Exporting *Miranda*: Protecting the Right Against Self-Incrimination when U.S. Officers Perform Custodial Interrogations Abroad

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I. Introduction

Zeinab Taleb-Jedi, a fifty-two-year-old American citizen, is standing trial in the Eastern District of New York for material support of a terrorist organization.[1] If convicted, Mrs. Taleb-Jedi could face up to fifteen years in federal prison.[2]

Mrs. Taleb-Jedi moved to Atlanta in 1978 to pursue a master's degree in political science,[3] later settling in Herndon, Virginia.[4] In 1999, she moved to Ashraf, Iraq to teach English classes and work as a translator.[5] Ashraf is the headquarters for the Mojahedin-e-Khalq ("MeK"),[6] an organization dedicated to overthrowing the current Iranian regime.[7] The United States is sympathetic to the MeK's objective, and the MeK enjoys the backing of about 150 members of Congress.[8] However, because the MeK uses violent tactics[9] the U.S. government has labeled the MeK a terrorist organization.[10]

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[1] United States v. Taleb-Jedi, 566 F. Supp. 2d 157 (E.D.N.Y. 2008); *see also* Tom Hays, *Iran Widow Must Go to Trial in NY on Terror Charge*, USATODAY.com, July 24, 2008, http://www.usatoday.com/news/nation/2008-07-24-2924275724_x.htm; Daisy Nguyen, *Woman Accused of Supporting Terror Group*, CBS News, Sept. 30, 2006, http://www.cbsnews.com/stories/2006/09/30/ap/national/mainD8KEV6200.shtml.

[2] Nguyen, *supra* note 1.

[3] William K. Rashbaum, *Iranian Woman Indicted in Brooklyn Terrorism Case*, N.Y. Times, Oct. 3, 2006, at B4, *available at* http://www.nytimes.com/2006/10/03/nyregion/03suspect.html.

[4] Jim Kouri, *Iranian-American Indicted for Attending Terrorist Training Camp*, Haw. Rep.com, Oct. 10, 2006, http://www.hawaiireporter.com (search "Search News" for "Iranian-American Indicted"; follow hyperlink to "Iranian-American Indicted for Attending Terrorist Training Camp").

[5] Government's Opposition to Defendant's Pre-Trial Motions at 18, United States v. Taleb-Jedi, No. CR 06 652 (E.D.N.Y. Jan. 29, 2008), 2008 WL 400568 [hereinafter Gov't's Opposition].

[6] United States v. Afshari, 426 F.3d 1150, 1152 (9th Cir. 2005).

[7] *Id.*; *see also* Privacy Digest, http://www.privacydigest.com (Nov. 15, 2007, 12:20).

[8] Douglas Jehl, *A Nation at War: Oil Supply; U.S. Bombs Iranian Guerilla Forces Based in Iraq*, N.Y. Times, Apr. 17, 2003, at B1, *available at* http://query.nytimes.com/gst/fullpage.html?res=9D05E5DD163AF934A25757C0A9659C8B63.

[9] People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 20 (D.C. Cir. 1999).

[10] *Id.* at 18.

In 2003, the United States invaded Iraq and attacked Ashraf.[11] The attack was brutal,[12] killing at least twenty people and injuring many more.[13] There were no reports that the residents returned fire or put up any resistance.[14] After the attack, U.S. tanks and helicopters surrounded the town, demanding that its occupants disarm or "be destroyed."[15] The residents consented to the U.S. demands,[16] and the camp became a *de facto* detention facility, with the U.S. soldiers regarding the residents as little more than prisoners.[17]

The U.S. army interrogated about 200 residents, including Mrs. Taleb-Jedi, whom officers interrogated on two separate days.[18] On the first day of her interrogation, Mrs. Taleb-Jedi signed an Advice of Rights ("AOR") form.[19] This form bore "some resemblance to the traditional *Miranda* rights offered to criminal defendants in the United States" but "differed significantly from the customary *Miranda* waiver."[20] Prior to the second day of interrogation, Mrs. Taleb-Jedi did not sign an AOR.[21] U.S. officers interrogated her anyway.[22] Later, the U.S. government used the statements she made during both interrogations to indict her for material support of a terrorist organization.[23]

Mrs. Taleb-Jedi's case raises important issues. This Essay looks at one of those issues: the admissibility at trial of testimonial statements made during overseas custodial interrogations by U.S. officers. This Essay uses Mrs. Taleb-Jedi's case to argue that individuals interrogated abroad by U.S. officials require greater protections than those afforded currently by *Miranda v. Arizona*.[24] In doing so, this Essay focuses on the right against self-incrimination found in the Fifth Amendment and the *Miranda* warning/waiver framework constructed to protect that right. Thus, the discussion in this Essay moves along two axes. First, it investigates the constitutional status of *Miranda* warnings. It observes that the Supreme Court has held that the warnings are constitutionally required, but the law in this area is not stable

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[11] Jehl, *supra* note 8, at B1.

[12] *Id.*

[13] Amended Memorandum of Law in Support of [Defendant] Zeinab Talib-Jedi's Pre-Trial Motions at 17, United States v. Taleb-Jedi, No. CR 06 652 (E.D.N.Y. Nov. 1, 2007), *available at* http://www.aclu.org/pdfs/safefree/us_v_talebjedi_memo_of_law.pdf [hereinafter Amended Memorandum].

[14] *Id.*

[15] *Id.* at 18.

[16] Anthony Flott, In Command, http://www.unoalumni.org/incareof/we_remember/col_steve_novotny_heads_iraq_prison (last visited Nov. 4, 2008).

[17] *Id.* (quoting Lieutenant Colonel Steve Novotny as saying that "they were our prisoners").

[18] Amended Memorandum, *supra* note 13, at 31.

[19] *Id.*

[20] *Id.*

[21] Gov't's Opposition, *supra* note 5, at 17.

[22] *Id.*

[23] *Id.*

[24] 384 U.S. 436 (1966).

and could change in the future. Second, it analyzes the right against self-incrimination of suspects interrogated overseas by U.S. officers.

This Essay explores a relatively unmapped region of the contemporary interrogation landscape. It does not address two better-known subjects: the constitutionality of various interrogation techniques like waterboarding, or the constitutionality of detention itself (e.g., the designation of "enemy combatants," the status of prisoners at Guantanamo, habeas corpus, or related issues explored in cases like *Padilla*,[25] *Hamdi*,[26] and *Hamdan*[27]).

The first section of this Essay gives a brief overview of the history of suspects' due process rights regarding testimonial statements made during custodial interrogations. The second section describes the incorporation of the Fifth Amendment against the states and discusses *Miranda* itself before moving on to describe the splintered post-*Miranda* cases and the polarized Court as it exists today. The third section deals with the rights of individuals interrogated abroad by U.S. officers. This section also details the "foreign agent" exception to the *Bin Laden* rule[28] governing such interrogations and two "exceptions to the exception": the joint venture doctrine and tactics that "shock the conscience."

The final sections review the law as it now stands and looks ahead to possible developments. They set forth a number of concerns with the current state of the law, the greatest of which is that courts that review the constitutionality of overseas interrogations simply transplant the framework that has been built to protect the rights of suspects interrogated domestically. This framework does not take into account the significantly greater coercive environment that might exist in overseas interrogations. For example, at the time of her interrogation, Mrs. Taleb-Jedi was essentially stateless. Iranian by birth,[29] she could not live in Iran because she was an enemy of the regime.[30] She had nowhere left to go. If she did not cooperate with U.S. officers (agents of the very government that had bombed her neighborhood, killed her friends, encircled her with tanks, and turned her town into a prison camp), what could she do?

Suspects interrogated by U.S. officers overseas should be afforded greater Fifth Amendment protections than those envisioned by the *Bin Laden* court. These protections include: extending the right against self-incrimination to suspects interrogated by U.S. agents overseas, whether those suspects are tried in the U.S. or abroad; placing a burden on the government to show that a lawyer was not reasonably available at the time of interrogation; and increasing judicial scrutiny of allegations of waiver. This Essay also presents and rebuts two potential counter-arguments: first, that the "public

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[25] Rumsfeld v. Padilla, 542 U.S. 526 (2004).
[26] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
[27] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
[28] United States v. Bin Laden, 132 F. Supp. 2d 168 (S.D.N.Y. 2001); *see infra* Part V.A.
[29] Nguyen, *supra* note 1.
[30] *See, e.g.,* United States v. Afshari, 426 F.3d 1150, 1152 (9th Cir. 2005).

safety" exception to *Miranda* should extend to "war zones," and thus *Miranda* should not apply to overseas interrogations of this sort; and second, that a custodial environment does not exist in a situation like Mrs. Taleb-Jedi's, and thus *Miranda* should not apply.

II. Before *Miranda*, the Due Process Clause was the Primary Means to Protect Suspects' Rights Regarding Testimonial Statements Made During Custodial Interrogations

Custodial interrogation is an important aspect of our justice system,[31] but several constitutional provisions limit this power, including the Fifth Amendment right against self-incrimination,[32] the Fifth Amendment Due Process Clause,[33] and the Sixth Amendment right to counsel.[34] Today, the right against self-incrimination is the most important protection against pre-charge custodial interrogation. However, because it was not applied against the states until 1964,[35] early cases focused instead on the Due Process Clause.

At common law, a defendant's confession did not violate due process as long as it was reliable.[36] Courts presumed that a reliable confession was also voluntary.[37] In later years, courts moved away from the reliability test. They focused instead completely on voluntariness,[38] which led to an expansion of suspects' rights.[39] While the voluntariness test was a significant advancement over the reliability test, some critics have argued that it is fundamentally flawed because few, if any, confessions ever are truly voluntary.[40]

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[31] *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568, 578-80 (1961).

[32] U.S. Const. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . .").

[33] *Id.* ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

[34] U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.").

[35] Malloy v. Hogan, 378 U.S. 1, 3 (1964).

[36] *Culombe*, 367 U.S. at 583 n.25.

[37] Hopt v. Utah, 110 U.S. 574, 585 (1884).

[38] Ziang Sung Wan v. United States, 266 U.S. 1, 14 (1924) ("A confession is voluntary in law if, and only if, it was, in fact, voluntarily made.").

[39] *See, e.g.*, Spano v. New York, 360 U.S. 315, 323 (1959) (finding that a confession violated due process when police did not use violence or the third degree but falsely told the defendant that his childhood friend, a police officer, would lose his job if the defendant did not confess); Ashcraft v. Tennessee, 322 U.S. 143, 151 (1944) (holding that police tactics that fall short of physical violence but involve the "third degree" violate a suspect's due process rights); Brown v. Mississippi, 297 U.S. 278, 281-82 (1936) (holding that a confession obtained by brutally beating a suspect was a violation of due process).

[40] *See, e.g.*, David Simon, Homicide: A Year on the Killing Streets 199 (1991) ("[B]y any standards of human discourse, a criminal confession can never truly be called voluntary. With rare exception, confession is compelled, provoked and manipulated from a suspect by a detective who has been trained in a genuinely deceitful art."); Ronald J. Rychlak, *The Right to Remain Silent in Light of the War on Terror*, 10 Chap. L. Rev. 663, 666 (2007) ("Suspects . . . do not typically confess to civil authorities to cleanse their souls."). *But see*

Perhaps because of this criticism, the self-incrimination clause has replaced the Due Process Clause as the primary protection against statements made during custodial interrogations. However, courts continue to use the voluntariness test,[41] and it remains an important complement to the *Miranda* warning/waiver framework discussed below.[42]

III. *Miranda v. Arizona* Established a Framework to Satisfy the Self-Incrimination Clause

In the 1960s, the Warren Court revolutionized the application of constitutional rights against the states, which in turn significantly impacted the application of constitutional rights against the federal government. In 1964, the Warren Court incorporated the Fifth Amendment against the states.[43] This action augmented suspects' rights during custodial interrogations and paved the way for *Miranda*.

A. Miranda *Requires Specific Warnings*

In *Miranda v. Arizona*, the Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[44] The Court explained that these safeguards exist if the interrogating officer gives the suspect these warnings: (1) that the suspect has a right to remain silent; (2) that anything she says can and will be used against her in court; (3) that she has the right to confer with counsel before answering any questions and to have counsel present during questioning; and (4) that if she is indigent, she has a right to have appointed counsel present.[45]

The *Miranda* Court held that in the absence of these warnings, a confession is inadmissible regardless of whether it is voluntary.[46] The Fifth Amendment does not necessarily require "any particular solution for the inherent compulsions of the interrogation process as it is presently conducted."[47] However, the Court imposed the *Miranda* warnings as a de jure

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Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects' Dignity*, 41 Val. U. L. Rev. 1, 56 (2006) (noting that recent studies suggest approximately 20% of confessions would have occurred in the absence of police interrogation).

[41] Rychlak, *supra* note 40, at 669.

[42] Today, courts using the voluntariness test look at the totality of the circumstances to determine "whether a defendant's will was overborne in a particular case." Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). Courts consider the defendant's age, her education, her intelligence, the length of the detention, the nature and duration of questioning, and the use of physical punishment or the deprivation of food or sleep. *Id.*

[43] Malloy v. Hogan, 378 U.S. 1, 3 (1964).

[44] 384 U.S. 436, 444 (1966).

[45] *Id.* at 467-73.

[46] *Id.* at 477.

[47] *Id.* at 467.

rule because the right against self-incrimination is "the essential mainstay of our adversary system."[48] At the same time, the exact wording of *Miranda* need not be repeated verbatim.[49] In this sense, *Miranda* warnings can be seen as a floor. States and the federal government are free to use different wording, but that wording must be as effective as, or more effective than, wording indicated by the *Miranda* decision.[50]

B. For Miranda *to Apply, the Requirements of Custody and Interrogation Must be Satisfied*

Miranda warnings protect testimonial statements made when two criteria are fulfilled: the suspect must be in custody, and officers must be interrogating the suspect.[51] Two independent inquiries determine whether a suspect is in custody. "[First], what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave."[52] Lower courts make this determination by using an objective test that asks whether a reasonable person would feel "deprived of his freedom in a significant way."[53]

The second prerequisite for *Miranda* is interrogation. The *Miranda* Court described interrogation as "questioning initiated by law enforcement officers."[54] In 1980, the Court elucidated this test, giving it an expansive definition that included "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[55]

C. Miranda *Warnings are Constitutionally Requisite Rather than Prophylactic*

Since *Miranda*, the Court has wrestled with the constitutional status of *Miranda* warnings. In *Miranda* itself, the Court explained that to protect

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[48] *Id.* at 460.
[49] *See id.* at 479.
[50] *See id.* at 478-79.
[51] *Id.* at 444.
[52] Thompson v. Keohane, 516 U.S. 99, 112 (1995).
[53] United States v. Luther, 521 F.2d 408, 410 (9th Cir. 1975) (establishing a totality of the circumstances test that looks at "the language used to summon [the suspect], the physical surroundings of the interrogation, the extent to which [the suspect] is confronted with evidence of his guilt, and pressure exerted to detain him").
[54] *Miranda*, 384 U.S. at 444.
[55] Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) ("[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily on the perceptions of the suspect, rather than the intent of the police.").

against the inherently coercive nature of custodial interrogation, a suspect "must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."[56] This language seemed to leave the door open for two possible interpretations. The first interpretation is that some sort of warning, although not necessarily exactly the *Miranda* language, is constitutionally required. One possible problem with this interpretation is explaining why, if a warning is constitutionally required, the Court went for decades without saying so.

The second interpretation is that *Miranda* warnings, or something like them, are necessary to protect constitutional rights but are not themselves constitutionally requisite. Two possible problems exist with this interpretation. First, it is unclear how the Court can say that something is not constitutionally mandated but is still necessary. One could argue that the judicial inquiry should end with the constitutional analysis, and any related policy decisions should be left to Congress. Second, if *Miranda* warnings are not constitutionally required, then it is unclear how, as the *Miranda* Court stated, a confession can be *de facto* inadmissible if the warnings are not given.

Not surprisingly, in the wake of *Miranda* the Justices struggled to answer these questions. In 1974, Justice Rehnquist wrote that *Miranda* rights "were not themselves rights protected by the Constitution . . . ."[57] In 1985, Justice O'Connor seemed to concur, writing that "errors . . . made by law enforcement officers in administering the prophylactic *Miranda* procedures . . . should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself."[58] Indeed, one text notes that during this period, "doctrinally confusing cases" led to "doctrinal gyrations" that became "a minefield for police officers who wish[ed] to fairly apply the law."[59]

Meanwhile, Congress was not happy with *Miranda*.[60] Soon after *Miranda*, Congress passed 18 U.S.C. § 3501, which provides: "In any criminal prosecution brought by the United States . . . a confession . . . shall be admissible in evidence if it is voluntarily given."[61] Congress made it clear that its purpose in passing § 3501 was to overrule *Miranda*.[62] However, in spite of the fact that the Court at least arguably indicated that *Miranda* warnings were not constitutionally requisite, for thirty years Attorneys General refused to enforce § 3501, apparently believing that the statute was unconstitutional.[63]

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[56] *Miranda*, 384 U.S. at 467.
[57] Michigan v. Tucker, 417 U.S. 433, 444 (1974).
[58] Oregon v. Elstad, 470 U.S. 298, 309 (1985).
[59] Marvin Zalman & Brad W. Smith, *The Attitudes of Police Executives toward* Miranda *and Interrogation*, 97 J. Crim. Law & Criminology 873, 883 (2007).
[60] Rychlak, *supra* note 40, at 673.
[61] 18 U.S.C. § 3501 (2000).
[62] Rychlak, *supra* note 40, at 673.
[63] *Id.* at 674.

In 2000, the Court's holding in *Dickerson v. United States*[64] seemed to settle the dispute. Chief Justice Rehnquist, writing for the majority, stated, "*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress."[65] Therefore, *Miranda* warnings were constitutionally required, and § 3501 was unconstitutional.[66] Perhaps in an effort to explain why courts had gone for so many years without discovering these constitutionally required warnings, Rehnquist stated: "[O]ur application of [the self-incrimination clause] to the context of custodial police interrogation is relatively recent because the routine practice of such interrogation is itself a relatively new development."[67] Justice Scalia, joined by Justice Thomas, wrote a scathing dissent that criticized the vagueness of the majority's holding and the apparent inconsistency between *Dickerson* and previous holdings by Rehnquist, O'Connor, and Kennedy.[68]

In spite of *Dickerson*'s clear statement that *Miranda* rights were constitutionally requisite, the Court remained badly fractured regarding *Miranda*'s legacy. In subsequent cases, no Justice was able to garner a majority, and concurring opinions were often difficult to reconcile. For example, in 2003 dicta that was (at best) tangentially related to the issue at hand, Justice Thomas referred to *Miranda* warnings as "prophylactic" no fewer than five times[69] in spite of the fact that, as Justice Stevens's concurrence pointed out, the Court had "disavowed the prophylactic characterization of *Miranda* in *Dickerson v. United States*" only three years earlier.[70] The very next year, again addressing an issue that had little to do with the case at hand, Thomas asserted: "[T]he *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause."[71]

The same year, in *Missouri v. Seibert*,[72] the Court seemed to breathe new life into *Dickerson*. In *Seibert*, the Court addressed a popular, if transparent, method police used to bypass *Miranda*.[73] In that case, police interrogated a suspect without informing her of her *Miranda* rights.[74] After eliciting a confession, they read her *Miranda* rights.[75] Then, they confronted her with the earlier, non-mirandized confession, forcing her to "cover[ ] the same ground a second time."[76] The Court found that the second statement,

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[64] 530 U.S. 428 (2000).
[65] *Id.* at 432.
[66] *Id.* at 442.
[67] *Id.* at 435.
[68] *Id.* at 445-47 (Scalia, J., dissenting).
[69] Chavez v. Martinez, 538 U.S. 760, 770, 772 & n.3 (2003).
[70] *Id.* at 788 (Stevens, J., concurring).
[71] United States v. Patane, 542 U.S. 630, 636 (2004).
[72] 542 U.S. 600 (2004).
[73] *Id.* at 604.
[74] *Id.*
[75] *Id.*
[76] *Id.*

although technically mirandized, was inadmissible because it "could not effectively comply with *Miranda*'s constitutional requirement."[77]

D. A Suspect May Waive Her Miranda *Rights*

Even when *Miranda* applies, a suspect has the option of waiving her *Miranda* rights. Because of the inherently coercive nature of interrogation, however, a presumption against waiver exists.[78] In fact, the government faces a heavy burden of demonstrating waiver because "the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation."[79]

To show waiver, a prosecutor must demonstrate that (1) a waiver actually occurred, and (2) the waiver was made voluntarily, knowingly, and intelligently.[80] Regarding the first requirement, a waiver need not be express.[81] Instead, existence of waiver depends on "the totality of circumstances surrounding the interrogation."[82] The second requirement has two independent dimensions: whether the waiver was made voluntarily and whether it was made knowingly and intelligently.[83] A waiver is voluntary if it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception."[84] A waiver is knowing and intelligent if it is made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[85]

Courts look at the totality of the circumstances to determine whether a waiver was made voluntarily, knowingly, and intelligently.[86] Only if the totality indicates "both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived."[87] This test involves analysis of a defendant's "age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."[88]

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[77] *Id.*
[78] Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964).
[79] Miranda v. Arizona, 384 U.S. 436, 475 (1966).
[80] *Id.* at 444.
[81] North Carolina v. Butler, 441 U.S. 369, 373 (1979).
[82] Fare v. Michael C., 442 U.S. 707, 725 (1979).
[83] Moran v. Burbine, 475 U.S. 412, 421 (1986) (citing *Miranda*, 384 U.S. at 444, 475).
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Fare v. Michael C., 442 U.S. 707, 725 (1979).

IV. *New York v. Quarles* Established a "Public Safety" Exception to *Miranda*

In 1984, the Supreme Court's *New York v. Quarles*[89] opinion outlined a "public safety" exception to the *Miranda* warning/waiver requirement. In *Quarles*, a woman told police officers that a man raped her at gunpoint and then ran into a supermarket.[90] She told the officers that the man was black, approximately six feet tall, and wearing a jacket that said "Big Ben" in yellow letters on the back.[91] Officers entered the supermarket, where they arrested a suspect who fit the woman's description.[92] The suspect had an empty shoulder holster.[93] Without reading the suspect his *Miranda* rights, police questioned him about the location of his gun.[94] The suspect responded, "The gun is over there."[95] At trial, the government tried to introduce the suspect's statement.[96]

The Supreme Court held that "under the circumstances involved in this case, overriding considerations of public safety justify the officer's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon."[97] Explaining its holding, the Court stated:

> We decline to place officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.[98]

The location of the interrogation also influenced the Court's decision. The Court noted that the *Miranda* Court primarily was concerned about interrogations that occurred in police stations:

> The *Miranda* decision was based in large part on this Court's view that the warnings which it required police to give to suspects in custody would reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interro-

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[89] 467 U.S. 649 (1984).
[90] *Id.* at 651-52.
[91] *Id.* at 651.
[92] *Id.* at 652.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.* at 651.
[98] *Id.* at 657-58.

> gation in the presumptively coercive environment of the station house.[99]

In contrast, the exchange in question occurred in the field, while police were "in the very act of apprehending a suspect."[100] Therefore, concerns about unconstitutional coercion were greatly diminished.[101]

V. Suspects Acted on Abroad by U.S. Officers Enjoy Some Constitutional Protections

In 1950, the Court seemed to indicate that the Fifth Amendment does not apply to aliens tried abroad by U.S. tribunals.[102] However, in its 1958 *Reid v. Covert* opinion, the Court held that the Fifth Amendment does apply to U.S. citizens tried abroad by U.S. tribunals.[103] The Court has also held that aliens in the United States subjected to INS deportation hearings enjoy some, but not the full range of, Fourth Amendment rights.[104]

In *United States v. Verdugo-Urquidez*, the Court held that the Fourth Amendment does not apply "to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country."[105] The Court distinguished *Reid v. Covert*, explaining that unlike the Fifth Amendment, the Fourth Amendment "prohibits 'unreasonable searches and seizures' whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is 'fully accomplished' at the time of an unreasonable governmental intrusion."[106] The Court viewed the pivotal issue as the location of the search rather than the citizenship of the defendant. In doing so, the Court employed a logic of spatial dependence that laid the groundwork for *United States v. Bin Laden*.[107]

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[99] *Id.* at 656 (citing Miranda v. Arizona, 384 U.S. 436, 455-58 (1966)).

[100] *Id.* at 657.

[101] *Id.* at 656-58.

[102] Johnson v. Eisentrager, 339 U.S. 763, 783 (1950) ("The Court of Appeals has cited no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses, except to quote extensively from a dissenting opinion . . . .").

[103] Reid v. Covert, 354 U.S. 1, 18-19 (1957) ("[W]e conclude that the Constitution in its entirety applied to the trials of Mrs. Smith and Mrs. Covert.").

[104] INS v. Lopez-Mendoza, 468 U.S. 1032, 1051 (1984) ("At issue here is the exclusion of credible evidence gathered in connection with peaceful arrests by INS officers. We hold that evidence derived from such arrests need not be suppressed in an INS civil deportation hearing.").

[105] 494 U.S. 259, 261 (1990).

[106] *Id.* at 264 (citing United States v. Leon, 468 U.S. 897, 906 (1984); United States v. Calandra, 414 U.S. 338, 354 (1974)).

[107] 132 F. Supp. 2d 168 (S.D.N.Y. 2001).

A. United States v. Bin Laden *Established that the Fifth Amendment Self-Incrimination Clause Extends to Suspects Interrogated Abroad by U.S. Officers*

Verdugo-Urquidez might seem to stand for the proposition that non-citizens acted upon abroad by U.S. officers do not enjoy constitutional protections. However, in *Bin Laden*, a Southern District of New York judge interpreted *Verdugo-Urquidez* differently.

In August 1998, terrorists bombed the U.S. embassy in Kenya.[108] Acting on a tip, U.S. and Kenyan officers properly arrested Daoud Al-'Owhali and transported him to the Criminal Investigation Division of the Kenyan National Police.[109] They presented him with a modified AOR written in English.[110] After Al-'Owhali indicated that he could not read English but could understand spoken English somewhat, the officers read the AOR to him, watching for signs of comprehension.[111] When the officers finished reading the AOR, they instructed Al-'Owhali to sign his name at the bottom of the form.[112] The officers subsequently interrogated Al-'Owhali.[113] At trial, an FBI interpreter present at most of Al-'Owhali's interrogations stated that in his opinion, Al-'Owhali likely would have had trouble understanding the AOR when it was read aloud to him in English.[114]

The *Bin Laden* court held that an alien enjoys the Fifth Amendment right against self-incrimination when interrogated abroad by U.S. officers, even if the alien's "only connections to the United States are his alleged violations of U.S. law and his subsequent U.S. prosecution."[115] The *Bin Laden* court explained that when addressing Fifth Amendment concerns about overseas custodial interrogations by U.S. agents, courts "may and should apply the [*Miranda*] warning/waiver framework . . . [even if the] defendant's interrogation by U.S. agents occurred wholly abroad and while he was in the physical custody of foreign authorities."[116] Thus, a testimonial statement obtained in the absence of the *Miranda* warning/waiver framework is *de facto* inadmissible at trial in the United States.[117]

The *Bin Laden* court distinguished *Verdugo-Urquidez* by explaining that in the context of Fourth Amendment search and seizure, the relevant moment occurs when agents perform a search. In *Verdugo-Urquidez*, the search occurred outside the United States. In the context of the Fifth Amendment self-incrimination clause, however, the relevant moment is not

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[108] *Id.* at 172.
[109] *Id.* at 173.
[110] *Id.*
[111] *Id.* at 174.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 181.
[116] *Id.*
[117] *Id.*

when officers interrogate a suspect—it is when the government introduces the suspect's testimonial statement at trial.[118] Therefore, if a trial occurs inside the United States, the self-incrimination clause protects the defendant regardless of the location of the interrogation.

Explaining its decision, the court stated that the inherent coerciveness of custodial interrogation is "no less troubling when carried out beyond our borders and under the aegis of a foreign stationhouse. It is, on the contrary, far more likely that a custodial interrogation held [abroad] will present greater threats of compulsion . . . ."[119] Examples of greater threats of compulsion include local laws that "might permit lengthy incommunicado detention subsequent to arrest," "[s]ubstandard detention conditions," and local authorities who "privately engage in aggressive practices."[120] The court reasoned that these factors might create an environment where, by the time U.S. agents arrive to question a suspect, "strong countervailing forces will already have run head first into the free will of the accused."[121] The court also worried that suspects may be predisposed to talking with U.S. officers because they want to be tried in the United States rather than in a country with less progressive protections.[122]

B. Interrogation by Foreign Agents Falls Under an Exception to the Bin Laden *Rule*

The right against self-incrimination does not protect suspects interrogated abroad by foreign agents. Thus, the resulting testimonial statements are not *de facto* inadmissible in U.S. courts.[123] However, a court still will perform a voluntariness analysis to make sure the defendant's due process rights have not been violated.[124]

Two "exceptions to the exception" limit the reach of this rule. The first is the joint venture doctrine. This doctrine has two prongs; if either prong is satisfied, then the right against self-incrimination attaches. The first prong states that "evidence obtained through activities of foreign officials, in which federal agents substantially participated and which violated the accused's Fifth Amendment or *Miranda* rights, must be suppressed in a subsequent trial in the United States."[125] The second prong states that U.S.

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[118] *Id.* at 182 ("Although conduct by law enforcement officials prior to trial may ultimately impair [the privilege against self-incrimination], a constitutional violation occurs only at trial." (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (alteration in original))).

[119] *Id.* at 186.

[120] *Id.*

[121] *Id.*

[122] *Id.* at n.12.

[123] United States v. Yousef, 327 F.3d 56, 145 (2d Cir. 2003).

[124] *Bin Laden*, 132 F. Supp. 2d at 182 n.9 (citing United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972)).

[125] Pfeifer v. U.S. Bureau of Prisons, 615 F.2d 873, 877 (9th Cir. 1980), *cert. denied*, 447 U.S. 908 (1980).

officers may not use local agents to perform a custodial interrogation "in order to circumvent the requirements of *Miranda*."[126] The second "exception to the exception" involves interrogation tactics that "shock the judicial conscience."[127] When a foreign agent's tactics are so extreme that they shock the judicial conscience, a court may exclude evidence garnered as a result of those tactics.[128]

C. "Advice of Rights" Forms are Necessary but may be Adjusted to Fit the Circumstances

Having determined that U.S. officers working abroad must provide *Miranda* warnings before performing custodial interrogations, the *Bin Laden* court next tackled the issue of what exactly the officers should say. The court looked at each of the four *Miranda* warnings described above. The court concluded that the officers must tell the suspect that he has the right to remain silent regardless of whether he has already spoken with foreign authorities.[129] The officers must also tell the suspect that anything he says may be used against him in a U.S. court.[130]

On the other hand, the *Bin Laden* court found that it is not possible to provide suspects interrogated overseas with the same right to counsel warnings as those the *Miranda* Court extended to domestic suspects. The *Bin Laden* court stated: "To the maximum extent possible, efforts must be made to replicate what rights would be present if the interrogation were being conducted in America."[131] In this spirit, officers should tell suspects they have the right to counsel as long as "the particular overseas context . . . presents *no* obvious hurdle to the implementation of an accused's right to the assistance and presence of counsel . . . ."[132] At the same time, the court acknowledged that the availability of counsel "may often be affected by the fact that the suspect is being interrogated overseas and that he is in the physical custody of a foreign nation."[133] Therefore, as long as U.S. officers "do the best they can to give full effect to a suspect's right to the presence and assistance of counsel," while keeping in mind that "the ultimate authority of the foreign sovereign" might limit their options, U.S. officers will be fulfilling the requirements of *Miranda* and any subsequent testimonial statements will be admissible at trial in a U.S. court.[134]

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[126] *Bin Laden*, 132 F. Supp. 2d at 187 (citing *Welch*, 455 F.2d at 213).

[127] Stowe v. Devoy, 588 F.2d 336, 341 (2d Cir. 1978) (quoting United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976)).

[128] *Id.* (deploying the "shock the judicial conscience" framework in the context of search and seizure).

[129] *Bin Laden*, 132 F. Supp. 2d at 187.

[130] *Id.* at 188.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* at 189.

VI. This Area of Law is Unstable and Could Change in the Near Future

This area of the law is unstable both because *Miranda* itself could be reinterpreted and because *Bin Laden* is a district court case that could be reversed by a higher court. As discussed above, the *Dickerson* interpretation of *Miranda* is far from legal bedrock. Only two Justices, Scalia and Thomas, dissented in *Dickerson*. Thomas's opinions in *Martinez* and *Patane*, however, indicate that he and Scalia have not conceded defeat. Moreover, in the eight years since *Dickerson*, the Court's composition has changed. Chief Justice Roberts and Justice Alito have replaced two of the *Dickerson* majority, Justices Rehnquist and O'Connor. These changes, and possible changes in the future, could see a new majority emerge that might overturn *Dickerson*.

Bin Laden depends on *Dickerson* because it assumes that *Miranda* warnings are constitutionally requisite and that the absence of the *Miranda* warning/waiver framework renders a testimonial statement inadmissible at trial. A Supreme Court ruling that overturns *Dickerson* and rules that *Miranda* warnings themselves are not constitutionally protected would attenuate the protections afforded to suspects interrogated both domestically and abroad. This, of course, would significantly change the *Bin Laden* analysis.

Even if the Supreme Court does not overturn *Dickerson*, *Bin Laden* is still a district court case that is not binding on any court. It is not clear to what extent higher courts will agree with its logic. However, in the seven years since *Bin Laden*, a number of opinions have referenced it favorably. A 2003 Second Circuit opinion said that "statements elicited during overseas interrogation by foreign police in the absence of *Miranda* warnings must be suppressed whenever United States law enforcement agents actively participate in questioning conducted by foreign authorities."[135] A 2006 district court opinion cited *Bin Laden* for the proposition that "*Miranda* warnings are required where United States officials conduct [an] interrogation abroad."[136] But a 2007 district court opinion indicated that court's reluctance to embrace the logic of *Bin Laden*,[137] and a 2002 district court opinion seemed to reject it out of hand.[138]

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[135] United States v. Yousef, 327 F.3d 56, 145 (2d Cir. 2003).

[136] United States v. Karake, 443 F. Supp. 2d 8, 49 n.70 (D.D.C. 2006).

[137] *See* United States v. Suchit, 480 F. Supp. 2d 39, 45 n.21 (D.D.C. 2007) ("*Some courts* have recognized that the Fifth Amendment privilege against self-incrimination protects nonresident aliens facing a criminal trial in the United States even where the questioning by United States authorities takes place abroad." (emphasis added)).

[138] *See* Bear Stearns v. Wyler, 182 F. Supp. 2d 679, 680-81 (N.D. Ill. 2002) ("We fail to find it self-evident that the Fifth Amendment's privilege against self-incrimination is available to non-resident aliens.").

VII. Suspects Interrogated Abroad Should Receive Greater Protections than Suspects Interrogated Domestically

The Court should not overturn *Dickerson* or *Bin Laden*. In fact, suspects interrogated by U.S. officers overseas should receive greater Fifth Amendment protections than those envisioned by the *Bin Laden* court. These should include: extending Fifth Amendment protections to suspects interrogated by U.S. agents overseas, whether those suspects are tried in the United States or in United States courts located abroad; placing a burden on the government to show that a lawyer was not reasonably available at the time of interrogation; and increasing the scrutiny of allegations of waiver.

A. All Suspects Should Have a Right Against Self-Incrimination, Regardless of Where They Are Tried

The *Bin Laden* court distinguished *Verdugo-Urquidez*, in part, by deploying the logic of spatial dependence also present in *Reid v. Covert*. The *Bin Laden* court noted that a Fifth Amendment self-incrimination violation occurs not at the time of the interrogation but at the time of the trial.[139] In *Bin Laden*, the trial itself happened in the United States and therefore, the Fifth Amendment right against self-incrimination attached.

This logic of spatial dependence is a convenient means of reconciling *Bin Laden* and *Verdugo-Urquidez*, which might otherwise be in direct conflict. At the same time, this logic "uncritically assumes that there is a spatial limitation to constitutional rights."[140] If the trial happened outside the United States, then presumably the *Bin Laden* framework would not apply, and the defendant would not have access to the Fifth Amendment right against self-incrimination.

The notion of extra-territorial courts is far from fanciful. One author noted: "It is easy to imagine American civil courts set up abroad, as was commonly the case in the nineteenth-century consular jurisdiction era—and which may be true of future U.S. courts, military or civil."[141] In theory the U.S. government might even interrogate prisoners in the United States and then transport them abroad for trial in order to bypass the Fifth Amendment self-incrimination right. Setting aside potential popular backlash, such a system seems to comply at least facially with the requirements of the *Reid v. Covert*/*Verdugo-Urquidez*/*Bin Laden* line of cases.

It simply does not make sense for something as fundamental as the Fifth Amendment protection against self-incrimination to depend on whether the U.S. government chooses to try a defendant outside the United States. The Supreme Court has stated that the right against self-incrimination is the

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[139] *Bin Laden,* 132 F. Supp. 2d at 181-82.
[140] Kal Raustiala, *Geography of Justice*, 73 Fordham L. Rev. 2501, 2556 (2005).
[141] *Id.*

"essential mainstay of our adversary system" which contributes directly to the "hallmark of our democracy," and that it helps to protect "the inviolability of the human personality."[142] Given these weighty concerns, there does not seem to be any equally important countervailing argument in favor of allowing the U.S. government to bypass *Miranda* by trying defendants abroad.

Even in a world where the U.S. government is allowed to try defendants abroad, thus bypassing the self-incrimination right, courts should at least require the government to demonstrate some level of necessity before doing so. In past centuries, extra-territorial courts might have been necessary because international travel was difficult, expensive, and time-consuming. Those reasons seldom apply today, but in some cases the government could argue that time was of the essence and a defendant needed to be tried immediately. The government should be forced to present its argument to a court, and any extra-territorial conviction should stand only if the court finds the government's argument meritorious.

B. The Government Should Have the Burden of Showing That an Attorney Was Not Reasonably Available at the Time of Interrogation

The *Bin Laden* court states that U.S. officers performing custodial interrogations abroad must provide a suspect with an AOR before interrogation, but that in many cases, counsel might not be available.[143] The court reasons that it does not make sense to require officers to promise something they cannot deliver, so officers should be permitted to excise the standard *Miranda* attorney provisions if it would not be logistically feasible to provide the suspect with an attorney.[144]

The court seems to treat this as a straightforward issue. However, the court gives officers too much power and, by doing so, it conflicts with the policy behind the right against self-incrimination. That right exists to protect suspects during interrogation. More fundamentally, it exhibits an underlying mistrust of the inherently coercive nature of custodial interrogation itself. As discussed above, few, if any, confessions ever are truly voluntary, and officers who are experts at the craft of interrogation are skilled in a "genuinely deceitful art."[145] Why then did the *Bin Laden* court give officers the power to determine whether an attorney is available to assist the suspect?

Instead of the *Bin Laden* court's vague, permissive guidelines, courts should impose a greater burden on the government by requiring officers ei-

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[142] Miranda v. Arizona, 384 U.S. 436, 460 (1966) (quoting United States v. Grunewald, 233 F.2d 556, 579, 581-82 (2d Cir. 1956), *rev'd*, 353 U.S. 391 (1957)).

[143] *See Bin Laden*, 132 F. Supp. 2d at 188.

[144] *See id.* at 188-89.

[145] SIMON, *supra* note 40, at 199.

ther to delay interrogation until an attorney arrives or to show that counsel was not reasonably available. A "reasonable availability" test is more in line with the policy behind the right against self-incrimination than the *Bin Laden* court's suggestion.

At trial, when the government tries to introduce a testimonial statement that is the result of an overseas custodial interrogation by a U.S. officer, the government should have the burden of showing that an attorney was not reasonably available for the suspect during the interrogation. This analysis should take into account four factors: (1) the efforts the U.S. officer took to locate an attorney in the local country; (2) the efforts the U.S. officer took to transport an attorney from the United States; (3) the amount of time it would have taken for an attorney to arrive; and (4) any countervailing time constraints on the officer (for example, that the interrogation took place in a country that was unstable, so that staying in the country would potentially be dangerous for the officer).

When reviewing these factors, courts should remember that domestically, a suspect is *always* given counsel regardless of convenience or cost; therefore, a presumption should exist for a finding that counsel was reasonably available. In analyzing the first and second factors, a court should limit its inquiry to the effort made by the officer, rather than an *ex post facto* determination of whether the officer actually could have found an attorney if he had tried. In considering the fourth factor, courts should keep in mind that in the context of the Fifth Amendment right against self-incrimination, the "ticking time bomb" hypothetical should never be a factor. An officer should never be forced to decide between wasting valuable time searching for an attorney, and interrogating a suspect who has valuable information about an impending terrorist strike. Because the right against self-incrimination is remedied by an exclusionary rule, it never prohibits officers from interrogating suspects any time they want; it only prohibits the government from introducing subsequent testimonial statements at trial.

It is possible to argue that it is not desirable or appropriate to ask U.S. officers to look for attorneys in the local country. One author noted that while requiring an officer to look for an attorney "sounds perfectly palatable in theory, determining what local law is with respect to right to counsel is, in practice, a tremendous burden for law enforcement acting abroad."[146] This argument is unpersuasive for a number of reasons. First, neither *Bin Laden* nor the "reasonable availability" test requires an officer actually to succeed in finding an attorney; *Bin Laden* only requires that the officer try, and the reasonable availability test only requires that the officer make a reasonable effort. Second, no indication exists that determining local law with respect to right of counsel would, in fact, be difficult for U.S. officers. In fact, one could argue that if U.S. officers are charged with traveling to foreign coun-

[146] Michael R. Hartman, *A Critique of* United States v. Bin Laden *in Light of* Chavez v. Martinez *and the International War on Terror*, 43 COLUM. J. TRANSNAT'L L. 269, 280 (2004).

tries to interrogate a suspect, the least they could do is be familiar enough with local law to learn about the availability of counsel. Third, though determining local law may be difficult, for instance due to language barriers, placing this additional burden on an officer seems a small price to pay to ensure the protection of a suspect's constitutional rights. This is especially true considering the importance of the right and the fact that the officer need only make a reasonable effort.

C. Courts Should Scrutinize Allegations of Waiver More Closely

In the context of domestic interrogations, the "waiver" aspect of the warning/waiver framework is troubling and possibly contrary to the policy behind *Miranda*. Courts have stated many times their concern with the inherently coercive nature of custodial interrogation. It is unclear why courts are not more concerned that suspects will be coerced into waiving their *Miranda* rights. As one scholar noted, there is "a certain lack of logic in a rule that assumes that any statement taken without warnings must have been coerced, but does not presume that waivers of the right to remain silent or to have an attorney have been coerced."[147] Expressing a similar sentiment, Justice White wrote: "[I]f the defendant may not answer without a warning a question such as 'Where were you last night?' without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint?"[148]

The concern with coercion is even greater in the context of overseas interrogations. For example, if a suspect is in the custody of local law enforcement, the suspect's will is often significantly eroded by the time U.S. officers have a chance to talk with her. Also, suspects like Mrs. Taleb-Jedi might find themselves essentially stateless and unable to imagine what their futures will be like if they decide not to cooperate with U.S. officers. Further, the joint venture doctrine seems to be based on a distrust of officers, both local and American, and seems to suggest the propriety of greater scrutiny of allegations of waiver.

Courts should place a greater burden on the government to show noncoercion of a confession resulting from a waiver of *Miranda* rights during an overseas custodial interrogation. The court's inquiry should seek to balance an objective determination of the amount of coercion the suspect faced against the clarity of the manifestation of waiver. The more coercive the environment, the clearer the indication of waiver must be. In making its determination, a court should keep in mind that some environments might be so coercive that waiver could not occur voluntarily, regardless of the govern-

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[147] Rychlak, *supra* note 40, at 677.
[148] Miranda v. Arizona, 384 U.S. 436, 536 (1966) (White, J., dissenting).

mental precautions or the clarity of the waiver. In those circumstances, testimonial statements that result from waivers should not be admitted.

VIII. Potential Counterarguments

In this section, I describe and rebut two potential counterarguments. The first counterargument is that the public safety exception to *Miranda* should extend to areas designated as "war zones." The second counterargument is that an individual like Mrs. Taleb-Jedi is not in a custodial setting at all, and therefore the right against self-incrimination does not apply.

A. The Public Safety Exception to Miranda *Should Not Extend to War Zones*

The government might argue that Iraq was a "war zone" when U.S. agents interrogated Mrs. Taleb-Jedi and that a public safety exception to the *Miranda* warning/waiver framework should therefore apply. The government might observe that under *Quarles*, it is clear that an exception to *Miranda* exists when (1) the risk to the public safety is sufficiently high (in other words, the situation is dangerous); and (2) it would be logistically difficult to apply *Miranda*.[149]

War zones are the archetypal example of dangerous situations where the risk to the public safety is high. War zones are areas where the rule of law has broken down completely, where officers are not safe, where the distinction between civilians and enemy combatants is not clear, and where a split second can be the difference between life and death. Indeed, it is hard to imagine any situation that is more dangerous than a war zone. To require soldiers to make a choice between risking their lives by taking the time to apply the *Miranda* framework or the threat of risking the inadmissibility of statements at trial is grossly unfair. Applying *Miranda* in war zones, the argument might go, is contrary to the public good because it will drastically impair the government's ability to prosecute defendants apprehended in war zones, who might be very dangerous individuals whom the United States has a compelling interest in removing from society. One could also argue that it is contrary to the goals articulated by the *Quarles* Court: if a single gun is dangerous enough to require the public safety exception, then suspects apprehended in war zones should clearly also fall under this exception.

In addition, the *Quarles* Court noted that a public safety exception is more likely to occur when an officer interrogates a suspect in the field than when the interrogation occurs in the relative safety of a station house. In war zones, there are no "station houses" as courts understand the term; there are no safe areas where officers do not have to worry about being attacked. In war zones, every location is a potential target. This fact might indicate

[149] New York v. Quarles, 467 U.S. 649, 656-58 (1984).

that a war zone exception should exist. Finally, one could argue that war zones are extremely rare, and therefore the war zone exception will not arise often.

These arguments are not persuasive, because two important aspects of the *Quarles* Court's reasoning undermine them. First, the *Quarles* Court envisioned specific exceptions to *Miranda* that are clearly defined by precise facts. The Court limited its inquiry to individual officers who face a specific volatile situation, such as a gun hidden in a supermarket, which they need to neutralize immediately.[150] In doing so, the *Quarles* Court indicated that the public safety exception relies on an individualized inquiry which ensures that the law sacrifices individual rights only when doing so is mandated by the greater public good in a particular situation.[151] Unlike the specific facts of *Quarles*, a war zone by definition is a very large area with many simultaneous events involving many individuals. It is not constitutionally sound to jettison the individualized inquiry and morph the *Quarles* holding into a vast mandate that covers an entire war zone.

Of course, this is not to say that events which occur within a war zone will never fall under the public safety exception. Some of these events may require a public safety exception; many of them likely will not. This determination must be made on a case-by-case basis. To permit a generic war zone extension of the public safety exception would be to abandon the concept of an individualized, fact-based inquiry. This, in turn, would create a gaping hole in the enforcement of individual rights, which clearly is not what the *Miranda* Court intended when it created the warning/waiver framework or what the *Quarles* Court intended when it created the public safety exception.

Secondly, the *Quarles* Court, in addition to envisioning fact-specific exceptions to *Miranda*, relied heavily on the location of the interrogation. The *Quarles* Court explained that it contemplated an exception to *Miranda* for officers working in the field who were dealing with difficult, high-pressure, potentially high-stakes situations, far from the presumptively coercive environment of a station house.[152] A war zone exception would not take into account whether the interrogation occurred in the field or in a station house-like environment such as a military command center or a police station in a secure "green zone." Therefore, a war zone exception would contradict one of the *Quarles* Court's primary reasons for creating a public safety exception in the first place. Importantly, although the *Quarles* Court probably would consider the officer's safety as part of a public safety determination, both the *Quarles* and *Miranda* Courts primarily were concerned about the likely coercive effect on the suspect. Thus, an argument based solely on the officer's safety overlooks a crucial aspect of the *Miranda* Court's reasoning.

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[150] *See id.* at 655.
[151] *See id.* at 658-59.
[152] *See id.* at 656.

B. An Individual in Mrs. Taleb-Jedi's Situation is in a Custodial Environment

Miranda applies only to interrogations that take place in custodial settings.[153] A custodial setting occurs when "a law enforcement official questions an individual" in a setting with "inherently coercive pressures that tend to undermine the individual's will to resist and to compel him or her to speak . . . ."[154] As described above, the test for custody is twofold: (1) what were the circumstances surrounding the interrogation; and (2) would a reasonable person have felt she was at liberty to terminate the interrogation and leave?

The government might argue that Mrs. Taleb-Jedi was not in a custodial setting when U.S. officers interrogated her. She was not under arrest, and a reasonable person in her situation would not understand herself to be under arrest. She was not in a hostile police station house. In fact, she was in the middle of the town where she lived, surrounded by her friends and co-workers, none of whom was under arrest or constrained in any way. The fact that a war happened to be going on outside her town did not somehow transform Mrs. Taleb-Jedi into a prisoner.

This argument is likely to fail. It is true that Mrs. Taleb-Jedi was not technically under arrest at the time of her interrogation. However, a person need not be under arrest to be in custody. It is enough if a reasonable person would have felt she was not at liberty to terminate the interrogation and leave. The restraints associated with a formal arrest include legal authority to detain, a massive disparity in the amount of force at the disposal of two parties, and a suspicion that a party has committed a crime. All of these restraints were present in Mrs. Taleb-Jedi's case. The U.S. officers had legal authority to detain civilians because Iraq was under the martial law of the U.S. military.[155] In addition, a massive disparity in the amount of force existed, because Ashraf was surrounded by U.S. forces that had instructions to shoot on sight anyone who resisted them.[156] Finally, although there is no indication that Mrs. Taleb-Jedi was considered any more of a "suspect" than anyone else in the town, it is clear that all of the residents were treated with a great deal of suspicion.

In general, it is likely that these factors would be present in many overseas interrogations. The first factor, legal authority to detain, would probably be satisfied almost every time a U.S. officer interrogated a suspect overseas, either in a war zone (as in Mrs. Taleb-Jedi's case) or in peacetime when the interrogation occurred with the cooperation of local authorities. The second factor, a massive disparity in the amount of force at the disposal

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[153] *Miranda*, 384 U.S. at 477.

[154] Gov't's Opposition, *supra* note 5, at 47 (citing United States v. Rodriguez, 356 F.3d 254, 258 (2d Cir. 2004)).

[155] *In Command*, *supra* note 16.

[156] *Amended Memorandum*, *supra* note 13.

of the two parties, would also likely be present either in a war zone, where the full might of the U.S. military is brought to bear, or when the interrogation occurs with the cooperation of local authorities. Although many overseas interrogations might not fit into the traditional station house custodial framework, it is probably often the case that a reasonable person would not consider herself at liberty to terminate the interrogation and leave. Therefore, a custodial setting would exist, and this prong of the *Miranda* threshold test would be satisfied.

IX. Conclusion

Suspects like Mrs. Taleb-Jedi need greater protections. It is not enough to simply transplant abroad the *Miranda* warning/waiver framework used to protect domestic suspects' right against self-incrimination. Instead, courts should reinforce overseas suspects' right against self-incrimination by: extending that right to all those interrogated overseas (regardless of whether they are tried overseas or domestically); placing a burden on the government to show that an attorney was not reasonably available at the time of interrogation; and placing a heavier burden on the government to show waiver. With these protections in place, courts will be able to guarantee the right against self-incrimination for suspects interrogated overseas, thus heeding the *Bin Laden* court's warning that it is "far more likely that a custodial interrogation held [abroad] will present greater threats of compulsion" than one conducted in the United States.[157]

[157] United States v. Bin Laden, 132 F. Supp. 2d 168, 186 (S.D.N.Y. 2001).