

# The Question:

Is there a need for a  
“foreign official coercion”  
exclusionary rule?



## The Assumption:

Use of confessions procured by *actual* torture or coercion in U.S. courts offends basic notions of fundamental fairness



# U.S. v. Abu Ali

This Court shares the view of the *Brown* Court that torture, and evidence obtained thereby, have no place in the American system of justice (or of any nation for that matter), and the Court will continue to clearly and steadfastly assume its duty to protect the human and legal rights of all who appear before it.



## The Dilemma:

What is the constitutional basis  
for excluding confessions  
procured by foreign official  
coercion?



# Due Process Coercion

- *Government* conduct that overbears the suspect's free will, but . . . *Colorado v. Connelly*:
- No due process protection unless there is an “essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other.”
- Even “[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.”



# Self-Incrimination, Chavez, and “Time Framing”

- The Odd Case of Able Seaman Bram
- A Self-Executing Exclusionary Rule, but . . .
  - Completely ignored by Connelly
  - Completely consumed by Miranda?

“[t]he Fifth Amendment privilege is not concerned  
‘with moral and psychological pressures to confess  
emanating from sources other than official  
coercion.’”



# The Convention Against Torture

- Article 15: Obligation to ensure statements derived from torture “shall not be invoked as evidence in any proceedings . . . .”
- Initial US report indicated this obligation was fully satisfied by existing U.S. law, but . . . .
- What law?



# Reliability: An Important, but Secondary Interest

- Reliability is frequently, but erroneously invoked as a primary justification for excluding coerced confessions
- Preventing introduction of unreliable evidence is a secondary *potential* benefit of exclusion
- A reliability touchstone would be dangerously under-inclusive and open the door to a “coerced but corroborated” rule



# Identifications v. Confessions: Why Reliability Doesn't Matter

- IDs and Due Process: Elevating Accuracy over Process
  - Reaffirmed in *Perry v. NH*
  - Flawed Process alone will not trigger Due Process Exclusion
- What does the absence of any analogous confession “qualifier” reveal about the nature of the ultimate interest?



# A “Humanity” Based Extension of the Concept of “State Action”

- Powell → Brown → Spano: A Clear Focus on Elevating Protection of Human Dignity over Technical Process

“However guilty defendants, upon due inquiry, might prove to have been ...”



# Eliminate Uncertainty: Exclusion for “Conscience Shocking” Foreign Treatment

- ❑ Advances core objectives of Due Process
- ❑ Tailored to address only the most offensive treatment
- ❑ Fully implements US CAT obligations
- ❑ Signals US abhorrence to coercion at the hands of *any* government
- ❑ Protects the integrity of our judicial process



# The Rochin Principle

“we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically . . . Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. *They are methods too close to the rack and the screw to permit of constitutional differentiation.*

