TWO-PHASE INTERROGATION TECHNIQUES IN THE TERRORISM CONTEXT: ANALYZING THE EFFECT OF ENHANCED INTERROGATION TECHNIQUES ON THE ADMISSIBILITY OF SUBSEQUENT NON-COERCIVELY OBTAINED ADMISSIONS

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ABSTRACT

As the United States is embroiled in a seemingly never-ending war against faceless terrorist organizations, it continues to detain suspected terrorists. As the government (and the public at large) wrestles with resolving each detainee's case, the consequences of enhanced interrogation techniques on the government's prosecution of enemy detainees has never been satisfactorily resolved. With the election of Donald Trump in 2016, his stated enthusiasm for enhanced interrogation techniques brought torture back into the American collective consciousness. This note focuses on the effect of so-called two-phase interrogations on the admissibility of any inculpatory statement made by enemy detainees subjected to enhanced interrogation techniques. Applicable federal precedent suggests that any inculpatory statement made after a detainee has endured enhanced interrogation techniques is inadmissible in a federal criminal prosecution.

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I. INTRODUCTION

"Would I approve waterboarding?" then-presidential candidate Donald J. Trump rhetorically asked a group of cheering supporters in Ohio.[1] "You bet your ass I would approve it. You bet your ass. In a heartbeat."[2] Now-President Trump has consistently endorsed the use of enhanced interrogation techniques—some bordering on torture—as an effective counterterrorism tool. He has even shown a willingness to order the use of

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[1] Zerohedge, *Trump Waterboarding*, YOUTUBE (Nov. 24, 2015), https://www.youtube.com/watch?v=HUMjK00u6JY.

[2] *Id.*

techniques that are "a hell of a lot worse than waterboarding."[3] In response to critics who question the efficacy of torture he said: "If it doesn't work, [terror suspects] deserve it anyway for what they're doing."[4]

The President's statements on torture have alarmed Americans and politicians alike.[5] Commentators have for years debated both the efficacy and ethical issues of enhanced interrogation techniques in intelligence gathering. However, a lesser-known but potentially consequential issue has received less attention: reinstitution of enhanced interrogation techniques may irrevocably undermine the government's ability to prosecute terrorism suspects in Article III federal courts.

In the early days of the War on Terror, the Bush Administration approved the use of enhanced interrogation techniques on detainees for intelligence-gathering purposes.[6] As a result, several detainees confessed to their involvement in terrorist activities.[7] However, those confessions were inadmissible in Article III federal courts because the confessions were the result of enhanced interrogation techniques. To overcome this obstacle, the government began to conduct a new set of interrogations, this time using commonly-accepted interrogation methods, in hope of obtaining new, admissible confessions to prosecute the detainees.[8]

Under its original two-phase interrogation technique, the government first interrogated detainees for intelligence-gathering purposes. During the early years of the War on Terror, this phase consisted of enhanced interrogation techniques.[9] Secondly, a "clean team" met with the detainees, informed them of their right to remain silent, and used non-coercive interrogation methods to obtain evidence that could be used for prosecution. The second phase included a variety of widely-accepted techniques,

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[3] Elizabeth Grimm Arsenault, *Donald Trump and the Normalization of Torture*, LAWFARE (Nov. 13, 2016, 10:02 AM), https://www.lawfareblog.com/donald-trump-and-normalization-torture.

[4] *Id.*

[5] *See* Michael Crowley, *McCain warns Trump on torture, waterboarding*, POLITICO (Nov. 19, 2016, 3:03 PM), http://www.politico.com/story/2016/11/john-mccain-trump-torture-waterboarding-231668.

[6] William J. Aceves, *United States v. George Tenet: A Federal Indictment for Torture*, 48 N.Y.U. J. INT'L L. & POL. 1, 48 (2015).

[7] *See, e.g.*, INT'L COMM. OF THE RED CROSS, REPORT ON THE TREATMENT OF FOURTEEN "HIGH VALUE DETAINEES" IN CIA CUSTODY 10 (Feb. 14, 2007) [hereinafter ICRC REPORT], https://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf.

[8] Morris D. Davis, *A Retrospective on the Military Commission: Historical Perspective on Guantanamo Bay: The Arrival of the High Value Detainees*, 42 CASE W. RES. J. INT' L. 115, 123 (2009).

[9] Jenny-Brooke Condon, *Extraterritorial Interrogation: The Porous Border Between Torture and U.S. Criminal Trials*, 60 RUTGERS L. REV. 647, 665 (2008).

including a "non-confrontational, rapport-building approach to facilitate dialogue" with the detainees.[10]

This note analyzes whether the detainees' statements in the second phase of these kinds of interrogations are admissible in Article III courts. In other words, should Article III courts admit terrorism suspects' "clean team" statements even though the suspect was subjected to enhanced interrogation techniques in the past. To answer this question, this note uses the case of Khalid Sheikh Mohammed ("KSM"), the alleged mastermind of the September 11th attacks. Although KSM's case is working its way through military commissions,[11] this note explores the potential admissibility of his "clean team" statements in Title III courts.

Admittedly, KSM is not a perfect case study. He was detained and interrogated in the early days of the War on Terror, at a time when the government was single-mindedly focused on preventing another attack. As a result, no thought was given to prosecuting KSM, much less the admissibility of his confessions. Also, the clean team that interrogated KSM made a conscious choice not to inform him of his *Miranda* rights even in the second phase.[12] Moreover, because KSM will be prosecuted before a military commission, he will face a different standard than the one applied in an Article III court. Despite these issues, KSM's case is instructive for several reasons. Although his circumstances are unique, he has undergone the types of coercive interrogation methods that President Trump has promised to pursue. Therefore, his case offers a general fact pattern to analyze the admissibility of a suspect's statements after he has been subjected to physically coercive techniques. Also, the Obama administration made substantial efforts to transfer KSM to New York to prosecute him in an Article III court.[13] Indeed, if it was not for the "storm of political opposition by an electorate concerned with the dangers of bringing alleged terrorists into the United States," KSM would be tried in an Article III court,[14] making the admissibility of his clean team statements a central issue.

The summary of the findings is as follows: to determine the admissibility of clean team statements, a court must first determine whether

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[10] Davis, *supra* note 8, at 123.

[11] John M. Bickers, *Asculum Defeats: Prosecutorial Losses in The Military Commissions and How They Help the United States*, 4 NAT'L SEC. L. J. 201, 246 (2016).

[12] *See* Davis, *supra* note 8, at 122.

[13] *See id.* at 122, n.16.

[14] Charles J. Dunlap, Jr., *Part 1: Ten Questions: Responses to The Ten Questions*, 37 WM. MITCHELL L. REV. 5150, 5166 (2011).

the question-first method was used as part of a deliberate scheme to undermine a detainee's right against self-incrimination. If it was, subsequent clean team statements that are substantially similar to the pre-warning statements are inadmissible unless curative measures are taken. If the officers did not intend to circumvent the detainee's *Miranda* rights, the admissibility depends on the voluntariness of the subsequent statements. If coercion was involved in the first phase, factors such as the length of time between the two phases, the setting of the interrogations, and identity of the interrogators are analyzed to determine whether the second interrogation was influenced by the coercion used in the first. Under this framework, KSM's clean team statements would likely be inadmissible in Article III courts.

This note begins by discussing the development of the legal principles that guide the admissibility of confessions. It then discusses the development of the legal landscape that governs two-phase interrogation techniques in the domestic context. The next section concerns the two phases of KSM's interrogations. Finally, it applies the current jurisprudence to analyze the admissibility of KSM's clean team statements in Article III courts.

II. THE DEVELOPMENT OF THE LEGAL STANDARD GOVERNING THE ADMISSIBILITY OF CONFESSIONS

In common law, the following two justifications are frequently relied upon to exclude statements that are given as a result of torture: (1) the unreliability of evidence gathered through coercion; and (2) the recognition that forcing an individual to self-incriminate undercuts the ideal of individual autonomy.[15] Indeed, the Supreme Court's early rationale that the Fifth Amendment protected against the use of torture in interrogations relied on these two justifications.[16] In 1936, before incorporating the Fifth Amendment's right against self-incrimination to the states, the Supreme Court held in *Brown v. Mississippi*[17] that the Fourteenth Amendment's Due Process Clause also protects against admissions that are the fruit of torture.[18] In so doing, the Court distinguished between (1) the legal prohibition against obtaining a confession by torture, and (2) the non-physical legal

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[15] Condon, *supra* note 9, at 659.

[16] *Id.*

[17] Brown v. Mississippi, 297 U.S. 278 (1936).

[18] Condon, *supra* note 9, at 660.

compulsion prohibited by the privilege against self-incrimination.[19] Through this analysis, *Brown* created a "voluntariness" requirement the admissibility of confessions at trials.[20]

About three decades later, the Supreme Court clarified the voluntariness requirement in the seminal case of *Miranda v. Arizona*.[21] *Miranda* first recognized the new paradigm in which custodial interrogations replaced physical torture as a way of obtaining a confession: "the modern practice of in-custody interrogation is psychologically rather than physically oriented."[22] Then, *Miranda* held that the psychologically coercive interrogations that "subjugated an individual to the will of his examiner" violated due process.[23] The Court thus clarified that the "voluntariness doctrine . . . encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice."[24]

III. THE DEVELOPMENT OF THE LEGAL STANDARD GOVERNING TWO-PHASE INTERROGATIONS IN THE DOMESTIC CONTEXT

The next half-century witnessed several attempts by Congress and local officials to circumvent *Miranda*'s voluntariness requirement.[25] As relevant here, police departments developed "the technique of interrogating [suspects] in successive, unwarned and warned phases."[26] National police-training organizations, including the Police Law Institute, instructed officers to first interrogate suspects without informing them of their *Miranda* rights, and then to inform the suspects of their rights only after a confession was obtained.[27] If the suspects waived their rights, the

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[19] Condon, *supra* note 9, at 661.

[20] *Id.*

[21] Miranda v. Arizona, 384 U.S. 436 (1966).

[22] *Id.* at 448.

[23] *Id.* at 457.

[24] *Id.* at 464–65.

[25] For example, Congress passed a law to override *Miranda*'s requirement for admission of confessions. *See* 18 U.S.C. § 3501. However, in *Dickerson v. United States*, the Supreme Court invalidated the law, holding Congress lacked the constitutional authority to supersede *Miranda*'s voluntariness requirement by enactment of subsections (a) and (b) of the act. *See* 530 U.S. 428 (2000).

[26] Missouri v. Seibert, 542 U.S. 600, 609 (2004).

[27] *Id.* at 610.

prosecutors would then introduce the subsequent incriminating statements in court.[28]

A. OREGON V. ELSTAD

In 1985, the Supreme Court first addressed the constitutionality of two-phase interrogations in *Oregon v. Elstad*.[29] In *Elstad*, police officers arrested a teenage burglary suspect at his home.[30] While one of the officers was informing the suspect's mother of the reason for his arrest, the other told the suspect that the officer "felt" that the suspect had a role in the burglary.[31] The teen admitted to having been at the scene.[32] About an hour later at the police station, he was given *Miranda* warnings and was interviewed by the officer to whom he had admitted his presence at the scene. The teen confessed to the burglary.[33]

At trial, the teen sought to suppress his second confession by arguing that his *Miranda* rights were violated.[34] He first argued that the "fruit of poisonous tree doctrine,"[35] previously applied to the Fourth Amendment, should be applied to his case.[36] He also argued that he had "let the cat out of the bag" in his pre-*Miranda* questioning and thus could no longer deny his involvement after he was informed of his rights.[37] The Court rejected both metaphorical arguments. First, it refused to extend the Fourth Amendment's "fruit of the poisonous tree doctrine" to a *Miranda* violation and held that while all pre-*Miranda* statements should be suppressed, "admissibility of any [post-*Miranda*] statement should turn . . . solely on whether it is knowingly and voluntarily made."[38] Second, the Court rejected the teen's argument that he was under a "subtle form of lingering compulsion."[39]

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[28] *Id.*

[29] Oregon v. Elstad, 470 U.S. 298 (1985).

[30] *Id.* at 301.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 302.

[35] A doctrine under the Exclusionary Rule which requires exclusion from trial evidence obtained through an illegal arrest, unreasonable search, or coercive interrogation.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 306, 309.

[39] *Id.* at 311.

The Court went on to distinguish between involuntary statements made due to physical violence or other methods used to psychologically break a suspect's free will, and "the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question[.]"[40] It concluded that, in that particular case, any "causal connection" between the first and second admissions was "speculative and attenuated"[41] because the first interrogation had "none of the earmarks of coercion."[42] In finding the defendant's post-*Miranda* statements admissible, the Court held that "a suspect who has once responded to unwarned yet non-coercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings."[43]

Two relevant principles emerge from *Elstad.* First, its holding was at least in part due to the unintentional nature of the *Miranda* violation. Justice Souter later characterized *Elstad*'s holding as "treating the living room conversation as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally."[44] It was significant that the *Miranda* violation in *Elstad* was not "to interrogate the suspect but to notify his mother of the reason for his arrest."[45]

Second, the Court was adamant that it was not endorsing question-first interrogation tactics. The majority opinion rejected Justice Brennan's contention in dissent that "with respect to successive confessions," the majority opinion had "strip[ped] remedies for *Miranda* violations of the 'fruit of the poisonous tree' doctrine prohibiting the use of evidence presumptively derived from official illegality."[46] The majority described Justice Brennan's concern as distorting "the reasoning and holding of [the Court's] decision."[47]

In short, *Elstad* held that the admissibility of the second statement depends solely on its voluntariness. The Court also listed several factors to consider in circumstances when an inculpatory statement is made prior to administration of a *Miranda* warning: "the time that passes between confessions, the change in place of interrogations, and the change in identity

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[40] *Id.* at 312 (internal quotation marks omitted).

[41] *Id.* at 313.

[42] *Id.* at 316.

[43] *Id.* at 318.

[44] Missouri v. Seibert, 542 U.S. 600, 615 (2004) (Souter, J., plurality opinion).

[45] *Elstad*, 470 U.S. at 315.

[46] *Id.* at 319 (Brennan, J., dissenting).

[47] *Id.* at 318, n.5.

of the interrogators all bear on whether that coercion has carried over into the second confession."[48]

B. MISSOURI V. SEIBERT

In 2004, the Court in *Missouri v. Seibert* again considered the admissibility of post-*Miranda* statement in the context of two-phase interrogations. Far from the "good faith Miranda mistake" in *Elstad*, the omission in *Seibert* was part of a scheme by the law enforcement to obtain a confession. Indeed, the officers were trained to first interview their suspect without giving the *Miranda* warnings to get a confession and to then conduct a clean interrogation for admissible statements.[49]

The defendant in *Seibert* set her mobile home on fire to hide her son's death.[50] Because she feared that the bed sores on his body would be mistaken for signs of physical abuse, she decided to burn his body.[51] As part of her scheme, she intentionally left another boy, who was living with her, to burn to death in the mobile home.[52] When she was arrested, the arresting officer followed police protocols and refrained from informing the defendant of her Miranda rights.[53] Later, at the police station, a police officer questioned her for thirty to forty minutes and she admitted to knowingly leaving the other teenager in the trailer.[54] After the interrogation, the defendant was given a twenty-minute coffee and cigarette break. After the break, the same officer turned on a tape recorder and gave the defendant her *Miranda* warnings.[55] The officer repeatedly confronted the defendant with her pre-warning admission.[56] Soon after, the defendant confessed.[57] The officer later testified that he was taught to continue repeating the question until the suspect gave the same answer as before the warning.[58] The trial court suppressed the pre-warning statement but admitted the post-

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[48] *Id.* at 310.
[49] *Seibert*, 542 U.S. at 605–06.
[50] *Id.* at 604.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 605.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 605–06.

warning confessions and the jury convicted the defendant of second-degree murder.[59] The appeal found its way to the Supreme Court.

A four-justice plurality and Justice Kennedy in concurrence issued two opinions that found the post-*Miranda* statements inadmissible.[60] The plurality's threshold inquiry was whether a late-given *Miranda* warning could still function effectively to advise the suspect that she had a real choice.[61] In distinguishing *Elstad*, the plurality opinion discussed several factors that could help determine the admissibility of the statements made during the clean interrogations:

> "[1] the completeness and detail of the questions and answers in the first round of interrogation, [2] the overlapping content of the two statements, [3] the timing and setting of the first and the second, [4] the continuity of police personnel, and [5] the degree to which the interrogator's questions treated the second round as continuous with the first."[62]

Justice Kennedy agreed with suppressing the post-*Miranda* statements but opined that the plurality opinion's test cut "too broadly."[63] His opinion instituted a two-part test. Under his approach, the initial inquiry concerns whether the officers used a deliberate two-step strategy to undermine the suspect's *Miranda* rights.[64] If so, post-warning statements that concern the same substance as the pre-warning statements should be suppressed "unless curative measures are taken before the postwarning statement is made."[65] Absent a deliberate strategy, the admissibility would continue to be governed by the principles of *Elstad.* In short, Justice Kennedy's approach suppresses post-*Miranda* statements in the "infrequent case . . . in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning," and only if the curative measures were not sufficient.[66] He explained that measures such as an "additional warning that explains the likely inadmissibility of [a] prewarning custodial statement" or a "substantial break in time and circumstances between the prewarning statement and the *Miranda* warning" might be sufficient.[67]

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[59] *Id.* at 606.
[60] *Id.* at 604.
[61] *Id.* at 611–12.
[62] *Id.* at 615.
[63] *Id.* at 622.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*

The divergence between the plurality and Justice Kennedy's concurrence arises from the latter's belief that statements should not be suppressed when there is a "legitimate countervailing interest" for withholding the *Miranda* warning.[68] Justice Kennedy argued that "admission of evidence is proper when it would further important objectives without compromising *Miranda*'s central concerns."[69] He cited examples: an officer "may not realize that a suspect is in custody and warnings are required," "may not plan to question the suspect or may be waiting for a more appropriate time."[70] In the absence of a deliberate circumvention of *Miranda*, Justice Kennedy reasoned that the *Elstad* test was sufficient to analyze voluntariness.

At its core, *Seibert* preserves *Miranda's* voluntariness requirement in the two-phase interrogation context. Its guiding principles emerge by understanding the Court's focus on the inherent tension between the *Miranda* requirement that law enforcement must "adequately and effectively" warn suspects of their constitutional guarantees, and the delaying of informing the suspects of their rights until an opportune time.[71] It excludes any statements that stem from the technique's encroachment on *Miranda*'s sphere of protected rights.

C. THE CURRENT DOCTRINAL LANDSCAPE

The absence of a majority opinion in *Seibert* required some interpretation on the part of the circuit courts to decide the appropriate legal standard. The circuits that have considered two-phase interrogations have followed Justice Kennedy's reasoning.[72] Therefore, when considering the

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[68] *Id.* at 621 (Kennedy, J., concurring).

[69] *Id.* at 619.

[70] *Id.* at 620.

[71] *Id.* at 611.

[72] United States v. Carter, 489 F.3d 528, 536 (2d Cir. 2007) ("We now join our sister circuits in holding that *Seibert* lays out an exception to *Elstad* for cases in which a deliberate, two-step strategy was used by law enforcement to obtain the postwarning confession"); United States v. Street, 472 F.3d 1298, 1313 (11th Cir. 2006) ("Because *Seibert* is a plurality decision and Justice Kennedy concurred in the result on the narrowest grounds, it is his concurring opinion that provides the controlling law."); United States v. Courtney, 463 F.3d 333, 338 (5th Cir. 2006) ("*Seibert* requires the suppression of a postwarning statement only where a deliberate two-step strategy is used and no curative measures are taken."); United States v. Williams, 435 F.3d 1148, 1157 (9th Cir. 2006) (Holding "that a trial court must suppress postwarning confessions obtained during a deliberate two-step interrogation where the midstream *Miranda* warning—in light of the objective facts and circumstances—did not effectively apprise the suspect of his rights."); United States v. Long Tong Kiam, 432 F.3d 524, 532 (3d Cir. 2006) (Applying "the *Seibert* plurality opinion as narrowed by Justice Kennedy."); United States v. Mashburn, 406 F.3d 303, 309 (4th

admissibility of second-phase statements, the initial inquiry involves examining the intent of the law enforcement agents to see whether omitting the *Miranda* warnings was calculated to undermine the suspect's *Miranda* rights.[73] If the answer is no, *Elstad* controls. If law enforcement intended to undermine the suspect's rights, the post-warning statements that concern the same substance as the pre-warning statements will be excluded unless curative measures are taken before the post-warning statement is made.

In deciding the first question, circuits generally agree that "a court should review the totality of the objective and subjective evidence surrounding the interrogations to determine deliberateness, with a recognition that in most instances the inquiry will rely heavily, if not entirely, upon objective evidence."[74] A non-exhaustive list of objective evidence of deliberateness includes evidence such as "the timing, setting and completeness of the pre-warning interrogation, the continuity of police personnel and the overlapping content of the pre- and post-warning statements."[75]

To ascertain the subjective evidence of intent, a court should conduct "a somewhat closer scrutiny of an investigator's testimony . . . when the proffered rationale is not a legitimate reason to delay or where it inherently lacks credibility in view of the totality of the circumstances."[76] This scrutiny is not ordinarily required when the delay is legitimate, such as to protect officer or community safety, or when the delay is an innocent product of a "rookie mistake," miscommunication, or "a momentary lapse in judgment."[77]

Cir. 2005) ("The admissibility of postwarning statements is governed by *Elstad* unless the deliberate 'question-first' strategy is employed.") United States v. Stewart, 388 F.3d 1079, 1090 (7th Cir. 2004) ("Where the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings, *Elstad* appears to have survived *Seibert*."); United States v. Hernandez-Hernandez, 384 F.3d 562, 566 (8th Cir. 2004) (Holding that *Elstad* controlled because it did not appear that law enforcement "used a multi-step interrogation in 'a calculated way to undermine the *Miranda* warning.'").

[73] This issue was neither raised nor discussed in *Seibert* because the police officer testified that his department was trained in using the two-step process. Since *Seibert*, the Supreme Court has not ruled on this particular issue.

[74] United States v. Capers, 627 F.3d 470, 479 (2d Cir. 2010).

[75] Reyes v. Lewis, 833 F.3d 1001, 1030 (9th Cir. 2016) (citing *United States v. Williams*, 435 F.3d 1148, 1159 (9th Cir. 2006)).

[76] United States v. Moore, 670 F.3d 222, 229 (2d Cir. 2012).

[77] *Id.*

D. THE APPLICATION OF THE CURRENT DOCTRINE

1. Application of the "Totality of the Objective and Subjective Evidence" Deliberateness Standard

Because KSM would likely have gone to trial in New York, this note focuses on the Second Circuit cases that deal with two-phase interrogations.

In *United States v. Capers*, the Second Circuit held that postal inspectors deliberately deprived a postal worker of his *Miranda* rights when they questioned him using a two-phase interrogation procedure.[78] The postal worker, Capers, was apprehended in a sting operation in which he was caught opening envelopes rigged with alarms, and taking money orders and cash from those envelopes.[79] After the envelope alarm was triggered, and without informing the suspect of his *Miranda* rights, the inspectors detained Capers and asked him where he was hiding the contents of the envelopes.[80] The suspect pointed to his pocket and confessed that he had taken the contents.[81] About ninety minutes later, after transporting the suspect to another facility, the inspectors read to him the *Miranda* warnings and he signed a Waiver of Rights form, indicating his willingness to talk. Subsequently, the inspectors proceeded to ask him about committing mail theft.[82] He verbally confessed to taking the money orders.[83]

The Second Circuit held that the totality of the circumstances showed that the postal inspectors had employed a deliberate two-step interrogation technique to undermine the suspect's *Miranda* rights. The court was not convinced by the inspectors' contention that they wanted to make sure the money orders and the cash were not lost, because the suspect was already apprehended in the room in which he had opened the envelopes.[84] There was also no legitimate reason or excuse for delaying the *Miranda* warning.[85]

The interrogations also failed the court's evaluation of the objective evidence.[86] First, the statements elicited from the defendant during the first

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[78] *Capers*, 627 F.3d at 483.

[79] *Id.* at 472.

[80] *Id.* at 472–73.

[81] *Id.* at 473.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 481–82.

[85] *Id.* at 481.

[86] *Id.* at 483.

and second interrogations largely overlapped.[87] Second, the circumstances surrounding the two interrogations, including (1) the nature of the places in which interrogation were held and (2) the continuity in the postal inspectors who interrogated the suspect, pointed to a "deliberate two-step interrogation."[88] As to this point, it was significant that the suspect remained handcuffed and was faced with aggression and hostility "throughout the process."[89] Third, although the location of the interrogations had changed—the first taking place at the post office and the second at another facility—"the inquisitorial environment of the questioning was consistent" because both were designed to induce the suspect to confess.[90] Fourth, although not as systematic as *Seibert*, "at least to some extent the latter session was 'essentially a cross-examination using information gained during the first round of interrogation.'"[91]

Alternatively, in *United States v. Williams*,[92] the Second Circuit held that law enforcement had not engaged in a deliberate two-phase interrogation to undermine the defendant's Miranda rights. Pursuant to a warrant, New York Police Department officers searched a Bronx apartment, secured the apartment's occupants, and found four semi-automatic handguns.[93] When an Alcohol, Tobacco, Firearms and Explosives ("ATF") officer entered the apartment, he found two suspects handcuffed and saw the weapons lying on the floor beside them. Having expected to find nine or ten guns in the apartment, and a third suspect, the officer asked the occupants three questions: (1) to whom did the firearms belong, (2) where were the other firearms, and (3) where was the third trafficker.[94] The ATF officer's questions were not preceded by a *Miranda* warning.[95] One of the suspects, the defendant, responded that the guns belonged to him.[96] The record lacked responses to the latter two questions.[97] Two hours later at the police station, the defendant waived his *Miranda* rights and confessed to

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[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* at 484.
[92] United States v. Williams, 681 F.3d 35 (2d Cir. 2012).
[93] *Id.* at 37.
[94] *Id.* at 37–38.
[95] *Id.*
[96] *Id.* at 37.
[97] *Id.*

various crimes, including conspiring to traffic guns.[98] The district court granted the defendant's motion to suppress his station-house confession for being "the product of a two-step interrogation practice barred by *Missouri v. Seibert*."[99]

The Second Circuit reversed, holding that, under the totality of the circumstances, including the objective and subjective evidence, the ATF officer did not engage in a deliberate two-step interrogation to undermine the defendant's *Miranda* rights.[100] The record lacked subjective evidence showing that the ATF officer calculated his pre-warning questions "to elicit incriminating statements that he could then use later to cross-examine the defendant after administering *Miranda* warnings."[101] Indeed, finding only four guns in the apartment, when expecting nine or ten, and only two suspects, when expecting to three, were enough to evoke the public safety exception.[102] As such, these circumstances showed the lack of the officer's intent to undermine *Miranda*'s requirements.[103] In clarifying the standard for the public safety exception, the court stated that it did not need to find that the officer's public safety considerations were justified; it only needed to find that the ATF officer was "waiting for a more appropriate time" to formally question the defendant.[104]

The objective evidence also weighed against a finding of deliberateness. First, the "questions and answers in the first . . . interrogations were neither complete nor detailed."[105] The officer asked only three questions and the defendant offered only one "incriminating response."[106] This contrasted with the pre-warning questioning in *Seibert* which was "systematic, exhaustive, and managed with psychological skill," that left "little, if anything, of incriminating potential left unsaid."[107] Second, the defendant's pre-warning and post-warning statements "did not 'appreciably overlap.'"[108] While his first-stage statements linked him only to the four guns, his later statement "explained in detail the history,

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[98] *Id.* at 38.
[99] *Id.* at 36–37.
[100] *Id.* at 41.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at 42.
[105] *Id.* at 44.
[106] *Id.*
[107] *Id.* (quoting *Seibert*, 542 U.S. at 616).
[108] *Id.* (quoting *United States v. Moore*, 670 F.3d 222, 231 (2d Cir. 2012).

operation, and profit-sharing arrangements of his conspiracy" to traffic guns.[109] Indeed, the defendant's second interrogation did not cover the same grounds, which suggests the absence of "a focused attempt to make the defendant feel locked into his recently elicited inculpatory statements."[110] Third, despite "some continuity of personnel between the apartment and the station house," the difference in the "timing and setting" of the two interviews weighed against finding of deliberateness because the "spontaneous and somewhat frenzied" setting of the first stage was unlike the second in which the defendant was calmly questioned.[111] Fourth, the two-hour break between the two phases coupled with the absence of any facts showing the latter phase to be defendant's cross-examination using information gained in the prior phase pointed to a break between the first and the second interrogation.[112]

2. Application of *Elstad's* Voluntariness Requirement

As previously discussed, if based on the totality of the circumstances, the court determines that law enforcement did not engage in a deliberate two-step process to undermine a defendant's *Miranda* rights, the case is controlled by *Elstad*. *Elstad*'s central inquiry is whether the defendant's confession was voluntary.[113] In the Second Circuit, "a confession is not voluntary when obtained under circumstances that overbear the defendant's will at the time it is given."[114]

In *Williams*, the defendant's post-*Miranda* statements were voluntary because the record lacked any signs of coercion in the first phase.[115] The "brevity and focus of [the officer's] pre-warning questions," the two hours that separated the initial and the station house interrogations, and the fact that the defendant did not contest the voluntariness of his *Miranda* waiver were "'highly probative' of voluntariness."[116]

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[109] *Id.*

[110] *Id.*

[111] *Id.* at 44–45.

[112] *Id.* at 45.

[113] *See* Part III.A, *supra*.

[114] *Williams*, 681 F.3d at 45 (quoting *United States v. Anderson*, 929 F.2d 96, 99 (2d Cir. 1991)).

[115] *Id.*

[116] *Id.* (quoting *Elstad*, 470 U.S. at 318).

IV. TWO-PHASE INTERROGATIONS IN THE TERRORISM CONTEXT

A. DEVELOPMENT OF ENHANCED INTERROGATION TECHNIQUES

On September 17, 2001, President Bush granted the director of central intelligence "unprecedented, broad authority" to extract information from persons who were deemed to be involved in terrorist acts against the United States.[117] Although the President's memorandum of notification was silent on the use of enhanced interrogation techniques, the CIA began a detention and interrogation program that continued until 2009, when it was halted by President Obama.[118] As described by a 2007 Justice Department memorandum, enhanced interrogation techniques are designed to "dislodge the detainee's expectations about how he will be treated in U.S. custody, to create a situation in which he feels that he is not in control, and to establish a relationship of dependence on the part of the detainee."[119]

B. PHASE ONE: THE USE OF ENHANCED INTERROGATION TECHNIQUES ON KHALID SHEIK MOHAMMAD

Pakistani Inter-Services Intelligence arrested Khalid Sheik Mohammad in 2003, possibly with the help of the CIA.[120] He was held and interrogated at several CIA secret prisons around the world.[121] He was first sent to a CIA detention site referred to as Cobalt or Salt Pit, which is located outside of Bagram Air Base in Afghanistan.[122] A few days later, he was transferred to another CIA detention facility in Poland code-named

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[117] STEPHEN DYCUS, ET AL., NATIONAL SECURITY LAW 994 (6th ed. 2016).

[118] *Id.* at 171.

[119] STEVEN G. BRADBURY, MEMORANDUM FOR JOHN A. RIZZO ACTING GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY: RE APPLICATION OF THE WAR CRIMES ACT, THE DETAINEE TREATMENT ACT, AND COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS TO CERTAIN TECHNIQUES THAT MAY BE USED BY THE CIA IN THE INTERROGATION OF HIGH VALUE AL QAEDA DETAINEES (July 20, 2007) 6, https://www.aclu.org/sites/default/files/torturefoia/released/082409/olc/2007%20OLC%20opinion%20on%20Interrogation%20Techniques.pdf.

[120] Gregory S. McNeal, *A Cup of Coffee After the Waterboard: Seemingly Voluntary Post-Abuse Statements*, 59 DEPAUL L. REV. 943, 947 (2010).

[121] *Id.*

[122] SENATE SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM 81 (Dec. 9, 2014), https://www.intelligence.senate.gov/sites/default/files/press/executive-summary_0.pdf [hereinafter SSCI] (Executive Summary); Aceves, *supra* note 6, at 69.

"Detention Site Blue."[123] He was subsequently transferred to three other facilities before being sent to the Guantanamo Bay Naval Facility in 2006 to face trial by a military commission.[124] These detention centers included "Detention Site Black," "Detention Site Blue" and another unclassified location.[125] Although it is not clear if KSM was subjected to enhanced interrogation techniques at each of the facilities, the evidence points to his being subjected to those techniques in at least three of the facilities.[126]

The interrogators' treatment of KSM in his first interrogation phase can be deduced by combining information from (1) the Office of Legal Counsel ("OLC") memos (sometimes referred to as the "torture memos") that examined the legality of the enhanced interrogation techniques, (2) reports from the International Committee of the Red Cross ("ICRC"), and (3) KSM's testimony before a military panel in a Combatant Status Review Tribunal ("CSRT").[127] The "Committee Study of the Central Intelligence Agency's Detention and Interrogation Program" by the Senate Select Committee on Intelligence also provides some important details. These sources show that KSM underwent a variety of enhanced interrogation techniques, "including nudity, standing sleep deprivation, the attention grab and insult slap, the facial grab, the abdominal slap, the kneeling stress position, and walling."[128]

KSM was also waterboarded 183 times.[129] "Waterboarding consists of immobilizing an individual and pouring water over his face to simulate drowning, which produces a severe gag reflex."[130] The detainee lies on a gurney that is inclined ten to fifteen degrees with the detainee's head at the lower end of the gurney.[131] The interrogators place a cloth over the detainee's mouth and pour cold water on the cloth.[132] Though the procedure only lasts up to forty seconds,[133] it makes the subject believe that death is imminent.[134] Internal CIA records show that waterboarding of KSM

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[123] SSCI, *supra* note 122, at 83.

[124] *Id.* at 95–96.

[125] *See id.*

[126] ICRC REPORT, *supra* note 7, at 10.

[127] McNeal, *supra* note 120, at 945, 947.

[128] Aceves, *supra* note 6, at 69.

[129] McNeal, *supra* note 120, at 950.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* at 947.

evolved into a "series of near drownings."[135]

According to the ICRC report, KSM alleged that in his third interrogation stop, he was held in a prolonged stress standing position for one month.[136] The OLC memos authorized stressed positions such as wall standing and stress positions "to produce the physical discomfort associated with temporary muscle fatigue."[137] While in stressed positions, the detainees could either defecate in a bucket without cleaning themselves or wear diaper-like garments.[138]

Moreover, KSM underwent multiple rectal rehydration sessions[139] "without a determination of medical need," a procedure that the chief of interrogations characterized as illustrative of the interrogator's "total control over the detainee."[140] A CIA medical officer's email gave the following instruction for rectal rehydration of detainees as a means of behavior control: insert the Ewald "tube up as far as you can, then open the IV wide. No need to squeeze the bag—let gravity do the work."[141] The officer also discussed using "the largest Ewal [sic]" available.[142]

The use of enhanced interrogation techniques on KSM abruptly stopped on March 24, 2003.[143] During the period in which KSM was subjected to enhanced interrogations, he mostly fabricated stories about Al Qaeda's capabilities and plans, as well as his role in various other plots.[144] He did, however, provide statements about directing prospective pilots to study at flight schools.[145] He later admitted to having made up stories during these sessions after his refusal to answer to the interrogators resulted in further physical abuse.[146] At certain instances, right before being

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[135] SSCI, *supra* note 122, at 3.

[136] ICRC REPORT, *supra* note 7, at 10.

[137] SSCI, *supra* note 122, at 3.

[138] *Id.* at 53.

[139] Rectal rehydration or feeding refers to the process of inserting a tube into a person's anal passage to feed them.

[140] *Id.* at 82.

[141] *Id.* 100.

[142] *Id.*

[143] *Id.* at 93.

[144] *See id.* at 86–96.

[145] *Id.* at 86.

[146] Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10016, 15 (Mar. 10 2007) [hereinafter KSM's Hearing], http://nsarchive.gwu.edu/torturingdemocracy/documents/20070310.pdf.

waterboarded, KSM appeared "to lose control" and became "somewhat frantic," and stated that he had been forced to lie.[147]

C. PHASE TWO: CLEAN TEAM'S INTERROGATIONS

Clean teams generally consist of groups of interrogators who "use non-abusive techniques to extract inculpatory statements from detainees."[148] Government prosecutors have argued that because the clean teams were not "tainted" by coerced interrogations during the first phase, the information they gathered should be admissible in courts.[149]

When KSM was transferred to Guantanamo Bay in September 2006, prosecutors doubted that any of KSM's post-capture statements would be admissible at his military commission trial, even though "the evidentiary rules in military commissions are more lenient than the rules in federal courts and courts-martial."[150] Therefore, a "clean team" was created to interrogate and get confessions from KSM.[151]

The clean teams in Guantanamo Bay consisted of Federal Bureau of Investigation ("FBI") and military law enforcement agents.[152] Colonel Morris D. Davis, who served as the Chief Prosecutor of the Military Commission at Guantanamo Bay,[153] described the environment of the clean team interrogations as comfortable and collegial.[154] The interrogators used rapport-building techniques that created a dynamic of mutual respect, "like soldiers from opposite sides sitting down over coffee after the war is over to reflect on their past battles."[155]

In this phase of interrogations, the FBI agents would go "to extraordinary lengths" to explain to each detainee that his decision to talk was voluntary and that "there would be no punishment nor reward tied to the decision."[156] Colonel Davis recalled how in one session, the law enforcement agents "were going to such great lengths" that he as a prosecutor worried that they risked "persuading the detainee to change his

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[147] SSCI, *supra* note 122, at 90.

[148] McNeal, *supra* note 120, at 945.

[149] *Id.* at 953.

[150] *Id.* at 951.

[151] *Id.* at 952.

[152] Davis, *supra* note 8, at 120.

[153] *Id.* at 115.

[154] *Id.* at 123.

[155] *Id.* at 123.

[156] *Id.* at 121.

mind and switch his yes to a no."[157] Although the content of KSM's confessions to the clean team are unknown, reports indicate that the clean teams "obtained admissions from some of the high value detainees when they were interviewed at Guantanamo Bay."[158]

V. THE ADMISSIBILITY OF KSM'S STATEMENTS TO CLEAN TEAMS UNDER THE CURRENT LEGAL FRAMEWORK

This section discusses the admissibility of KSM's clean team statements in an Article III court. The initial question is whether the two-phase interrogations were used as a deliberate attempt to undermine KSM's *Miranda* rights.[159] As discussed above, this question must be answered by considering "the totality of the objective and subjective evidence surrounding the interrogations."[160]

A. SUBJECTIVE FACTORS

An assessment of the subjective factors points to the conclusion that the two-phase interrogation of KSM was not used to elicit incriminating statements that could later be used to cross-examine him after administering *Miranda* warnings. Therefore, the interrogations were not part of a scheme to deliberately undermine KSM's *Miranda* rights. The CIA interrogators who first questioned KSM believed that he was one of the masterminds behind the September 11th attacks. Thus, they reasonably could have thought that KSM could provide the United States with valuable intelligence on Al-Qaeda's terrorist plots and the whereabouts of other Al-Qaeda leaders, including Osama Bin Laden. In fact, within two hours of KSM's capture, the chief of interrogations at Detention Site Cobalt sent an email to CIA headquarters with the subject line "Let's roll with the new guy," in which he requested permission to "press [KSM] for threat info right away."[161]

The interrogators' conduct during the first phase shows that they were more interested to learn about Al Qaeda's future plots rather than KSM's

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[157] *Id.*

[158] *Id.* at 120.

[159] Discussion of KSM's *Miranda* rights is not a comment on whether he or other foreign nationals who are arrested in battlefield or otherwise abroad are entitled to these Constitutional rights. However, because this analysis concerns admissibility of information to Article III courts, this article necessarily assumes that KSM was entitled to *Miranda* rights.

[160] United States v. Capers, 627 F.3d 470, 479 (2d Cir. 2010).

[161] SSCI, *supra* note 122, at 81.

previous actions. For example, on March 12, 2003, eleven days after his capture, KSM provided information on the Heathrow Airport and Canary Wharf terrorist plots.[162] Believing that KSM was discussing this information to avoid talking about plots in the United States, the CIA interrogators waterboarded him twice that day.[163] As this example shows, enhanced interrogations in the first phase were not designed to obtain a confession from KSM for later use by the clean teams, but were conducted as an intelligence gathering mission.

Because the goal of the CIA interrogators was to collect intelligence that could be used to prevent terrorist attacks, these interrogations fit well within the "countervailing concerns of public safety" doctrine discussed by Justice Kennedy as a legitimate reason to delay informing a suspect of his *Miranda* warning.[164] Like in *Williams*, in which questioning gun-trafficking suspects was justified under the public safety exception because officers had expected to find more guns and gun-traffickers, here the CIA interrogators' questioning of KSM also qualifies for the public safety exception because the interrogators reasonably believed that KSM had information about future plots that justified delaying his *Mirandized* formal interrogation for prosecution purposes.

Moreover, because the jurisprudence of two-phase interrogations has developed in the domestic context, it is reasonable to assume that courts, when deciding terrorism cases, will give substantial weight to the unique challenge of gathering intelligence and protecting national security.[165] Therefore, it is reasonable to assume that courts will give substantial credence to government's interest in gathering intelligence for national security purposes. In short, the subjective circumstances surrounding the first phase of KSM's interrogation suggest that the CIA interrogators did not use the two-phase interrogation technique to circumvent KSM's *Miranda* rights.

B. OBJECTIVE FACTORS

Although some of the factors cut both ways, the overall analysis of the objective factors indicate that the use of the two-phase interrogation was not calculated to undermine KSM's *Miranda* rights.[166]

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[162] *Id.* at 86.

[163] *Id.*

[164] Missouri v. Seibert, 542 U.S. 600, 619 (2004) (Kennedy, J., concurring).

[165] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

[166] Although KSM was never given *Miranda* warnings, the analysis here assumes that he was

First, the questions and answers in the first phase of KSM's interrogations were expansive and detailed, which weighs in favor of a finding of deliberateness. Unlike the first phase of questioning in *Williams*, which consisted of only three questions and thus pointed away from deliberateness, the first phase of KSM's questioning was thorough and performed over three and a half years.[167] During this period, CIA interrogators disseminated 831 intelligence reports from questioning KSM, more than any other detainee.[168] Therefore, KSM's first phase of questioning was conducted like the first interrogation in *Seibert* that was "systematic, exhaustive, and managed with psychological skill." As such, the manner of questioning points to deliberateness.

Second, while the contents of KSM's first and second interrogations largely overlapped, the circumstances do not suggest that the interrogators tried to make KSM feel locked into his inculpatory statements. Although both the CIA intelligence reports from the first phase of interrogations and the contents of the clean team's interrogation remain classified, it is likely that KSM admitted to playing a role in the September 11th attacks and other terrorist plots in both phases of interrogation. However, several factors point to the unlikelihood that KSM's clean team needed to use his earlier statements to obtain his admission. For example, KSM has maintained that he was one of Al Qaeda's senior leaders[169] and continually provided information on various Al Qaeda leaders and operatives who had already been captured.[170] KSM's willingness to provide inculpatory information about captured operatives continued throughout his subsequent detention and interrogation in CIA custody.[171] Therefore, although KSM's answers during the two phases substantially overlapped, there is no indication that the admissions from the first phase were used in the second phase to cross-examine him. Because the core concern in *Seibert* was to protect the central voluntariness of *Miranda*, the second factor points to the absence of deliberateness.

Moreover, the circumstances surrounding the two phases, including the nature of the places in which interrogation were held and the change in personnel who interrogated KSM, point to the absence of deliberateness. The settings of the two phases were vastly different. The first phase of the

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given the *Miranda* warnings before his interrogations by the clean team.

[167] SSCI, *supra* note 122, at 96.

[168] *Id.*

[169] KSM's Hearing, *supra* note 146, at 15; *See also* SSCI, *supra* note 122, at 81.

[170] SSCI, *supra* note 122, at 81.

[171] *Id.*

interrogations occurred by CIA interrogators who used enhanced interrogation techniques. He was subjected to sleep deprivation, nudity, waterboarding, and other physical abuse.[172] According to KSM, during the first month of his detention, he "would be placed against a wall and subjected to punches and slaps in the body, head and face" if the interrogators perceived that he was not cooperating.[173] In contrast, the clean teams used non-confrontational, rapport-building techniques to facilitate a dialogue with KSM.[174] Although it is unclear if KSM knew that the clean team interrogators were from different agencies, he likely knew that the individual interrogators were different. According to the Chief Prosecutor of the Military Commission at Guantanamo Bay, the detainees enjoyed talking with the members of their clean teams and occasional laughter was not uncommon.[175] The vast difference in the setting and interrogators in KSM's two phases are unlike *Capers* in which the similarity in the interrogation settings and the continuity of the interrogators pointed to a deliberate two-step interrogation. Here, the circumstances surrounding the two phases point to lack of deliberateness.

Accordingly, the totality of circumstances surrounding KSM's interrogations do not satisfy the subjective and objective requirements that would pass Justice Kennedy's threshold inquiry that there was a deliberate two-phase interrogation conducted by the government. Therefore, *Elstad*'s principles guide the remainder of the analysis, and any clean team statements are only admissible if they were voluntarily made.

C. *ELSTAD*'S VOLUNTARINESS ANALYSIS

The analysis under *Elstad* revolves around a single question: "whether the second statement was . . . voluntarily made."[176] Recall that *Elstad* distinguished between statements made due to physical violence or other methods used to psychologically break a suspect's free will, and "the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question."[177] The factual circumstances in *Elstad* did not reveal a causal connection between the first

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[172] See Part IV.B.

[173] ICRC REPORT, *supra* note 7, at 13.

[174] See Part IV.C.

[175] Davis, *supra* note 8, at 122–24.

[176] Oregon v. Elstad, 470 U.S. 318 (1985).

[177] *Id.* at 312.

and second admissions because the first interrogation had "none of the earmarks of coercion."[178]

Unlike *Elstad*, however, the first phase of KSM's interrogations involved enhanced interrogation techniques, many of which were designed and administered to make KSM feel "that he is not in control" and to establish "a relationship of dependence."[179] For example, KSM was subjected to multiple rectal rehydration sessions with the sole objective of establishing the interrogator's "total control" over him.[180] Therefore, the question becomes whether the use of enhanced interrogation techniques had an irreparable impact on KSM's free will. *Elstad* enumerated several factors to help courts analyze whether coercion from the first interrogation carried over into the second confession. The factors include "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators."[181]

On the one hand, the three and a half years that separated the two phases; the change in the locations, settings, and the identity of the interrogators; and KSM's apparent initial willingness to discuss his role as an Al Qaeda leader, all point to voluntariness for his clean team admissions. In fact, as described by the former Chief Prosecutor at Guantanamo Bay, some of the detainees were so proud of their terrorist activities that their admissions came in the form of bragging.[182]

On the other hand, because of the abusive nature of the first phase, KSM could have reasonably thought that not admitting to his role in the terrorist plots would restart the use of enhanced interrogation techniques. This would be a reasonable assumption because prior to arriving at Guantanamo, KSM was transferred between several CIA prisons and tortured in at least three of them. Also, the stated goal of the enhanced interrogation techniques—to create a feeling of dependency and lack of free will in the detainees—coupled with the physical and psychological coercion inflicted on KSM during the first phase of the interrogations, point to a causal connection between the first and second admissions.

Because of the coercion used during the first phase of the interrogations and the likelihood of its causal relationship with KSM's clean

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[178] *Id.* at 316.

[179] BRADBURY, *supra* note 119, at 6.

[180] SSCI, *supra* note 122, at 82.

[181] *Elstad*, 470 U.S. at 310.

[182] Davis, *supra* note 8, at 122–24.

team statements, it is likely that an Article III court would find KSM's clean team statements involuntary, and thus inadmissible.

VI. CONCLUSION

One of the most divisive political and legal issues the War on Terror has revolved around the efficacy of Article III courts versus military tribunals to prosecute terrorism suspects. Without picking a side in that debate, it is fair to say that keeping open the option of using Article III courts to prosecute terrorism suspects is a wise policy, given the issues that remain with prosecutions in military commissions.[183]

Additionally, there are several reasons to believe that Article III courts will process an increasing number of terrorism cases in the future.[184] For example, over the past few years, the Justice Department has quietly prosecuted multiple terrorism cases in Article III courts, including members of Al-Qaeda who were captured overseas.[185] For example, since 2013, two terror suspects have been tried and convicted in federal courts for crimes committed in Afghan battlefields.[186] In the fall of 2017 alone, these courts processed four terrorism cases—including that of Ahmed Abu Khattala, the alleged conspirator behind the 2014 Benghazi attacks that resulted in the death of U.S. Ambassador Christopher Stevens.[187] Moreover, at his Senate confirmation hearing, Deputy Attorney General Rod Rosenstein indicated his preference for continuing to use federal courts to prosecute terrorism cases, a policy favored by many at the Justice Department.[188] Moreover, even President Trump, who once ridiculed Article III courts' ability to prosecute terrorist suspects (he called the idea "a joke and a laughing stock") has acknowledged the viability of those courts to prosecute

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[183] Missy Ryan, *The Guantanamo quagmire: Still no trial in sight for 9/11 suspects*, WASH. POST: NATIONAL SECURITY (September 6, 2016), https://www.washingtonpost.com/world/national-security/no-end-in-sight-for-troubled-guantanamo-trials-once-seen-as-a-swift-path-to-justice/2016/09/06/b7833b5a-704a-11e6-8533-6b0b0ded0253_story.html? ("Ten years [after their capture], none of [the] 14 'high value' detainees brought to Guantanamo Bay have been convicted or sentenced in the military commissions. Roughly half a dozen cases tried in other commission proceedings have resulted in convictions, but most have been thrown out on appeal.").

[184] *See generally* Karen J. Greenberg, *Prosecuting Terrorists in Civilian Courts Still Work; So Why Does Trump Appear to Favor Military Commissions?*, THE ATLANTIC (Nov. 20, 2017), https://www.theatlantic.com/international/archive/2017/11/isis-trump-terrorist-obama-court-military-guantanamo/546296 (discussing several terrorism cases prosecuted in Article III courts).

[185] Ryan, *supra* note 183.

[186] Greenberg, *supra* note 184.

[187] *Id.*

[188] *Id.*

terrorism cases.[189] President Trump has good reasons for his newfound respect for Article III courts, particularly given the military commissions' sluggish pace in processing Guantanamo Bay detainees.[190]

However, while enhanced interrogation techniques had not been used on any of the recent terrorism suspects prosecuted in federal courts, reinstituting these methods may significantly limit the Justice Department's ability to use the federal courts for prosecuting terrorism suspects. This threat is particularly relevant for cases in which a suspect's inculpatory statements constitute the prosecution's ticket to conviction because of the ambiguity and the circumstantial nature of the remaining evidence. Limiting the federal courts' ability to process terrorism cases does not only deliver a blow to the government's ability to prosecute terrorist suspects, but also undermines the American public's faith in the efficacy of our constitutional processes.

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[189] *Id.*

[190] Ryan, *supra* note 183.