ARTICLES

A DIFFERENT KIND OF CRIMINAL? *MIRANDA*, TERROR SUSPECTS, AND THE PUBLIC SAFETY EXCEPTION

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I. INTRODUCTION

Ten years after the tragic terror attacks of September 11, 2001, the tension between civil liberties and national security-based law enforcement endures. The due process rights of terror suspects are at the pinnacle of this ongoing debate. Two cases in particular pushed the boundaries of constitutional compliance. On December 25, 2009, Umar Farouk Abdulmutallab attempted to detonate an explosive device while on a flight from Amsterdam to Detroit.[1] The "Christmas Day Bomber" was then taken into custody and questioned by FBI agents before being read his *Miranda* rights.[2] In May 2010, Faisal Shahzad attempted to detonate a car bomb in Times Square and was later questioned by FBI agents for three hours prior to his *Miranda* rights advise-

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[1] Monica Davey, *Would-Be Plane Bomber Pleads Guilty, Ending Trial*, N.Y. TIMES, Oct. 12, 2011, http://www.nytimes.com/2011/10/13/us/umar-farouk-abdulmutallab-pleads-guilty-in-plane-bomb-attempt.html.

[2] Evan Perez, *Rights are Curtailed for Terror Suspects*, WALL ST. J., March 23, 2011, http://online.wsj.com/article/SB10001424052748704050204576218970652119898.html.

ment.[3] In light of these cases, Attorney General Eric Holder announced that he would work with Congress to seek new legislation formalizing *Miranda's* public safety exception.[4] When these efforts stalled, the FBI issued a memorandum ("FBI Memo") in October 2010 establishing the current policy: terror suspects will not be read *Miranda* warnings during the first critical hours of custodial interrogation.[5]

This article critically examines the policy to forego providing *Miranda* warnings to terror suspects due to public safety concerns. The discussion begins with a 1984 Supreme Court decision, *New York v. Quarles*, which held that un-Mirandized statements may be admitted into evidence so long as the questioning is related to an immediate threat to the public.[6] Because the public safety exception already exists, there is concern that formalizing, and likely expanding, the *Quarles* decision through a policy memo or legislation will backfire. Others criticize the FBI Memo as an unconstitutional limitation on the rights of criminal suspects—one of many examples of executive overreach during the last ten years.[7]

There are two primary issues at stake when deciding whether or not to provide *Miranda* warnings to terror suspects. Do we forego the warnings and obtain a confession that could provide valuable intelligence to prevent future attacks, or do we provide the warnings, knowing any confessions stand a much better chance of being admitted into evidence, thereby removing the immediate terror threat? The tension between the forward-looking nature of intelligence gathering and the post-hoc deterrence and incapacitation goals of criminal punishment will always exist, but these goals are not irreconcilable.

The uncertainty of terror threats and the diminished value of involuntary statements undermine arguments calling for an unqualified exception to *Miranda*. Yet the possibility of mass casualty attacks requires officials to utilize all available intelligence in order to save lives.

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[3] Devlin Barrett, *Shahzad Used Inferior Bomb to Avoid Detection*, WALL ST. J., July 21, 2010, http://online.wsj.com/article/SB10001424052748704723604575379371725895584.html. *See also* Perez, *supra* note 2.

[4] Anne E. Kornblut, *Obama Administration Looks Into Modifying* Miranda *Law in the Age of Terrorism*, WASH. POST, May 10, 2010, at A10.

[5] FBI Memorandum, *Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Inside the United States*, N.Y. TIMES, Mar. 25, 2011, http://www.nytimes.com/2011/03/25/us/25miranda-text.html.

[6] New York v. Quarles, 467 U.S. 649, 655-56 (1984).

[7] Charlie Savage, *Delayed* Miranda *Warnings Ordered for Terror Suspects*, N.Y. TIMES, Mar. 24, 2011, http://www.nytimes.com/2011/03/25/us/25miranda.html?ref=US.

After discussing the merits of the policy and legal considerations of the current approach to formalizing the public safety exception, this article analyzes proposals aimed at allowing the full use of a terror suspect's statements to prevent future attacks, and suggests limits to the introduction of those same statements at trial.

II. Doctrinal History

As a result of the Christmas Day Bomber and Times Square bombing cases, Attorney General Eric Holder announced that he would seek a congressional statute that would codify the public safety exception to *Miranda* warnings.[8] When congressional action stalled, we learned later that the FBI published an internal memo, which lays out when and how *Miranda* will be applied to terror suspects.[9] In order to fully understand the implications of the new policy, it is necessary to revisit the doctrinal history of Fifth Amendment rights during custodial interrogation.

Although criminal suspects have always had a Fifth Amendment right against self-incrimination,[10] the enforcement of this right during custodial police interrogations has evolved considerably. Prior to the *Miranda* decision, an accused's right to remain silent was applied through a "voluntariness doctrine." Police violated this doctrine when, in the totality of the circumstances, the defendant's power of resistance was overcome by an excessively coercive police interrogation.[11] Beyond the right to remain silent, the Court held that the Sixth Amendment also provided a right to counsel during police interrogations.[12]

Ultimately, the pre-*Miranda* tests were deemed by many to be incoherent and unpredictable.[13] The "totality-of-the-circumstances" test, for example, allowed lower courts to take into consideration inconsis-

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[8] *Id.*

[9] *Id.*

[10] U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .").

[11] Fikes v. Alabama, 352 U.S. 191, 197-98 (1957) (citing Stein v. New York, 346 U.S. 156, 185 (1953)).

[12] Escobedo v. Illinois, 378 U.S. 478 (1964) (holding that criminal suspects had a right to counsel during police interrogations under the Sixth Amendment).

[13] Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 Ohio St. L.J. 733, 745 (1987) ("Under the 'totality of the circumstances' approach, virtually everything is relevant and nothing is determinative. If you place a premium on clarity, this is not a good sign.").

tent, and at times irrelevant, information to determine whether a suspect's confession was voluntary.[14] As a result, the Court crafted an easily applicable standard in the *Miranda* decision.

a. Miranda

In 1966, the Warren Court issued its decision in *Miranda v. Arizona*, which is the starting point for any discussion of custodial interrogation.[15] The Court established a bright line rule that prohibits the admission into evidence of any statements rendered during a custodial interrogation when the requisite warnings have not been given.[16] Suspects must be warned—as any non-lawyer can recite based on popular television and film crime dramas—that (a) they have a right to remain silent, (b) anything they say can be used against them in court, (c) they have the right to speak to an attorney and to have an attorney present during any questioning, and (d) if they cannot afford a lawyer, one will be provided at government expense.[17] The Court later reaffirmed this standard by holding that "any criminal trial use against a defendant of his involuntary statement is a denial of due process of law."[18]

The *Miranda* decision proved quite controversial, and generated several decades of case law and scholarship seeking to determine the scope of its application. In 1974, the Court fueled debate in *Michigan v. Tucker* over whether the *Miranda* decision clarified a constitutional standard or merely provided a prophylactic safeguard of Fifth Amendment rights.[19] It was only with the *Dickerson v. United States* decision in 2000 that the Court settled the debate.[20] *Miranda* is a constitutional standard, the Court held, but the exceptions established since 1966

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[14] *See, e.g.*, Davis v. North Carolina, 384 U.S. 737 (1966). *See also* Yale Kamisar, *On the Fortieth Anniversary of the* Miranda *Case: Why We Needed It, How We Got It—And What Happened to It*, 5 Ohio St. J. Crim. L. 163, 163-69 (2007) (discussing the "totality of the circumstances" test).

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

[16] *Id.* at 444.

[17] *Id.* at 444-45.

[18] Mincey v. Arizona, 437 U.S. 385, 398 (1978).

[19] Michigan v. Tucker, 417 U.S. 433 (1974) (holding that the *Miranda* rule was only judicially created and was therefore merely a prophylactic safeguard of Fifth Amendment rights). For a discussion of the "constitutional v. prophylactic" debate, see Richard H.W. Maloy, *Can a Rule be Prophylactic and Yet Constitutional?*, 27 Wm. Mitchell L. Rev. 2465 (2001).

[20] Dickerson v. United States, 530 U.S. 428 (2000) (reaffirming *Miranda* as a constitutional rule, but also affirming its progeny by stating that no constitutional rule is unchangeable).

were still valid.[21] This decision effectively mooted the prophylactic argument and cemented *Miranda* as the standard by which to measure the constitutionality of police conduct during custodial interrogations.[22]

Beyond the constitutional question, several important qualifications have been added to *Miranda*. The first case of the Burger Court to deviate from the bright line rule was *Harris v. New York*, which allows a defendant's statements to be used to impeach him as a witness even though the *Miranda* warnings are faulty.[23] The next deviation from *Miranda* arose in *Oregon v. Hass*, which allows a defendant's statements to be used as impeachment evidence even when he is questioned after he asks for, and is denied, assistance of counsel.[24] Similarly, an accused's pre-arrest silence may be used as impeachment evidence if he takes the stand in his own defense.[25] In another impeachment case, *Fletcher v. Weir*, the Court held that when no *Miranda* warnings are given, an accused's post-arrest statements can be used as impeachment evidence during his testimony.[26] In fact, there are numerous post-Warren Court cases that interpret *Miranda* quite narrowly—in terms of custody,[27] waiver,[28] and fruit of the poisonous tree[29]—which have significantly

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[21] *Id.* at 432.

[22] *See* David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SEC. L. & POL'Y 1, n.198 (2011).

[23] Harris v. New York, 401 U.S. 222 (1971). Kamisar suggests that the Court seemed unconcerned with *Miranda*'s language that an accused's statements could not be used for any purpose absent proper rights warnings. Kamisar, *supra* note 14, at 179.

[24] Oregon v. Hass, 420 U.S. 714 (1975). This case specifically gives police little incentive to cease interrogation after the defendant asserts his/her *Miranda* rights. *See also* Kamisar, *supra* note 14, at 179.

[25] Jenkins v. Anderson, 447 U.S. 231, 240 (1980).

[26] Fletcher v. Weir, 455 U.S. 603, 607 (1983).

[27] Illinois v. Perkins, 496 U.S. 292, 297 (1990) (holding that no warning is required when "there is no '*interplay* between police interrogation and police custody'"). Other cases construe custody narrowly. *See, e.g.*, Stansbury v. California, 511 U.S. 318 (1994); Berkemer v. McCarty, 468 U.S. 420 (1984); California v. Beheler, 463 U.S. 1121 (1983); Oregon v. Mathiason, 429 U.S. 492 (1977).

[28] *Miranda* requires that confessions are admissible when the accused "knowingly and intelligently" waives his rights. Miranda v. Arizona, 384 U.S. 436, 475 (1966). Later cases appear to have diminished this requirement. *See, e.g.*, Connecticut v. Barrett, 479 U.S. 523 (1987) (rejecting the contention that defendant's express desire for counsel before making a written statement amounted to invocation of right to counsel); North Carolina v. Butler, 441 U.S. 369 (1979) (holding that no express written or oral waiver is required to establish waiver of *Miranda* rights).

[29] United States v. Patane, 542 U.S. 630, 644 (2004) (holding that evidence derived from a voluntary, un-Mirandized statement will not be excluded); Oregon v. Elstad, 470 U.S. 298 (1985) (holding that the fruit of the poisonous tree doctrine is inapplicable to

weakened the intended Fifth Amendment protections of the decision.[30]

b. Quarles *and the Public Safety Exception*

The current policy of delaying *Miranda* warnings when interrogating terror suspects has its origins in a 1984 case, *New York v. Quarles*, which created the public safety exception.[31] After the initial post-*Miranda* rulings that sought to clarify the limits of "custody" and "interrogation," the *Quarles* Court carved out the first real exception to the bright line rule, allowing police to purposefully deviate from *Miranda*'s rights warnings.[32] In that case, a rape victim informed police that she was assaulted by a man carrying a gun.[33] The police identified a man at a local supermarket matching the suspect's description.[34] When they apprehended the suspect, Quarles, he was wearing an empty weapons holster.[35] The police asked him where the weapon was and he pointed them in the right direction.[36] Only then, after the police retrieved the weapon, did they read Quarles his *Miranda* rights.[37]

The Supreme Court ruled that Quarles' unwarned statements were admissible because the police questions were related to an objectively reasonable need to protect the police or the public from an immediate danger.[38] The Court distinguished *Miranda*'s concerns with mere loss of evidentiary testimony, and the more serious threat in *Quarles* of harm or death due to a public safety issue—in this case a missing gun.[39] Limiting this deviation from *Miranda*, the Court noted

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violations of *Miranda*). But see cases where the statements were involuntary and the derivative evidence is held inadmissible: Wong Sun v. United States, 371 U.S. 471, 488 (1963); United States v. Ghailani, 743 F. Supp.2d 261, 287-88 (S.D.N.Y. 2010) (precluding witness testimony in federal criminal trial because government failed to show that testimony was sufficiently attenuated from coercive government conduct so as to be admissible).

[30] Kamisar, *supra* note 14, at 184 ("It is highly likely that the cumulative effect of cases like *Butler*, *Elstad*, *Harris* and *Hass* contributed significantly to the softening of *Miranda*'s impact.").

[31] New York v. Quarles, 467 U.S. 649, 655-56 (1984).

[32] Rorie A. Norton, Note, *Matters of Public Safety and the Current Quarrel Over the Scope of the* Quarles *Exception to* Miranda, 78 Fordham L. Rev. 1931, 1939 (2010).

[33] *Quarles*, 467 U.S. at 651-52.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 656-57.

that the "exception . . . will be circumscribed by the exigency which justifies it."[40] Justice Rehnquist, writing for the majority in *Quarles*, went out of his way to distinguish the public safety exception from an earlier case, *Orozco v. Texas*.[41] In that case, the accused's unwarned confessions were properly suppressed, Justice Rehnquist reasoned, because the questions were "clearly investigatory," unlike the questioning in *Quarles* that was focused on the safety of the arresting officers and the general public.[42]

Today, there is a split in the Circuit Courts regarding the applicability of the public safety exception. The First, Eighth, and Ninth Circuits apply a broad approach to the exception.[43] This approach allows the exception to apply when there are "inherently dangerous circumstances posing a material threat to officers or the public, without regard to an immediate or objective threat."[44]

A narrow approach is taken by the Second, Fourth, Fifth, Sixth, and Tenth Circuits.[45] Under this approach, courts require officers to have actual knowledge of an imminent threat to public safety before utilizing the exception.[46] Two cases in particular stand out under this approach.

The first is *United States v. Williams*, which permits the application of the public safety exception only when an officer has a "reason to believe (1) that the defendant might have (or recently have had) a weapon, and (2) that someone other than police might gain access to that weapon and inflict harm with it."[47] The second case, *United States v. Estrada*, is arguably the most comprehensive application of *Quarles*. The Court held that the public safety exception only applies "where there are sufficient indicia supporting an objectively reasonable need

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[40] *Id.* at 658.

[41] *Id.* at 659 n.8.

[42] *Id.*; *see also* Norton, *supra* note 32, at 1941.

[43] Norton, *supra* note 32, at 1949. *See* United States v. Liddell, 517 F.3d 1007 (8th Cir. 2008); United States v. Fox, 393 F.3d 52 (1st Cir. 2004); United States v. Brady, 819 F.2d 884 (9th Cir. 1987).

[44] Norton, *supra* note 32, at 1934 (criticizing the broad approach because it allows for officer mishandling of weapons to be the "public safety" concern, rather than *Quarles'* intention that a member of the public be at risk of harm from an unattended weapon).

[45] *See* United States v. Dejear, 552 F.3d 1196, 1201-02 (10th Cir. 2009); United States v. Williams, 483 F.3d 425, 428-29 (6th Cir. 2007); United States v. Estrada, 430 F.3d 606, 612 (2d Cir. 2005); United States v. Mobley, 40 F.3d 688, 693 (4th Cir. 1994); United States v. Raborn, 872 F.2d 589, 595 (5th Cir. 1989).

[46] Norton, *supra* note 32, at 1934.

[47] *Williams*, 483 F.3d at 428.

to protect the police or the public from immediate harm."[48] The salient feature of this case is that it requires police questioning to be grounded in safety concerns. It is the character of the questions—related to safety as opposed to investigatory concerns—that is most important under this application of the *Quarles* public safety exception.[49]

The remaining Circuits, the Third, Seventh, and Eleventh, have either "failed to properly address the issue or have inconsistently applied the *Quarles* exception."[50]

As terrorism related cases make their way through the appeals process, it will be instructive to see whether the broad or narrow approach gains favor among the Circuits. Based on the varied application of the public safety exception in the lower courts, it would not be unreasonable for the Supreme Court to grant certiorari to provide further guidance to the *Quarles* exception. Future developments will certainly shape the way the exception is applied in terrorism related cases.

III. Current Application: Public Values & Public Safety

Today, when terror suspects are taken into custody, the public safety exception is automatically applied. On October 21, 2010, the FBI published an internal memorandum, obtained by the New York Times, setting forth the Bureau's policy.[51] According to this Memo, agents will not provide warnings when (a) there is a reasonable safety concern, and (b) the concern relates to an immediate threat.[52] Once the public safety questions are exhausted, agents are instructed to advise the arrestee of his *Miranda* rights and to cease further questioning unless the arrestee waives those rights.[53] If one stopped reading the Memo at this point, it would appear to be a direct application of the *Quarles* public safety exception. The Memo continues, however, to authorize further questioning when "continued unwarned interrogation

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[48] *Estrada*, 430 F.3d at 614.

[49] *See id.* at 612 ("[A] question that plainly encompasses safety concerns, but is broad enough to elicit other information, does not necessarily prevent application of the public safety exception when safety is at issue and context makes clear that the question primarily involves safety.").

[50] Norton, *supra* note 32, at 1948. *See also* United States v. Duncan, 308 F. App'x 601 (3d Cir. 2009); United States v. Johnson, 95 F. App'x 448 (3d Cir. 2004); United States v. DeSumma, 272 F.3d 176 (3d Cir. 2001).

[51] FBI Memorandum, *supra* note 5.

[52] This does not apply to indicted defendants or persons represented by counsel. *Id.* at n.1.

[53] *Id.*

is necessary to collect valuable and timely intelligence not related to any immediate threat, and . . . the government's interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation."[54]

Under these exceptional circumstances, agents are encouraged to obtain the approval of their Special Agent in Charge ("SAC") in order to proceed after the public safety questions have been exhausted.[55] The SAC should then, when feasible, consult with FBI Headquarters, including the Office of General Counsel, and Department of Justice attorneys before granting approval of questioning under these exceptional circumstances.[56] Requests for continued questioning are reviewed on a case-by-case basis.[57]

The FBI Memo suggests that the additional, non-public safety questioning is based in part on the status of the accused, but primarily on the magnitude and nature of the threat that terrorist organizations pose.[58] It explains that terrorists, particularly operational international terrorists, "may warrant significantly more extensive public safety interrogation without *Miranda* warnings than would be permissible in an ordinary criminal case."[59] As this section reveals, there are a number of concerns with expanding the public safety exception, but these concerns might be justified on the unique ability of terrorists to inflict mass casualty attacks.

a. *A Different Type of Criminal or a Different Type of Crime?*

The FBI Memo reveals that terror suspects will be treated differently than the average criminal suspect. But does the flexible application of constitutional criminal procedure signal that we are dealing with a different type of criminal? Based on the experience of the last ten years during the "war on terror," it is evident that policy makers believe that we are dealing with a unique threat.

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[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* The Memo defines an "operational terrorist" as "an arrestee who is reasonably believed to be either a high-level member of an international terrorist group; or an operative who has personally conducted or attempted to conduct a terrorist operation that involved risk to life; or an individual knowledgeable about operational details of a pending terrorist operation." *Id.*

Well before the debate arose regarding the application of *Miranda* in terrorism cases, the discussion regarding the treatment of suspected terrorists was framed in terms of the law of war.[60] A full decade and two armed conflicts have generated a framework for dealing with al Qaeda, Taliban, and related forces through military tribunals, law of war detention, and targeted killings. Each of these takes place without the full spectrum of constitutional protections.[61]

President Obama changed the focus of this debate dramatically upon taking office in 2009. After ordering a stop to all Military Commission proceedings, the new administration conducted a thorough review of all military detentions, trials, and interrogations of terror suspects.[62] In the following months, the President and Attorney General Eric Holder made clear that federal law enforcement would be the emphasis in future counterterrorism efforts.[63] Although federal court trials against terror suspects have been ongoing throughout the past decade (and longer),[64] the emphasis in 2009 shifted quite dramatically from a war paradigm to civilian law enforcement procedures.

The struggle between a law of war and law enforcement paradigm is far from over. In December 2011, the House of Representatives passed a new defense spending bill that would require the military to take custody of non-United States citizen members of al Qaeda or affiliated groups involved in plotting or carrying out attacks on the United States.[65] Remaining true to its law enforcement emphasis, the administration successfully negotiated with Congress to include language that allows the President discretion to utilize "existing criminal enforcement and national security authorities of the FBI" even if a terror suspect is initially held in military custody.[66]

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[60] *But see, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006) (holding that the first post-9-11 military commission system "lack[ed] power to proceed because its structure and procedures violate[d] both the UCMJ and the Geneva Conventions").

[61] *Id.*

[62] *See* Exec. Order No. 13, 491, 74 Fed. Reg. 4893 (Jan. 22, 2009); Exec. Order No. 13, 492, 74 Fed. Reg. 4897 (Jan. 22, 2009); Exec. Order No. 13, 493, 74 Fed. Reg. 4901 (Jan. 22, 2009).

[63] *See* Keith A. Petty, *Beyond the Court of Public Opinion: Military Commissions and the Reputational Pull of Compliance Theory*, 42 Geo. J. Int'l L. 303, 305 (2011).

[64] *See generally* Richard B. Zabel & James J. Benjamin, Jr., In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts (2008).

[65] Donna Cassata, *Last-Minute Moves Help House Pass $662b Defense Bill*, Assoc. Press (Dec. 15, 2011), http://articles.boston.com/2011-12-15/news/30521013_1_defense-bill-law-enforcement-jay-carney.

[66] *Id.*

Even though the administration is committed to utilizing federal law enforcement, some are concerned that the current deviation from *Miranda* for terror suspects "marks another step back from [the President's] pre-election criticism of unorthodox counterterror methods."[67] Those critical of this approach consider it an erosion of civil liberties akin to the counter-terror and interrogation policies that were widely condemned in the previous administration.[68] In fact, many consider the notion that security concerns—as in the public safety exception—cannot be used to trump civil liberties. Doing so, it is argued, makes us less safe.[69]

One scholar goes so far as to suggest that exploiting constitutional exceptions vis-à-vis terror suspects signals to terrorists that their actions are successful at forcing us to dilute civil liberties.[70] As a result, they are encouraged to attack in order to perpetuate a cycle of violence followed by a reduction in rights.[71] These cases, it is argued, would not be possible if the Court did not feel pressure from lawmakers urging more flexibility to interrogate terror suspects in the wake of the attempted attacks by Abdulmutallab and Shahzad.[72]

The vulnerability of detained terror suspects is another argument used against the application of the public safety exception.[73] Looking back at the development of Fifth Amendment case law, the need for

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[67] Perez, *supra* note 2.

[68] *See* Tim Reid, *Torture Memo has Put US in Danger, CIA Tells Barack Obama*, Times (London), Apr. 21, 2009, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6135965.ece. For a detailed discussion of controversial interrogation practices during the previous ten years, see Keith A. Petty, *Professional Responsibility Compliance and National Security Attorneys: Adopting the Legal Framework of Ethical Legal Process*, 2011 Utah L. Rev 1563 (2011).

[69] Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 Calif. L. Rev. 301, 313 (2009).

[70] Ctr. for Const. Rts., The State of Civil Liberties: One Year Later (2002).

[71] Ryan T. Williams, *Stop Taking the Bait: The Dilution of* Miranda *Does Not Make America Safer From Terrorism*, 56 Loy. L. Rev. 907, 910 (2010) (citing three recent cases that limited the scope of *Miranda* warnings as setting a dangerous precedent); *see also* Florida v. Powell, 130 S. Ct. 1195 (2010) (holding that *Miranda* must not be verbatim in all States); Maryland v. Schatzer, 130 S. Ct. 1213 (2010) (holding that there is a break in custody after a fourteen day attempt to interrogate); Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) (holding that *Miranda* waiver was valid despite ambiguity over whether suspect understood warnings, and that suspect must verbally assert the right to remain silent in order to obtain that right).

[72] Williams, *supra* note 71, at 909.

[73] Amos N. Guiora, *Relearning Lessons of History:* Miranda *and Counterterrorism*, 71 La. L. Rev. 1147, 1148 (2011).

Miranda arose largely because the voluntariness test allowed for considerable pressure to be applied to criminal suspects. Individuals "who were ignorant of their rights, unsophisticated about police practices and court procedures, easily dominated, or otherwise psychologically vulnerable were more likely to be on the losing end of a successful police interrogation."[74] As the mistreatment of terror suspects in previous years indicates, "[t]here can scarcely be a situation where a greater need for protection against police and government abuse exists than that of the detention and interrogation of a terrorist suspect."[75]

While concern for civil liberties is justified in this context, the above arguments habitually discount the legitimate safety concerns at stake in national security cases. Perhaps instead of asking whether we are dealing with a different type of criminal, we must consider whether terror attacks embody a heightened level of criminality. The potential for terrorists to conduct mass casualty attacks is well known and an ongoing concern. The cases of the Abdulmutallab's attempted attack on Christmas Day and Shahzad's failed Times Square bombing demonstrate that terrorist groups, or even radicalized individuals, will not stop trying to kill United States citizens in dramatic, horrifying ways.

Delaying *Miranda* warnings in order to gain information that could prevent a terror attack is a considerable public interest. Recall that the *Quarles* Court stated that the application of the public safety exception "will be circumscribed by the exigency which justified it."[76] In the case of terror threats, the exigency is significantly greater than whether a suspect hid a pistol in aisle six of the grocery store, and, as a result, should allow law enforcement to fully exploit the exception. By doing so, police will have the opportunity to confront a much more serious threat than the concern in *Miranda* of the loss of evidentiary testimony.

It is seductive to frame the current policy regarding the interrogation of terror suspects as a "new law" styled to defeat a "new foe."[77] This argument is flawed because the application of the *Quarles* public safety exception is not a "reduction" of liberty, but rather an implementation of a pre-existing exception to *Miranda* designed to safeguard the well being of the citizenry. As will be discussed in more

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[74] Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 871-72 (1981).

[75] Williams, *supra* note 71, at 928.

[76] New York v. Quarles, 467 U.S. 649, 658 (1984).

[77] Williams, *supra* note 71, at 925-26.

detail below, this requires case-by-case determinations by professionals on the ground.

b. *A Necessary Policy?*

The enduring debate over civil liberties and national security often overlooks whether an expanded public safety exception is necessary at all. One must ask pragmatically, which approach will prove most effective at minimizing the threat while safeguarding the rights of the accused? In the case of interrogating terror suspects, this amounts to determining whether Mirandized interrogations will prevent confessions of attempted or developing plots.

Studies indicate that the *Miranda* decision has had little impact (negative or positive) on confession rates.[78] This means that even when *Miranda* warnings are properly administered many suspects still choose to waive their rights.[79] One commentator humorously notes that while the Fifth Amendment prohibits unlawful coercion, it "does not protect suspects against their own poor judgment."[80] Overwhelmingly, judges, lawyers, and police find that *Miranda* has had a negligible effect on law enforcement.[81] One prominent critic of *Miranda* claims that it has had a detrimental effect on law enforcement,[82] but numerous commentators question these empirical findings.[83]

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[78] Kamisar, *supra* note 14, at 177.

[79] George C. Thomas, III, *Stories About* Miranda, 102 MICH. L. REV. 1959, 1999 (2004).

[80] Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 562 (1996).

[81] ABA SPECIAL COMMITTEE ON CRIMINAL JUSTICE IN A FREE SOCIETY, CRIMINAL JUSTICE IN CRISIS 28 (1988).

[82] Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U. L. REV. 1084, 1084 (1996); Paul G. Cassell, Miranda*'s "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. & PUB. POL'Y 327, 327 (1997); Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 390 (1996). *See also* Paul G. Cassell & Bret Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 840 (1996).

[83] *See* John J. Donahue, III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN L. REV. 1147, 1147 (1998); Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogation Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 402-07 (1999); Stephen J. Schulhofer, *Bashing* Miranda *is Unjustified – and Harmful*, 20 HARV. J.L. & PUB. POL'Y, 347, 347 (1997); Schulhofer, *supra* note 80, at 501; George C. Thomas, III, *Plain Talk about the* Miranda *Empirical Debate: A "Steady State" Theory of Confessions*, 43 UCLA L. REV. 933, 934 (1996); Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 110 (1998).

The high rate of voluntary confessions—nearly eighty percent by one count[84]—refutes the call for the need to do away with *Miranda*, whether applied to terror suspects or not. Reports suggest that Shahzad provided valuable information prior to his *Miranda* warning, and continued providing valuable information well after his warnings.[85] Concerns about applying *Miranda* at all overlook the way that the warnings are applied and the impact they have on criminal suspects. *Miranda* has had positive effects for suspected criminals and for law enforcement by adding predictability and confidence that confessions will pass constitutional muster.[86] Law enforcement ultimately embraced the *Miranda* rule, despite initial misgivings.[87] Whatever can be said of rights warnings, there is no credible evidence that they impede law enforcement.[88]

More importantly, law enforcement officers have other investigative techniques and often better evidence than a suspect's confessions. Abdulmutallab provides a perfect example. Numerous suspects on the plane saw that he was trying to set off an explosive in his shorts, and, when he failed, he was severely burned and had the remnants of the failed makeshift bomb in his possession.[89] The abundance of eyewitness testimony in addition to physical evidence would be more than enough to convict.[90]

The availability of non-confessional evidence generates several schools of thought. On one hand, there is no harm in providing rights warnings because the majority of suspects waive *Miranda* warnings and confess anyway. Conversely, there is little reason to be concerned with the admissibility of a suspect's statements when there is often better

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[84] Leo & White, *supra* note 83, at 468.

[85] Michael B. Mukasey, Op-Ed., *Shahzad and the Pre-9/11 Paradigm*, WALL ST. J., May 12, 2010, http://online.wsj.com/article/SB10001424052748703880304575236303698836186.html.

[86] Scott E. Sundby, Mapp v. Ohio*'s Unsung Hero: The Suppression Hearing as Morality Play*, 85 CHI.-KENT L. REV. 255, 256 (2010) (arguing for continuation of exclusionary rule because of its deterrent effect on Fourth Amendment violations, and because it requires police and judges to articulate their application of Fourth Amendment procedures).

[87] *Id.*

[88] Chris Strohm, *FBI Says* Miranda *Readings Don't Hurt Bureau*, GOV'T EXECUTIVE (Oct. 6, 2010, 10:33 PM), http://www.govexec.com/defense/2010/10/fbi-says-miranda-readings-dont-hurt-bureau/32505/.

[89] Davey, *supra* note 1.

[90] Abdulmutallab ultimately pleaded guilty to all charges against him in October 2011. *Id.*

evidence available to prove the suspect's guilt. Still others view *Miranda* as irrelevant in national security cases. From this perspective, it is better to not read the warnings and gain valuable information about future threats. As discussed in the next section, gathering intelligence about possible future attacks is a priority in terrorism related cases, at times at the expense of law enforcement considerations.

c. *Law Enforcement v. Intelligence*

The pursuit of criminal convictions is not the only government interest at play when interrogating terror suspects. While the incapacitation of a dangerous criminal is always advantageous, the ability to obtain information about future operations is also significant. In the national security arena—as opposed to law enforcement—the paramount concern is intelligence gathering to prevent future attacks.[91] As a result, there will always be a tension between neutralizing immediate threats (law enforcement) and neutralizing future threats (intelligence).[92]

Terrorists often operate with others to conduct well-coordinated simultaneous attacks.[93] Taking this into consideration, the FBI Memo on interrogating terror suspects allows questioning that exceeds immediate public safety concerns.[94] It permits "questions about possible impending or coordinated terrorist attacks; the location, nature, and threat posed by weapons that might pose an imminent danger to the public; and the identities, locations, and activities or intentions of accomplices who may be plotting additional imminent attacks."[95] Additionally, a terror suspect will often be able to provide valuable information about where he was recruited and trained, and sources of funding.[96]

The current FBI policy is a response to concerns that reading *Miranda* warnings to terror suspects will freeze cooperation with both law enforcement and intelligence agents.[97] Nonetheless, even though unwarned interrogations yield more successful intelligence results, they

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[91] *See* Mukasey, *supra* note 85.

[92] *See* Kris, *supra* note 22, at 72.

[93] *Id.* at 77.

[94] FBI Memorandum, *supra* note 5.

[95] *Id.*

[96] *See* Kris, *supra* note 22, at 24, 82-86, 93.

[97] *See* FBI Memorandum, *supra* note 5; *see also* Kris, *supra* note 22, at 73-74.

are only slightly more effective than Mirandized questioning.[98] As mentioned above, accused criminals waive their *Miranda* rights in the vast majority of cases.[99] Moreover, "only Mirandized interrogation offers an enhanced ability to neutralize the terrorist by using his statements" at trial to secure long-term detention.[100]

David Kris, former Assistant Attorney General for National Security at the Department of Justice, describes this dilemma in terms of a balancing test.[101] Reading *Miranda* warnings offers a high risk/high reward situation because there is a higher risk that an accused will not provide valuable intelligence, but the pay-off is a greater likelihood that the statements will be admissible at trial.[102] On the other hand, un-Mirandized questioning may result in better intelligence, but there is also a higher risk that those statements will be excluded at trial. Still, if securing a conviction is the goal, *Miranda* warnings provide the safest way to ensure confessions are available as evidence at trial.[103]

The availability of the public safety exception and the recent provision for mandatory military detention in the new Department of Defense ("DOD") spending bill may skew the balancing test. Regarding Department of Justice ("DOJ") policy, Kris states that there must be proper guidance and training of law enforcement professionals so that they may fully exploit the public safety exception in questioning terror suspects.[104] Proper application of this standard will allow statements into evidence, and in the process incapacitate current threats without rendering rights advice. Similarly, the recent DOD spending bill authorizes military detention of non-United States citizen terror suspects as a lawful means of incapacitating threats.[105] While the recent version of the bill grants the President the discretion to pursue traditional law enforcement measures, the default will be military detention.[106] The balancing test once suggested that utilizing *Miranda* whenever possible

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[98] *See* Kris, *supra* note 22, at 74-75.
[99] Leo & White, *supra* note 83, at 468.
[100] Kris, *supra* note 22, at 74.
[101] *Id.* at 1, 75.
[102] *Id.* at 73-74.
[103] *Id.* at 75 & n.207.
[104] *Id.* at 77.
[105] National Defense Authorization Act for Fiscal Year 2012, S. 1867, 112th Cong. § 1032(b)(1) (2011); Jennie Ryan, *White House Withdraws Threat to Veto Defense Bill*, JURIST (December 15, 2011, 10:21 AM), http://jurist.org/paperchase/2011/12/white-house-withdraws-threat-to-veto-defense-bill.php.
[106] National Defense Authorization Act for Fiscal Year 2012, S. 1867, 112th Cong. § 1032(a)(1), (4) (2011); Ryan, *supra* note 105.

was the best way to neutralize a current terrorist threat, but the availability of detention without trial provides even less incentive to read a suspect his rights.[107]

Critics of an expanded use of the public safety exception argue that it is the capture of terror suspects, not the post-hoc dilution of *Miranda* rights, which makes America safer.[108] This argument fails to account for the value added by intelligence gathering. It is not unreasonable to assume that the information provided by Abdulmutallub was helpful in United States efforts to target Anwar al-Awlaki in Yemen, the former head of al Qaeda in the Arabian Peninsula and a United States citizen.[109]

Some raise the issue that a rights discount for terror suspects is a slippery slope.[110] How long before the FBI Memo is applied to common criminal suspects? These concerns, however, are not credible based on the language in the FBI Memo. It applies only to "operational terrorists," which is defined as "an arrestee who is reasonably believed to be either a high-level member of an international terrorist group; or an operative who has personally conducted or attempted to conduct a terrorist operation that involved risk to life; or an individual knowledgeable about operational details of a pending terrorist operation."[111]

Besides limiting its scope to dangerous persons, the Memo is narrowly tailored to specific offenses that carry the possibility of substan-

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[107] *See* Kris, *supra* note 22, at 74.

[108] Williams, *supra* note 71, at 928.

[109] *See* Kevin Krolicki & Jeremy Pelofsky, *Nigerian Man Charged with Trying to Blow up U.S. Jet*, REUTERS, Dec. 26, 2009, http://www.reuters.com/assets/print?aid=USLDE5BP03M20091226; Mark Mazzetti et al., *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES, Sept. 30, 2011, http://www.nytimes.com/2011/10/01/world/middleast/anwar-al-awlaki-is-killed-in-yemen.html; Rich Schapiro, *Flight 253 Terrorist Umar Farouk Abdulmutallab Led Life of Luxury in London Before Attempted Attack*, N.Y. DAILY NEWS, Dec. 27, 2009, http://articles.nydailynews.com/2009-12-27/news/17942464_1_umar-farouk-abdulmutallab-british-international-school-trafalgar-square.

[110] Guiora, *supra* note 73, at 1172-74.

[111] FBI Memorandum, *supra* note 5, at n.2. It is reasonable to consider whether this definition will extend just to terrorists involved in deadly plots, or those who are further removed from front line operations, such as providing material support in the form of money, propaganda, weapons, or training. *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (interpreting the Material Support for Terrorism statute to include an NGO providing legal support to an armed group in an effort to achieve a peaceful resolution to a civil war). Would the lawyers of this NGO be subject to un-Mirandized interrogation, assuming they are non-United States citizens?

tially more harm to the public.[112] Additionally, the policy has built-in oversight provisions. When agents anticipate that they will need to question a suspect outside the scope of the immediate safety concern, they are to seek approval from their Senior Agent in Charge and should discuss the matter with FBI headquarters and DOJ attorneys.[113]

IV. The FBI Memorandum: An Unlawful Expansion of *Quarles*?

Concerns over the application of the public safety exception to terror suspects are based on two primary issues. First, as partly addressed above, many are concerned that the FBI Memo provides an unlawful extension of the *Quarles* public safety exception. They claim that diminishing civil liberties does not make us more secure, and, in any event, empirical evidence demonstrates that most suspects waive their rights and confess. The second issue is whether a memo was the lawful means to go about making this change to criminal procedure.

On its face, it appears that the FBI Memo is in compliance with the Supreme Court's ruling in *Quarles*. The first part of the FBI Memo is directly based on this decision. In order for law enforcement to forego rights warnings to terror suspects, there must be (a) a reasonable safety concern, (b) the threat must be immediate, and (c) once the public safety questions are exhausted, then the suspect must be read his rights warnings.[114] This part of the Memo seems to comply not only with the *Quarles* standard, but also the narrower interpretation of the public safety exception in *Estrada*[115] and *Williams*.[116]

It is the second part of the Memo—questioning beyond the public safety concern in exceptional circumstances—that could prove troubling. Still, the unwarned questions, standing alone, do not pose a constitutional dilemma.[117] Constitutional violations do not occur at the time of questioning. Rather, Fifth Amendment violations occur, if at all, when unwarned statements are admitted into evidence at trial.[118]

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[112] *See* FBI Memorandum, *supra* note 5.

[113] *Id.*

[114] *Id.*

[115] United States v. Estrada, 430 F.3d 606, 613-14 (2d Cir. 2005).

[116] United States v. Williams, 483 F.3d 425, 428 (6th Cir. 2007).

[117] Chavez v. Martinez, 538 U.S. 760, 767 (2003) (plurality opinion).

[118] United States v. Patane, 542 U.S. 630, 641 (2004) (plurality opinion). *See also Chavez*, 538 U.S. at 769 (holding that the Fifth Amendment right against self-incrimination only prohibits the introduction of compelled statements at a person's criminal trial). *But see* Thomas Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Marti-

As a result, law enforcement agents do not violate the law when they fail to read *Miranda* warnings.

In addition to constitutional compliance, fully exploiting the public safety exception is consistent with FBI policy incorporating the *Quarles* standard. Operational guides to agents provide that "*Miranda* warnings are required to be given prior to custodial interviews,"[119] but that standard booking questions and public safety questions are not "interrogation" for purposes of *Miranda*.[120]

The admissibility of confessions is only one possible concern when not providing rights warnings. Another concern might be the effect on other evidence if it was discovered through unlawful interrogations. Under the fruit of the poisonous tree doctrine, the government is prohibited from admitting evidence derived from unlawful conduct—usually in the context of an unlawful search and seizure violating the Fourth Amendment.[121] So, if the government fails to warn an accused of his rights and obtains a confession about a hidden drug stash, both the statement and the drugs would normally be excluded.[122]

Evidence derived unlawfully will be admissible when it would have inevitably been discovered even without the coercive conduct, if discovered through an independent source, or if the evidence is sufficiently attenuated from the coercive government conduct.[123] For example, in a recent terrorism trial, *United States v. Ghailani*, a key witness was excluded from testifying because the government learned of his identity through coercive interrogation of the accused.[124] The prosecution was unable to sufficiently attenuate the tainted information about the witness from Ghailani's harsh treatment.[125]

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nez, 70 TENN. L. REV. 987, 1007-18 (2003) (arguing that the Fifth Amendment right against self-incrimination was intended by the Framers to prevent the government from compelling self-incriminating statements—the admissibility issue logically followed from the right against compulsory incrimination).

[119] FBI DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE 63 (Dec. 16, 2008), *available at* http://documents.nytimes.com/the-news-operations-manual-from-the-f-b-i.

[120] FBI, LEGAL HANDBOOK FOR SPECIAL AGENTS, § 7-2.1(1), *available at* http://vault.fbi.gov/Legal%20Handbook%20for%20FBI%20Special%20Agents. *See also* Kris, *supra* note 22, at 20 n.56.

[121] Wong Sun v. United States, 371 U.S. 471, 484 (1963).

[122] *Id.*

[123] Nix v. Williams, 467 U.S. 431, 442 n.3 (1984). *See also* Kris, *supra* note 22, at 40-41 n.117.

[124] United States v. Ghailiani, 743 F. Supp. 2d 261, 265 (S.D.N.Y. 2010).

[125] *Id.*

It is clear that coercive interrogation and unlawful government conduct is a bar to admissibility.[126] Un-Mirandized interrogation, however, will not necessarily result in the exclusion of the resulting evidence.[127] In *Michigan v. Tucker*, for example, the Rehnquist Court allowed the testimony of a witness whose identity was learned from unwarned questioning of the accused.[128] In fact, in the *Quarles* decision, both the statement of the accused and the weapon derived from his un-Mirandized statement, were admitted at trial.[129] The Court has gone so far as to declare that the fruit of the poisonous tree doctrine does not apply to violations of *Miranda*.[130] In a more recent case, *United States v. Patane*, the Court clarified that evidence derived from a voluntary, un-Mirandized statement will not be excluded from evidence.[131] The *Patane* Court held that evidence regarding the accused's pistol was admissible, even though this information was derived from an un-Mirandized, and inadmissible, confession.[132]

The legality of the FBI Memo does not seem to be in serious doubt. The *Quarles* Court specifically allows for public safety questioning without warnings. Additionally, the ongoing "exceptional" questioning will only violate the Fifth Amendment if admitted at trial. The remaining issue is whether the Memo was the proper way to apply an expansion of the *Quarles* exception.

A codification of the public safety exception, and a possible expansion, is significant enough to warrant public debate. Attorney General Holder made an effort to generate a dialogue between the political branches by seeking new legislation.[133] Ultimately, his efforts were rebuffed.[134] Such a quick preemption of the discursive process, and the possibility of statutory authority for un-Mirandized terrorist interrogations, was shortsighted. In fact, where the previous administration was often rebuked for not involving Congress in counterterrorism

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[126] *See* Brown v. Mississippi, 297 U.S. 278 (1936).

[127] Michigan v. Tucker, 417 U.S. 433, 451 (1974).

[128] *Id.* at 452.

[129] New York v. Quarles, 467 U.S. 649, 651 (1984).

[130] Oregon v. Elstad, 470 U.S. 298, 318 (1985) (holding that statements during a lawful interrogation were admissible even though the accused was previously interrogated without *Miranda* warnings).

[131] United States v. Patane, 542 U.S. 630, 643-44 (2004) (plurality opinion) (holding that evidence regarding the accused's pistol was admissible, even though this information was derived from an un-Mirandized, and inadmissible, confession).

[132] *Id.*

[133] *See* Savage, *supra* note 7.

[134] Perez, *supra* note 2.

strategy,[135] the reverse now seems to be true. Congress is spurning the administration's efforts at dialogue on controversial issues.[136]

Even if Congress had welcomed this exchange, the Court previously struck down efforts to legislate a change to *Miranda*. In *Dickerson v. United States*, the Court prohibited a specific statutory provision that sought to erase *Miranda* from the history books.[137] The act would have taken us back to the pre-*Miranda* voluntariness standard—requiring that waivers of the Fifth Amendment right to remain silent be knowing and voluntary.[138] *Dickerson* held that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution."[139] Some question whether this decision was based on the Court "slapping back" at Congress for invading its turf.[140]

The distinction between *Dickerson* and the DOJ's approach is that the FBI Memo is an effort to codify existing case law (*Quarles*), not abolish *Miranda* altogether. The issue with the additional questioning—those questions that go beyond the imminent threat—is readily acknowledged in the FBI Memo.[141] In short, prosecutors may lose the ability to admit these statements. Although it does not appear that the DOJ tried to do an end run around the Court to allow for intelligence gathering, there is the possibility that the Memo will be struck down just as the proposed legislation in *Dickerson*.

The Court has often encouraged other branches of government to stake a claim in the *Miranda* debate,[142] but they have, until now, failed to do so in an effective manner. The FBI Memo should be seen as the executive's attempt to apply the law of custodial interrogation to the unique threat posed by terrorist attacks.

V. Proposed Amendments to the Public Safety Exception

The current controversy regarding interrogation of terror suspects will be tested in the future, whether it is the appeal of Abdulmutallab's guilty plea, or a non-terrorism case challenging the disparity in the

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[135] *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[136] *See* Perez, *supra* note 2.

[137] Dickerson v. United States, 530 U.S. 428, 431-32 (2000).

[138] *Id.* at 435-36.

[139] *Id.* at 437.

[140] *See* Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 Sup. Ct. Rev. 61, 72 (2001).

[141] FBI Memorandum, *supra* note 5.

[142] Miranda v. Arizona, 384 U.S. 436 (1966); *see also Dickerson*, 530 U.S. at 428.

application of the public safety exception in the lower courts. As a result, current efforts to codify the public safety exception must take into account the limitations established in *Quarles*.

Unrelated to terrorism cases, one commentator recommends a three-part test to determine compliance with *Quarles*.[143] First, there must be an objective threat.[144] The officer must have a reason to believe the defendant has, or recently had, a weapon.[145] Second, the threat must be immediate.[146] To satisfy this part of the test, someone other than the police must be able to gain access to the weapon and inflict harm with it.[147] The third part analyzes whether the *Quarles* exception, embodied in the first two parts, was properly applied by law enforcement.[148] In this step, the officer's questions must be objectively evaluated to ensure that they are narrowly tailored to the threat at hand.[149] Overall, this test seems to embody the narrow holdings of the Second and Sixth Circuits in *Estrada*[150] and *Williams*[151] respectively, and is a mirror image of the first part of the current FBI policy.[152]

Another commentator has offered a much less restrictive proposal for applying *Quarles* to the interrogation of terror suspects.[153] A draft statute would provide:

> When a law enforcement officer questions any suspect arrested for terrorist offenses found in chapter 113B of Title 18, or comparable offenses under state law, a situation involving the public safety shall automatically be deemed to exist and the officer need not provide any advice of rights to the suspect. Any voluntary statements made by the suspect shall be admissible in any prosecution thereafter brought by the United States or by the District of Columbia.[154]

Instead of requiring an objective and immediate threat to the public safety before deferring rights warnings, the detaining officer under

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[143] Norton, *supra* note 32, at 1963-67.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] United States v. Estrada, 430 F.3d 606, 613-14 (2d Cir. 2005).

[151] United States v. Williams, 483 F.3d 425, 428 (6th Cir. 2007).

[152] FBI Memorandum, *supra* note 5.

[153] Paul Cassell, *Time to Codify a* Miranda *Exception for Terrorists?*, The Volokh Conspiracy (Oct. 21, 2010), http://www.volokh.com/2010/10/21/time-to-codify-a-miranda-exception-for-terrorists/.

[154] *Id.*

this standard need only have a reasonable belief that the suspect is involved in a terrorism related offense. This proposal seems far more permissive than even the current FBI Memo in allowing law enforcement the discretion in giving rights warnings. The discussion above about the "slippery slope" of the application of the exception to the common criminal would also be more relevant here, since law enforcement would have incentive to categorize offenses as terrorism related in order to get around *Miranda* warnings.

The first part of the FBI Memo would easily satisfy either the narrow three-part test or the draft statute above. However, there remains one troubling aspect of the current policy—the questioning permitted in exceptional circumstances. Although this questioning can be justified on legitimate national security concerns and intelligence gathering needs, it is at this stage an additional requirement should be added for attorneys litigating these cases. Currently, the Memo only *suggests* that unwarned questions not relating to the public safety may not be admissible.[155] In rather opaque language, it states that the intelligence value of these statements will sometimes outweigh "disadvantages of proceeding with unwarned interrogation."[156]

In order to remedy this issue, it should be impermissible for prosecutors to attempt to admit statements derived from unwarned, post-*Quarles* questioning. With no relation to the immediate threat, these questions are clearly an unconstitutional expansion of *Quarles*. Prosecutors are ethically obligated to seek justice,[157] which prohibits attempting to violate the rights of the accused in order to gain an advantage at trial. The DOJ should adopt a policy that prohibits efforts to admit post-*Quarles* confessions in terror cases. This would satisfy concerns that the current FBI policy oversteps the *Quarles* exception and sacrifices civil liberties for the sake of timely intelligence. In addition, this would signal to law enforcement that there is no incentive to undertake additional questioning of terror suspects unless there is an operational need. It might also prevent local law enforcement from drawing the wrong lessons from federal practice, thereby overcoming the "slippery slope" argument.

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[155] FBI Memorandum, *supra* note 5.

[156] *Id.*

[157] Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (2008).

VI. Conclusion

The ten years following September 11, 2001 can rightfully be called the national security decade. As the events of that horrible day fade into the distance, the more difficult it becomes to justify utilizing different standards for a different type of criminal. Now is an appropriate time to engage in a discourse regarding constitutional criminal procedures applicable in complex national security cases. This is particularly true in light of attempted terror attacks like the Christmas Day Bomber in 2009 and the Times Square Bomber in 2010.

The current approach to interrogation of terror suspects walks a fine line between constitutional compliance and robust counter-terrorism policy. In the FBI Memo, the *Quarles* public safety exception to *Miranda* warnings is fully exploited with a possible expansion in "exceptional" circumstances. While there are some risks involved in the additional questioning permitted, as well as the fact that this is an internal memo and not legislation, the policy gets at least two things right.

First, there is an appreciation of establishing clear guidance to agents in the field so that the standard is applied uniformly and in a timely manner. This will not only help law enforcement agents protect the public, but also safeguard the rights of the accused. Second, these procedures are based on an interpretation of the *Miranda* decision, which is still the touchstone of any issue dealing with custodial interrogation. That the policy relies on a well recognized exception to that case demonstrates respect for the rule of law.

Ultimately, the broad application of the public safety exception to terror suspects does not appear to erode a criminal suspect's Fifth Amendment right to remain silent. Only if the prosecution makes efforts to introduce the additional questions—those not related to an immediate public safety concern—will the government be in danger of crossing ethical and constitutional limits.

Scholars agree that *Miranda* had a "civilizing effect" on police behavior.[158] Exercising the *Quarles* exception does little to erode that professionalism, and, in fact, makes police aware that public safety questioning is at the extreme end of lawful interrogation. The FBI Memo's oversight provisions similarly safeguard this professionalism.

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[158] Ricahrd A. Leo, *The Impact of* Miranda *Revisited*, 86 J. Crim. L. & Criminology 621, 669-70 (1996).

This will help ensure that *Miranda*'s underlying question—whether the government is willing to treat the "lowliest" among us with "respect and consideration"[159]—is answered in the affirmative.

[159] Gerald Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1471 (1985).