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The Conservative Court and Torture Attenuation

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The Conservative Court and Torture Attenuation

*Ari B. Rubin**

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I. INTRODUCTION

Can statements or evidence that authorities obtain by torture ever be admitted in federal courts? In terrorism crimes, intelligence operatives are often the first to question a suspect, most often without issuing *Miranda* rights,¹ and sometimes using coercive means. Law enforcement teams who later interview those *Mirandized* suspects can avoid a court excluding evidence derived from their interviews by means of “attenuation”—an exception to the exclusionary rule.² Attenuation doctrine in its most basic form requires a court to weigh: (1) separation in “temporal proximity” between the interviews; (2) “the presence of intervening circumstances”; and (3) attention to “the purpose and flagrancy of the official misconduct.”³ But few trials have tested these factors against fact patterns as extreme as those that might occur in terrorism crimes.

Such a case is bound to appear before the Supreme Court. Khalid Sheikh Mohammed and the 9/11 plotters, currently in pre-trial proceedings before a military commission at Guantanamo Bay, are challenging the admissibility of statements that they made to the FBI based on the defendants’ claims that their confessions were the results of CIA torture.⁴ If not their case, with future terrorist attacks all but certain, the Court—now with a conservative-leaning majority—will eventually have to decide just how much attenuation is needed.⁵ This Article seeks to answer

¹ *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966) (“Procedural safeguards must be employed to protect the privilege [against self-incrimination] . . . unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored.”).

² See Katherine Sheridan, Note, *Excluding Coerced Witness Testimony to Protect a Criminal Defendant’s Right to Due Process of Law and Adequately Deter Police Misconduct*, 38 FORDHAM URB. L.J. 1221, 1238–39 (2011) (defining the exclusionary rule and explaining that “excluding the unconstitutionally obtained evidence at the victim’s trial, is constitutionally required and provides immediate relief to the victim”). Attenuation, then, is an exception to the exclusionary rule, “where the evidence obtained is too attenuated from the original violation.” *Id.* at 1246.

³ *Utah v. Strieff*, 136 S. Ct. 2056, 2062 (2016).

⁴ Transcript of Record at 24797, 24813, *United States v. Khalid Sheikh Mohammed, et al.* (Mil. Comm. Sept., 2019), <https://www.mc.mil/CASES.aspx> [hereinafter KSM Record].

⁵ See DNI, *Worldwide Threat Assessment of the U.S. Intelligence Community*, Testimony of Dan R. Coats, Dir. Nat’l Intelligence 4, 10–12 (Jan. 29, 2019), <https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf>

that question from an originalist perspective. The Court’s prior holdings on Guantanamo matters have proceeded on purposive and pragmatic grounds.⁶ This Article looks instead to the origins of attenuation from “independent source” doctrine in the early-twentieth century,⁷ to the exclusionary rule before that, and because attenuation is a court-made solution, to the Supreme Court’s evolving application. This approach will not only point to the likely outcome of the Court’s review, it will suggest techniques that federal investigators should employ in the future to avoid exclusion in their cases.

This Article proceeds in three parts. Part I defines attenuation doctrine, identifies the type of national security case in which it might arise, and lays out the attenuation claim at the heart of the KSM trial.⁸ Part II looks to the history of attenuation and distinguishes its pragmatic application from original intent.⁹ Finally, Part III returns to the KSM trial and applies the doctrine using an originalist approach.¹⁰ The Article concludes that the Court will likely find attenuation in the KSM trial insufficient.¹¹ But the origin of the rule and its value in national security cases both weigh in favor of the Court preserving it for future use by laying out a roadmap for law enforcement to follow. Although any such case could touch on international or military law, this Article focuses on the federal criminal law perspective. Recent events—from

(explaining that terrorism “will continue to be a top threat to US and partner interests worldwide” and describing regions and groups of concerns).

⁶ *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that statutory habeas jurisdiction extends to detained aliens in Guantanamo).

⁷ *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (holding that facts improperly obtained by the Government are not necessarily “sacred and inaccessible,” but must be gained from an independent source to be used in any way proposed by the Government).

⁸ *See infra* Part I.

⁹ *See infra* Part II.

¹⁰ *See infra* Part III.

¹¹ *See infra* Conclusion.

the 2012 Benghazi attacks¹² to significant domestic terrorism incidents in 2019¹³—show that intelligence agencies conducting extralegal interrogation can become steep obstacles to orderly judicial procedure. Lower courts and national security players of all sorts need guidance.

II. TERRORIST TRIALS AND FRUITS OF TORTURE

This Part defines attenuation doctrine and show how it has presented in the KSM trial. A proper understanding of the doctrine reveals why it is more likely to occur in terrorism cases.

Attenuation doctrine in its simplest form works as follows: Law enforcement interviews a suspect without issuing *Miranda* rights; the suspect provides information pertinent to a criminal prosecution;¹⁴ and then, law enforcement either talks to another person based in part upon the suspect’s information, finds other evidence based upon the suspect’s information, or talks to the suspect again, this time with *Miranda* rights, and the suspect provides the same information.¹⁵ This secondary evidence at the end of the chain is sometimes referred to as the “fruit” of the original inquiry.¹⁶ In most situations, the exclusionary rule bars any use of the original, non-*Mirandized* statement in the Government’s case-in-chief.¹⁷ But attenuation doctrine allows that with enough time, changed circumstances, and indirect connection to the prior confession, courts

¹² See David D. Kirkpatrick, *A Deadly Mix in Benghazi*, N.Y. TIMES (Dec. 28, 2013), www.nytimes.com/projects/2013/benghazi/index.html.

¹³ See Mitch Smith, Rick Rojas & Campbell Robertson, *Dayton Gunman Had Been Exploring ‘Violent Ideologies,’ F.B.I. Says*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/mass-shootings.html> (detailing attacks in Dayton, Ohio, El Paso Texas, and Gilroy, California).

¹⁴ Alternatively, although not relevant for this Article, law enforcement might find evidence without a valid warrant.

¹⁵ See generally *Utah v. Strieff*, 136 S. Ct. 2056, 2058, 2061 (2016) (discussing the admissibility of evidence when the connection between the unconstitutional conduct and the evidence admitted is “interrupted by some intervening circumstance”).

¹⁶ This comes from the phrase, “fruit of the poisonous tree,” see *Nardone v. United States*, 308 U.S. 338, 341 (1939), but applying the term accurately, the court treats fruits evidence arising in a Fourth Amendment violation differently from confessions that defendants challenge under the Fifth Amendment because the defendant can reassert his free will in the latter. See *United States v. Bayer*, 331 U.S. 532, 540–41 (1947) (considering later confession as fruit of first illicit confession in Fifth Amendment context); *Missouri v. Seibert*, 542 U.S. 600, 623–24 (2004) (O’Connor, J., dissenting) (explaining the distinction between Fourth and Fifth Amendment analyses).

¹⁷ See *Mincey v. Arizona*, 437 U.S. 385, 397–98 (1978) (“Statements made by a defendant in circumstances violating the strictures of *Miranda v. Arizona* are admissible for impeachment.”).

may conclude that the original misconduct was not the proximate source of the fruits—another unknown factor might have enabled law enforcement to reach the result that it did.¹⁸ Typically, it is difficult to prove such a break in the chain. Accordingly, an attenuation doctrine exception is rare.¹⁹

Attenuation claims related to confessions are more likely to arise in national security cases because national security investigations are uniquely predisposed to non-*Mirandized* questioning. First, military or intelligence personnel, with less focus on evidence admissibility, are often the ones who apprehend them.²⁰ Second, defendants may be an ongoing military threat, which compels personnel to question them initially for their intelligence value, and those statements often overlap with later criminal inquiries.²¹ Third, these defendants can offer ongoing intelligence value sometimes long after capture, so questioning by non-law enforcement could recommence at any point.²² A fourth uncommon but real-life factor is that the interrogators, either out of emotion or perceived need, might use coercive techniques, making the potential for taint even higher.²³

¹⁸ See *Strieff*, 136 S. Ct. at 2061–62 (outlining the factors courts consider when applying attenuation doctrine).

¹⁹ Matthew E. Sweet, *Stretching the Attenuation Doctrine to Its Limits: How the Supreme Court Erred in Utah v. Strieff and What Can Be Done to Preserve the Doctrine*, 25 GEO. MASON L. REV. 861, 880 (2018) (“While the Supreme Court allowed for recognized exceptions to the exclusionary rule, such as the attenuation doctrine, the understanding was that these instances would be rare.”).

²⁰ See Spencer Ackerman, *Only Three of 116 Guantánamo Detainees Were Captured by US Forces*, GUARDIAN (Aug. 25, 2015, 7:00 AM), <https://www.theguardian.com/us-news/2015/aug/25/guantanamo-detainees-captured-pakistan-afghanistan> (telling the history of detainees captured by foreign security organizations and militias).

²¹ See FeiFei Jiang, *Dancing the Two-Step Abroad: Finding a Place for Clean Team Evidence in Article III Courts*, 47 COLUM. J.L. & SOC. PROBS. 453, 456 (2014).

²² See S. SELECT COMM. ON INTELLIGENCE, CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM, S. Rep. No. 113–288, at 66–73(2014) [hereinafter Torture Report] (describing prolonged detention and resumed interrogation of terrorism suspect ‘Abd al -Rahim al Nashiri).

²³ See David Luban & Katherine S. Newell, *Personality Disruption as Mental Torture: The CIA, Interrogational Abuse, and the U.S. Torture Act*, 108 GEO. L.J. 333, 370 (2019) (longstanding CIA training, as noted in the agency’s Human Resource Exploitation Training Manual, was that “interrogators induce regression through the application of ‘psychological techniques’ to ‘control’ a subject’s mental state of mind and induce compliance”); see generally *id.* at 365–72 (describing the history of CIA interrogation programs).

There are two categories of terrorism trials that this Article considers: those in Article III courts and those before the Guantanamo Military Commission. They use different evidentiary rules, but the attenuation doctrine ultimately stems from Supreme Court holdings, touches on constitutional protections, and appears in both venues.²⁴ Although there is no certainty that the Supreme Court will review the doctrines in both forums equally, because previous military courts have looked to Article III precedent in attenuation claims,²⁵ and because of attenuation's constitutional origins,²⁶ rulings applicable to defendants in either forum would likely begin from the same analysis.

Article III courts have weighed a handful of attenuation claims in the terrorism context. Their holdings, relying on conflicting precedent, show that the doctrines' boundaries are poorly defined.²⁷ The Second Circuit in *United States v. Ghailani* found attenuation insufficient when a defendant's forced confession led to the discovery of a pivotal witness.²⁸ In *United States v. Khatallah*, the D.C. District Court reviewed a nearly textbook case of federal agents actively attenuating a prior CIA interrogation and held that the Government's efforts were sufficient.²⁹ Part III of this Article argues that despite these holdings' failure to consider the doctrine's

²⁴ In the Court's previous Guantanamo rulings, it has extended other liberty enhancing protections to the detainees. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *see generally* *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (considering extraterritorial application of Fourth Amendment).

²⁵ *See, e.g.*, *United States v. Jones*, 64 M.J. 596, 603, 606–07 (A. Ct. Crim. App. 2007) (citing Supreme Court and federal Circuit precedent in considering whether to suppress statements of co-accused).

²⁶ *See, e.g.*, *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (“Suppression of evidence due to Fourth Amendment violations is the court's last resort, not its first impulse”); *United States v. Wauneka*, 770 F.2d 1434, 1440 (9th Cir. 1985) (“[I]n determining the admissibility of a defendant's statement given after the Miranda warning, the court should look first to determine whether the statement made by a defendant before the Miranda warning was actually coerced in violation of the fifth amendment. If it was, then the court must suppress the evidence unless the violation was sufficiently attenuated.”).

²⁷ Sweet, *supra* note 19, at 864.

²⁸ 743 F. Supp. 2d 261, 282–83 (S.D.N.Y. 2010).

²⁹ 275 F. Supp. 3d 32, 64 (D.D.C. 2017).

origins, they help identify best practices personnel should use.³⁰ Still, courts weighing new cases need clear rules.

Nowhere today does the absence of clear rules shine brighter than in the KSM trial. The KSM trial is a pinnacle example of evidence purloined through coercion. In fall 2019, the participants began litigating an exclusion motion.³¹ The trial is complex by any standard—with five defendants³² and over two decades of factual and procedural history—and all the messier because of the untested rules of the Guantanamo Military Commissions, a tribunal created for the purpose of trying Guantanamo detainees.³³

These are the KSM trial’s known facts. Authorities abroad captured Khalid Sheikh Mohammed and his four codefendants, accused of plotting the 9/11 attack, between 2002 and 2003.³⁴ U.S. officials held them in various CIA detention facilities,³⁵ which the CIA called “site black,” and which took on the moniker “black sites.”³⁶ Detainees of the War on Terror first left

³⁰ See *infra* Part III.B.

³¹ See Carol Rosenberg, *Lawyers Press Case that 9/11 Confessions Given to F.B.I. Are Tainted*, N.Y. TIMES (July 29, 2019), <https://nyti.ms/2ZnYI5C> [hereinafter *Lawyers Press Case*].

³² The men charged are Khalid Sheikh Mohammed, Walid bin Attash, Ramzi bin al-Shibh, Ammar al-Baluchi (born Ali Abdul Aziz Ali), and Mustafa Ahmad al Hawsawi. See Jess Bravin, *Military Judge Sets January 2021 Trial Date for Accused 9/11 Conspirators*, WSJ (Aug. 30, 2019 5:35 PM), <https://www.wsj.com/articles/military-judge-sets-january-2021-trial-date-for-accused-9-11-conspirators-11567200907>.

³³ This is the Government’s third attempt at creating a judicial mechanism on the island, which began with the Combatant Review Tribunals, a process that the Supreme Court then barred in 2006. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 625 (2006) (finding tribunal in violation of Geneva Convention); *Rasul v. Bush*, 542 U.S. 466, 481 (2004) (finding tribunal violated required habeas protections). After that came a prior incarnation of the Military Commissions, which the Court halted because they still did not afford detainees adequate habeas protections. See *Military Commission Act of 2006*, Pub. L. No. 109-366, 120 Stat. 2600 (2006); *Boumediene v. Bush*, 553 U.S. 723, 795 (2008) (finding provisions of the 2006 MCA unconstitutional). The current tribunal was established under Congress’ *Military Commission Act of 2009*. See *Military Commission Act of 2009*, Pub. L. No. 111-84, H.R. 2647, 123 Stat. 2190 (2009).

³⁴ See Sacha Pfeiffer, Greg Myre & Vanessa Romo, *Trial Date Set For Khalid Sheikh Mohammed, 4 Others Charged in Sept. 11 Attacks*, NPR (Aug. 30, 2019), <https://www.npr.org/2019/08/30/755983643/trial-date-set-for-khalid-sheikh-mohammed-4-others-charged-in-9-11-attacks> (detailing the timeline and events surrounding KSM’s capture and upcoming trial).

³⁵ See Carol Rosenberg, *Architect of C.I.A. Interrogation Program Testifies at Guantánamo Bay*, N.Y. TIMES (Jan. 21, 2020), <https://nyti.ms/3aB5f2T> (guards and interrogators detained the suspects at “secret overseas prisons set up after the 2001 attacks and the subsequent invasion of Afghanistan”).

³⁶ Torture Report, *supra* note 22, at 95, 154.

these black sites and arrived at Guantanamo's ad hoc Camp X-Ray on January 11, 2002, but the KSM defendants came much later: in September 2006.³⁷ The attenuation question primarily concerns those years between capture through their arrival and early custody at Guantanamo. A 2014 Senate Intelligence Committee Report, known as the "Torture Report," confirmed early accounts of the CIA using "enhanced interrogation techniques" ("EITs") and other coercive methods.³⁸ These techniques involved "attention grasp, walling, the facial hold, the facial slap . . . cramped confinement, wall standing, stress positions, sleep deprivation beyond 72 hours, and the waterboard."³⁹ Cables show that KSM's exposure to EITs lasted four weeks,⁴⁰ during which time he confessed to at least one significant accusation: that he was responsible for murdering Wall Street Journal Reporter Daniel Pearl.⁴¹

After arriving at Guantanamo in 2006, the facility's then-commander informed the defendants that they were in Department of Defense custody, they would be treated under the Geneva Conventions, and they would have the right to meet Red Cross representatives.⁴² They were allowed to shower, given fresh clothing, and provided halal meals and regular Islamic prayer calls.⁴³ In January 2007, the commander informed the defendants that "they had an appointment the following day," which they "could choose to attend."⁴⁴ The detainees all agreed

³⁷ See John Ryan, *Interrogations Confirmed by Third Witness*, LAWDRAGON (Nov. 2, 2019), <http://www.lawdragon.com/2019/11/02/fbi-involvement-in-cia-black-site-interrogations-confirmed-by-third-witness/> [hereinafter *Interrogations Confirmed*].

³⁸ Torture Report, *supra* note 22, at xi.

³⁹ *Id.* at 77.

⁴⁰ See Daniel DeFraia, *Harrowing Cables Detail How the CIA Tortured Accused 9/11 Mastermind, Khalid Sheikh Mohammed, Jeopardizing the Case Against Him*, INTERCEPT (Sept. 11, 2019, 11:03 AM), <https://theintercept.com/2019/09/11/khalid-sheikh-mohammed-torture-cia/> (describing KSM's 2003 waterboarding).

⁴¹ *Id.*

⁴² *Interrogations Confirmed*, *supra* note 37.

⁴³ Carol Rosenberg, *Guantánamo Testimony Details Initial Handling of Prisoners Accused of Plotting 9/11*, N.Y. TIMES (Nov. 12, 2019), <https://nyti.ms/36pkfP5>.

⁴⁴ *Id.*

to go and meet with unfamiliar personnel, whom the defendants later learned were FBI.⁴⁵ At trial, the Government referred to these FBI agents as “clean teams” because, the Government said, they had no interaction with previous CIA interrogators.⁴⁶ The clean teams did not provide the defendants *Miranda* warnings but conveyed a basic instruction that they had a right not to speak.⁴⁷ The defendants continued to meet voluntarily with the FBI over multiple sessions.⁴⁸ All five of the defendants again offered some or all of their previous confessions.⁴⁹

In 2009, based largely on these confessions, the Department of Justice under the Obama administration brought charges against the defendants in a New York Article III court.⁵⁰ That effort to try them domestically fell to bipartisan political opposition over concerns of safety and revealing intelligence information.⁵¹ Through 2011 and 2012, the administration released plans to try the detainees on Guantanamo instead and reissued charges in the Military Commission.⁵² The trial then suffered a litany of setbacks as key personnel and trial judges left, and federal courts reversed previous decisions in other Military Commission proceedings.⁵³

⁴⁵ *Interrogations Confirmed*, *supra* note 37.

⁴⁶ See Rosenberg, *Lawyers Press Case*, *supra* note 31.

⁴⁷ Emma DiNapoli et al., *Update from the Military Commissions: A Big September in the 9/11 Case*, LAWFARE (Oct. 23, 2019, 11:36 AM), <https://www.lawfareblog.com/update-military-commissions-big-september-911-case>.

⁴⁸ See *id.*

⁴⁹ See Rosenberg, *Lawyers Press Case*, *supra* note 31.

⁵⁰ *United States v. Khalid Shaikh Mohammad, et al.*, No. 93CR00180, Indictment (S.D.N.Y. 2011), 2011 WL 1227685, <https://www.justice.gov/archive/opa/documents/ksm-indictment.pdf>.

⁵¹ Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES (Apr. 4, 2011), <https://www.nytimes.com/2011/04/05/us/05gitmo.html>.

⁵² See *id.*; see also Alan Silverleib, *Accused 9/11 Terror Suspects to Face Military Trials*, CNN (Apr. 5, 2011, 1:04 PM), edition.cnn.com/2011/US/04/04/guantanamo.tribunals/index.html.

⁵³ See *Q&A: Guantanamo Bay, US Detentions, and the Trump Administration*, HUM. RTS. WATCH (June 27, 2018, 12:01 AM), <https://www.hrw.org/news/2018/06/27/qa-guantanamo-bay-us-detentions-and-trump-administration#q4> (describing Guantanamo Military Commission program’s general history and setbacks); Carol Rosenberg, *Former Navy Judge Named to Oversee Guantánamo Military Court*, N.Y. TIMES (May 28, 2019), <https://www.nytimes.com/2019/05/28/us/politics/christian-reismeier-guantanamo-military-court.html> (describing controversies and turnover in the convening authority for military commissions); Carol Rosenberg, *Military Judge in Trial of Sept. 11 Suspects Will Step Aside*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/us/politics/9-11-judge-guantanamo.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer> (describing the turnover in KSM trial judges).

In 2017, the first trial judge heard the defendants' arguments as to whether their previous CIA detentions and confessions tainted their later statements to the FBI clean teams.⁵⁴ The defendants argued that their ready admission of guilt to the FBI "was essentially a Pavlovian response."⁵⁵ In effect, the CIA had "trained the defendants to later tell the FBI agents what the CIA had forced them to say."⁵⁶ That November, after years of defense efforts to gain classified evidence through discovery, a retired FBI agent, Abigail L. Perkins, sensationally revealed in testimony that the FBI clean teams had actually been in communication with the CIA the entire time of the defendants' CIA custody.⁵⁷ In summer 2018, the judge ruled that all confessions made to the FBI would be excluded.⁵⁸ That judge then left the case, and his replacement reversed the ruling based on the Government's argument that the FBI evidence was essential to their case.⁵⁹

In June 2019, the third KSM trial judge, Col. W. Shane Cohen, took over, for the first time announced an official trial start date of January 2021, and then agreed to rehear arguments from the defendants as to whether he should suppress their confessions.⁶⁰ In late-summer 2019, even more damning evidence emerged as to a link between CIA and FBI efforts.⁶¹ Testimony revealed: the FBI agents had not told the defendants in their initial sessions that they were FBI;

⁵⁴ See Lisa Hajjar, *The Battle for Truth about CIA Torture*, MIDDLE E. RES. & INFO. PROJECT (Jan. 17, 2020), <https://merip.org/2020/01/the-battle-for-truth-about-cia-torture/> (describing the "clean team" process).

⁵⁵ See Rosenberg, *Lawyers Press Case*, *supra* note 31.

⁵⁶ See *id.*

⁵⁷ Hajjar, *supra* note 54.

⁵⁸ See John Ryan, *Another "Groundhog Day" as Sept. 11 Case Revisits Access to Intelligence Witnesses and Suppression*, LAWDRAGON (June 25, 2019), www.lawdragon.com/2019/06/25/another-groundhog-day-as-sept-11-case-revisits-access-to-intelligence-witnesses-and-suppression [hereinafter *Groundhog Day*].

⁵⁹ *Id.*

⁶⁰ Carol Rosenberg, *Lawyer for 'Unabomber' Takes Over Defense for Man Accused of Plotting 9/11*, N.Y. TIMES (Sept. 9, 2019), <https://nyti.ms/34zkzKd>.

⁶¹ The agents, in defense of their conduct, said that their sessions involved no threats or raised voices, the defendants exhibited no fear, and that much of the evidence on which the questioning was based came from evidence the FBI had gathered prior to the defendants arriving in CIA custody. See Ryan, *Groundhog Day*, *supra* note 58.

the camp commander confirmed findings in the Senate Torture Report that the CIA was involved in running Camp X-Ray and that CIA personnel were working as guards when the defendants arrived; that the clean teams reported back to the CIA every result of their questioning, in which the agents erased mentions of torture; an FBI translator in one defendant's interviews had in fact been the same translator the CIA used when they interrogated the defendant; and the CIA had brought at least one defendant to Guantanamo in 2003–04 when the CIA was using it as a black site and interrogated the defendant in the very same room that the FBI later used.⁶² Finally, FBI interviewers admitted that they had had partial access to the defendants' CIA interrogation statements from the outset.⁶³ The defense teams claimed that the overdue reveal of all this evidence suggested that there was more between the CIA and FBI yet to be discovered.⁶⁴ Lead counsel for defendant Aziz Ali called the combined CIA-FBI interrogations “a whole . . . plan, a scheme or a program . . . to obtain statements from [the defendants] by torture and other cruel, inhuman and degrading treatment.”⁶⁵

The case had strong momentum for a ruling on the defense teams' suppression motion leading into 2020, but a string of setbacks ground proceedings to a halt. First, the Covid-19 pandemic struck the base in March 2020, and the court paused all hearings.⁶⁶ Then, a few days later, Judge Cohen, who had been the primary driver of the accelerated schedule, announced that

⁶² See DiNapoli et al., *supra* note 47.

⁶³ FBI testimony confirmed that the FBI had sent CIA questions to be asked during the defendants' interrogations, that the FBI reviewed information from the intelligence community broadly on a highly classified database, but feedback from the defendant's interrogations were only sporadically available. *See id.*

⁶⁴ See Rosenberg, *Lawyers Press Case*, *supra* note 31; see also *Interrogations Confirmed*, *supra* note 37.

⁶⁵ See Rosenberg, *Lawyers Press Case*, *supra* note 31; see also *Interrogations Confirmed*, *supra* note 37.

⁶⁶ See Rebecca Kheel, *Navy Sailor at Guantanamo Tests Positive for Coronavirus*, HILL (Mar. 24, 2020, 11:24 AM), <https://thehill.com/policy/defense/489211-navy-sailor-at-guantanamo-tests-positive-for-coronavirus> (describing first known Covid-19 case at Guantanamo).

he was stepping down for personal reasons.⁶⁷ A new judge took over in September⁶⁸ but less than a month later, he too left because of a conflict of interest.⁶⁹ A few weeks after that, in what must have felt like a cruel joke to all involved, the military commission tried but failed to appoint what would have been the sixth judge assigned to the trial since arraignment.⁷⁰ The last hearing held at Guantanamo was in February 2020.⁷¹ The prospects of starting the actual trial in January 2021 are nil, and hopes of beginning before the twentieth anniversary of 9/11 have all but vanished.⁷² But there is no question that the defense teams' suppression motion remains the next pivotal decision before the court and the matter is all teed up for resolution when hearings finally resume. That said, the preeminent journalist covering the Guantanamo beat once wisely warned, "That is the thing about reporting on Guantanamo: Write about it, and it will not happen."⁷³ So perhaps the safest takeaway should be that the KSM trial remains one of the primary candidates to advance the attenuation debate—*eventually*.

III. THE ORIGINS OF ATTENUATION DOCTRINE

The body of precedent on attenuation doctrine, evolving far beyond its original meaning, begs for the Supreme Court's clarification. This Part looks to its origins in the exclusionary rule and spells out how the original intent was lost in contemporary application.

⁶⁷ See Carol Rosenberg, *Military Judge in 9/11 Trial at Guantánamo Is Retiring*, N.Y. TIMES (March 25, 2020), <https://nyti.ms/2Ugs2KW>.

⁶⁸ See Carol Rosenberg, *Military Names New Judge for Guantánamo Bay 9/11 Trial*, N.Y. TIMES (Sept. 17, 2020), <https://nyti.ms/2RBuCJL>.

⁶⁹ See Carol Rosenberg, *New 9/11 Trial Judge Steps Down, Citing Conflicts*, N.Y. TIMES (updated Oct. 4, 2020), <https://nyti.ms/3l2ZPlI>.

⁷⁰ See Carol Rosenberg, *Pandemic Delays Start of 9/11 Trial Past 20th Anniversary of Attacks*, N.Y. TIMES (Dec. 18, 2020), <https://www.nytimes.com/2020/12/18/us/politics/sept-11-trial-covid-delay.html>. As of December 2020, after multiple failed attempts to find a new judge, Chief Military Commissions Judge Col. Douglas K. Watkins has stepped in to preside personally over the trial. *See id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See Carol Rosenberg, *I Expected 2020 to Be a Hectic Year at Guantánamo. I Was Wrong.*, N.Y. TIMES (Aug. 26, 2020), <https://nyti.ms/3gvVep4>.

A. *Constitutional protections and the exclusionary rule*

The exclusionary rule, broadly, is a recourse courts may use to refuse admission of evidence acquired contrary to defendants' rights.⁷⁴ Its exact origins are contested.⁷⁵

Originalists largely decry the rule as a modern construction.⁷⁶ There was little Court jurisprudence on these issues prior to the late-nineteenth century.⁷⁷ This is for many reasons, including the introduction of *Miranda* protections only in 1966, the relatively recent emergence of federal law enforcement,⁷⁸ and the Supreme Court not gaining appellate jurisdiction in criminal trials until 1889.⁷⁹ The Supreme Court first employed the exclusionary rule in the federal criminal case *United States v. Weeks*⁸⁰ in 1914 and applied the exclusionary rule to the states through the Fourteenth Amendment in *Mapp v. Ohio* in 1961.⁸¹

⁷⁴ See *Herring v. United States*, 555 U.S. 135, 139–40 (2009) (internal citation omitted) (“We have stated that this judicially created rule is designed to safeguard Fourth Amendment rights generally through its deterrent effect.”); see also Sheridan, *supra* note 2, at 1239–40 (describing broadly the exclusionary rule’s purpose and application).

⁷⁵ See ANNA C. HENNING, CONG. RSCH. SERV., R40189, *HERRING V. UNITED STATES: EXTENSION OF THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN FOURTH AMENDMENT CASES 2–3* (2009) (“In past Fourth Amendment cases, the Supreme Court has stated that the exclusionary rule is ‘of constitutional origin.’ In other cases, the Court has characterized the rule as a ‘judicially created remedy . . . rather than a personal constitutional right.’” (quoting first *Mapp v. Ohio*, 367 U.S. 643, 649 (1961), then *United States v. Calandra*, 414 U.S. 338, 348 (1974))).

⁷⁶ See Adam Liptak, *Supreme Court Edging Closer to Repeal of Evidence Ruling*, N.Y. TIMES (Jan. 31, 2009), <https://www.nytimes.com/2009/01/31/washington/31scotus.html> (naming Justices Roberts, Alito, Scalia and Thomas as justices willing to abolish the exclusionary rule entirely).

⁷⁷ See Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1, 6 (2009) (there were few or no published cases on search and seizure questions in most states prior to the late nineteenth century).

⁷⁸ *Id.* (“During the late eighteenth century, when the Constitution was debated and ratified, there were no professional police officers to enforce criminal laws.”).

⁷⁹ See *United States v. Sanger*, 144 U.S. 310, 319 (1892) (“The appellate jurisdiction of this court rests wholly on the acts of Congress. For a long time [this court] . . . had no jurisdiction of a writ of error in a criminal case.”). Congress did not grant appellate jurisdiction to the Supreme Court in capital cases until 1889. See Act of February 6, 1889, ch. 113, § 6, 25 Stat. 655, 656; for “otherwise infamous crime[s]” in 1891, see Act of March 3, 1891, ch. 517, § 5, 26 Stat. 826, 827, *repealed by* Act of January 20, 1897, ch. 68, 29 Stat. 492; and finally, for all criminal cases in 1911, see Act of March 3, 1911, § 240, 36 Stat. 1087, 1157 (1911) (codified at 28 U.S.C. § 1254(3) (1976)).

⁸⁰ 232 U.S. 383 (1914).

⁸¹ 367 U.S. 643 (1961).

Weeks involved a Fourth Amendment violation.⁸² State and federal law enforcement searched the defendant’s home and seized his effects without a warrant.⁸³ The Court recognized a Fourth Amendment violation and then held that the trial court committed reversible error, which could only be corrected on remand by withholding that evidence from the jury.⁸⁴ The Court noted that without exclusion, “protection of the Fourth Amendment . . . is of no value . . . [and] might as well be stricken from the Constitution.”⁸⁵

While *Weeks* addressed a Fourth Amendment claim, the only constitutional mention of exclusion is in the Fifth Amendment.⁸⁶ The Fifth Amendment protection against self-incrimination bars use of coerced statements at trial,⁸⁷ and early on, the Court extended that bar to statements prior to trial, for instance, when prosecutors improperly coerced testimony in grand jury proceedings.⁸⁸ To analyze admissibility of pre-trial statements before *Miranda*, courts would assess a declarant’s voluntariness based on the totality of the circumstances.⁸⁹ After courts incorporated *Miranda*, the analysis separated from a voluntariness analysis to a presumption of exclusion whenever officers violated *Miranda*’s procedures.⁹⁰ In *Dickerson v. United States*, the Court further divorced the analysis from its historic voluntariness standard by identifying *Miranda* as originating from Constitutional protections.⁹¹ The *Dickerson* holding came despite

⁸² See 232 U.S. 383.

⁸³ *Id.* at 386–88.

⁸⁴ See *id.* at 398–99.

⁸⁵ *Id.* at 393.

⁸⁶ See U.S. CONST. amend. V.

⁸⁷ See *id.*

⁸⁸ See, e.g., *Bram v. United States*, 168 U.S. 532 (1897).

⁸⁹ See *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (“The due process test takes into consideration the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.” (internal citation omitted)). Originally, only if a court found that statements were involuntary would they be excluded. See, e.g., *Harrison v. United States*, 392 U.S. 219, 222 (1968).

⁹⁰ See *Dickerson*, 530 U.S. at 434 (internal citation omitted).

⁹¹ 530 U.S. 428 (2010).

Justice Scalia and other originalists' objections.⁹² As will be discussed below, this history is notable in that the shift from voluntariness increased courts' reliance on exclusionary rule exceptions to allow evidence through.⁹³

Early on, the Supreme Court recognized three distinct purposes for the exclusionary rule: deterrence of police misconduct; provision of a remedy for the defendant; and preservation of judicial integrity.⁹⁴ Within these purposes, there is an inherent tension between societal interests and personal constitutional rights.⁹⁵ As *Miranda* cases multiplied, courts soon faced instances of minor errors in *Miranda* procedures—a short delay in reading the defendant his rights⁹⁶ or a mistake that results in potentially excluding pivotal evidence⁹⁷—pitted against exclusion rules that seemed too harsh in their harm to societal wellbeing.⁹⁸ These events led the Court to carve out occasional doctrinal exceptions to exclusion.⁹⁹ Early exceptions included the use of non-*Mirandized* statements for impeachment purposes, fruits evidence if statements were coerced for

⁹² See, e.g., William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 56 (2002) (“[T]he Rehnquist Court does not have a coherent standard for when to overturn precedent and when to uphold it.”).

⁹³ See *infra* Part II.B.

⁹⁴ See *Mapp v. Ohio*, 367 U.S. 643, 656–60 (1961) (“Our decision . . . gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.”).

⁹⁵ *In re Juan C*, No. B073351 (Cal. Ct. App. 1994) (stating “an inherent tension exists between the exercise of First Amendment rights and the government's need to maintain order during a period of social strife”); see also *Landmark Communications, Inc. v. Virginia* 435 U.S. 829, 844 (1978).

⁹⁶ See, e.g., *Michigan v. Tucker*, 417 U.S. 433, 446 (1974) (deciding in an instance where police began questioning the defendant and then remembered to inform him of his rights that the law “cannot realistically require that policeman investigating serious crimes make no errors whatsoever”).

⁹⁷ See generally *Stone v. Powell*, 428 U.S. 465, 485 (1976) (recognizing the importance of the court’s truth-seeking function, concluding that “[w]hile courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence”).

⁹⁸ See, e.g., *United States v. Patane*, 542 U.S. 630, 636 (2004) (stating that the *Miranda* rule is prophylactic and employed to protect against violations of Self-Incrimination Clause and is not implicated by admission into evidence of physical fruit from voluntary statement); *Oregon v. Elstad*, 470 U.S. 298, 305–06 (1984) (distinguishing derivative evidence violations under Fourth Amendment from Fifth Amendment context); *Michigan v. Tucker*, 417 U.S. 433, 451–52 (1974) (holding fruit of *Miranda* violation not necessarily poisonous).

⁹⁹ See *supra* notes 97–98.

emergency needs, independent source doctrine, and good faith, just to name a few.¹⁰⁰ It was here that the Court recognized attenuation doctrine.

B. Attenuation doctrine as an exception to the exclusionary rule

The attenuation exception permits use of excludable evidence if the link between the evidence and the misconduct is sufficiently weak.¹⁰¹ The doctrine was born from dicta in Justice Frankfurter’s *Nardone v. United States* decision.¹⁰² In that case, the Government sought to introduce evidence obtained in part based on an illegal wiretap.¹⁰³ Instead of excluding the indirect evidence, the Court cited *Silverthorne Lumber Co. v. United States* as recognizing an independent source exclusionary rule exception¹⁰⁴ and concluded, “sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government’s proof. As a matter of good sense, however, such connection may have become *so attenuated* as to dissipate the taint.”¹⁰⁵

¹⁰⁰ See *Murray v. United States*, 487 U.S. 533 (1988) (independent source); *Nix v. Williams*, 467 U.S. 431, 444 (1984) (inevitable discovery); *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (attenuation). The Court also allowed certain uses of otherwise inadmissible evidence. See *United States v. Havens*, 446 U.S. 620 (1980) (evidence inadmissible in the Government’s case-in-chief can be used to impeach defendant); *United States v. Salvucci*, 448 U.S. 83 (1980) (evidence obtained in illegal search and seizure admissible against defendant whose fourth amendment rights were not violated by search and seizure); *Michigan v. DeFillippo*, 443 U.S. 31 (1979) (the government obtained evidence in a search incident to arrest made pursuant to a statute found unconstitutional after the arrest and the evidence was held to be admissible); *United States v. Janis*, 428 U.S. 433 (1976) (evidence state police obtained in good faith violation of fourth amendment admissible in federal civil tax proceeding); *Michigan v. Tucker*, 417 U.S. 433 (1974) (despite inadmissibility of defendant’s statements obtained in violation of *Miranda*, evidence discovered as a result of defendant’s statements is admissible); *United States v. Calandra*, 414 U.S. 338 (1974) (the government may use illegally obtained evidence as basis of questions for witness before federal grand jury).

¹⁰¹ Originally, attenuation doctrine applied only to fruits evidence. Misconduct leading to direct evidence, such as a defendant’s non-*Mirandized* confession, could not be exempted because the link “is both proximate and strong, not remote or attenuated.” See Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1218 (2012) (internal citations omitted).

¹⁰² 308 U.S. 338 (1939). This case was based on a statutory violation, section 605 of the Communications Act of 1934, but Frankfurter sought constitutional justification, writing that exclusion “must be justified by an over-riding public policy expressed in the Constitution or the law of the land.” *Id.* at 340.

¹⁰³ *Id.* at 340.

¹⁰⁴ *Id.* at 340–41 (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)).

¹⁰⁵ *Id.* at 341 (emphasis added).

From *Nardone* emerged the first test for assessing whether attenuation was sufficient: first, did the Government use illegal means; second, if so, was a “substantial portion” of the Government’s case a product of those illegal means; and third, did the Government’s evidence have an origin independent of the illegal means.¹⁰⁶ If so, the evidence might be attenuated.¹⁰⁷ Key to this early test was the reliance on an additional, legal source.¹⁰⁸ In other words, the Government must show cause to conclude that the contested evidence was obtained separate from its misconduct.¹⁰⁹

The attenuation doctrine went largely untouched, at least explicitly, until the Court ruled thirty years later in *Wong Sun v. United States*.¹¹⁰ *Wong Sun* involved the admissibility of confessions and tangible evidence under both the Fourth and Fifth Amendments.¹¹¹ The Court ruled that law enforcement’s unlawful invasion of the defendant’s home had tainted statements that he made immediately afterwards, and that evidence derived therefrom—seized heroin—was inadmissible.¹¹² But applying the attenuation doctrine, the Court held that the defendant’s second confession, which he made days later, was admissible because of the insulation of time.¹¹³ Again, as in *Nardone*, the Court intertwined attenuation with independent source doctrine, but it expanded on the concept in two ways.¹¹⁴ First, the Court tied attenuation to the goal of

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See id.* at 341 (“[T]he facts improperly obtained do not ‘become sacred and inaccessible. If knowledge of them is gained from an independent source[,] they may be proved like any others.’” (quoting *Silverthorne Lumber Co.*, 251 U.S. at 392)).

¹⁰⁹ *Id.* (“This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.”).

¹¹⁰ 371 U.S. 471 (1963).

¹¹¹ *Id.* at 477.

¹¹² *Id.* at 486–88.

¹¹³ *Id.* at 491.

¹¹⁴ Brent D. Stratton, *The Attenuation Exception to the Exclusionary Rule: A Study in Attenuated Principle and Dissipated Logic*, 75 J. CRIM. L. & CRIMINOLOGY 139, 146 (1984) (analyzing the holding in *Wong Sun*, 371 U.S. at 471).

dissuading police misconduct.¹¹⁵ It did so by defining attenuation as occurring when the Government did not exploit its misconduct.¹¹⁶ Second, the Court suggested that a factor of attenuation may be an intervening voluntary act by the defendant, such as a demonstrably non-coerced confession.¹¹⁷ Accordingly, attenuation could now apply even when authorities would never have uncovered the derivative evidence absent the initial misconduct.¹¹⁸ The takeaway is the added purposive element: The Court asked what effect its ruling would have on police conduct.¹¹⁹ The concern with deterring misconduct, as opposed to voluntariness,¹²⁰ became a hallmark of Fourth Amendment attenuation analysis.¹²¹

The most consequential case in attenuation doctrine development came next. In *Brown v. Illinois*, the police illegally arrested the defendant (without probable cause), then *Mirandized* and interrogated him, at which point he made inculpatory statements.¹²² The Supreme Court reversed an Illinois Supreme Court ruling, held that *Miranda* warnings did not serve as a *per se* attenuator between police misconduct and a defendant's confession, and therefore the statements were inadmissible.¹²³ Although the disputed evidence was a coerced confession, the Court analyzed it

¹¹⁵ *Id.*

¹¹⁶ *Wong Sun*, 371 U.S. at 488 (1963) (citing John M. Maguire, EVIDENCE OF GUILT; RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE 221 (1959)) (The Court made this connection in citing an authoritative treatise: “[T]he issue . . . [is whether] the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”).

¹¹⁷ *Id.* at 491. The Court considered this matter of later volitional testimony more fully in *Missouri v. Seibert*, 542 U.S. 600 (2004).

¹¹⁸ See generally *supra* notes 106–08.

¹¹⁹ *Id.* at 484.

¹²⁰ Voluntariness is the gravitational center of Fifth Amendment analysis. See *supra* note 89; see also *Missouri v. Seibert*, 542 U.S. 600, 607 (2004) (“In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person ‘shall be compelled in any criminal case to be a witness against himself.’” (quoting *Bram v. United States*, 168 U.S. 532, 542 (1897))).

¹²¹ See *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (“The Court has stressed that the ‘prime purpose’ of the exclusionary rule ‘is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.’” (quoting *United States v. Calandra*, 414 U.S. 338, 347 (1974))).

¹²² *Brown v. Illinois*, 422 U.S. 590, 591 (1975).

¹²³ *Id.* at 603.

on Fourth Amendment grounds because it was predicated on an illegal arrest.¹²⁴ And because this was a Fourth Amendment case, “voluntariness of the statement” was only “a threshold requirement”; the Court also had to consider whether the voluntary confession occurred because the police initially violated the defendant’s rights.¹²⁵ Thus, like *Wong*, the Court was concerned with how its ruling affected police conduct.¹²⁶ *Brown* spelled out a four-part test for attenuation: (1) whether the police gave Miranda warnings prior to the disputed statement; (2) “the temporal proximity of the arrest and the confession”; (3) “the presence of intervening circumstances”; and (4) “the purpose of and flagrancy of the official misconduct.”¹²⁷ In effect, these factors sought to capture the totality of circumstances regarding voluntariness as well as the extent of police misconduct.¹²⁸ *Brown* advanced the attenuation doctrine from *Wong Sun* in two ways: first, with a four-part test that became the basis of many attenuation rulings since; and second, by strengthening the focus on the defendant’s voluntariness in confessing, even in Fourth Amendment cases.¹²⁹ At the same time, by balancing multiple factors, *Brown* reemphasized Fifth Amendment due process considerations, the basis of the exclusionary rule, as still integral to the attenuation test.¹³⁰

¹²⁴ *Id.* at 591, 601.

¹²⁵ In considering the exclusionary rule under the Fifth Amendment, a declarant’s willingness to speak to the police in of itself may remove any taint to how the police obtained that testimony. In contrast, in analyzing an illegal arrest under the Fourth Amendment, because the police would never have had identified the defendant absent their misconduct, the Court could not completely excuse the misconduct based alone on Brown’s voluntariness the second time. The Court turned to attenuation doctrine instead. *Id.* at 604; *see* Stratton, *supra* note 114, at 160 n.97; *see also infra* note 134 and associated text.

¹²⁶ *Brown*, 422 U.S. at 602–03.

¹²⁷ *Id.* at 603–04.

¹²⁸ *Id.* at 603. Although the Court applied attenuation doctrine only to a defendant’s confession, it later expanded use of the test to cases in which defendants challenged other tainted fruits evidence, hence the *Brown* test has been used in both Fourth and Fifth Amendment contexts. *See, e.g.,* United States v. Ceccolini, 435 U.S. 268 (1978) (statement by witness found through initial police misconduct).

¹²⁹ *Brown*, 422 U.S. at 603–04.

¹³⁰ *Id.* at 601.

The Court added one more piece to the doctrine in *United States v. Ceccolini*, in which it affirmed an instance of attenuation when a federal agent learned facts from an earlier illegal search, interviewed a related witness four months later, and then that witness helped secure a federal indictment.¹³¹ *Ceccolini* a Fourth Amendment case, repurposed *Brown*'s test for instances of a witness'—rather than a defendant's—ill-gotten testimony.¹³² In this new scenario, the Court shifted its focus away from the defendant's interests; there was now the witness' intent to consider.¹³³ “Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition.”¹³⁴ Under the modified doctrine: first, the Court treated the witness' voluntariness as a key factor, almost—but not fully—labeling it an independent source.¹³⁵ Additionally, the Court returned to a due process goal of exclusionary rule exceptions: the interest of furthering justice.¹³⁶ It expressed that the societal cost of excluding otherwise reliable evidence demanded that trial judges find a tight nexus between witness testimony and Government due process violations.¹³⁷ Finally, the Court, as in *Wong Sun*, weighed whether exclusion would successfully dissuade police misconduct and decided in the instance of a witness' testimony, it would not; excluding a witness' voluntary confession would deter normal, appropriate investigating rather than police infractions.¹³⁸

¹³¹ *Ceccolini*, 435 U.S. at 270–72.

¹³² *Id.* at 276–77.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See id.* at 276–77. The Court noted two significant justifications. First, that “[t]he greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means.” *Id.* at 276. Second, “[w]itnesses can, and often do, come forward and offer evidence entirely of their own volition.” *Id.* Logically, the Court reasoned, if under normal circumstances this source likely would have come to authorities freely, the distant link to a prior bad act should not be dispositive.

¹³⁶ *Id.* at 275–76 (citing *Alderman v. United States*, 394 U.S. 165, 174–75 (1969)).

¹³⁷ *Id.* at 278.

¹³⁸ *Id.* at 275, 280.

This string of Fourth Amendment cases shows an abiding interest in how exclusion affects future police actions. It remains tied to independent source doctrine by asking whether the misconduct was the but-for cause of obtaining the disputed evidence. The next series of cases revealed a narrower inquiry for Fifth Amendment cases.

Oregon v. Elstad,¹³⁹ like *Brown v. Illinois*, dealt with a defendant's potentially coerced confession, but this time it stemmed from a Fifth Amendment violation. The Court addressed whether a suspect's *Mirandized* statements could be admitted if they followed an initial, nearly identical confession made prior to the police reading the defendant his rights.¹⁴⁰ The Court rooted its analysis in Fifth Amendment due process rights; it asked if law enforcement's methods were "offensive to due process" or "clearly" prevented the suspect from "exercise[ing] a free and unconstrained will."¹⁴¹

In *Elstad*, the police admittedly elicited a confession pre-*Miranda* at the site of his arrest, then took him to the police station and held a proper *Mirandized* interview.¹⁴² The Court's holding affirmed the constitutional origins of *Miranda* as stemming from the Fifth Amendment and assured that any statement in violation of *Miranda* was prohibited in the Government's case-in-chief.¹⁴³ But the Court then ruled that subsequent statements could be used if they were demonstrably voluntary.¹⁴⁴ To test voluntariness, the court adopted a similar four-part test to that in *Brown*, although it acknowledged that *Brown* applied those factors to fruits evidence in the Fourth Amendment context and here the test was a means of probing the defendant's state of

¹³⁹ *Oregon v. Elstad*, 470 U.S. 298, 300 (1985).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 304 (internal citations omitted).

¹⁴² *Id.* at 300.

¹⁴³ *Id.* at 306–07.

¹⁴⁴ *Id.* at 318.

mind.¹⁴⁵ Distinguishing this case further, the Court stressed that the initial wrong in *Brown*, lack of probable cause, was outside of the defendant's control, and his later willingness to speak did not eliminate that violation; therefore, the only basis to admit the later confession in *Brown* was in the interests of justice.¹⁴⁶ The Fifth Amendment voluntariness test was different because the defendant, similar to the witness in *Ceccolini*, had the free will to reconsider his choice to speak.¹⁴⁷ Thus looking to *Brown*'s fourth factor, flagrancy of police misconduct was not meant to determine the police's subjective intent but to capture its coercive effect on the defendant.¹⁴⁸

The Court ruled that the defendant spoke to the police willingly both times, the police did not use the defendant's initial confession to force the second one, and therefore the attenuative effect of the second interview was sufficient.¹⁴⁹ In considering the impact of the non-*Mirandized* statement on the suspect's later confession, the Court stressed that a forced confession—one involving “unconscionable methods” or violence—would be much more violative of the Fifth Amendment than a freely given one, which merely lacked the procedural safeguard of police informing the suspect of his rights.¹⁵⁰

The *Elstad* holding speaks to the key distinction between Fourth versus Fifth Amendment attenuation doctrine.¹⁵¹ Fourth Amendment cases turned on the odiousness of law enforcement's constitutional violation and relative value of the exclusionary rule's deterrent effect.¹⁵² Under the Fifth Amendment, in contrast, the Court looked to the test it applied to pre-*Miranda*-era custodial

¹⁴⁵ *Id.* at 306.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 315, 318.

¹⁴⁸ *Id.* at 304, 318.

¹⁴⁹ *Id.* at 315.

¹⁵⁰ *Id.* at 312 (“There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a ‘guilty secret’ freely given in response to an unwarned but noncoercive question, as in this case.”).

¹⁵¹ *Id.* at 304–05.

¹⁵² *Id.*

statements, assessing voluntariness by the totality of the circumstances and case-by-case, with consideration of the declarant's purpose.¹⁵³ Thus, a court's job when a confession was involved was to return to that full due process, voluntariness analysis.¹⁵⁴

Elstad offered one more piece on voluntariness that is particularly relevant in the national security sphere. The defendant had succeeded on appeal below claiming that once he admitted the information to the police without *Miranda*, it would have been useless from his own perspective to deny it in the later interview because he had already let the “cat out of the bag.”¹⁵⁵ The Court broadly dismissed the cat out of the bag theory.¹⁵⁶ First, it concluded that the effect of any previous confession, dissipated by time, would not control a defendant's reasoning.¹⁵⁷ Second, it found that the balance of state-versus-defendant interests weighed against this theory because it would allow astute defendants to “effectively immunize” themselves by admitting guilt before accepting their *Miranda* rights.¹⁵⁸ Denying this argument heightens a defendant's burden of persuasion to show that authorities had overborne their free will.

¹⁵³ *Id.* at 308 (“Where an unwarned statement is preserved for use in situations that fall outside the sweep of the *Miranda* presumption, the primary criterion of admissibility remains the ‘old’ due process voluntariness test.”) (internal citations omitted); *see also id.* at 309 (“[T]he living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give.” (quoting *Ceccolini*, 435 U.S. at 277)). The Court stressed that *Miranda*'s requirements were stricter—excluding more evidence—than the Fifth Amendment alone. *See Elstad*, 470 U.S. at 306 n.1 (“A *Miranda* violation does not constitute coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements.”).

¹⁵⁴ *Elstad*, 470 U.S. at 306.

¹⁵⁵ *Id.* at 302 (citing *United States v. Bayer*, 331 U.S. 532, 540 (1947) as source of theory).

¹⁵⁶ *See id.* at 311–12 (“Even in such extreme cases as *Lyons v. Oklahoma*, 322 U.S. 596 (1944), in which police forced a full confession from the accused through unconscionable methods of interrogation, the Court has assumed that the coercive effect of the confession could, with time, be dissipated.”).

¹⁵⁷ *See id.* at 311–12 (“Even in such extreme cases as *Lyons v. Oklahoma*, 322 U.S. 596 (1944), in which police forced a full confession from the accused through unconscionable methods of interrogation, the Court has assumed that the coercive effect of the confession could, with time, be dissipated.”).

¹⁵⁸ *See id.* at 312.

Finally, the Court in *Missouri v. Seibert*¹⁵⁹ ruled once more on *Mirandized* confessions after non-*Mirandized* confessions, but this time, split decisions, both excluding the statement, muddied the clear doctrine that *Elstad* had spelled out. *Seibert* involved a state police policy to purposely evade *Miranda* with a two-step interview technique, whereby police elicited a confession pre-*Miranda* and then referred back to that confession to compel the defendant to repeat it post-*Miranda*.¹⁶⁰ The plurality employed the *Brown v. Illinois* test as repurposed by the *Elstad* Court.¹⁶¹ The Court ruled that the flagrancy of the misconduct in this case was so severe that the defendant could not reasonably see how to walk back what the police reminded her she had already confessed to, and therefore her initial admission caused her post-*Miranda* confession.¹⁶² But Kennedy, in a concurring opinion, upturned the paradigm. He added to the *Elstad* test an initial query as to the officers' intent.¹⁶³ If the officers' subjective purpose appeared non-coercive, he said he would apply the plurality's test; if it were coercive, Kennedy would next look to see if officers took specific "curative steps," such as "a substantial break in time and circumstances" or "an additional warning that explains the likely inadmissibility of the pre-warning custodial statement."¹⁶⁴ Only if they had, would he return to the *Elstad* test.¹⁶⁵

O'Connor, in a sharp dissent that Rehnquist, Scalia, and Thomas joined, lambasted Kennedy's purposive approach. She reasserted that the proper Fifth Amendment due process analysis was exclusively a question of the defendant's voluntariness, and that "[t]houghts kept

¹⁵⁹ 542 U.S. 600, 615 (2004).

¹⁶⁰ *Id.* at 602.

¹⁶¹ The Court, applying those factors, focused on "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id.* at 615.

¹⁶² *See id.* at 616 ("In particular, the police did not advise that her prior statement could not be used.").

¹⁶³ *Id.* at 622 (Kennedy, J., concurring).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

inside a police officer's head cannot affect [the defendant's] experience.”¹⁶⁶ O'Connor also stood by the majority opinion she had wrote in *Elstad* rejecting a strict cat out of the bag theory (which the plurality agreed with in this case).¹⁶⁷

This holding produced a morass below. The Circuits are now split on which test they apply.¹⁶⁸ The Sixth is alone in applying the plurality's test.¹⁶⁹ Four Circuits apply both the plurality and Kennedy's test together, and the rest apply only Kennedy's, concluding that when a majority on the Court fails to offer a consistent rule, the assenting judges who decide the case on the narrowest grounds should control.¹⁷⁰

There are three takeaways from this analysis of the doctrine's evolution key to original intent. First, in the Fourth Amendment context, attenuation grows out of the independent source exception in *Nardone* and remains deeply tied to it.¹⁷¹ To the extent that the subsequent fruits can ever be characterized as independently derived from their illicit source, the former will be held admissible.¹⁷² Second, in the Fifth Amendment context, and surprisingly, even to some extent in Fourth Amendment cases, deterrence of police misconduct is a weak factor.¹⁷³ In none of the significant attenuation cases, other than *Wong Sun*, does deterrence weigh decisively against admitting evidence.¹⁷⁴ Instead, in most cases—*Ceccolini*, *Elstad*, and *Seibert*—the opposite is

¹⁶⁶ *Id.* at 624 (O'Connor, J., dissenting).

¹⁶⁷ *See id.* at 627–28 (O'Connor, J., dissenting).

¹⁶⁸ *United States v. Abu Khatallah*, 275 F. Supp. 3d 32, 62 (2017).

¹⁶⁹ *Id.*

¹⁷⁰ *See id.* (summarizing holdings). Kennedy's test, by adding the preemptive factor, sought to limit the number of instances in which courts would intervene to exclude evidence.

¹⁷¹ *Nardone v. United States*, 308 U.S. 338, 341–43 (1939).

¹⁷² *Id.*

¹⁷³ *See Missouri v. Seibert*, 542 U.S. 600, 602–03 (2004); *Oregon v. Elstad*, 470 U.S. 298, 306–08 (1985); *United States v. Ceccolini*, 435 U.S. 268, 272–74 (1978).

¹⁷⁴ *See Seibert*, 542 U.S. at 602–03; *Elstad*, 470 U.S. at 306–08; *Ceccolini*, 435 U.S. at 272–74.

true: good faith on authorities' part weighs in favor of attenuation.¹⁷⁵ Third, in Fifth Amendment cases, integral to the exclusionary rule's original application, attenuation hinges on the declarant's voluntariness.¹⁷⁶ A court must consider the extent of police misconduct and the interests of justice only as it pertains to the declarant's intent.¹⁷⁷ As in *Wong Sun*, where the witness spoke to authorities on his own volition, or *Elstad*, where the defendant twice admitted guilt willingly, the defendant's unforced desire to speak turned the later evidence into the equivalent of an untainted source and outweighed the minimal constitutional violation.¹⁷⁸

IV. HOW THE COURT WILL APPLY ATTENUATION DOCTRINE TO FRUITS OF TORTURE

An originalist approach to attenuation returns us to its source: the Fifth Amendment Due Process Clause. Every version of the attenuation test is meant to capture whether a defendant's investigation and "conviction rest[ed] on a fair trial," conducted in accordance with "concepts of fundamental fairness."¹⁷⁹ Only when attenuation also implicates the Fourth Amendment does deterring police misconduct play a role, and then, only a supporting one.¹⁸⁰ The test then is "deterrence value versus the drastic and socially costly course of excluding reliable evidence."¹⁸¹ In Fifth Amendment cases, when—as O'Connor's *Seibert* dissent made clear—due process is unconcerned with deterrence, a court must ask whether authorities overbore the defendant's will.¹⁸² In its original application, attenuation in Fifth Amendment cases is purely a voluntariness test.¹⁸³

¹⁷⁵ See *Seibert*, 542 U.S. at 602–03; *Elstad*, 470 U.S. at 306–08; *Ceccolini*, 435 U.S. at 272–74.

¹⁷⁶ See *Elstad*, 470 U.S. at 318–19; *Wong Sun*, 371 U.S. at 490–92.

¹⁷⁷ See *Elstad*, 470 U.S. at 318–19; *Wong Sun*, 371 U.S. at 490–92.

¹⁷⁸ See *Elstad*, 470 U.S. at 318–19; *Wong Sun*, 371 U.S. at 490–92.

¹⁷⁹ See *Ashcraft v. Tennessee*, 322 U.S. 143, 159 (1944) (Jackson, J., dissenting).

¹⁸⁰ *Seibert*, 542 U.S. at 624 (O'Connor, J., dissenting) (internal citation omitted).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

In applying attenuation doctrine to the KSM trial, it is striking how different the facts are from any prior Supreme Court case. The Fourth Amendment analysis is upturned because whether personnel lifted the defendant from the battlefield or foreign law enforcement rendered him into U.S. custody, neither *Miranda* nor probable cause in the traditional sense were required.¹⁸⁴ Another major difference is that the CIA interrogations' coercive effect, whatever its lingering impact, far outmatches anything that the Court has previously considered. These distinctions mean that a Court will either have to rule on strongly pragmatic grounds or look beyond recent precedent to historical intent.

The remainder of this Article proposes how an originalist Court might decide the attenuation question by using the KSM trial as an example. Based on that, the Article offers best practices for law enforcement moving forward to take advantage of attenuation doctrine.

A. Analyzing the KSM trial

The KSM trial is a Fifth Amendment analysis. The Court must decide whether a two-step, CIA-then-FBI interrogation produced admissible confessions.¹⁸⁵ Here, the voluntariness test takes precedence.¹⁸⁶ But first, the Court must decide whether to even speak on the matter.

The Court's first inquiry is jurisdictional. It remains a hallmark in certain conservative legal circles that the Court's intervention in prior Guantanamo cases was "the most blatant and

¹⁸⁴ See *United States v. Marzano*, 537 F.2d 257, 269–70 (7th Cir. 1976) (*abrogated* on other grounds) (“[I]f information is obtained in a search by a private individual absent probable cause, the information is usable if Government agents did not participate in the search.”); DEP’T OF DEF., OFF. OF MILITARY COMM’N, MILITARY COMMISSIONS FACT SHEET 3 (2017) (noting that under the 2009 MCA, *Miranda* warnings were unnecessary for detainees).

¹⁸⁵ Rosenberg, *Lawyers Press Case*, *supra* 31.

¹⁸⁶ *Id.*

consequential usurpation of Executive power in our history.”¹⁸⁷ Justices subscribing to this view could find several ways to avoid a decisive attenuation ruling.

The Court could hold that constitutional protections do not apply to terrorism defendants at Guantanamo. If the Fourth and Fifth Amendment protections do not extend to non-citizen detainees, then the attenuation question is moot. Detainees suffered a major setback on this question in August 2020, when a three-judge panel on the D.C. Circuit ruled for the first time that constitutional Due Process does not apply to non-citizens at Guantanamo.¹⁸⁸ The defendant in that case then sought a rehearing en banc.¹⁸⁹ There are some reasons to believe that the panel decision will not stand,¹⁹⁰ in no small part because the decision subverts a wealth of precedent trending towards recognizing such rights.¹⁹¹ The Court has held that *habeas* protections apply to foreign detainees on U.S. soil, which includes Guantanamo, and that in such holdings, judges must determine on an issue-by-issue basis whether constitutional rights apply.¹⁹² In *Reid v. Covert*, the Court held that the Fifth and Sixth Amendment rights apply to civilians in U.S.

¹⁸⁷ Attorney General William P. Barr Delivers the 19th Annual Barbara K. Olson Memorial Lecture at the Federalist Society’s 2019 National Lawyers Convention, Pt. II, U.S. DEP’T OF JUSTICE (Nov. 15, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-19th-annual-barbara-k-olson-memorial-lecture> (referring specifically to the Court’s 2008 *Boumediene* decision).

¹⁸⁸ *Al Hela v. Trump*, 972 F.3d 120, 150–51 (D.C. Cir. 2020).

¹⁸⁹ See Motion to Extend Time to File Petition, *Al Hela v. Trump*, 972 F.3d 120 (D.C. Cir. 2020) (defendant seeking an extension to file a petition for rehearing en banc).

¹⁹⁰ The panel split 2-1 on the question of whether a due process analysis was even necessary for the court to reach its decision. See *Al Hela*, 972 F.3d at 154 (Griffith, J., concurring). And the two judges signing the majority opinion previously suffered a string of reversals before the court en banc. See Carol Rosenberg, *Court Rules Guantánamo Detainees Are Not Entitled to Due Process*, N.Y. TIMES (Sept. 2, 2020), <https://nyti.ms/2Gp5IdK>.

¹⁹¹ See, e.g., *Rasul v. Bush*, 542 U.S. 466, 473 (2004); *Ali v. Trump*, 959 F.3d 364, 369 (D.C. Cir. 2020) (“[T]he determination of what constitutional procedural protections govern the adjudication of habeas corpus petitions from Guantanamo detainees should be analyzed on an issue-by-issue basis.”).

¹⁹² *Rasul*, 542 U.S. at 473. (“Section 14 of the Judiciary Act of 1789 authorized federal courts to issue the writ of habeas corpus to prisoners who are ‘in custody, under the colour of the authority of the United States, or are committed for trial before some court of the same. ...[C]ongress extended the protections of the writ to ‘all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.’”).

military trials abroad, without saying whether that right extended to foreign citizens.¹⁹³ Even Justice Scalia, who recognized that a non-citizen might be rightfully detained throughout the duration of a conflict, said that if that defendant then faced a criminal trial in Article III court, constitutional rights would become binding.¹⁹⁴ None of this answers the question of detainees tried in a military commission, and in fact, the traditional approach described in *Ex Parte Quirin*,¹⁹⁵ which Scalia and Thomas cited in several Guantanamo cases, was that a military commission hearing was largely left to its own interpretation of its rules.¹⁹⁶ But as Scalia also noted, the habeas case, *Ex Parte Quirin*, “was not this Court’s finest hour,” suggesting that passivity towards the military commissions is not a guarantee.¹⁹⁷ In the end, because the Supreme Court has never addressed the Fifth Amendment’s Self-Incrimination Clause’s applicability to non-citizens tried abroad,¹⁹⁸ the Court could use an absence of constitutional protection as a basis to pass on the case. But in trials of U.S. citizens, no such avoidance is possible, which means that the attenuation analysis is still inevitable.¹⁹⁹

The Court could also hold that the exclusionary rule does not apply. It could, for instance, decide there is a presumption in a foreign detainee context, where defendants’ custody originates with intelligence officials or soldiers and not law enforcement, that the exclusionary rule’s deterrent purpose would be moot because non-law enforcement lacks sufficient stake in the

¹⁹³ 354 U.S. 1, 14 (1956) (noting both the plurality and the concurrences agreed that the constitutional applicability related not to the petitioners’ citizenship but to the place of their confinement and trial).

¹⁹⁴ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 559 (2004) (Scalia, J., dissenting) (questioning “whether there is a different, special procedure for imprisonment of a citizen accused of wrongdoing *by aiding the enemy in wartime*.”)

¹⁹⁵ 317 U.S. 1, 47 (1942).

¹⁹⁶ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 677–78 (2006); see *id.* at 680 (Thomas, J., dissenting); *Hamdi*, 542 U.S. at 560 (Scalia, J., dissenting); see *id.* at 584 (Thomas, J., dissenting).

¹⁹⁷ See *Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting) (highlighting the problematic nature of the Court’s analysis of *Ex parte Quirin*, and the controversial consequences of the ruling).

¹⁹⁸ See 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 721 cmt. b (1987) (“Although the matter has not been definitely adjudicated, the Constitution probably governs also at least some exercises of authority by the United States in respect of some aliens abroad.”).

¹⁹⁹ *Utah v. Strieff*, 136 S. Ct. 2056, 2058 (2016).

outcome of future trials. Eliminating the exclusionary rule for an entire class of defendant is conceivable only because pure originalist thinkers pan the exclusionary rule as a judicial creation in the first place.²⁰⁰ Recent Court decisions that made no attempt at a historic justification and that based exclusion on practicality and deterrence alone have poured fuel on this fire.²⁰¹ But disavowing the exclusionary rule would be a radical move, even in light of the necessities of war. As Justice Harlan wrote in his dissent in *Mapp*, even textualists recognize the Fifth, if not Fourth, Amendment’s exclusion requirement.²⁰² Along with Justice Rehnquist’s *Dickerson* holding that *Miranda* must carry constitutional weight if, for no other reason, because “law enforcement practices have adjusted to its strictures,” dismissing exclusion in terrorism crimes, even while protecting it in all other matters, challenges strong, longstanding norms and would put at risk other Article III protections.²⁰³

If the Court did not punt by dismissing the exclusionary rule entirely, it could still achieve the same effect by declaring that national security concerns that arise under torture are a “political question,” and a matter for other branches to decide.²⁰⁴ Conversely, the Court might turn to what originalists believe was the Founders’ intended solution for official misconduct in

²⁰⁰ See *Wolf v. Colorado*, 338 U.S. 25, 32 (1949) (emphasizing that the exclusion of evidence was a remedy, not a constitutional right). Originalists argue that there is zero evidence of the rule before the late-nineteenth century, let alone at the framing or in colonial common law. See generally Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821 (2002) (discussing the history of criticism of the exclusionary rule); Akhil Reed Amar, *Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 HARV. J. L. & PUB. POL’Y 457 (1997); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994). Justice Hugo Black summarized that “the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.” *Wolf*, 338 U.S. at 39–40 (Black, J., concurring).

²⁰¹ See *Roots*, *supra* note 77, at 27 (“These cases illustrate that the faux originalism of modern anti-exclusionists is largely a projection of contemporary punitive and statist political views onto an invented past.”); see, e.g., *United States v. Leon*, 468 U.S. 897, 918 (1984) (holding that “suppression of evidence” should be ordered “only in those unusual cases in which exclusion will further the purposes of the exclusionary rule”).

²⁰² *Mapp v. Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting) (citation omitted) (accepting “the premise that [exclusion] can be achieved by bringing the Fifth Amendment to the aid of the Fourth”).

²⁰³ *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (internal citations omitted).

²⁰⁴ *Baker v. Carr*, 369 U.S. 186, 278 (1962) (Frankfurter, J., dissenting).

lieu of exclusion: a private suit by the defendant following completion of the primary trial.²⁰⁵

The challenge to private suits is the difficulty of bringing such claims. Some famous attempts have been rejected in the terrorism context on grounds of insufficient proof, and such barriers are highest in national security cases where essential evidence is classified and accessible, if at all, only through extensive discovery.²⁰⁶ The situation is admittedly different than some Guantanamo trials in which so much discovery has already emerged, but the Court might have to narrowly restrict the use of a private suit to the Guantanamo construct—ignoring the practicalities of its broader application—in order to justify this recourse as reasonable.²⁰⁷ Again, if not the KSM trial, at some point the Court will have to decide attenuation in the terrorism context.

Assuming that the court does not take an escape hatch but confronts the issue head on, it is almost bound to rely on its *Elstad* holding.²⁰⁸ *Elstad* and *Seibert* both dealt with two-step police interrogations and subsequent confessions and most closely match the KSM trial facts.²⁰⁹ Moreover, parroting Justice O’Connor’s *Seibert* dissent, the conservative Court will likely outright reject Justice Kennedy’s inclusion of a deterrence analysis because deterring police misconduct had no basis in original Fifth Amendment analysis.²¹⁰ Thus, the Court will focus on voluntariness.

²⁰⁵ See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 69 (1998). This approach has statutory basis now as a Section 1983 *Bivens* claim, and the Court has explicitly backed this approach as an alternative to exclusion in the past. See *Utah v. Strieff*, 136 S. Ct. 2056, 2064 (2016).

²⁰⁶ See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (relying on Fed. R. Civ. Proc. 12(b)(6)) (dismissing petitioner’s § 1983 suit on grounds that petitioner has not met the requirements of a “facially plausible” claim).

²⁰⁷ See generally Julian Borger, *Guantánamo: Psychologists Who Designed CIA Torture Program to Testify*, *GUARDIAN* (Jan. 20, 2020, 12:00 AM), <https://www.theguardian.com/us-news/2020/jan/20/guantanamo-psychologists-cia-torture-program-testify> (describing a private, civil suit brought by the American Council on Civil Liberties on behalf of three detainees tortured in CIA custody at various black sites against the CIA psychologists who designed the torture techniques, which was later settled out of court).

²⁰⁸ *Oregon v. Elstad*, 470 U.S. 298 (1985).

²⁰⁹ *Id.*; *Missouri v. Seibert*, 542 U.S. 600 (2004).

²¹⁰ See generally *Seibert*, 542 U.S. at 622–29 (O’Connor, J., dissenting).

The *Elstad* voluntariness test, which O'Connor more clearly delineated in *Seibert*, looks to: (1) elapse of time; (2) change in location; (3) change in interrogators; and (4) defendant citing other reasons in the totality of circumstances that his or her confession was involuntary.²¹¹ The *Seibert* plurality, which also based their test on *Elstad*, perhaps lessened the defendant's burden but still looked to the same indications of voluntariness: (1) a distinct purpose between the two rounds of questioning; (2) lack of overlapping content between sessions; (3) different timing and setting between them; (4) change in personnel; and (5) the degree to which questioners treated the second round as non-continuous with the first.²¹²

In the KSM trial analysis, no matter how these factors are weighed, the Court will very likely find the two sets of interrogations linked. The attenuation requirements are not met.

First, as for difference in time, although there was a significant gap between the 2002 and 2003 CIA interrogations and the 2006 and 2007 FBI interviews, the September 2006 transfer from CIA to FBI custody had occurred only weeks earlier.²¹³ A few weeks is still much more time than the usual few hours a court might find sufficient for attenuation in a criminal context, which would weigh in favor of attenuation, but in the broader context of events, a few weeks seems less significant.

Second, for at least one defendant whom the FBI questioned in the very same room as the CIA interrogation, there was no shift at all in location.²¹⁴ But even for the others, it is essential to

²¹¹ *Id.* at 628 (O'Connor, J., dissenting) (citing *Elstad*, 470 U.S. at 310, 318).

²¹² *See id.* at 615 (referring to *Elstad*, 470 U.S. at 314–15).

²¹³ KSM Record, *supra* note 4.

²¹⁴ *Id.*

note that their location was hidden from them for as long as they were in custody.²¹⁵ For these detainees, location became meaningless.

Third, as for continuity of interrogators, although the FBI brought in new personnel, there was some overlap, such as the translator and guards.²¹⁶ Moreover, prior to the FBI interviews, the camp commander never made clear with which organization the detainees would be meeting, meaning roles and identities likely blurred.²¹⁷

Fourth, whether the Court relies on O'Connor's test and looks to evidence of non-voluntariness that the defendants have highlighted, or the Court uses the plurality's test and weighs distinct purpose between rounds, overlapping content, and degree of continuity, each increasingly disfavors attenuation. The defendants have argued that their entire detention was one continuous CIA operation, and they have elicited strong and voluminous evidence of CIA and FBI coordination.²¹⁸ This is important because the flagrancy of it suggests an effort to use the first interrogations' results to solicit the same prohibited evidence for the FBI, exactly like Missouri's two-step technique that the Court held unconstitutional in *Seibert*.²¹⁹ The defendants could further point to official coercion in that the FBI never made it sufficiently clear that the defendants were now operating under a different set of rights, at least not as clear as *Miranda* would have required. If the defendants can show that identical questions were asked between

²¹⁵ When personnel moved them between facilities, they were blindfolded and earmuffed. See Ben Taub, *Guantánamo's Darkest Secret*, NEW YORKER (Apr. 15, 2019), <https://www.newyorker.com/magazine/2019/04/22/guantanamos-darkest-secret?verso=true>.

²¹⁶ KSM Record, *supra* note 4.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*; *Seibert*, 542 U.S. 600.

both interviews, or more egregiously, that the agents explicitly referred to prior confessions to the CIA, the totality of evidence would be damning.

With all that said, there are certain arguments that the defendants have made that an originalist Court would roundly dismiss. The defendants will not profit from a cat out of the bag theory. Instead, the defendants would have to point to other evidence that they felt forced them to confess. The Court will tread carefully on the question of whether the defendant's psychology, because of enhanced interrogation, made them more amenable to involuntary statements. The Court would likely consider the effect on the defendants' mental state in only a strict physiological sense, "not on free choice in any broader sense of the word."²²⁰

Because this is a Fifth—not Fourth—Amendment analysis, deterrence is not a factor.²²¹

Relatedly, the U.S. intelligence community's intentions, aside from the FBI, are irrelevant unless that intent played out through action. Showing that the CIA hid its ongoing role at Guantanamo is insufficient if the defendants cannot also prove that this enabled the FBI to trick the defendants.

Another argument likely to fail is that evidence procured by torture is inherently unreliable. However true this might be, there is no historical basis in the exclusionary rule to bar evidence based on reliability alone.²²² Exclusion's original purpose was to protect defendants' constitutional rights against official misconduct.²²³ The value of admitting reliable evidence is a

²²⁰ *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (internal citation omitted).

²²¹ *See supra* notes 151-154, 173 and associated text.

²²² *Compare Philip N.S. Rumney, Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric and Clarke*, 40 U.S.F. L. REV. 479 (2006), with Marcy Strauss, *Torture*, 48 N.Y.L. SCH L. REV. 201, 263 (2004) (arguing that it is impossible to verify whether torture is effective or not due to lack of data).

²²³ *See Brown v. Illinois*, 422 U.S. 590, 612 (1975) (Powell, J., concurring) (internal citation omitted) ("The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.").

factor that may outweigh a defendant’s rights and require admitting otherwise prohibited evidence,²²⁴ but unreliability has never been a reason favoring exclusion.²²⁵

Finally, looking to the facts alone, the Court might adopt this mode of analysis and still find the balance of evidence weighing in favor attenuation. Consider *Lyons v. Oklahoma*, an early Article III case involving quasi-torture in which state police arrested a murder suspect, interrogated him at the station, jailed him for eleven days, interviewed him again at the prosecutor’s office for ten hours before sending him to prison, and finally, after twelve hours at the prison, he confessed.²²⁶ During his second interview, police officers allegedly assaulted him and “a pan of the victims’ bones was placed in Lyon’s lap.”²²⁷ The defendant claimed that “fear instilled by” his initial interrogation “continued sufficiently in its coercive effect” to produce the later confession.²²⁸ The Court, applying an early voluntariness test, unspoiled by the deterrence test of later *Miranda*-era precedent, held that the second confession was attenuated.²²⁹ Factors it found persuasive were the twelve hours and change in location from interrogation to confession, and that the defendant confessed to the prison warden—someone who was uninvolved in the interrogation and whom, the Court said, the defendant knew and had no reason to fear.²³⁰

Contemporary jurists might dismiss a holding like this as a product of a racist era, but its fact

²²⁴ See *California v. Greenwood*, 486 U.S. 35, 44 (1988) (“[O]ur decisions concerning the scope of the Fourth Amendment exclusionary rule have balanced the benefits of deterring police misconduct against the costs of excluding reliable evidence of criminal activity.”).

²²⁵ As Justice Black insisted, “[t]he purpose of the exclusionary rule, unlike most provisions of the Bill of Rights, does not include, even to the slightest degree, the goal of insuring that the guilt-determining process be reliable.” *Kaufman v. United States*, 394 U.S. 217, 238 (1969) (Black, J., dissenting).

²²⁶ See 322 U.S. 596, 598–600 (1944).

²²⁷ *Id.* at 599.

²²⁸ *Id.* at 600.

²²⁹ The Court asked whether the defendant “at the time he confesse[d], [was] in possession of ‘mental freedom.’” *Id.* at 599 (referencing *Ashcraft v. State of Tennessee*, 322 U.S. 143 (1944)).

²³⁰ See *id.* at 604.

pattern is strikingly relevant, and this was the era in which the attenuation doctrine was born, and to which originalists must look.

Whatever the outcome in this two-step confession dispute, the KSM defendants should not assume that the rule will translate to a later Fourth Amendment attenuation claim. Perversely, although Fourth Amendment analyses typically exclude more, its unique attenuation tests favor defendants less in terrorism cases. The winning claim for a Fifth Amendment attenuation case is that the defendants' near-continuous, multi-year interrogation made them act involuntarily. If the Court turns from voluntariness to the original Fourth Amendment goal of deterring misconduct, the lesser-deterrability of CIA and military personnel will weigh against exclusion.²³¹ In fact, a private lawsuit—the original and only punishment prior to the exclusionary rule—might be more effective, pressuring the agencies' and individual employees' pecuniary interests. Also weighing against Fourth Amendment exclusion would be if the Court looks all the way back to independent source doctrine: Prosecutors might argue that overwhelming public information about the 9/11 plot and plotters demonstrates that authorities could have identified any disputed evidence even without the tainted confessions.²³²

²³¹ See Jonathan M. Fredman, *Intelligence Agencies, Law Enforcement, and the Prosecution Team*, 16 YALE L. & POL'Y REV. 331, 333–39 (1998) (“[I]ntelligence agencies normally depend on sources that cannot be revealed in court, and draw upon legal authorities separate from those of law enforcement.”). As a matter of law enforcement intent, the burden of securing lawful evidence is on the FBI, not the CIA. An originalist court would find the CIA's intentions irrelevant in the attenuation analysis. It would neither care nor attempt to regulate how intelligence agencies gathered information. To the extent that the Court considers intent at all, it would ask whether the FBI sought to profit from the CIA's effort or instead erected a firewall between the two evidence streams. Morris D. Davis, *Historical Perspective on Guantanamo Bay: The Arrival of the High Value Detainees*, 42 CASE W. RES. J. INT'L L. 115, 119 (2009) (“Law enforcement's retrospective focus—what has the person already done in the past?—with its well-defined and rigid rules is often at cross purposes with the intelligence community's prospective focus—what is the person planning to do in the future?—and its vaguely defined, situation-driven practices. Trying to merge these two focuses presents the classic square peg and round hole challenge.”).

²³² See, e.g., ASRA Q. NOMANI ET AL., *THE TRUTH LEFT BEHIND: INSIDE THE KIDNAPPING AND MURDER OF DANIEL PEARL 12-15* (2011), available at <https://s3.amazonaws.com/www-s3-1.icij.org/uploads/2017/10/thepearlproject.pdf> (confirming, based on a broad study of publicly available evidence, that KSM orchestrated Daniel Pearl's murder).

These final points suggest that the KSM trial defense teams should continue to elicit evidence showing sustained CIA-FBI coordination through the defendants' 2007 confessions, and they should take caution before pushing their luck to exclude additional evidence.

B. Best practices for law enforcement

The analysis above considers an extreme case for the Supreme Court's interpretation. In doing so, it offers less in the way of best practices for law enforcement to utilize attenuation as a rehabilitation tool in the face of tainted evidence. Therefore, with its original intent now laid out, it is lastly worth considering two district court terrorism decisions that drew sharper lines as to how much attenuation is needed: *United States v. Ghailani*²³³ and *United States v. Khatalla*.²³⁴ Those holdings applied attenuation tests from *Ceccolini*²³⁵ and *Seibert*²³⁶ respectively, without considering original intent, but their probing factual reviews and resulting split on whether attenuation was met holds rich guidance.

Ahmed Khalfan Ghailani is to-date the only Guantanamo detainee tried in an Article III court.²³⁷ In his case, the judge considered whether a key Government witness should be excluded because authorities identified him largely through Ghailani's coercive CIA interrogation.²³⁸ The court ruled that it would exclude the witness.²³⁹ The court applied the *Ceccolini* test, asking how tied the witness' discovery was to the inadmissible CIA confession and what was the extent of

²³³ 743 F. Supp. 2d 261 (S.D.N.Y. 2010).

²³⁴ 275 F. Supp. 3d 32 (D.D.C. 2017).

²³⁵ *United States v. Ceccolini*, 435 U.S. 268 (1978).

²³⁶ *Missouri v. Seibert*, 542 U.S. 600 (2004).

²³⁷ See Daniel Moritz-Rabson, *Guantanamo Inmates to Demand Trial or Release in U.S. Court Hearing*, NEWSWEEK (July 10, 2018, 4:57 PM), <https://www.newsweek.com/guantanamo-inmates-have-habeas-corpus-hearing-1016825>; see also Victor Hansen, *Use and Misuse of Evidence Obtained during Extraordinary Renditions: How Do We Avoid Diluting Fundamental Protections*, 35 NOVA L. REV. 281, 284–85 (2011) (describing the absence of federal trials addressing rendition).

²³⁸ *United States v. Ghailani*, 743 F. Supp. 2d 261 (S.D.N.Y. 2010).

²³⁹ *Id.* at 288.

official misconduct.²⁴⁰ It found that authorities would not have found him had it not been for Ghailani's statements; regardless of how much time had passed, the foreign police who arrested the witness created and maintained compulsive conditions compelling the witness to testify; and the witness' prior statements suggested his testimony would be unreliable.²⁴¹ The only factor that the court found weighing in favor of attenuation was that the CIA's purpose was intelligence gathering, not producing trial evidence.

Contrast this with *Khatallah*, in which the court found attenuation satisfactory.²⁴² There, military, intelligence, and FBI personnel, captured the defendant in Libya, transported him by Naval ship to America for an Article III trial, interviewed him first for intelligence value, and then again at a later point in the sea journey for criminal evidence.²⁴³ The judge applied both Justice Kennedy's and the plurality's tests from *Missouri v. Seibert* and held that under either approach, attenuation was sufficient.²⁴⁴ The court noted extensive precautions authorities took in establishing two information streams: None of the FBI agents who conducted interviews were involved in Khatallah's capture or initial processing; the CIA and FBI maintained a strict partition between interview teams; although there was some overlapping content between interviews, the focus of the intelligence sessions was future terrorist threats rather than prior acts; and there was a two-day break, a literal décor change,²⁴⁵ and a clear explanation that the interviews were distinct before the FBI began.²⁴⁶ The FBI team read the defendant his *Miranda*

²⁴⁰ The court looked to “[1] the stated willingness of the witness to testify, [2] the role played by the illegally seized [or other illegally obtained] evidence in gaining his cooperation, [3] the proximity of the illegal behavior [to] the decision to cooperate and the actual testimony at trial, and [4] the police motivation in conducting the search’ or engaging in other illegal activity.” *Id.* at 275 (quoting *United States v. Leonardi*, 623 F.2d 746, 752 (2d Cir. 1980)).

²⁴¹ *See id.* at 282–84.

²⁴² *United States v. Abu Khatallah*, 275 F. Supp. 3d 32, 70 (2017).

²⁴³ *Id.* at 45–51.

²⁴⁴ *Id.* at 61.

²⁴⁵ *Id.* at 45 (“The FBI team pasted green wallpaper and hung ‘decorative pictures’ on the wall, and placed a green tablecloth and placemats on the table.”).

²⁴⁶ *Id.* at 64–66.

rights in English and Arabic, discussed its meaning, secured waiver orally and in writing, and repeated the process after any lengthy break.²⁴⁷ Looking to Kennedy's test, the court found that far from a suggestion of official misconduct, the teams made an express effort to show the defendant that he was starting fresh.²⁴⁸

The simplest takeaway from these cases is that it is more productive to prepare for an attenuation claim prior to arrest than to try to cure a case involving tainted evidence. The *Ghailani* assessment differs from the originalist test in three ways: First, it disregarded the multi-year time gap between confession and the witness' decision to testify; second, the judge was too easily persuaded that the witness felt coerced without providing a fuller, fact-intensive analysis; and third, it considered the absence of reliability as a factor weighing against attenuation.²⁴⁹ Still, prosecutors should take from this case that long time gaps are not enough, and that they must make every possible effort to confirm voluntariness from whomever speaks. As for the *Khatallah* holding, although an originalist court would not have performed Kennedy's test, the analysis strongly reflected a pure originalist approach. Importantly, the court's ready embrace of attenuation suggests that future law enforcement teams should follow the *Khatallah* team's playbook to a tee.²⁵⁰ The hard split between intelligence and law enforcement personnel, the firmly divided interview sessions (down to the added touch of a décor change), and the transparent effort to keep the intelligence streams separate add up to hallmark traits of an effective attenuation effort. The precautions onboard that ship should be a model moving

²⁴⁷ *Id.* at 46–47.

²⁴⁸ *Id.* at 63–64.

²⁴⁹ *See* *United States v. Ghailani*, 743 F. Supp. 2d 261, 278–88 (S.D.N.Y. 2010).

²⁵⁰ *See* *United States v. Abu Khatallah*, 275 F. Supp. 3d 32, 45–51 (2017).

forward, both for authorities' benefit and that too of suspects making informed choices. It is likely that case will get at least a passing mention in a future Supreme Court holding.

V. CONCLUSION

Contemporary courts looking to the most recent Supreme Court attenuation holdings would have found plenty of support to dismiss such claims and exclude disputed evidence on purposive grounds. In contrast, originalism is naturally dismissive of the exclusionary rule, and courts looking to the attenuation doctrine's origins would lean more favorably towards finding its tests met, especially if personnel took precautions or rapid curative steps.²⁵¹

This Article highlighted the important role that attenuation doctrine can serve in terrorism cases. It defined the doctrine and then laid out the KSM trial's facts: a newsworthy and extreme example of where attenuation might apply.²⁵² It then dug into the history and evolution of the exclusionary rule and attenuation to reveal their original meaning.²⁵³ It concluded, by showing that an originalist Court would likely deny the KSM trial's attenuation claim, but then described how such an analysis combined with the fact patterns of two similar terrorism cases, offered guidance for practitioners in future cases.²⁵⁴

Torture will likely exceed the Court's limit on the sort of misconduct authorities can attenuate. The KSM trial in particular is an outrageous example. Authorities should respond to a denial in that case by turning to successful attenuation cases, like *Khatallah*, and taking preemptive steps to establish separate evidence chains, with law enforcement and intelligence

²⁵¹ See *Collins v. Virginia*, 138 S. Ct. 1663, 1676 (2018) (Thomas, J., concurring) (“Historically, the only remedies for unconstitutional searches and seizures were ‘tort suits’ and ‘self-help.’” (quoting *Utah v. Strieff*, 136 S.Ct. 2056, 2061 (2016))).

²⁵² See *supra* Part I.

²⁵³ See *supra* Part II.

²⁵⁴ See *supra* Part III.

personnel fully quarantined from each other. With new receptivity to many attenuation claims and their increasingly likelihood in future terrorism cases, authorities should be able to meet national security needs, conduct successful prosecutions, and still faithfully protect defendants' rights.