Commissions Act allows military judges to admit statements produced through "coercion," where the judge finds the statement "reliable and possessing sufficient probative value" and "the interests of justice would best be served by admission of the statement into evidence." Military Commissions Act § 3(a). For statements elicited after the passage of the Detainee Treatment Act, the military judge may admit a coerced statement if the judge finds the statement to be reliable and possessing sufficient probative value; the "interests of justice would best be served by admission of the statement into evidence"; and "the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005." *Id.* Thus, the law arguably permits the government to use information produced through past abuse of detainees. The law provides, however, that in all cases evidence obtained by torture may not be used in military commissions. *Id.*

98. Langbein, *supra* note 52, at 101.

99. *See* ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 103, 188 (1993).

100. *Id.* at 188. Beginning in the 1940s, the U.S. military relocated hundreds of criminal investigation personnel abroad, including FBI, Secret Service, and customs agents, in order to monitor the hundreds of thousands of U.S. military personnel based overseas. *Id.* at 464.

101. President Nixon's declaration of a "war on drugs" expanded the role of the Drug Enforcement Administration (DEA) abroad during the 1960s. *Id.* at 138. That agency recognized that as "most illicit drugs originate from abroad, most of the information, evidence, and traffickers could be found there as well." *Id.* The FBI also responded to the rise in the Russian mafia by substantially increasing the number of agents stationed in Eastern Europe. Tuerkheimer, *supra* note 39, at 309-10.

102. NADELMANN, *supra* note 99, at 465 (noting that "[d]ozens of federal criminal statutes were modified and enacted to cover extraterritorial offenses against U.S. citizens and other interests abroad"). *See also* Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 481-84 (1990) (stating that as "jurisdiction is believed to expand, so does

The internationalization of U.S. law enforcement has also been shaped by increased cooperation between U.S. and foreign law enforcement entities. For example, mutual legal assistance treaties (MLATs), formal agreements between two nations, obligate one state to provide evidence or assistance to another.[103] These agreements seek to enhance a nation's evidence-gathering capabilities beyond its borders and provide procedural order to the increasing number of U.S. statutes with extraterritorial reach.[104] Less formally, law enforcement entities frequently aid one another in the investigation of crime, sharing tips,[105] resources,[106] and jointly participating in sting operations.[107]

That is frequently the case in counterterrorism investigations. Law enforcement agencies substantially recalibrated their functions and focus abroad in response to global terrorism. In the 1990s, the FBI created a counterterrorism division, a departure from the FBI's traditional focus on white-collar, drug, and gang-related crimes.[108] This development increased the number of FBI field offices overseas, known as legal attaché offices, particularly in the Middle East.[109]

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the drive to exercise it"). As Justice Brennan noted in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 280-81, nn.1-4 (1990) (Brennan, J., dissenting), a case involving an extraterritorial search, "foreign nationals must now take care not to violate" a range of U.S. drug, antitrust, criminal, and securities laws.

103. *See* NADELMANN, *supra* note 99, at 315-17. As one scholar has put it, MLATs "constitute the most organized effort to facilitate international cooperation among the contracting nations in the investigation and prosecution of crime." Tuerkheimer, *supra* note 39, at 357.

104. Tuerkheimer, *supra* note 39, at 357-60.

105. *See, e.g.*, United States v. Lopez-Imitola, No. 03 CR.294 (RPP), 2004 WL 2534153, at *2 (S.D.N.Y. Nov. 9, 2004); United States v. Heller, 625 F.2d 594 (5th Cir. 1980).

106. *See, e.g.*, United States v. Trenary, 473 F.2d 680, 682 (9th Cir. 1973).

107. *See, e.g.*, United States v. Emery, 591 F.2d 1266 (9th Cir. 1978).

108. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 74-78 (2004) [hereinafter 9/11 Commission Report].

109. *Id.* Between 1996 and 2000 alone, the FBI planned to double the number agents stationed abroad. Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring The Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 GEO. L.J. 851, 852 (2003) (citing RICHARD A. BEST, JR., CONG. RESEARCH SERV., INTELLIGENCE AND LAW ENFORCEMENT: COUNTERING TRANSNATIONAL THREATS TO THE U.S. 12 (2001)); *see also Counter-terrorism Policy: Hearings Before the S. Judiciary Comm.*, 105th Cong. 123 (1998) (testimony of Louis J. Freeh, Director, FBI, describing the expansion of the FBI's activities overseas). Following the East African embassy bombings in 1998, the agency tripled its budget for counterterrorism efforts. *Id.* The court presiding over the trial of defendants convicted of plotting those attacks recognized that with increasing frequency, U.S law enforcement personnel "are dispatched and stationed beyond our

After the September 11 terrorist attacks, the government reconceptualized the goal of interrogations, with direct consequences for law enforcement personnel operating overseas. As Joseph Margulies has noted, given that "9/11 was principally an intelligence failure," the administration subsequently viewed interrogation as a tool of intelligence gathering, not as a means of prosecuting past crimes.[110] This shift of focus has resulted in diluted legal incentives to avoid abusive interrogation abroad. The requirements of *Miranda* and the due process "voluntariness" requirement do not constrain law enforcement agents gathering intelligence abroad so long as the government does not seek to use those statements at a criminal trial.[111] Accordingly, today greater numbers of U.S. law enforcement officers operate abroad with fewer legal constraints.

D. From Cooperation to Rendition

Extraordinary rendition is an intensely secretive[112] and illegal manifestation of transnational cooperation to investigate terrorism suspects.[113] Human rights groups contend—and government officials

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national borders." United States v. Bin Laden, 132 F. Supp. 2d 168, 185 (S.D.N.Y. 2001).

109. 9/11 Commission Report, *supra* note 108, at 76.

110. JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 21 (2006); *see also* Paul J. McNulty, Deputy Attorney General, Prepared Remarks at the American Enterprise Institute (May 24, 2006) ("The 9/11 attacks shifted the law enforcement paradigm from one of predominantly reaction to one of proactive prevention. We resolved not to wait for an attack or an imminent threat of an attack to investigate or prosecute."), *available at* http://www.usdoj.gov/archive/dag/speeches/2006/dag_speech_060524.html (last visited Oct. 6, 2006); Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 313 (2003) (noting that after September 11, the Bush administration was unwilling to utilize the civilian criminal justice system to adjudicate terrorist cases).

111. *Bin Laden*, 132 F. Supp. 2d at 189 ("To the extent that a suspect's *Miranda* rights allegedly impede foreign intelligence collection, we note that *Miranda* only prevents an unwarned or involuntary statement from being used as evidence in a domestic criminal trial; it does not mean that such statements are never to be elicited in the first place.").

112. Extraordinary rendition is the extralegal transfer of terrorism suspects to foreign custody for the purpose of interrogation, detention, and, likely, torture. For a summary of off-the-record victim accounts, see COMM. ON INT'L HUMAN RIGHTS, ASS'N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUM. RTS. & GLOBAL JUST., NYU SCH. OF L., TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" 8-19 (2004) [hereinafter TORTURE BY PROXY] ("Given the secrecy that surrounds Extraordinary Renditions, information about the practice is scarce.").

113. Article 3 of the Convention Against Torture states: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture, *supra* note 88, art. 3. The United States' obligations under this treaty are fully binding and enforceable through its implementing

have acknowledged—that in pursuing the war on terror, the United States has rendered terrorism suspects to foreign countries that routinely torture, such as Jordan, Egypt, and Syria, for the specific purpose of avoiding legal constraints on interrogation and detention applicable in the United States.[114] Although rendition is not a new practice,[115] after September 11 its scope and purpose changed.

During the 1990s, the United States rendered a limited number of terrorists in order to immobilize those who could not be tried in the United States.[116] Throughout the second half of the last century, law enforcement agents also tested the legal boundaries of extraterritorial police work, frequently kidnapping foreign defendants to bring them to the United States for trial.[117] After

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legislation, the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, tit. XXII (codified as a note to 8 U.S.C. § 1231).

114. *See* TORTURE BY PROXY, *supra* note 112, at 8-13; Mayer, *supra* note 2, at 106 ("Critics contend that the unstated purpose of such renditions is to subject the suspects to aggressive methods of persuasion that are illegal in America—including torture."); Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1 (reporting comments of unnamed U.S. official: "We don't kick the [expletive] out of them. We send them to other countries so that they can kick the [expletive] out of them.").

115. *See* Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond*, 25 LOY. L.A. INT'L & COMP. L. REV. 457, 458 (2003) ("'Operation Condor' in the Southern Cone States of Argentina, Brazil, Chile, Paraguay, and Uruguay serves as a notorious example . . . of abusive collaboration among military and police forces against alleged 'terrorists.'"); ALFRED W. MCCOY, A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR 109 (2006) ("Former CIA director George Tenet later testified that, in the years before 9/11, the CIA was involved in the transport of some seventy individuals to foreign countries without formal extradition.").

116. As Joseph Margulies has noted, under the Clinton administration the rendition of prisoners to counties that practice torture was not motivated by interrogation; instead, rendition was utilized to get certain individuals "'off the streets' when a criminal conviction was not feasible." MARGULIES, *supra* note 110, at 189 (discussing statements by former CIA official Michael Scheuer).

117. The practice prompted the United States Court of Appeals for the Second Circuit to revisit the long-established *Ker-Frisbie* doctrine, which had previously upheld the government's power to prosecute irrespective of the legality of the method by which the government acquired possession of a defendant. *See* Ker v. Illinois, 119 U.S. 436, 444 (1886); Frisbie v. Collins, 342 U.S. 519, 522-23 (1952). In *United States v. Toscanino*, the Second Circuit ruled that the *Ker-Frisbie* doctrine could no longer be reconciled with the Supreme Court's expansive notion of due process and that the use of illegal kidnapping attendant with the use of torture to render a suspect into the jurisdiction of the United States may require a court to divest itself of criminal jurisdiction. *See* 500 F.2d 267, 275 (2d Cir. 1974). Subsequent decisions have taken a more permissive view of courts' power to try defendants who are illegally brought into the jurisdiction of the United States. *See* United States v. Alvarez-Machain, 504 U.S. 655, 657 (1992); United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 65-66 (2d Cir.

September 11, rendition was no longer a last resort or used to bring suspects to justice; the United States has since rendered suspected terrorists to gather intelligence through covert and abusive interrogation methods that are illegal in the United States.[118] The case of Maher Arar, a Canadian with dual Syrian citizenship, illustrates the United States' willingness to utilize the practice to extract information from suspected terrorists based on limited suspicion. United States officials intercepted Arar at JFK airport in 2002 while he was attempting to change flights on his way home to Canada and sent him to Syria, where he was detained for a year and tortured.[119]

Although extraordinary rendition is traditionally a covert CIA practice and not a law enforcement tool,[120] the practice reveals the government's inclination and ability to exploit transnational cooperation in national security cases in order to circumvent U.S. law.[121] As traditional law enforcement agencies engage more frequently in intelligence work abroad and the government expresses confidence in the reliability of evidence produced through torture and coercion abroad—as evidenced by the Military Commissions Act of 2006—the fruits of extraordinary rendition may inevitably taint U.S.

1975) (noting that absent allegations of torture and any protest of abduction by the relevant foreign states, abduction of defendant alone did not violate due process).

118. *See* Mayer, *supra* note 2. After September 11, the United States vigorously explored new avenues for rendition with states widely acknowledged to torture. *See* Jodie Morse, *How Do We Make Him Talk?*, TIME, Apr. 15, 2002, at 44 (reporting comments of a "well-placed American military official . . . that at least initially the U.S. had looked for an ally to conduct an interrogation [of al Qaeda leader Abu Zubaydah] . . . to squeeze him . . . [through brutal tactics such as] drugs, mind games and sleep deprivation").

119. *See* Ian Austen, *Canadians Fault U.S. for Its Role in Torture Case*, N.Y. TIMES, Sept. 18, 2006, at A6; 1 COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR 149-73 (2006). Based on an erroneous tip by Canadian officials that Arar had connections to a terrorist, the United States sent Arar to Syria in spite of his insistence that he would be tortured. *Id.* Syrian officials tortured Arar and detained him in a grave-like cell for nearly a year. *Id.* Arar sued the United States government in 2004, claiming that the United States "ordered his removal to Syria for the express purpose of detention and interrogation under torture by Syrian officials." Arar v. Ashcroft, 414 F. Supp. 2d 250, 252 (E.D.N.Y. 2006). The district court dismissed Arar's complaint. *Id.* at 287-88. Arar appealed to the United States Court of Appeals for the Second Circuit, which affirmed. *See* Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008). Canada issued a report in September 2006, clearing Arar of any ties to terrorists and criticizing U.S. officials for his rendition and subsequent torture. *See* Ian Austen, *Canada Will Pay $9.75 Million to Man Sent to Syria and Tortured*, N.Y. TIMES, Jan. 27, 2007, at A1.

120. Mayer, *supra* note 2, at 107.

121. While the government apparently utilizes extraordinary rendition as a way of avoiding domestic law, rendition constitutes a violation of domestic and international law in and of itself. *See supra* notes 112-13 and accompanying text.

criminal proceedings. The attorneys for convicted terrorist Jose Padilla claim it already has.

During his criminal trial, Padilla's lawyers sought to suppress statements Padilla made to the FBI in 2002, claiming that the material witness warrant that the FBI used to arrest him was based on statements extracted from Abu Zubayda, a principal al Qaeda leader who the United States allegedly rendered to Jordan, and another source, Binyam Ahmed Muhammad, who claimed he was tortured after his arrest in Pakistan in April 2002.[122] Although a federal court in Florida denied Padilla's motion to suppress, finding in part insufficient evidence that Zubayda or Muhammad were the sole sources leading to Padilla's arrest,[123] the case illustrates how the blurring line between legitimate transnational cooperation in law enforcement and the United States' reliance on foreign governments that routinely torture to interrogate terrorism suspects abroad poses new challenges for courts presiding over domestic criminal trials.

III. CONFESSIONS LAW IN THE ERA OF GLOBALIZED LAW ENFORCEMENT

A. A Crack in the "Voluntariness" Bulwark Abroad

As the Court noted in *Abu Ali*, when U.S. prosecutors seek convictions based on confessions produced through torture, the judiciary's guarantee of due process of law is the criminal justice system's primary "bulwark against the tyranny of torture and extreme government coercion."[124] Unless U.S. actors substantially participate in a foreign interrogation, *Miranda v. Arizona*,[125] does not apply to foreign interrogations.[126] In contrast, courts have

122. United States v. Padilla, No. 04-60001-CR, 2007 WL 188146, at *1-2, 4-7 (S.D. Fla. Jan. 22, 2007) (adopting and annexing the corrected report and recommendation of Magistrate Judge Stephen T. Brown dated Sept. 20, 2006); *see also* Curt Anderson, *Judge Rejects Padilla Bids to Suppress Evidence, Statements*, ASSOCIATED PRESS, Sept. 8, 2006; Jason Burke, *Global Web of Secret U.S. Prisons: Jason Burke Charts the Worldwide Hidden Network of Jails Where More than 3,000 al-Qaeda Suspects Have Been Held Without Trial—and Many Subject to Torture—since 9/11*, OBSERVER INT'L, June 13, 2004, at 22. After Abu Zubayda was shot and captured in Pakistan, U.S. officials interrogated him and then reportedly flew him to Jordan, where he was held for several years in a secret location until his transfer to Guantanamo. Anderson, *supra*.

123. United States v. Padilla, No. 04-60001-CR, 2007 WL 188146 (S.D. Fla. Jan. 22, 2007); Anderson, *supra* note 122. A jury subsequently found Padilla guilty on all counts. Abby Goodnaugh & Scott Shane, *Padilla is Guilty on all Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1.

124. United States v. Abu Ali, 395 F. Supp. 2d 338, 379 (E.D. Va. 2005).

125. 384 U.S. 436 (1966).

126. *See supra* Part III.B.

interpreted the Due Process Clause to apply even where incriminating statements are extracted by foreign officials,[127] reasoning that in order to be admissible against a defendant in a U.S. criminal trial, all confessions must be made "voluntarily" to satisfy due process guarantees.[128] Six years after its decision in *Miranda*, the Supreme Court described "voluntariness" as the "ultimate test" of admissibility "which has been the only clearly established test in Anglo-American courts for two hundred years."[129]

Following the Supreme Court's 1986 decision in *Colorado v. Connelly*,[130] scholars reassessed whether due process required suppression of involuntary statements coerced by foreign actors.[131] In *Connelly*, the defendant approached a police officer and, without prompting, confessed that he had murdered.[132] He later moved to suppress those statements on the basis that he involuntarily spoke because of a mental illness that caused him to suffer from command hallucinations.[133]

Reversing the Colorado Supreme Court's holding that the confession was inadmissible because it was involuntary,[134] the Supreme Court held that absent coercive state action, the admission of an involuntary, and even unreliable, confession at trial does not violate due process.[135] The Court stated that involuntary confession jurisprudence has always required an "essential link between coercive activity of the State, on the one hand, and a resulting

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127. *See, e.g.*, United States v. Karake, 443 F. Supp. 2d 8 (D.D.C. 2006).

128. Davis v. North Carolina, 384 U.S. 737, 740 (1966) (citing Brown v. Mississippi, 297 U.S. 278 (1936)); *see also* Dickerson v. United States, 530 U.S. 428, 443-44 (2000).

129. Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)). To determine whether a confession was made voluntarily, courts look to the totality of the circumstances and consider whether the confession is "the product of an essentially free and unconstrained choice by its maker" or whether the individual's "will has been overborne and his capacity for self-determination critically impaired." *Id.* (quoting *Culombe*, 367 U.S. at 602).

130. 479 U.S. 157 (1986).

131. Scholars have suggested that under *Connelly*'s view of due process, involuntary statements coerced by foreign agents could be admitted at criminal trials so long as U.S. officials do not take part in the interrogation. *See* M. K. B. Darmer, *Beyond* Bin Laden *and* Lindh*: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319, 365-66 (2003) (stating that "[b]efore Connelly, one could have argued that the introduction into evidence of such statements was itself sufficient to trigger 'state action' calling for due process review"); Godsey, *supra* note 45, at 1732 n.131 (arguing that the *Connelly* decision "arguably undercut" the idea that the United States has an interest in preventing the admission of unreliable confessions regardless of whether the confessions are elicited by foreign actors from noncitizen defendants).

132. 479 U.S. at 159-60.

133. *Id.* at 161.

134. *Id.* at 162, 171.

135. *Id.* at 167.

confession by a defendant, on the other."[136] The Court reasoned that suppression of Connelly's confession would not deter further violations of the Constitution, since the police did nothing wrong in obtaining his confession.[137]

If courts after *Connelly* find "due process" violations only in circumstances where suppression will deter police misconduct, confessions extracted by foreign actors presumably would be admissible regardless of whether they are "voluntary."[138] Courts have repeatedly noted that domestic courts are not tasked with supervising the behavior of foreign actors because the penalty for misconduct—suppression—will have no deterrent effect on foreign actors abroad.[139] Such an interpretation of "voluntariness" would weaken the constitutional prohibition on evidence obtained by torture.

Moreover, *Connelly*'s rejection of reliability as an independent basis for finding a confession inadmissible[140] also weakens protections against confessions elicited through abusive conduct abroad. Confessions law has historically excluded involuntary confessions in part because of their unreliability.[141] Indeed, the

136. *Id.* at 165.

137. *Id.* at 166 (citing United States v. Leon, 468 U.S. 897, 906-13 (1984)).

138. Professor Stephen Saltzburg, commenting on the *Lindh* case in 2002, noted that John Walker Lindh's statements likely would be admitted in spite of the Northern Alliance's attempt to burn, drown, and kill him immediately preceding his interrogations by U.S. officials. *See* Nina Totenberg, *Morning Edition* (National Public Radio broadcast Jul. 15, 2002). Satzberg noted: "The law . . . focuses on the government's action when it comes to coercion. And so the fact that someone may be feeling all kinds of pressure—may be scared, may be frightened, all that—doesn't say that the government has overreached when the government seeks to interrogate someone." *Id.*

139. In analyzing *Miranda*'s application to foreign actor interrogations, courts have noted that because "*Miranda* was intended as a deterrent to unlawful police interrogations, when the interrogation is by the authorities of a foreign jurisdiction, the exclusionary rule has little or no effect upon the conduct of foreign police." United States v. Chavarria, 443 F.2d 904, 905 (9th Cir. 1971); *see also* United States v. Emery, 591 F.2d 1266, 1267 (9th Cir. 1978); United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972).

140. *Connelly*, 479 U.S. at 166-67 (acknowledging that statements by someone in the condition of Connelly could, in fact, be "quite unreliable," but concluding that that potential was not a constitutional question and was better left "to the evidentiary laws of the forum") (citing Lisenba v. California, 314 U.S. 219, 236 (1941)).

141. *See* Bram v. United States, 168 U.S. 532, 546 (1897) (pointing to reliability concerns as a justification for excluding coerced confessions because "pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on") (citation omitted); *see also* Laurence A. Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 92-101 (1989); George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L.

unreliability of information produced by torture led many European jurisdictions to prohibit torture as a tool of investigation by the end of the eighteenth century.[142] In the extraterritorial confessions context, where the role of deterrence is diminished, the Court's dismissal of reliability in the admissibility calculus could leave extraterritorial confessions virtually unregulated.

In contrast, the United Kingdom's 2005 decision in *A v. Secretary of State for the Home Department*[143] rejected such a result, ruling that both domestic prohibitions on torture and international law precluded British courts from receiving evidence obtained by torture, even if procured "by officials of a foreign state without the complicity of the British authorities." The court cited the unreliability of such evidence, the government's interest in discouraging torture, and concerns about the integrity of judicial proceedings as justifications for excluding such evidence.[144] The court noted that its ruling was consistent with Article 15 of the Convention Against Torture, which requires "[e]ach State Party [to] ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceeding . . . ."[145]

Recent rulings suggest that in spite of *Connelly*, U.S. courts see the issue similarly to the United Kingdom and view the guarantee of due process as a significant limitation on the admissibility of evidence obtained by torture, even where U.S. actors are not complicit in acts of torture abroad. For example, in *United States v. Karake*,[146] the District Court for the District of Columbia suppressed statements extracted through torture by Rwandan officials, finding those statements to be involuntary.[147] In addition, in *Abu Ali*, the

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REV. 231, 276 (1988); *see also* Darmer, *supra* note 131, at 364 (noting that the Court in *Connelly* "appeared to collapse the traditional 'complex of values' underlying the due process voluntariness test into a single concern: preventing 'police overreaching' or 'coercive police conduct'" and demonstrated "little constitutional concern for the inherent reliability of the confession at issue").

142. *See* Langbein, *supra* note 52, at 93.

143. [2005] UKHL 71 (U.K.).

144. *Id.* ¶¶ 35-40.

145. *Id.* at ¶¶ 35-37 (citing Convention Against Torture, *supra* note 88, art. 15). The United States, however, has taken the position that Article 15 of the Convention Against Torture is not self-executing, and Congress has not acted to implement the prohibition domestically. *In re* Extradition of Atuar, 300 F. Supp. 2d 418 (S.D. W. Va. 2003); *see also* Elzbieta Klimowicz, *Article 15 of the Torture Convention: Enforcement in U.S. Extradition Proceedings*, 15 GEO. IMMIGR. L. J. 163 (2000).

146. 443 F. Supp. 2d 8 (D.D.C. 2006).

147. *Karake* involved the prosecution of three nonresident Rwandan defendants, who were members of the Liberation Army of Rwanda (ALIR), for the 1999 murder of two American tourists in the Bwindi Impenetrable National Forest in Uganda. *Id.* at 12. Defendants moved to suppress twenty-nine statements they made in Rwandan custody to U.S. and Rwandan officials who investigated the attack over the course of

district court invoked a "voluntariness" analysis to evaluate the confessions obtained by Saudi officials, without addressing *Connelly*'s suggestion that misconduct by state actors is essential for a due process violation.[148]

One court that has recognized *Connelly*'s potential impact on extraterritorial confessions has "assume[d] without deciding that the constitutional protection against involuntary confessions applies to confessions coerced by foreign police."[149] In *United States v. Wolf*,[150] the United States Court of Appeals for the Ninth Circuit questioned the "continuing vitality" of its previous decision in *Brulay v. United States*,[151] which held that the Fifth Amendment would bar "the use in an American trial of involuntary confessions obtained at the hands of Mexican police."[152] Noting that *Brulay* was "cast into serious doubt" by *Connelly*,[153] the court declined to address the conflict because it was not briefed by the parties. The court's dictum suggests that in the absence of misconduct by U.S. actors, some courts may be willing to permit involuntary confessions from abroad.[154]

The majority of the post-*Connelly* cases indicate, however, that courts may view the Supreme Court's permission to admit involuntary statements as limited to circumstances in which an individual is compelled to speak because of factors that cannot be attributed to any abuse of official authority—whether that of U.S. actors or foreign officials. This approach is consistent with what many scholars have characterized as a "police methods" interpretation of confessions law;[155] that is, a view of the Constitution as protecting an accused "from improper methods of interrogation."[156]

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four years. *Id.* at 12, 48-49. The court ruled that a Rwandan military official "extracted" the statements "only after countless hours of repetitive questioning over a period of many months, during which time [the defendants] were subjected to periods of solitary confinement, positional torture, and repeated physical abuse." *Id.* at 94.

148. United States v. Abu Ali, 395 F. Supp. 2d 338, 374 (E.D. Va. 2005) (noting that if the court believed Abu Ali's claim that Saudis forced him to confess through torture in "that instance, the Court would rule that the resulting statements were involuntary"). However, the court ultimately found Abu Ali's statements to be the product of his free will, rejecting Abu Ali's claim that he was tortured by the Saudis. *Id.* at 378.

149. United States v. Wolf, 813 F.2d 970, 972 n.3 (9th Cir. 1987).

150. 813 F.2d 970.

151. 383 F.2d 345, 348 (9th Cir. 1967).

152. *Wolf*, 813 F.2d at 973 n.3.

153. 479 U.S. 157 (1986).

154. *Wolf*, 813 F.2d at 972 n.30.

155. Yale Kasimar, Wayne R. LaFave & Jerold H. Israel, MODERN CRIMINAL PROCEDURE 454 (8th ed. 1994).

156. *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2626 (1996). Alschuler argues that "Supreme Court decisions have vacillated between two incompatible readings of the

Although a "police methods" approach to admissibility is primarily concerned with deterring police overreaching and ensuring fair play, that is, preventing officers who have engaged in improper conduct from "keep[ing] the advantage of their improper methods,"[157] Yale Kasimar has noted that this rationale is not solely about deterrence. By excluding the fruits of improper police methods, courts also seek to condemn abusive practices and to protect the legitimacy of the criminal process.

Those rationales also have salience when excluding confessions obtained by foreign actors through abusive interrogation abroad. If courts extend an imprimatur of legitimacy to evidence obtained by torture by foreign actors, or do not simply apply the same standards of voluntariness when evaluating coercive conditions of interrogation abroad, our own officials may not take seriously the constitutional prohibition of torture and our commitment to an adversarial, not inquisitional, criminal process. As was noted in the case *S v Nkomo*, "It does not seem to me that one can condemn torture while making use of the mute confession resulting from torture, because the effect is to encourage torture."[158] While domestic courts may not be able to deter the conduct of foreign actors during interrogation, a robust due process analysis can avoid the legitimization of torture and discourage U.S. officials from exploiting the fruits of abusive interrogation abroad.

Adopting a narrow view of *Connelly* in the extraterritorial setting would eliminate all limitations against the admission of evidence extracted through torture outside the United States, while practices such as extraordinary rendition suggest that protections against torture abroad should be heightened.[159] The challenge for

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Fifth Amendment guarantee that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Id.* at 2625 (quoting U.S. CONST. amend. V). One reading sees "this language as affording defendants and suspects a right to remain silent" and the other focuses on the methods of interrogation. *Id.* at 2625-26. A focus on impermissible police methods during interrogation is also consistent with the due process analysis, which inquires whether state action is "consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Brown v. Mississippi, 297 U.S. 278, 286 (1936) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

157. Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 941 (1995) (quoting Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 428 (1954)). Kamisar notes that Paulsen was one of the first commentators "to call attention to the emerging police methods rationale for the admissibility of confessions." *Id.* at 941 n.47.

158. A v. Sec'y of State for the Home Dep't, [2005] UKHL 71 (U.K.) (quoting S v Nkomo, 1989 (3) ZLR 117, 131).

159. *See* United States v. Bin Laden, 132 F. Supp. 2d 168, 186-87 (S.D.N.Y. 2001) (noting that it is "far more likely" that custodial interrogation abroad can present

courts addressing extraterritorial confessions should not be to revisit whether due process prohibits the use of involuntary confessions at trial when the confession was obtained by foreign actors, but to ensure that the analysis of due process violations is equally as rigorous as in the domestic stationhouse setting.

B. Miranda *Abroad*

The requirements of *Miranda* apply to U.S. officials' extraterritorial interrogations of U.S. citizens.[160] Courts applying these protections abroad have reasoned that the deterrent rationale for suppressing non-Mirandized statements applies with equal force to interrogations by U.S. officials in foreign countries.[161]

In 2001, the District Court for the Southern District of New York, in *United States v. Bin Laden*,[162] addressed an issue it described as one of first impression: whether *Miranda* applies to U.S. officials' interrogations of nonresident foreign nationals outside the United States.[163] That case involved the admissibility of statements made by defendants tried in connection with the 1998 bombing of the U.S. embassy in Nairobi.[164] The defendants, Saudi and Tanzanian nationals, moved to suppress statements they made during interrogation by U.S. law enforcement officials in Kenya and South Africa.[165] United States officials interrogated one of the defendants, Al-'Owhali, over the course of several days at a Kenyan police facility.[166] The Americans provided him with an English-language advice of rights form (AOR), which largely tracked *Miranda* warnings; the U.S. officials, however, informed the defendant that those rights would apply only if he were in the United States.[167]

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greater threats of compulsion, since U.S. law enforcement cannot control all that happens to the accused).

160. *See, e.g.*, United States v. Covington, 783 F.2d 1052, 1056 (9th Cir. 1985) (recognizing that "the constitutional guarantees of the fifth amendment as well as other constitutional safeguards secure United States citizens against acts of agents of the United States whether acting at home or abroad"); Reid v. Covert, 354 U.S. 1, 6 (1957) ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.").

161. *Bin Laden*, 132 F. Supp. 2d at 187.

162. *Id.* at 168.

163. *Id.* at 181.

164. *Id.* at 171.

165. *Id.* FBI agents, a New York City police detective, and an assistant U.S. attorney assisted in the joint U.S.–Kenyan investigation. *Id.* at 172.

166. *Id.* at 172-73.

167. *See id.* at 173.

Addressing the admissibility of Al-'Owhali's subsequent statements, District Judge Sand noted that the privilege against self-incrimination is only violated "when a defendant's involuntary statements are actually used against him at an American criminal proceeding," not during the moment of his interrogation.[168] Thus, the issue was not a question of the extraterritorial reach of the Fifth Amendment, but whether the privilege against self-incrimination extended to nonresident defendants subject to domestic criminal proceedings.[169] In light of the "expansive" and "inclusive" text of the Fifth Amendment, which states that "no person" shall be compelled to be a witness against himself, the court concluded that the privilege applies "with equal vigor to all defendants" and "without apparent regard to citizenship or community connection."[170]

Bin Laden is an important and unique opinion in extraterritorial confessions jurisprudence because the court recognized that the externalities of extraterritorial interrogation required greater judicial vigilance of coercion. Acknowledging the strong potential that detainees held by foreign governments could face lengthy incommunicado detention, substandard detention conditions, and aggressive interrogation practices of foreign governments,[171] Judge Sand invoked a core *Miranda* concern—the inherent coerciveness of custodial interrogation—adapted for the international setting.[172] The court suggested that it is "far more likely that custodial interrogation [abroad] in such conditions will present greater threats of compulsion, since all that happens to the accused cannot be controlled by the Americans."[173] Judge Sand saw value in *Miranda* as

168. *Id.* at 181-82 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) ("Although conduct by law enforcement officials prior to trial may ultimately impair [the privilege against self-incrimination], a constitutional violation occurs only at trial."); Deshawn E. *ex rel.* Charlotte E. v. Safir, 156 F.3d 340, 346 (2d Cir. 1998) ("Even if it can be shown that a statement was obtained by coercion, there can be no Fifth Amendment violation until that statement is introduced against the defendant in a criminal proceeding.").

169. *Bin Laden*, 132 F. Supp. 2d at 182.

170. *Id.* at 183. The court reasoned that unlike the phrase "the people," which appears in most of the other Amendments contained in the Bill of Rights, the phrase "no person" is not limited in scope. *Id.* (citing U.S. CONST. amends. I, II, IV, IX & X). The court further noted that the Supreme Court has explicitly treated the privilege against self-incrimination as a "fundamental trial right of criminal defendants." *Id.* at 184 (quoting *Verdugo-Urquidez*, 494 U.S. at 264; Malloy v. Hogan, 378 U.S. 1 (1964)).

171. *Id.* at 186.

172. *Id.* According to the court, the coerciveness of custodial interrogation is equally as troubling "when carried out beyond our borders and under the aegis of a foreign stationhouse." *Id.*

173. *Id.* Thus, the court held "that courts may and should apply the familiar warning/waiver framework set forth in *Miranda*" when determining whether the government may introduce a defendant's statements elicited by U.S. agents through

a prophylactic measure to "dissipate the taint of compulsion" occasioned by such circumstances.[174]

The *Bin Laden* decision has elicited considerable scholarly criticism because of the court's suppression of the defendants' statements on the basis of an ineffective *Miranda* warning. The court ruled that the AOR read to the suspects by U.S. law enforcement officials was inadequate because it may have suggested to the defendants that they lacked a right to counsel because they were geographically outside of the United States, a misstatement of the applicable foreign law.[175] Scholars have suggested that the court unfairly faulted U.S. law enforcement officers for failing to properly advise the defendants on the status of foreign law.[176] Other criticism has suggested that if courts follow *Bin Laden*'s holding and enforce the Fifth Amendment overseas, "competing considerations of intelligence and prosecution will make it extremely difficult to determine exactly how U.S. officials should proceed with interrogation when Taliban, al Qaeda, or terrorist suspects are captured."[177]

Most of the criticism of *Bin Laden* has focused on the difficulties of law enforcement compliance with *Miranda* abroad. Few have questioned whether Judge Sand's assessment of *Miranda*'s power to deter coercion abroad has succeeded in practice or to what extent

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interrogation while the defendant is "in the physical custody of foreign authorities." *Id.* at 181.

174. *Id.* at 187 ("The great wisdom of *Miranda*—that American law enforcement must do what it can at the start of interrogation to dissipate the taint of compulsion—is equally prescient, if not more so, when U.S. agents are conducting custodial interrogations in foreign lands, where certain factors impinging on voluntariness will simply be out of their control.").

175. *Id.* at 189-90. According to the court, this was problematic in light of the fact that South African and Kenyan law may have afforded some assistance and presence of counsel during the interrogations, particularly if the defendants could have obtained counsel at their own cost. *Id.* at 190-91.

176. *See* Godsey, *supra* note 45, at 1767-78; Michael R. Hartman, Note, *A Critique of* United States v. Bin Laden *in Light of* Chavez v. Martinez *and the International War on Terror*, 43 COLUM. J. TRANSNAT'L L. 269, 279-80 (2004) (reading *Bin Laden* to require agents acting overseas to determine local law governing the right to counsel and arguing that such practice would constitute "a tremendous burden for law enforcement acting abroad").

Mark Godsey argues that "the *Bin Laden* holding places American law enforcement officers in an untenable position; FBI agents must maneuver through the complexities of foreign law and become temporary diplomats with the sensitive responsibility of negotiating international human rights with the host country." Godsey, *supra* note 45, at 1767. According to Godsey, "[s]uch a situation has never been required by *Miranda* and its progeny, and the Supreme Court made clear in *Berkemer v. McCarty* that the evolving *Miranda* rule must be crafted in a way to avoid placing law enforcement officers in such complicated scenarios." *Id.* at 1767-68.

177. Sievert, *supra* note 110, at 320.

U.S. agents are able to affect "factors impinging on voluntariness" in light of transnational cooperation in the war on terror.[178] After *Bin Laden*, U.S. courts ruling on the admissibility of statements from nonresident foreign nationals have followed its ruling that the Fifth Amendment privilege against self-incrimination applies to nonresident foreign nationals prosecuted in the United States.[179]

The *Bin Laden* court's pre-September 11 view of U.S. actors as powerless bystanders in foreign investigations failed to recognize that collaboration between the United States and foreign nations could be designed to undermine constraints on U.S. actors. For example, in *Abu Ali*, the FBI acknowledged that when it interrogated Abu Ali in Saudi Arabia over the course of five days in September 2003, it asked the Saudis to put Abu Ali in solitary confinement during that period and the Saudis complied.[180] The United States did not seek to admit the fruits of those non-Mirandized, "intelligence-focused" interrogations; instead, it simply relied on confessions obtained by the Saudis, which were subject to lesser scrutiny. Arguably, an unintended consequence of applying *Miranda* abroad is the incentive that U.S. actors will rely on foreign interrogators as their agents. This perverse outcome elevates the importance of a robust analysis of both due process and the "joint venture" doctrine.

C. Joint Ventures

Statements elicited from a defendant by foreign officials are generally admissible in spite of foreign law enforcement officials' failure to provide *Miranda* warnings.[181] In refusing to extend *Miranda* to foreign officers' interrogations, courts have unanimously accepted the premise that the exclusionary rule has little deterrent

178. *Bin Laden*, 132 F. Supp. 2d at 186-87.

179. In *United States v. Karake*, 443 F. Supp. 2d 8, 90 (D.D.C. 2006), the court cited *Bin Laden* and deemed the *Miranda* warnings provided to the Rwandan defendants outside of the United States to be inadequate, recognizing that "the language used to issue *Miranda* warnings in the United States is not appropriate for overseas interrogations" because "the [standard] domestic warnings promise rights that the United States government" may not be able to provide abroad, "such as the provision of legal counsel at government expense." In *Karake*, whether *Miranda* applied to the overseas interrogations of noncitizens by U.S. officials was not a disputed issue, as the government conceded that it applies when U.S. agents participate in the interrogation. *Id.* at 13 n.2; *cf.* Bear Sterns & Co. v. Wyler, 182 F. Supp. 2d 679 (N.D. Ill. 2002).

180. *See* United States v. Abu Ali, 395 F. Supp. 2d 338, 343 (E.D. Va. 2005).

181. United States v. Chavarria, 443 F.2d 904, 905 (9th Cir. 1971) ("[S]o long as the trustworthiness of the confession satisfies legal standards, the fact that the defendant was not given *Miranda* warnings before questioning by foreign police will not, by itself, render his confession inadmissible.").

effect upon the conduct of foreign officials.[182] However, in certain circumstances, even when incriminating statements are obtained through foreign officials, *Miranda* may still apply.[183] In those instances, application of *Miranda* depends upon whether a "joint venture" exists between the United States and foreign law enforcement officials with respect to the relevant custodial interrogation or whether an agency relationship exists between foreign officers and U.S. authorities.[184]

Courts have interpreted the "joint venture" doctrine narrowly, requiring a high level of involvement—"active" or "substantial" participation—by U.S. law enforcement personnel in the specific interrogation or investigative act at issue.[185] In analyzing "joint ventures," courts rarely consider the long-term cooperation or background of mutual facilitation between two countries as relevant to the admissibility of evidence or a confession. In light of that narrow focus, courts rarely find that cooperation between U.S. law enforcement and foreign governments rises to the level of a joint venture or agency relationship.

For example, in *Pfeifer v. United States Bureau of Prisons*[186] the United States Court of Appeals for the Ninth Circuit rejected a claim by a convicted prisoner that the presence of an U.S. DEA agent who was in the room and visibly armed during the defendant's interrogation by Mexican officials constituted a joint venture.[187] The court reasoned that the armed agent's presence alone did "not

182. *See, e.g.*, United States v. Emery, 591 F.2d 1266 (9th Cir. 1978); United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972); *Chavarria*, 443 F.2d at 905 ("*Miranda* was intended as a deterrent to unlawful police interrogations. When the interrogation is by the authorities of a foreign jurisdiction, the exclusionary rule has little or no effect upon the conduct of foreign police.").

183. *Emery*, 591 F.2d at 1268.

184. *See, e.g.*, United States v. Maturo, 982 F.2d 57, 61 (2d Cir. 1992). Even when U.S. officials participate in foreign interrogations in less direct ways, statements obtained in violation of *Miranda* could still be subject to suppression when "the conduct of foreign law enforcement officials renders them agents, or virtual agents, of United States officials." United States v. Karake, 281 F. Supp. 2d 302, 308 (D.D.C. 2003).

185. *See, e.g.*, United States v. Yousef, 327 F.3d 56, 145 (2d Cir. 2003); United States v. Bagaric, 706 F.2d 42, 69 (2d Cir. 1983); United States v. Bin Laden, 132 F. Supp. 2d 168, 187 (S.D.N.Y. 2001) (citing line of cases "uniformly recogniz[ing]" that a lack of *Miranda* warnings provided by foreign officials "will still lead to suppression if U.S. law enforcement themselves actively participated in the questioning"); *see also* United States v. Trenary, 473 F.2d 680, 682 (9th Cir. 1973); United States v. Lopez-Imitola, No. 03 CR.294 (RPP), 2004 WL 2534153, at *2 (S.D.N.Y. Nov. 9, 2004); United States v. Lira, 515 F.2d 68, 70-71 (2d Cir. 1975).

186. 615 F.2d 873 (9th Cir. 1980).

187. *Id.* at 877.

constitute substantial participation by a federal agent in the activities of Mexican officials leading to Pfeifer's conviction."[188]

Similarly, in *United States v. Heller*,[189] the United States Court of Appeals for the Fifth Circuit ruled that the interrogation of a defendant convicted of counterfeiting charges after his arrest by British officials did not violate the requirements of the Fifth Amendment because of the absence of *Miranda* warnings.[190] The court rejected the defendant's claim that a joint venture existed on account of the fact that his arrest by British officials ensued after they received a tip from a Secret Service agent.[191] Acknowledging that "but for a tip from an American official appellant probably would not have been arrested,"[192] the court still concluded that the "participation of American law enforcement officers in appellant's arrest was peripheral at most."[193]

One exception to the norm in the "joint venture" jurisprudence is *United States v. Emery*.[194] In that case, the United States Court of Appeals for the Ninth Circuit found that a joint venture existed between U.S. and Mexican officials and suppressed the defendant's inculpatory statements to Mexican agents in the absence of *Miranda* warnings.[195] In *Emery*, Mexican officials arrested the defendant after a DEA agent alerted them to a possible drug transaction.[196] That DEA agent was present during an undercover marijuana sale to the defendant and during the subsequent arrest, search, and interrogation by the Mexican police.[197] Emery, who never received *Miranda* warnings, made incriminating statements about his involvement in a drug trafficking scheme.[198]

The district court convicted on the basis of his statements and the Ninth Circuit reversed.[199] The Ninth Circuit held that a joint venture existed between the U.S. and Mexican authorities because the DEA agent "substantially participated in the entire arrest."[200] The court noted that the agent alerted the Mexican police to the possible activity and coordinated airport surveillance; he also

188. *Id.*
189. 625 F.2d 594 (5th Cir. 1980).
190. *Id.* at 599-600.
191. *Id.* at 596, 599-600.
192. *Id.* at 600.
193. *Id.* at 599-600.
194. 591 F.2d 1266 (9th Cir. 1978).
195. *Id.* at 1268.
196. *Id.* at 1267.
197. *Id.*
198. *Id.*
199. *Id.* at 1268.
200. *Id.*

supplied a pilot for the plane that was to pick up the drugs in the undercover operation.[201] The court reasoned that the deterrent rationale of *Miranda* had force in these circumstances such that its constitutional safeguards "should not be circumvented merely because the interrogation was conducted by foreign officials in a foreign county."[202]

Emery is significant in that the court did not limit its inquiry to the role of U.S. officials in the interrogation that produced the incriminating statements. Rather, the court looked at the entire course of cooperative conduct when evaluating whether a joint venture existed. Arguably, the participation of U.S. officials in the actual interrogation, which led to suppression in *Emery*, was less substantial than the participation of the FBI and Secret Service agents in *Abu Ali*, where the court found that no joint venture existed.[203] In *Emery*, U.S. officials did not submit questions to the defendant during the interrogation, although a DEA agent was present. In *Abu Ali*, U.S. officials watched the interrogation—albeit surreptitiously—and submitted at least six questions for the defendant, which the Saudis posed to Abu Ali. United States officials also interrogated Abu Ali separately over the course of four nights in

201. *Id.*

202. *Id.*

203. The United States Court of Appeals for the Fourth Circuit affirmed the lower court's decision, concluding that the June 15, 2003 interrogation of Abu Ali was not a joint venture between the United States and Saudi Arabia because the United States, "lacking any investigative control or authority, did not 'actively' or 'substantially' participate." United States v. Abu Ali, 528 F.3d 210, 230 (4th Cir. 2008). The court refused to find a joint venture based solely on the fact that U.S. officials posed questions for the Saudis to ask Abu Ali, reasoning that such conduct did not amount to "substantial participation." *Id.* The court also reasoned that requiring *Miranda* warnings in these circumstances would create a chilling effect, "potentially discourag[ing] the United States and its allies from cooperating in criminal investigations of an international scope. . . . Such an unwarranted hindrance to international cooperation would be especially troublesome in the global fight against terrorism." *Id.* Significantly absent from the court's reasoning, however, was any discussion of the policies animating *Miranda* and whether compliance with its mandates had the potential to deter U.S. actors from misconduct and to protect Abu Ali's Fifth Amendment rights. Judge Motz dissented from this part of the majority's decision and would have found that Abu Ali's June 15 interrogation constituted a joint venture. *Id.* n.6 ("Whatever else 'active' or 'substantial' participation may mean, when United States law enforcement officials propose the questions propounded by foreign law enforcement officials, and those questions are asked in the presence of, and in consultation with United States law enforcement officials, this must constitute 'active' or 'substantial' participation."). Judge Motz reasoned that to hold otherwise would "permit[] United States law enforcement officers to strip United States citizens abroad of their constitutional rights simply by having foreign law enforcement officers ask the questions. This cannot be the law." *Id.*

September 2003, explaining later at his suppression hearing that their efforts were intelligence focused.[204]

Although courts have not spoken uniformly on the level of cooperation required for a joint venture,[205] most courts evaluating alleged "joint ventures" dismiss substantial investigative cooperation between two countries in a particular case in favor of focusing on the role of U.S. agents in a specific interrogation or arrest.[206] Given what Ethan A. Nadelmann has described as "the emergence of a transnational police community and subculture . . . powerfully shaped by the fact of U.S. involvement,"[207] there is an arguable disconnect between the reality of transnational cooperation and courts' unwillingness to extend *Miranda* protections abroad.

IV. SAFEGUARDING CRIMINAL TRIALS FROM TORTURE EVIDENCE OBTAINED ABROAD

To ensure that U.S. criminal trials do not unwittingly sanction evidence obtained by torture and coercion abroad, U.S. courts must first acknowledge a paradigm shift in transnational cooperation in the prosecution of crimes, particularly those related to terrorism. Courts must recognize that the U.S. government's pursuit of partnerships with foreign governments willing to detain and interrogate terrorism suspects through torture beyond the United States[208] warrants greater judicial vigilance when analyzing confessions obtained abroad.

A number of factors and practices would further enable vigorous scrutiny of extraterritorial confessions. First, at a minimum, courts must ensure that the standards for determining the voluntariness of extraterritorial confessions applicable to domestic stationhouse

204. United States v. Abu Ali, 395 F. Supp. 2d 338, 356 (E.D. Va. 2005).

205. United States v. Yousef, 327 F.3d 56, 146 (2d Cir. 2003) ("The Second Circuit . . . has failed to define [the] precise contours [of the joint venture doctrine] in speculating that [it] may also apply where United States officials, although asking no questions directly, use foreign officials as their interrogation agents in order to circumvent the requirements of *Miranda*."); *see also* United States v. Suchit, 480 F. Supp. 2d 39, 56 n.24 (D.D.C. 2007) (noting lack of consensus on what constitutes a "joint venture").

206. *See* United States v. Mundt, 508 F.2d 904, 907 (10th Cir. 1974) (finding that even though DEA agent played a "substantial role in the events leading up to [the defendant's] arrest" by Peruvian officials, his role in the sting operation was insufficient to be deemed a joint venture). Similar to *Abu Ali*, the court in *Mundt* found no joint venture even though the DEA agent met with the defendant and "talked to him" in a Peruvian prison after his arrest. *Id.* at 906-07. The judge concluded that the DEA agent was not—at that time—seeking evidence for use in an American case and that the Peruvians were in ultimate control. *See id.* at 907.

207. NADELMANN, *supra* note 99, at 188.

208. *See* Priest, supra note 36; Mayer, *supra* note 2.

interrogations apply equally to claims of abuse at the hands of foreign actors. Second, courts must evaluate the credibility of foreign witnesses and defendants' claims of extraterritorial torture against country conditions evidence, human rights reporting, and pattern and practice evidence relevant to foreign governments' use of torture. Third, courts must additionally ensure that the U.S. justice system's insistence on openness in the criminal trial process is not diluted by greater reliance on foreign actors and nations.[209] That is true particularly where the case involves cooperation with a foreign country such as Saudi Arabia, whose infamous penchant for secrecy in the criminal justice system creates a safe harbor for inquisitorial practices that inevitably lead to oppression. Fourth, courts called upon to evaluate claims of torture abroad should better understand the nature of torture and evidence of its occurrence. Finally, courts should reconsider the standards employed to evaluate the constitutional significance of transnational cooperation in the investigation of crimes. In light of the United States' pursuit of partnerships with foreign governments willing to detain and interrogate through torture,[210] courts addressing alleged "joint ventures" in terrorism cases in the post–September 11 period should start their analysis with an acknowledgement of the extant potential for abuse.

A. Ensuring Equivalent Voluntariness Abroad

In the wake of the war on terror, courts are vulnerable to unwittingly admitting confessions coerced through torture by relaxing judicial standards for determining the voluntariness of extraterritorial confessions.[211] For example, in the domestic context, courts have suppressed statements elicited from defendants subjected to solitary confinement and incommunicado detention, finding those conditions to be coercive.[212] In *Stein v. New York*,[213] the Supreme Court noted the importance of considering the practice of incommunicado detention without charges when determining

209. *See generally* Waldron, *supra* note 27.

210. Priest, *supra* note 36; Mayer, *supra* note 2.

211. *See, e.g.*, United States v. Marzook, 435 F. Supp. 2d 708, 708 (N.D. Ill. 2006).

212. *See, e.g.*, Davis v. North Carolina, 384 U.S. 737, 744-46 (1966) (noting that limiting communication with the outside world can have a "significant effect" on an accused's strength, ability to resist, and belief that his custodians intend "to keep him under absolute control where they could subject him to questioning at will" until he confesses); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (finding that thirty-six hours of continuous interrogation during a period in which the defendant was held incommunicado and without sleep or rest were so inherently coercive that it rendered the defendant's confession involuntary).

213. 346 U.S. 156 (1953).

voluntariness of confessions, recognizing that the practice typically facilitates the use of force during interrogation. The Court stated, "[T]o delay arraignment, meanwhile holding the suspect incommunicado, facilitates and usually accompanies use of 'third-degree' methods."[214] Thus, the Court noted it "regard[s] such occurrences as relevant circumstantial evidence in the inquiry as to physical or psychological coercion."[215]

Although the Supreme Court has long viewed incommunicado detention as a red flag often suggestive of coercion, in *Abu Ali*, the court disregarded unrefuted evidence that the Saudis held Abu Ali incommunicado and in solitary confinement for periods throughout his detention without charges.[216] Courts may disregard extraterritorial conditions that would likely be deemed coercive in the domestic setting,[217] where such conditions are endemic to the foreign government's prison or detention facilities. If a foreign government's detention conditions and practices are systemically deplorable or if incommunicado detention is viewed as an inevitable aspect of detention far from the United States, courts may be hesitant to declare all confessions elicited in those conditions to be coercive or abusive. Such reasoning is not a sufficient basis for ignoring material factors in the totality of the circumstances bearing on the voluntariness of an individual defendant's confession, and courts must be willing to exclude such evidence if U.S. officials are unable to dissipate the taint of compulsion.

In 2006, Australia's Victoria Court of Appeal did just that. The court held in *R v. Thomas*[218] that in certain circumstances the prosecution of terrorism suspects may be foreclosed where officials rely exclusively on extraterritorial confessions. In that case, the state relied on a confession obtained from an Australian terrorism suspect after prolonged detention in Pakistan.[219] Finding that Australian

214. *Id.* at 186.

215. *Id.*

216. In *Abu Ali*, a U.S. government witness, a consular official from the Department of State who visited Abu Ali in prison in Saudi Arabia, testified that Abu Ali remained in solitary confinement from September 2003 until January 2004. United States v. Abu Ali, 395 F. Supp. 2d 338, 354 (E.D. Va. 2005). Abu Ali also claimed he was subject to solitary confinement and incommunicado detention from the first day of his arrest until he provided his videotaped confession forty-five days later. *Id.* at 353-54. The court did not give weight to the use of solitary confinement in its analysis of voluntariness. *Id.* at 381. Regional and international human rights bodies have recognized that prolonged solitary confinement may amount to torture. *See, e.g.*, Loayza Tamayo Case, 1997 Inter-Am. Ct. H.R. (ser. C) No. 33 (Sept. 17, 1997).

217. *See Davis*, 384 U.S. at 744-46; *Ashcraft*, 322 U.S. at 143.

218. R v. Thomas (2006) 14 V.R. 475 (finding that evidence of an interview containing involuntary admissions should not have been admitted).

219. *Id.* at 601.

officials could not dissipate the coercive effect of conditions and interrogations in Pakistan, the court noted:

> [T]here was only one course properly open to the investigating officials in light of the position taken by the Pakistani authorities. It was to acknowledge that no formal record of interview could be conducted so long as the applicant was in Pakistan since, as the investigating officials appreciated, any such interview would be unlawful, that is, would be contrary to Australian law.[220]

B. Evaluating Torture Claims in Context

To fully appraise the credibility of a defendant's claim of extraterritorial coercion or torture, courts cannot divorce the allegation from the context of the relevant nation's human rights practices.[221] As adjudicators evaluating torture claims in the international law context have long recognized, a nation's torture and interrogation practices are highly relevant to evaluating the credibility of a country's denials of torture.[222]

In *Abu Ali*, the court evaluated the "voluntariness" of Abu Ali's confession by appraising the credibility of individual Saudi agents and Abu Ali, without assessing the agents' denials against Saudi Arabia's record of torture. The court denied defense lawyers the ability to present evidence pertaining to "Saudi Arabia's human rights record, its record on torture, and even particularly on the record of the Mabahith al-Amma," the Saudi Secret police that interrogated Abu Ali.[223] As a result, Mabahith agents testified at Abu Ali's trial that they have a governmental policy against torture and Abu Ali was precluded from effectively challenging that claim.[224]

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220. *Id.*

221. *See* United States v. Marzook, 435 F. Supp. 2d 708 (N.D. Ill. 2006); United States v. Karake, 443 F. Supp. 2d 8, 61-62 (D.D.C. 2006); *Abu Ali*, 395 F. Supp. 2d at 386 ("In making this judgment, the Court is mindful that there have been news reports accusing the Saudi government of engaging in and condoning torture or human rights violations.").

222. *See, e.g.*, Nevmerzhitsky v. Ukraine, 43 Eur. Ct. H.R. 32 (2005) (holding that detention conditions in the Ukraine as inspected by the Committee for the Prevention of Torture were consistent with the applicant's claim of torture); Mikheyev v. Russia, App. No. 77617/01 (Eur. Ct. H.R. Jan. 26, 2006) (finding that victim was "seriously ill-treated by agents of the State" while in Russian detention in part by crediting evidence that other detainees had suffered, or had been threatened with, similar abuse and ill-treatment while detained).

223. AMNESTY INT'L, THE TRIAL OF AHMED ABU ALI—FINDINGS OF AMNESTY INTERNATIONAL'S TRIAL OBSERVATION 5 (2005), *available at* http://amnesty.org/library/index/engamr511922005.

224. *Abu Ali*, 395 F. Supp. 2d at 345.

The judge also denied the defense an opportunity to present two British witnesses who claimed they could speak to Saudi Arabia's pattern and practice of torture based on personal experience.[225] Those witnesses were held in al-Ha'ir prison at the same time as Abu Ali and claimed that the Saudis tortured them to confess to acts of terrorism.[226] The court rejected that evidence, ruling that only evidence directly related to Abu Ali's interrogation was admissible.[227] Although the court noted that it "was mindful that there have been news reports accusing the Saudi government of engaging in and condoning torture or human rights violations," the court dismissed those accounts as irrelevant to evaluating the credibility of Abu Ali's torture claims.[228] The court largely took the Saudi interrogators at their word, in spite of significant evidence that torture is endemic in the Saudi criminal justice system[229] and the evidence that torturers nearly always deny their acts.[230]

Confession cases involving prosecutions of black defendants in the early twentieth century in the American South illustrate the danger of assessing the credibility of government denials of torture without considering the relevant pattern or practice. In criminal cases from that time, scores of black defendants alleged that they falsely confessed only after being brutally tortured at the hands of police or white mobs intervening as vigilantes during the "investigation" of crimes.[231] Invariably, white police officers called

225. AMNESTY INT'L, *supra* note 223, at 5.

226. *Id.*

227. *Id.*

228. *Abu Ali*, 395 F. Supp. 2d at 386.

229. *See* AMNESTY INT'L, SAUDI ARABIA: A SECRET STATE OF SUFFERING (2000), *available at* http://www.amnesty.org/en/library/info/MDE23/001/2000 (last visited Feb. 14, 2008) (stating that "torture is endemic" in the Saudi criminal justice system and the "government spares no effort to keep its appalling human rights record a secret," including refusing to let international monitors or human rights groups researchers in the country or access to information about the regime's human rights record); Human Rights Watch, Human Rights Watch World Report 1998, Saudi Arabia, http://www.hrw.org/worldreport/Mideast-08.htm (noting prevalence of detention and torture in both political and criminal cases in Saudi Arabia).

230. *See* Catherine Powell, *Tinkering with Torture in the Aftermath of* Hamdan*: Testing the Relationship Between Internationalism and Constitutionalism*, 40 N.Y.U. J. INT'L L. & POL. 723, 742-44 (2008).

231. *See* Newman v. State, 187 S.W.2d 559, 563 (Tex. Crim. App. 1945); *see, e.g.* Williams v. United States, 341 U.S. 97, 98-104 (1951) (affirming officers' conviction for criminal deprivation of constitutional rights where they brutally beat four defendants with rubber hose, club, and other implements to force a confession); Screws v. United States, 325 U.S. 91, 92, 106 (1945) (plurality opinion) (holding that officers who beat suspect to death with a blackjack could be liable for criminal deprivation of constitutional rights); Fisher v. State, 110 So. 361 (Miss. 1926); White v. State, 91 So. 903, 904 (Miss. 1922).

upon to testify at suppression hearings denied subjecting the defendants to abuse.[232] In those cases in which southern courts ruling on the admissibility of allegedly coerced confessions did not sufficiently evaluate the pattern and practice of abuse directed at black suspects during that time, later generations are left wondering whether justice was done.

For example, in *Newman v. State*, a 1945 case decided by the Texas Court of Criminal Appeals, the court rejected a defendant's claim that two white police officers tortured him until he falsely confessed to a murder.[233] The defendant claimed that after his arrest, two officers took him from the jail to retrieve evidence of the crime and while returning to the jail "carried him off the road and near a certain church . . . whipped him across the back, hips, and breast with a rubber hose three or four feet in length, while he was handcuffed to a tree."[234] The court rejected the defendant's allegations of torture because he never complained or "mentioned . . . that he was whipped or mistreated" when later questioned by a special prosecuting attorney.[235] The court acknowledged, however, that one of the deputy sheriffs, whom the defendant claimed had whipped him, "came into the room after the statement had been transcribed and while it was being read over to the appellant by the stenographer."[236] Without assurance that the court fully considered the context of the alleged abuse and the pattern of similar abuses against other black defendants during that time, modern readers of *Newman* may not be persuaded by the court's easy conclusion that the defendant's allegations were "abundantly disproven."[237]

Similarly, courts should consider foreign nations' human rights practices because domestic adjudicators are not otherwise well-positioned to assess allegations and denials of extraterritorial

232. *See Newman*, 187 S.W.2d at 563. *See generally* Michael J. Klarman, *The Racial Origins Of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) (arguing that "egregious exemplars of Jim Crow justice" in the South "provided the occasion for the birth of modern criminal procedure" by requiring the Supreme Court "to assume the function of superintending the state criminal process").

233. *Newman*, 187 S.W.2d at 568.

234. *Id.* at 563.

235. *Id.* The court did note, however, that a month after the alleged whipping, the defendant proffered his body and claimed that "there were, then, welts upon his body made by the whipping." *Id.* at 564. The court gave little weight to the evidence that the defendant made this contemporaneous allegation, noting "no supporting witness attested the fact that there were any welts upon his body at that time." *Id.*

236. *Id.*

237. *Id.* Equally troubling is the court's reasoning that the defendant was fabricating his allegations simply because he did not report the abuse while he was still in the custody of those who could harm him again. *Id.* at 564-65.

torture. As noted by the Supreme Court in *Stein v. New York*,[238] one reason federal courts afford state trial courts significant deference with respect to factual determinations relating to coercion is the notion that the judge and jury are able to observe witnesses while "knowing local conditions" and while being "close to the scene of events."[239] When the interrogation and alleged coercion occur in a foreign country, where the defendant is in the custody of foreign actors the court knows little about, trial judges must not shun evidence that would educate the court about local conditions where the confession took place.

Some courts addressing extraterritorial confessions seem to appreciate that human rights reporting and pattern and practice evidence have a role in evaluating the credibility of a foreign actor's denials of coercion or torture. For example, in *Marzook*, the court permitted the defendant to introduce evidence and witnesses bearing on Israel's use of stress and duress techniques during the period of the defendant's detention.[240] The court, however, did not give this evidence great weight and, instead, credited the Israeli interrogators' claims that U.S. citizens like the defendant were not subjected to those practices.[241] The court also evaluated certain evidence bearing on the Israeli witnesses' credibility in camera, denying the defendant the ability to challenge the witnesses on the basis of this evidence.[242]

United States v. Karake[243] stands out among criminal prosecutions involving claims of extraterritorial interrogation. In evaluating the credibility of a Rwandan official who denied torturing the defendants, the court considered Rwanda's record on torture, specifically at Camp Kami, the Rwandan military camp where the defendants were held.[244] In contrast to *Abu Ali*, the court also permitted witnesses to testify who claimed to have been tortured at Camp Kami in the years previous to the defendants' detention.[245] The

238. 346 U.S. 156 (1953).

239. *Id.* at 180-81.

240. United States v. Marzook, 435 F. Supp. 2d 708, 730 (N.D. Ill. 2006).

241. *Id.* at 777.

242. *Id.* at 749. That evidence was heard ex parte and in camera in accordance with the Classified Information Procedures Act (CIPA). In dismissing concerns that the defendant was disadvantaged by the inability to review that evidence, the court stated "[d]efendant had more than sufficient opportunity to cross examine [the interrogators] . . . [t]o the extent that the ex parte testimony was relevant, it went, at best, to the credibility of the testifying ISA officials." *Id.* at 749.

243. 443 F. Supp. 2d 8 (D.D.C. 2006).

244. *Id.* at 61-62 (considering Department of State reports and other documents reporting rampant human rights violations in Rwanda and at Camp Kami).

245. *Id.* at 61.

court cited this evidence in rejecting the official's denial of torture as incredible.[246]

The *Karake* court's consideration of country-conditions evidence to evaluate the credibility of a foreign official's denials of torture is consistent with the practice of foreign courts and international human rights bodies.[247] In the context of domestic stationhouse interrogation, courts have similarly recognized the significance of evidence showing a pattern or practice of police brutality and torture in helping to determine the credibility of suppression hearing witnesses.[248] In other domestic proceedings in which adjudicators are called upon to determine the credibility of torture claims—including § 1983 police misconduct cases and asylum proceedings—courts have similarly acknowledged the vital role of this evidence in discerning the credibility of torture claims and denials.[249]

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246. *Id.*

247. *See, e.g.*, Nevmerzhitsky v. Ukraine, 43 Eur. Ct. H.R. 32 (2005) (citing detention conditions in the Ukraine as consistent with the applicant's claim of torture); Mikheyev v. Russia, App. No. 77617/01 (Eur. Ct. H.R. Jan. 26, 2006) (crediting evidence that other detainees had suffered, or had been threatened with, abuse and ill-treatment similar to victim); *see also* Fionnuala Ní Aoláin, *The European Convention on Human Rights and Its Prohibition on Torture*, *in* TORTURE, *supra* note 18, at 213, 220 ("As many observers have noted, torture and other forms of inhuman and degrading treatment are by and large not sporadic occurrences within institutional settings; rather they are evidence of [a] systemic problem indicating widespread resort to such measures by officials of the state.").

248. *See* People v. Patterson, 735 N.E.2d 616, 645 (Ill. 2000) (noting that defendant's allegations of torture by Chicago police officers were consistent with a report by police department's office of professional standards, which found that torture was systemic and methodical at Chicago's Area 2 police station under the command of Lt. Jon Burge). On hearing for postconviction relief, the Illinois Supreme Court concluded that, in light of the OPS report and the relevant prior allegations of torture, the defendant had presented sufficient evidence to warrant a hearing to evaluate his torture claims. *Id.* Specifically, the court noted that at a hearing the trial court could determine whether "any of the officers who interrogated [the] defendant may have participated in systemic and methodical interrogation abuse present at [the] Area 2" precinct and to evaluate the credibility of officers who testified at the defendant's suppression hearing, whom the court noted "might have been impeached as a result." *Id.; cf.* Hinton v. Uchtman, 395 F.3d 810 (7th Cir. 2005).

249. Asylum adjudicators consistently evaluate the credibility of an applicant's claims of torture by reference to human rights reporting regarding conditions in the country where the applicant fears persecution. *See, e.g.*, 8 U.S.C. § 1158(b)(1)(B)(iii) (2006) ("[A] trier of fact may base a credibility determination on . . . the consistency [of] the applicant's . . . statements . . . with other evidence of record (including the reports of the Department of State on country conditions) . . . ."); 8 C.F.R. § 208.12(a) (2006) ("In deciding an asylum application, or in deciding whether the alien has a credible fear of persecution . . . the asylum officer may rely on material provided by the Department of State . . . .").

For example, in *Wilson v. City of Chicago*,[250] the plaintiff, a convicted murderer, brought a civil rights action against his interrogating officers and the City of Chicago, seeking civil redress for torture. The Illinois Supreme Court had already excluded Wilson's confession from his second murder trial because of the evidence that police officers tortured him to confess.[251] Wilson claimed that on the day of his arrest, several Chicago police officers, including Lieutenant Jon Burge, punched, kicked, and smothered him with a plastic bag, subjected him to electric shock, and burned him against a hot radiator until he confessed.[252] The Chicago Police Department dismissed Burge after an investigation into claims that he and his associates tortured nearly 200 African American men in the Area 2 and Area 3 police stations on the South Side of Chicago from the 1970s through the 1990s.[253] Addressing Wilson's § 1983 claims, the Seventh Circuit held that the lower court had erred in excluding the testimony of two other persons who claimed that Burge tortured them during custodial interrogation.[254] The court reasoned that the evidence was "plainly relevant" to evaluating the likelihood that Wilson's torture took place, as well as the credibility of Burge, who denied that he ever subjected a defendant to electric shock.[255]

Given the United States' acknowledged pursuit of partnerships with foreign governments willing to detain and interrogate terrorism suspects through torture,[256] courts evaluating the admissibility of extraterritorial confessions must be similarly cognizant of foreign nations' torture and interrogation practices.

C. Resisting Greater Secrecy in Criminal Trials

Greater reliance on extraterritorial interrogations in the war on terror risks movement toward greater secrecy in U.S. criminal trials.

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250. 6 F.3d 1233 (7th Cir. 1993).

251. *Id.* at 1236.

252. *Id.*

253. *See* Eric Ruder, *The Chicago Files: Police Torture in America*, COUNTERPUNCH, June 9, 2006, http://www.counterpunch.org/ruder06092006.html. Many victims of Lt. Burge's interrogations allege that they were tortured through electrical shocks, including the use of a cattle prod and hand-cranked electrical device attached to a black box. John Conroy, *The Mysterious Third Device*, CHICAGO READER, Feb. 4, 2005, *available at* http://www.chicagoreader.com/policetorture/thirddevice/; *see also Hinton*, 395 F.3d at 822 (Woods, J., concurring) (comparing defendant's descriptions of Chicago Police Department's use of torture at Area 2 as "reminiscent of the news reports of 2004 concerning the notorious Abu Ghraib"); HUM. RTS. WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES (1998), *available at* http://www.hrw.org/reports98/police/index.htm.

254. *Wilson*, 6 F.3d at 1238.

255. *Id.*

256. *See* Mayer, *supra* note 2.

The United States' detention and interrogation practices abroad are built—and depend upon—extreme secrecy. For example, the government has maintained that the CIA's secret detention of terrorism suspects at clandestine black site prisons abroad is an "'irreplaceable' tool for combating terrorism" and has vehemently protected the secrecy of the program.[257] In the fall of 2006, the government sought to prevent Majid Khan, one of several "high-value" detainees who were transferred to the U.S. detention facility at Guantanamo Bay after being held for three years at a secret black site prison abroad, from speaking to lawyers about his interrogations and treatment abroad.[258] The government claimed that Khan's extraterritorial detention and treatment constituted "a secret that should never be shared with the public."[259] The government has also invoked the "state secrets privilege"—a previously rarely used privilege that permits the government to stop the release of information in a lawsuit that would cause harm to national security—to dismiss lawsuits by victims of extraordinary rendition in the interest of maintaining the program's secrecy.[260] While the CIA's interrogation and detention practices fill the outer spectrum of government secrecy in terrorism investigations, the government's inclination toward secrecy to preserve transnational partnerships is reflected in recent terrorism trials as well. For example, in both *Abu Ali* and *Marzook*, courts permitted foreign interrogators to testify using pseudonyms,[261] and in *Marzook*, the court considered ex parte, in camera evidence under the Classified Information Procedures Act that the court acknowledged was related to the witnesses' credibility.[262]

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257. *See* Mayer, *supra* note 24, at 46.

258. *See* Leonnig & Rich, *supra* note 37.

259. *Id.*

260. *See* El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007) (affirming dismissal on basis of state secrets privilege). In *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), the government also moved to dismiss the case by asserting the state secrets privilege, on grounds that the reasons Arar was sent to Syria instead of Canada constituted state secrets. *See* Center for Consittutional Rights, Arar v. Ashcroft Timeline, http://ccrjustice.org/ourcases/current-cases/arar-v.-ashcroft (last visited Mar. 27, 2008). The district court never reached that claim because it dismissed the case on other grounds. *See Arar*, 414 F. Supp. 2d at 252. The Second Circuit, however, pointed to the government's invocation of the privilege as a "further special factor counseling us to hesitate" before recognizing Arar's claims under the doctrine of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Arar v. Ashcroft, 532 F.3d 157, 183 (2d Cir. 2008).

261. *See* United States v. Marzook, 435 F. Supp. 2d 708, 715 (N.D. Ill. 2006); Eric Lichtbaum, *U.S. Details Charges Against Student Linked to Plot Against Bush*, N.Y. TIMES, Sept. 20, 2005, at A22.

262. *Marzook*, 435 F. Supp. 2d at 746-47.

Secrecy is not only largely foreign to U.S. criminal trials,[263] it undermines the already difficult task of determining whether torture occurred abroad.[264] Moreover, secrecy undermines one of the few deterrents against the use of torture by foreign governments: the risk that their practices will be exposed and their reputations damaged in the world community.[265]

In addition, courts must be wary that the United States' greater reliance on foreign actors to investigate terrorism suspects does not permit a slow return to the furtive investigation practices rejected by the Constitution.[266] Practices such as detention without charges and incommunicado detention should not be sanctioned as valid investigative practices, as they were in *Abu Ali*.

Although foreign security agents may arguably have legitimate national security interests to protect, courts must balance these claims against a skeptical recognition that there are strong incentives—not based on security concerns—for foreign governments

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263. *See generally* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (noting presumptive openness of criminal trials in both England and the United States). In *Abu Ali* and *Marzook*, federal courts allowed security agents from Israel and Saudi Arabia to testify using pseudonyms during suppression hearing testimony. *See Marzook*, 435 F. Supp. 2d at 715; Lichtbaum, *supra* note 261, at 22. Moreover, the court in *Marzook* allowed portions of the hearing to be conducted in camera under CIPA. *Marzook*, 435 F. Supp. 2d at 715.

264. *See* Mammadov v. Azerbaijan, App. No. 34445/04, ¶ 74 (Eur. Ct. H.R. Jan. 11, 2007), *available at* http://www.echr.coe.int/echr.

265. *See* Oona A. Hathaway, *The Promise and Limits of the International Law of Torture*, *in* TORTURE, *supra* note 18, at 199, 207 (arguing that in "the international law of torture—reputational concerns often play a more significant role than do the much-studied sanctions imposed by a treaty in states' decisions to commit to international legal limits on their torture practices and then abide by or shirk them"); *see also* Ní Aoláin, *supra* note 247, at 222 ("[T]he consequences in political terms for a state of being deemed a gross violator of human rights may be quite extensive in political terms, when participation in international human rights structures is a defining feature (externally and internally) of its constitutionalism and democratic standing."). Furthermore, "membership of human [rights] regimes is increasingly deemed to be a precursor to the membership of the elite international economic communities." *Id.* at 222-23.

266. *See* Stein v. New York, 346 U.S. 156, 197 (1953) (Black, J., dissenting). In an impassioned dissent, Justice Black noted the danger of incommunicado detention and allowing greater secrecy in criminal investigation:

> Tyrannies have always subjected life and liberty to such secret inquisitorial and oppressive practices. But in many cases, beginning at least as early as Chambers v. State of Florida, 309 U.S. 227, this Court set aside state convictions as violative of due process when based on confessions extracted by state police while suspects were held incommunicado. That line of cases is greatly weakened if not repudiated by today's sanction of the arbitrary seizure and secret questioning of the defendants here. State police wishing to seize and hold people incommunicado are now given a green light.

Id.

to cloak their interrogation and torture practices in secrecy.[267] Most importantly, where foreign governments refuse to assist in a domestic prosecution without assurance of secrecy that would run counter to U.S. principles of openness in criminal trials, U.S. courts must be willing to deprive the prosecution of the benefit of foreign witnesses and evidence.[268]

D. Understanding Torture and Proof

The *Karake* decision is significant among other recent extraterritorial confessions cases not only because of the court's thorough examination of Rwanda's pattern and practice of torture, but also because of the role of physical evidence in corroborating the defendant's claims of coercion.[269] Unlike recent cases such as *Abu Ali* and *Marzook*, which turned sharply on the credibility of prosecution witnesses in the absence of conclusive physical evidence, in *Karake* physical evidence that the Rwandans tortured the defendants was overwhelming.[270] The court's decision to suppress the involuntary confessions relied heavily on the defendants' scarring, which the court deemed the "most compelling" evidence of torture and the involuntary nature of the confessions.[271]

The three defendants seeking suppression of involuntary statements in *Karake* presented extensive scarring all over their bodies, much of which they attributed to severe beatings and other forms of torture they endured at Camp Kami, such as being cut with barbed wire and subjected to prolonged, tight shackling of their extremities.[272] The scarring was corroborated "by *both* the defense and government medical experts" who, remarkably, testified unanimously "that the scarring [was] consistent with the physical abuse described by the defendants."[273] Thus, the defendants' physical evidence in *Karake* and the related expert testimony was unusually powerful evidence of abuse. In addition, the fact that the three defendants were tried together provided for valuable corroboration; each defendant's individual account of torture could be compared to

267. *See* Hathaway, *supra* note 265, at 207-09; Ní Aoláin, *supra* note 247, at 222-23.

268. *See* R v. Thomas (2006) 14 V.R. 475 (excluding confession obtained from Australian terrorism suspect in Pakistani prison).

269. *See* United States v. Karake, 443 F. Supp. 2d 8, 61-62 (D.D.C. 2006).

270. *See id.*

271. *Id.*

272. *Id.* at 62-69.

273. *Id.* at 61-62. In addition to the consistent evidence from the defendants, "even the government's expert could not provide any other plausible explanation of how three defendants, all of whom shared the same experience—being housed at Kami for lengthy periods of time under Kibingo's custody—could exhibit exactly the same telltale signs of abuse, including binding, shackling and handcuffing." *Id.* at 69.

the other defendants' similar testimony and provided instant corroboration of a pattern or practice of torture and abuse at Camp Kami.

In the absence of evidence like that at issue in *Karake*, it is exceedingly difficult for adjudicators to evaluate claims of extraterritorial torture. This is particularly true when the alleged acts occur on other continents in conditions that may be unfamiliar to the court and surrounded by considerable secrecy. As the European Court of Human Rights recently noted in *Mammadov v. Azerbaijan*,[274] a case involving a complaint by an Azerbaijani national under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms, "allegations of torture in police custody are extremely difficult for the victim to substantiate if he or she has been isolated from the outside world, without access to doctors, lawyers, family or friends who could provide support and assemble the necessary evidence."[275] Those challenges are arguably all the more present when the allegation involves claims of abuse during prolonged detention of an individual by officials from another government.

Physical evidence alleviates the challenges for courts determining the voluntariness of extraterritorial confessions.[276] United States courts, however, must be wary not to ratchet up their expectation for physical corroboration of torture and mistreatment when evaluating claims of extraterritorial coercion; coercive practices that courts have deemed to produce involuntary confessions in the domestic setting, such as incommunicado detention and solitary confinement, are equally coercive abroad and leave little tangible proof of abuse.[277] Moreover, courts should also recognize that torture

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274. App. No. 34445/04 (Eur. Ct. H.R. Jan. 11, 2007), *available at* http://www.echr.coe.int/echr; *see also* Aksoy v. Turkey, App. No. 21987/93 (Eur. Ct. H.R. Dec. 18, 1996), *available at* http://www.echr.coe.int/echr.

275. *See* Mammadov v. Azerbaijan, App. No. 34445/04, ¶¶ 1, 74 (Eur. Ct. H.R. Jan. 11, 2007), *available at* http://www.echr.coe.int/echr.

276. *See* U.N. HIGH COMM'R FOR HUM. RTS., MANUAL OF EFFECTIVE INVESTIGATION AND DOCUMENTATION OF TORTURE AND OTHER CRUEL INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, U.N. Doc. Sales No. E.10.XIV.1 (1999), *available at* http://physiciansforhumanrights.org/library/documents/reports/istanbul-protocol.pdf [hereinafter ISTANBUL PROTOCOL]. The Istanbul Protocol notes the difficulty of securing physical corroboration of torture allegations:

> Most torture takes place in places where people are held in some form of custody, where preservation of physical evidence or unrestricted access may be initially difficult or even impossible. Investigators must be given authority by the State to obtain unrestricted access to any place or premises and be able to secure the setting where torture allegedly took place.

Id. at 20.

277. *See, e.g.*, United States v. Marzook, 435 F. Supp. 2d 708 (N.D. Ill. 2006). In *Marzook*, the court noted that photographs of the defendant from the time of his

is often purposefully conducted in a manner to avoid scarring, as in the case of electric-shock torture, sensory deprivation, waterboarding, asphyxiation, and countless forms of psychological torture.[278]

Some U.S. courts have exhibited a limited understanding of torture and its results in the domestic stationhouse setting. For example, in *Hinton v. Uchtman*,[279] one of the Chicago Police torture cases, the defendant in a triple murder case claimed at his suppression hearing that police officers at the city's Area 2 precinct extracted his confession through torture.[280] The trial court, however, found the officer's denials of torture more credible than the defendant's allegations and denied his motion to suppress.[281] The defendant was sentenced to life in prison after a bench trial.[282] After the defendant petitioned for postconviction relief, the United States Court of Appeals for the Seventh Circuit exhibited a limited appreciation of the value of pattern and practice evidence when evaluating claims of torture, as well as a lack of familiarity with torture methods.

The court refused to decide whether newly discovered evidence that Hinton presented regarding the endemic and well-documented torture practices at the Area 2 station was sufficient "to demonstrate by clear and convincing evidence that the trial court's credibility determinations [regarding the voluntariness of his confession] were

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interrogation did not "evidence any signs of physical abuse on Defendant's face, head, neck and other exposed areas." *Id.* at 754. However, the defendant claimed that Israeli interrogators primarily tortured him through methods that may not produce physical indicators: psychological torture, stress positions, hooding, sleep deprivation, and sexual humiliation. *Id.* at 714, 755; *cf.* Reck v. Pate, 367 U.S. 433, 440 (1961) ("[P]hysical mistreatment is but one such circumstance [to be considered on the issue of the voluntariness of a confession], albeit a circumstance which by itself weighs heavily.").

278. *See* Interview with Hernan Reyes, Medical Coordinator for Health in Detention, Int'l Comm. of the Red Cross (June 24, 2005), http://www.icrc.org/Web/Eng/siteeng0.nsf/html/audio-torture-Reyes-230605!OpenDocument (noting that many countries have moved away from physical torture to avoid the visible traces of torture that could lead to accountability, but that "the psychological effects, those non-visible effects, were in fact much more serious . . . the worst scars are in the mind"); *see also* MCCOY, *supra* note 115, at 100. For a discussion of methods used by torturers—such as electric shock and "bagging"—in order to avoid physical evidence of trauma on their victims, see Human Rights at Home: The Chicago Police Torture Archive, What is Torture?—Medical Standards for Determining Torture, http://humanrights.uchicago.edu/chicagotorture/whatis2.shtml (excerpting testimony of expert witness Dr. Robert Kirschner in *People v. Cannon*, 688 N.E.2d 693 (1997)).

279. 395 F.3d 810 (7th Cir. 2005).

280. *Id.* at 814.

281. *Id.* at 815.

282. *Id.* at 817.

erroneous."[283] The court based its decision on the "harmless error" doctrine, reasoning that whether Hinton's confession was involuntary, and therefore wrongly admitted, was irrelevant in light of the other overwhelming evidence of guilt leading to his conviction.[284] Nevertheless, the court's discussion of the endemic torture at the Area 2 police station reveals the court's limited regard for this evidence in evaluating the reliability of torture allegations.

For example, the concurring opinion, while recognizing the "mountain of evidence indicat[ing] that torture was an ordinary occurrence at the Area Two station of the Chicago Police Department during the exact time period pertinent to Hinton's case," nevertheless noted that "it was not enough for Hinton to show that Burge had tortured or supervised the torture of a substantial number of other arrestees."[285] According to Judge Wood, "Hinton had to offer some evidence indicating that he himself was the victim of this abuse," which was "exceedingly difficult" given that the trial court "did not credit his account of the torture at all, given the lack of markings on his body or other corroborative evidence."[286] The concurrence failed to recognize the high degree of corroboration provided by Hinton's contemporaneous report of specific forms of torture at his suppression hearing that later tracked with countless other allegations of similar abuse at Area 2 that later came to light.

In addition, both the majority and concurring opinions exhibited an unrealistic expectation of physical corroboration, noting that the trial court's adverse credibility determination was proper because Hinton failed to offer any corroborating evidence at the suppression hearing aside from his own testimony.[287] While Hinton admitted he did not have bruising or extensive lacerations from being beaten, two of the more egregious forms of torture that he claimed he endured would likely not have produced physical evidence of scarring: asphyxiation by having a plastic bag placed over his face and electric shocks to his genitals.[288] Courts' lack of facility in evaluating evidence bearing on the truthfulness of torture claims is also apparent—if not more so—in the extraterritorial setting.

In *Marzook*, the district court rejected the defendant's claims of torture by Israeli security agents, based partly on the lack of medical evidence corroborating the defendant's allegations of physical and

283. *Id.* at 819.

284. *Id.* at 820.

285. *Id.* at 822 (Wood, J., concurring).

286. *Id.*

287. *Id.* at 819 (majority opinion) (noting Hinton "presented the trial judge with a clear question of the credibility of the witnesses, which was properly resolved in the State's favor").

288. *Id.* at 814.

psychological coercion.[289] The defendant claimed that he was hooded with a filthy, rotten-smelling hood and tied with his hands behind him and forced to sit on a low, slanted chair, a stress and duress technique that caused him excruciating pain.[290] He also claimed that Israeli security agents subjected him to sensory deprivation by exposing him to "deafening music and the sounds of people screaming in pain" and handcuffed him in a painful position in a "dark, freezing, closet-sized cell in which [he] could not stand upright, sit or lie down."[291] The court found the defendant's claims of torture to lack credibility largely because of the testimony of Israeli security agents who denied mistreating him and partly based on the lack of medical evidence corroborating his claims.[292] The court failed to reconcile the fact that many of the acts of torture alleged by the defendant were not likely to leave evidence of the abuse.[293]

In recognition of the difficulties adjudicators face in evaluating the credibility of torture allegations, the United Nations has created a set of guidelines called the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (commonly known as the Istanbul Protocol), which aims to "serve as international guidelines for the assessment of persons who allege torture and ill-treatment, for investigating cases of alleged torture and for reporting findings to the judiciary or any other investigative body."[294] United States courts increasingly tasked with evaluating the voluntariness of extraterritorial confessions obtained by foreign governments widely acknowledged to engage in torture should consider several of the Istanbul Protocol's essential principles.

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289. United States v. Marzook, 435 F. Supp. 2d 708, 754-55 (N.D. Ill. 2006).

290. *Id.* at 739. Although the court employed a thorough analysis of the defendant's treatment during interrogations by his primary interrogator, it did not fully resolve the defendant's report to a U.S. embassy official—who interviewed him during his Israeli detention—that he was tortured immediately after his arrest. *Id.* at 755.

291. *Id.* at 739.

292. *Id.* at 756-58. The court reviewed several transcripts and tapes of interrogations between the defendant and his chief Israeli interrogator, which the court found to reveal a calm and friendly atmosphere during interrogation. *Id.* at 773.

293. ISTANBUL PROTOCOL, *supra* note 276, at 33. The Istanbul Protocol notes:

> To avoid physical evidence of beating, torture is often performed with wide, blunt objects, and torture victims are sometimes covered by a rug or shoes, in the case of falanga, to distribute the force of individual blows. Stretching, crushing injuries and asphyxiation are also forms of torture that have the intent of producing maximal pain and suffering with minimal evidence. For the same reason, wet towels may be used with electric shocks.

Id. at 31.

294. *Id.* at 1.

For example, unlike the court in *Abu Ali*, the Istanbul Protocol recognizes the role that "knowledge about regional practices of torture and ill-treatment" may play in evaluating the credibility of torture allegations.[295] According to the protocol, such information is important because it "may corroborate an individual's accounts of torture or ill-treatment."[296]

The Istanbul Protocol also recognizes that the absence of physical evidence of trauma "should not be construed to suggest that torture did not occur, since such acts of violence against persons frequently leave no marks or permanent scars."[297] United States courts ruling on suppression motions should recognize that torturers often attempt to conceal their acts and choose forms of torture "that have the intent of producing maximal pain and suffering with minimal evidence."[298]

E. Reevaluating Joint Ventures in the War on Terror

By narrowly construing the "joint venture" doctrine, courts evaluating extraterritorial interrogations have diluted constraints on U.S. law enforcement operating abroad. By restricting their inquiry to the extent of U.S. involvement in discrete interrogations, courts have ignored evidence of broader transnational cooperation in the particular case.[299] Analyzing international law enforcement cooperation in the 1980s and 1990s, Andreas Lowenfield has argued that the United States' transnational police efforts posed grave potential for abuse.[300] Lowenfield cited a pattern of U.S. officials relying on foreign actors to carry out criminal investigations in order to avoid constitutional restraints.[301] After September 11 those incentives may be greater. While many agree that effective antiterrorism efforts require increased transnational cooperation, the government's demonstrated openness to torture in the investigation of terrorism suspects warrants a new, more scrupulous model to evaluate joint ventures. The analysis must consider the government's

295. *Id.* at 27.

296. *Id.*

297. *Id.* at 31.

298. *Id.* at 33.

299. *See, e.g.*, United States v. Trenary, 473 F.2d 680 (9th Cir. 1973).

300. *See* Lowenfeld, *supra* note 102, at 459.

301. *Id.* ("I would be more comfortable, more confident that my government understands the enduring values, if the U.S. government gave up (or were ordered to give up) the recurring attempts to rely on the allegation that U.S. officers were just bystanders, or played merely a subordinate role in a search or seizure, when the object of the exercise, understood from the beginning, was prosecution in the United States."); *see also* United States v. Maturo, 982 F.2d 57, 61 (2d Cir. 1992) (noting that cooperation could be "designed to evade constitutional requirements applicable to American officials" abroad).

inclination and incentives to circumvent U.S. law and the high degree of transnational cooperation and facilitation in prosecuting the war on terror.

Cases from the American South during the Jim Crow era illustrate the danger of employing an overly circumscribed notion of joint venture.[302] In many criminal cases of that time, local officials released suspects to the custody of white mobs and vigilantes, or merely turned a blind eye to the inevitable intervention of private violence during "investigations."[303]

For example, in *White v. State*,[304] the Mississippi Supreme Court refused to countenance a confession extracted from an eighteen-year-old black defendant by a crowd of white farmers and townspeople who took him into custody after the local authorities arrested and then released him. The white mob transported the defendant to the scene of the crime, locked the door, and administered "the water cure,"[305] a practice similar to waterboarding.[306] The record in *White* suggests cooperation between the police and the vigilante mob, or at the very least that the officers condoned the citizens' attack on the defendant. The court held that the trial court erred in refusing to allow defendant's counsel to show a connection between the confession induced by the water cure and a second confession obtained from the defendant at the local jail.[307] The court recognized that "the same two witnesses . . . who stood on the breast and neck of appellant while administering the 'water cure,' . . . were the ones who obtained the confession at the jail."[308]

Similarly, in *United States v. Price*,[309] a criminal complaint charged Mississippi police officers with releasing three civil rights activists, Cheney, Schwerner, and Goodman, from a jail in the dark of night and transporting them to a remote, unpaved road so that they could be intercepted by a mob that later shot and killed the victims.[310] In holding that the indictment sufficiently alleged a

302. *See generally* Klarman, *supra* note 232, at 49 (discussing "egregious exemplars of Jim Crow justice" in the South).

303. *See id.* at 52.

304. 91 So. 903, 904-05 (Miss. 1922).

305. *Id.* at 904.

306. The court described the practice inflicted on the eighteen-year-old defendant, noting that a member of the mob "stood with one foot entirely upon appellant's breast, and the other foot entirely upon his neck" while others "pour[ed] water from a dipper into the nose of appellant, so as to strangle him, thus causing pain and horror, for the purpose of forcing a confession." *Id.*

307. *Id.* at 905.

308. *Id.*

309. 383 U.S. 787 (1966).

310. *See id.* at 790.

conspiracy to violate due process under the Fourteenth Amendment, the Supreme Court recognized that the state "used its sovereign power, and its office to release the victims from jail so that they were not charged and tried, as required by law, but instead could be intercepted and killed."[311] In fact, as one scholar has noted, "The line between vigilante and official justice was scarcely discernible in the Segregated South."[312]

While these cases arose in the context of due process voluntariness analyses or liability for civil rights violations, they illustrate the danger of narrowly evaluating police cooperation with third parties. If the courts had been called upon to evaluate the existence of a "joint venture" in these cases and had focused on the role of individual officers in the discrete interrogation or other relevant act, they likely would have missed the larger picture of abuse. While officers were not present during the administration of the "water-cure" in *White*, there is ample reason to conclude based on the facts and context that the officers knew about or approved of the mob's efforts to elicit a confession.[313] Similarly, in *Price*, though the murders occurred after the victims' release from custody, the Court refused to ignore the government's role in facilitating the attack.

Applying a narrow analysis of the joint venture doctrine in modern extraterritorial confession cases may fail to appreciate the "transnational police community and subculture"[314] that dominates law enforcement activities in the war on terror. Rather than limiting their inquiry to discrete investigative acts, courts should take a more expansive view of the "joint venture" doctrine and consider the entire course of transnational cooperation in a particular case.

For example, in *Abu Ali* the court concluded that U.S. officials did not play a significant role in Abu Ali's July 15, 2003 interrogation in Saudi Arabia.[315] The FBI submitted questions to Saudi interrogators for use during that interrogation and surreptitiously viewed the interrogation from behind a one-way mirror.[316] Nevertheless, the court ruled that a joint venture between the United States and Saudi Arabia did not exist because the Saudi government

311. *Id.* at 799.

312. Skolnick, *supra* note 29, at 106, 107 (noting study by Arthur Raper in the 1930s that concluded at least half of all lynchings in 1930s "were carried out with police officers participating and that in nine-tenths of the others, police either condoned or winked at the mob action").

313. *See White*, 91 So. at 904-05.

314. Nadelmann, *supra* note 99, at 188.

315. United States v. Abu Ali, 395 F. Supp. 2d 338, 383 (E.D. Va. 2005).

316. *Id.* at 349-50. The FBI also admitted interrogating Abu Ali over the course of four nights in September 2003, but did not seek to admit those non-Mirandized statements at his trial. *Id.* at 343, 356.

"controlled every aspect" of that interrogation.[317] According to the court, the "Saudi government was in complete control of Mr. Abu Ali while in custody," such that the FBI never "substantially participated" in the interrogation.[318]

The court's analysis proves too much. In the context of foreign custody, the foreign government will always possess ultimate control over their own detention facilities and prisoners. That fact should not discourage courts from finding the involvement of U.S. actors constitutionally significant.

In addition, by analyzing one interrogation of Abu Ali in isolation, the court disregarded the fact that the FBI had access to Abu Ali and interrogated him directly only three months later.[319] The FBI interrogated Abu Ali for thirty to thirty-five hours over the course of four days in September 2003, during which time he asked for a lawyer and was told "he was not entitled to an attorney in Saudi Arabia."[320] An FBI agent who testified at a pretrial hearing in Abu Ali's criminal case admitted interrogating Abu Ali and stated that Saudi security force agents were present for more than half the time.[321] The agent also revealed that, during the interrogation, he requested that the Saudis put Abu Ali in isolation and that the Saudi's complied with his request.[322] According to Abu Ali, after the first day of interrogation, Saudi security officers told Abu Ali "that he was embarrassing them by not cooperating with the FBI" and then placed him in solitary confinement where they "handcuffed [him] to a chain hanging from the ceiling and left [him] standing up until the afternoon."[323]

In analyzing the existence of a "joint venture," the court did not evaluate the import of Abu Ali's allegation that the Saudis used painful stress positions to facilitate the FBI's interrogation[324] or the significance of the fact that the Saudis accommodated the FBI's request that Abu Ali be placed in isolation.[325] Dismissing this evidence because the prosecution did not seek to admit the fruits of this specific interrogation at trial, the court failed to analyze what the September 2003 interrogation revealed about the level and

317. *Id.* at 382-83.
318. *Id.* at 382. The Fourth Circuit affirmed. *See supra* note 203.
319. *Id.*
320. *Id.* at 356.
321. *Id.*
322. *Id.*
323. *Id.* at 370.
324. *Id.*
325. *See id.* at 382.

purpose of cooperation between the two countries in the investigation of Abu Ali.[326]

If courts continue to employ insufficiently skeptical analyses of confessions and the role of U.S. actors in foreign investigations abroad, they will unwittingly create a perverse incentive for the U.S. government to export its intelligence and evidence gathering to foreign entities that torture. Doing so will satisfy the government's desire for "flexibility" in interrogation, while insulating interrogation practices from the scrutiny applied to domestic law enforcement activities.

V. CONCLUSION

Although few have doubted the strength of constitutional protections to prevent the admission of evidence obtained by torture in U.S. criminal trials,[327] recent terrorism prosecutions relying on extraterritorial confessions expose the risk that confessions obtained by torture abroad may be unwittingly admitted in U.S. criminal trials. Ironically, courts' lack of skepticism with respect to extraterritorial confessions is unwarranted, given the markedly increased transnational cooperation in the prosecution of crimes, particularly those related to terrorism, and the U.S. government's acknowledged pursuit of partnerships with foreign governments willing to detain and interrogate terrorism suspects through torture beyond the United States.[328]

United States courts can better safeguard domestic criminal trials from the threat of torture abroad by first acknowledging this emerging phenomenon. Then, displaying appropriate skepticism, courts should consider a number of factors and practices outlined in this Article that will help enable vigorous scrutiny of extraterritorial confessions and ensure that torture is never countenanced in U.S. criminal trials.

326. *Id.* ("[W]hile Miranda warnings were not given during that interrogation, the government has indicated that it does not seek to use any statements obtained during that interrogation in its case-in-chief.").

327. *See, e.g.*, Skolnick, *supra* note 29, at 122; Chesney, *supra* note 29, at 76-77; Scheppele, *supra* note 2, at 276; Mayer, *supra* note 2, at 108.

328. *See* Mayer, *supra* note 2, at 106-07; Priest, *supra* note 36.