Chapter 7 – The Admissibility and Weight of Involuntary Statements

Even assuming that hearsay concerns do not require the exclusion or discounting of statements provided to interrogators or otherwise given in a custodial setting, problems often still arise concerning the voluntariness of those statements. In a criminal proceeding, after all, involuntary statements are not admissible as a matter of due process, and custodial interrogation without counsel is regarded as so inherently coercive that the Supreme Court has generally required judges to exclude the resulting statements. Whether judges should take the same approach in the context of detainee habeas review, and if not where they should instead draw the line, is a pressing question given the significant weight the government places on detainee statements in these cases and the frequency with which allegations of outright coercion arise.

Unfortunately, the law on this issue remains unsettled in key respects. The courts do agree on some overarching points. A statement will not be discredited merely because it was given in a custodial context without access to counsel or the benefit of a *Miranda*-style statement of rights,[434] for example, and no one has suggested the admissibility of the fruits of coercion rising to the level of torture. But between these poles, the judges vary in their approaches. Complicating matters further, the judges also vary in their approach to evidentiary disputes concerning whether abuse occurred in the first place. Indeed, the law relating to the handling of involuntary statements arguably has seen the least progress among all the major issues raised in the habeas litigation.

There are at least three distinct questions whenever a coercion allegation arises in connection with proffered evidence: First, in what circumstances is a statement inadmissible because of voluntariness concerns—i.e., what is the actual standard for resolving that question? Second, was the petitioner in fact mistreated, as alleged? And third, in circumstances where the detainee was *previously* subject to abuse, how much time must pass and how much must circumstances change between the time of the coercive treatment and later-extracted statements to alleviate the "taint" caused by the earlier mistreatment?

Two caveats are important to note at the outset of this discussion. First, many of the judges' coercion discussions are more redacted than are their discussions of other issues that arise in these opinions, and thus are more difficult to analyze. By necessity, our analysis proceeds from the publicly released opinions, though the classified opinions would undoubtedly provide a much more comprehensive view of what is going on in the cases.

Second, courts are as eager to avoid needlessly considering allegedly coerced

[434] Indeed, some rulings denying habeas relief hinge on allegedly involuntary admissions. *See, e.g.*, Al Odah v. Obama, 648 F. Supp. 2d 1 (D.D.C. Aug. 24, 2009); G. Al Bihani v. Obama, 594 F. Supp. 2d 35 (D.D.C. Jan. 28, 2009); Sliti v. Bush, 592 F. Supp. 2d 46 (D.D.C. Dec. 30, 2008).

statements as they are eager to avoid third-party hearsay unnecessarily. Where judges do not need to rely on allegedly coerced statements, they tend not to clutter their opinions with consideration of that evidence. One example of this was in *Khalifh*, Judge Robertson's final Guantánamo merits opinion before his retirement.[435] In *Khalifh*, the petitioner had alleged that certain of his own statements that the government had offered against him were products of his mistreatment. Judge Robertson wrote that he didn't need to resolve the credibility of the torture allegations themselves, but rather could resolve the case by setting aside the statements that occurred within the "window of alleged mistreatment" from late 2004 to early 2005 because "none of the statements from the window period [were] necessary for the government to prove its case *in toto*."[436] While Judge Robertson set aside that evidence, he did credit one statement that was allegedly derived from mistreatment, a statement that was corroborated by other evidence on record.[437] He found that the petitioner was a part of Al Qaeda and associated forces and denied the petition. In the D.C. Circuit case of *Al-Madhwani v. Obama*, Judge Henderson followed a similar approach in declining to review the district court's consideration of Al-Madhwani's coercion claims on the grounds that "the record contains sufficient evidence unaffected by any claim of coercion to uphold the district court's determination that Madhwani was ''part of'' al-Qaida."[438]

As with hearsay, a certain high-altitude agreement masks significant divergence in practice and approach in this area. On the one hand, the district judges have been relatively uniform in their adoption of a standard for separating admissible and inadmissible statements, referring to the test in terms of "voluntariness." They do not appear to construe voluntariness in this context as strictly as would be done in the criminal setting (or else all statements derived from long-term custodial interrogation without counsel would be excluded),[439] though they do borrow from criminal law the notion that voluntariness, whatever that label entails, turns on an assessment of the totality of the circumstances.

Yet while the judges have dealt with allegations of abuse in almost half of the Guantánamo merits cases, neither the district nor the circuit judges have addressed the issue systematically. This is surprising, because interrogation statements so often form the core of the government's evidence against habeas petitioners, and because these statements so often face challenge on

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[435] Khalifh v. Obama, No. 05-1189 (D.D.C. May 28, 2010).

[436] *Id.*, slip op. at 6 (discussing what was allegedly the third of three "confessions," made outside the "taint window"). Judge Roberson found the alleged confession "ambiguous at best" and did not credit it. *Id.*

[437] *See id.*, slip op. at 13 ("In one interview Khalifh admitted to losing his leg while clearing mines for the Taliban. This could be discounted, by itself, because it occurred during the window period, but it has independent corroboration.").

[438] Al-Madhwani v. Obama, 642 F.3d 1071, 1074 (D.C. Cir. May 27, 2011)

[439] *See* Al Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. July 13, 2010).

voluntariness grounds. Because of the diversity of practice, the government's capacity to carry its burden in cases turning on interrogation statements might vary significantly from courtroom to courtroom. Making matters worse, the consensus among the district judges that at least exists with respect to the notion of using some form of voluntariness as the touchstone of admissibility has not actually been endorsed by the D.C. Circuit, and hence might yet prove vulnerable on appeal.[440]

When Must Statements Be Excluded or Given No Weight?

Despite extensive litigation, it remains unclear where the "voluntariness" line is being drawn in the habeas setting. All the judges seem to accept that government mistreatment can indeed require the exclusion or discounting[441] of statements directly derived from abusive methods because mistreatment affects the statements' reliability. They also agree that abuse can taint even subsequent statements derived from non-abusive methods, and that the government bears the burden of proving that a statement is reliable despite prior mistreatment of the person who gave it.[442] On the other hand, none appears to believe that the mere fact that a statement was rendered in the context of long-term custodial interrogation without counsel renders such statements too involuntary to be admitted or credited, however much that result might be compelled were the voluntariness standard of criminal law actually applied. Unfortunately, no consensus has emerged with respect to just what this modified approach to voluntariness actually requires.

In theory, judges might draw that line anywhere along a spectrum that ranges from torture, through cruel, inhuman, and degrading treatment, and on to still-lesser forms of coercion that may be lawful but that exceed the baseline

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[440] *See, e.g.*, Obaydullah v. Obama, 688 F.3d 784 (D.C. Cir. Aug. 3, 2012) (finding that petitioner's failure to produce evidence demonstrating coercion, combined with affirmative evidence of non-coercion, permits the admissibility of petitioner's statements).

[441] Judge Huvelle in particular often uses a separate proceeding. *See, e.g.*, Al Qurashi v. Obama, 733 F. Supp. 2d 69 (D.D.C. Aug. 3, 2010). Others, like Judge Robertson, tend to "formally 'receive' all the evidence" and give it the weight the judge believes it deserves. *See, e.g.*, Salahi v. Obama, 710 F. Supp. 2d 1, 7 (D.D.C. Mar. 22, 2010) (discussing evidence allegedly "taint[ed]" by coerced evidence); Awad v. Obama, 646 F. Supp. 2d 20, 23 (D.D.C. Aug. 12, 2009).

[442] *See Salahi*, 710 F. Supp. 2d at 6; Anam v. Obama (Al Madhwani), 696 F. Supp. 2d 1, 7-8 (D.D.C. Jan. 6, 2010). *But see Al Qurashi*, 733 F. Supp. 2d at 79-80 n.15 (Huvelle, J.) (stating that the court will "assume that the government must prove the voluntariness of petitioner's statements by a preponderance of the evidence," but noting the government's argument that "'[i]n a federal habeas action, the burden of proving that the confession was involuntary rests with the petitioner.'") (citations omitted). The presumption of regularity regarding the government's evidence does not override concerns about coerced statements. *See* Latif v. Obama, No 10-5319, slip op. at 8 (D.C. Cir. Oct. 14, 2011, reissued Apr. 27, 2012) (Henderson, J., concurring) (noting that "the presumption of regularity does not. . . answer the reliability inquiry if the detainee claims he was coerced in making admissions").

level of coercion inherent in long-term detention at Guantánamo. Alternatively, the courts might draw it according to some more objective measure, such as whether a statement was obtained through the use of a method found on the list of interrogation approaches specifically authorized in the Army Field Manual on interrogation (or simply whether the method was consistent with the Geneva Conventions, if an answer to that question could be discerned).[443] Nearly three years after *Boumediene*, however, the judges have made remarkably little progress in addressing the issue.

Consider, for example, the approach taken by Judge Kollar-Kotelly in *Al Rabiah*. Her model involved a relatively bright-line standard keyed to two external sources: the Army Field Manual and the Geneva Conventions. Because interrogators violated those standards in that case, she concluded, all the directly resulting testimony was unreliable.[444] Judge Kollar-Kotelly explained that according to the Army Field Manual these techniques are "not necessary to gain the cooperation of interrogation sources . . . [and are] likely to yield unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear."[445] Judge Kollar-Kotelly did not explicitly hold that any statement derived from interrogation using tactics outside the Field Manual is *per se* unreliable, and her discussion is clouded by her observation that reasons other than the coercion itself made her doubt the statements' reliability.[446] Still, her discussion is distinctive among the judges of the district court, most of whom have taken a more impressionistic approach and none of whom have hinted at reliance on these particular sources as a proxy for

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[443] *See, e.g.*, Khairkhwa v. Obama, 793 F. Supp. 2d 1., 28 (D.D.C. May 27, 2011) (citing the interrogation report, which stated that "the direct approach orchestrated with the pride and ego up (proper military protocol) and love of country were and have been the approaches used by interrogators to elicit information from [informant]" as probative that informant's statement was not coerced) (citations omitted).

[444] Al Rabiah v. United States, 658 F. Supp. 2d 11, 39-40 (D.D.C. Sept. 17, 2009) (noting that the petitioner would "request time to pray or otherwise ask for a break, and then he would provide a full confession through an elaborate or incredible story. . . . Ultimately, his interrogators grew increasingly frustrated with the inconsistencies and implausibilities associated with his confessions and began threatening him with rendition and torture, and decided to place him in [a program of disrupted sleep]. These tactics violated both the Army Field Manual and the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, but they did not produce any additional confessions.").

[445] *Id.* at 45.

[446] For example, Judge Kollar-Kotelly pointed to the evidence in the interrogation records themselves, that the Al Rabiah's interrogator did not credit the confessions they had elicited. *Id.* at 34 (agreeing with the assessment of "Al Rabiah's interrogators, as well as Al Rabiah's counsel in this case, that Al Rabiah's confessions are not credible. Even beyond the countless inconsistencies associated with his confessions that interrogators identified throughout his years of detention, the confessions are also entirely incredible."). She also observed that the government itself relied not on the confessions in their entirety but rather on the "least detailed and least inculpatory version of Al Rabiah's confessions." *Id.* For Judge Kollar-Kotelly, this "underscore[d] the lack of reliability and credibility associated with the confessions themselves" and she was "unwilling to credit confessions that the Government cannot even defend as believable." *Id.*

determining voluntariness.

In the end, however, even as Judge Colleen Kollar-Kotelly's suggested approach may have had doctrinal appeal because of its clarity, the D.C. Circuit seems to have little appetite for such line drawing—at least where the Geneva Conventions are concerned. The D.C. Circuit did not opine directly on Judge Kollar-Kotelly's ruling, since the government did not appeal its loss in *Al Rabiah*. But it signaled an unreceptiveness to Geneva Convention claims generally in *Al Adahi*, where Judge Randolph dismissed the petitioner's argument that his interrogation statements should be suppressed because they were gathered in violation of Geneva Convention provisions that require that covered individuals "shall in all circumstances be treated humanely."[447] As Judge Randolph wrote in his opinion: "Even if the Convention had been incorporated into domestic U.S. law and even if it provided an exclusionary rule, Congress has provided explicitly that the Convention's provisions are not privately enforceable in habeas proceedings."[448] And while, as explained in Chapter 3, this holding may now be in question because of the cryptic outcome in *Al Warafi*, it remains the D.C. Circuit's most notable comment regarding the admission of statements allegedly gathered in violation of the Conventions. That, of course, still leaves open the question of whether Judge Kollar-Kotelly's approach with respect to the Army Field Manual might have legs in the future.

Competing Approaches to Evidentiary Disputes Concerning Involuntariness

Even assuming that more of a consensus existed as to the precise meaning of voluntariness in this context, disputes would still arise as to other matters. Judges assessing allegations of torture or coercion must determine as an initial matter whether they believe any mistreatment took place, how severe that mistreatment was, and whether it renders resulting statements unreliable. Sometimes, this inquiry is made easy by decisions by the government not to contest allegations of abuse—either out of recognition of their truth or out of a tactical decision not to litigate the circumstances of intelligence interrogations. This happened in Judge Huvelle's courtroom in *Bacha*,[449] for example, and in

[447] Corrected Reply Brief For Appellee at 22-23, Al Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. July 13, 2010) (No. 09-5333), ECF No. 1226767.

[448] *See Al Adahi*, 613 F.3d at 1111 n.6 (noting that, "[e]ven if the Convention had been incorporated into domestic U.S. law and even if it provided an exclusionary rule, Congress has provided explicitly that the Convention's provisions are not privately enforceable in habeas proceedings.").

[449] Bacha v. Obama (Jawad), No. 05-2385 (D.D.C. July 17, 2009). In *Bacha*, in fact, the government not only did not contest the fact of mistreatment, but it did not oppose detainee efforts to suppress evidence on taint grounds, thus depriving the judge of the occasion to opine on the issue in any detail. Judge Huvelle indicated that she would have been receptive to the petitioner's suppression motion even if the government had opposed it. *See id.* slip op. at 2-18.

Judge Robertson's in Salahi.[450]

At the other end of the spectrum, there are cases in which a detainee claims to have been treated improperly at some point in time, but not necessarily in connection with the interrogation that produced the statements in question. Such was the case in *Al Kandari*, where Judge Kollar-Kotelly found herself considering mistreatment allegations and whether to credit them. An antecedent question was presented, however: Whether Al Kandari was even alleging that the coercion he claimed to have suffered led him to make the statements in question. Al Kandari's counsel admitted that his statements were not the result of his treatment by government officials, and even admitted that his generalized claims of abuse were "not relevant" to the court's decision.[451] Such concessions simplify adjudication in some cases, but they do little to clarify the law of coercion.

Where the presence of coercion is both relevant and contested, the judges have adopted a variety of strategies for assessing the issue—strategies that are not always consistent between courtrooms, or even within the same courtroom.

One such approach is to focus on the strength of the government's efforts at rebuttal of abuse allegations. Consider, for example, one of Judge Hogan's decisions, *Anam*. Judge Hogan wrote in that case that the petitioner's allegations were not adequately rebutted, at least in part because the government had inexplicably (according to Judge Hogan) failed to offer contrary testimony from the interrogators with firsthand knowledge of the matter, despite having at least one available.[452] He seems to have expected that the government would offer such testimony since it would not have been difficult to have procured it. Similarly, in *Awad*, Judge Robertson apparently considered rebuttal evidence key to evaluating a coercion claim. In that case, the petitioner claimed that "any incriminating statements he made were made 'as a result of torture, the threat of torture or coercion and are therefore unreliable.'"[453] Judge Robertson dealt with the allegation only in a footnote. He wrote that only one of the petitioner's coercion allegations—that "interrogators threatened to withhold medical treatment until . . . [the petitioner] provided them information"—was "specific" enough to consider. And he rejected the complaint on the basis that the government supported its argument with "interrogators' notes" that revealed, in Judge Robertson's view, "that Awad was provided care and that he used his medical condition as an excuse to avoid answering difficult questions."[454] Judge

[450] Salahi v. Obama, 710 F. Supp. 2d 1 (D.D.C. Mar. 22, 2010). In *Salahi*, it was not seriously contested that petitioner Salahi was subject to mistreatment, and so the core of Judge Robertson's analysis deals with whether the mistreatment would impact his statements' reliability—not on whether he believed the allegations.

[451] Al Kandari v. Obama, 744 F. Supp. 2d 11, 42-23 (D.D.C. Sept. 15, 2010).

[452] *See* Anam v. Obama (Al Madhwani), 696 F. Supp. 2d 1, 7 n.5 (D.D.C. Jan. 6, 2010) (noting that "the Government chose not to call those interrogators as witnesses and even moved to quash Petitioner's subpoena to call one of the interrogators who was available to testify.").

[453] Awad v. Obama, 646 F. Supp. 2d 20, 24 n.2 (D.D.C. Aug. 12, 2009).

[454] *Id.*

Robertson ultimately credited the petitioner's admissions.[455]

One problem with this approach, as noted above, is that we still lack a clear answer to the underlying question of how much and what type of mistreatment a detainee has to experience before the alleged abuse renders the resulting statements inadmissible or deserving of little or no weight. Of course, one reason this issue has received scant attention from the judges is that they have often found the coercion to have been so extreme that the statements' lack of reliability was simply not in question. For example, Judge Hogan in *Anam* discussed the severity of government abuse and its effect on the reliability of statements made by petitioner Musa'ab Omar Al Madhwani in Afghanistan and Pakistan, before his transfer to Guantánamo.[456] Judge Hogan did not offer any definition of the standard he ultimately used to discount the statements alleged to have been procured by mistreatment, but merely identified the conditions that in his judgment crossed the line in this particular instance: Al Madhwani's original confessions, for example, were given after where he was suspended in his cell by his left hand for days, and after the guards at the prison blasted his cell with music 24 hours a day at very high levels.[457] Such mistreatment continued at another site in Afghanistan, before the detainee's transfer to Guantánamo. Ultimately, Judge Hogan concluded, "it is clear from the records that any statements the petitioner provided in Afghanistan or Pakistan were coerced."[458]

While in cases like *Anam*, where the alleged abuse was both uncontested by the government and extreme, such an impressionistic standard raises little controversy, the judges clearly have different impressions about when alleged abuse crosses the line in less extreme scenarios. At one end of the spectrum, Judge Kessler has suggested that merely making statements at a detention site where abuse was taking place—even if the abuse involved someone *other* than the detainee—is grounds for doubting the value of that statement, apparently on the ground that the mere fear of potential torture suffice to preclude a finding of voluntariness. In *Ali Ahmed*, Judge Kessler stated that the witness's testimony had "been cast into significant question, due to the fact that it was elicited at Bagram amidst actual torture or fear of it."[459] Later in the *Ali Ahmed* opinion, she considered the statements of a different detainee that the government offered as evidence that Ali Ahmed received military training. She wrote that the witness in question "made the inculpatory statement at Bagram Prison in Afghanistan, about which there have been widespread, credible reports of torture and detainee abuse." She then rejected the government's attempt to rehabilitate one

[455] Because of the scope of redactions in the opinion however, it is difficult to discern to what extent the opinion—which denied Awad's petition in the end—actually relied on these statements or otherwise addressed the rules Judge Robertson found applicable to such claims.

[456] *Anam* (Al Madhwani), 696 F. Supp. 2d 1.

[457] *Id.* at 6.

[458] *Id*.

[459] Ali Ahmed v. Obama, 613 F. Supp. 2d 51, 56 (D.D.C. May 11, 2009).

of the allegedly coerced statements evidence by showing that it was made during "the same interrogation session where he made inculpatory statements about himself."[460] Judge Kessler concluded that "[a]ny effort to peer into the mind of a detainee at Bagram, who admitted to fearing torture at a facility known to engage in such abusive treatment, simply does not serve to rehabilitate a witness whose initial credibility must be regarded as doubtful." [461] In this case, Judge Kessler seemed to treat the mere fact of coercion's taking place in a facility holding the detainee as presumptive grounds for discounting any statement by that detainee.

No other judge has followed this approach. And, indeed, Judge Kessler herself has treated coercion claims in more recent opinions rather differently, suggesting that some variation exists even within her own jurisprudence. In her most recent pair of decisions, concerning petitioners Al Nadhi and Al Assani, Judge Kessler confronted arguments that statements made by a detainee known as "Riyadh the Facilitator" were unreliable because, the petitioners claimed, Riyadh had been rendered to Jordan and tortured before arriving at Guantánamo.[462] Judge Kessler wrote that she would apply a totality-of-the-circumstances test and consider "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators" in determining whether prior coercion carries over into a second statement—factors that she did not explicitly consider in *Ali Ahmed*, where she did not consider any factors other than the fact of "widespread, credible reports of torture."[463] She concluded in both of the more recent cases that because the petitioners had presented no information about the extent of torture suffered by Riyadh or its impact on his statements, she would credit his statements.[464] These later two cases are not necessarily inconsistent with her earlier approach in *Ali Ahmed* or *Mohammed*, because the allegations of abuse in *Al Nadhi* and *Al Assani* were, in her judgment, completely unsupported; indeed, she wrote, the petitioner "presented no information" to back up his claims. And it is certainly possible that, had the detainees persuaded her that others were abused in facilities in which Riyadh the Facilitator was being held, she would have suppressed his statements too. But her methodology does seem to have shifted at least somewhat from her approach in *Ali Ahmed*, where the petitioner had made no allegation that the *specific* witness had been abused yet where she still excluded that witness's statements.

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[460] *Id.* at 61.

[461] *Id.* at 62.

[462] Al Adahi v. Obama (Al Assani), 698 F. Supp. 2d 48, 59 n.14 (D.D.C. Mar. 10, 2010); Al Adahi v. Obama (Al Nadhi), 692 F. Supp. 2d 85, 96 n.13 (D.D.C. Mar. 10, 2010).

[463] *Ali Ahmed*, 613 F. Supp. 2d at 61.

[464] *Al Adahi* (Al Assani), 698 F. Supp. 2d at 59 n.14 ("Petitioner has presented no information on the extent of torture suffered by Riyadh or its impact on his statements. Without such information, the Court is not prepared to reject the Government's evidence as unreliable. Therefore, the Government's evidence stands as unrebutted and must be accepted as credible.").

Judge Kennedy takes a different approach to refereeing disputes regarding the credibility of mistreatment allegations in two of his cases, *Abdah* (Esmail) and *Abdah* (Uthman)—an approach that also seems less than entirely consistent between the two cases. In these cases, the government conceded that the alleged mistreatment, if proven to the extent the petitioner had alleged, would require the exclusion of statements derived from that mistreatment. In both of these cases, after announcing a standard for his assessment—that "resort to coercive tactics by an interrogator renders the information less likely to be true,"[465] Judge Kennedy engaged in a fact-intensive inquiry to evaluate the allegations. In Uthman's case, he ended up crediting the petitioner's allegations in full and thus did not credit the statements alleged to have been made as a result of them—and he ultimately granted the petition. In *Abdah (Esmail)*, however, Judge Kennedy did not end up believing the allegations as advanced by the petitioner, and he thus credited the statements that were allegedly made as a result of them—and ultimately denied Esmail's petition.

In *Abdah* (Uthman), the statements of two detainees, Hajj and Kazimi, formed part of the government's case against the petitioner. The petitioner claimed that their statements were made as the result of abuse, and the government contested these allegations. The petitioner presented evidence of the claim in the form of declarations from Kristin Wilhelm, an attorney who represented Hajj, describing the torture that Hajj allegedly experienced, and of Martha Rayner, a Professor at Fordham University Law School and counsel for Kazimi.[466] To contest the allegations, by contrast, the government produced a witness who testified for the government at the hearing, a criminal investigator for the Criminal Investigation Task Force ("CITF").

Judge Kennedy reviewed the declarations of both attorneys who represented the detainees and the testimony of the CITF investigator. As an initial matter, he declared that he was not persuaded by the government's contention that Wilhelm and Raynor's declarations fell short because they were "not direct, sworn statements of the detainees themselves."[467] He then went on to reject the government's rebuttal evidence: "The investigator's testimony added to the record persuasive evidence that the investigator herself did not mistreat Hajj or Kazimi and that the investigator did not observe any torture, or even any signs of abuse in the demeanor or physical state of either man, while the investigator was with them."[468] But it had failed to effectively rebut the evidence of abuse because "the investigator [had] no knowledge of the circumstances of either detainee's confinement before his arrival at Bagram and quite limited knowledge of his

[465] Abdah v. Obama (Esmail), 709 F. Supp. 2d 25, 28 n.3 (D.D.C. Apr. 8, 2010) ("The Court agrees with Esmail's underlying legal argument: statements that are the product of torture are unreliable."); Abdah v. Obama (Uthman), 708 F. Supp. 2d 9, 16 (D.D.C. Apr. 21, 2010).

[466] Abdah v. Obama (Uthman), 708 F. Supp. 2d at 18-19 (D.D.C. Apr. 8, 2010).

[467] *Id.* at 16.

[468] *Id.* at 15.

treatment there."[469] For Judge Kennedy, that the investigator testified to meeting with each man in an interrogation room on each of several days for approximately four hours at a time was insufficient: "The investigator did not see Hajj or Kazimi other than during those four-hour sessions and did not inquire of them, or anyone else, about their treatment in the various prisons in which they were held."[470] Not only did the testimony of the government's witness fall short of outweighing the detainees' attorneys' accounts, it didn't even give the court a "reason to doubt the veracity of the declarations."[471] And so, because the government had failed to rebut the petitioner's allegations, Judge Kennedy decided to disregard the inculpatory statements because, he found, the treatment described in the two declarations rose to the level of "torture," and because that treatment was "recent."[472]

The government's main counterargument was that the statements were nevertheless reliable for two reasons: first, because the CITF investigator had testified that he believed Hajj and Kazimi were truthful in response to questions and, second, because one of the detainees, Kazimi, had said in an interview with the investigator that he had been unfairly accused of more allegations than had other detainees because he had been truthful with interrogators.[473] Judge Kennedy was skeptical of these arguments, though his reasons were somewhat vague: he simply stated that the conditions in which the detainees were interrogated were coercive and that the reasons for crediting them in spite of the coercion did not "outweigh the reasons to infer, based on the coercive circumstances so close in time to the interrogation, that they are unreliable."[474] Because the reasons did not speak directly to the issue of whether there had been a sufficient break in the stream of events "sufficient to insulate the statement from the effect of all that went before," Judge Kennedy concluded that the statement must be discounted.

The government challenged this ruling on appeal,[475] writing that Judge Kennedy's finding of "ongoing torture" at Bagram was "unexplained" and "patently inadequate" in light of evidence that one of the detainees, Hajj, "felt relaxed during the interviews at Bagram but that he felt free to complain about matters regarding his treatment and conditions of confinement."[476] But, on

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[469] *Id.* at 19-20.

[470] *Id.* at 20.

[471] *Id.* at 16.

[472] *Id.*at 14.

[473] *Id.* at 16 n.7.

[474] *Id.* at 16-17.

[475] See Brief for Appellant-Respondent at 50, Uthman v. Obama, No. 10-5235 (D.C. Cir. Mar. 29, 2011) (stating that the district court's "fleeting reference to the "ongoing" torture of Hajj was patently inadequate. The district court neither made any finding about the nature of the "ongoing" torture at Bagram; nor did it explain the basis for its finding.").

[476] *Id.*

appeal, the D.C. Circuit did not engage the question; it reversed Judge Kennedy's opinion based only on only those facts he had explicitly found using other record evidence, and thus did not need to delve into the specifics of the evidence Judge Kennedy had rejected.[477]

In *Abdah* (Esmail), by contrast, Judge Kennedy was far more dubious of the petitioner's account, and in the end, he actually accepted as evidence for the government's allegations all of the statements that the petitioner alleged to have been coerced. As in *Abdah* (Uthman), in *Abdah* (Esmail) the petitioner challenged statements given to interrogators as being the product of coercive abuse.[478] And Judge Kennedy once again assessed in detail the record evidence on the issue. Although he found that there was "evidence in the record to support the contention that Esmail was subjected to mistreatment while in United States custody," he believed that Esmail had exaggerated the claims of severe mistreatment of the kind that would bring the reliability of his statements into doubt. And in sharp contrast to his approach in *Uthman*, he seemed to accept the testimony of interrogators that they had not witnessed any abuse, notwithstanding their inability to witness the conditions of a given detainee's treatment all of the time.

Judge Kennedy first reviewed carefully three different sources of Esmail's allegations: the summary of his CSRT testimony and two declarations provided in 2009 and 2010. Then he examined documents from a variety of sources that Esmail alleged corroborated the general practice of torture at the U.S. detention facilities in Bagram and Kandahar.[479] He concluded that Esmail had been mistreated. He then turned to government-submitted rebuttal declarations from two interrogators who worked at Bagram and at Kandahar. Judge Kennedy credited the Bagram interrogator's declaration, believing his claims about a lack of abuse of detainees at Bagram, during interrogations and at other times, based on his assertions that, "[w]hen [he] interrogated detainees, they were not stripped, hooded, or shackled" and he personally "did not threaten the detainees with harm to themselves or to their families."[480] This witness also swore that he had not seen any other interrogators or other people employ coercive interrogation techniques.[481] And he rebutted one of Esmail's allegations specifically by attesting that there were no dogs present when he interrogated him.[482] Summarizing the degree of overlap between the allegations and the

[477] *Id.* at 19 (describing that the court took note of certain evidence that the "detainees were relaxed, showed no signs of abuse, appeared truthful, and did not feel compelled" to tell an interrogator whatever he wanted to hear, but "nevertheless concluded that the statements of Hajj and Kazimi could not be used because they had been tortured before they came to Bagram, and that the torture of I Hajj was 'ongoing' when he was questioned at Bagram").

[478] 709 F. Supp. 2d 25 (D.D.C. Apr. 8, 2010).

[479] *Id.* at 31.

[480] *Id.*

[481] *Id.* at 31.

[482] *Id.* at 32.

rebuttal, Judge Kennedy wrote that the declarations confirmed "some portions of Esmail's description of his treatment, such as being forced to be naked in the presence of guards and being held in a cold location," but discredited the "other, more serious allegations, such as Esmail's being threatened with dogs or thrown in a ditch of waste."[483]

But Judge Kennedy concluded that although he believed that Esmail had been "mistreated," Esmail had not "endure[d] the severe abuse he describe[d]."[484] He also examined the statements in the documents themselves, and found that "nothing about the summaries of Esmail's statements suggests to the Court that they are the product of coercion, whereas there are indications to the contrary."[485] All told, Judge Kennedy found Esmail's statements voluntary, even while he seemed to believe that Esmail had been forced to be naked in front the guards and held in a cold location. Those conditions did not render the detainee's statements unreliable, at least in this case.

What was curious about these two cases is that the government witnesses in *Abdah* (Esmail) seemed to have no more personal knowledge of the actual treatment of the individual who was allegedly coerced than did the CITF investigator whose testimony Judge Kennedy found insufficient in *Abdah* (Uthman) to rebut the petitioner's claims. Judge Kennedy recognized in *Abdah* (Esmail) for example, that neither interrogator had "witnessed" the severe events Esmail alleged and that the declarations did not "directly disprove" each of Esmail's significant allegations. But "direct" contradiction was seemingly what he required of the government's witness in *Abdah* (Uthman); in *Abdah* (Esmail) he did not demand the same perfect match between the allegations of torture and the personal observation of the rebuttal witness. He wrote that the government witnesses were more credible than the petitioner, though he did not explain the apparent incongruity with *Uthman*. It is, of course, true that, in *Esmail*, a number of other factors apart from the competing testimony and declarations likely influenced Judge Kennedy's assessment of the competing claims. Such factors included medical records the government produced that cast doubt on the veracity of the allegations, discrepancies in Esmail's two sets of allegations, and the fact that information Esmail claimed to have given only because he was forced to say it was "independently corroborated" by other information in the record.[486] But Judge Kennedy also examined the inculpatory statements themselves—a step he had not taken in *Uthman*—and found that the

[483] *Id.* at 33.

[484] *Id.* at 36.

[485] *Id.* at 36.

[486] *Id.* at 35 ("It is reasonable to infer based on the late addition of allegations that could reasonably be expected to appear in the First Declaration that Esmail has embellished his statements with false allegations in an effort to create an advantage for himself in this litigation."). Judge Kennedy also found the timing of the alleged abuse to be implausible: "Based on the timing of these interviews, there was little opportunity for Esmail to be affected by mistreatment in U.S. custody such that his statements became unreliable." *Id.* at 36.

interrogation summaries did "not read as they likely would were the interviewee speaking out of fear."[487]

Judge Huvelle also dealt with an exaggerating petitioner in the *Al Qurashi* case and decided to deny the petitioner's motion to suppress statements that were allegedly the product of mistreatment.[488] Specifically, the petitioner had requested that she suppress his confession that he had attended the Al Farouq training camp because, he said, he made the confession to an FBI interrogator only after having been beaten by Pakistani authorities while in Pakistani custody.

In a lengthy, 50-page opinion, Judge Huvelle reviewed the evidence, writing that she believed the petitioner's claims were "exaggerated." [489] She found that the allegations themselves seemed questionable and were riddled with "timeline inconsistencies."[490] Further, the alleged torture was not supported by "definitive medical evidence."[491] She found the petitioner's stated reasons for recanting to be "not credible," and she described her "[c]ommon-sense" observation that, had the petitioner been abused as he had alleged, there would have been "*some* form of marks upon the head, neck, or face, whether in the form of abrasions, bruises, swelling, or simply redness ."[492] She did, however, credit testimony from the FBI Special Agent who testified at the suppression hearing because she found his "demeanor and [the] substance of his testimony" credible.[493] And, unlike Judge Kennedy had done in *Abdah* (Uthman), Judge Huvelle did not expect the FBI Special Agent's testimony to contain evidence that he had personal knowledge of events that took place in the Pakistani prison; rather, she considered the evidence of interactions the Special Agent did have with the petitioner, where he had the opportunity to observe whether the petitioner "manifested any evidence of having been tortured."[494] In a sense, she used the evidence of the interactions that the Special Agent did have with the petitioner to infer the absence of mistreatment during time periods that the Special Agent did not personally observe the petitioner's treatment—a leap that Judge Kennedy seemed unwilling to make in *Uthman*.

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[487] *Id.* at 34-35 (indicating incredulity about the more "sensational abuse" listed in Esmail's second declaration because the "additional allegations, were they truthful, could have appeared in the earlier declaration").

[488] Al Qurashi v. Obama, 733 F. Supp. 2d 69 (D.D.C. Aug. 8, 2010)

[489] *Id.* at 79 (describing how the court must "ask whether 'the confession is the product of an essentially free and unconstrained choice by its maker,' or whether 'his will has been overborne and his capacity for self-determination [has been] critically impaired.'" The answer to this question is determined by considering "the totality of all of the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.") (quoting Culombe v. Connecticut, 367 U.S. 568. 602 (1961)).

[490] *Id.* at 87.

[491] *Id.*

[492] *Id.* at 84-88.

[493] *Id.* at 82.

[494] *Id.*

When Does the Taint of Prior Coercion Dissipate?

The degree of attenuation between mistreatment that the courts find and later statements has also become a major issue in the habeas cases. Courts that find that mistreatment took place continue to struggle with determining whether and when statements elicited in non-coercive contexts subsequent to the alleged mistreatment are tainted by the earlier coercion. They have focused on quantitative factors, such as the amount time between coercion and later, un-coerced interrogation, as well as qualitative factors, such as the identity of the interrogators or the forum in which the statement is made.

Early on in the Guantánamo habeas litigations, Judge Kessler presided over *Mohammed*.[495] In that case she faced allegations of coercion that occurred early on in the government's custody of one of the government witnesses, Binyam Mohamed, before he was transferred to Guantánamo. The government acknowledged Mohamed's mistreatment but argued that later statements given to interrogators at Guantánamo should not be discredited by it.[496] Finding, as Judge Kessler did, a dearth of case law on point and virtually nothing binding from the prior Guantánamo cases, she opted, at the government's suggestion, to turn to the criminal case law as a useful, albeit not perfect, analogy.[497] She mined Supreme Court case law, considered both Due Process arguments and reliability arguments, and adopted a voluntariness test for the statements:

> The use of coercion or torture to procure information does not automatically render subsequent confessions of that information inadmissible. The effects of the initial coercion may be found to have dissipated to the point where the subsequent confessions can be considered voluntary. The Government bears the burden of showing that the confessions are voluntary. To determine if the effects of the earlier coercion have dissipated—that is, to determine the voluntariness of the subsequent confessions—courts apply a "totality of the circumstances" test.

She noted that certain factors, such as "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second

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[495] Mohammed v. Obama, 689 F. Supp. 2d 38 (D.D.C. Nov. 19, 2009).

[496] Specifically, the government conceded the petitioner had been badly abused over a long period of time by other governments to whom the United States had rendered the detainee before his return to U.S. custody and his transfer to Guantánamo. It did, however, claim that the rapport the FBI agent later built with him vitiated the taint of his prior abuse and that his statements implicating the petitioner should therefore be credited.

[497] *Mohammed*, 689 F. Supp. 2d at 61.

confession." But she also emphasized that "courts have never insisted that a specific amount of time must pass before the taint of earlier mistreatment has dissipated."[498]

To apply her standard, Judge Kessler spent 23 pages cataloguing and discussing Mohamed's mistreatment. She found that Binyam Mohamed had been

> physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculpate himself and others in various plots to imperil Americans.[499]

To assess the gravity of mistreatment, she examined prior case law in which federal courts, in criminal cases, had considered whether to admit allegedly involuntary statements. In one case in which the individuals' statements had been excluded, the individuals had been "brutally beaten, whipped, and exposed to mock executions in the days before making a coerced confession and being thrust into the courtroom for a one-day show trial."[500] Judge Kessler found Mohammed's case was much more like that case than it was similar to other cases in which the treatment was much less severe.[501]

She also had taken a step distinct from some of her peers on the district court when she reviewed a number of scientific articles describing the effects of physical and psychological torture on prisoners. In her opinion, the articles supported her view that "even though the identity of the individual interrogators changed (from nameless Pakistanis, to Moroccans, to Americans, and to [the FBI Special Agent], there is no question that . . . [f]rom Binyam Mohamed's perspective, there was no legitimate reason to think that transfer to

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[498] *Id.* at 62-63 ("Further, courts should examine, *inter alia,* the age, education, intelligence, and mental health of the witness; whether he has received advice regarding his Constitutional rights; the length of detention; the 'repeated and prolonged nature of the questioning'; and the 'use of physical punishment such as the deprivation of food or sleep.' This multi-factor inquiry aims to uncover whether there has been a 'break in the stream of events . . . sufficient to insulate the statement from the effect of all that went before.'") (quoting Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

[499] *Id.* at 64.

[500] *Id.* at 64.

[501] *Id.* at 63. One of the less severe examples was a case in which the individual had been repeatedly questioned "by a police officer, in his own country, by his own fellow-citizens, at a police station, over several days without sleep and with only minimal amounts of food and water." The treatment in that case was unlike that experienced in *Reck v. Pate*, a case in which a murder suspect was "held incommunicado for eight days, questioned extensively for four, and interrogated while sick." 367 U.S. 433, 440-41 (1961).

Guantánamo Bay foretold more humane treatment; it was, after all, the third time that he had been forced onto a plane and shuttled to a foreign country where he would be held under United States authority."[502] Ultimately, she concluded that she could not credit Binyam Mohamed's confession as voluntary: "The earlier abuse had indeed 'dominated the mind' of Binyam Mohamed to such a degree that his later statements to interrogators are unreliable."[503] His will, she determined, "was overborne by his lengthy prior torture, and therefore his confessions to Agent [redacted] do not represent reliable evidence to detain Petitioner."[504]

The D.C. Circuit did not review this opinion. Though the government appealed it, the appeal was dismissed later for mootness.[505] In a different case, *Ahmed*, Judge Kessler seemed to go one step further, suggesting a presumption that torture will infect *all* future statements in the absence of specific reason to conclude otherwise. Discussing one of the detainees whose statements the government offered against the petitioner, Judge Kessler wrote that, "there is evidence that [he] underwent torture, which may well have affected the accuracy of the information he supplied to interrogators."[506] The detainee also said that he had "spent time at Bagram and the Dark Prison, and alleges that he has been tortured."[507] The same witness also claimed that "he made inculpatory statements … [REDACTED] because he feared further torture." The government did not dispute the allegations of torture at Bagram or the Dark Prison, but argued, rather, that the "residual fear" of torture had been overcome by June of 2004, when the detainee informed them that he had given them bad information in the past. The government argued that the fact that the identification was made *after* the detainee was comfortable enough with interrogators to confess to his earlier deceit should be taken as indication that he was no longer coerced. But Judge Kessler was unpersuaded: "Based on two of these interrogations . . . the Government asks the Court to assume that his alleged mistreatment at several detention centers was effectively erased from his memory. . . . [T]he Court cannot infer that past instances of torture did not impact the accuracy of later statements."[508] Judge Kessler rejected the government's attempt to rebut what appeared to be her presumption that torture had infected all subsequent statements, though she did not explain exactly why it fell short or what sort of showing would pass muster.

Judge Robertson takes a different approach to attenuation, suggesting in the one case in which he confronted the issue that he was looking for evidence of a

[502] *Id.* at 65

[503] *Id.* at 66.

[504] *Id.*

[505] Mohammed, No. 05-5224 (D.C. Cir. Jan. 11, 2011) (dismissing appeal as moot).

[506] Ali Ahmed v. Obama, 613 F. Supp. 2d 51, 57 (D.D.C. May 11, 2009).

[507] *Id.*

[508] *Id.* at 58.

"clean break" from the period in which coercion affected the reliability of detainee statements. In *Salahi*, it was not seriously contested that the government's mistreatment of the detainee would affect the reliability of any statements directly derived from the coercive interrogation sessions. But the government contended that the taint had lifted. As Judge Robertson summarized:

> The government acknowledges that Salahi's abusive treatment could diminish the reliability of some of his statements. But abuse and coercive interrogation methods do not throw a blanket over every statement, no matter when given, or to whom, or under what circumstances. Allegations of mistreatment certainly taint petitioner's statements, raising questions about their reliability. But at some point—after the passage of time and intervening events, and considering the circumstances—the taint of abuse and coercion may be attenuated enough for a witness's statements to be considered reliable—there must certainly be a "clean break" between the mistreatment and any such statement. Here, it is the government's burden to demonstrate that a particular statement was not the product of coercion, and that it has other indicia of reliability.[509]

Judge Robertson found "ample evidence . . . that Salahi was subjected to extensive and severe mistreatment at Guantánamo from mid-June 2003 to September 2003."[510] And he considered Salahi's position that every incriminating statement he made while in custody (even outside the June-September time period) was therefore unreliable. Like Judge Kessler's assessment of scientific evidence in *Mohammed*, he received expert testimony on the notion that the mistreatment "likely compromised the accuracy of the information [Salahi] provided to interrogators," but he found the expert's testimony "biased and unpersuasive."[511] Unlike Judge Kessler in *Ahmed*, however, Judge Robertson seemed comfortable with the notion that, once a detainee had grown sufficiently comfortable to disavow his earlier incriminating statements at least once, the "taint" of earlier mistreatment has dissipated sufficiently to consider subsequent statements given under non-coercive conditions as voluntary. He noted that the statement at issue was made both "a year after [Salahi's] coercive interrogation and after [Salahi] had disavowed earlier incriminating statements."[512] And while Judge Robertson ultimately discounted the interrogation statements in question, he made clear that he did so not because of any residual taint from the earlier mistreatment but because the statement was too sparse and too ambiguous to

[509] Salahi v. Obama, 710 F. Supp. 2d 1, 7 (D.D.C. Mar. 22, 2010).

[510] *Id.* at 6.

[511] *Id.* at 7 n.8.

[512] *Id.* at 10.

support the government's suggested inference from it.[513] Elsewhere in the opinion, he credits another statement made in December 2004, about a year after Salahi's coercive interrogation ended, indicating that perhaps one year was presumptively an adequate amount of time in Judge Robertson's view.[514]

In Anam, Judge Hogan offered his own manner of determining not only the level of abuse endured by the petitioner, but also whether the prior mistreatment might affect statements given at a later date and in a different location. And his focus, the consistency of threat to the detainee and the use by U.S. forces of the fruits of the coercive interrogation in eliciting statements later under non-coercive circumstances, differs significantly from Judge Robertson's approach. In Anam, as described above, the government sought to rely on statements that the petitioner, Al Madhwani, gave after allegedly severe mistreatment in Afghanistan or Pakistan and his subsequent transfer to less problematic conditions at Guantánamo.[515] There were 26 statements given by the petitioner at Guantánamo, and Judge Hogan concluded that 23 of them were "tainted by coercive interrogation techniques [and] therefore . . . lack[ed] sufficient indicia of reliability."[516] First, like other judges confronting this issue, he adopted a totality of the circumstances standard used in the criminal prosecution context to determine when taint has been vitiated sufficiently to allow a statement's use.[517] Second, Judge Hogan expressly allocated to the government the burden to disprove taint under this test: "Since the Government is relying on these twenty-six documents [from interrogations at Guantánamo], the Government has the burden of establishing that they are reliable."[518]

Assessing the government's evidence against the petitioner's allegations, Judge Hogan recognized the government's argument that the locations of the two sets of interrogations had changed, as had the officials who elicited the statements from the petitioner. In particular, he recognized that the prior abuse

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[513] *Id.* at 11 ("The remaining evidence that Salahi was an active recruiter is less significant. Salahi made several incriminating statements after coercive interrogation that he was a recruiter and spread propaganda about al-Qaida, but in none of those statements did he say he was tasked to do so, nor did he provide detail about any specific recruiting missions he was given.").

[514] *Id.* at 10. But the statement, that Salahi had said he "wanted to work a little bit," did not help the government's case. While Judge Robertson did not dismiss the statement as the product of coercion, he held merely that it did not support the government's interpretation of its significance. *See also* Al Rabiah v. Obama, 658 F. Supp. 2d 11, 29-36 (D.D.C. Sept. 17, 2009) (using a "totality of the circumstances" test and declining to credit statements even after Al Rabiah "subsequently confided in interrogators [REDACTED] that he was being pressured to falsely confess," but taking note that interrogators themselves "never believed his confessions based on the comments they included in their interrogation reports."). *Id.* at 28.

[515] Anam v. Obama (Al Madhwani), 696 F. Supp. 2d 1 (D.D.C. Dec. 14, 2009).

[516] *Id.* at 3.

[517] *Id.* at 7 ("criminal courts 'may take into consideration the continuing effect of the prior coercive techniques on the voluntariness of any subsequent confession.'") (quoting United States v. Karake, 443 F. Supp. 2d 8, 87-88 (D.D.C. 2006)).

[518] *Id.* at 5.

had occurred while Pakistani and Afghan authorities held the petitioner, whereas the statements it actually sought to use were given to American interrogators at Guantánamo. But Judge Hogan determined that that even the Guantánamo statements were "tainted" by the prior treatment and thus could not be considered. This was in part because he found that the United States "forces were involved in both Afghanistan prisons where he was involved, and that the petitioner believed the United States government orchestrated the harsh interrogation techniques to which he was subject." Because the U.S. was involved both with the earlier conditions of confinement and his later detention at Guantánamo, Al Madhwani was "gripped by the same fear that infected his Afghanistan confessions."[519] Judge Hogan continued:

> [Al Madhwani's] Guantánamo interrogators did little to assuage that fear. According to the reliable evidence in the record, multiple Guantánamo interrogators on multiple occasions threatened Petitioner when he attempted to retract statements that he now claims were false confessions. Therefore, from Petitioner's perspective, his interrogators and custodians did not change in any material way during the period in question.[520]

Judge Hogan also found that Al Madhwani had received continued threats while at Guantánamo. The six-month time period that passed between the Afghanistan and Guantánamo confessions was itself insufficient, because the operative test was not the "length of time between a previously coerced confession and the present confession"; rather the operative time period was that between the present confession and the "removal of the coercive circumstances."[521]

Judge Hogan was also "particularly concerned" with another factor: whether the subsequent interrogators were aware of statements Al Madhwani made previously as a result of abuse, and whether this in some manner informed the construction of the subsequent, non-abusive interrogations.[522] Specifically, this approach suggests that if the government wishes in the future to obtain statements usable in habeas proceedings during the interrogation of someone with a non-frivolous claim of prior abuse, it may need to employ a "clean-team" approach—an interrogation approach designed to insulate the fruits of prior

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[519] *Id.* at 7.

[520] *Id.* at 7 (footnote and citations omitted).

[521] *Id.* at 8.

[522] *See id.* (explaining that because the Guantánamo interrogators had access to and relied upon his coerced confessions from Afghanistan. . . . Far from being insulated from his coerced confessions, his Guantánamo confessions were thus derived from them."). Judge Hogan was also unpersuaded by the government's argument that the statements' internal consistency indicated they were reliable. *See id.* at 9.

harsh interrogations from later, non-coercive questioning.[523]

Notwithstanding his taint analysis of the Guantánamo interrogation statements, Judge Hogan ultimately did admit some of Al Madhwani's post-abuse statements—specifically, statements made in the context of three CSRT and ARB proceedings. He explained that the "circumstances surrounding" those statements were "fundamentally different" from those in which he gave the other statements during interrogations. In the CSRT and ARB proceedings were separated by "months, if not years," from the harsh interrogations.[524] The taint of prior abuse was also overcome in part by the fact that Al Madhwani's interlocutors there were not interrogators, that no one "who may have previously threatened" the petitioner was present at the proceedings, that Al Madhwani had assistance from a personal representative, and that Al Madhwani's actual statements to those bodies—including some denials of government allegations—suggested that he did not fear retaliation for giving statements other than those the interrogators wanted to hear.[525] Judge Hogan found the statements to the CSRT and the ARB "reliable" and, on the basis of those statements and other record evidence, denied Al Madhwani's petition.[526]

This aspect of Judge Hogan's ruling in *Anam* creates yet another divergence of practice on the district court, because it contrasts sharply with how Judge Urbina considered similar facts in *Hatim*.[527] As described in his merits opinion, the government's case against Hatim rested primarily on the claim that the detainee had attended Al Qaeda's Al Farouq training camp and that he stayed at a guesthouse used by Al Qaeda to facilitate the intake of its trainees. Hatim apparently confessed to these facts both during interrogations and when appearing before a CSRT. In the habeas proceedings, however, the petitioner sought to recant his admissions about Al Farouq, arguing that he was tortured while in U.S. custody in Afghanistan, that he falsely confessed to attending Al Farouq during interrogation sessions only in order to avoid abuse, and that he repeated this confession before his CSRT because he believed "he would be punished if he gave the tribunal a different account than what he had previously told interrogators."[528] Judge Urbina noted that the government did not contest the underlying torture allegation, and he conducted a taint analysis for both the later interrogation and CSRT statements.[529]

The situation, in other words, closely resembled the one Judge Hogan faced

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[523] Josh White, Dan Eggen and Joby Warrick, *U.S. to Try 6 On Capital Charges Over 9/11 Attacks*, WASHINGTON POST, Feb. 12, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/02/11/AR2008021100572.html (discussing the use of "Clean Teams").

[524] Anam v. Obama (Al Madhwani), 696 F. Supp. 2d 1, 9 (D.D.C. Dec. 14, 2009).

[525] *Id.* at 9-10.

[526] *Id.* at 10.

[527] Hatim v. Obama, No. 05-1429 (D.D.C. Dec. 15, 2009).

[528] *See id.*, slip op. at 18.

[529] *See id.*, slip op. at 18-19.

in Al Madhwani's case, *Anam*. In both cases, the government did not rebut the allegations of mistreatment, and detainees argued that torture in Afghanistan tainted confessions given later in Guantánamo. And just as Judge Hogan did in Al Madhwani's case, Judge Urbina in *Hatim* placed the burden on the government to disprove the detainee's claim of taint and found that the mere change of location to Guantánamo and the passage of time did not suffice to vitiate the taint.

In contrast to Judge Hogan, however, Judge Urbina did not carve out an exception for CSRT statements, but rather treated them as equally tainted and thus unworthy of consideration:

> The petitioner also maintains that he told the CSRT that he had trained at al-Farouq only because he would be punished if he gave the tribunal a different account than what he had previously told interrogators. . . . As Judge Kessler has observed in another GTMO habeas case involving a third-party witness who claimed to have been tortured, when—as here—the government presents no evidence to dispute the detainee's allegations of torture and fails to demonstrate that the detainee was unaffected by his past mistreatment, the court should not infer that the prior instances of coercion or torture did not impact the accuracy of the detainee's subsequent statements.[530]

Judge Urbina noted a variety of reasons to doubt the government's case for detention even if he had been willing to accept the CSRT or interrogation statements into evidence, and thus we cannot say for certain that the apparent conflict between his approach and that of Judge Hogan is outcome-determinative in this particular instance. (Indeed, in *Anam*, Judge Hogan paid special attention to the "unrestrained tone and content of his remarks," which, he said, were "key to judging their reliability."[531]) However, Judge Urbina's decision to follow Judge Kessler's approach in this case—creating, effectively, an *inference* of taint that must be shown not to exist—clearly differs from Judge Hogan's view that a CSRT proceeding is somehow inherently different from and more protective than an interrogation. The government's disagreement with Urbina's approach showed up in the *Hatim* appeal—where the government argued both in its brief and at oral arguments that Judge Urbina's conclusion was "the product of an erroneous view of the showing of attenuation necessary to determine that statements are not the product of prior mistreatment."[532] Because the D.C. Circuit found that Judge Urbina had applied the wrong substantive standard for

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[530] *Id*. at 12.

[531] Anam v. Obama (Al Madhwani), 696 F. Supp. 2d 1, 10 (D.D.C. Dec. 14, 2009).

[532] Brief for Government at 26, Hatim v. Gates, 632 F.3d 720 (D.C. Cir. Feb. 15, 2011) (pointing out that the government did produce evidence about the petitioner's presence at Al Farouq that "indisputably could not have been affected by Hatim's alleged treatment at Kandahar").

detention and vacated the decision on that basis, it did not reach the issue of the allegedly coerced evidence, but rather remanded the case for further consideration.

Finally, Judge Kennedy also offered a brief taint analysis in his *Uthman* opinion—an analysis that was effectively *dicta* because the government had not argued that any of the statements at issue were sufficiently remote from the alleged coercion to be found voluntary on that ground. But his analysis nonetheless offers a few guideposts as to Judge Kennedy's thinking on the subject of attenuation. With regard to one of the detainees, Hajj, Judge Kennedy wrote that there was virtually no attenuation between allegedly involuntary statements given at Bagram, because his torture "was ongoing" at the time of the statements. The other detainee, Kazimi, "had arrived [at Bagram] directly from the CIA prison, at which he was tortured, only about a month earlier." So it seems that, in Judge Kennedy's view, a period of a month—at least where the locations of mistreatment and interrogation are a field facility and Bagram, respectively—does not create a "break in the stream of events . . . sufficient to insulate the statement from the effect of all that went before."[533] Without more, the passage of a month will be insufficient to clear the taint of past abuse for Judge Kennedy. Beyond that, we know very little.

Conclusion

Given the prevalence of coercion claims in these cases, it is remarkable how little clarity has developed. While it is generally agreed that statements must be "voluntary" in order to be considered; little else about what interrogation conditions likely result in a violation of this standard is clear. We can say with certainty only that judges would not tolerate the fruits of torture, yet that they also are not precluding admission of statements merely because they are produced in the setting of long-term custodial interrogation without counsel. Nor is it clear whether the judges take the same approach to analyzing evidence where the claim of excessive coercion is contested. And while we know generally that mistreatment does taint later statements, for how long and until what circumstances change may vary a great deal from courtroom to courtroom.

The result is that, nearly three years into the post-*Boumediene* habeas regime, nobody knows what the rules are regarding coerced evidence. And since the D.C. Circuit has never spoken substantively to the issue of coercion, the entire edifice, such as it is, may turn out to be a house of cards when the appellate court finally addresses it.

[533] Abdah v. Obama (Uthman), 708 F. Supp. 2d at 16-17 (D.D.C. Apr. 8, 2010) (quoting Clewis v. Texas, 386 U.S. 707, 710 (1967)).