Coercing Voluntariness

WADIE E. SAID*

INTRODUCTION

In recent years, the issue of coercive interrogations has generated a great deal of debate and commentary in both the popular media and academia. It is not unreasonable to conclude that any discussion of what constitutes a coercive interrogation focuses on whether a government can engage in torture to obtain information that would thwart an impending terrorist attack threatening the lives of many innocent civilians. In the United States, the aftermath of the September 11, 2001, attacks by al-Qaeda has seen a heightened focus on the methods of interrogation employed by U.S. authorities, both civilian and military, when questioning those deemed to be suspected terrorists. The controversy engendered by the establishment of a detention camp and system of military tribunals in Guantanamo Bay, Cuba,[1] the Abu Ghraib scandal,[2] and the existence of the so-called "extraordinary rendition" measure[3] demonstrates this dilemma most vividly in both the popular and academic realm. The weighty issue of what is permitted in interrogating suspected terrorists has also merged with a debate on the power of the executive branch in a time of war, specifically the power to designate U.S. citizens as enemy combatants to be held and questioned without being charged or afforded any of the constitutional rights that inure to criminal defendants.

However, the issue of how the United States' courts, in criminal cases, should treat statements that defendants have given to foreign law-enforcement bodies or security

---

* Assistant Professor, University of South Carolina School of Law. A.B., Princeton University; J.D., Columbia University. I would like to thank George Bisharat, Tommy Crocker, Lisa Eichhorn, and Susan Kuo for reviewing earlier drafts of this Article and providing helpful comments and suggestions. Many thanks to Lloyd Flores for excellent research assistance. This Article is dedicated to the memory of Marc E. Guerette.

1. *See, e.g.*, LAUREL E. FLETCHER & ERIC STOVER, THE GUANTANAMO EFFECT: EXPOSING THE CONSEQUENCES OF U.S. DETENTION AND INTERROGATION PRACTICES (2009).

2. *See, e.g.*, Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005).

3. *See, e.g.*, Arar v. Ashcroft, No. 06-4216-cv, 2009 WL 3522887 (2d Cir. Nov. 2, 2009).

services, especially when those statements may have been the product of a coercive interrogation, is an important matter meriting its own discussion. With a new president in office pledging to close the detention facility in Guantanamo Bay within a year,[4] a move that could signify the end of the United States' experiment with trying suspected terrorists in extraordinary tribunals, the federal courts could in turn serve as the central forum for the government's antiterrorism efforts. While not arising exclusively in the context of a war on terrorism, the issue of foreign confessions has taken on a renewed relevance in light of current events, and it is compounded by the perceived extraordinary nature of terrorist crimes themselves. In particular, two recent federal cases, *United States v. Abu Ali*,[5] in which the defendant was held and interrogated in Saudi Arabia for a year and a half on suspicion of involvement with an al-Qaeda cell,[6] and *United States v. Abu Marzook*,[7] in which one defendant had previously been arrested, interrogated, and convicted in Israel on charges of membership and support of Hamas,[8] have addressed the question of when a confession obtained abroad by a foreign agency will be admitted into evidence. Both federal courts allowed the admission of the statements made abroad despite the defendants' respective claims that their confessions were the product of coercive interrogation.[9] In so ruling, these cases revealed that current legal standards fail to lead courts to consider all relevant factors in assessing the admissibility of a foreign confession in the United States. Further, these cases also beg the question as to whether or not there is a separate and distinct standard for confessions made by alleged terrorists, as opposed to ordinary criminals.

This Article aims to demonstrate that the legal mechanism in place for assessing whether a statement obtained abroad was improperly coerced—namely, the voluntariness test[10]—is unwieldy and ultimately too subjective. The much-criticized test, which had governed the admissibility of domestic confessions prior to the decision in *Miranda v. Arizona*,[11] envisions an inquiry into the conditions of the suspect's interrogation, as well as an evaluation of his or her own personal characteristics.[12] In evaluating the totality of the circumstances, a court determines whether the defendant's statements were coerced based on a preponderance of the evidence.[13] When the prosecution seeks to admit statements given to foreign agents, the primary source of

---

4. Neil A. Lewis, *Justice Dept. Under Obama Is Preparing for Doctrinal Shift in Policies of Bush Years*, N.Y. TIMES, Feb. 1, 2009, at A14; Susan Saulny, *Michigan Prison Is Considered for Detainees*, N.Y. TIMES, Aug. 13, 2009, at A17.

5. 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

6. *Id.* at 224–26.

7. 435 F. Supp. 2d 708 (N.D. Ill. 2006).

8. *Id.* at 712–13.

9. *Abu Ali*, 528 F.3d at 234; *Abu Marzook*, 435 F. Supp. 2d at 777.

10. The voluntariness inquiry is alternatively referred to as that of an "involuntary confession." *See* Colorado v. Connelly, 479 U.S. 157, 165–66 (1986) (referring to the same test under both terms).

11. 384 U.S. 436 (1966).

12. *Abu Ali*, 528 F.3d at 232; *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

13. *See Abu Ali*, 528 F.3d at 231 (stating that the district court found that the government "'demonstrated by a preponderance of the evidence'" that the statements were voluntary (quoting United States v. Abu Ali, 395 F. Supp. 2d 338, 342 (E.D. Va. 2005))).

evidence is the foreign agent's own testimony that the statements were not coerced.[14] Today, when the test is applied to confessions elicited abroad, especially in the terrorism context, where fear can color a court's perspective, it is far too easy to conclude that a foreign agent is telling the truth when he testifies that he did not abuse a defendant.

Ultimately, any evaluation of this thorny issue requires a more objective standard that reflects reality. In this regard, this Article makes several proposals. First, in cases of interrogations involving countries and intelligence agencies about which the State Department itself has found credible and sustained evidence regarding systematic use of torture and coercive tactics, this evidence must make its way into the record. The government should not be allowed to argue that coercive interrogation did not occur in the instant prosecution without directly confronting its previous recognition of the prevalence of the practice in the country at issue. Second, the government should be required to prove the voluntariness of any statements by clear and convincing evidence and not by the preponderance of the evidence standard currently in effect. While the latter standard applies to general motions to suppress, a heightened standard is necessary in the foreign interrogation context to eliminate the admission of any illegally obtained evidence. Finally, the inquiry into the voluntariness of a confession made abroad should, to the extent possible, avoid focusing on the actions or characteristics of the defendant. The Supreme Court has recognized that a lack of intelligence or awareness on a defendant's part can indicate that a confession was involuntary in the domestic context.[15] In the foreign context, however, especially where the focus of an investigation is on political crimes, a more informed defendant who is aware of a foreign agency's reputation for harsh interrogation techniques may be more likely to falsely confess rather than suffer the potential abusive treatment.

Part I of this Article provides a short explication of the legal standards that govern the admissibility of foreign confessions, including exceptions to the voluntariness test. Part II discusses the *Abu Ali* and *Abu Marzook* cases in detail and analyzes the relevant decisions as they pertain to the admission of the foreign statements at issue. The particulars of these two cases reveal a legal test with ample room for arbitrariness in the decision-making process. Part III places the *Abu Ali* and *Abu Marzook* cases in a broader context and proposes methods to ensure that statements made abroad are not admitted when made in conditions that indicate an unacceptable level of coercion.

I. LEGAL STANDARDS FOR ADMISSIBILITY OF CONFESSIONS

A statement made abroad will be admitted if found to have been made voluntarily.[16] The voluntary test is a test that envisions a highly fact-specific inquiry into the circumstances in which the statement was made. Courts have recognized two exceptions to this general rule: if the statement came as a result of tactics that "shock the conscience," or was the product of a "joint venture" between American and foreign law enforcement, it will be excluded.[17] Identifying the legal standards that govern

14. *See, e.g.*, *Abu Marzook*, 435 F. Supp. 2d at 713–14 (stating that the court heard over six days of testimony from two witnesses who were foreign interrogators from Israel).

15. *See, e.g.*, Spano v. New York, 360 U.S. 315, 321–23 (1959).

16. *E.g.*, *Abu Ali*, 528 F.3d at 227.

17. *Id.* at 228; *Abu Marzook*, 435 F. Supp. 2d at 744.

admissibility of foreign confessions is a relatively straightforward task; fashioning reliable tests out of those standards is more complicated.

A. Voluntariness

The central and most important of the legal tests that govern the admissibility of foreign confessions turns on whether they have been made voluntarily. This standard governed confessions made in the United States prior to the issuance of *Miranda v. Arizona*[18] by the Supreme Court in 1966.[19] Unlike *Miranda*, which is rooted in the Fifth Amendment's ban on self-incrimination, the voluntariness test sprang from the Due Process Clause of the Fourteenth Amendment in the state context, and the Fifth Amendment's eponymous clause in the federal context, although in its current guise "it is unclear from which provision in the Bill of Rights it emanates."[20] Inspired by *Bram v. United States*,[21] this test has been applied explicitly by a number of circuits when dealing with the admissibility of foreign confessions.[22] Today, after *Miranda*, the system of warnings envisioned by that case is still not required when dealing with statements made to foreign law-enforcement authorities and, therefore, the exclusionary rule will not bar the introduction of those statements in a criminal trial in the United States.[23] This rule is rooted in inherently practical considerations, as the

---

18. 384 U.S. 436 (1966).

19. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 432–35 (2000) (discussing the history and continuing viability of the voluntariness test); Oregon v. Elstad, 470 U.S. 298, 304–05 (1985); *Abu Ali*, 528 F.3d at 227 (citing, inter alia, United States v. Yousef, 327 F.3d 56, 145 (2d Cir. 2003)). Incidentally, while the Supreme Court has yet to address directly the inapplicability of *Miranda* to purely foreign interrogations, the lower courts are unanimous in so holding. *See, e.g.*, *Abu Ali*, 528 F.3d at 227.

20. Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465, 470–71, 489–90 (2005). The Supreme Court first employed the Fourteenth Amendment test in 1936 in the seminal case of *Brown v. Mississippi*, 297 U.S. 278 (1936), which involved a confession obtained by the torture of a black defendant by white police officers in rural Mississippi; the origins of the test in the federal, Fifth Amendment context are less clear. *See* Paul Cassell & Robert Litt, *Will* Miranda *Survive?:* Dickerson v. United States*: The Right to Remain Silent, The Supreme Court, and Congress*, 37 AM. CRIM. L. REV. 1165, 1168 (2000) (stating that during the era of deciding the admissibility of confessions under the voluntariness test, "in federal prosecutions, the Court relied on the Due Process clause of the Fifth Amendment to overturn convictions"); Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 OHIO ST. L.J. 497, 499–500 (1992).

21. 168 U.S. 532 (1897). Incidentally, *Bram*'s voluntariness test derived from the self-incrimination clause of the Fifth Amendment. *See* Withrow v. Williams, 507 U.S. 680, 688 (1993).

22. *E.g.*, United States v. Mundt, 508 F.2d 904, 906 (10th Cir. 1974); Brulay v. United States, 383 F.2d 345, 348–49 (9th Cir. 1967) ("We then turn to the problem: were the statements voluntary within Fifth Amendment standards which we believe to be applicable?"). *But see* United States v. Wolf, 813 F.2d 970, 972 n.3 (9th Cir. 1987) (questioning *Brulay*'s continuing viability on this issue in light of *Colorado v. Connelly*, 479 U.S. 157 (1986)).

23. *Abu Ali*, 528 F.3d at 227 (citing United States v. Martindale, 790 F.2d 1129, 1132 (4th Cir. 1986)); *Brulay*, 383 F.2d at 348–49; *see also* United States v. Chavarria, 443 F.2d 904, 905

United States cannot dictate to other countries what rights suspects should receive, nor would the exclusionary rule deter any type of misconduct by foreign police operating in their own home countries.[24]

While the idea that *Miranda* warnings would be required whenever an individual is interrogated by foreign law enforcement is, at best, unrealistic, the voluntariness test is designed to comport with the minimum requirements of the Constitution.[25] The standards that govern the voluntariness test are derived from Supreme Court precedent dealing with confessions made in the domestic criminal context, although it bears note "that neither linguistics nor epistemology will provide a ready definition of the meaning of 'voluntariness.'"[26] What must be shown is that any confession represents an individual's "'essentially free and unconstrained choice.'"[27] On the other hand, if a defendant's "'will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.'"[28] The government must make a showing, by a preponderance of the evidence, that any statements it wishes to introduce meet the above standards, and the Supreme Court has also noted that a voluntariness inquiry has nothing at all to do with a confession's reliability, which is an entirely separate issue.[29]

"In determining whether a defendant's will was overborne in a particular case, the Court [assesses] the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."[30] A nonexhaustive list of factors includes an individual's age, level of intelligence, and education; an assessment of whether the individual was informed of constitutional rights; the length of the detention; the nature and length of questioning; and any evidence of physical punishment involving the denial of food or sleep.[31] In addition to physical torture, threats thereof, as well as psychological torture and conditions of detention, are relevant to whether a confession or statement is made voluntarily.[32] In short, while the

---

(9th Cir. 1971).

24. *Chavarria*, 443 F.2d at 905; *Brulay*, 383 F.2d at 348–49; *see also* United States v. Covington, 783 F.2d 1052, 1056 (9th Cir. 1985) (recognizing the importance of the Constitutional inquiry, while also noting that "the exclusionary rule is not applicable if the statements are obtained by foreign officers in a foreign country even if it may violate the foreign law").

25. *See, e.g.*, *Covington*, 783 F.2d at 1056.

26. Schneckloth v. Bustamonte, 412 U.S. 218, 224 (1973).

27. *Id.* at 225.

28. *Id.* at 225–26 (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)); *see also* United States v. Wilson, 162 U.S. 613, 623 (1896) ("In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort.").

29. United States v. Raddatz, 446 U.S. 667, 678 (1980) (citing Lego v. Twomey, 404 U.S. 477, 486 (1972)). The Fifth Amendment also envisions that evidence adduced be reliable, and statements or confessions obtained as a result of coercive pressure, especially where such pressure rises to the level of torture, are inherently unreliable. *See* United States v. Karake, 443 F. Supp. 2d 8, 50–51 (D.D.C. 2006) (citing Oregon v. Elstad, 470 U.S. 298 (1985)); *Schneckloth*, 412 U.S. 218.

30. *Schneckloth*, 412 U.S. at 226.

31. *Id*.

32. *See* Ashcraft v. Tennessee, 322 U.S. 143 (1944); *Karake*, 443 F. Supp. 2d at 51–52 (providing an overview of relevant cases).

voluntariness test is the central vehicle for determining whether statements made to foreign agents are admissible in a criminal case, an individualized inquiry into the facts surrounding the interrogation is envisioned as the method for making that determination. As a result, these flexible standards can make it difficult to predict with any regularity how a particular decision may turn out.

In purely domestic cases, the voluntariness test retains its vitality in the post-*Miranda* world primarily as a vehicle to assess whether waivers of *Miranda* rights are made voluntarily, thus rendering postwaiver confessions admissible in court.[33] That is not to say that the test has been anything but unclear and controversial, especially given subsequent case law and the *Miranda* doctrine. Yale Kamisar, the preeminent scholar of the law of confessions, noted in an influential law review article in 1963 that, with respect to the due process voluntariness test as it then existed, "'there are some words which, owing to their history, needlessly obstruct clear thinking,' and 'voluntary,' 'involuntary,' et al., are surely among them."[34] Scholars discussing the test have criticized its lack of clarity and determinative features, and have debated whether its focus should be on coercive police behavior as opposed to the reliability of the confession elicited.[35] Prior to *Miranda*, the notion of assessing what constituted an involuntary confession inexorably led to confusion in how those standards, in their imprecision, were to be applied.[36] Indeed, the lack of clear standards for the voluntariness test prior to *Miranda* seems to have persisted in the post-*Miranda* world.[37] What has changed, however, is the likelihood that a confession will be suppressed on voluntariness grounds; since *Miranda* was decided, the Supreme Court

---

33. *See, e.g.*, Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2004 (1998) ("Because the admissibility of statements given after a valid waiver of *Miranda* rights must be determined on the basis of the voluntariness test, that test remains vitally important." (citation omitted)).

34. Yale Kamisar, *What Is an 'Involuntary' Confession? Some Comments on Inabu and Reid's* Criminal Investigations and Confessions, 17 RUTGERS L. REV. 728, 759 (1963) (quoting JEROME FRANK, FATE AND FREEDOM 139 (1945)) (footnote omitted).

35. *See, e.g.*, Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 745–55 (1987); Yale Kamisar, *On the Fortieth Anniversary of the* Miranda *Case: Why We Needed It, How We Got It—And What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 163–69 (2007); Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 728–29 (1992) (noting that the pre-*Miranda* Supreme Court moved away from reliability as the sole factor underlying its analysis of the voluntary nature of a confession when the methods under scrutiny were less brutal and more subtle); Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 113–14 (1998).

36. *See, e.g.*, Godsey, *supra* note 20, at 470 ("[T]he vast 'wiggle room' inherent in the highly subjective voluntariness test offers judges free rein to interpret the facts of an interrogation in a myriad of ways, thus making a finding that a confession was made involuntarily very rare in practice."); Seidman, *supra* note 35, at 733 (calling the *Culombe* opinion a "total disaster" that saw Justice Harlan, in dissent, agreeing with the voluntariness test articulated by Justice Frankfurter's opinion, but disagreeing with the result based on the facts of the case, a "fiasco" that "laid the groundwork for *Miranda*").

37. Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 464–65 (1999); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 116 (1997).

has reversed a confession given after warnings were administered on only two occasions.[38]

While it might be surprising that the voluntariness test has survived in the domestic context to the present day, its application to confessions made to foreign agents abroad has generated no real controversy. This lack of debate is puzzling given that cases involving allegations of the type of Islamist terrorism have exercised so many in the last several years. It is perhaps not unreasonable to conclude that such a poorly defined test could lead reasonable people to disagree on what constitutes a voluntary confession, especially when gauging the nature and degree of the threat an individual defendant may represent.

B. Shocks the Conscience

While the voluntariness inquiry, however maligned, may seem straightforward, a complicating factor involves the use of what courts have deemed the "shock the conscience" test as part of the relevant inquiry in deciding the admissibility of statements given to foreign agents.[39] This test allows courts to exclude even "voluntary" statements made to foreign agents if they were given under standards that shock the judicial conscience.[40] It necessarily demands a specific inquiry into the circumstances of any confession, since what might shock the conscience needs to be spelled out in some detail. This rule is generally posited as an exception to the voluntariness test; that is, even statements made voluntarily will be found inadmissible if elicited under standards that shock the conscience.[41] At least one federal court has criticized the "shock the conscience" test as both superfluous to the issue of voluntariness and as inapplicable to the Fifth Amendment due process inquiry because of its roots in Fourth Amendment jurisprudence.[42]

The criticism raises strong points in both instances. With respect to the issue of voluntariness, it seems difficult to construe a confession as made "voluntarily," when it was elicited under circumstances that "shock the conscience."[43] The test is therefore of questionable validity when a voluntariness inquiry would demand almost of necessity a determination as to whether the conduct of foreign agents "shocks the conscience."[44]

---

38. Arizona v. Fulminante, 499 U.S. 279 (1991); Mincey v. Arizona, 437 U.S. 385 (1978). By way of contrast, in the twenty-five years prior to *Miranda*, there were some twenty-three Supreme Court decisions reversing convictions on voluntariness grounds. *See* Seidman, *supra* note 35, at 745.

39. *See, e.g.*, United States v. Heller, 625 F.2d 594, 599 (5th Cir. 1980) (citing United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976)); United States v. Cotroni, 527 F.2d 708, 712 n.10 (2d Cir. 1975).

40. United States v. Yousef, 327 F.3d 56, 145–46 (2d Cir. 2003).

41. *Id.*; *see also* United States v. Abu Marzook, 435 F. Supp. 2d 708, 744 (N.D. Ill. 2006); United States v. Abu Ali, 395 F. Supp. 2d 338, 380 (E.D. Va. 2005).

42. United States v. Karake, 443 F. Supp. 2d 8, 52–53 nn.73–74 (D.D.C. 2006).

43. *Id.* at 52 n.73 (criticizing the Second Circuit's inconsistent application of the test and noting that "[w]hile statements which would be considered 'involuntary' under the Fifth Amendment arguably could be obtained by methods not rising to the level of 'shock the conscience,' it is difficult to conceive that the reverse could be true. Nor is there any case law supporting that possibility" (citation omitted)).

44. Indeed, the *Karake* court, while criticizing the test and questioning its validity,

Further, the test may, however unintentionally, raise the bar as to what constitutes a voluntary confession; an additional inquiry into whether the conduct in question shocks the conscience may have led one to believe mistakenly that particularly egregious conduct is needed for a confession to be deemed involuntary.

The significance of the blurring of the lines between what "shocks the conscience" under the Fourth Amendment and Fifth Amendment jurisprudence is relevant here and requires some background. In the context of police investigations, the phrase was first employed in the case of *Rochin v. California*,[45] in which the Supreme Court overturned the conviction of a defendant from whose stomach illegal narcotics had been forcibly extracted as a violation of the Due Process Clause of the Fourteenth Amendment.[46] *Rochin*, dating from the era before the Fourth and Fifth Amendments were held applicable to the states, stands as an example of the so-called "fundamental fairness" inquiry into police action under the concept of "substantive due process," which has been criticized by Professor William Stuntz as "thoroughly unlawlike."[47] However, *Rochin* served as a central source of the law of search and seizure in the decade before *Mapp v. Ohio*[48] was decided.[49] More importantly, the Supreme Court has recognized that *Rochin*, were it decided today, would be subject to a Fourth Amendment analysis under *Mapp* and its progeny.[50] That the Fourth and Fifth Amendments operate

---

nonetheless chose (curiously) to make use of its terminology. *Id*. at 85–86 ("Indeed, based on the totality of circumstances, the Court finds that the conditions under which defendants were held at Kami and the abuse and mistreatment they endured while being interrogated *shock the conscience* and therefore render the statements involuntary and inadmissible." (emphasis added)).

45. 342 U.S. 165 (1952).

46. *Id.* at 172 ("[W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.").

47. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 822 (2006) [hereinafter Stuntz, *The Political Constitution of Criminal Justice*]; William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 436–39 (1995) [hereinafter Stuntz, *Substantive Origins*]; *see also* Graham v. Connor, 490 U.S. 386, 392–94 (1989) (rejecting the notion that substantive due process claims involving executive action should be governed solely by the "shocks the conscience" standard); Mapp v. Ohio, 367 U.S. 643, 665 (1961) (Black, J., concurring) (stating that with respect to *Rochin*, "the practical result of this *ad hoc* approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free").

48. 367 U.S. 643.

49. Stuntz, *Substantive Origins*, *supra* note 47, at 441.

50. Sacramento v. Lewis, 523 U.S. 833, 849 n.9 (1998). It is of note that Justice Black, in his concurring opinion in *Mapp*, remarked that *Rochin* presented an "almost perfect example of the interrelationship between the Fourth and Fifth Amendments." *Mapp*, 367 U.S. at 664. However, Justice Black's opinion was not adopted in subsequent Supreme Court rulings and was rejected by scholarly opinion. *See* Yale Kamisar, Mapp v. Ohio*: The First Shot Fired in the Warren Court's Criminal Procedure "Revolution," in* CRIMINAL PROCEDURE STORIES 45, 51–52 (Carol S. Steiker ed., 2006) ("Justice Black's theory of the exclusionary rule is badly flawed

differently and protect different rights is now axiomatic and cemented by Supreme Court precedent.[51]

In light of the above, several circuits will allow for the admission of evidence obtained abroad in violation of the Fourth Amendment, provided the search leading to the evidence was legal in the country of origin and the evidence was not procured under circumstances that shock the judicial conscience.[52] This rule is in contrast to the Fifth Amendment rule, under which the issue of whether the actions of foreign agents are legal in their own countries has no bearing on the voluntariness of the confession for constitutional purposes in the United States.[53] Therein lies the key difference between the two amendments; where the Fourth Amendment rule requires that evidence be obtained legally in a foreign locale, the Fifth Amendment rule demands an inquiry into voluntariness of any statements to be introduced into evidence. The addition of a "shock the conscience" test to the Fourth Amendment rule makes sense, but its addition to the Fifth Amendment rule is less valid. Specifically, while a "shock the conscience" test, however devoid of standards, might serve as an important barrier to the introduction of, for example, any physical or wiretap evidence obtained by dubious means, its importance is less obvious when a voluntariness requirement would inevitably subsume it.

---

and, so far as I know, nobody subscribes to it today.").

51. *See* Chavez v. Martinez, 538 U.S. 760, 766–67 (2003) (noting that the Fourth Amendment is violated at the time of the search or seizure, while the Fifth Amendment is violated only when the tainted confession or statement is introduced at trial); Withrow v. Williams, 507 U.S. 680, 691 (1992); 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, 880–81 (2003) (stating that where the Fourth Amendment exclusionary rule is judicially created, the Fifth Amendment privilege against self-incrimination serves as a constitutionally based exclusionary rule).

Note, however, the Supreme Court pointed out in *Chavez*—a civil action against a police officer who conducted an allegedly coercive interrogation—that an inquiry into the constitutionality of the means of interrogation, when statements made as a result of an allegedly coercive interrogation are not introduced at trial, is subject to a substantive due process analysis. *Chavez*, 538 U.S. at 773 ("Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances.").

Professor Godsey has remarked that the Supreme Court's decision in *Chavez*, taken in conjunction with its earlier ruling in *Colorado v. Connelly*, 479 U.S. 157 (1986), has rendered the due process involuntary confession test into a freestanding civil liberty, a violation of which, much like that of the Fourth Amendment, occurs at the time of the action in question. Godsey, *supra* at 889–95. This is in contrast with a violation of the Self-Incrimination Clause of the Fifth Amendment, where a violation occurs only upon introduction at trial of the statements that were the result of the allegedly coercive interrogation. *Id*.

52. *See, e.g.*, United States v. Maturo, 982 F.2d 57, 60–61 (2d Cir. 1992); United States v. Rosenthal, 793 F.2d 1214, 1230–31 (11th Cir. 1986); United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976).

53. *See* United States v. Martindale, 790 F.2d 1129, 1132 (4th Cir. 1986); United States v. Covington, 783 F.2d 1052, 1056 (9th Cir. 1985).

As is the case under the Fifth Amendment, however, the Fourth Amendment's exclusionary rule does not apply to searches and seizures abroad precisely because it has little or no deterrent value with respect to foreign law enforcement.[54] Whatever the similarities and differences between the tests under the two amendments, however, the application of the "shock the conscience" test in the Fifth Amendment police-interrogation context by a few courts seems to have resulted from an unexplained migration from the Fourth Amendment realm.[55] Indeed, the legal basis for excluding evidence obtained abroad in such a manner has rarely been expressed; one of the leading cases articulating the standard remarked that the court retained the authority to exclude evidence seized in violation of the Fourth Amendment under the supervisory powers of the federal courts.[56] In the Fifth Amendment context, in light of the very real question as to whether such a "thoroughly unlawlike" test adds anything at all to the voluntariness inquiry, it does to appear a bit dubious when reviewing foreign police interrogation methods.

C. Joint Venture

A key exception to the admissibility of voluntary statements made to foreign agents is that if the confessions resulted from an interrogation that was run as a "joint venture" between the United States and foreign law enforcement, *Miranda* warnings are required lest the statements be suppressed.[57] The joint-venture analysis in the foreign investigation context derives directly from a dynamic of cooperation between state and federal law enforcement agencies, first addressed by the Supreme Court in the late 1920s. In that era, federal agents were using state law-enforcement officers to conduct investigations so as to make an end run around constitutional protections that applied to federal investigations, but not those of the states.[58] The end result of this practice was that federal officials could introduce evidence derived from state investigations in federal trials, while state officials were free to introduce evidence illegally obtained by federal agents.[59] This practice, also known as the "silver platter" doctrine, was

---

54. *See, e.g.*, Stowe v. Devoy, 588 F.2d 336, 341 (2d Cir. 1978).

55. United States v. Karake, 443 F. Supp. 2d 8, 52 n.74 (D.D.C. 2006); *see also* Godsey, *supra* note 51, at 891–92.

56. *Morrow*, 537 F.2d at 139; *see also* Godsey, *supra* note 51, at 893 n.239 (discussing *Morrow* and explaining that courts may exclude evidence pursuant to such powers when the Constitution does not apply).

57. United States v. Abu Ali, 528 F.3d 210, 229–30 (4th Cir. 2008) (the definition cited here would include a formal type of joint venture, as well as one in which foreign law-enforcement officers act as "agents" of U.S. law enforcement), *cert. denied*, 129 S. Ct. 1312 (2009). Additionally, it should be noted that a joint venture between U.S. law enforcement and foreign agents constitutes an exception to the inapplicability of the Fourth Amendment overseas. *See, e.g.*, United States v. Barona, 56 F.3d 1087, 1091–93 (9th Cir. 1995); United States v. Behety, 32 F.3d 508, 510–11 (11th Cir. 1994).

58. *See* Irvin B. Nathan & Christopher D. Man, *Coordinated Criminal Investigations Between the United States and Foreign Governments and Their Implications for American Constitutional Rights*, 42 VA. J. INT'L L. 821, 827–31 (2002) (discussing *Byars v. United States*, 273 U.S. 28 (1927), and *Gambino v. United States*, 275 U.S. 310 (1927), as the first examples of this analysis).

59. Elkins v. United States, 364 U.S. 206 (1960); *see also* Robert M. Bloom & Hillary

ultimately held invalid by the Supreme Court in 1960, particularly as it applied to the search and seizure provisions of the Fourth Amendment.[60] It is from this background that the joint venture doctrine has come to apply in the international context, despite its obsolete status in the domestic sphere, where constitutional protections now apply to both state and federal investigations. The rationale behind the rule is that U.S. law-enforcement agents cannot make use of foreign agents to interrogate a suspect so as to purposefully circumvent *Miranda* requirements.[61] Thus far, federal circuit courts have applied the joint venture doctrine and used the same criteria to determine the existence of joint ventures under both the Fourth and Fifth Amendments.[62]

The joint venture doctrine requires "active" or "substantial" participation on behalf of U.S. law enforcement, but only a few cases discuss those standards in any detail, and each case is highly fact specific.[63] Further, scholars have criticized these standards as "inappropriately" stringent, given that, in the context of joint federal-state investigations, the Supreme Court required only some sort of participation by federal officials in order for federal constitutional protections to apply.[64] In any event, despite

---

Massey, *Accounting for Federalism in State Courts: Exclusion of Evidence Obtained Lawfully by Federal Agents*, 79 U. COLO. L. REV. 381, 386–88 (2008); Nathan & Man, *supra* note 58, at 831.

60. Bloom & Massey, *supra* note 59, at 386–87. The Court eliminated the practice altogether by (1) "holding that evidence lawfully obtained by state officials pursuant to state law was not admissible in federal courts when its collection violated the Fourth Amendment" and (2) by making the Fourth Amendment's exclusionary rule applicable to the states. *Id.*

61. *Abu Ali*, 528 F.3d at 227.

62. *See, e.g.*, United States v. Yousef, 327 F.3d 56, 145–46 (2d Cir. 2003) (Fifth Amendment); *Barona*, 56 F.3d at 1092–93 (Fourth Amendment). The Ninth Circuit first brushed up against the contours of a joint venture analysis in *Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967), but only applied the test under the Fourth Amendment, while subjecting the statements made to the Mexican authorities to a voluntariness analysis. *Id.* at 347–49. The first explicit application of the international joint venture test in the Fifth Amendment context seems to have come in *United States v. Trenary*, 473 F.2d 680, 681–82 (9th Cir. 1973), in which the court applied the doctrine via a citation to a footnote in *United States v. Nagelberg*, 434 F.2d 585 (2d Cir. 1970), which noted that "[t]he presence of an American officer should not destroy the usefulness of evidence legally obtained on the ground that methods of interrogation of another country, at least equally civilized, may vary from ours." *Trenary*, 473 F.2d at 681–82 (citing *Nagelberg*, 434 F.2d at 587 n.1). In support of this proposition, the *Nagelberg* court cited three cases involving an international joint venture analysis under the Fourth Amendment. *Nagelberg*, 434 F.2d at 587 n.1. Additionally, *Nagelberg* is cited as the original authority for the shocks-the-conscience exception under the Fifth Amendment and has been duly criticized as inapposite. *See* United States v. Karake, 443 F. Supp. 2d 8, 53 n.74 (D.D.C. 2006). Even so, this blurring of the lines between the two amendments in the joint venture discussion can be construed as less problematic than the similar ambiguity present in the shocks-the-conscience analysis, if only because (a) there is no larger test, such as voluntariness, to subsume the joint venture analysis, and (b) in both cases, the goal is to prevent United States law enforcement from getting around the Constitution by using foreign law enforcement, whether by design or otherwise.

63. *Karake*, 443 F. Supp. 2d at 14–15, 94 n.114 (discussing cases describing "active" and "substantial" participation sufficient to give rise to a joint venture).

64. *See* Elkins v. United States, 364 U.S. 206, 213 (1960) (holding that federal involvement occurs where "federal agents had participated" in search); Lustig v. United States, 338 U.S. 74, 78 (1949) (holding that a federal official conducts a search "if he had a hand in it"); *see also*

some initial resistance,[65] the "substantial participation" requirement is now routinely applied, without controversy, in cases involving U.S.-foreign investigations.

By way of example, in *United States v. Emery*,[66] the Ninth Circuit held that a U.S.-foreign joint venture existed where U.S. agents warned their Mexican counterparts that a drug deal was going to occur, provided surveillance on and personnel to the deal, gave the signal to make an arrest, and then were present at the defendants' interrogation in Mexico but did not provide *Miranda* warnings.[67] On the other hand, in *United States v. Heller*,[68] the Fifth Circuit held there was no joint venture where American involvement in the defendant's arrest by British authorities was "peripheral."[69] While admittedly tipped off by an American official, the British agents interrogated and charged Heller with violating British, not American, law, and an American agent was allowed to interrogate him only for a limited time after receiving permission from the British.[70] Further, the American agent obtained two statements after giving Heller his *Miranda* warnings and "did not exchange information" with the British officers "regarding their separate interrogations of appellant."[71] Likewise, in *United States v. Trenary*,[72] the Ninth Circuit found no joint venture when an American agent, who did not identify himself as such, acted only as an interpreter for the Mexican police in questioning the defendants.[73] While the above cases do not provide clear standards to determine the existence of a joint venture based on substantial or active participation, it seems relatively uncontroversial to conclude, as the Fourth Circuit has, that, at a minimum, mere presence at a foreign interrogation, without more, is insufficient to give rise to such an arrangement.[74]

D. The Extent of Miranda *Abroad—The Embassy Bombings Case*

While the above text details what is required to admit a foreign confession into evidence in a criminal trial, a word is warranted about the limits of *Miranda* abroad.

1. *United States v. Bin Laden*

In the trial of those accused of carrying out the August 1998 bombings of the United States Embassies in Nairobi, Kenya, and Dar Es Salaam, Tanzania, Judge Leonard Sand of the Southern District of New York addressed the admissibility of statements

---

Nathan & Man, *supra* note 58 at 832–34 (noting also that "the application of the heightened standard by the lower courts invites confusion").

65. *See, e.g.*, Stonehill v. United States, 405 F.2d 738, 748 (9th Cir. 1968) (Browning, J., dissenting) (noting that the doctrine allows federal officials to engage in activities that violate the Fourth Amendment "so long as they do not participate too much").

66. 591 F.2d 1266 (9th Cir. 1978).

67. *Id.* at 1268. For an example of a joint venture in the Fourth Amendment sphere, see *United States v. Peterson*, 812 F.2d 486, 488–90 (9th Cir. 1987).

68. 625 F.2d 594 (5th Cir. 1980).

69. *Id.* at 599 n.7.

70. *Id*.

71. *Id.*

72. 473 F.2d 680 (9th Cir. 1973).

73. *Id.* at 681–82.

74. United States v. Abu Ali, 528 F.3d 210, 228–29 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

made by the nonresident alien defendants to American law enforcement in the aftermath of the bombings while the defendants were detained abroad in the custody of foreign governments.[75] Rather than give *Miranda* warnings, the U.S. interrogators initially gave what was deemed an "advice of rights" or "AOR" form to the defendants being questioned.[76] Initially, the court, in an opinion filed under seal, suppressed the statements made to FBI agents by one of the defendants, Mohamed Rashed Daoud Al-'Owhali, a Saudi national, while in the custody of the Kenyan National Police.[77] The government moved for reconsideration of the decision and a hearing was held as to the admissibility of the statements made in Kenya.[78]

The court held *Miranda* applicable in the case of nonresident aliens being interrogated by U.S. law-enforcement personnel abroad,[79] and its holding is worth quoting at length:

> Our analysis of Defendants' motions to suppress statements turns chiefly on the constitutional standard we adopt today, as a matter of first impression, concerning the admissibility of a defendant's admissions at his criminal trial in the United States, where that defendant is a non-resident alien and his statements were the product of an interrogation conducted abroad by U.S. law enforcement representatives. We conclude that such a defendant, insofar as he is the present subject of a domestic criminal proceeding, is indeed protected by the privilege against self-incrimination guaranteed by the Fifth Amendment, notwithstanding the fact that his only connections to the United States are his alleged violations of U.S. law and his subsequent U.S. prosecution. Additionally, we hold that courts may and should apply the familiar warning/waiver framework set forth in *Miranda v. Arizona* to determine whether the government, in its case-in-chief, may introduce against such a defendant evidence of his custodial statements—even if that defendant's interrogation by U.S. agents occurred wholly abroad and while he was in the physical custody of foreign authorities.[80]

The court took great pains to emphasize that its ruling applied only when statements taken abroad were intended to be introduced in a criminal trial in the United States, and should not be taken to apply to interrogations made for the purpose of intelligence gathering.[81] However, the court further remarked on the relationship of its holding to the joint venture doctrine, noting that "the existence of the exception itself is based on the assumption that *Miranda* must apply to any portion of an overseas interrogation

---

75. United States v. Bin Laden (*Bin Laden I*), 132 F. Supp. 2d 168 (S.D.N.Y. 2001) (statements made by defendants Al-'Owhali and Mohamed); United States v. Bin Laden (*Bin Laden II*), 132 F. Supp. 2d 198 (S.D.N.Y. 2001) (statements made by defendant Odeh).

76. *Bin Laden I*, 132 F. Supp. 2d at 173–74, 180–81; *Bin Laden II*, 132 F. Supp. 2d at 202–05.

77. *Bin Laden I*, 132 F. Supp. 2d at 171–72.

78. *Id*.

79. *Id.* at 181.

80. *Id*. (citation omitted). The court ultimately upheld the admission of statements made by defendants Khalfan Khamis Mohamed and Mohamed Sadeek Odeh, while those of Al-'Owhali were partially suppressed. *Id*. at 192–94; *Bin Laden II,* 132 F. Supp. 2d at 211–12.

81. *Bin Laden I*, 132 F. Supp 2d at 189 n.19 ("What we find impermissible is not intelligence gathering by agents of the U.S. government empowered to do so, but rather the use in a domestic criminal trial of statements extracted in violation of the Fifth Amendment.").

that is, in fact or form, conducted by U.S. law enforcement," which "is perfectly consistent with our holding today."[82] In the end though, the court noted that the government is not to be held to the letter of *Miranda* where such a situation would be impossible, especially insofar as *Miranda* relates to the right to counsel.[83] In those situations, the government must put forth its best efforts to learn the law in the foreign jurisdiction governing the right of criminal defendants to counsel, and even advocate that, if requested, counsel be appointed by the foreign government.[84]

2. The Second Circuit Opinion

In one of an exhaustive series of opinions upholding the convictions of the embassy bombing defendants, the Second Circuit agreed with the district court that "foreign nationals interrogated overseas [by U.S. agents] but tried in the civilian courts of the United States are protected by the Fifth Amendment's self-incrimination clause."[85] Unlike the district court, however, it expressly declined to hold that *Miranda* applied to overseas interrogations conducted by U.S. officials, but rather "proceed[ed] on the assumption that the *Miranda* warning/waiver framework generally governs the admissibility in our domestic courts of custodial statements obtained by U.S. officials from individuals during their detention under the authority of foreign governments."[86] In so doing, the Second Circuit ruled that U.S. agents operating abroad were not compelled to give a verbatim recitation of the familiar *Miranda* warnings before interrogating an individual.[87]

The Second Circuit expressly disagreed with the district court regarding the role U.S. agents must play in conveying to a detainee his Fifth Amendment right of counsel at the interrogation phase, since the right (or lack thereof) to counsel in a foreign country is clearly not the same as if the interrogation were to take place in the United States.[88] Specifically, in response to the district court's requirement that U.S. law-enforcement personnel learn the criminal procedure rules of the foreign jurisdiction and urge that counsel, if requested, be appointed for a detainee, the court ruled that *Miranda* "does not compel the police to serve as *advocates* for detainees before local

---

82. *Id*. at 187.

83. *Id*. at 187–89.

84. *Id.* at 189.

> U.S. law enforcement can only do the best they can to give full effect to a suspect's right to the presence and assistance of counsel, while still respecting the ultimate authority of the foreign sovereign. And if an attorney, whether appointed or retained, is truly and absolutely unavailable, and that result remains unsatisfactory to the suspect, he should be told that he need not speak to the Americans so long as he is without legal representation. Moreover, even if the suspect opts to speak without a lawyer present, he should know that he still has the right to stop answering questions at any time.

Id.

85. United States v. Odeh (*In re* Terrorist Bombings) (*In re Terrorist Bombings III*), 552 F.3d 177 (2d Cir. 2008).

86. *Id.* at 203.

87. *Id.* at 204.

88. *Id.* at 207–08.

authorities."[89] The court pointed out that even in the United States, police officers are not required to advocate on behalf of suspects, and that the foreign arena should be no different.[90] Finally, in response to the defendants' concerns that a failure to advocate for the appointment of counsel, where it may lead to a detainee's refusal to speak to U.S. agents, might also land the detainee in the position of being forced to speak to foreign law enforcement, the Second Circuit noted that such a risk would exist even when a U.S. agent attempted, without success, to secure counsel in a foreign jurisdiction.[91]

---

89. *Id*. at 208 (emphasis in original). This ruling corresponds to the prior scholarly criticism of the *Bin Laden I* holding with respect to the applicability of *Miranda* abroad to nonresident aliens in foreign custody. On the practical level, the criticisms centered on the unwieldy nature of enforcing American constitutional rights in settings in which their applicability depends on either the strictures of foreign law or the whims and predilections of foreign law enforcement agents. *See, e.g*, M.K.B. Darmer, *Beyond* Bin Laden *and* Lindh: *Confessions Law in an Age of Terrorism*, 12 CORNELL J. L. & PUB. POL'Y 319, 347–51 (2003) [hereinafter Darmer, *Beyond* Bin Laden *and* Lindh]; 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, 1758–70 (2002); Godsey, *supra* note 51 at 854–55. On a more theoretical level, there is the question of whether case law and legal doctrine support the applicability of *Miranda* and the due process voluntariness test to situations such as the one the *Bin Laden* court faced, given that it is far from clear that the Fifth Amendment applies to nonresident aliens interrogated abroad. *See* Godsey, *supra* note 51, at 867–96; *see also* M. Katherine B. Darmer, Miranda *Warnings, Torture, the Right to Counsel and the War on Terror*, 10 CHAP. L. REV. 631, 644–45 (2007). The theory that the due process voluntariness test does not apply to non-Americans interrogated abroad by foreign agents stems from the Supreme Court's ruling in *Colorado v. Connelly*, 479 U.S. 157 (1986), in which the Court held that a violation of due process demands some sort of state action the courts can hope to control, such as an actual police interrogation. *Id.* at 165–66; *see also* United States v. Wolf, 813 F.2d 970, 972 n.3 (9th Cir. 1987) (questioning the continuing validity of the voluntariness test in light of *Connelly*, but not deciding the issue). As a result, scholars have noted that the acts of foreign agents would not constitute the type of state action required under *Connelly*, and any confession obtained from a nonresident foreigner as a result of such an interrogation could be admitted into evidence. Darmer, *Beyond* Bin Laden *and* Lindh, *supra* at 365–67; Godsey, *supra* note 51, at 882–95. While this criticism indeed raises legitimate concerns about the continuing viability of the voluntariness test in such a context, especially given the Court's analyses in both *Connelly* and *Chavez*, the lower courts have been uniform in continuing its application when faced with evaluating the admissibility of confessions made to foreign agents overseas. *Id.* at 894–95. Because it is unclear when this issue might be presented to the Supreme Court for resolution, the continued viability of the test will be assumed, even concerning nonresident foreigners, whose cases are not dealt with in any extensive detail in this Article. Moreover, in light of the Supreme Court's decision in *Chavez v. Martinez*, 538 U.S. 760 (2003), the *Bin Laden* opinion has been characterized as extending *Miranda* too far in too extraordinary a context. *See* Godsey, *supra* note 51, at 895; 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 (2004).

90. *In re Terrorist Bombings III*, 552 F.3d at 208.

91. *Id*. (remarking also that the "risk of being forced to speak to their foreign jailors would also exist, moreover, if U.S. agents were not involved at all").

The net effect of *In re Terrorist Bombings* is that when conducting interrogations abroad, U.S. agents are required to comply with the Fifth Amendment's right against self-incrimination, although their duty regarding the right to counsel is limited to conveying it to the detainee. While the specific legal issues presented in that case are not the subject of this Article, both the circuit and district court opinions provide several elucidating observations on the problems associated with foreign confessions.

Ultimately, despite all criticism, federal courts apply the voluntariness test in nearly uniform fashion to analyze the admissibility of a confession taken abroad. However, even in this narrow context, when put into practice, the voluntariness inquiry is sufficiently malleable and in no way guarantees that a foreign confession admitted into evidence is not the subject of coercion. Terrorism-related cases only serve to highlight the concern about the test's ability to adequately gauge the involuntary nature of a confession.

II. *ABU ALI*, *ABU MARZOOK*, AND THE ADMISSIBILITY OF FOREIGN CONFESSIONS

Two relatively recent opinions[92] in two separate cases provide insight into how courts assess the admissibility of foreign confessions when faced with allegations of coercive interrogations. That these opinions come in the context of terrorism prosecutions in which the defendants are Arab Muslims alleged to have been active on behalf of a specially designated Foreign Terrorist Organization (FTO) underscores the need for legal tests and procedures that can adequately gauge the voluntariness of a statement made abroad to foreign agents. Both cases involve Muslim-American citizens of Arab origin interrogated abroad,[93] so the concerns in *In re Terrorist Bombings* with the constitutional rights of nonresident aliens do not figure greatly into the discussion. The level of American law-enforcement involvement differs in each scenario. While the *Abu Ali* case saw American law enforcement playing a role in the interrogation conducted in Saudi Arabia,[94] there was no American role in Mohammad Salah's interrogation at the hands of Israeli agents.[95] A further important contrast stems from the nature of the allegations. Both cases involved charges against individuals suspected of being active in FTOs, yet where *Abu Ali* concerned an active terrorist cell allegedly conspiring to directly attack American targets,[96] *Abu Marzook* involved an individual who had been interrogated, charged, convicted, sentenced, imprisoned, and finally released after serving a four-year sentence abroad prior to his return to the United States to face charges rooted in the statements given over a decade earlier to foreign investigators.[97]

---

92. United States v. Abu Ali, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009); United States v. Abu Marzook, 435 F. Supp. 2d 708 (N.D. Ill. 2006).

93. *Abu Ali*, 528 F.3d at 221–25; *Abu Marzook*, 435 F. Supp. 2d at 712, 718.

94. *Abu Ali*, 528 F.3d at 227–30.

95. *Abu Marzook*, 435 F. Supp. 2d at 774.

96. *Abu Ali*, 528 F.3d at 224.

97. *See Abu Marzook*, 435 F. Supp. 2d at 712–13.

A. The Abu Ali *Case*

1. Background

The first of the opinions involves Ahmad Omar Abu Ali, a United States citizen and Virginia resident.[98] While a student at a Saudi university, Abu Ali was arrested in June 2003 by Saudi authorities in the wake of the May 2003 Riyadh suicide bomb attacks that left nine Americans dead, on suspicion of being involved with an al-Qaeda cell.[99] While in Saudi custody, during which time he was afforded neither the right to counsel nor the opportunity to hire any,[100] he was interrogated and gave a series of incriminating statements detailing his role in the cell's activities, which included its plotting to commit attacks within the United States.[101] Upon learning of his detention and the incriminating statements Abu Ali made to the Saudi authorities, the FBI requested that its agents be permitted to ask him a series of questions; they were eventually allowed to observe Saudi agents interrogate him in a session that occurred on June 15, 2003.[102] The next month, Abu Ali confessed in writing to the Saudi authorities and was subsequently videotaped reading his confession out loud.[103]

Concurrent with Abu Ali's arrest in Saudi Arabia were the U.S. government's efforts to prosecute several individuals who were active in his home mosque in Virginia and whose activities had aroused the suspicions of the authorities in the wake of September 11, 2001.[104] The charges were rooted in allegations of providing assistance to the FTO Lashkar-e-Taiba in military operations, which included actions taken in conjunction with the Taliban against the United States.[105] The collective name given to the group of about fourteen prosecutions was the "Virginia Paintball Case,"[106] as a result of government allegations that those charged had trained for violent activity by playing the game of paintball.[107] One of the prosecutions involved a local *imam* named Ali Al-Timimi, who was convicted of solicitation to levy war against the United States, mostly based on sermons in which he spoke of the duty to fight American troops in Afghanistan.[108] At one point, Abu Ali was a suspect in the Virginia Paintball Case,[109] but he was never indicted in those prosecutions.

---

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

99. *Id.* at 341, 343–44.

100. *See id.* at 356.

101. *Id.* at 341, 343.

102. *Id.* at 343.

103. *Id.* In September 2003, Abu Ali was interrogated by the FBI while still in Saudi custody and made several incriminating statements without being apprised of his *Miranda* rights, but the government declined to attempt to introduce those statements at his criminal trial. *Id.*

104. *See* United States v. Benkahla, 530 F.3d 300, 303 (4th Cir. 2008); United States v. Chandia, 514 F.3d 365, 369–70 (4th Cir. 2008); United States v. Khan, 461 F.3d 477, 483 (4th Cir. 2006).

105. *Khan*, 461 F.3d at 484. Lashkar-e-Taiba is active in Pakistan and focused on the dispute over the Indian State of Kashmir. *Id.* It is perhaps best known for its deadly attack on the Indian city of Mumbai in November 2008. Lydia Polgreen & Souad Mekhennet, *Militant Network Is Intact Long After Mumbai Siege*, N.Y. TIMES, Sept. 30, 2009, at A1.

106. *See Abu Ali*, 395 F. Supp. 2d at 356.

107. *Khan*, 461 F.3d at 483–84.

108. *See, e.g.*, Wayne McCormack, *Inchoate Terrorism: Liberalism Clashes with*

Over a year into his detention in Saudi Arabia, Abu Ali's parents filed a petition on his behalf for a writ of habeas corpus in the United States District Court for the District of Columbia, essentially on the theory that their son was being detained by Saudi authorities at the request of the United States government, although they also included allegations of his being tortured by the Saudi authorities.[110] In response to the petition, the government moved to dismiss on the theory that a federal district court lacked jurisdiction to consider a habeas petition by a United States citizen detained by a foreign government, but it made no factual contentions in opposition.[111] The district court rejected the government's argument as far too broad, and denied the motion to dismiss.[112] While this decision garnered scholarly attention for its ruling on a habeas matter with serious implications for how the government can deal with terrorist suspects abroad,[113] it did not serve to end the legal limbo of Ahmad Omar Abu Ali himself, who remained in Saudi custody.

The district court also found the act of state doctrine, the political question doctrine, and the separation of powers doctrine did not bar consideration of the petition, but that any determination of whether Abu Ali was in the actual or constructive custody of the United States—a threshold question as to jurisdiction—could not be addressed on a motion to dismiss.[114] To resolve the issue of whether Abu Ali was in the actual or constructive jurisdiction of the United States, and thus entitled to the protections of habeas corpus, the court ordered discovery as to what the government's role actually was in holding and detaining him in Saudi Arabia.[115]

Fundamentalism, 37 GEO. J. INT'L L. 1, 1–3 (2005); Elisa Kantor, Note, *New Threats, Old Problems: Adhering to* Brandenburg*'s Imminence Requirement in Terrorism Prosecutions*, 76 GEO. WASH. L. REV. 752, 770–73 (2008) (discussing and critiquing Al-Timimi's prosecution as not in accordance with the First Amendment's protections on freedom of speech).

109. *Abu Ali*, 395 F. Supp. 2d at 356.

110. Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 30–31 (D.D.C. 2004). Apparently, Abu Ali's father had learned of details relevant to his son's predicament through his employment at the Saudi Arabian Embassy in Washington, D.C. *Id.* at 33. For example, in a sworn affidavit submitted by one of Abu Ali's attorneys, in response to concern about Abu Ali being tortured in Saudi Arabia, a federal prosecutor "smirked and stated that 'He's no good for us here, he has no fingernails left.'" *Id.* at 36.

111. *Id*. at 37. The court asked the government to show cause as to why the habeas petition should not be granted. *Id.* The government filed papers that it should be denied "as a matter of law," but it "[did] not offer any evidence (or even contentions) rebutting petitioners' claims regarding its role in the detention of their son." *Id.*

112. *Id.* at 40–41. Consider the court's reasoning in this regard, which echoes the concerns of the joint venture analysis under the Fourth and Fifth Amendments: "The authority sought would permit the executive, at his discretion, to deliver a United States citizen to a foreign country to avoid constitutional scrutiny, or, as is alleged and to some degree substantiated here, work through the intermediary of a foreign country to detain a United States citizen abroad." *Id.* at 31.

113. *See, e.g.*, Stephen I. Vladeck, *Deconstructing* Hirota*: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497, 1532–35 (2007).

114. *Abu Ali*, 350 F. Supp. 2d at 57–65. The court also held that the Hostage Act did not create a duty on the part of the President to demand the Saudi government to release Abu Ali. *Id*. at 67.

115. *Id*. at 68.

Subsequent to the ruling—and according to Abu Ali's attorneys, perhaps even because of it[116]—a grand jury in the Eastern District of Virginia indicted Abu Ali on a series of terrorist crimes in early February 2005, and later that month, he was extradited to the United States.[117] He was ultimately charged with nine different counts, including several related to providing material support to al-Qaeda, in violation of 18 U.S.C. § 2339A and § 2339B.[118] The most dramatic charge was a conspiracy to assassinate the President of the United States in violation of 18 U.S.C. § 1751, which accompanied two other violent conspiracy charges involving airplane hijacking.[119] A glance at the superseding indictment reveals that the bulk of the evidence against Abu Ali came from statements that he and other alleged members of the cell had given to Saudi authorities, highlighting the importance those statements were to play in the case.[120]

2. Motion to Suppress Statements Made to Saudi Authorities

After hearing testimony from Abu Ali, American and Saudi security officials, American consular officers, and medical experts for the government, Federal District Judge Gerald Bruce Lee denied the motion to suppress the statements Abu Ali made to Saudi officials in early June 2003, and ruled that those statements were admissible at trial.[121] This ruling was upheld on appeal by a three-judge panel of the Fourth Circuit.[122] Abu Ali asserted that he was beaten, whipped, psychologically tortured, and

---

116. Eric Lichtblau, *American Accused in a Plot to Assassinate Bush*, N.Y. TIMES, Feb. 23, 2005, at A1 ("'I suspect it's no coincidence that this man sat in detention for 20 months until a federal judge in the United States was threatening to require the American government to disclose its arrangements with the Saudi government for holding him,' said David D. Cole, a Georgetown University law professor who is representing Mr. Abu Ali's family in the case. 'The lawsuit gave the government a tremendous incentive to bring some charges.'"); Josh Meyer, *Student Allegedly Talks of Assassination Plots*, L.A. TIMES, Mar. 2, 2005, at A19 (stating that Abu Ali's attorney "contended that the Justice Department only sought a grand jury indictment against Abu Ali as a way of shutting down a civil lawsuit his family filed against the U.S. government, alleging it was partially responsible for him being tortured and illegally detained by Riyadh"). It should be noted, however, that Abu Ali's motion to dismiss on the basis of prosecutorial vindictiveness on this point was dismissed. United States v. Abu Ali, 395 F. Supp. 2d 338, 385–86 (E.D. Va. 2005).

117. United States v. Abu Ali, 528 F.3d 210, 225 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009). Abu Ali moved unsuccessfully for a change of venue from the Eastern District of Virginia to the District of Columbia, essentially arguing that the former, as an area where the September 11, 2001, attacks had taken place, featured a jury pool that was irretrievably biased against him. *See* United States v. Abu Ali, No. CRIM A. 05-53, 2005 WL 2171448, at *1 (E.D. Va. Sept. 6, 2005).

118. *Abu Ali*, 528 F.3d at 225.

119. *Id.*

120. Superseding Indictment, United States v. Abu Ali, No. 1:05CR53 (E.D. Va. Sept. 8, 2005); Press Release, U.S. Dep't of Justice (Sept. 8, 2005) (on file with the Indiana Law Journal).

121. United States v. Abu Ali, 395 F. Supp. 2d 338, 386–87 (E.D. Va. 2005).

122. *Abu Ali*, 528 F.3d at 221.

held without counsel during the period of interrogation in June 2003.[123] It remains unclear from the record in the case whether he was held pursuant to an American request or at the behest of the Saudis, but at some point he was apprised of the possibility of being transferred to American custody and deemed an "enemy combatant."[124]

a. Detention and Interrogation in Saudi Arabia

Prior to the suppression hearing, the court allowed for seven days of live testimony, conducted via satellite videoconferencing, by the Saudi security officials involved in detaining and interrogating Abu Ali.[125] Pursuant to Rule 15 of the Federal Rules of Criminal Procedure, the Saudi officials were present in Saudi Arabia, where they were allowed to testify under pseudonyms in the presence of prosecutors, defense counsel, and an Arabic language translator.[126] The judge, Abu Ali, other defense counsel, and prosecutors were present in Virginia and observed the proceedings as they happened,[127] although there was no simultaneous telephone link between Abu Ali in Virginia and his counsel in Saudi Arabia.[128] Apparently, this arrangement was unprecedented in U.S.-Saudi relations, as it marked the first time that the Saudi government had ever allowed access to officers of its security service, the Mabahith, although it would not permit them to testify in court in the United States.[129]

The Mabahith officers testified under the following appellations, Arresting Officer, Lieutenant Colonel-Warden, Brigadier-General, and Captain.[130] To a man, they all denied that Abu Ali had been mistreated in any way during his detention and interrogation at their hands.[131] Abu Ali testified that he was first beaten severely at the

---

123. *Abu Ali*, 395 F. Supp. 2d at 367–71.

124. *Id.* at 354, 356.

125. *Id.* at 344.

126. *Id.*

127. *Id.*

128. *See* United States v. Abu Ali, 528 F.3d 210, 240 (4th Cir. 2008) ("Abu Ali was able to communicate via cell phone with his defense counsel in Saudi Arabia *during the frequent breaks* in the proceedings." (emphasis added)), *cert. denied*, 129 S. Ct. 1312 (2009).

129. *Id.* at 239. The Fourth Circuit identifies the Mabahith as "part of the Saudi Ministry of Interior," whose "mission is to fight terrorism." *Id.* at 224 n.2. The United States Department of State, in its annual report on human rights for 2003, the year Abu Ali was interrogated, described the Mabahith as the "Ministry of Interior's security service." U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003: SAUDI ARABIA 2020, 2022 (2003) [hereinafter HUMAN RIGHTS REPORTS 2003]. The most current report describes the Mabahith as an "internal security police." U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2007: SAUDI ARABIA § 1.d (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2007/100605.htm [hereinafter HUMAN RIGHTS REPORTS 2007]. The word, in Arabic, literally means "investigations." *See* HANS WEHR, A DICTIONARY OF MODERN WRITTEN ARABIC 42 (J. M. Cowan ed., 3d ed. 1976).

130. *Abu Ali*, 395 F. Supp. 2d at 345–47.

131. *Id.* Apparently, they had learned of Abu Ali's membership in the al-Qaeda cell under investigation after interrogating one of its leaders, who identified him by photograph and code name ("Reda"). *Id.* at 344. On that basis, all the government witnesses who testified, both Saudi and American, averred that the decision to arrest Abu Ali was taken entirely by the Saudi

last interrogation on the first day of his arrest and then again the next day when he was struck repeatedly on his back by an unknown object while shackled to the floor.[132] After that, he agreed to cooperate with the Saudi authorities and was interrogated at night for lengthy periods over forty-seven straight days.[133] During this time, his requests for effective consular assistance and access to a lawyer were denied or ignored.[134]

The FBI apparently learned of Abu Ali's detention on June 9, 2003, one day after his arrest and nearly immediately requested access to the interrogation sessions.[135] The Mabahith initially refused the request, but eventually they agreed to allow the FBI to observe the sessions, which were conducted in Arabic, and even to ask questions through the Saudi officers.[136] The right to ask questions was not unfettered; out of thirteen questions drafted by the FBI, the Mabahith asked only six and made clear prior to any questioning that there were too many questions.[137] The testimony reflected that the interrogation took place on June 15, 2003, and that Abu Ali did not appear to be in any pain or discomfort, although he seemed to fidget a great deal.[138] Essentially, the government witnesses described a relatively relaxed and nonconfrontational session between Abu Ali and the Saudi officers.[139] The FBI agents testifying made clear that they did not consider giving *Miranda* warnings at this point, since they viewed the matter as falling under the rubric of an "intelligence interview."[140]

The court observed the July 24, 2003, videotaped confession of Abu Ali to observe his demeanor alone, not for the content of the confession itself, and found that he exhibited "noteworthy demeanor."[141] Further, the court focused on some of the statements and the actions of Abu Ali during the videotaped session and observed that he was "under some stress."[142] He was not aware of the videotaping at the time and made a few strange remarks or gestures that at the very least demonstrated that the interrogations had psychologically affected him.[143] For his part, Abu Ali testified that he was "going nuts" in the videotape, partially as a result of exhaustion at the end of the forty-seven-day-long interrogation, and partially because the Saudi authorities promised him a return to the general prison population from solitary confinement if he read the confession.[144]

---

officials and was based on information generated solely by them. *Id.* at 344–49.

132. *Id.* at 367–69. He was also told that if he were found to be associated with the Riyadh bombings that his hand or foot might be cut off or that he might even be beheaded. *Id.* at 369.

133. *Id.* at 367–71.

134. *Id.*

135. *Id.* at 348–50.

136. *Id.*

137. *Id.* at 349–50.

138. *Id.* at 348–51.

139. *See id.*

140. *Id.* at 349–50.

141. *Id.* at 347–48.

142. *Id.*

143. *See id.* ("In two instances, he exhibited unusual behavior. In one place, he acknowledges receiving certain training to conceal his identity and he laughs and says something to the effect of, 'Well, I guess that did not work out' or 'I guess we see how that worked out.' Additionally, he was reading a statement when he spontaneously, without direction, simulated cocking a weapon or automatic type rifle.").

144. *Id.* at 371.

Abu Ali met on six occasions with a United States consular officer named Charles Glatz, who testified that Abu Ali never complained about his treatment at the hands of the Saudis (calling it "'excellent,' 'kind,' and 'humane'"), appeared to be in good physical shape, and showed no outward signs of mistreatment or discomfort.[145] Abu Ali testified that he lied about the lack of mistreatment and tried to send a distress signal but perceived some hostility from Glatz.[146] Certain aspects of Glatz's own testimony spoke of a different situation, however. In their first meeting on July 8, 2003, one full month after Abu Ali's arrest, Glatz was prevented by Mabahith officials from discussing any aspect of the case with Abu Ali, from giving Abu Ali a letter from his mother or a list of local Saudi attorneys, and from obtaining a Privacy Act waiver of information so that Abu Ali's parents could learn of the consular visits.[147] A Mabahith official was present for the meeting between the two and took active notes during their conversation.[148] While Abu Ali denied that he had been subjected to sleep deprivation, he told Glatz that the Saudis kept the lights on twenty-four hours a day.[149] In his capacity as a consular officer, Glatz "could not secure a pen and piece of paper for him, could not arrange a phone call, or get him a lawyer, and so [Abu Ali] saw no point in complaining to the consul about physical abuse."[150]

The period in which Glatz visited with Abu Ali spanned at least the first six months of his detention, and "the biggest problem was that Mr. Abu Ali was being 'held incommunicado,'" meaning "that even if he had a lawyer, under the Saudi system an attorney could not have visited him during the investigation."[151] While it is unclear from the opinion when the investigation actually ended, nothing in the record shows that Abu Ali ever met with or was apprised of a right to meet with counsel while in Saudi Arabia.[152] The court found it significant that Abu Ali never complained to Glatz about his treatment by the Saudis during the "couple of five-second intervals when he and Mr. Abu Ali were alone and out of earshot of the Mabahith official observing the meetings" on September 6, 2003, and October 6, 2003.[153]

Abu Ali did complain to Glatz about threats made to him by the FBI and the Secret Service, in which they described his three options as cooperation and a life sentence in Saudi Arabia, cooperation and joint prosecutions in Saudi Arabia and the United States, or being declared an "enemy combatant" and imprisoned indefinitely without

---

145. *Id.* at 352–54. In February 2005, when Abu Ali was on the plane that was to take him from Saudi Arabia to the United States, he told a different consular officer that "he wished he had previously been able to tell him about his treatment in the prison, but that there had always been a Saudi guard present," and that "[h]e did not say anything about being physically mistreated, but said that he had not refused a consular visit, and that any Saudi claim that he had done so was 'typical of the mind games' that they had played on him." *Id.* at 358.

146. *Id.* at 369–71.

147. *Id.* at 352–54 ("Mr. Abu Ali was instructed prior to the Consul meeting not to discuss his treatment and not to sign anything concerning his rights.").

148. *Id.*

149. *Id.*

150. *Id.* at 354.

151. *Id.* at 353.

152. *See id.* at 343–72; *see also id.* at 356 ("Agent Cole testified that Mr. Abu Ali did ask for an attorney in their first meeting, but Agent Cole told him that he was not entitled to an attorney in Saudi Arabia.").

153. *Id.* at 353.

charge in the United States.[154] While Abu Ali was later interrogated by the FBI in September 2003 for what was deemed intelligence gathering, those agents did not provide him with *Miranda* warnings or access to counsel and, as a result, did not seek to introduce the fruits of those discussions at his criminal trial.[155] Both FBI agents interrogating Abu Ali testified that he complained to them about being tortured by the Saudi authorities but that he did not elaborate further on his statements.[156] For his part, Abu Ali testified that he complained to one of the FBI agents that he was being mistreated and that when the agent reported his contention to the Saudi authorities, Abu Ali was moved from his cell in the general population to one in solitary confinement, where he was handcuffed to a chain hanging from the ceiling and left standing up through the night until the next afternoon.[157]

b. Medical Experts

The medical experts and related testimony in the suppression hearing presented two different versions of Abu Ali's experience; the first being that he had been physically tortured by the Saudi authorities throughout the lengthy interrogation process and, as a result, suffered from posttraumatic stress disorder (PTSD), and the second being that he was not physically mistreated and did not legitimately suffer from PTSD.[158] The doctor who, on behalf of the government, initially examined Abu Ali (when he boarded the plane that took him from Saudi Arabia to the United States) testified that he "said nothing about any type of mistreatment, and that the only aspect of his confinement that he described that could be considered psychological mistreatment was his having been placed in solitary confinement."[159] In his medical report, the doctor did not remark on, nor have pictures taken of, the marks on Abu Ali's back, as he considered them to be of no consequence and to be the type of mark he saw all the time, and thus, they signified nothing.[160] He also noted that he did not examine Abu Ali for any signs of torture and, accordingly, did not look for any.[161]

The government produced a second doctor to testify regarding the marks on Abu Ali's back, and he concluded that those marks were not scars and consequently not the result of any corporal punishment to which Abu Ali may have been subjected.[162] The doctor did not have the benefit of conducting an exam of Abu Ali, but rather, he reviewed the report of Abu Ali's expert and photographs taken showing the marks on his back.[163]

Abu Ali's first expert witness was, like those of the government, a medical doctor who conducted an exhaustive exam of Abu Ali while in pretrial detention in the United

---

154. *Id.* at 354. An FBI agent later confirmed this testimony. *Id.* at 356.

155. *See supra* note 103.

156. *Abu Ali*, 395 F. Supp. 2d at 355–57. One of the agents approached the interrogation of Abu Ali on the assumption that he was a "terrorist." *Id.*

157. *Id.* at 370.

158. *See id.* at 357–67, 371–72.

159. *Id.* at 357.

160. *Id.*

161. *Id.*

162. *Id.* at 360–62.

163. *Id.*

States.[164] He testified that the marks on Abu Ali's back were, in fact, scars and were consistent with being beaten and whipped.[165] He further testified that Abu Ali was physically mistreated on several occasions while in Saudi custody, in addition to being psychologically abused.[166] This last assessment was based on the fact that Abu Ali was kept in solitary confinement for lengthy periods, subjected to constant threats, and repeatedly interrogated between 8:00 p.m. and 4:00 a.m. or 6:00 a.m. for lengthy periods.[167] Based on Abu Ali's experiences in Saudi detention, the doctor concluded that he suffered from depression and the most severe form of PTSD.[168] However, he also testified that Abu Ali had a substantial amount to gain by lying to him ("malingering"), although in his experience very few victims of torture did so.[169] With respect to his conclusions, he "admitted that dermatology and psychology are different fields from internal medicine."[170] In addition, the doctor's background as an outspoken advocate for victims of torture and his political activism (e.g., his lobbying Congress against then-Attorney General Alberto Gonzales on the issue of detainee abuse) seem to have impacted his credibility as a witness, although to what degree is hard to tell.[171]

Abu Ali's second expert witness was an assistant professor of psychiatry at George Washington University Medical Center who provided testimony in greater detail about what she described as Abu Ali's severe form of PTSD.[172] She made her diagnosis on the basis of three two-hour interviews she conducted with Abu Ali while he was detained in the United States pending trial.[173] Her inexperience as an expert witness seems to have made an impact,[174] as the court noted she grew "quite defensive on cross-examination and appeared to be a bit frustrated with the detailed questions about her findings."[175] Her findings and methodology were challenged in detail, and she also recognized that Abu Ali could be a malingerer.[176] The government's psychiatric expert, who examined Abu Ali over five sessions in September 2005, rejected Abu Ali's expert witness' diagnosis of PTSD, finding that she erred in not relying on anything other than her own reports and in ruling out the possibility of malingering too quickly.[177]

---

164. *Id.* at 362–64 (explaining that the doctor, certified as an expert in internal medicine, was "Chairman of the Bellevue Commission for Victims of Torture" and "has taken courses and seminars on treating victims of torture and routinely trains physicians in caring for victims of torture").

165. *Id.* at 362.

166. *Id.* at 362–63.

167. *Id.* at 363.

168. *Id.* at 362–64.

169. *Id.* at 364.

170. *Id.*

171. *See id.*

172. *Id.* at 364–67.

173. *Id.*

174. *See id.* at 366 ("Dr. Gaby testified on cross-examination that she does not 'routinely do this work,' and this was the first time she had examined someone charged with a felony . . . in a criminal case.").

175. *Id.*

176. *Id.* at 364–67.

177. *Id.* at 370–71.

3. Analysis of the Decisions

As noted, the district court denied the motion to suppress, specifically finding that Abu Ali's statements were made voluntarily,[178] that he was not subject to treatment that shocks the conscience,[179] and that there existed no joint venture between the United States and Saudi Arabia.[180] All these rulings were upheld on appeal.[181] While the district court was faced with a difficult situation involving very serious charges, allegations of torture, and contradictions between and within the witnesses' testimony, these realities do not immunize either of the decisions from criticism, despite the gravity of the court's predicament.

a. District Court Opinion—Voluntariness

The district court ruled, based on the totality of the circumstances, that Abu Ali's statements were made voluntarily by a preponderance of the evidence.[182] It found the testimony of the Saudi Mabahith officers to be credible, noting that the testimony of the officer in charge of the detention facility in which Abu Ali was allegedly beaten and whipped was unimpeached, while the testimony of Abu Ali raised questions as to his credibility.[183] Further, it remarked that Abu Ali's behavior during the time period of June 11 through June 15, 2003, was inconsistent with a person having been tortured.[184] Abu Ali's concern that the United States knew about his custody raised serious questions as to whether he was tortured, since it raised the question why an allegedly tortured detainee in a foreign country would not want the American authorities to know.[185]

As to Abu Ali's claims of torture, the court found that it was left with many unanswered questions, but noted that if it had to base a decision solely on Abu Ali's testimony, it would have found his statements to be involuntary.[186] The court did not accept the diagnosis of Abu Ali's medical experts because it was largely based on Abu Ali's self reporting, and ultimately did not accept the PTSD diagnosis made by Abu Ali's physicians.[187] In the first instance, there existed a substantial dispute as to the marks on Abu Ali's back.[188] The disputed medical information coupled with the assessment of the Saudi officials and Abu Ali's testimony favored the government's

---

178. *Id.* at 387.
179. *Id.* at 381.
180. *Id.* at 383.
181. United States v. Abu Ali, 528 F.3d 210, 229–34 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).
182. *Abu Ali*, 395 F. Supp. 2d at 378. The court also found that the statements were given under conditions that did not shock the conscience. *Id.* at 380–81. The brief nature of the ruling on this point underscores the somewhat superfluous role this test plays, as it did not seem to add anything of note to the legal analysis.
183. *Id.* at 373–74.
184. *Id.* at 374.
185. *Id.*
186. *Id.*
187. *Id.* at 374, 376–77.
188. *See id.* at 375.

assertion of voluntariness. Additionally, the court's observation of Abu Ali led it to question his reliability.[189] Specifically, the court's observation of Abu Ali revealed him to be "intelligent, capable, and articulate," but the court also determined that his testimony "[did] not flow logically."[190] But, despite its denial of the motion to suppress, the court did accept some of Abu Ali's assertions at face value and acknowledged that it was left with questions as to Abu Ali's credibility based on the testimony at the hearing.[191]

The most glaring aspect of the opinion denying the motion to suppress the confession concerns the court's assessment of the context in which those statements were made—namely, Saudi custody. During the individualized inquiry into Abu Ali's experience in Saudi Arabia, the court did not take into account what is publicly known about interrogation at the hands of the Mabahith and other security forces, because such evidence was not allowed by the court.[192] Consider the Department of State's own global report on human rights practices and its entry on Saudi Arabia for the year 2003, when the bulk of the abusive treatment of Abu Ali allegedly took place.[193] It is worth quoting from it at length to demonstrate what the same executive branch that was prosecuting Abu Ali had to say about the Saudi security services detaining him:

> [T]here were credible reports that the authorities abused detainees, both citizens and foreigners. Ministry of Interior officials were responsible for most incidents of abuse of prisoners, including beatings, whippings, and sleep deprivation. In addition, there were allegations of torture, including allegations of beatings with sticks and suspension from bars by handcuffs. There were reports that torture and abuse were used to obtain confessions from prisoners (see Section 1.e.). Canadian and British prisoners that were released during the year reported that they had been tortured during their detention.
>
> The Government continued to refuse to recognize the mandate of the U.N. Committee Against Torture to investigate alleged abuses. A government committee established in 2000 to investigate allegations of torture still had not begun functioning at year's end.[194]
>
> . . . .
>
> The law provides that authorities may not detain suspects for more than 3 days without charging them. However, in practice persons were held weeks or months and sometimes longer. . . .
>
> . . . .

---

189. *Id.* at 378.

190. *Id.*

191. *Id.*

192. AMNESTY INT'L, THE TRIAL OF AHMED ABU ALI—FINDINGS OF AMNESTY INTERNATIONAL'S TRIAL OBSERVATIONS 4–6, *available at* http://www.amnesty.org/en/library/asset/AMR51/192/2005/en/dom-AMR511922005en.html.

193. HUMAN RIGHTS REPORTS 2003, *supra* note 129.

194. *Id.* at 2021.

> *Political detainees who are arrested by the General Directorate of Investigation (GDI), the Ministry of Interior's security service (Mabahith), have been held incommunicado in special prisons during the initial phase of an investigation, which may last weeks or months.* The GDI allowed the detainees only limited contact with their families or lawyers.[195]

The court seemed to dismiss these claims by noting it was "mindful that there have been news reports accusing the Saudi government of engaging in and condoning torture or human rights violations."[196] Were it simply a case of news reports, that would be one thing; but the Department of State has gone on record with these statements, and a reason does not immediately suggest itself as to why the government's own report cannot be considered in the totality-of-the-circumstances analysis. Indeed, on a motion to suppress, hearsay evidence is admissible, and can be used to aid the court in making its determination on the admissibility of a confession.[197] Surely, consideration of this evidence would require reconsideration of the credibility of the Saudi officers' testimony, especially when one considers what they alluded to in their testimony. For example, one officer "admitted that he has threatened an inmate before" and "once tied a person to a tree for five minutes in connection with questioning."[198] The main officer questioning Abu Ali pointed out that while "he never used force on a subject," fortuitously "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."[199]

Had these statements been viewed by the district court in light of the State Department's own report, perhaps they would have enhanced the court's totality-of-the-circumstances analysis to one more reflective of the actual nature of interrogation by the Mabahith in general terms.[200] Of course, Supreme Court precedent has held that generalized evidence or statistics of disparate treatment fall short of proving any constitutional violation in criminal prosecutions where no individualized showing is made. A well-known example of this phenomenon is *McCleskey v. Kemp*,[201] where the Court rejected an equal protection challenge to Georgia's imposition of capital

---

195. *Id.* at 2022 (emphasis added).

196. United States v. Abu Ali, 395 F. Supp. 2d 338, 396 (E.D. Va. 2005).

197. FED. R. EVID. 104; United States v. Raddatz, 447 U.S. 667, 679 (1980); United States v. Karake, 443 F. Supp. 2d 8, 50–51 (D.D.C. 2006).

198. *Abu Ali*, 395 F. Supp. 2d at 347.

199. *Id.* (noting that some of his testimony was "questionable").

200. *Cf.* Wilson v. City of Chicago, 6 F.3d 1233, 1238 (7th Cir. 1993) (ruling, in a § 1983 action involving allegations of police torture against members of the Chicago Police Department, that district court committed error when it refused to allow the "plainly relevant" testimony of two witnesses who claimed to have been tortured by a defendant for purposes of proof of torture claim and to impeach the credibility of the same defendant). Note also that the international human rights organizations Amnesty International and Human Rights Watch made this point in their reports on Abu Ali's case. *See* AMNESTY INT'L, *supra* note 192; Human Rights Watch, Submission to the Committee Against Torture in Response to United States Positions Expressed During the Committee's Consideration of the Second Periodic Report of the United States on May 5 and May 8, 2006, www.hrw.org/sites/default/files/related_material/hrw_response_051706.pdf.

201. 481 U.S. 279 (1987).

punishment, based on a statistical study demonstrating that the death penalty was disproportionately likely to apply to black defendants where the victim was white.[202] In *McCleskey*, the Court ruled that absent a showing of discriminatory intent in the defendant's own case, that is, that the state targeted him for imposition of the death penalty on account of his race, there was no violation of equal protection.[203] Another example is *United States v. Armstrong*,[204] which saw the Supreme Court reject an equal protection challenge to the prosecution of the defendant, based on unofficial statistics that tended to show that no charges of crack distribution were ever brought in the Central District of California against white defendants.[205] Because there was no showing of discriminatory intent toward the defendant himself, a selective prosecution claim failed.[206]

Without debating the merits of the above cited decisions, it is not clear why the Saudi internal security service should receive the same benefit of the doubt regarding generalized reports or statistics as Georgia state[207] and federal prosecutors,[208] respectively. A monarchy at the time of Abu Ali's detention, Saudi Arabia had a human rights record that was, and still is, subject to severe criticism.[209] While in the United States it is rare to find examples of courts presuming the existence of

---

202. *Id.* at 291–99.

203. *Id.*

204. 517 U.S. 456 (1996).

205. *Id.* at 463–71.

206. *See id.* at 470; *see also* Wayte v. United States, 470 U.S. 598, 609–10 (1985) (stating that even where a defendant can show a discriminatory effect of a particular policy, he still must show that "the Government intended such a result," that is, it "prosecuted him *because of* his protest activities" (emphasis in original)).

207. *McCleskey*, 481 U.S. at 296 n.18 ("Our refusal to require that the prosecutor provide an explanation for his decisions in this case is completely consistent with this Court's longstanding precedents that hold that a prosecutor need not explain his decisions unless the criminal defendant presents a prima facie case of unconstitutional conduct with respect to his case.").

208. *Armstrong*, 517 U.S. at 476 (Stevens, J., dissenting) ("Federal prosecutors are respected members of a respected profession. Despite an occasional misstep, the excellence of their work abundantly justifies the presumption that 'they have properly discharged their official duties.'" (citation omitted)).

209. *See, e.g.*, HUMAN RIGHTS REPORTS 2003, *supra* note 129, at 2020 ("Saudi Arabia is a monarchy without elected representative institutions or political parties. . . . The Government's human rights record remained poor; although there were positive improvements in a few areas, serious problems remained. Citizens did not have the right to change their government. There were credible reports that security forces continued to torture and abuse detainees and prisoners, arbitrarily arrest and detain persons, and hold them in incommunicado detention. There were cases in which [religious police] continued to intimidate, abuse, and detain citizens and foreigners. There was no evidence that violators were held accountable for abuses. Most trials were closed, and defendants usually appeared before judges without legal counsel. There were reports that the Government infringed on individuals' privacy rights. The Government continued to restrict freedom of speech and press, although there has been an increase in press freedom over a series of years. The Government restricted freedom of assembly, association, religion, and movement. Violence and discrimination against women, violence against children, discrimination against ethnic and religious minorities, and strict limitations on worker rights continued.").

prejudicial conditions, they do exist.[210] Saudi Arabia's justice system, were it part of the United States, would undoubtedly be considered unconstitutional on many levels of theory and application. Further, the nature of the evidence in Abu Ali's case is also different from that in *McCleskey* and *Armstrong*. Whereas in *McCleskey* the evidence presented was in the form of a statistical study conducted by academics,[211] and in *Armstrong*, in the form of affidavits by attorneys, newspaper reports, and unofficial statistics,[212] here it bears repeating that the report relevant to Abu Ali's conditions of detention came from an agency within the same executive branch that was prosecuting Abu Ali.[213]

In finding his confession to be voluntary, the court managed to somehow elide several key aspects of Abu Ali's detention and interrogation. Even assuming that his allegations of torture[214] and physical mistreatment were not sufficiently established or were successfully rebutted, it was undisputed that Abu Ali was held for over a year and a half without ever being charged, whether in the United States or Saudi Arabia. He was not allowed to meet with an attorney during that time. Whatever meetings he had with United States authorities were either custodial interrogations intended for intelligence-gathering purposes, based on the FBI's view that he was a "terrorist," or consular visits that were tightly controlled and observed by Saudi security. Where the American consular authorities could not help him at all, the FBI informed him that were he not to cooperate with their investigation, he risked being named an enemy combatant by the United States and held indefinitely without charge. He was interrogated for lengthy periods during the night hours over forty-seven straight days, a situation that exhausted him. On this basis alone, and not denying the fact that Abu Ali was considered by the U.S. intelligence community to be an individual with dangerous associations,[215] it is hard to see how the district court could find his statements to have been made voluntarily. While Abu Ali was not entitled to the exclusionary remedy available for *Miranda* violations, *Miranda*'s rationale is instructive in his case, since the conditions of his interrogation appear to have had "no purpose other than to subjugate the individual to the will of his examiner."[216]

---

210. An exception to this general rule is stated in *State v. Peart*, 621 So. 2d 780 (La. 1993), in which the Louisiana Supreme Court ruled that, given the extremely high caseloads state public defenders had to take on due to funding constraints, it would assume ineffective assistance of counsel for any defendant represented by a public defender until the funding problem was alleviated and caseloads reduced. *Id.* at 789–92.

211. *McCleskey*, 481 U.S. at 286–87.

212. *Armstrong*, 517 U.S. at 459–61.

213. *See supra* text accompanying note 194.

214. The court provided a section in the opinion decrying the use of torture and noting its illegality under United States law. United States v. Abu Ali, 395 F. Supp. 2d 338, 379–80 (E.D. Va. 2005).

215. In addition to being connected to the so-called Virginia Paintball case, see *supra* notes 105–09 and accompanying text, he was alleged to have been in contact with one of the individuals who later committed the mass suicide attack in London, England, on July 7, 2005, in which fifty-six people were killed. RON SUSKIND, THE ONE PERCENT DOCTRINE 201–03 (2006). According to the emails, which were seized pursuant to the NSA's wireless wiretapping program, the two were planning to commit violent activity. *Id.*

216. Miranda v. Arizona, 384 U.S. 436, 457–58 (1966) ("The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—

b. Fourth Circuit Opinion—Voluntariness

The Fourth Circuit upheld the district court's ruling that Abu Ali's confession was made voluntarily, deferring heavily to the latter's findings and determinations.[217] While the Fourth Circuit acknowledged Abu Ali's lengthy detention and interrogation incommunicado, it also found that his "personal characteristics did not render him particularly susceptible to coercion or pressure" and that his conditions of confinement were not onerous enough to overbear his will.[218]

Leaving aside the issues surrounding the conditions of his confinement, the court of appeals' analysis of Abu Ali's personal characteristics is not so clear cut as to be self-evident. While Abu Ali was undisputedly familiar with the Saudi agents on a cultural, linguistic, and perhaps even a religious level,[219] it is not apparent why those traits make him less, as opposed to more, susceptible to coercion. Given Saudi Arabia's human rights record, an individual as "well-educated . . . intelligent, capable, and articulate"[220] as Abu Ali would almost assuredly know of the Saudi security services' reputation for heavy-handed tactics in interrogation. Unlike the situation in the United States, where a criminal suspect has Fifth Amendment rights but does not always exercise them for various reasons, in Saudi Arabia, Abu Ali had no rights guaranteed to him and, based on his character and background, likely had a significant fear that he might be tortured. Taking its cue from *Schneckloth*, the Fourth Circuit's analysis is rooted in a standard assumption taken from the American police interrogation context: namely, that the more educated and sophisticated criminal defendant, with full awareness of his constitutional rights, benefits from his refusal to cooperate with the police. In the Saudi context, the opposite may in fact be true. In the latter situation, a suspect/detainee might automatically conclude that some form of cooperation (whether based in fact or fiction) is immediately necessary to avoid prolonged brutality. This is borne out by Abu Ali's testimony that when he finally read his confession, he was acting "nuts" and was completely exhausted by his interrogation, which lasted forty-seven straight days.[221]

A second aspect of the Fourth Circuit's opinion that bears on the voluntariness of Abu Ali's confession, but was stated in a separate context, concerns the format governing the Saudi officers' testimony. As noted, their testimony came in the form of depositions under Federal Rule of Criminal Procedure 15 conducted via two-way videolink from Saudi Arabia, outside the physical presence of Abu Ali himself, and under pseudonyms.[222] The court held that their testimony satisfied *Maryland v. Craig*'s[223] two-part test for allowing the testimony to be taken outside the presence of a

---

that the individual may not be compelled to incriminate himself. Unless 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.").

217. United States v. Abu Ali, 528 F.3d 210, 231–34 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

218. *Id.* at 233–34.

219. *Id.* at 233.

220. *Id.*

221. United States v. Abu Ali, 395 F. Supp. 2d 338, 371 (E.D. Va. 2005).

222. *Id.* at 344.

223. 497 U.S. 836 (1990). In *Craig*, the Court held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only

criminal defendant, as an exception to his rights under the Sixth Amendment's Confrontation Clause.[224]

Given the government's national security interest and the nature of the charges, the first part of the test—to protect a compelling governmental interest—was easily satisfied.[225] The second part was slightly more complicated, and focused on how to secure the reliability of the testimony to be offered.[226] As evidence of mechanisms to ensure the reliability of the Saudi officers' testimony, the Fourth Circuit cited the facts that the Saudi officers were administered an oath, that they were subjected to cross-examination, and that their testimony and the defendant's reaction to it were visible to the jury on a split screen videotape.[227] While, as the Fourth Circuit noted, these mechanisms ostensibly satisfy the second part of the *Craig* test, some points regarding each mechanism are worthy of further consideration.

First, the purpose of administering an oath is to impress the witness "'with the seriousness of the matter and [to] guard[] against the lie by imposing the possibility of a penalty for perjury.'"[228] This might be true in the context of criminal law enforcement in the domestic arena,[229] but an oath administered to unaccountable security officials in a monarchy with no democratic institutions, no constitution, and no appreciation of the constitutional rights enjoyed by the accused in the United States, does not inspire confidence. Further, the decision to allow the officers' testimony via videolink from Saudi Arabia in no way exposed these individuals to the perjury sanction. Because the government of Saudi Arabia would not allow the Mabahith officers to leave the country to testify, there is virtually no likelihood that they would be turned over to the United States to face a possible perjury charge in the unlikely event that evidence of such were able to be produced. While we may never know what actually happened during Abu Ali's time in Saudi custody, and with all due respect to the district court's observations of how the Saudi witnesses conducted themselves on the stand and its crediting of their testimony, there was no impediment to their lying and getting away with it.[230] Testimony given in such circumstances is inherently unreliable and should not have been credited.

---

where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850 (citing Coy v. Iowa, 487 U.S. 1012, 1021 (1988)).

224. United States v. Abu Ali, 528 F.3d 210, 240–42 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

225. *Id.* at 240 ("[T]he Supreme Court has long acknowledged that 'no governmental interest is more compelling than the security of the Nation.'" (quoting Haig v. Agee, 453 U.S. 280, 307 (1981))).

226. *Id.* (citing *Craig*, 497 U.S. at 850).

227. *Id.* at 241–42.

228. *Craig*, 497 U.S. at 845–46 (quoting California v. Green, 399 U.S. 149, 158 (1970)).

229. *But see* Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 878 n.98 (2008) (citing articles and statistics that note the very remote possibility of a perjury prosecution in any case).

230. In the United States, at least, police brutality is often accompanied by a willingness to engage in perjury, on the rationale that the police's main goal of making arrests and fighting crime somehow justifies abuse. *See* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1326–27 (1999). There are no doubt similar motivations for foreign governments to hide or obfuscate their use of coercive interrogation techniques in terrorism investigations from public scrutiny, and it is entirely possible to conclude that foreign

c. Joint-Venture Analysis

The district court found that there was no joint venture between the FBI and the Mabahith, nor did the latter act as the agents of the former for the purposes of circumventing *Miranda*, a ruling that was upheld by a 2-1 majority of the three-judge Fourth Circuit panel.[231] The dissenting judge felt that there was in fact a joint venture, but that, in any event, any error was harmless, given the voluntary nature of the confession, and as a result was not grounds for its suppression.[232] Behind the two positions were two different considerations. The court of appeals majority seemed to be motivated by concerns that applying *Miranda* to the facts of Abu Ali would interfere with international law-enforcement cooperation—most crucial in the war on terrorism—by forcing U.S. norms onto foreign countries, while the dissent noted that once an American agent poses questions, whether directly or through a foreign officer, that is the type of custodial interrogation governed by *Miranda*.[233]

As the Fourth Circuit pointed out, there is little case law on what constitutes active or substantial participation in the joint venture context. Again, there is no way to determine the nature of the cooperation between the two agencies, American and Saudi, on the date on which the Mabahith posed the FBI's questions; subsequently it seems, however, that there was some sort of joint endeavor. When the FBI interrogated Abu Ali in September 2003, they did so for allegedly intelligence-related purposes. Criminal prosecution in the United States may have been foreclosed, but for the initial confession given to the Saudis. The curious nature of Abu Ali's indictment, which came a year and a half after his arrest in Saudi Arabia and a little over a month after an unfavorable ruling for the government in his habeas petition, also gives credence to his allegations that the Mabahith were acting at the behest of the FBI.[234] How germane these points are to the analysis seems secondary to the discussion the Fourth Circuit panel was ostensibly having among its members. What emerges from the opinion is a discussion of the nature of terrorist-related offenses, and whether or not they create a

---

intelligence agents might resort to perjury in due course. *See* Jenny-Brooke Condon, *Extraterritorial Interrogation: The Porous Border Between Torture and U.S. Criminal Trials*, 60 RUTGERS L. REV. 647, 694–95 (2008).

231. United States v. Abu Ali, 395 F. Supp. 2d 338, 381–83 (E.D. Va. 2005) (basing its ruling on the fact that the Mabahith officers controlled all aspects of Abu Ali's detention and interrogation); *see also Abu Ali*, 528 F.3d at 229 n.5 (upholding the ruling on the same basis).

232. *Abu Ali*, 528 F.3d at 230–31 & n.6.

233. *Id.* at 230 nn.5–6. The dissent cited *United States v. Bin Laden (Bin Laden I)*, 132 F. Supp. 2d 168, 187 (S.D.N.Y. 2001), with approval for the proposition that "*Miranda* must apply to any portion of an overseas interrogation that is, in fact or form, conducted by U.S. law enforcement." *Id.* at 230 n.6.

234. In a recent article covering several of the decisions discussed here, Jenny-Brooke Condon highlights the drawbacks of the limited and narrow joint venture analysis conducted by the district court in *Abu Ali*, and argues persuasively for a more rigorous review that "consider[s] the government's inclination and incentives to circumvent U.S. law and the high degree of transnational cooperation and facilitation in prosecuting the war on terror." Condon, *supra* note 230, at 700–01, 704 ("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.").

special legal regime that is less protective of constitutional rights than what might be deemed "ordinary" crimes.

4. Sentencing

After Abu Ali's conviction,[235] the district court sentenced him to a thirty-year term of imprisonment, followed by a thirty-year period of supervised release.[236] The government had argued for a life sentence, based on the Sentencing Guidelines calculation, but the district court demurred, finding:

> Abu Ali never planted any bombs, shot any weapons, or injured any people, and there is no evidence that he took any steps in the United States with others to further the conspiracy." The court also commented on the defendant's lack of a prior criminal history and his good behavior while incarcerated in the United States.[237]

A majority of the Fourth Circuit panel overturned the sentence as too great a variance from the guidelines and remanded for resentencing, impliedly asking the district court to think more seriously about imposing a life sentence.[238] The dissent took the position that the majority, in remanding, failed to apply Supreme Court precedent and created, in effect, a kind of terrorism exception to allow for a less deferential review of the district court's sentencing decision.[239]

In reflecting on the voluntariness analysis employed in both *Abu Ali* decisions, it seems that some form of terrorism exception had to have been in effect. Consider the Fourth Circuit majority's comments in evaluating the district court's sentence:

> We are similarly unmoved by the district court's (and dissent's) references to letters describing Abu Ali's "general decent reputation as a young man" and his overall "good character." What person of "decent reputation" seeks to assassinate leaders of countries? What person of "good character" aims to destroy thousands of fellow human beings who are innocent of any transgressions against him? This is not good character as we understand it, and to allow letters of this sort to provide the basis for such a substantial variance would be to deprive "good character" of all its content.[240]

Using this sort of moralistic logic to justify imposition of more severe penalties because the underlying crime involves terrorism and national security might be

---

235. To underscore the importance of Abu Ali's conviction, in a recent article former Attorney General John Ashcroft highlighted it as a notable "success [] in the War on Terror." John Ashcroft, *Reflections on Events and Changes at the Department of Justice*, 32 HARV. J.L. & PUB. POL'Y 813, 828–29 (2009).

236. *Abu Ali*, 528 F.3d at 259 (4th Cir. 2008).

237. *Id.* (quoting United States v. Abu Ali, 395 F. Supp. 2d 338 (E.D. Va. 2005)).

238. *See id.* at 269.

239. *Id.* at 271–82 (Motz, J., dissenting) ("The majority seems to believe that the particular context of the sentence in this case, involving as it does terrorist crimes, renders appropriate some form of special—and less deferential—review.").

240. *Id.* at 268 (citation omitted).

understandable, if not expected, in such a case. Whatever its merits or demerits, it is a short leap to employ the same logic in assessing the voluntariness of Abu Ali's confessions. If Abu Ali can be characterized in such negative and dangerous terms, an application of the voluntariness test can easily result in a finding that a confession was voluntary, simply by virtue of a hostile or unsympathetic judge guiding the facts of the voluntariness test to a conclusion he or she desires. Criticism of the voluntariness test is well-known; the test is particularly susceptible to judicial manipulation, as previously indicated.[241] Hostility and bias in this form toward a criminal defendant probably colored the analysis in the *Abu Ali* decision, because the evidence of Saudi misconduct was available had the courts actually wanted to hear and process it. In any event, at resentencing, the district court accepted the Fourth Circuit's logic and sentenced Abu Ali to life in prison.[242]

B. The Abu Marzook *Case*

The case of *United States v. Marzook*[243] presents the second recent instance of a federal prosecution involving the introduction of a confession made abroad to foreign agents. Muhammad Salah, one of the defendants in the *Marzook* prosecution, was arrested by Israeli military authorities upon trying to enter the Gaza Strip in January 1993.[244] Salah, a naturalized American citizen of Palestinian origin, gave a series of statements to the Israeli authorities that incriminated him as a high-level operative in the Islamic Resistance Movement, better known as Hamas.[245] As a result of his confession, Salah eventually pled guilty to "being an active member of, holding office in, and performing services for an illicit organization (Hamas), engaging in activity against the public order and undermining regional security, and providing shelter to terrorists."[246] During his period of incarceration in Israel, which lasted until November

---

241. *See supra* notes 30–35 and accompanying text. For another example of a type of terrorism exception in application, see *United States v. Hammoud*, 381 F.3d 316, 327, 354–56 (4th Cir. 2004) (upholding 155-year prison sentence to defendant found guilty of providing material support to Hezbollah, a banned FTO, in violation of 18 U.S.C. § 2339B), *overruled by* Hammoud v. United States, 543 U.S. 1097 (2005). *See also Hammoud*, 381 F.3d at 371–85 (Gregory, J., dissenting) (discussing the weakness of the evidence and general excessiveness of the sentence).

242. Jerry Markon, *Fall's Church Man's Sentence in Terror Plot Is Increased to Life*, WASH. POST, July 28, 2009, at A3.

243. United States v. Marzook (*Marzook IV*), 435 F. Supp. 2d 708 (N.D. Ill. 2006). On a side note, although the named defendant is sometimes referred to simply as Marzook, in point of fact his last name is Abu Marzook. *See, e.g.*, United States v. Marzook (*Marzook III*), 426 F. Supp. 2d 820 (N.D. Ill. 2006); United States v. Marzook (*Marzook I*), 383 F. Supp. 2d 1056 (N.D. Ill. 2005). This practice, which is not unheard of in the federal terrorism cases, is akin to referring to someone with the last name of Johnson as "John." For the purposes of this Article, reference will be made to the names as officially recorded, regardless of whether they are correctly rendered.

244. *Marzook IV*, 435 F. Supp. 2d at 712.

245. *Id.*; *see also* Boim v. Holy Land Found. for Relief & Dev., 511 F.3d 707, 712 (7th Cir. 2007), *vacated*, *reh'g en banc granted*, 2008 U.S. App. LEXIS, at *1 (7th Cir. June 16, 2008), *modified*, 549 F.3d 685 (7th Cir. 2008), *cert. denied*, Boim v. Salah, 130 S. Ct. 458 (2009).

246. *Boim*, 511 F.3d at 712.

1997, the Office of Foreign Assets Control (OFAC) of the Treasury Department listed him as a specially designated terrorist, a classification that endures to this day.[247]

1. Motion to Suppress

In August 2004, Salah was indicted, along with Abu Marzook,[248] the deputy head of the political wing of Hamas, and Abdelhaleem Ashqar on three charges: a Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy charge in violation of 18 U.S.C. § 1962(d), one charge of knowingly providing material support to a banned FTO in violation of 18 U.S.C. § 2339B, and one charge of obstructing justice by providing false information in a civil action in which the family of an American citizen killed in a Hamas shooting in the West Bank sued individuals and corporations they believed to be associated with Hamas.[249] Crucial to the government's case were the statements that Salah allegedly made to the Israeli authorities while in custody between January and March 1993, and consequently he moved to suppress their admission as being the product of torture.[250]

---

247. *Id*.; OFFICE OF FOREIGN ASSETS CONTROL, DEP'T OF THE TREASURY, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS 324 (2009), *available at* http://www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf. Salah was the first American citizen to be so designated. *See* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 28 (2003).

248. Abu Marzook's saga in the federal courts of the United States prior to the filing of charges in the Northern District of Illinois is noteworthy in its own right, even though he was indicted in absentia and did not appear in the action in which Salah and Ashqar were tried. In July 1995, Abu Marzook, the then-head of the political wing of Hamas and a former United States permanent resident, was detained by U.S. immigration authorities while trying to enter the country at John F. Kennedy International Airport in New York. Marzook v. Albright, No. 97 CIV. 2293, 1997 WL 181163, at *1 (S.D.N.Y. Apr. 14, 1997); Marzook v. Christopher, No. 96 Civ. 4107, 1996 WL 583378, at *1 (S.D.N.Y. Oct. 10, 1996). He then spent two years in detention and unsuccessfully fought off a challenge to his being extradited to Israel to face murder charges on account of his being a leader of Hamas. *In re* Extradition of Marzook, 924 F. Supp 565, 593 (S.D.N.Y. 1996). One former Central Intelligence Agency officer claimed that the agency, with the aid of the FBI, manipulated Abu Marzook into traveling to the United States, so that he might be detained for unrevealed intelligence purposes. MELISSA BOYLE MAHLE, DENIAL AND DECEPTION: AN INSIDER'S VIEW OF THE CIA FROM IRAN-CONTRA TO 9/11, at 246 (2004). In April 1997, Israel withdrew its extradition request, even after Abu Marzook had indicated his willingness to be tried there, and he was subsequently deported to Jordan. Neil Macfarquhar, *Terror Suspect Freed by U.S.; Flies to Jordan*, N.Y. TIMES, May 6, 1997, at A1.

249. Second Superseding Indictment of Muhammad Hamid Khalil Salah at 20, United States v. Marzook, 462 F. Supp. 2d 915 (N.D. Ill. 2006) (No. 03CR978); *Boim*, 511 F.3d at 713.

250. United States v. Marzook (*Marzook IV*), 435 F. Supp. 2d 708, 712–13 (N.D. Ill. 2006). Specifically, Salah alleged that he was

> beaten, subjected to physical pressure, stripped naked, handcuffed in an interrogation room for long periods of time, threatened with taking pictures of him naked, forced to sit in a low child's chair, slapped, left for long periods of time in a tiny freezing cell, denied sleep for long periods of time, subjected to having a foul smelling sack placed on his head for long periods of time, subjected to deafening loud music, forced to sleep on a cold floor for long periods without a mattress or blanket, placed in dark cells,

At the hearing on the motion to suppress, United States District Judge Amy St. Eve heard testimony from Salah's primary Israeli interrogators, several FBI agents, and Salah's own witnesses.[251] Salah himself did not testify, but submitted an affidavit in which he set forth his allegations of abuse.[252] The agents from the Israel Security Agency (ISA), formerly known as the General Security Service (GSS), were allowed, pursuant to the Classified Information Procedures Act (CIPA), to enter the courtroom through a separate entrance, testify in a closed session, and have their identities kept secret, on the basis that such information was classified in Israel and would be treated as such by the United States.[253]

While the ISA agents did not deny that they used the coercive practices described in Salah's allegations in the normal course of interrogating Palestinian detainees, they denied having employed them in Salah's case specifically.[254] To buttress this point, the officer supervising Salah's interrogation pointed to an order issued by the then-head of the GSS that allowed for only "frontal interrogation," that is, questioning of Salah, and not the techniques available to GSS agents generally, on account of his American citizenship.[255] In the course of extensive testimony by the Israeli agents, it was made clear that Salah was not provided an attorney upon request, since Israeli law did not allow him one for a period of at least fifteen days, and, regardless, the interrogation could, and in this case did, continue even after counsel was appointed.[256] While he was tried in an Israeli military court and not in the civilian court system, it was unclear from the record as to exactly when he received an attorney, though the court noted that appointment of counsel did take place within the time period allowed for by Israeli law.[257] In any event, the ISA agents' testimony set forth in detail their version of the investigation, and they produced evidence in the form of logs, detailed reports, and transcripts of sessions to buttress the government's contention that Salah's statements were made voluntarily.

Well over a month into the interrogation, Salah was placed in a cell at a new facility with Palestinians collaborating with the ISA. Salah alleged that these collaborators coerced him via threats to write down a lengthy statement, essentially confessing to a series of crimes involving his activism on behalf of Hamas.[258] The fifty-three page statement was the most extensive explication of Salah's alleged illegal activities and

---

> threatened with violence, threatened with murder, threatened with harm to his family through the FBI, threatened with long detention without being brought before a judge, threatened with long prison sentences, denied food, clothing, or worship, or subjected to extreme heat and cold.

Id. at 718.

251. *Id.* at 714.

252. *Id.* For an explanation of the incentives a criminal defendant enjoys not to testify on his own behalf, see Bellin, *supra* note 229.

253. United States v. Marzook (*Marzook II*), 412 F. Supp. 2d 913 (N.D. Ill. 2006).

254. *Marzook IV*, 435 F. Supp. 2d at 718; *see also* United States v. Salah, 462 F. Supp. 2d 915, 917–18 (N.D. Ill. 2006) (stating that the government admitted that ISA used the following methods during the time period in question: hoods, handcuffs, shackles, handcuffing a detainee to a small chair while hooded, threatening harm to detainee and his family, sleep deprivation, and, under certain circumstances suggesting an imminent threat to human life, slapping).

255. *Marzook IV*, 435 F. Supp. 2d at 717–18.

256. *Id.* at 759–60.

257. *Id.*; *see also id.* at 734–36.

258. *Id.* at 721–22, 766–70.

subsequently led to his confessing orally before the ISA agents, who tape-recorded his statements.[259] Unlike Abu Ali, Salah never testified at the suppression hearing, and instead relied only on the affidavit he had executed in support of his motion to suppress.[260] The government nonetheless introduced evidence that it claimed undermined Salah's credibility, concerning a false loan application he had previously completed.[261] Salah's expert and fact witnesses testified generally about Israeli interrogation techniques as applied to Palestinians, but the court did not seem to give them much credit, because (1) those witnesses were not present at Salah's interrogation,[262] and (2) their investigations of Salah's allegations were either cursory or nonexistent.[263]

Ultimately, the court ruled that all of the statements but one Salah had made while in custody were not the product of torture, and could be introduced into evidence at his criminal trial.[264] The sole exception was a set of signed statements made to an Israeli police officer that were written in Hebrew, a language that Salah did not read or understand.[265]

2. *Abu Marzook*—Analysis

The court approached the question of voluntariness by analyzing (1) the conduct of the ISA agents, (2) the conditions of the interrogation, and (3) the personal characteristics of Salah.[266] The court found neither the agents' conduct nor the conditions of the interrogation to have been coercive, and it noted that Salah was "intelligent and articulate."[267] Given that many of the issues raised in the *Marzook* decision are similar to those in *Abu Ali*, repetitive commentary is unnecessary at this stage. However, there are certain points particular to the facts in *Marzook* that invite further analysis, and they are set forth below.

The decision rested primarily on the court's finding that the main ISA interrogators were credible in their respective testimony, which collectively reinforced the government's argument that the statements were made voluntarily. The court noted explicitly that Salah's decision not to testify clearly impacted its decision to deny the motion to suppress, although given the court's generally favorable impression of the ISA agents' testimony, it appears unlikely to have made any great difference. Of particular importance was the court's acceptance of the testimony that at the time of

---

259. *Id.* at 766–70.
260. *Id.* at 714.
261. *Id.* at 737–39.
262. *Id.* at 760. The evidence revealed that Judith Miller, then a reporter for the *New York Times*, was the only individual not employed by the Israeli authorities to have witnessed a session of Salah's interrogation. *See id.* at 721, 774. In fact, she not only witnessed a portion of the interrogation, but also was allowed to ask clarifying questions of Salah through the ISA interrogator. *Id.* at 721. Apparently, the GSS permitted this arrangement as a tactic "to convince the FBI that terrorist activities were taking place in America of which they were unaware." *Id.*
263. *Id.* at 760.
264. *Id.* at 777.
265. *Id.* at 762–64.
266. *Id.* at 741–43.
267. *Id.* at 753.

Salah's interrogation, the supervisory agent had been given an order originating from the head of the GSS that Salah was to be treated differently on account of his American citizenship. Like Saudi Arabia in the *Abu Ali* decision, however, Israel in 1993 had been the subject of a State Department report on human rights that found that "intornational [sic], Israeli, and Palestinian human rights groups and diplomats continued to provide detailed and credible accounts of widespread abuse, which they claim in some cases amounted to torture, of Palestinian and *Palestinian-American* detainees, both immediately after arrest and during interrogation."[268] Clearly, there is a discrepancy between the State Department's own report and the ISA agents' testimony. The only version of the alleged GSS order was testimonial. Had the State Department report been part of the record, perhaps the court might have been more critical in its assessment of the agent's testimony on this point. At least the State Department report may have forced the government to try and introduce written documentation of the GSS order, if any such evidence existed. Part of the testimony in the record reflected an admitted historical pattern of GSS agents lying to Israeli courts up to 1987.[269] When coupled with the State Department's own report, a totality-of-the-circumstances analysis might lead to the opposite conclusion than the one the court ultimately drew. At the very least, the report should form part of the analysis.

The vagaries of the voluntariness analysis were on full display with respect to the statements of Salah regarding the body of an Israeli soldier who had presumably been killed by Hamas and buried in an undisclosed location.[270] Salah and his interrogators wrote out an agreement whereby he and a number of female Palestinian prisoners would be released, along with the return of $96,000 which was seized from Salah at the time of his arrest, if he led them to the soldier's burial site.[271] The court allowed evidence of the statements, the agreement, and a map drawn by Salah of the supposed location of the body. The only problem with this evidence was that it did not accurately reflect where the body was buried, even though Salah accompanied the GSS agents on a search for the body around the time of his interrogation.[272] Although the body was not recovered until sometime in 1996, the court credited the ISA agent's testimony as demonstrating Salah's knowledge of the burial location, and, as a result, the motion to suppress this evidence was denied.[273]

One can view this testimony in two diametrically opposed ways. First, it could be as the ISA agent said; namely, that Salah did know of the body's location, which serves as evidence of his high-level Hamas connection, but made a minor mistake regarding only one junction, an irrelevant point in light of the bigger picture. Second, it could also be just as Salah averred; namely, that he came up with the idea of the agreement under coercion as a tactic to obtain his own release after many days of harsh interrogation. The outwardly credible testimony of an intelligence agent employed by a friendly country is juxtaposed against the assertion of a Palestinian-American Muslim, who has

---

268. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993: ISRAEL 1204 (1994) [hereinafter HUMAN RIGHTS REPORTS 1993] (emphasis added).

269. *Marzook IV*, 435 F. Supp. 2d at 716.

270. *Id.* at 720–21.

271. *Id.* at 720, 765–66.

272. *Id.* at 720–21.

273. *Id.* ("'I am convinced that Muhammad Salah was seriously willing to help us find the body. He just made a mistake with regards to the junction, that's all.'"); *see also id.* at 765–66.

already been declared a specially designated terrorist by the U.S. government, and is on trial for committing very serious terrorist crimes. Under the voluntariness test, a judge is entirely free to choose whichever of these two narratives suits the judge's own personal prejudices and predilections. Regardless of the outcome, the test does not serve to predict with any regularity how a judge makes a determination in such a situation.

A particularly troubling aspect of the court's decision concerns the fifty-three page handwritten statement made by Salah to Palestinian collaborators working for the ISA in which he detailed his alleged activities on behalf of Hamas at great length. Salah's ISA interrogators decided to have him placed in a cell with these collaborators—Palestinians serving time for low-level, nonviolent crimes—because they were unsatisfied with the level of information he had furnished them so far, over a month into his interrogation. While Salah claimed in his affidavit to the district court that he was subject to abuse and severe threats to his person from these collaborators, also known as the "birds,"[274] the court pointed out the contradictory positions and statements he had made in the past regarding this episode. These contradictions, coupled with the ISA agents' testimony that the birds did not abuse Salah, effectively ended the inquiry on this matter, even though the government failed to put any of these collaborators on the stand to testify.[275]

The birds' tactic begs the question as to how such behavior can be found not coercive and in line with Supreme Court precedent on voluntariness, among other tests. Consider the facts of *Arizona v. Fulminante*,[276] one of the two post-*Miranda* cases in which the Supreme Court invalidated a confession as being involuntary.[277] Fulminante, a suspect in the killing of his eleven-year-old stepdaughter in Arizona, was imprisoned on unrelated federal charges in New Jersey.[278] While imprisoned, a paid FBI informant befriended Fulminante and inquired about the murder of the latter's stepdaughter.[279] After Fulminante repeatedly denied involvement with the crime, the informant told the FBI, which requested that he find out more about the matter.[280] The informant then proceeded to offer Fulminante protection from threats he had been receiving in prison stemming from his perceived identity as a child murderer, but only if Fulminante came clean about his role in the murder.[281] Fulminante confessed to the informant, and the confession formed the basis of his murder trial in Arizona, at which he was convicted and received a sentence of death.[282] The Supreme Court ruled that Fulminante's

---

274. In the Palestinian dialect of the Arabic language, the use of the word "aSafeer," which means "little birds" or "sparrows," may be used in an appropriate context to connote spies. This is no doubt the intention behind the use of this term by both Salah and the ISA agents.

275. *Marzook IV*, 435 F. Supp. 2d at 769 ("Contrary to Defendant's assertion, the failure to call any of the 'birds' as witnesses at trial does not require the suppression of Salah's handwritten statement.").

276. 499 U.S. 279 (1991).

277. *See* Seidman, *supra* note 35, at 745.

278. *Fulminante*, 499 U.S. at 282.

279. *Id.* at 282–83.

280. *Id.*

281. *Id.* at 283.

282. *Id.* at 283–84.

confession was involuntary, as it was the result of an offer of protection from threats of violence.[283]

Specifically, the Court "made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient."[284] In *Marzook*, the district court dismissed the argument that the written statement Salah made while engaged in the bird operation was the product of coercion. The court noted that Salah did not complain about any coercion to the ISA agents, to the Israeli military court, or to his lawyer at the time, and that contemporaneous medical records reflected no marks or scars of physical abuse or mistreatment.[285] Indeed, the court went so far as to remark that given the relationship between Salah and his lead interrogator, he would assuredly have complained about any mistreatment had any really occurred.[286] Further complicating matters for Salah was the fact that his affidavit in support of the motion to suppress alleged physical abuse at the hands of the birds, while an earlier affidavit he submitted in the Abu Marzook extradition saga[287] alleged only threats of physical abuse.[288]

With respect to the discrepancies pointed out by the court, the notion that an individual under interrogation by a hostile foreign agency should be prejudiced if he fails to complain about any alleged abuse seems both an unfair and unrealistic expectation. Even despite this assertion, at the very least there seems to be some dispute as to a material fact regarding what occurred when Salah was with the birds. Both of Salah's affidavits referenced in the opinion discuss either threats of abuse and/or actual abuse by these individuals, a situation that should give rise to some concern about the method in which the written statement was obtained. Resolving the matter without so much as having any of the birds testify appears to contravene *Fulminante*'s holding on voluntariness, which is rooted in a factually analogous situation, to a certain degree.[289] The fact that the court also precluded cross-examination of the ISA on classified grounds regarding the bird operation and its details also renders its analysis incomplete in light of *Fulminante*.[290] At the very least, before denying the motion to suppress, the court should have heard more testimony

---

283. *Id.* at 287–88.

284. *Id.* at 287 (citations omitted).

285. United States v. Marzook (*Marzook IV*), 435 F. Supp. 2d 708, 767–69 (N.D. Ill. 2006).

286. *Id.* at 767–68.

287. *See* Marzook v. Christopher, 96 Civ. 4107 (KMW), 1996 WL 583378, at *5 n.7 (S.D.N.Y. Oct. 10, 1996).

288. *Marzook IV*, 435 F. Supp. 2d at 768–69.

289. Where Fulminante admittedly received threats and then traded a confession for protection, Salah allegedly felt threatened by the birds and confessed to appease them, so the situations are not factually identical. However, both cases involve fact patterns in which a confession is made under threat of violence, a quintessentially "involuntary" circumstance.

290. *See* Defendant Salah's Motion to Set Aside the Court's Decision on His Motion to Suppress and to Reassign Case to Another Judge for a *De Novo* Hearing ¶ 6, United States v. Marzook, 435 F. Supp. 2d 708 (N.D. Ill. 2006) (No. 03 CR 978) ("[A]ll questions about the 'Birds' (Palestinian collaborators who tortured Mr. Salah at the behest of the GSS/ISA) and the training or other use of coercion and torture by the interrogator/witnesses were similarly blocked via objections [on the basis of the information having been classified by the government of Israel] by the U.S Attorneys and the GOI.").

about Salah's treatment by the birds so as to adequately gauge what sort of treatment he received at their hands.

This logic is borne out by the Supreme Court's jurisprudence on the use of confidential informants in the Sixth Amendment context. In the United States, once an individual has been arrested and formally charged before a judicial officer, the Sixth Amendment right to counsel attaches.[291] At that instant, the use of paid informants or undercover officers engaged in an effort to "deliberately elicit" incriminating statements from a criminal defendant violates the Sixth Amendment right to counsel.[292] To make out a violation, "the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks."[293] This right has been explicitly recognized in the case of jailhouse informants seeking information from criminal defendants.[294]

While it is obvious that Salah, who was interrogated by the ISA eleven years prior to being indicted in the United States, did not have a Sixth Amendment right to counsel while detained, the above jurisprudence reflects the Supreme Court's serious concern with the interrogation of a defendant outside the presence of counsel. Indeed, the Supreme Court has remarked that the more serious violation occurs when the defendant is not even aware that the defendant is being interrogated.[295] These conditions were present in *Marzook*. Whatever threats or violence the birds may or may not have carried out, their actions undisputedly rose to the level of deliberate elicitation, at least in the form of questioning. The opinion is clear that Salah was not aware that he was being interrogated by spies for the ISA, who directly asked that he provide information on his Hamas-related activities. He had been before a military court judge several times, and even had been appointed counsel, so the interrogation occurred in the form of an end run around his lawyer after he had been before a judicial officer. Considering all these facts in their entirety, simply denying the motion to suppress the written statement made to the birds without requiring further testimony and discovery by the government seems to be a violation of at least the spirit of relevant Sixth Amendment jurisprudence.[296]

On a final point, as with the *Abu Ali* district court opinion, the *Marzook* court conducted a brief shocks-the-conscience analysis that in many ways was superfluous to the voluntariness inquiry, and it relied entirely on case citations that provided authority for the test in the Fourth Amendment sphere only.[297] The analysis on this issue was a

---

291. *See, e.g.*, Rothgery v. Gillespie County, 128 S. Ct. 2578, 2581 (2008) (holding that the Sixth Amendment right applies after a formal hearing in which charges are made against an individual even in the absence of a public prosecutor).

292. Massiah v. United States, 377 U.S. 201, 206 (1964).

293. Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986).

294. *See id.*; *see also* United States v. Henry, 447 U.S. 264 (1980).

295. *Kuhlmann*, 477 U.S. at 457 (citing *Massiah*, 377 U.S. at 206).

296. The Supreme Court has noted that the Sixth Amendment right to counsel is a "safeguard[] . . . deemed necessary to insure fundamental human rights of life and liberty," and, in conjunction with other constitutional amendments, serves as an "essential barrier[] against arbitrary or unjust deprivation of human rights." Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

297. United States v. Marzook (*Marzook IV*), 435 F. Supp. 2d 708, 744, 774 (N.D. Ill. 2006). The fact that there was no joint venture between the U.S. and Israeli authorities was less controversial. *See id*. at 773–74.

mere paragraph long, and cited to the *Abu Ali* district court opinion decrying the use of evidence derived from torture in the United States courts.[298] Aside from the jurisprudentially suspect nature of the analysis and authorities cited, the analysis adds nothing to the voluntariness inquiry, thereby underscoring the questionable nature of conducting a shocks-the-conscience inquiry in the Fifth Amendment context.

Both the *Abu Ali* and *Marzook* decisions illustrate the difficulty of the voluntariness inquiry in the context of a terrorism trial. The applicability of the voluntariness test poses similar dilemmas whether the criminal harm being prosecuted is immediate, as in the case of Abu Ali, or concerns expansive conspiracy charges that do not allege any role in planning or perpetrating violence, as in the case of Salah.[299] Ultimately, when faced with a foreign confession in a terrorism case, courts need to be able to confront the issue of whether the confession itself is the product of coercion without being overly influenced by the background and nature of the defendants and the charges against them.

III. METHODS FOR ENSURING COERCED STATEMENTS ARE KEPT INADMISSIBLE

What constitutes a voluntary statement made abroad can easily become a contested matter, as the above sections hopefully demonstrate. Even though highly fact specific, the unpredictable nature of the voluntariness inquiry can lead to curious results. These concerns raise the question of whether there is a viable alternative to the voluntariness test. After all, when the tactics employed were clearly coercive, statements given to foreign law enforcement should be found to be involuntary.

A. The Karake *Decision*

In *United States v. Karake*,[300] Judge Ellen Segal Huvelle of the United States District Court for the District of Columbia found three confessions to have been involuntary.[301] The confessions were made by three defendants, among whom were members of the Liberation Army of Rwanda, to Rwandan authorities investigating the killings of two American tourists in Uganda.[302]

The court credited the testimony of the three defendants because they all described similar treatment in great detail, and, most importantly, because the medical evidence showed strong indications of physical abuse.[303] The decision also highlighted the evidentiary differences between the instant case and that of *Abu Ali*.[304] As with *Abu Ali*

298. *Id.* at 774.

299. For a highly critical analysis of the prosecution of Muhammad Salah, see Michael E. Deutsch & Erica Thompson, *Secrets and Lies: The Persecution of Muhammad Salah (Part I)*, 37 J. PALESTINE STUD. 38 (2008); Michael E. Deutsch & Erica Thompson, *Secrets and Lies: The Persecution of Muhammad Salah (Part II)*, 38 J. PALESTINE STUD. 25 (2008).

300. 443 F. Supp. 2d 8 (D.D.C. 2006).

301. *Id.*

302. *Id.* at 12, 94.

303. *Id.* at 61–63.

304. *Id.* at 85 n.110 ("It is worth noting the significant differences between the evidence presented in this case and that in *United States v. Abu Ali* . . . . In *Abu Ali*, defendant alleged that he was whipped on his back, hung by his wrists from the ceiling of his cell, chained in a

and *Marzook*, it is a difficult exercise to second-guess a court conducting an inquiry into the voluntariness of statements made abroad, and this Article does not make these criticisms lightly. However, some key distinctions are worth pointing out. First, the *Karake* court considered State Department reports on human rights abuses in the Rwandan detention center in question, while, as noted above, the courts in both *Abu Ali* and *Marzook* did not consider similar reports.[305] *Karake* also allowed individuals other than defendants to testify as to the abusive treatment they had received at the hands of Rwandan authorities at the detention facility, while the *Abu Ali* court did not allow two British nationals to testify about their torture at the hands of Saudi authorities.[306]

Aside from these evidentiary distinctions, there is the nature of the crime. While the killing of two American tourists is a serious violent crime that deserves condemnation and punishment, it does not fall under the rubric of large-scale terrorism, especially that of the Islamic variety. Of the forty-five groups currently on the State Department's list of banned FTOs, thirty-one are Islamic and/or Arab in orientation or makeup.[307] The Liberation Army of Rwanda, elements of which were responsible for a genocide in 1994, is not so listed. Courts are surely not immune to the pressure to be perceived as strong and resolute on the issue of terrorism, although whether such considerations influenced the decisions in *Abu Ali* and *Marzook* is a matter for personal interpretation.[308] Also noteworthy is the type of entity conducting the interrogation.

---

crouching position, and beaten while in the custody of Saudi Arabian officials. The physical evidence, however, did not support Abu Ali's claims. Though Abu Ali's medical expert described certain linear marks on Abu Ali's back as 'highly consistent' with whipping, a doctor who examined Abu Ali before he was transferred to the United States did not even record those marks because they were 'inconsequential.' Moreover, the government's expert explained that a scar from whipping would take approximately four weeks to heal, during which time they 'would be uncomfortable to touch.' This was significant because FBI officials observed Abu Ali no more than 4 days after he alleged he was whipped, and witnessed no discomfort during Abu Ali's interrogation. The government's expert refused to even term the marks on defendant's back a 'scar' because they exhibited 'no depression, spreading or thickening.' Nor was the pattern of marks consistent with scars from whipping. Also, one of defendant's medical experts became 'defensive' and 'frustrated' during cross-examination, undermining her testimony. This is all in marked contrast to the instant case, in which every medical expert found defendants' allegations consistent with the scarring exhibited on their bodies. Additionally, FBI agents did observe an injury to Karake that was consistent with his testimony that he was struck with a brick. These serious and substantial differences mandate a different outcome here than was reached in *Abu Ali*." (citations omitted)).

305. *Id.* at 61.

306. *Id.*; AMNESTY INT'L, *supra* note 192, at 4–5. The *Marzook* court heard testimony from Palestinians who claimed they had been mistreated by Israeli authorities but heavily discounted their relevance. United States v. Marzook (*Marzook IV*), 435 F. Supp. 2d 708, 760–61 (N.D. Ill. 2006).

307. *See* Office of the Coordinator for Counterterrorism, U.S. Dep't of State, Foreign Terrorist Organizations (July 7, 2009), http://www.state.gov/s/ct/rls/other/des/123085.htm.

308. The pressure to obtain results in terrorism cases can be analogized somewhat to that of capital murder cases and can therefore impact the importance of securing a defendant's confession. *See* Joseph L. Hoffman, House v. Bell *and the Death of Innocence*, *in* DEATH PENALTY STORIES 470 (John H. Blume & Jordan M. Steiker eds., 2009) ("In the absence of [corroborative] testimony, the only alternative may be to try to obtain a confession from the defendant, but this can lead to pressure that crosses the line into coercion." (citing Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 88–91 (2008) (giving examples of dubious

Saudi Arabia and Israel each have a well-funded and modern internal-security apparatus, and the United States in particular assuredly values the work Saudi and Israeli security services perform in their routine course of business. These agencies retain an ability to devise highly sophisticated tactics of interrogation, as well as to furnish a professional and well-trained force of officers who can be called on to provide testimony, if need be. None of this is true in the case of Rwanda, a troubled and poor country only fourteen years removed from a genocide perpetrated by one ethnic group against another.

B. Alternative Tactics and the Ticking Bomb

Whatever the arguable distinctions regarding terrorism-based crimes, it is perhaps a risky endeavor to criticize the voluntariness test in this context, especially when one considers the alternatives, two of which have prompted much commentary and criticism in the wake of the September 11, 2001, attacks. The existence of a system of military commissions for so-called enemy combatants, who do not enjoy the same number or quality of rights as a criminal defendant in the United States, is one such alternative. Drawing on recent experience then, when one considers the fact that the evidentiary rules of these commissions as constituted appear to provide for the admission of statements or confessions without regard to how they were obtained, the voluntariness test can seem practically harmless in comparison.[309] Another possible alternative is to subject individuals to the practice of "extraordinary rendition," in which individuals are sent to countries where the use of coercive techniques may be employed more readily than in or by the United States.[310] Trial in a civilian court, therefore, where the voluntariness test would govern the admissibility of a foreign confession, seems to be a superior option to those discussed above.

Even before the current incarnation of the "war on terror," in *Bin Laden* the government itself had pointed out that it would be "'positively perverse'" to require suppression of statements made to U.S. authorities abroad in the absence of *Miranda* warnings, when those statements would be admissible if made to foreign police.[311] Whatever the implications of the government pointing out the situation as it was in the federal courts of the United States, it does seem logical to at least ask why U.S. agents are ostensibly more restrained by American courts than are foreign police in obtaining statements through coercion. One potential casualty of the perception that courts may bind law enforcement's hand too tightly is that the government in turn may try to institute policies that disfavor the use of federal criminal prosecutions as a viable counterterrorism tactic. That the Supreme Court has already had occasion to issue several decisions on extraordinary measures adopted by the government to detain, interrogate, and prosecute terrorist suspects outside the traditional criminal context is

---

confessions in capital cases))).

309. Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1054 (2008) (noting that the legislation authorizing such extraordinary tribunals "potentially allow[] the admission of evidence obtained through coercive interrogation").

310. *See* Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123 (2006).

311. United States v. Bin Laden (*Bin Laden I*), 132 F. Supp. 2d 168, 187 n.13 (S.D.N.Y. 2001).

proof enough of the draw of nontraditional methods to bypass those constitutional protections accruing to criminal defendants. However, given the recent and extremely expansive use of conspiracy liability as a basis for a criminal terrorism prosecutions,[312] coupled with the decisions in *Abu Ali* and *Marzook* discussed above, the question can be asked if the experience of the last seven years bears out the notion that the government is constrained in prosecuting terrorists in federal court. Indeed, even the pre-September 11 experience in terrorism trials, most notably *Bin Laden*, dealt with the issue of confessions in a manner that would, in the words of Professor Kim Lane Scheppele, "give human rights lawyers pause."[313]

Motivating the debate over the use of coercive interrogation techniques is the hypothetical of the "ticking bomb," which poses the particular dilemma of how public officials should deal with the prospect of saving a number of lives by torturing one individual believed to have the information necessary to stop a deadly attack. The concerns involving the ticking-bomb hypothetical also apply to the criminal prosecution context.[314] In light of this concern, at least one scholar has argued for an extension of the so-called public-safety exception[315] to the *Miranda* warnings when U.S. law-enforcement agents engage in interrogations of terrorism suspects abroad, so as to allow for their subsequent criminal prosecution without the need for an extraordinary tribunal.[316] Even leaving aside most of the many valid criticisms of the ticking bomb hypothetical,[317] the near impossibility of showing the sort of dangerousness that would allow for the admissibility of admittedly involuntary statements comes into view. While there very well may be a valid public safety exception to *Miranda* and, by extension, the voluntariness test, in times of true

---

312. *See* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Models*, 60 STAN. L. REV. 1079, 1104–06 (2008); Peter Margulies, *Guantanamo by Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas After September 11*, 43 GONZ. L. REV. 513 (2008).

313. Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PENN. J. CONST. L. 1001, 1025 n.84 (2004).

314. *See, e.g.*, David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1440 (2005) (noting that the ticking-bomb hypothetical "has become the alpha and omega of our thinking about torture"); *see also* ERIC A. POSNER & ADRIAN VERMEULE, SECURITY, LIBERTY, AND THE COURTS (2007); Thomas P. Crocker, *Torture, with Apologies*, 86 TEX. L. REV. 569, 570 nn.4–5 (2008) (reviewing RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006)). For a discussion of the constitutional implications of a similar type of hypothetical in the domestic criminal context pre-September 11, 2001, see Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457 (1997) (reviewing AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997)).

315. New York v. Quarles, 467 U.S. 649, 653 (1984) (where police asked an arrestee about the location of his discarded gun in a public supermarket without first Mirandizing him, the Supreme Court noted "that this case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*").

316. *See* M.K.B. Darmer, *Lessons from the* Lindh *Case: Public Safety and the Fifth Amendment*, 68 BROOK. L. REV. 241, 271–87 (2002) (discussing the extension of *Quarles* in the international terrorism context).

317. *See* Luban, *supra* note 314.

emergency, the cases discussed in this Article do not present that type of imminent threat. It is undisputed that Abu Ali did not take any action to carry out any of the conspiracies he was convicted of committing, and there was no evidence to suggest that anyone in the United States had conspired with him in that regard.[318] Similarly, Salah was tried in 2006 partially on the basis of statements he had made in 1993, so an imminent threat of terrorist violence was not present, and the jury may not even have believed the statements he made to the Israeli agents.[319] Based on the record examined above, the applicability of the ticking-bomb hypothetical and debate in the context of terrorism prosecutions is therefore questionable.

C. Adding Safeguards to Strengthen the Voluntariness Test

The discussion above hopefully illustrates the flaws in allowing the voluntariness test, in its current guise, to remain as the relevant inquiry in terrorism cases involving confessions made abroad. Several safeguards are required to prevent the introduction of statements obtained by way of illegal coercive tactics, and thereby diminish the taint of any conviction gained as a result of such evidence.

First, courts reviewing the voluntariness of a confession must squarely confront and consider the State Department's country reports on human rights, so as to allow the fullest possible picture of an interrogation by a given country's agents to be reflected in the record. Put differently, the government should not be permitted to argue that no torture or coercive interrogation took place in a given case, without confronting its documentation of such practices in general in a given country. In situations where the suspect does not have a right to counsel in a meaningful form, can be held for a long period of time without charges being filed, and faces trial (if at all) in a military court, courts must weigh the implications of these conditions of interrogation in light of the State Department's reports, and not ignore them. Further, it is not clear why a foreign intelligence service in a terrorism case should be presumed, like U.S. police are usually presumed, to be acting in good faith.[320] Both the *Abu Ali* and *Marzook* decisions seemed to assume the good faith of the Saudi and Israeli authorities, respectively, where the record, if considered in its entirety, would lead to the opposite result.

Second, courts should require that the government prove the voluntariness of any confession under a clear and convincing standard, and not the lesser preponderance of the evidence test. Supreme Court precedent mandates the lower standard on a motion to suppress, based on the Court's observation that "from our experience over this period of time no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence."[321] By

---

318. *See* United States v. Abu Ali, 528 F.3d 210, 262–65 (4th Cir. 2008) (criticizing the district court's comparison of the Abu Ali case to the John Walker Lindh and Timothy McVeigh cases but not addressing the district court's findings of fact regarding Abu Ali's actions to carry out the conspiracies), *cert. denied* 129 S. Ct. 1312 (2009).

319. *See* Margulies, *supra* note 312, at 535 n.135, 545.

320. Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1536 (2007) (noting that, for example, in the context of a constitutionally permissible pretextual traffic stop, "the presumption of good faith accorded police officers would almost always lead a court to credit any race-neutral explanation given for the stop").

321. Lego v. Twomey, 404 U.S. 477, 488 (1972).

way of example, in the context of inevitable discovery, which the Court held "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment," it declined to require a clear and convincing evidence standard.[322] A foreign interrogation, with its alien rules, dynamics, and language, seems to present a situation in which courts are asked to speculate, precisely because the record is replete with contested recollections and assertions, quite the opposite of "demonstrated historical facts capable of ready verification or impeachment."[323] Indeed, because modern torture techniques are designed not to leave physical marks,[324] detecting the effects of torture may prove near impossible, since, as was true in *Abu Ali*, the evidence of psychological damage was highly contested and therefore could not rise to the level of a demonstrated fact capable of ready verification.

In the foreign interrogation context, it is undisputed that the exclusionary rule will have little to no deterrent effect on the conduct of foreign intelligence agencies. Given the potential that this situation creates for an end run around *Miranda*, foreign statements need to be subjected to a higher level of judicial scrutiny. Closing this loophole would serve the purpose of ensuring that the government does not employ foreign governments to conduct more permissive interrogations than allowed by the Constitution. As Justice Brennan noted in dissent in *Nix v. Williams*, "[i]ncreasing the burden of proof serves to impress the factfinder with the importance of the decision and thereby reduces the risk that illegally obtained evidence will be admitted."[325]

Finally, it is not clear what the purpose is of focusing on a defendant's characteristics or actions under interrogation, since they do not really add anything to the voluntariness analysis.[326] As noted above, a more informed defendant might be much quicker to confess in a political/terrorism case than one less aware of the potential brutality of the interrogators. Additionally, scrutinizing individuals' behavior while interrogated in conditions where no lawyer or charges are forthcoming with any degree of predictability, if ever, seems to be imposing an unreasonable burden on a defendant to demonstrate an involuntary confession. If one of the main contentions of a

---

322. Nix v. Williams, 467 U.S. 431, 444 n.5 (1984) (ruling, in the context of a case involving the application of the inevitable discovery doctrine, that a preponderance of the evidence standard suffices on motions to suppress generally) (citations omitted).

323. *Id.*

324. Condon, *supra* note 230, at 700 (quoting United Nations guidelines to the effect 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 scars'"); HUMAN RIGHTS FIRST & PHYSICIANS FOR HUMAN RIGHTS, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY 5 (2007), *available at* http://physiciansforhumanrights.org/library/documents/reports/2007-phr-hrf-summary.pdf (describing enhanced interrogation methods, many of which cause mental and psychological harms).

325. *Nix*, 467 U.S. at 459–60 (Brennan, J., dissenting).

326. Professor Mark Godsey's suggestion would be to replace the nebulous voluntariness test with a uniform one that measures whether or not law-enforcement agents engage in behavior that "objectively penalizes" a criminal defendant for exercising his right to silence. *See* Godsey, *supra* note 20, at 518–39. Such a test would serve the more pertinent purpose of focusing only on the conduct of the interrogators, although its application seems limited to the domestic context. Indeed, Godsey hesitates at a blanket application of such a test in the terrorism context, when statements are made to foreign police abroad, so an exclusive focus on the foreign officials' conduct may be an unrealistic basis on which to exercise discretion. *Id.* at 527 n.310.

defendant moving to suppress is that he/she has been traumatized severely by the interrogation, then the focus must be entirely on the tactics of the interrogation, not the behavior of the defendant, whose voluntariness is seriously limited by the circumstances of his detention.

CONCLUSION

Ultimately, the application of the voluntariness test has been haphazard, much like in its heyday prior to *Miranda*. Where the terrorism context provides a new life for its use, it is hard not to conclude that it has been applied in an arbitrary fashion. Given the inapplicability of *Miranda* to foreign interrogations, perhaps a voluntariness inquiry is all that is possible under current circumstances, legal and political. Nevertheless, minimum safeguards need to be added to the test so as to avoid the appearance of a sham. When confessions are admitted even though there was little to no opportunity to consult with a lawyer, and the security agencies conducting the interrogations have been cited in official U.S. government reports for engaging in widespread abusive interrogation, the question of how voluntariness requirements have truly been met is not easily answered. Without the imposition of some objective criteria, raising the standard of proof, or presuming some level of prejudice, courts engaging in such analyses are likely to make rulings at odds with all the relevant facts in the record.