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COMMENTARY

The Military Commissions Act, Coerced Confessions, and the Role of the Courts

PETER MARGULIES

A society's treatment of those it considers to be the "worst of the worst" is an accurate measure of its integrity and strength. Cutting corners can signal that a society lacks confidence in its highest ideals. The Military Commissions Act of 2006 (MCA)[1] is a case in point, posing a challenge to a core principle of American justice: that courts should not admit evidence yielded by coerced interrogation. Judicial skepticism about such evidence pre-dates the American Constitution, driven then as now by the unreliability of such evidence and its corrosive effect on government institutions. Abandoning that principle would undermine a core premise of the American legal system and compromise our standing with the rest of the world. Fortunately, courts will often find interpretive space under the MCA to uphold fundamental principles. When that space runs out, courts can invoke their inherent power to protect the integrity of judicial proceedings and resort to the Constitution itself.

The MCA and Admission of Evidence Obtained Through Coercion

After the Supreme Court, in *Hamdan v. Rumsfeld*,[2] struck down the President's military commissions, Congress filled the vacuum by passing the MCA. The MCA provided more concrete rules on the question of the tribunal's ability to proceed in the defendant's absence. It also provided rules on the defendant's ability to see evidence against him. In addition, the MCA included a number of provisions on the admissibility of evidence obtained through coercion.

The MCA's provisions regarding the admissibility of evidence obtained by coercion are three-fold. Under the MCA, a tribunal must suppress evidence obtained through torture, defined as treatment intended to cause "severe pain." In cases where the pain caused is "serious," but not "severe," the tribunal should admit evidence if it is reliable, probative, and serves the interests of justice. Finally, for evidence obtained on or after December 30, 2005, the MCA provides that courts should admit statements that are reliable, probative, and were not obtained through "cruel, unusual, and inhumane treatment" that would violate the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

The United States, International Law, and Torture after September 11

These provisions are necessary because of the apparent abusive treatment of detainees that occurred after the attacks of September 11, 2001, and lasted at least through 2003. During this time, the United States, primarily through the CIA but also through some military personnel, engaged in a spectrum of practices designed to produce information, elicit confessions, and "break" detainees. These practices included water-boarding, in which a detainee is tied supine to a board, his face is covered, and interrogators pour water over his face to simulate drowning. Other practices included prolonged standing, the protracted use of stress positions in which the subject stands on tip-toes or leans against a wall supporting himself by his fingertips, sleep deprivation lasting for two days or more, and exposure to extremes of hot and cold.

These "alternative methods" of interrogation, as the Bush Administration has described them, have produced only modest results. Accounts of the interrogation of Al Qaeda figures indicate that normal interrogation methods yielded useful information, but that escalating tactics to include alternative methods produced little data of value about impending attacks. Moreover, many detainees at Guantánamo and elsewhere are either foot-soldiers in the Taliban, terrorist wannabees, or simply people in the wrong place at the wrong time offered up for bounty. Even if inclined to talk, they often have little information to impart.

International law has increasingly frowned on coercive methods of interrogation, stressing their harshness against the backdrop of their lack of efficacy. Barred by the Convention Against Tor-

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ture and customary international law, torture is a violation of *jus cogens*, or fundamental legal norms. The ban on torture has no exceptions. International tribunals increasingly hold that lesser abuses such as prolonged hooding and use of stress positions are also prohibited as "cruel, inhuman, or degrading" treatment.

As the United States ramps up the military commissions at Guantánamo, however, prosecutors may well seek to introduce evidence obtained through the use of "alternative methods." While certain methods, such as waterboarding, may arguably rise to the level of torture, and thus be categorically inadmissible, another provision of the MCA allows the President to find that interrogation methods do *not* meet this definition. A court may be obliged to defer to the President's position under the administrative law principles laid down by the Supreme Court in *Chevron v. Natural Resources Defense Council*.[3] Moreover, under the MCA, detainees do not have direct recourse to international law. However, the MCA authorizes a court to exclude evidence obtained through methods less severe than torture, as long as it finds that the evidence is not "reliable" or, for evidence obtained recently and in the future, that the methods used are not "cruel, unusual, and inhumane" under the Constitution.

The MCA's Clash with the American Legal Tradition

The MCA's apparent insistence on a case-by-case inquiry into reliability conflicts with a core premise of the Anglo-American legal tradition. For centuries, English and American courts have proclaimed their skepticism about the reliability of coerced confessions. Chief Justice Rehnquist said it best in *Dickerson v. United States*,[4] a case holding that Congress lacked the power to supplant the warnings that the Court mandated in *Miranda v. Arizona*[5] to guard against the inherently coercive setting of custodial interrogations. Commenting on the provenance of this concern about coercions expressed in cases under both the Fifth Amendment privilege against self-incrimination and the Due Process Clause,[6] Rehnquist observed that judicial focus on the voluntariness of defendants' statements to custodial authorities has "roots in the common law, as the courts of England and the United States recognized that coerced confessions are inherently untrustworthy."[7] The English courts' recognition of the unreliability of confessions "forced from the mind by . . . the torture of fear"[8] pre-dates the American Constitution, and was surely familiar to the framers.

Although courts have often cited the unreliability of such statements, they have also looked more broadly to the corrosive effect of coercion on the institutions of justice, government, and society. Once tolerated, habits of coercion are difficult to break. Indeed, such habits develop their own institutional momentum, outliving any efficacy that "alternative methods" may enjoy. The spread of institutional acceptance may also exacerbate political and social inequality, as officials identify subjects of coercion, including non-citizens, the poor, and groups subordinated on the basis of race, religion, or ethnicity. The political branches often give such institutional costs short shrift, preferring, as in the MCA, to stress the semblance of security over more abiding concerns. The result is a danger to democratic governance at home, and to reputation abroad. As the Supreme Court has observed, "human values are sacrificed where an agency of the government . . . wrings a confession out of an accused against his will."[9] According to the Court, a government pursuing legitimate interests in safety and security "must obey the law while enforcing the law . . . life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."[10]

Courts do not have the luxury of remaining indifferent to coercive methods. When they turn a blind eye to such practices and preside over or affirm judgments thus secured, they become complicit in institutional decline. Permitting evidence obtained through coercion to be admitted undermines the adversarial system that the Framers envisioned as a bulwark of liberty, imposing an "inquisitorial character"[11] on American justice that transforms the judge from a neutral referee to a partisan ally of the government.

The cases demonstrate this concern with torture. The notion of the person in custody as helpless, without the means to fairly counter coercion, is echoed in cases from the 1800s to *Miranda* that warn against granting the government the power to "press the witness unduly, . . . browbeat him if he be timid or reluctant, . . . push him into a corner, . . . [and] entrap [the witness] into false contradictions."[12] In *Bram v. United States*,[13] the Supreme Court criticized the coercion exercised against an accused who had been stripped of his clothing, and against whom the agents of the government exercised "complete authority and control."[14] The Court's description of power relationships could apply equally to the humiliation imposed more recently on detainees at Abu Ghraib.

Coerced Witness Statements and the Sixth Amendment

The role of the courts in policing coerced interrogation extends beyond the Fifth Amendment and the Due Process Clause. The Supreme Court has also recently invoked the Sixth Amendment to preclude the use of unreliable hearsay against a criminal defendant. In *Crawford v. Washington* and *Davis v. Washington*, the Supreme Court traced a long line of Anglo-American cases driven by skepticism about the reliability of statements made by potential witnesses subject to government interrogation. For the Court, the "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for . . abuse."[15] The Court cited the treason trial of Sir Walter Raleigh in 1603, which used out-of-court statements of dubious reliability to prove a case based more on political expediency than legal merit. According to the Court, those statements are unreliable because they are the product of governmental influence and agendas, not the spontaneous recollection of disinterested individuals. In the military commission context, the statements most likely to be introduced are statements made by fellow detainees while in custody. Since those statements

are also the product of custodial interrogation, and possibly of mistreatment, they are also unreliable. In the ordinary criminal law context, their introduction at trial would clearly run afoul of the Court's reinvigorated interpretation of the Sixth Amendment's Confrontation Clause. Permitting such evidence to bolster verdicts in military commissions would transform those tribunals into up-dated Star Chambers, clashing with the ideals of fairness that form the face of American justice for the world.

Interpreting the MCA to Deter Coerced Interrogation

Because of these concerns, federal courts hearing challenges to military commission verdicts should play a robust role in ensuring that the commissions, as well as the Combatant Status Review Tribunals (CSRTs) that have been convened for the other Guantánamo detainees, exclude evidence obtained by coercion. In many cases, courts can do this through simply enforcing the MCA as written. As noted, the MCA requires that tribunals exclude unreliable testimony. Citing the lines of precedent stemming from Due Process, Fifth Amendment, and Confrontation Clause concerns, courts should hold that evidence obtained through coercion has been shown to be unreliable, and should therefore exclude such evidence. Solidifying this interpretation of the MCA, courts may invoke the avoidance canon, which holds that courts should construe a statute to avoid serious constitutional problems. Courts can also exclude evidence obtained after 2005 by finding that interrogation methods violate constitutional protections against "cruel, unusual, or inhumane treatment."

In cases in which the evidence produced by coercive interrogation before 2006 is corroborated by documentary or other sources, courts will have greater difficulty in relying on the MCA's language, which seems to require admission of evidence that is reliable. Moreover, courts have been reluctant to import rigid constitutional standards into cases involving investigation or trial outside the United States, particularly when those cases concern foreign nationals. Judicial review of military commission verdicts may oblige courts to confront the difficult issue of the Constitution's application abroad.

Coercive Interrogation and the Constitution's Application Abroad

The Supreme Court has rejected the absolutist view that the Constitution applies with equal force here and abroad. Practical impediments to such blanket coverage have driven the courts to a more pragmatic approach. However, despite rejecting an absolutist view of the extraterritorial application of constitutional guarantees, courts have imposed significant constraints on government overreaching, particularly in the area of fundamental rights. Moreover, courts have recognized that violating fundamental rights abroad to gain an advantage in a United States tribunal threatens the legal system's integrity.

When dealing with evidence obtained by foreign governments prior to a defendant's trial in United States courts, courts have invoked their supervisory power over government law enforcement and applied the "shock the conscience" test. The Supreme Court announced this test in the pre-*Miranda* case of *Rochin v. California*[16] to forbid the warrantless stomach-pumping of a suspect. Applying this test to the extraterritorial context, courts have looked to the degree of coercion used by agents of foreign governments, and in at least one case disallowed evidence obtained through egregious physical abuse of the defendant. Since the courts apply the "shock the conscience" standard to conduct by *foreign* governments, this test should be a floor for assessing United States conduct at home or abroad. Indeed, Judge Henry Friendly, for whom Chief Justice John Roberts once served as a law clerk, noted in *Birdsell v. United States*[17] that courts could exercise their supervisory authority to prevent federal officials from leveraging abusive conduct abroad into a strategic advantage at trial.

Moreover, judges have often been pragmatic in marking the scope of the Constitution's extraterritorial applicability, sending signals that the government must observe fundamental rights. In *Downes v. Bidwell*,[18] one of the *Insular Cases*, the Supreme Court held that the Constitution did not apply across the board to a territory such as Puerto Rico. Accordingly, the Court upheld a duty imposed on goods shipped from Puerto Rico which would otherwise have violated the Constitution. However, the Court, in its plurality opinion, also indicated that residents of territories would retain core rights granted under the Constitution and rooted in natural law, including a right to due process and to the protection of "life, liberty, and property."

In more recent cases, pragmatic concurrences played a significant role. In *Reid v. Covert*,[19] for example, Justice Harlan's concurrence recognized that due process required a jury trial in a capital prosecution involving the spouse of an American serviceman located abroad. Harlan argued that, given the stakes involved, this safeguard was necessary to ensure the fairness and independence of the tribunal. The admission of coerced evidence poses an analogous threat to the integrity of the military commissions involving Guantánamo detainees.

Similarly, in *United States v. Verdugo-Urquidez*,[20] Justice Kennedy's concurrence asserted that the warrantless seizure of a Mexican national in Mexico by United States authorities for the purpose of bringing the defendant to trial in the United States was appropriate. Kennedy observed that the vagaries of foreign criminal justice systems could make invocation of the warrant requirement impractical. However, Justice Kennedy noted that the defendant was clearly entitled to due process protections for his United States trial. Further, Kennedy suggested that due process would also protect the defendant while in Mexico from abusive conduct by United States officials. While Kennedy concluded that a warrantless seizure did not violate due process, the logic of his opinion suggests that coercive interrogation would impinge on core norms.

Faced with this logic, the executive branch will doubtless resort again to the Supreme Court's decision in *Johnson v. Eisentrager*,[21] in which the Court rejected a habeas petition from a German officer convicted by a military tribunal convened after World War II. However, one can read *Eisentrager* to bolster the continued vitality of fundamental rights. As the Supreme Court has recently observed in *Rasul v. Bush*,[22] the defendant in *Eisentrager* had

the benefit of a trial before a military commission, which to all appearances was a fair and accurate proceeding. Moreover, the defendant did not allege that the commission had considered evidence obtained through coercion. Viewed from this perspective, *Eisentrager* is consistent with a pragmatic approach that permits the government flexibility abroad, but insists on the protection of fundamental constitutional guarantees.

This extraterritorial protection of fundamental rights from abuse by federal officials should apply in any forum in which the defendant finds himself—territorial tribunal, military tribunal, or Article III court. Admittedly, certain procedural rights may not be present in the first two forums, including a jury in cases involving the trial of members of the uniformed services or persons like the Guantánamo detainees accused of violations of the law of war. Other distinctive features of United States jurisprudence, such as *Miranda* warnings, may be impractical under Justice Kennedy's analysis in *Verdugo-Urquidez*, because interrogation may also entail exigent attempts to prevent future acts of terror. However, core rights, such as the right to a fair and accurate determination of culpability and the right to freedom from physical or serious psychological abuse, should inhere in any context reviewed by United States courts.

At this level of fundamental rights, the courts could also bring international law back in, to inform the court's interpretation of constitutional guarantees. The status of torture as a violation of *jus cogens* dovetails with the recognition in *The Insular Cases* of fundamental norms guaranteed under natural law and the Constitution and with Harlan's recognition in *Reid* and Kennedy's recognition in *Verdugo-Urquidez* of the abiding applicability of due process. The Court should view the *jus cogens* status of torture, as well as the increasingly disfavored status of lesser forms of coercion, as barring evidence obtained through tactics that inflict pain.

Conclusion

Courts have an array of interpretive tools at their disposal to reconcile the MCA with abiding values that inform the rule of law. First, courts can interpret the MCA to broadly construe the meaning of "torture," and thus categorically exclude evidence obtained through abusive treatment. Second, courts can construe the statutory term "reliable" *narrowly*, to exclude evidence such as statements obtained through coercion that Anglo-American courts have historically regarded as suspect. Third, courts can use their supervisory power over federal authorities to bar evidence obtained through methods that "shock the conscience." Fourth, courts can hold that the fundamental rights guaranteed in the Due Process clause apply to military commissions convened at Guantánamo and require the suppression of statements made under coercion by either the defendant or by third parties such as fellow detainees.

This array of interpretive tools has limits. The pragmatic jurisprudence outlined above will not grant detainees a package of rights identical to those enjoyed by defendants in American civilian courts. Indeed, mandating a rigid equivalence of rights might deprive the government of flexibility it needs to effectively combat terrorism. A pragmatic approach will grant the government this flexibility, while obliging military commissions to observe core norms that support the rule of law.

NOTES

1 Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

2 126 S. Ct. 2749 (2006).

3 467 U.S. 837 (1984).

4 530 U.S. 428 (2000).

5 384 U.S. 436 (1966).

6 530 U.S. at 434.

7 *Dickerson*, 530 U.S. at 433, citing *Rex v. Rudd*, 1 Leach 115, 117-18, 122-23, 168 Eng. Rep. 160, 161, 164 (K.B. 1783) (Lord Mansfield).

8 See *Dickerson*, 530 U.S. at 433, citing *King v. Warickshall*, 1 Leach 262, 263-64, 168 Eng. Rep. 234, 235 (K.B. 1783).

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

10 See *Jackson v. Denno*, 378 U.S. 386, citing *Spano v. New York*, 360 U.S. 315, 320-21 (1959).

11 See *Brown v. Walker*, 161 U.S. 591, 596 (1896).

12 See *Miranda v. Arizona*, 384 U.S. 436, 443 (1966), quoting *Brown v. Walker*, 161 U.S. 591.

13 168 U.S. 532 (1897).

14 *Id.* at 563.

15 See *Crawford v. Washington*, 541 U.S. 36, 56 n. 7 (2004); also *Davis v. Washington* (Nos. 05-5224 and 05-5705) No. 05–5224, 154 Wash. 2d 291, 111 P. 3d 844, affirmed; No. 05–5705, 829 N. E. 2d 444, reversed and remanded.

16 342 U.S. 165 (1952).

17 346 F.2d 775, 782 n. 10 (5th Cir. 1965).

18 182 U.S. 244 (1901).

19 354 U.S. 1 (1957).

20 494 U.S. 259 (1990).

21 339 U.S. 763 (1950).

22 542 U.S. 466 (2004).