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LESSONS FROM THE *LINDH* CASE: PUBLIC SAFETY AND THE FIFTH AMENDMENT*

M.K.B. Darmer[†]

INTRODUCTION

Few recent cases have been as provocative as that of the “American Taliban,”¹ John Walker Lindh, who recently pled guilty to charges carrying a prison term of twenty years.² Ever since this American son of privilege was captured fighting alongside American enemies in Afghanistan, his case has stirred passionate feelings and posed difficult legal and moral questions.³

The legal case against Lindh⁴ was based largely upon admissions he made to interrogators after he was captured in

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¹ See Laurie Levenson, *Native Son*, L.A. DAILY J., Jan. 28, 2002, at 7.

² See Plea Agreement, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37-A); Neil A. Lewis, *American Who Joined Taliban Pleads Guilty to Felony Charges*, N.Y. TIMES, July 16, 2002, at A1.

³ See Katharine Q. Seelye, *American Charged as a Terrorist Makes First Appearance in Court*, N.Y. TIMES, Jan. 25, 2002, at A1 (stating that defense lawyers intended to stage “potential trial of the new century” in the *Lindh* case). Among other things, Lindh argued that the government’s case against him violated his right to freedom of association. See Defendant’s Memorandum of Points and Authorities in Support of Motion to Dismiss Counts Two Through Nine on Freedom of Association, Overbreadth and Vagueness Grounds (Motion #3), *United States v. Lindh*, No. 02-37-A, 2002 WL 1489373 (E.D. Va. July 11, 2002). This article focuses on claims made by Lindh implicating the constitutionality of his confession.

⁴ Although initially referred to as “Walker,” John Walker Lindh has since

Afghanistan.⁵ Lindh's admissions were made without counsel⁶ and, he claimed, under conditions so onerous that any waiver of rights and subsequent confession must be judged involuntary. For example, Lindh alleged that he was interrogated after being bound naked to a stretcher and placed in a windowless shipping container.⁷

American courts can now avoid ruling on difficult questions about the constitutionality of his confession: on July 15, 2002, Lindh entered his plea of guilty on the day that a protracted hearing on his motion to suppress his confession was to begin.⁸ In some ways, the *Lindh* case was unusual. Lindh was captured as a Taliban comrade-in-arms in Afghanistan, but was to be tried in a conventional civilian court. In contrast, the government designated Yaser Esam Hamdi, the so-called "second American Talib,"⁹ as an "enemy combatant," and detained him at the Norfolk Naval Station

resumed using his family name, Lindh, as his surname. See *Walker No More*, N.Y. TIMES, Jan. 25, 2002, at A11.

⁵ See Government's Opposition to Defendant's Memorandum in Support of Release and Government's Proffer in Support of Detention at 4, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37-A) ("The Government's case against Lindh includes numerous statements he made to military personnel, to the FBI and to the media."); William Glaberson, *Whether Walker Knew of Counsel Is Issue*, N.Y. TIMES, Jan. 18, 2002, at A15 ("The case against him is almost entirely based on his own statements," said H. Richard Uviller, a criminal law expert at Columbia Law School, "so if those statements are barred from court, there goes the case."); see also Steven Brill, *End of Their Rope*, NEWSWEEK, Apr. 15, 2002, at 48 (emphasizing importance of confession to case); cf. Government's Proffer at 5 ("[I]t is not just his statements that incriminate Lindh;" an "array of corroborating evidence . . . support[s] Lindh's statements to the FBI.").

⁶ See Defendant's Supplemental Memorandum of Points and Authorities in Support of Motion to Compel Production of Discovery in Response to Government's March 15, 2002, Notice of Documents Filed *in Camera* at 1, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37-A) (asserting that statements allegedly made to the government were made during period when "the government held Mr. Lindh incommunicado, denying him communications from his family or counsel"); see also Seelye, *supra* note 3, at A1 (stating that defense lawyers claim Lindh was held "incommunicado" for fifty-four days after requesting a lawyer).

⁷ See Proffer of Facts in Support of Defendant's Suppression Motions at 18, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37-A); see also Defendant's Supp. Mem. to Compel at 3-5 (describing circumstances surrounding Lindh's capture and confinement); Brill, *supra* note 5 (arguing that the most damning confession was made after Lindh was strapped in a container for three days and was denied request for lawyer). A photograph of Lindh in the container was widely circulated. Cf. *Malinski v. New York*, 324 U.S. 401 (1945) (confession held involuntary where, *inter alia*, defendant was stripped of clothing and held in that condition for several hours).

⁸ See Lewis, *supra* note 2.

⁹ See Richard A. Seranno & Greg Miller, *A Second American Talib Might Be in U.S. Custody*, L.A. TIMES, Apr. 4, 2002, at A16.

Brig without filing criminal charges.¹⁰ The Court of Appeals for the Fourth Circuit recently denied Hamdi access to counsel,¹¹ whereas Lindh had a small army of privately retained defense counsel advising him when he entered his guilty plea.¹² The disposition of the *Lindh* case and the status of *Hamdi* underscore the significance of the formal designation “enemy combatant”¹³ and also the difficulty of fitting a case like Lindh’s into the traditional framework of a criminal case.

The exact circumstances of a case like Lindh’s may be unlikely to recur. Yet, future courts will undoubtedly confront similar issues in confessions law that force a balancing of a suspect’s civil rights against the demands of national security.

This Article uses the *Lindh* case to examine enduring questions related to the right against self-incrimination and the right to counsel in the context of custodial interrogations and confessions. It does so against the backdrop of the Supreme Court’s somewhat incoherent Fifth and Sixth Amendment jurisprudence.

In particular, *Lindh* provides an opportunity to address a question heretofore unresolved by the Supreme Court: whether a “public safety” exception should permit continued questioning of a suspect who invokes his right to counsel. The Court has already recognized a public safety exception to *Miranda*,¹⁴ such that authorities can dispense with the traditional *Miranda* warnings in exigent circumstances.¹⁵ In cases where *Miranda* warnings are given, however, the Court in *Edwards v. Arizona*¹⁶ extended “second-level” protections to a defendant who invokes his right to counsel.¹⁷ That is, though *Miranda* confers upon a suspect both the “right to remain

¹⁰ See *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (reversing district court’s order appointing counsel and ordering access to detainee).

¹¹ *Id.*

¹² Parties to the plea agreement included five attorneys for Lindh. See Plea Agreement, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37-A).

¹³ The plea agreement in *Lindh* specifically provided that the government would forego designating Lindh as an “enemy combatant,” unless Lindh engages in specifically proscribed future conduct. See *Lindh Plea* ¶ 21.

¹⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring the provision of warnings to a suspect in advance of custodial interrogation).

¹⁵ *New York v. Quarles*, 467 U.S. 649 (1984). The continued viability of that exception, however, is called into question by the Supreme Court’s recent decision in *Dickerson v. United States*, 530 U.S. 428 (2000). See discussion *infra* Part III.

¹⁶ 451 U.S. 477 (1981).

¹⁷ For the characterization of these protections as “second-level,” see YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 521 (10th ed. 2002).

silent" and the "right to an attorney," a suspect who asks for an attorney effectively prevents interrogators from asking him any further questions. Questioning must come to an immediate halt, and may be reinitiated only by the suspect.¹⁸

Lindh specifically alleged that he invoked his right to counsel while being interrogated in Afghanistan,¹⁹ thus implicating the *Edwards* rule.²⁰ If Lindh indeed asked for an attorney, *Edwards* would have required that government agents stop interrogating him.²¹ It appears, however, that the interrogators persisted.

The *Lindh* case arose at an awkward time in the development of confessions law. Since *Miranda*, the Court has systematically chipped away at the underpinnings and implications of that decision.²² On the crest of the new millennium, the Supreme Court had the opportunity to jettison the remnants of *Miranda* in *Dickerson v. United States*.²³ Instead, in a 7-2 decision reflecting an uneasy compromise,²⁴ the Court tersely endorsed *Miranda* based on an analysis

¹⁸ The *Edwards* rule was expanded in *Minnick v. Mississippi*, 498 U.S. 146 (1990), which held that, when a suspect requests counsel, *Edwards* bars the police from reinitiating questioning without counsel's presence even after the defendant actually consults with his attorney. A suspect who instead asserts his right to remain silent may be re-questioned by authorities under certain circumstances. See *Michigan v. Mosley*, 423 U.S. 96 (1975) and discussion *infra* notes 135-41 and accompanying text.

¹⁹ See *infra* Part I.

²⁰ Indeed, Lindh relied heavily on *Edwards* in his motion to suppress. See Defendant's Memorandum of Points and Authorities in Support of Motion to Suppress Statements for Violations of His Fifth Amendment Rights (*Miranda* and *Edwards*), *United States v. Lindh* (E.D. Va. 2002) (No. 02-37A).

²¹ More precisely, the government would have been unable to introduce into evidence against Lindh any statements made in response to continued interrogation. Courts have held that a violation of the Self-Incrimination Clause does not occur until the statement is actually introduced into evidence against a defendant. See, e.g., *United States v. Bin Laden*, 132 F. Supp. 2d 168 (S.D.N.Y. 2001).

²² See generally Alfredo Garcia, *Is Miranda Dead, Was it Overruled, or is it Irrelevant?*, 10 ST. THOMAS L. REV. 461 (1997).

²³ 530 U.S. 428 (2000).

²⁴ See Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1, 3 (2001) ("The fact that Chief Justice Rehnquist, for decades an implacable critic of *Miranda*, wrote the majority opinion, is . . . a sure sign of a compromise opinion, intentionally written to say less rather than more, for the sake of achieving a strong majority on the narrow question of *Miranda*'s continued vitality.") (footnote omitted); cf. Yale Kamisar, *Foreword: From Miranda to Section 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879, 889 (2001) [hereinafter *From Miranda*] (speculating that Chief Justice Rehnquist "may have decided that the best resolution of *Dickerson* would be a compromise" that affirmed *Miranda* but also maintained all of the post-*Miranda* jurisprudence limiting the impact of *Miranda*) (footnote omitted).

widely denounced as unsatisfactory.²⁵ The Court putatively reaffirmed the “constitutional” foundation of *Miranda* while, paradoxically, apparently leaving intact a line of pre-*Dickerson* cases that had substantially eroded *Miranda* by reasoning that the *Miranda* warnings were subconstitutional or “merely prophylactic.”²⁶ The result is unsettling doctrinal incoherence²⁷ in a critical area of constitutional criminal procedure.

This Article argues that the *Lindh* case provides a compelling example of the justification for a “public safety” exception to *Edwards*.²⁸ If authorities believed that Lindh possessed information critical to public safety—if, for example, there was a basis to believe that he had knowledge of impending terrorist attacks—then strong policy considerations would have supported permitting continued interrogation. It is difficult, however, to square that public policy with the Supreme Court’s recent reaffirmation of *Miranda* in *Dickerson*.²⁹ If a public safety exception is constitutional in the

²⁵ See *infra* note 27.

²⁶ See *infra* Part III.C.

²⁷ Paul G. Cassell, *The Paths Not Taken: Supreme Court’s Failures in Dickerson*, 99 MICH. L. REV. 898, 901 (2001) [hereinafter *Supreme Court’s Failures*] (arguing that majority’s “cursory treatment” of Court’s prior “deconstitutionalization” of *Miranda* “leaves *Miranda* doctrine incoherent”); Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1071 (2001) (stating that the *Dickerson* opinion “was, in a word, terrible. The Court, when squarely faced with the issue of whether the four *Miranda* warnings were required by the federal constitution, not only refused to answer coherently, but breached its duty to provide a justification for *Miranda* or *Dickerson* and squandered an opportunity to rationalize contradictory case law regarding *Miranda*’s exceptions.”); *The Supreme Court 1999 Term—Leading Cases*, 114 HARV. L. REV. 179, 200 (2000) (noting that the Court’s failure to acknowledge *Miranda*’s core substantive holding “left the *Dickerson* Court with no firmer ground for the protection of Fifth and Sixth Amendment rights than the half-hearted assestion that *Miranda* had become a national habit.”). But see Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121, 1121 (2001) (arguing that *Dickerson* placed *Miranda* “upon a more secure, constitutional footing”).

²⁸ Several lower courts have held that there is a “public safety” exception to *Edwards* analogous to the “public safety” exception to *Miranda*, such that authorities could persist in questioning a suspect even in the face of his invocation of the right to counsel. See, e.g., *United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994); *United States v. DeSantis*, 870 F.2d 536 (9th Cir. 1989). Indeed, at least one commentator has argued that the public safety exception, “taken to its logical conclusion, trumps an *Edwards* violation.” Garcia, *supra* note 22, at 464. This argument, however, preceded the Supreme Court’s recent revivification of *Miranda* in *Dickerson*. See *infra* notes 196-216 and accompanying text.

²⁹ 530 U.S. 428 (characterizing *Miranda* as a “constitutional decision” that could not be superseded by legislation). The *Edwards* rule was derived from language in *Miranda* providing that questioning must cease until a lawyer is provided when a suspect invokes his right to counsel. See discussion *infra* notes 149-51 and accompanying text.

wake of *Dickerson*, then complications arise in defining the proper scope of the exception.

This Article analyzes issues related to the *Lindh* confession in four parts. Part I describes the competing claims made by Lindh and the government regarding the circumstances of his confession. That part is not intended to resolve factual discrepancies, but to provide a context for a discussion of confessions law. Part II briefly traces the development of confessions law in this country through *Miranda*. Part III then addresses the Supreme Court's post-*Miranda* jurisprudence, taking a thematic approach that focuses on issues likely to recur in cases involving national security. Sections A and B address the scope of a suspect's right to have counsel present during interrogation. That discussion focuses on *Edwards v. Arizona*,³⁰ which gave increased protection to a suspect who invoked the "right to counsel" strand of *Miranda*, and on *Moran v. Burbine*,³¹ which held that a suspect need not be informed of an attorney's efforts to contact him in order to make an effective waiver. Section III.C then turns to the "prophylaxis" cases, which weakened the thrust of *Miranda* and undermined the basis for the original decision.³² That section focuses particularly on the "public safety" exception to *Miranda* developed in *New York v. Quarles*,³³ which may well have implications for future cases involving threats to national security.³⁴ Section III.D deals with the Supreme Court's recent *Dickerson* decision and the way in which that case implicitly calls into question the continuing viability of cases, such as *Quarles*, that are based on a prophylaxis reading of *Miranda*. It ultimately concludes that the public safety exception embodied in *Quarles* will survive *Dickerson*.

³⁰ 451 U.S. 477 (1981).

³¹ 475 U.S. 412 (1986). The applicability of *Burbine* to the *Lindh* case is explicitly addressed in Glaberson, *supra* note 5.

³² See Lesley A. Lunney, *The Erosion of Miranda: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 728 (1999) (discussing costs associated with Burger and Rehnquist Courts' "eviscerat[ion]" of *Miranda*); see also Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal For The Abolition Of Custodial Confessions*, 68 N.C. L. REV. 69, 74 (1989) ("The Justices' recent attempts to contain *Miranda* have led to a mendacious jurisprudence in the confessions area . . .").

³³ 467 U.S. 649 (1984).

³⁴ See generally Jonathan B. Zeitlin, *Voluntariness with a Vengeance: Miranda and a Modern Alternative*, 14 ST. THOMAS L. REV. 109 (2001) (arguing for an expansion of the public safety exception).

Indeed, Part IV argues that the public safety exception will likely flourish in the wake of concerns for national security and proposes an expansion of the public safety exception to cover cases where legitimate concerns for public safety take precedence over a suspect's *Miranda* right to counsel. Specifically, Part IV calls for a "public safety" exception to the *Edwards* rule and analyzes ways in which the constraints of the Fifth Amendment can be reconciled with the demands of national security.

I. THE LINDH CASE

A. Allegations Surrounding Lindh's Confession³⁵

According to John Walker Lindh, the United States took him into custody on December 1, 2001, only after he endured brutal treatment from Northern Alliance troops in Afghanistan.³⁶ In early November 2001, he and fellow Afghani troops retreated approximately fifty miles after defending against an advance of Northern Alliance troops in the Takhar region.³⁷ This retreat left Lindh weak and exhausted.³⁸ On approximately November 24, Lindh's group turned over their weapons to Northern Alliance troops under the command of General Abdul Rashid Dostum, forces that allegedly had a reputation for committing atrocities against their enemies.³⁹ Dostum's forces imprisoned Lindh and his comrades at the Qala-I-Jangi ("QIJ") fortress near Mazar-e-Sharif.⁴⁰

Immediately upon Lindh's arrival at QIJ, a co-prisoner detonated a grenade, causing Dostum's forces to herd the prisoners into a basement.⁴¹ The next day, the captors brought

³⁵ Before pleading guilty, Lindh's motion to suppress his statements rested on two primary grounds: the claim that his *Miranda-Edwards* rights had been violated and the claim that his statements were involuntary. This discussion deals primarily with Lindh's claims regarding his *Miranda* and *Edwards* rights, which are the focus of this Article. The other claims are provided here in substantially abbreviated form and will be dealt with more exhaustively in a companion article that more closely analyzes Lindh's due process claims, M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y __ (forthcoming 2003) (draft on file with author).

³⁶ See Proffer of Facts in Support of Defendant's Suppression Motions at 3-5, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37-A).

³⁷ See *id.* at 3.

³⁸ See *id.* at 4.

³⁹ See *id.* at 5; see also *id.* at 2-3, n.6.

⁴⁰ See *id.*

⁴¹ Defendant's Proffer at 5.

Lindh and other prisoners out to an open area. They seated the handcuffed prisoners in rows and beat them.⁴² After one of the guards struck Lindh in the head, Lindh noticed two Americans with guns and cameras walking among the group.⁴³ The two Americans⁴⁴ pulled Lindh out of the line and briefly interrogated him, then returned him to the group.⁴⁵ Lindh made no statements at that time.⁴⁶

While sitting with his hands tied, Lindh heard an explosion and attempted to run, but was shot in the thigh and played dead for about twelve hours.⁴⁷ Fellow prisoners then helped Lindh and others into the basement of QIJ.⁴⁸ Dostum's forces eventually killed many of Lindh's comrades.⁴⁹ Finally, "[w]ounded, starved, frozen and exhausted," Lindh "emerged from the basement on December 1" with about eighty-five other survivors of the 300 prisoners who had arrived with him at QIJ.⁵⁰

Lindh's captors transported him to Sheberghan.⁵¹ United States Special Forces and a CNN reporter encountered Lindh in a small room.⁵² The reporter, Robert Pelton, asked Lindh questions, but Lindh refused to grant permission to film him.⁵³ In response, Lindh alleged, Pelton offered Lindh the food

⁴² *Id.* at 6.

⁴³ *Id.*

⁴⁴ One of the Americans was Agent Johnny Michael Spann of the CIA, see *infra* note 48.

⁴⁵ *Id.* at 7.

⁴⁶ See Government's Response to the Defendant's Proffer of Facts at 13, United States v. Lindh (E.D. Va. 2002) (No. 02-37A).

⁴⁷ Defendant's Proffer at 7-8.

⁴⁸ See *id.* According to the government, Johnny Michael Spann of the CIA was conducting interviews of detainees at QIJ, including Lindh, on November 25, shortly before the prison uprising. Lindh did not answer any of Spann's questions. Spann was ultimately killed during the uprising. See Affidavit in Support of a Criminal Complaint and an Arrest Warrant ¶ 15, United States v. Lindh, (E.D. Va. 2002) (No. 02-37A).

⁴⁹ Defendant's Proffer at 9-10.

⁵⁰ *Id.* at 10. The government pointed out that these particular circumstances had nothing to do with its treatment of Lindh while in United States custody. See Government's Response at 4. Had Lindh not made "astoundingly bad decisions," he would not have suffered the privations and conditions he experienced during the retreat and while hunkered down in the basement. *Id.* In the government's view, Lindh was not the victim of fate. Rather, he took "extraordinary measures to insert himself into this war . . . and he should not now be heard to complain that life on the battlefield was unpleasant." *Id.*

⁵¹ Defendant's Proffer at 11. Sheberghan contained both a hospital and a prison. See *id.*

⁵² See *id.* at 12.

⁵³ *Id.* The government argued that Lindh's objection was to being filmed, not

and medical assistance of the U.S. forces in exchange for the interview.⁵⁴ Only then, “fearing torture and death if he remained in Dostum’s custody,” did Lindh agree to the interview, according to him.⁵⁵

The government took strong issue both with Lindh’s suggestion that Pelton was acting in connection with the U.S. military and Lindh’s claim that his statements were involuntary.⁵⁶ It characterized Pelton as “a reporter hot on the trail of a sensational story” who needed no prompting to interview Lindh.⁵⁷

The CNN interview was broadcast on December 2, 2001.⁵⁸ In it, Lindh stated that his “heart became attached” to the Taliban.⁵⁹

Following the interview with the reporter, Special Forces personnel interrogated Lindh at a nearby compound, held him overnight and then transported him to the Turkish School House at Mazar-e-Sharif.⁶⁰ Lindh was held there for two or three days, then interrogated again.⁶¹ Lindh asserted that he asked when he could see a doctor or lawyer, more than once, but that his interrogators “responded that they did not know.”⁶²

to being questioned. See Government’s Response to the Defendant’s Proffer of Facts at 2 & n.5, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37A).

⁵⁴ Defendant’s Proffer at 12.

⁵⁵ *Id.* Lindh ultimately subpoenaed Pelton to testify at the hearing on Lindh’s motion to suppress statements. Lindh sought to suppress the content of his interview to Pelton in addition to statements made to United States authorities.

⁵⁶ Government’s Response at 15-16.

⁵⁷ *Id.* Specifically, it said that “[t]he notion that Pelton needed the U.S. military to prompt him to question Lindh is, to put it mildly, preposterous.” *Id.* In addition, the government argued that Lindh’s protestation to Pelton that he did not wish to be filmed was “hardly an indication of a ‘will’ that has been overwhelmed,” *id.*, and pointed out that Lindh’s demeanor during the interview demonstrated that he had his wits about him. See *id.* at 16-17. Specifically, the government pointed out that Lindh was “by turns, sharp, polite, cautious, articulate, definite in his opinions, vague when it serves his purposes, and keenly interested in his precise status. Whatever privations Lindh claims to have suffered before his arrival at the Sheberghan hospital facility, he still had his wits fully about him when he was interviewed by CNN.” *Id.* at 16-17. Furthermore, “the notion that the United States military needed CNN to conduct an interview on its behalf is similarly preposterous.” *Id.* at 16.

⁵⁸ Affidavit in Support of a Criminal Complaint and an Arrest Warrant ¶ 13, *United States v. Lindh*, (E.D. Va. 2002) (No. 02-37A).

⁵⁹ *Id.* The CNN correspondent also reported that Lindh acknowledged attending “several training camps,” being “trained in the use of a Kalashnikov rifle,” having seen Bin Laden “several times” and having “beg[un] his jihad on the front lines north of Kabul . . .” *Id.*

⁶⁰ *Id.* at 14-15.

⁶¹ *Id.* at 15.

⁶² Proffer of Facts in Support of Defendant’s Suppression Motions at 16, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37-A).

A bullet remained lodged in Lindh's leg, and he repeatedly expressed concern about his wound.⁶³

The government denied that Lindh asked for an attorney during this period.⁶⁴ While acknowledging that military personnel did not give Lindh *Miranda* warnings, it argued that military interrogation for the purposes of gathering military intelligence is simply not subject to the *Miranda* rules.⁶⁵

The government flew Lindh to Camp Rhino on December 7, 2001.⁶⁶ Before that flight, according to Lindh, one soldier told him that he "wanted to shoot him there and then."⁶⁷ During the flight to Camp Rhino, Lindh alleged that his handcuffs were so unbearably tight that he screamed, "pleading with the guards to loosen them."⁶⁸ The guards refused and told Lindh to "shut up" when he asked his captors not to kill him.⁶⁹

Lindh alleged that, at Camp Rhino, guards cut off his clothes, bound him to a stretcher with duct tape, and placed him in a windowless metal shipping container, "[c]ompletely naked, wearing nothing but his blindfold and shaking violently from the cold nighttime air."⁷⁰ About twenty minutes later, a member of the U.S. Marine Corps questioned Lindh briefly about what he was doing in Afghanistan and whether he was an American.⁷¹

⁶³ *Id.* The bullet was removed about two weeks later. *See id.* at 21. A fuller discussion of Lindh's medical condition as it relates to the circumstances surrounding his confession will be addressed in the author's companion due process article. *See supra* note 35.

⁶⁴ *See* Government's Opposition to Defendant's Motion to Suppress Statements for Violation of His Fifth Amendment Rights (*Miranda* and *Edwards*) at 29, *United States v. Lindh* (E.D. Va. 2002) (No. 03-37A) ("We expect that each of his interrogators during the period December 1 through December 7 will testify unequivocally that a request for counsel was never made."); *see also id.* at 30 (stating that Lindh first asked for counsel on December 12, 2001).

⁶⁵ *Id.* at 3-4, 6-15; *cf. id.* at 18-20 (arguing that, even if *Miranda* applied, Lindh's statements should be admissible under an analogy to the "public safety" exception to *Miranda*).

⁶⁶ *See* Defendant's Proffer at 17.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 17-18 (citing to government discovery letter for assertion regarding Lindh's being told to "shut up").

⁷⁰ *Id.* at 18.

⁷¹ Defendant's Proffer at 18 (citing Government Discovery Letter #15). According to Lindh, a lead military interrogator told a Navy physician that "sleep deprivation, cold and hunger might be used' during [Lindh's] interrogation." *Id.* (citing Government Discovery Letter #21). The government took sharp issue with Lindh's

After remaining confined inside the stretcher for two days, Lindh said that he was taken, “still blindfolded and handcuffed,” to a nearby building or tent.⁷² His blindfold was removed and he was greeted by an FBI agent.⁷³ Then:

The agent told Mr. Lindh he wanted to ask some questions and proceeded to read from an advise of rights form. Whenever the form referred to Mr. Lindh’s right to counsel, the agent paused and said, “Of course, there are no lawyers here.” Mr. Lindh was not told that his parents had retained an attorney for him who was ready and willing to see him in Afghanistan. . . .

After the advice of rights, Mr. Lindh asked when he could see an attorney. Again the FBI told Mr. Lindh that there were no lawyers there. Faced with the prospect of being returned to the same or worse conditions that had immediately preceded his FBI interrogation, Mr. Lindh signed the waiver form.⁷⁴

The government consistently maintained that the FBI agent who questioned Lindh on December 9 and 10 advised him of his *Miranda* rights, and that Lindh acknowledged that he understood his rights and waived them.⁷⁵ It further contended that Lindh’s account of the agent’s statement was

claim that it used such tactics to overbear Lindh’s will and encourage him to talk. See Government’s Response to the Defendant’s Proffer of Facts at 22-24, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37A). Specifically, “Lindh’s claims—‘that the Government bound him naked and blindfolded in a box to prepare him for interrogation by the FBI’—[are] simply untrue. . . . [A]t the time he was interviewed by the FBI, Lindh had clothes to wear, access to several blankets, had received meals on December 8 and December 9, and . . . had slept.” *Id.* at 23. While it did not dispute that Lindh was placed in a “large metal container,” it asserted that he was secured inside only “initially” and that “[w]ithin an hour or two, he was wrapped in two comforters for warmth.” Government’s Opposition to Defendant’s Memorandum in Support of Release and Government’s Proffer in Support of Detention at 6, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37-A). Then, within two days, the government provided Lindh with medical “scrubs” and released him from the stretcher. *Id.* The government justified Lindh’s confinement, saying that he was “treated as a potentially dangerous detainee given his suspected affiliation with a terrorist organization.” *Id.* It also asserted that Lindh received twice-daily medical care from a Navy physician, including antibiotics, ointment and dressing changes. *Id.*

⁷² Defendant’s Proffer at 20.

⁷³ *Id.*

⁷⁴ *Id.* Cf. *Duckworth v. Egan*, 492 U.S. 195 (1989) (upholding adequacy of warning where government advised suspect that “[w]e have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court”). Had Lindh’s suppression motion proceeded to resolution, he likely would have argued that his case was distinguishable from *Egan*’s because his family had retained a lawyer ready, willing and able to meet with him.

⁷⁵ See Affidavit in Support of a Criminal Complaint and an Arrest Warrant ¶ 5, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37-A); Defendant’s Memorandum of Points and Authorities in Support of Motion to Suppress Statements for Violations of His Fifth Amendment Rights at 5 (*Miranda* and *Edwards*), *United States v. Lindh* (E.D. Va. 2002) (No. 02-37A).

misleadingly incomplete. According to the government, although the agent did tell Lindh that no lawyers were available, he also made clear that, if Lindh wanted an attorney, the interview would simply cease.⁷⁶

On December 9 and 10, the FBI interviews went forward, however, and were fruitful. According to the government, Lindh admitted that he traveled to Afghanistan in June 2001 to fight with the Taliban; was referred to a group run by Bin Laden's Al Qaeda terrorist organization; trained at an Al Qaeda terrorist training camp for seven weeks and met with Bin Laden in a small group.⁷⁷ Ultimately, Lindh "chose to go to the front lines to fight."⁷⁸ According to the government, Lindh further stated that "on September 11 or 12, he learned about the terrorist attacks in Washington and New York by radio. According to [Lindh], it was his and his comrades' understanding . . . that Bin Laden had ordered the attacks and that additional attacks would follow."⁷⁹ Lindh's admissions formed the backbone of the government's case against him.⁸⁰

Lindh alleged that his conditions of confinement improved after the FBI interrogations.⁸¹ Lindh also described his family's efforts to contact him and communications from an attorney, James Brosnahan, to government officials. Brosnahan had been retained by Lindh's parents to represent their son and, beginning on December 3, Brosnahan asked that Lindh not be interrogated. On December 14, the government advised Brosnahan that Lindh was "in the control of the United States armed forces and is being held aboard the USS PELELIU in the theater of operations."⁸²

⁷⁶ Government's Miranda Opposition at 5-6.

⁷⁷ Complaint at ¶ 7.

⁷⁸ *Id.* at ¶ 9.

⁷⁹ *Id.* at ¶ 10.

⁸⁰ See, e.g., Complaint (outlining extensive admissions made by Lindh); Neil A. Lewis, *Interviewer of Captured American Must Testify, Judge Rules*, N.Y. TIMES, July 13, 2002, at A8, ("the 10-count case against Lindh is knit together almost entirely from his own candid accounts of involvement with Al Qaeda and the Taliban").

⁸¹ Proffer of Facts in Support of Defendant's Suppression Motions at 21, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37-A). On December 14, U.S. personnel took Lindh to the vessel USS PELELIU. See *id.* at 21. Later, a Navy physician operated on Lindh and removed the bullet from his body. *Id.* The government described the fact that Lindh received surgery on December 14, and further described Lindh's treatment aboard the USS PELELIU in favorable terms. See Government's Opposition to Defendant's Memorandum in Support of Release and Government's Proffer in Support of Detention at 7, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37-A).

⁸² Defendant's Supplemental Memorandum of Points and Authorities in Support of Motion to Compel Production of Discovery in Response to Government's

A hearing on Lindh's motion to suppress statements made to U.S. representatives and to CNN correspondent Robert Pelton was scheduled to begin on July 15, 2002.⁸³ Instead, on that date, Lindh pled guilty to two felony charges carrying a prison sentence of twenty years.⁸⁴

B. *The Lindh Plea*

Lindh pled guilty to supplying services to the Taliban and to carrying explosives during the commission of a felony.⁸⁵ The agreement requires Lindh to cooperate fully with the United States by providing all information known to him and by testifying truthfully at any trials or proceedings, including military tribunals.⁸⁶ Lindh also agreed to withdraw all claims of "mistreatment by the United States military," and he acknowledged "that he was not intentionally mistreated by the U.S. military."⁸⁷ The United States agreed not to designate Lindh "an unlawful enemy combatant," barring proscribed future conduct by Lindh.⁸⁸

The government's explicit agreement to forego treating Lindh as an "enemy combatant" highlights the differences between the Lindh case and that involving the second American Talib, Yaser Esam Hamdi. Hamdi has been specifically designated an "enemy combatant," and that status has led to his indefinite detention without counsel.⁸⁹ In recently arguing against the appointment of counsel for Hamdi, the government contended that Hamdi's access to counsel would "interfere with—and likely thwart—ongoing efforts by the United States military to gather and evaluate intelligence about the enemy, its assets, and its plans, and its supporters."⁹⁰ Without the status of "enemy combatant," however, Hamdi

March 15, 2002, Notice of Documents Filed *in Camera* at 8, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37-A). Lindh alleges that he did not receive mail until about January 6, 2002. *Id.*

⁸³ Scheduling Order, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37-A) (filed Feb. 15, 2002); *see also* Lewis, *supra* note 2.

⁸⁴ Plea Agreement, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37-A); Lewis, *supra* note 2.

⁸⁵ Lindh Plea ¶ 1.

⁸⁶ *Id.* ¶ 4.

⁸⁷ *Id.* ¶ 22.

⁸⁸ *Id.* ¶ 21.

⁸⁹ *See generally* Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002).

⁹⁰ Brief for Respondent-Appellants at 38, *Hamdi v. Rumsfeld* (4th Cir. 2002) (No. 02-6895).

would have access to counsel, as Lindh ultimately did. Lindh also had the opportunity to argue that his confession should have been suppressed, both because it violated his Fifth Amendment rights as interpreted by *Miranda* and *Edwards*, and because the statements were involuntary under the Due Process Clause. While the court in his case avoided that quagmire, these questions are certain to recur. Deciding whether confessions should come into evidence often pits the rights of the accused against the interests of security.

II. DEVELOPMENT OF CONFESSIONS LAW IN THE UNITED STATES

For most of the twentieth century, the Supreme Court analyzed the admissibility of confessions under the auspices of the Due Process Clauses to the Constitution, deciding on a case-by-case basis whether confessions were "involuntary."⁹¹ The Court's confession cases, however, yielded "no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question arose."⁹² Rather, the voluntariness test involved "a complex of values."⁹³ Professor Steven Penney recently identified three concerns that dominated the Court's opinions during this era:⁹⁴ the unreliability of confessions extracted under questionable circumstances, deterring abusive police practices⁹⁵ and

⁹¹ See *Dickerson v. United States*, 530 U.S. 428, 433 (2000) (explaining that "notions of due process" prohibited coerced confessions before *Miranda*); *Michigan v. Tucker*, 417 U.S. 433, 441 (1974) ("In state cases the Court applied the Due Process Clause of the Fourteenth Amendment, examining the circumstances of interrogation to determine whether the processes were so unfair or unreasonable as to render a subsequent confession involuntary."); *Spano v. New York*, 360 U.S. 315, 315 (1959) (describing case as "another in the long line of cases presenting the question whether a confession was properly admitted into evidence under the Fourteenth Amendment."); see also Darmer, *supra* note 35 (tracing history of due process law in confessions cases); Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2197 (1996) (stating that due process had a "constitutional reign of thirty years").

⁹² *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973) (seeking guidance from the Court's confessions jurisprudence in resolving question of voluntariness in Fourth Amendment consent search context).

⁹³ *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960).

⁹⁴ Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 310, 313 (1998).

⁹⁵ Most commentators have focused on some version of Penney's first two concerns. See JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 65 (1993) [hereinafter GRANO, *CONFESSIONS*] ("In the view of most commentators, courts have had two real reasons for excluding confessions as involuntary: (1) a desire, surviving from the common-law approach, to eliminate untrustworthy confessions and (2) a desire to control offensive police practices.").

protecting the autonomy of the individual suspect.⁹⁶ Of course, the concerns were often intertwined, sometimes inextricably. For example, in some cases the goals of avoiding false confessions and deterring police misconduct were complementary, as abhorrent police practices were often the same tactics likely to produce unreliable confessions.⁹⁷

As police tactics moved beyond the uncontroversially despicable to the more morally ambiguous, however, the line-drawing became more difficult. As Professor Lesley A. Lunney stated, "[i]n part, the difficulties with applying the voluntariness standard to control psychological coercion were the result of the Court's internal disagreements concerning the proper balancing of the interests of suspect and society."⁹⁸ Application of the due process test, pre-*Miranda*, led to bitter divisions because of the virtual impossibility of reaching consensus on the question: How much pressure on a suspect is *too much*.⁹⁹

In a pair of cases decided in 1964, *Massiah v. United States*¹⁰⁰ and *Escobedo v. Illinois*,¹⁰¹ the Court invalidated two confessions¹⁰² under the Sixth Amendment right to counsel.¹⁰³ Professor Louis Michael Seidman analyzed the Court's attraction to the Sixth Amendment right to counsel as a desire

⁹⁶ See Penney, *supra* note 94, at 313. Penney argues that the third concern, referred to as the "self-determination theory," is "morally suspect" because "the idea that criminal suspects should have an intrinsic, deontological right to silence fails to accord with widely-held views of political and personal morality." *Id.* Cf. R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15 (1981) (suggesting that a suspect does not have moral "right to silence" in the face of strong evidence of guilt).

⁹⁷ See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936) (invalidating confession extracted by horrific physical abuse). For a more thorough discussion of the *Brown* cases and others of that era, see Darmer, *supra* note 35. Cf. Edith Rose Gardner, Comment, *Coerced Confessions of Prisoners of War*, 24 GEO. WASH. L. REV. 528, 534-40 (1955) (detailing conditions endured by American prisoners of war in the Korean conflict, some of whom made false confessions).

⁹⁸ See Lunney, *supra* note 32, at 735.

⁹⁹ Cf. Judge Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 955 (1965) ("[T]he very question is how far these [Bill of Rights] safeguards extend. Five to four divisions within the Court afford no more impressive evidence on that score than did those of thirty years ago with respect to the due process and equal protection clauses.").

¹⁰⁰ 377 U.S. 201 (1964).

¹⁰¹ 378 U.S. 478 (1964).

¹⁰² For a thorough and penetrating analysis of the *Escobedo* case, see Gerald Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1437-43 (1985).

¹⁰³ These cases "worked together" with the Court's extension, the prior year, of the Sixth Amendment right to counsel to the states in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Lunney, *supra* note 32, at 738.

for certainty.¹⁰⁴ In his words, "[v]oluntariness is a metaphysical abstraction, but the presence or absence of counsel is a fact in the world."¹⁰⁵

In *Massiah*, the defendant made damaging admissions to his codefendant who, unbeknownst to Massiah, was a government informant.¹⁰⁶ The Court held that federal agents violated Massiah's Sixth Amendment right to counsel because they "deliberately elicited [the statements] from him after he had been indicted"¹⁰⁷ At that stage of the case, the Court ruled, statements elicited from Massiah in the absence of his counsel could not be used against him.¹⁰⁸

The dissent protested that this new rule broke with the traditional test for admitting confessions and would now exclude admissions made to police, "no matter how voluntary and reliable."¹⁰⁹ In the dissent's view, "absence of counsel" should be "one of several factors by which voluntariness is to be judged," rather than a per se determinant requiring suppression.¹¹⁰

One month later in *Escobedo*, the Court extended *Massiah*'s rule to pre-indictment stages of an investigation.¹¹¹ *Escobedo* was the focus of a murder investigation, was in police custody, was subject to interrogation designed to elicit incriminating statements and was denied opportunities to consult with his retained lawyer.¹¹² The police denied *Escobedo*'s repeated requests to consult with his lawyer, as well as *Escobedo*'s lawyer's repeated requests to consult with his

¹⁰⁴ Louis Michael Seidman, Brown and Miranda, 80 CAL. L. REV. 673, 734 (1992).

¹⁰⁵ *Id.*

¹⁰⁶ *Massiah*, 377 U.S. at 202.

¹⁰⁷ *Id.* at 206.

¹⁰⁸ See *id.* at 206. "*Massiah* represents a pure right to counsel approach." JEROLD H. ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION 414 (2000). The triggering event for the attachment of the right is the commencement of adversary proceedings, such as an arraignment or the filing of an indictment. See *id.* At that point, the government is prohibited from "deliberately elicit[ing] incriminating statements" from a suspect, "regardless of whether the individual is in 'custody' or being subjected to 'interrogation' in the *Miranda* sense." *Id.* Of course, in Lindh's case, he was not formally charged until he was returned to the United States. Accordingly, it would have been the *Miranda* line of cases, rather than *Massiah*, that governed the admissibility of his confession.

¹⁰⁹ *Massiah*, 377 U.S. at 209 (White, J., dissenting, joined by Clark & Harlan, JJ.).

¹¹⁰ *Id.* at 213.

¹¹¹ 378 U.S. 478 (1964).

¹¹² *Id.* at 490-91.

client.¹¹³ During the course of questioning, Escobedo implicated himself in a murder plot, but he insisted that his associate had fired the fatal shots.¹¹⁴

The Court seemed particularly offended by the fact that Escobedo “was undoubtedly unaware that under Illinois law an admission of ‘mere’ complicity in the murder plot was legally as damaging as an admission of firing the fatal shots. The ‘guiding hand of counsel’ was essential to advise petitioner of his rights in this delicate situation.”¹¹⁵ In addition, the majority suggested that the officers’ repeated urging of Escobedo to make a statement “[w]ithout informing him of his absolute right to remain silent,”¹¹⁶ and the officers’ failure to “effectively warn[] him of his absolute constitutional right to remain silent,” contributed to the constitutional violation.¹¹⁷ Over strong dissent, the Court found a violation of Escobedo’s Sixth Amendment right to counsel.

The majority dismissively responded to the dissent’s concern that providing counsel at this stage of a case would invariably reduce the number of confessions. The Court stated:

No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.¹¹⁸

Despite its rhetorical force, Professor Gerald Caplan called the Court’s assertion “misleading because the right that the Court was defending, far from being of long standing, was newly discovered, indeed created, in this very opinion.”¹¹⁹ In Caplan’s view, the Court discerned unfairness in the mere fact that Escobedo did not fully appreciate the legal significance of his statements, and it appeared to sympathize with Danny Escobedo as an “underdog.”¹²⁰ The Court implicitly suggested that the defendant should be given a “sporting chance” to

¹¹³ *Id.* at 482. The police went so far as to tell Escobedo in response to his requests for his attorney that his attorney did not want to see him. *Id.*

¹¹⁴ *See id.* at 482-83.

¹¹⁵ *Id.* at 486 (internal citations omitted).

¹¹⁶ *Escobedo*, 378 U.S. at 485.

¹¹⁷ *Id.* at 490-91.

¹¹⁸ *Id.* at 490.

¹¹⁹ Caplan, *supra* note 102, at 1440.

¹²⁰ *Id.* at 1441.

escape guilt for his crimes, a suggestion that Caplan and others denigrate.¹²¹

In recognizing a Sixth Amendment right to counsel during custodial interrogation, the *Escobedo* decision had profound and far-reaching implications.¹²² In subsequent years, the Court "recharacterized" *Escobedo* as vindicating rights under the Fifth Amendment Self-Incrimination Clause¹²³ and limited the *Escobedo* holding to its facts.¹²⁴ Nonetheless, the Court's conception of a role for defense counsel in the interrogation room was a radical, and not properly thoughtful, development. Rather than insisting that government agents simply *refrain from* unlawful practices, the Court in this era imposed upon the government an affirmative obligation to provide counsel to a suspect during a criminal investigation.¹²⁵

¹²¹ See *id.* (discussing "sporting theory" of justice in writings of Wigmore, Pound and Bentham). For a thorough critique of this theory, see GRANO, CONFESSIONS, *supra* note 95, at 28-32.

¹²² As Professor Grano has put it, "if one takes *Escobedo*'s reasoning seriously, all police interrogation should be prohibited until the defendant has had an opportunity to consult with a lawyer." Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 89 J. CRIM. L. & CRIMINOLOGY 1465, 1470 (1999) [hereinafter Grano, *Selling the Idea*].

¹²³ See *United States v. Gouveia*, 467 U.S. 180, 188 n.5 (1984) ("[W]e have made clear that we required counsel in *Miranda* and *Escobedo* in order to protect the Fifth Amendment privilege against self-incrimination rather than to vindicate the Sixth Amendment right to counsel."); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) ("[T]he Court in retrospect perceived that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination.'") (citing *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966)).

¹²⁴ *Michigan v. Tucker*, 417 U.S. 433, 438 (1974) ("As we have noted previously, *Escobedo* is not to be broadly extended beyond the facts of that particular case."); see also *Kirby*, 406 U.S. at 689 ("Secondly, and perhaps even more important for purely practical purposes, the Court has limited the holding of *Escobedo* to its own facts.").

¹²⁵ *Miranda* can be seen as a continuation of this trend, as it required the government specifically to advise a suspect that he has a "right to an attorney." See discussion *infra* notes 127-31 and accompanying text; cf. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (recognizing right to counsel during trial). As Professor Kamisar points out:

James Thompson [who later became a law professor at Northwestern University and then governor of Illinois], who had the distinction of making the losing argument in [*Escobedo*], read it quite broadly. He told a group of prosecuting attorneys attending a criminal law program that . . . "[I]n dealing with [a suspect who, unlike Danny Escobedo,] has not expressly indicated that he is aware of his right to counsel, absolute compliance with the *Escobedo* rule may well require a warning of the right to counsel along with the warning of the privilege against self-incrimination."

KAMISAR ET AL., *supra* note 17, at 453 n.i. In this regard, *Miranda* carried forward the vision of *Escobedo*. But see Seidman, *supra* note 104, at 744 (characterizing *Miranda* as a "retreat from the promise of liberal individualism . . . under the cover of bold advance.

Because counsel could be relied upon to advise her client to demur to questioning,¹²⁶ the Court essentially required the government to thwart its own investigations.

On the heels of the Court's decisions in *Escobedo* and *Massiah*, lawyers for Ernesto Miranda relied on the Sixth and Fourteenth Amendments in urging reversal of his conviction.¹²⁷ But in *Miranda v. Arizona*,¹²⁸ the Supreme Court adopted a different approach,¹²⁹ relying on the Fifth Amendment right against self-incrimination.¹³⁰ The Court held that a custodial confession would be presumed involuntary, and thus would be inadmissible, if the police failed to give a suspect four specified warnings, now widely recognized: that he has the right to remain silent; that any statements he makes can be used against him; that he has the right to an attorney during

From this perspective, the central point of *Miranda* was not the establishment of new rights in the stationhouse. *Escobedo*, *Massiah*, and *Culombe v. Connecticut*, 367 U.S. 568 (1961) (invalidating confession on due process grounds) had already created all the rights any defendant needed. . . . *Miranda* added . . . a mechanism by which the defendant could give up these rights.”).

¹²⁶ See *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., dissenting) (“[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.”); Seidman, *supra* note 104, at 734-35 (“Virtually any competent lawyer would advise his client in the strongest possible terms to remain silent, and it would be a rare client indeed who would disregard such advice.”).

¹²⁷ See Paul C. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and The Overhauling of Miranda*, 85 IOWA L. REV. 175, 191 n.35 (1999) [hereinafter Cassell, *The Statute*].

¹²⁸ 384 U.S. 436 (1966). The *Miranda* opinion actually disposed of four different cases, all of which involved confessions that were ultimately suppressed. See *id.*

¹²⁹ See Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2003 (1998) (*Miranda* “established the most important new approach for dealing with the constitutional admissibility of confessions.”).

¹³⁰ *Miranda*, 384 U.S. at 439, 467. While this was the first time in the twentieth century that the Court explicitly applied the Fifth Amendment to custodial interrogation, the majority asserted that “our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings.” *Id.* at 442. But see *id.* at 531 (White, J., dissenting) (“[T]he Court’s holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent.”); cf. *Escobedo v. Illinois*, 378 U.S. 478, 497 (1964) (White, J., dissenting) (“It is incongruous to assume that the provision for counsel in the Sixth Amendment was meant to amend or supersede the self-incrimination provision of the Fifth Amendment, which is now applicable to the States. That amendment addresses itself to the very issue of incriminating admissions of an accused and resolves it by proscribing only compelled statements.”). For a discussion of the Court’s earlier reliance on the Fifth Amendment in the nineteenth century, see Darmer, *supra* note 35.

questioning; and that an attorney will be appointed for him if he cannot afford one.¹³¹

As Yale Kamisar noted, "*Miranda* . . . has been widely criticized both for going too far and for *not going far enough*."¹³² Regardless of its flaws, however, *Dickerson* indicates that *Miranda* is here to stay.

III. THE COURT'S POST-MIRANDA JURISPRUDENCE

A. *The "Second-Level" Miranda Safeguards: The Primacy of the Right to Counsel*

Miranda dictates that interrogators provide warnings of two discrete rights: the right to remain silent and the right to counsel.¹³³ If a suspect invokes his right to counsel, he gains greater protections than if he had invoked his right to silence, a development of the Court's post-*Miranda* jurisprudence that "may have surprised the *Miranda* Court."¹³⁴

*Michigan v. Mosley*¹³⁵ involved the right to silence. An officer read Mosley the *Miranda* warnings and began questioning the suspect regarding one of two restaurant

¹³¹ *Miranda*, 384 U.S. at 444. The scholarly discussion about the *Miranda* decision itself is rich and full, and it is beyond the scope of this article to do anything beyond providing the most cursory description of this landmark decision and the controversy over its legitimacy. For fuller treatment of the decision, see Caplan, *supra* note 102; Cassell, *The Statute*, *supra* note 127, at 183-94 (including in-depth account of the underlying investigation and confession of *Miranda* based upon the first-hand account of former Phoenix police Captain Carroll F. Cooley); Fred E. Inbau, "Playing God": 5 to 4 (*The Supreme Court and the Police*), 57 J. CRIM. L. CRIMINOLOGY & POL. SCI. 377, 377 (1966); and Yale Kamisar, *A Dissent From the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966).

¹³² Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L.J. 387, 387 (2001) [hereinafter *Miranda Thirty-Five Years Later*] (footnotes omitted); see also Cassell, *Supreme Court's Failures*, *supra* note 27, at 918 ("Miranda's lack of proportionality is shown not only by its overbroad reach in particular cases, but also by its unlimited application."); Greenawalt, *supra* note 96, at 68 ("As the dissenters in *Miranda* clearly recognized, the *Miranda* rules are not fully responsive to the concern that underlay their creation."); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 461 (1987) (arguing that *Miranda*'s requirement that specified warnings be given does not go far enough in protecting a suspect from compulsion). For a fuller discussion of criticism of the majority opinion, see Darmer, *supra* note 35.

¹³³ *Miranda*, 384 U.S. at 444.

¹³⁴ KAMISAR ET AL., *supra* note 17, at 521. Besides being technical, there is a somewhat artificial nature to this distinction. Depending upon the precise words that a suspect may happen to use in responding to the *Miranda* warnings, he may unwittingly trigger one prong of the "second-level" safeguards as opposed to the other.

¹³⁵ 423 U.S. 96 (1975).

robberies.¹³⁶ Mosley replied that he did not want to answer any questions about the robberies.¹³⁷ The officer immediately stopped the questioning and proceeded to complete the arrest and booking process.¹³⁸ That evening, a different officer questioned Mosley—after again reading him the *Miranda* warnings—regarding the murder of a man during a failed holdup attempt in January. Mosley denied any involvement until the officer falsely informed him that an accomplice had implicated him. Mosley then implicated himself in the shooting.¹³⁹

In interpreting *Miranda*, the *Mosley* Court determined that when a suspect has invoked his right to silence, “[t]he critical safeguard . . . is a person’s ‘right to cut off questioning[.]’” and thus, the appropriate inquiry is “whether his ‘right to cut off questioning’ was ‘scrupulously honored.’”¹⁴⁰ The Court held that the first officer did honor the suspect’s right to end the questioning. Thus, the second officer was entitled to re-initiate questioning several hours later on an unrelated crime.¹⁴¹

In *Edwards v. Arizona*,¹⁴² the Court elevated the “right to counsel” strand of *Miranda* and provided greater protections to a suspect who invokes his right to counsel than for one who invokes his right to silence. In that case, Edwards was arrested and informed of his *Miranda* rights.¹⁴³ He agreed to submit to questioning but, in the course of that questioning, said that he wished to consult with an attorney.¹⁴⁴ The police did not provide Edwards with counsel.¹⁴⁵ Instead, the next day, detectives approached Edwards in jail. When Edwards said that he did not want to talk, a guard told him he “had to.”¹⁴⁶ Detectives

¹³⁶ *Id.* at 97.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 98.

¹⁴⁰ *Mosley*, 423 U.S. at 103-04.

¹⁴¹ *Id.* at 104-05. The dissent maintained that the January holdup attempt may very well have been covered by the suspect’s invocation of silence regarding ‘robberies’ and made light of the majority’s assertion that the questioning was in a different location when it was only a different location within the jail house. *Id.* at 118-20 (Brennan, J., dissenting).

¹⁴² 451 U.S. 477 (1981).

¹⁴³ *Id.* at 478.

¹⁴⁴ *See id.* at 478-79.

¹⁴⁵ *Id.* at 482.

¹⁴⁶ *Id.* at 479, 482.

gave Edwards fresh *Miranda* warnings, and this time he made an incriminating statement.¹⁴⁷

The Court held that Edwards had not validly waived his right to counsel and that his confession must be suppressed.¹⁴⁸ In addition, the Court established the rule that an accused, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."¹⁴⁹ In reaching its holding, the Court relied on language in *Miranda*.¹⁵⁰

The *Edwards* Court justified the distinction from *Mosley*, explaining that it had noted in *Mosley* that the *Miranda* Court had itself "distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel."¹⁵¹

As Dean Scott W. Howe pointed out in a recent article, the predominance of the right to counsel over the right to silence is an "ironic development in the Court's jurisprudence."¹⁵² After all, the Court decided *Miranda* under the auspices of the Fifth Amendment Self-Incrimination Clause, which by its terms protects against "compelled" self-incrimination and makes no reference to the assistance of counsel whatever.¹⁵³ The Sixth Amendment protects the right to counsel, but has been traditionally interpreted to provide for counsel in the trial context. Indeed, as Professor Grano argued, neither the text of the Amendment nor its history:

support its extension to protect a suspect from the investigatory process. The right to counsel evolved on the battleground of the criminal trial; it 'sprang from complaints that a defendant without counsel's assistance could not adequately defend himself in court

¹⁴⁷ See *Edwards*, 451 U.S. at 479, 482.

¹⁴⁸ See *id.* at 484, 487.

¹⁴⁹ *Id.* at 484-85.

¹⁵⁰ *Id.* at 485 (citing *Miranda*, 384 U.S. at 474).

¹⁵¹ *Edwards*, 451 U.S. at 485 (citing *Mosley*, 423 U.S. at 104 n.10).

¹⁵² Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From Brown to Miranda, Furman and Beyond*, 54 VAND. L. REV. 359, 402 (2001).

¹⁵³ Cf. *id.* ("Miranda had created the new right to counsel under the Fifth Amendment privilege ostensibly as a protection for the central guarantee embodied in the privilege—the right to silence.").

against legal charges. The use of counsel to shield the defendant from detection is fundamentally different, and is not supported by the history of the right to counsel.¹⁵⁴

B. *How Broad is the Miranda Right to Counsel?*

Later cases ameliorated the effects of the *Edwards* rule somewhat.¹⁵⁵ In *Moran v. Burbine*,¹⁵⁶ for example, the Court held that, despite *Miranda*'s admonition that a suspect be advised of his right to counsel, the police were not obligated to provide a suspect with specific information regarding the availability of an attorney retained by his family in a case where the suspect himself did not request counsel.¹⁵⁷

In *Burbine*, the defendant was arrested and his sister made efforts to reach a lawyer at the Public Defender's Office to assist him.¹⁵⁸ An Assistant Public Defender called the police station and explained that she represented Burbine.¹⁵⁹ The police told the attorney that they were not going to question Burbine, but then did.¹⁶⁰ Burbine was unaware of his sister's efforts and the Assistant Public Defender's call.¹⁶¹ Before he gave a statement, Burbine was *Mirandized* and executed a written waiver form stating that he did not want an attorney.¹⁶² He later contended that, by failing to inform him of the telephone call made by the attorney on his behalf, his interrogators "deprived him of information essential to his ability to knowingly waive his Fifth Amendment rights."¹⁶³ The

¹⁵⁴ Grano, *Selling the Idea*, *supra* note 122, at 1488-89.

¹⁵⁵ In *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), the Court held that the *Edwards* prohibition did not apply in a case where a suspect invoked his right to counsel but then, a few minutes later, asked, "What is going to happen to me now?" In *Davis v. United States*, 512 U.S. 452 (1994), the Court declined to extend the *Edwards* rule when a suspect did not make an unambiguous request for counsel, but instead said, "Maybe I should talk to a lawyer." *Id.* at 455. The Court, in an opinion written by Justice O'Connor for a 5-4 majority, held that "[i]f the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect." *Id.* at 459. *But see* *Minnick v. Mississippi*, 498 U.S. 146 (1990) (holding *Edwards* prohibition applicable even where the suspect had been given the right to confer with counsel).

¹⁵⁶ 475 U.S. 412 (1986).

¹⁵⁷ *See id.* The applicability of *Burbine* to the *Lindh* case is addressed in Glaberson, *supra* note 5.

¹⁵⁸ *Burbine*, 475 U.S. at 416-417.

¹⁵⁹ *Id.* at 417.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 417-18.

¹⁶³ *Burbine*, 475 U.S. at 421.

Supreme Court disagreed, noting that there was no dispute that the police had followed the *Miranda* requirements "with precision" and that Burbine never requested an attorney.¹⁶⁴

C. *The Prophylaxis Line of Cases and the Public Safety Exception*

In a relatively conservative era under Chief Justices Burger and Rehnquist,¹⁶⁵ the Court has taken pains to limit the reach of *Miranda*.¹⁶⁶ In practice, the grand vision of *Miranda* soared only on the pages of the majority opinion, and foundered in the workaday world of competing considerations, such as crime control. Significantly, later Courts created exceptions to the requirement for warnings itself. For example, the Court held that statements taken in violation of the *Miranda* rules can be used to impeach a defendant who chooses to testify,¹⁶⁷ recognized a "public safety exception"¹⁶⁸ and held that the "fruits" of a *Miranda* violation need not be suppressed.¹⁶⁹ It is difficult to read this line of cases without concluding that they were decided with an eye towards reaching a pre-determined outcome,¹⁷⁰ that they reflect an exasperation with the

¹⁶⁴ *Id.* at 420. In this regard, Lindh's allegations may have distinguished his case from *Burbine*, although the government took issue with Lindh's claim that he asked for an attorney. *See supra* Part I.

¹⁶⁵ *Cf. Howe, supra* note 152, at 376-77 (describing the mid-1960s as "the peak of the Warren Court's liberal activism in criminal procedure").

¹⁶⁶ *See Garcia, supra* note 22, at 462 ("*Miranda* has been . . . decimated by judicially crafted qualifications and the public safety exception, and no longer serves as the brake upon overzealous law enforcement that its progenitors intended.") (footnotes omitted); Lunney, *supra* note 32, at 746 ("Rather than overturn *Miranda*, the Burger and later Rehnquist Courts set about to limit its reach by interpreting *Miranda*'s requirements narrowly and crafting exceptions to its commands.").

¹⁶⁷ *Harris v. New York*, 401 U.S. 222 (1971). For a thorough and profoundly critical analysis of the case, see Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 106-15. In Professor Stone's words:

Whatever one's views of the result in *Harris*, the opinion from beginning to end, from the Court's treatment of the record, to its use of precedent, to its analysis of policy, lacks candor, meticulousness, and reasoned elaboration. In short, *Harris* was an exercise of raw judicial power, with little or no effort made to explain or to justify its premises or conclusions.

Id. at 114.

¹⁶⁸ *New York v. Quarles*, 457 U.S. 649 (1984).

¹⁶⁹ *Oregon v. Elstad*, 470 U.S. 298 (1985). For instance, even if a suspect makes a confession without the benefit of the warnings, a subsequent confession made after the warnings are administered is admissible. *Id.*; *cf. Michigan v. Tucker*, 417 U.S. 422 (1974).

¹⁷⁰ *See Lunney, supra* note 32, at 796 ("There is little to suggest that the Burger/Rehnquist Courts ever had an open mind concerning *Miranda*. As early as

constraints of *Miranda*, and that they start from a premise that *Miranda* was an illegitimate exercise of authority by a more liberal activist Court.¹⁷¹ The rationale in many of those limiting decisions was that the *Miranda* warnings—while “prophylactic” rules designed to safeguard constitutional rights—are not *themselves* constitutionally mandated.¹⁷²

The assertion that the *Miranda* warnings were prophylactic in nature and not constitutionally required was first made¹⁷³ by then-Justice Rehnquist in *Michigan v. Tucker*.¹⁷⁴ *Tucker* involved the admissibility of the testimony of a witness identified through the defendant’s responses to questions that were not preceded by warnings.¹⁷⁵ The *Tucker* Court treated the *Miranda* procedural safeguards as not themselves required by the Constitution, but instead as measures to ensure the protection of the right against compulsory self-incrimination.¹⁷⁶ Ultimately, the Court found that the “police conduct at issue here did not abridge respondent’s constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege.”¹⁷⁷

The description of the *Miranda* rules as merely “prophylactic” was a significant reconstitution of *Miranda* that yanked the original opinion from its roots.¹⁷⁸ *Miranda*, after all,

1974, in *Tucker*, the Burger Court’s assault on *Miranda*’s constitutional foundations strongly foreshadowed the Court’s desired destination.”).

¹⁷¹ See *id.* at 798 (“Perhaps the Rehnquist and Burger Courts believed that the Warren Court assumed too much authority, and therefore set out to weaken the Court’s institutional position intentionally through their treatment of *Miranda* and other legacies of the Warren Court.”); *cf. id.* at 793-94 (considering, and then rejecting, theory that Burger and Rehnquist Courts’ approach “may . . . serve to distinguish the inappropriate ‘activism’ of the Warren Court, from the more measured and judicious approaches of the later Courts”) (footnotes omitted).

¹⁷² ISRAEL ET AL., *supra* note 108, at 357 (“The Supreme Court has repeatedly called the *Miranda* rules ‘not themselves rights protected by the Constitution,’ but only ‘procedural safeguards’ or ‘prophylactic rules’ designed to ‘provide practical reinforcement’ for the privilege against self-incrimination.”).

¹⁷³ See *id.*

¹⁷⁴ See 417 U.S. 433, 446 (1974).

¹⁷⁵ See *id.* at 435. Police had arrested the defendant for rape and assault before the Supreme Court’s decision in *Miranda*, and the officers, though they had asked the defendant whether he wanted an attorney, and also had told him that “any statements he might make could be used against him,” had not provided the additional admonition, later required in *Miranda*, that an attorney would be provided for him if he could not afford one. *Id.* at 436.

¹⁷⁶ *Id.* at 443-44 (citing *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).

¹⁷⁷ *Id.* at 446.

¹⁷⁸ See Garcia, *supra* note 22, at 464 (describing Court’s “almost instant

involved the reversal of a conviction in a state court over which the federal courts have no supervisory power.¹⁷⁹ Justice Douglas recognized this in *Tucker* in a powerful dissent:¹⁸⁰ "The Court is not free to prescribe preferred modes of interrogation absent a constitutional basis. We held the 'requirement of warnings and waiver of rights (to be) fundamental with respect to the Fifth Amendment privilege,' . . . and without so holding we would have been powerless to reverse *Miranda's* conviction."¹⁸¹

Criticism aside, the characterization of the *Miranda* warnings as "prophylactic" carried over to the Court's decision in *New York v. Quarles*, where a sharply divided Court created a "public safety" exception to *Miranda's* warnings requirement.¹⁸² In the underlying case, police arrested Quarles, a man suspected of rape who fled into a supermarket.¹⁸³ Quarles ran when he saw the police, but stopped when ordered to do so by an officer with a drawn gun.¹⁸⁴ The officer who frisked the suspect noticed that he was wearing an empty shoulder harness and asked him for the location of the gun.¹⁸⁵ Quarles nodded in the direction of some empty cartons and said, "the gun is over there."¹⁸⁶

departure from its doctrinal foundation").

¹⁷⁹ Cf. Lunney, *supra* note 32, at 749-50 (noting that the *Tucker* Court had failed to explain how the Court could force the states to comply with *Miranda* if the decision were not constitutional in origin).

¹⁸⁰ Cf. Kamisar, *From Miranda*, *supra* note 24, at 887 (characterizing dissent as "forceful").

¹⁸¹ 417 U.S. at 462-63 (Douglas, J., dissenting). Professor Kamisar notes that "Justice Douglas, then in his thirty-fifth year in the Court," reminded his younger colleague, Rehnquist, of this. Kamisar, *From Miranda*, *supra* note 24, at 886. Interestingly, in 2000, Chief Justice Rehnquist authored the opinion reaffirming *Miranda* in *Dickerson v. United States*, 530 U.S. 428, which itself relies upon the fact that the federal courts have no supervisory power over the states. See Kamisar, *From Miranda*, *supra*, note 24, at 889. ("It is not an exaggeration to say that the Chief Justice's opinion in *Dickerson*, written a quarter-century after he wrote the opinion of the Court in *Tucker*, reads almost as if he recently reread Justice Douglas's dissent in *Tucker* and, on further reflection, decided that Douglas was right after all.").

¹⁸² 467 U.S. 649 (1984). See Kamisar, *From Miranda*, *supra* note 24, at 887 ("Despite Justice Douglas's forceful dissent, the mischievous language in *Tucker* did not go away. Indeed, it became quite significant."). Justice Rehnquist wrote the majority opinion in *Quarles*. Justice O'Connor wrote an opinion concurring in part and dissenting in part. See *Quarles*, 467 U.S. at 660. Justice Marshall wrote a dissenting opinion that was joined by Justices Brennan and Stevens. See *id.* at 674.

¹⁸³ *Quarles*, 467 U.S. at 651-52.

¹⁸⁴ *Id.* at 652.

¹⁸⁵ See *id.*

¹⁸⁶ *Id.*

In another Rehnquist opinion, the Supreme Court held both the gun and the statements admissible,¹⁸⁷ finding that "this case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."¹⁸⁸

The Court emphasized that there was no suggestion that the statements at issue were "actually compelled by police conduct which overcame [the defendant's] will to resist."¹⁸⁹ Accordingly, the Court framed the issue as whether the officer had been "justified in failing to make available to respondent the procedural safeguards associated with the privilege against self-incrimination since *Miranda*."¹⁹⁰ The Court held that the officer was justified, and that "the doctrinal underpinnings of *Miranda*" do not require that it "be applied in all its rigor to a situation" where questions are "reasonably prompted by a concern for the public safety."¹⁹¹ The Court found a public safety risk inherent in the situation confronted by the officers, because there was an "immediate necessity of ascertaining the whereabouts of a gun."¹⁹²

The Rehnquist opinion drew a sharp dissent from three other justices.¹⁹³ Justice Marshall asserted that, in crafting a:

"public safety" exception to *Miranda*, the majority makes no attempt to deal with the constitutional presumption established by that case. . . . Without establishing that interrogations concerning the public safety are less likely to be coercive than other interrogations, the majority cannot endorse the "public-safety" exception and remain faithful to the logic of *Miranda v. Arizona*.¹⁹⁴

In the dissent's view, authorities faced with a genuine emergency that demands immediate answers are not confronted with a dilemma. Rather:

¹⁸⁷ See *id.* at 651, 653. In addition to the statement "the gun is over there," lower courts had suppressed other statements, made after Quarles was *Mirandized*, on the ground that those statements were "fruit of the poisonous tree." *Id.* at 659-60. That holding, too, was rejected. *Id.*

¹⁸⁸ *Quarles*, 467 U.S. at 653 (emphasis added).

¹⁸⁹ *Id.* at 654.

¹⁹⁰ *Id.* at 654-55.

¹⁹¹ *Id.* at 656.

¹⁹² *Id.* at 657.

¹⁹³ See *Quarles*, 467 U.S. at 674 (Marshall, J., dissenting). Justices Brennan and Stevens joined the Marshall dissent. *Id.* Justice O'Connor filed a separate opinion, concurring in part and dissenting in part. She would have admitted the gun but suppressed the initial statement. See *id.* at 673-74.

¹⁹⁴ *Id.* at 684 (Marshall, J., dissenting).

If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. . . . If trickery is necessary to protect the public, then the police may trick a suspect into confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in *Miranda v. Arizona* proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.¹⁹⁵

Thus, according to the dissent, the police should ask their questions. The answers, however, should not be admissible against the defendant in court.

D. *The Dickerson Decision and the Future of Quarles*

The Supreme Court's decision in *Dickerson v. United States*¹⁹⁶ has the potential to undermine the stability of *Quarles* and the rest of the Court's prophylaxis line of jurisprudence. In *Dickerson*, the Court confronted the question of *Miranda*'s constitutional underpinnings head-on, ruling on the constitutionality of a statute,¹⁹⁷ passed by Congress in the wake of *Miranda*,¹⁹⁸ that used a "totality of the circumstances test" to determine whether a confession was coerced.¹⁹⁹ To the surprise

¹⁹⁵ *Id.* at 686 (Marshall, J., dissenting) (citing *Weatherford v. Bursey*, 429 U.S. 545 (1977) (Sixth Amendment violated only if trial affected)). Justice O'Connor made a similar point in her concurring opinion:

Miranda has never been read to prohibit the police from asking questions to secure the public safety. Rather, the critical question *Miranda* addresses is who shall bear the cost of securing the public safety when such questions are asked and answered: the defendant or the State. . . . When police ask custodial questions without administering the required warnings, *Miranda* quite clearly requires that the answers be presumed compelled and that they be excluded from evidence at trial.

Id. at 664 (O'Connor, J., concurring in part and dissenting in part).

¹⁹⁶ 530 U.S. 428 (2000).

¹⁹⁷ 18 U.S.C. § 3501 (1968).

¹⁹⁸ Though passed in 1968, the statute had been little used, in part because of conflicts within the Justice Department as to its constitutionality. See Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 469 (1999) ("As Justice Scalia pointed out recently, § 3501 'has been studiously avoided by every Administration . . . since its enactment more than 25 years ago.'") (citing *Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring)). As a former Assistant United States Attorney for the Southern District of New York, I can represent that that office did not rely upon the statute during the period I was employed there. *But see* Cassell, *The Statute*, *supra* note 127, at 197-208 (disagreeing with "conventional wisdom" that Justice Department has consistently had doubts about constitutionality of § 3501).

¹⁹⁹ As discussed in Part II, *Miranda* establishes an irrebutable presumption that all unwarned statements are coerced. Section 3501 would have allowed the courts

of some, the Supreme Court rejected the statute in favor of *Miranda*.²⁰⁰ While not explicitly holding that the *Miranda* warnings themselves are constitutionally required, the Court referred to *Miranda* as a “constitutional decision” that Congress cannot overrule.²⁰¹ According to the Court, because the statute essentially reinstated the due process voluntariness test that the Court used before *Miranda*, it failed to provide a constitutionally adequate substitute for the *Miranda* safeguards.²⁰²

Chief Justice Rehnquist, a longstanding detractor of *Miranda*, wrote the opinion for a 7-2 majority.²⁰³ He “concede[d] that there is language in some of our opinions that supports the view” that the *Miranda* warnings are not constitutionally required,²⁰⁴ but found that the “foremost” factor supporting the view of *Miranda* as a “constitutional decision” was the fact that the Court had consistently applied the *Miranda* requirements to the states over which the Court has no supervisory power.²⁰⁵ Acknowledging that cases, such as *Quarles*, had created exceptions to *Miranda*, Chief Justice Rehnquist noted that other decisions had broadened the application of *Miranda*.²⁰⁶ In the Court’s view, those cases “illustrate the principle—not that

to weigh the lack of warnings against other factors in determining whether a confession was actually coerced. See 18 U.S.C. § 3501 (2002).

²⁰⁰ The *Dickerson* decision, like *Miranda*, has received exhaustive treatment by notable constitutional scholars. See, e.g., Kamisar, *Miranda Thirty-Five Years Later*, *supra* note 132; Symposium, *Miranda After Dickerson: The Future of Confession Law*, 99 MICH. L. REV. 879 (2001). The intent of this article is to give simply an abbreviated description of the *Dickerson* case and to focus on the continued viability of the “public safety” exception in its wake.

²⁰¹ See *Dickerson*, 530 U.S. at 428.

²⁰² *Id.* at 442-43.

²⁰³ Some have speculated that Justice Rehnquist assigned the opinion to himself as a form of damage control. See Kamisar, *From Miranda*, *supra* note 24, at 889 (describing common speculation that, when Chief Justice Rehnquist realized that six of his colleagues were prepared to reaffirm *Miranda*, he assigned the opinion to himself “rather than let it go to someone like John Paul Stevens, probably the strongest champion of *Miranda* on the Court”; this explanation assumes the Chief Justice would have voted the other way if his colleagues had been split 4-4).

²⁰⁴ *Dickerson*, 530 U.S. at 438.

²⁰⁵ See *id.* The fact that the Court has no supervisory power over the state courts had been, of course, the basis of Justice Douglas’s dissent in *Tucker*, where Justice Rehnquist, writing for the majority, had first described the *Miranda* rules as prophylactic. See Kamisar, *From Miranda* *supra* note 24, at 889 (“It is not an exaggeration to say that the Chief Justice’s opinion in *Dickerson*, written a quarter-century after he wrote the opinion of the Court in *Tucker*, reads almost as if he recently reread Justice Douglas’s dissent in *Tucker* and, on further reflection, decided that Douglas was right after all.”).

²⁰⁶ See *Dickerson*, 530 U.S. at 441 (citing *Doyle v. Ohio*, 426 U.S. 610 (1976); *Arizona v. Roberson*, 486 U.S. 675 (1988)).

Miranda is not a constitutional rule—but that no constitutional rule is immutable.²⁰⁷

Finally, the Court determined that principles of stare decisis militated strongly against judicially overruling *Miranda* then, even if that Court might have decided *Miranda* differently. According to the majority, “[t]he warnings have become part of our national culture.”²⁰⁸ The opinion baffled many and satisfied almost no one.²⁰⁹

In a strongly-worded dissent, Justice Scalia derided the majority for describing *Miranda* as a “constitutional” decision without determining that the Constitution actually required *Miranda* warnings.²¹⁰ In his view, the initial *Miranda* decision was flawed, and he emphasized that subsequent cases have interpreted the decision as announcing “only ‘prophylactic’ rules.”²¹¹ In light of the prophylaxis line of cases, Scalia found that it is “no longer possible” for the Court to conclude that a mere violation of the *Miranda* rules itself violates the Constitution.²¹² Thus, the Court could not disregard a law passed by Congress.²¹³ Responding to the majority’s description of the *Miranda* rules as mutable, he said:

The issue . . . is not whether court rules are “mutable”; they assuredly are. . . . The issue is whether, *as mutated and modified*, they must *make sense*. The requirement that they do is the only thing that prevents this Court from being some kind of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy. And if confessions procured in violation of *Miranda* are confessions “compelled” in violation of the Constitution, the post-*Miranda* [prophylaxis line of] decisions I have discussed do not make sense.²¹⁴

As Justice Scalia’s *Dickerson* dissent vigorously demonstrates, the status of the prophylaxis line of cases is now uncertain, because those cases are premised on a rationale that

²⁰⁷ *Dickerson*, 530 U.S. at 441.

²⁰⁸ *Id.* at 443.

²⁰⁹ The *Michigan Law Review*, for example, hosted a symposium in which a number of prominent confessions law scholars were critical of the decision. See, e.g., Cassell, *Supreme Court’s Failures*, *supra* note 27, at 898 (recalling his “incredulity” upon reading the opinion); Kamisar, *From Miranda*, *supra* note 24, at 879; Klein, *supra* note 27, at 1071 (describing opinion as “terrible”).

²¹⁰ *Dickerson*, 530 U.S. at 444 (Scalia, J., dissenting). Scalia’s dissent was joined by Justice Thomas. See *id.*

²¹¹ *Id.* at 450.

²¹² *Id.* at 454.

²¹³ *Id.*

²¹⁴ *Id.* at 455.

has now been implicitly rejected. As Professor George C. Thomas III points out, “[i]f *Miranda* is best understood, in light of *Dickerson*, as constitutional in the strong sense, the exceptions and doctrinal limitations made on the authority of the prophylactic theory seem doomed.”²¹⁵ Though the *Dickerson* majority explicitly “embraced the entire doctrinal superstructure created with the prophylactic understanding,” it did so in dicta, “and it might be that *Dickerson* is the beginning of the end for some or all of those doctrinal limitations.”²¹⁶

If the Court were committed to an internally consistent *Miranda* and confessions law jurisprudence, the prophylaxis line would have to give way to the revived interpretation of *Miranda* provided by *Dickerson*.²¹⁷ The majority in *Dickerson*, however, appears content to have it both ways: interpreting *Miranda* as constitutional and sustaining the viability of those cases premised on the opposite view.²¹⁸ Moreover, while the *Dickerson* language approving the prophylaxis line is no more than dicta, it is dicta subscribed to by a formidable majority of seven on the Supreme Court.

IV. EXTENDING THE PUBLIC SAFETY EXCEPTION TO *EDWARDS*: APPLICATIONS TO THE TERRORIST CASES

Since *Quarles*, the Supreme Court has not addressed the potential scope of the public safety exception.²¹⁹ The state and lower federal courts, however, have applied the exception

²¹⁵ George C. Thomas III, *Separated at Birth but Siblings Nonetheless: Miranda and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1090 (2001).

²¹⁶ *Id.*; cf. Kamisar, *From Miranda*, *supra* note 24, at 894 (“Encouraged by *Dickerson*, defense lawyers will try hard to restore *Miranda* to its original vigor.”). *But see id.* (“But they are likely to discover that, although *Dickerson* seemingly repudiated the premises on which some *Miranda*-debilitating decisions are based, the exceptions to *Miranda* are going to remain in place.”).

²¹⁷ Justice Scalia essentially makes this point in his *Dickerson* dissent. 530 U.S. at 454-55. Cf. Klein, *supra* note 27, at 1030-31 (“The *Miranda* conundrum runs something like this. If the *Miranda* decision represents true constitutional interpretation . . . the impeachment and ‘fruits’ exceptions to *Miranda* should fall.”).

²¹⁸ See Dripps, *supra* note 24, at 35 (“gist” of *Dickerson* compromise opinion is “that the status quo will be maintained. The existing law, however, is regarded by virtually every informed observer as inconsistent and unprincipled”).

²¹⁹ In *Quarles* itself, the Court reaffirmed its earlier holding in *Orozco v. Texas*, 394 U.S. 324 (1969), in which the Court found impermissible questions about a gun there were unrelated to an immediate safety threat. *See United States v. Quarles*, 467 U.S. 649, 659 n.8 (1984). “The Court, however, has not had further occasion to explicate the boundary between exigent questioning in the interest of the public safety and ordinary investigatory questioning.” *United States v. Jones*, 154 F. Supp. 2d 617, 625 (S.D.N.Y. 2001).

to an expanding variety of cases, such as hostage takings.²²⁰ Given the current national preoccupation with security in the wake of the September 11 terrorist attacks, a court is far more likely to read the public safety exception expansively.

In 2000, the Second Circuit specifically approved the use of the *Quarles* exception in a case involving a terrorist plot.²²¹ In *United States v. Khalil*, defendant Abu Mezer and codefendant Khalil were both shot and wounded during a raid on their apartment in which the police discovered pipe bombs.²²² While Abu Mezer was at the hospital receiving treatment for his wounds,²²³ officers questioned him “as to how many bombs there were, how many switches were on each bomb, which wires should be cut to disarm the bombs, and whether there were any timers.”²²⁴ The officers questioned Abu Mezer without *Mirandizing* him,²²⁵ and he responded to the questions.²²⁶ In addition, in response to a question whether he “had planned to kill himself in the explosion,” Abu Mezer “responded simply, ‘Poof.’”²²⁷

The district court ruled that the public safety exception applied.²²⁸ On appeal, the defendant only challenged²²⁹ the introduction of his statement, “Poof,” in response to the question whether he had intended to commit suicide.²³⁰ He argued that the question regarding his plan to kill himself was

²²⁰ See, e.g., *Howard v. Garvin*, 844 F. Supp. 173 (S.D.N.Y. 1994); *State v. Finch*, 975 P.2d 67 (Wash. 1999); see also *People v. Mayfield*, 938 P.2d 485, 520-22 (Cal. 1997) (citing to list of hostage line of cases). Some courts have crafted a public safety exception, while others make use of the rescue doctrine.

²²¹ See *United States v. Khalil*, 214 F.3d 111 (2d Cir. 2000).

²²² *Id.* They discovered the bombs after an informant told them that defendant Abu Mezer was “very angry because of what happened between Jerusalem and Palestine” and planned forthwith to detonate bombs that they were keeping in their apartment. *Id.* at 115. Abu Mezer and codefendant Khalil were both shot and wounded during a raid on the apartment in which one of the men lunged at one of the officers, grabbing the officer’s gun and grappling with the officer; the other man crawled towards a bag that the officers believed (rightly, as it turned out) contained a bomb. After officers observed wiring in the bag, technicians found pipe bombs, including one on which a switch had been flipped, and they “were concerned that the bomb would explode before they could disarm it.” *Id.*

²²³ See *id.* at 115, 121.

²²⁴ *Id.* at 115.

²²⁵ *Id.* at 121.

²²⁶ *Khalil*, 214 F.3d at 121.

²²⁷ *Id.*

²²⁸ See *id.*

²²⁹ The defendant also challenged the statement on voluntariness grounds. *Id.*

²³⁰ *Id.*

“unrelated to public safety.”²³¹ While not unequivocally supporting the government’s view, the Second Circuit noted that it was “inclined to disagree” with defendant’s argument, “given that Abu Mezer’s vision as to whether or not he would survive his attempt to detonate the bomb had the *potential for shedding light* on the bomb’s stability.”²³² If a statement can be admissible under *Quarles* on this basis alone, it augurs the potential for a significant expansion of the public safety exception.

In a post-*Dickerson* case, *United States v. Jones*,²³³ the Southern District of New York discussed the continued viability of *Quarles*. While noting that the Rehnquist opinion in *Dickerson* “disavowed the implication in *Quarles* and other opinions of its vintage that the *Miranda* warnings are not mandated by the Self-Incrimination Clause of the Fifth Amendment,”²³⁴ Judge Gerald Lynch²³⁵ found, nonetheless, “no suggestion in *Dickerson* that *Quarles* and other exceptions to *Miranda* have been overruled.”²³⁶

The *Jones* opinion is instructive in analyzing the appropriate scope of *Quarles*. Judge Lynch noted that the Second Circuit’s recent *Khalil* decision²³⁷ did “little to test the limits of the *Quarles* exception,” because “the exigent risks to public safety” in *Khalil* were more extreme even than in *Quarles* itself.²³⁸ Judge Lynch explained, “confronted with a bomb that might or might not be about to explode, no rational person could think that the police, before questioning the

²³¹ *Khalil*, 214 F.3d at 121.

²³² *Id.* (emphasis added). Furthermore, the Second Circuit ruled that introduction of that statement was “at worst” harmless error, even if that court took a “different view as to the relevance” of the question regarding Abu Mezer’s contemplated suicide. *Id.*

²³³ 154 F. Supp. 2d 617 (S.D.N.Y. 2001) (finding *Quarles* applied when authorities had specific reason to believe that a gun was present and objectively reasonable basis for belief that child might find it).

²³⁴ *Id.* at 623 n.7.

²³⁵ Judge Lynch is the former Chief of the Criminal Division in the United States Attorney’s Office for the Southern District of New York and a professor at Columbia Law School. He has written extensively on matters involving criminal procedure. See, e.g., Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998); Gerald E. Lynch, *Toward a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 295 (1998); and Gerald E. Lynch, *A Conceptual, Practical and Political Guide to RICO Reform*, 43 VAND. L. REV. 769 (1990).

²³⁶ *Jones*, 154 F. Supp. 2d at 623 n.7.

²³⁷ See *supra* notes 221-32 and accompanying text.

²³⁸ *Jones*, 154 F. Supp. 2d at 626.

bomb's maker about its characteristics, must advise the bomber in effect that it behooves him to consult counsel before answering.²³⁹ Noting that other courts have split over the question how broadly to read the *Quarles* exception,²⁴⁰ Judge Lynch then applied *Quarles* to the drug case before him. In *Jones*, the authorities had "some specific reason, beyond generalizations about drug dealers, to think a gun was present"²⁴¹ and "an objectively reasonable" basis for concern that a young child "could be endangered."²⁴²

As Judge Lynch's *Jones* opinion demonstrates, most of the hard cases involving *Quarles*, thus far, have involved garden variety cases in which the authorities question drug dealers about the presence of guns.²⁴³ Questions designed to disable terrorist bombs, such as were present in *Khalil*, present a relatively easy application of *Quarles*. Along those lines, if Lindh had been questioned before being given *Miranda* warnings in an effort to learn about impending terrorist plots of which he had clear knowledge, the questioning would almost certainly have passed muster under *Quarles*, because it would have been designed to defuse a concrete, immediate threat.

Had he not pled guilty, however, Lindh's case would not have been so straightforward. In some ways Lindh was unlike the defendant Abu Mezer in *Khalil*, who specifically knew about disabling a bomb present in his very apartment. When the authorities approached Abu Mezer, they were virtually certain that he personally had knowledge that was vital to their ability to disarm a terrorist bomb. The presence of that bomb was not a matter of speculation; police officers had seen it in the defendant's apartment. *Lindh* presented the much harder situation where the suspect *may* have had information critical to the public safety.

One possible way to deal with the more speculative public safety cases would be to balance the likelihood that the suspect has the information with the importance of the information. The more potentially important the information,

²³⁹ *Id.* at 628. Of course, critics of the original *Quarles* decision would counter that the real question is not whether the suspect should be questioned without warnings or not. The real question is whether the government can later use those unwarned statements against the defendant at trial. See discussion of dissenting and concurring opinions in *Quarles* *supra* Part III.C.

²⁴⁰ *Jones*, 154 F. Supp. 2d at 626-28.

²⁴¹ *Id.* at 629.

²⁴² *Id.*

²⁴³ See *id.* at 626-28.

the less tolerable it seems to formulate rules that require authorities to bypass questioning a detainee.²⁴⁴ If there were even a .0001 percent chance that a suspect like Lindh had information about another terrorist plot akin to the World Trade Center and Pentagon attacks, does it make sense to say that he must first be given *Miranda* warnings? Is there really a constitutional requirement that they be provided? What does it mean to say after *Dickerson*, that *Miranda* warnings are "constitutionally required," and yet, that there are exceptions to the requirement?

If a suspect asks for an attorney after being *Mirandized*, as Lindh says he did, then *Edwards* is implicated, i.e., the rule requiring that all questioning must cease after a suspect invokes his right to counsel.²⁴⁵ The Supreme Court has never confronted the question whether there is a public safety exception to *Edwards*. If one accepts the legitimacy of *Quarles*, it is logical to extend the *Quarles* rationale to *Edwards* situations.²⁴⁶

Two courts of appeal specifically extended the *Quarles* exception to *Edwards* situations.²⁴⁷ In *United States v. Mobley*,²⁴⁸ the Fourth Circuit affirmed the denial of a suppression motion by Judge Thomas Selby Ellis, III—the same judge who presided over the *Lindh* case. The *Mobley* court relied on the Ninth Circuit's earlier decision in *United States v. DeSantis*.²⁴⁹

²⁴⁴ Some have suggested that, in extreme cases, even traditional due process concerns should give way to the need for information. See, e.g., Alan M. Dershowitz, Op-Ed, *The Parallels Between Us and Israel on Terrorism*, BOSTON GLOBE, Oct. 26, 2001, at A23 ("there are voices within our own FBI seeking authority to use torture to learn of imminent terrorist threats"); cf. Alan M. Dershowitz, Yes, *It Should Be "On the Books,"* BOSTON GLOBE, Feb. 16, 2002, at A15 ("Unless we are prepared to authorize the issuance of a torture warrant in the case of the ticking bomb, we should not torture, even if that means that innocent people may die. If we want to prevent the death of hundreds of innocent people by subjecting one guilty person to non-lethal pain, then we must find a way to justify this exception to the otherwise blanket prohibition on torture."). But see Philip B. Heymann, Op-Ed, *Torture Should Not be Authorized*, BOSTON GLOBE, Feb. 16, 2002, at A15 (arguing that torture should never be permitted).

²⁴⁵ See *infra* Part III.A.

²⁴⁶ Similarly, the Court's post-*Miranda* jurisprudence permits the government to impeach a defendant with statements taken in violation of *Miranda*. See *Harris v. New York*, 401 U.S. 222 (1971).

²⁴⁷ *United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994); *United States v. DeSantis*, 870 F.2d 536 (9th Cir. 1989).

²⁴⁸ 40 F.3d 688 (4th Cir. 1994); see also *United States v. Mobley*, 818 F. Supp. 164 (E.D. Va. 1993).

²⁴⁹ 870 F.2d 536.

In *DeSantis*, officers executed an arrest warrant at the defendant's home. DeSantis maintained that as soon as he answered the door, found out about the arrest warrant and was read his *Miranda* rights, he asked to call his attorney to "see if the matter could be straightened out, but was refused."²⁵⁰ DeSantis then asked if he could change his clothes, indicating that his clothes were in the other room. The officers assented, but they first questioned whether there were any weapons in the bedroom. This question led to DeSantis's affirmative response and, ultimately, disclosure of the location of a gun.²⁵¹

In urging suppression, DeSantis suggested that *Quarles* had absolutely no application after *Miranda* warnings were given.²⁵² The government, on the other hand, maintained that *Quarles* not only served as an exception to the requirement for *Miranda* warnings, but also as an exception to the voluntariness inquiry.²⁵³ The court disagreed with both parties and instead considered whether the public safety exception applied in situations where the accused had invoked his right to counsel. In so doing, the court confronted the question whether "the considerations undergirding *Quarles* necessitate[d] relaxation of certain procedural safeguards enunciated in *Edwards v. Arizona*"²⁵⁴

In extending the public safety exception to these facts, the court relied on reasoning in *Quarles* suggesting that the procedural safeguards of *Miranda* were not required in instances where the social cost of those safeguards is more than merely obtaining admissible evidence.²⁵⁵ In the court's view, *Edwards's* procedural safeguards likewise had to give

²⁵⁰ *Id.* at 537. What occurred during the execution of the warrant was disputed; however, the court of appeals determined that the dispute was not dispositive and credited the defendant's account while affirming the denial of the suppression motion. *Id.* at 538 n.1.

²⁵¹ *See id.* at 540.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *DeSantis*, 870 F.2d at 538. DeSantis failed in his attempts to distinguish *Quarles* factually from his case. The court easily dismissed two of DeSantis's arguments based on the outcome of *United States v. Brady*, 819 F.2d 884 (9th Cir. 1987). *See DeSantis*, 870 F.2d at 539. The court, based on *Brady*, determined that the fact that the officers had no reason to believe the defendant was unarmed was of "no consequence," and the "mere fact that the arrest did not take place in public" was also irrelevant. What was relevant was "whether there was 'an objectively reasonable need to protect the police or the public from any immediate danger.'" *Id.* at 539 (citing *United States v. Quarles*, 467 U.S. 649, 659 n.8 (1984)) (emphasis supplied in *DeSantis*).

²⁵⁵ *DeSantis*, 870 F.2d at 541.

way in the face of “[s]ociety’s need to procure the information about the location of a dangerous weapon”²⁵⁶

The Ninth Circuit concluded that the officers were legally entitled to question DeSantis regarding the location of the gun for their own safety, and that under the totality of the circumstances, the facts demonstrated that the officers did not coerce DeSantis’s responses. Therefore, the statements and the firearm were “properly admitted into evidence.”²⁵⁷

In *Mobley*, eight FBI agents arrested defendant Mobley at his home.²⁵⁸ As the Fourth Circuit explained, when the agents “determined that Mobley was alone, the officers seemed to relax. Mobley had answered the door naked, and it was quite apparent that he was unarmed.”²⁵⁹ One of the agents advised Mobley of his *Miranda* rights, and Mobley invoked his right to counsel, thereby implicating *Edwards*.²⁶⁰ Mobley was then advised that his home would be searched and was asked whether there was anything that “could be of danger to the agents.”²⁶¹ Mobley admitted that there was a weapon in a closet and led the agents to it.²⁶²

Judge Ellis denied Mobley’s motion to suppress, on the authority of *Quarles*.²⁶³ The Fourth Circuit noted that whether a public safety exception applied to *Edwards* was then a question of first impression in that circuit.²⁶⁴ After reviewing the rationale of *Quarles*, the court found that the public safety exception should be extended to *Edwards* cases.²⁶⁵ While acknowledging that *Quarles* was “not on all points with the situation in which the accused has claimed his right to counsel, the danger . . . from hidden traps and discarded weapons is as evident after the *Miranda* warnings have been given as

²⁵⁶ *Id.*

²⁵⁷ *Id.* The circumstances the court considered under the totality test were: (1) DeSantis was questioned in his own home rather than in the coercive environment of the police station; (2) the officers questioned DeSantis only in response to his request to enter the bedroom; and (3) the officers’ questions were not designed, from an objective standpoint, to elicit testimonial evidence, but instead were designed to secure the officers’ safety. *Id.*

²⁵⁸ *United States v. Mobley*, 40 F.3d 688, 690 (4th Cir. 1994).

²⁵⁹ *Id.*

²⁶⁰ *See id.*

²⁶¹ *Id.* at 691.

²⁶² *Id.*

²⁶³ *See Mobley*, 40 F.3d at 691.

²⁶⁴ *Id.*

²⁶⁵ *See id.* at 692.

before.”²⁶⁶ Moreover, “[t]he same considerations that allow the police to dispense with providing *Miranda* warnings in a public safety situation also would permit them to dispense with the prophylactic safeguard that forbids initiating further questioning of an accused who requests counsel.”²⁶⁷

The Fourth Circuit’s recognition of a public safety exception to *Edwards* was essentially dicta, because it ultimately found that the newly-minted exception should not be applied on the facts before it in *Mobley*.²⁶⁸ The Court stated:

As noted, *Mobley* was encountered naked; by the time he was arrested, the FBI already had made a security sweep of his premises, and they had found that he was the sole individual present. . . . Although we believe that the public safety exception is a valid and completely warranted exception to the *Miranda* and *Edwards* rules, we are persuaded that there was no demonstration of an “immediate need” that would validate protection under the *Quarles* exception in this instance. Absent an objectively reasonable concern for immediate danger to police or public, we must follow the rule, not the exception.²⁶⁹

Creating a new public safety exception that was not being applied in that case, the court did not fully analyze why *Quarles* should be extended to cases where warnings have already been given. As the Fourth Circuit recognized, *Quarles* reflected a concern that giving warnings would have the immediate effect of deterring a suspect from providing vital information. As the *Quarles* Court put it:

[I]f the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in *Quarles*’ position might well be deterred from responding. . . . Here, had *Miranda* warnings deterred *Quarles* from responding to Officer Kraft’s question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting *Quarles*. Officer Kraft needed an answer to his question . . . to insure that further danger to the public did not result from the concealment of the gun in a public area.²⁷⁰

Once warnings are provided, the rationale underlying *Quarles*, that is, the determination that where public safety is

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 692 (quoting *United States v. DeSantis*, 870 F.2d 536, 541 (9th Cir. 1989)).

²⁶⁸ *Mobley*, 40 F.3d at 693. However, the court further found that the district court’s admission of the statement was harmless error. *See id.* at 694.

²⁶⁹ *Id.* at 693.

²⁷⁰ *New York v. Quarles*, 467 U.S. 649, 657 (1984).

at stake, you cannot afford to give the warnings because the suspect may heed them and not provide vital information, does not apply.²⁷¹

However, an equally compelling rationale for a public safety exception exists. By invoking his right to counsel, a suspect implicitly suggests that he *has been deterred* from providing information. Whereas, under *Quarles*, the government speculates that a suspect may invoke his rights and judges that possibility too costly, in a “public safety” situation where a suspect is warned and invokes his right to counsel, the risk is no longer speculative. Rather, the suspect has already communicated that he will not provide information before consulting with a lawyer. While *Edwards* would demand that the government make no further efforts, that rule—no less than *Miranda*’s warnings requirement—should give way to the exigencies of public safety.²⁷²

Indeed, one could plausibly argue that *Edwards* is more susceptible to an exception than *Miranda*. *Miranda* suggests that unwarned statements are compelled. No such rationale underlies treating the invocation of the right to counsel differently than the invocation of the right to silence.

On the other hand, a defendant like Lindh could counter that the government, after telling him he had a right to counsel, “reneged” by persistently questioning him in the face of that invocation. In other words, the argument goes, breaking a promise made is worse than not making the promise in the first place.²⁷³ However, telling someone he has a “right to an attorney” does not necessarily imply that the government must permanently refrain from asking further questions if the suspect invokes that right.²⁷⁴ The suspect still has the right to

²⁷¹ *Mobley*, 40 F.3d at 692 n.1.

²⁷² Indeed, if the public safety exception is not extended to *Edwards*, the government is essentially punished if it does not take an expansive view of *Quarles*. That is, if an officer or agent errs on the side of providing warnings in a case where *Quarles* might have permitted him to dispense with the warnings, he would lose the ability to “correct the mistake” later if the public safety exception were not extended to *Edwards* cases.

²⁷³ Cf. *Gayne v. Coughlin*, 995 F. Supp. 268, 278 (E.D.N.Y. 1996) (“When a suspect is told that he has a right to remain silent, invokes his right, but is then questioned again, the suspect would have reason to believe that any further attempt to invoke the right to remain silent would be fruitless.”), *aff’d sub nom.*, *Gayne v. McClellan*, 129 F.3d 254 (2d Cir. 1997).

²⁷⁴ Cf. *Michigan v. Mosley*, 423 U.S. 96, 109 (1975) (White, J., concurring) (“[T]he statement in *Miranda* requiring interrogation to cease after an assertion of the ‘right to silence’ tells us nothing because it does not indicate how soon this interrogation may resume.”) (citing *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)).

remain silent, and can choose to do so until he consults with a lawyer.²⁷⁵

Given the fact that two circuit courts have already approved the principle of extending *Quarles* to *Edwards*, it appears likely that other courts will hold that, even if suspects like Lindh invoke their right to counsel, the *Edwards* rule should give way in exigent circumstances. Those rulings would be justified. Indeed, the courts should read a public safety exception to *Edwards* more expansively than did the Fourth Circuit in *Mobley*, recognizing that an exception is justified even if an "immediate" need cannot be easily demonstrated.

The public interests at stake are far more compelling in cases like *Lindh* than they were in *Mobley*.²⁷⁶ If the FBI and other officials interrogating Lindh did so based on a reasonable belief that questioning might yield information vital to the public interest, then such questioning should be within the scope of the public exception articulated in *Quarles*, even if *Edwards* would otherwise apply.²⁷⁷ Recall, in this connection, the expansive language adopted by the Second Circuit in *Khalil*.²⁷⁸ In that case, the court suggested that if the answer to a question had the potential even for "shedding light" on the danger (there, the stability of a bomb), then it might pass muster under *Quarles*. Regardless of the quality or importance of the information ultimately garnered from Lindh, at the time he was being interrogated it was surely plausible that he

²⁷⁵ In the case of foreign interrogation, such as that involved in Lindh's case, there may be an additional argument. In Lindh's case, the government's alleged statements that no lawyers were available in Afghanistan may well have been factually correct. The courts have never gone so far as to hold that the "right to counsel" means the right to counsel immediately. Though *Miranda* requires the government to either provide counsel or cease questioning in the face of an invocation, *Miranda* contemplated routine, stationhouse questioning, not foreign interrogation. There is no reason why *Miranda* should not be read narrowly when, in fact, defense counsel are not readily available. Cf. *Duckworth v. Egan*, 492 U.S. 195 (1989) (finding that warnings were adequate in case where officer advised defendant that "[w]e have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.").

²⁷⁶ Cf. Stuart Taylor Jr., *The Skies Won't Be Safe Until We Use Commonsense Profiling*, NAT'L J., Mar. 16, 2002, available at 2002 WL 7094821 (discussing the high stakes involved in airport screening where the goal is to avoid air disaster).

²⁷⁷ In the *Lindh* case, the government argued that military questioning done for the purpose of gathering military intelligence is simply not subject to the *Miranda* rules. See *supra* note 65 and accompanying text. That is a compelling argument, but the need for an exception to *Edwards* is broader than the need to exempt military questioning.

²⁷⁸ See *supra* note 232 and accompanying text.

possessed information that potentially could shed light on an ongoing terrorist threat.

Finally, lower courts, following the lead of Judge Lynch in the *Jones* case, will likely interpret the *Dickerson* decision as leaving intact the exceptions to *Miranda*, including the public safety exception. Once the ongoing viability of the underlying public safety exception to *Miranda* is accepted, the public safety exception can be extended to *Edwards* on an expanded *Mobley* analysis.

Given the Supreme Court's strong signal that it is "business as usual" with regard to the entrenched *Miranda* exceptions, it is not the job of the lower courts to reconcile that dictum with the Court's seemingly contradictory interpretation of the "constitutional" nature of the *Miranda* decision.²⁷⁹ In the short run, the public safety exception of *Quarles* can be extended to *Edwards* situations on the "expanded *Mobley* analysis" suggested above. In the longer run, however, we should strive for a more comfortable doctrinal home for public safety exceptions than the unsatisfying *ipse dixit* of the *Dickerson* majority.²⁸⁰

One solution would be a frank recognition that, if the Fifth Amendment requires *Miranda* warnings, and *Quarles* permits courts to use statements not preceded by such warnings, that is justified simply because "the Fifth Amendment itself must yield to public safety issues."²⁸¹ This reasoning seems to me unsatisfactory in light of the language of the Fifth Amendment itself, which does not suggest that society's "need" for a "compelled" statement can be balanced against an absolute prohibition against compelled self-incrimination.²⁸²

²⁷⁹ Cf. Dripps, *supra* note 24, at 77 ("[L]ower courts clearly cannot . . . reorient criminal procedure doctrine"; suggesting that more "general doctrinal foundations" after *Dickerson* can come only from the Supreme Court.).

²⁸⁰ See Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 70 (contending that Justice Scalia's dissent in *Dickerson* is "on firm ground . . . in criticizing the majority's frequent resort to *ipse dixit*"; Klein, *supra* note 27, at 1071 (referring to Chief Justice Rehnquist's holding in *Dickerson* as "judicial fiat that the law is to stay exactly as it was pre-*Dickerson*"; cf. *Miranda v. Arizona*, 384 U.S. 436, 500 (1966) (Clark, J., dissenting) (referring to the majority opinion in *Miranda* as "*ipse dixit*").

²⁸¹ Klein, *supra* note 27, at 1062 (offering possible justification for *Quarles*).

²⁸² But see Dorf & Friedman, *supra* note 280, at 79 n.77 ("Few rights are absolute, and all *Quarles* does is to acknowledge that some balancing is appropriate."); see also *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (dealing with "fighting words" exception to First Amendment freedom of speech). Some rights, however, have been read as absolute. The Fifth Amendment's double jeopardy provision, for example,

But does that necessarily mean that the public safety exception is itself unconstitutional? If society really needs information from a suspect, does dispensing with *Miranda* as a way to obtain that information violate the Constitution? I suspect that strict defenders of *Miranda* would argue—as Justice Marshall did in *Quarles*—that the dilemma I have posed is somewhat artificial. They would surely agree that interrogators should ask all the questions required to defuse any real emergency, whether it be one involving national security or a more pedestrian one involving a gun in a grocery store. However, in their view, the government should bear the “cost” of that questioning, with the “cost” being forfeiture of the use of any statements elicited during the emergency questioning.²⁸³ But, why should the government pay any such “cost” when it has acted rationally, perhaps even brilliantly, in preventing some act of destruction that the questions preempted? The answer, as the argument goes, is that the introduction into evidence of these “compelled” statements violates the defendant’s constitutional right against self-incrimination.²⁸⁴

Marshall’s dissent in *Quarles*, and arguments derived therefrom, are faithful to the rationale of *Miranda*. They serve, however, to illustrate the dubious foundations upon which that decision rests: (1) the presumption that any unwarned statements are coerced and (2) the assumption that subjecting a person to police interrogation is the same as compelling him to be “a witness against himself” at a criminal trial. In short, one can believe that the Fifth Amendment right against self-incrimination is absolute without believing that the *Miranda* rights are absolute. The question is one of defining the scope of the Fifth Amendment right against self-incrimination.

For example, even in a situation where “public safety” would be served by forcing a defendant to testify against himself at trial (perhaps because, for example, such testimony would more readily lead to the conviction of a dangerous perpetrator), I would argue that the Fifth Amendment absolutely forbids forcing that person to testify. I suspect few

is not set aside even in the most serious cases.

²⁸³ While Justice Marshall essentially made this point in his dissenting opinion in *New York v. Quarles*, 467 U.S. 649 (1984), it was Justice O’Connor, in her concurring opinion, who explicitly made the reference to “cost” 467 U.S. at 664. See *supra* note 195 and accompanying text.

²⁸⁴ See *Quarles*, 467 U.S. at 686 (Marshall, J., dissenting).

people would disagree, and yet, many agree with the validity of *Quarles*. Why? Because *Miranda* really did go “beyond” the requirements of the Fifth Amendment,²⁸⁵ despite *Dickerson*’s suggestion otherwise.

However, any suggestion that *Miranda* be cast aside wholesale, post-*Dickerson*, is purely academic. On the other hand, *Miranda* itself did not hold that statements made after warnings are given and a suspect invokes his right to counsel (the *Edwards* situation) are necessarily compelled.

One solution to the “public safety problem” involves Congress. Although the *Dickerson* Court found Section 3501 to be unconstitutional, that was in part because that statute did nothing more than displace *Miranda* with the pre-existing test that *Miranda* itself held inadequate.²⁸⁶ Professors Michael C. Dorf and Barry Friedman have argued that the Court would be obligated to give “serous consideration” to legislation consistent with “what *Dickerson* identified as *Miranda*’s core holding: that the Fifth Amendment requires ‘apprising accused persons of their right of silence and . . . assuring a continuous opportunity to exercise it.’”²⁸⁷ Under Dorf and Friedman’s hypothetical legislation, the public safety exception to *Edwards* would be unnecessary. While not motivated specifically by the public safety concerns addressed here, their hypothetical legislation actually forbids the presence of counsel at pre-charge interrogation sessions.²⁸⁸ Legislation would not have to go that far to vindicate the public safety exception at issue here.

²⁸⁵ Joseph Grano has made this argument in particularly compelling terms. See Grano, *Selling the Idea*, *supra* note 122, at 1497-98.

²⁸⁶ See Dorf & Friedman, *supra* note 280, at 72 (characterizing § 3501 as a “slap at the Court, and if any Court was likely to slap back, it was this one”) (citing Yale Kamisar, *Can (Did) Congress “Overrule” Miranda?*, 85 CORNELL L. REV. 883, 895 (2000) [hereinafter Kamisar, *Overrule*] for characterization of § 3501); Garcia, *supra* note 22, at 479 (describing statute as “in effect decreeing the return of the voluntariness standard *Miranda* had jettisoned”); Kamisar, *Overrule*, *supra* at 951 (“Congress chose not to replace the *Miranda* warnings with a credible substitute. Instead . . . Congress contented itself with making the pre-*Miranda* voluntariness test the sole test for admissibility of confessions.”); Klein, *supra* note 27, at 1057 (“Congress enacted 18 U.S. Code § 3501 in 1968 not in response to [the Court’s] request for alternatives but simply to overrule a decision it loathed.”) (citing Kamisar, *Overrule*, *supra* at 85). But see Cassell, *The Statute*, *supra* note 127 (arguing for constitutionality of § 3501); Cassell, *Supreme Court’s Failures*, *supra* note 27 (same).

²⁸⁷ Dorf & Friedman, *supra* note 280, at 78-85 (analyzing hypothetical federal legislation that requires warning of the right to silence, videotaping of confessions and the provision that counsel may not attend interrogation sessions before the onset of adversarial proceedings).

²⁸⁸ See *id.* at 81 (describing hypothetical “Anti-Coercion and Effective Custodial Interrogation Act”).

Legislation could be conceived that would change the timing of the provision of warnings, for example, or that did away with the "second-level" safeguards imposed by *Edwards*.²⁸⁹

Acceptance by the current Court of legislation along the lines proposed by Dorf and Friedman, or otherwise, would require, at minimum, a re-thinking of some precedents from *Miranda* to *Dickerson*.²⁹⁰ While it is unthinkable that the Court would soon reconsider wholesale its recent decision reaffirming *Miranda*, incremental reformulations and doctrinal shifts are not only plausible, but perfectly consistent with the Court's past practice.²⁹¹ Indeed, even without legislation, justifiable doctrinal shifts in the Court's confessions jurisprudence could allow the introduction into evidence of statements made even after a suspect asserted his right to counsel.

The Court, for example, could simply overrule *Edwards*. *Edwards*, of course, was based on language in *Miranda* that suggested that questioning must forever cease after a suspect invokes his right to counsel and before an attorney is present.²⁹² That language in *Miranda*, however, is dictum. None of the four underlying cases in *Miranda* involved a situation in which the suspect had asked for an attorney.²⁹³ The post-*Miranda* Courts have not hesitated to disregard other *Miranda* language, such as that involving the stringent requirements for waiver,²⁹⁴ and that suggesting that statements taken in violation of *Miranda* should not be used to impeach the defendant.²⁹⁵

²⁸⁹ Most commentators who have proposed legislative solutions as an alternative to the *Miranda* warnings would require something like videotaping of confessions in order for judges to make a better assessment of the voluntariness of confessions. See, e.g., Evan H. Caminker, *Miranda and Some Puzzles of "Prophylactic Rules,"* 70 U. CIN. L. REV. 1, 20-22 (2001); cf. Dorf & Friedman, *supra* note 280, at 78-85.

²⁹⁰ Cf. Dorf & Friedman, *supra* note 280, at 80.

²⁹¹ An obvious example is the Court's recharacterization of the Sixth Amendment *Escobedo* decision as a case vindicating the Fifth Amendment right against self-incrimination. See *supra* note 123 and accompanying text.

²⁹² See *supra* notes 148-50 and accompanying text.

²⁹³ See *Miranda v. Arizona*, 384 U.S. 436, 491-98 (1966) (discussing facts of *Miranda v. Arizona*, 401 P.2d 721 (Ariz. 1965); *Vignera v. New York*, 207 N.E.2d 527 (N.Y. 1965); *Westover v. United States*, 342 F.2d 684 (9th Cir. 1965); and *California v. Stewart*, 400 P.2d 97 (Cal. 1965)).

²⁹⁴ See *Darmer*, *supra* note 35 (discussing vitiation of waiver requirement).

²⁹⁵ See *Garcia*, *supra* note 22, at 481-82 ("Although the *Miranda* Court cautioned that statements taken in violation of its holding should not be used to impeach the defendant's testimony, the *Harris* Court dismissed that portion of the decision as uncontrolling dicta.") (citing *Miranda*, 384 U.S. at 477; *Harris v. New York*, 401 U.S. 222, 224 (1971)).

A paring of *Miranda* to its core picks up on the arguments of Professors Dorf and Friedman²⁹⁶ and Dean Howe,²⁹⁷ as well as Professor Thomas, who argued that, in essence, *Miranda* has become a case about due process notice.²⁹⁸ Under a plausible reformulation of *Miranda*, however, the decision could remain tethered to the Fifth Amendment and yet pared back to its essential elements. Doing away with the *Edwards* rule would leave the central protections of *Miranda* in place. In cases involving risks to national security, the mischievous effects of the *Edwards* rule are manifest. There is a real cost in a rule that, once the magic words are spoken, provides protections even beyond those of giving the initial *Miranda* warnings.

The Court's decision in *Escobedo*, that a suspect should have the "guiding hand of counsel" at the investigation stage had far-reaching implications.²⁹⁹ The Court has struggled with those implications ever since, given the problem so well articulated by Justice Jackson more than fifty years ago: "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement . . . under any circumstances."³⁰⁰ Dean Howe and others have argued that the "right-to-counsel aspects of *Miranda* doctrine are unfounded," and that suspects should not even be told they have the right to counsel during pre-charge investigations³⁰¹ because, in constitutional fact, they do not.³⁰² While this is probably right, we need not go that far to reach the more limited goal of finding doctrinal coherence for a public safety exception to *Edwards*. The Court can overrule *Edwards* while leaving the requirement for the four *Miranda* warnings intact.³⁰³

Reconciling the public safety exception with the reaffirmation of *Miranda*'s constitutional premise in *Dickerson*

²⁹⁶ See generally Dorf & Friedman, *supra* note 280.

²⁹⁷ See Howe, *supra* note 152, at 433-38.

²⁹⁸ See generally Thomas, *supra* note 215. But see Susan R. Klein, *Miranda's Exceptions in a Post-Dickerson World*, 91 J. CRIM. L. & CRIMINOLOGY 567 (2001) (criticizing Thomas's argument).

²⁹⁹ See *supra* notes 111-24 and accompanying text.

³⁰⁰ *United States v. Watts*, 338 U.S. 49, 59 (1949) (Jackson, J., dissenting).

³⁰¹ Howe, *supra* note 152, at 343-35.

³⁰² See *id.* at 343-35; see also Dorf & Friedman, *supra* note 280, at 85 (suggesting that right to counsel is not "core part" of the Fifth Amendment); *id.* at 80 n.80 (suggesting that Court should provide "better explanation" for its decision in *Edwards*).

³⁰³ Cf. Howe, *supra* note 152, at 435 ("[A]ssertion of the right to counsel should not call for more protection than assertion of the right to silence.").

goes beyond what is necessary to deal with cases involving national security that may confront the courts shortly. *Edwards* need not be overruled in the short term. Rather, given the Supreme Court's seeming tolerance for doctrinal incoherence, a public safety exception to *Edwards* can be easily justified by accepting the ongoing viability of the *Quarles* public safety exception and then expanding upon existing precedent under especially compelling circumstances like those presented in *Lindh*.

CONCLUSION

While the *Lindh* court never had the opportunity to address the question whether the public safety exception applied to that case, or should be expanded, other courts will inevitably face such questions in the near term. And nowhere does the need for a robust public safety exception appear so justified as in those cases dealing with terrorism and national security.³⁰⁴

More broadly, an expansive reading of the Fifth Amendment may be ill-suited to the threats confronting the nation in the twenty-first century; perhaps *Dickerson* would have been decided differently had it come a few years later. While there are certainly legitimate concerns about aspects of the government's conduct in the wake of the September 11 attacks, it is also legitimate to question—again—both the wisdom and the constitutional underpinnings of rules that act to thwart investigation and interrogation where gathering information is critical.

The *Hamdi* case may illustrate the government's unwillingness to be hamstrung by the rules of civilian trials in future similar cases, and *Lindh* might have found himself in indefinite military detention had he not been the first "American Talib" captured.³⁰⁵ The idea of the government

³⁰⁴ Even before September 11, 2001, the Supreme Court recently recognized, in the Fourth Amendment context, that normal rules might have to give way in emergency situations. See *Florida v. J.L.*, 529 U.S. 266, 273-74 (2000) ("The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk.").

³⁰⁵ Adam Liptak, *Accord Suggests U.S. Prefers to Avoid Courts*, N.Y. TIMES, July 16, 2002, at A14 (suggesting that cases of *Hamdi* and Jose Padilla [individual accused of planning to explode a radioactive device who is also being held in military

indefinitely detaining American citizens without charges is troubling. Yet, also troubling is the prospect of forcing these cases into a civilian model where interrogation must cease the moment a suspect asks for an attorney. Does the Constitution really require that a suspect be spared further questioning if he asks for an attorney? It does not, and the price of rules that say otherwise may just be too high.

