Hastings Law Journal

Volume 67 | Issue 6 Article 4

8-2016

Miranda Overseas: The Law of Coerced Confessions Abroad

David Keenan

Miranda Overseas: The Law of Coerced Confessions Abroad

David Keenan*

In recent years, Article III courts have become the preferred venue for the U.S. government to try terrorism suspects captured abroad. Many liberals have welcomed this development, characterizing it as a proper extension of American rule of law principles to the so-called "War on Terror." But while many have celebrated the marginalization of the military tribunal system, few have directly acknowledged its potential costs.

This Article examines one of those costs: Reduced procedural safeguards for Article III defendants against statements procured through coercive interrogation techniques. As courts have repeatedly recognized, the core purpose of the Fifth Amendment's Self-Incrimination Clause is to ensure that the accused is not compelled to testify against himself in a criminal proceeding. More controversially, Miranda warnings give effect to that purpose by requiring that any statements admitted into evidence be the product of a suspect's voluntary and informed choice.

However, where matters of national security are implicated, there is a danger that prosecutions of extraterritorial crimes will cause our domestic courts to bend or abandon traditional rules of American criminal procedure. That is particularly true with respect to protections against self-incrimination. Through a comparison of current legal doctrine with the Supreme Court's pre-incorporation jurisprudence, this Article argues that courts should be more, not less, vigilant in their review of confessions obtained abroad, especially by regimes that are known to engage in torture. In practice, however, the opposite has occurred. Foreign interrogation practices are subject to far fewer constraints than domestic ones. That realization ought to give some pause to those who tout the supposed virtues of our criminal justice system.

* Assistant Federal Public Defender, Office of the Federal Defender for the District of Connecticut. B.A., University of Southern California, 2003; M.A., Northwestern University, 2007; J.D., Yale Law School, 2013. The Author wishes to thank Fiona Doherty, Owen Fiss, Sabrina Shroff, Terence Ward, and the editors of the *Hastings Law Journal.*

TABLE OF CONTENTS

INTRODUCTION

That terrorism suspects captured abroad enjoy fewer constitutional rights than ordinary criminals is hardly a novel observation. Indeed, much of the debate over the last decade has centered on whether they should enjoy any constitutional rights at all.[1] But it has become apparent that Article III trials for those accused of terrorism-related offenses are now the norm rather than the exception. The last prisoner transfer to Guantanamo Bay occurred more than eight years ago,[2] and the Obama administration, like the Bush administration before it, has repeatedly used Article III courts to prosecute suspected terrorists.[3] In 2013, President Obama reaffirmed his intention to close the Guantanamo detention facility and transfer the individuals housed there to the United

1. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 733 (2008) (confirming, in a 5–4 decision, that prisoners detained at Guantanamo Bay enjoy the right of habeas corpus); Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After* Rasul v. Bush, 153 U. PA. L. REV. 2073, 2077 (2005) (arguing that terrorists enjoy constitutional rights under a "mutuality of obligation" approach to the extraterritorial application of U.S. law); Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?* 84 NOTRE DAME L. REV. 1975, 1975, 2047 (2009) (describing the Court's effort to define the legal boundaries of the war on terror as "quixotic," and asserting that *Boumediene* "simply imposed the will of five Justices who disagreed personally and politically with the government's detainee policies").

2. HUMAN RIGHTS FIRST, GUANTANAMO BY THE NUMBERS 2 (2016) (reporting last known arrival occurring on March 14, 2008).

3. N.Y.U. SCH. OF LAW, CTR. ON LAW & SEC., TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2011, 2 (2011) (documenting approximately 300 prosecutions of suspected terrorists between September 11, 2001–September 11, 2011).

States to stand trial.[4] As such, the position that terrorism suspects are not entitled to any rights under our Constitution no longer seems tenable.

While this development ought to be welcomed, it cannot be judged in isolation. Scholars ought to question what is to be gained from prosecuting terrorism suspects in Article III courts, particularly if those prosecutions threaten to erode traditional procedural protections for criminal defendants. The Bush administration pushed the boundaries of legality so far that extraordinary departures from ordinary criminal procedures now seem tame by comparison.

Perhaps those who are eager to prove the worthiness of Article III courts believe it is possible to create a cabined "national security" exception for terrorism prosecutions.[5] I am less sanguine. Treating terrorism suspects differently than ordinary criminals is itself an affront to core constitutional principles of due process and equal protection. But, the greater danger is that the law's disparate treatment of terrorism suspects becomes the exception that swallows the rule.

Rather than ask ourselves what might be gained from trying suspects in Article III courts, we would be better served to consider what is likely to be lost. To see why the danger of what some have termed "seepage" is not merely hypothetical,[6] it is necessary to understand the nature of the criminal procedural rights enshrined in the Constitution. Those rights are "transsubstantive" in that they apply equally to all criminal suspects.[7] For instance, the Fourth Amendment ordinarily requires probable cause for searches and seizures.[8] As one scholar has noted, "that standard incorporates the entire criminal code without differentiation."[9] Likewise, the Fifth Amendment's right against self-incrimination applies to "any criminal case."[10] Consequently, when courts make law in terrorism cases, they are not just making law for terrorists. What they say is equally applicable to suspected drug dealers, pimps,

4. Charlie Savage, *Amid Hunger Strike, Obama Renews Push to Close Cuba Prison*, N.Y. TIMES (Apr. 30, 2013), http://www.nytimes.com/2013/05/01/us/guantanamo-adds-medical-staff-amid-hunger-strike.html?pagewanted=all.

5. *See, e.g.*, Norman Abrams, *Terrorism Prosecutions in U.S. Federal Court: Exceptions to Constitutional Evidence Rules and the Development of a Cabined Exception for Coerced Confessions*, 4 HARV. NAT'L SEC. J. 58 (2012).

6. *See, e.g.*, Stephen I. Vladeck, *Terrorism Trials and the Article III Courts After* Abu Ali, 88 TEX. L. REV. 1501, 1501 (2010).

7. William J. Stuntz, Essay, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2140 (2002).

8. WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1(a) (5th ed. 2013).

9. Stuntz, *supra* note 7, at 2140 n.7.

10. U.S. CONST. amend V ("No person . . . shall be compelled in any criminal case to be a witness against himself, . . .").

antitrust violators, fraudsters, child pornographers, and immigration offenders.[11]

It is not easy, in other words, to divorce terrorism cases from our criminal procedure writ large. Both the amorphous nature of terrorism offenses—predicated on ordinary criminal acts like murder or even noncriminal acts such as the provision of goods and services—and the nature of our constitutional discourse, which presupposes that the scope of constitutional rights remains uniform and relatively fixed, would serve to defeat any such effort. When courts expound on the scope of *Miranda* protections overseas or the admissibility of evidence obtained without a search warrant, they are necessarily speaking not only of the rights of terrorists, but of the rights of all criminal suspects abroad. That latter category, as Justice Brennan presciently warned more than twenty-five years ago, is likely to grow ever larger as the United States seeks new ways to apply its laws overseas.[12]

This Article tackles one threat that the current legal regime for Article III terrorism prosecutions poses to our core constitutional values: its lack of safeguards against coerced confessions. As courts have repeatedly recognized, the central purpose of the Fifth Amendment's Self-Incrimination Clause is to ensure that the accused is not compelled to be a witness against himself in a criminal proceeding.[13] More controversially, *Miranda* warnings give expression to that right by requiring that any statements admitted into evidence be the product of a suspect's knowing and voluntary choice.[14]

Together, the Fifth Amendment and *Miranda* can be thought of as serving three basic values. First, they increase the probability that a confession offered into evidence is reliable.[15] Second, they deter abusive police practices by preventing the use of illegally obtained confessions to prove guilt.[16] And third, they protect the autonomy of the individual subjected to the psychological pressures of custodial interrogation by giving her a choice as to whether she shall speak or remain silent.[17]

---

11. Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 81, 103–04 (2003) ("The historical record of the 'drug exception' and/or the 'organized crime exception' swallowing the Fourth, Fifth, and Sixth Amendments is reason enough to beware the 'leaching factor' that may attend the changes terrorism cases have wrought.").

12. United States v. Verdugo-Urquidez, 494 U.S. 259, 280 (1990) (Brennan, J., dissenting) ("Foreign nationals must now take care not to violate our drug laws, our antitrust laws, our securities laws, and a host of other federal criminal statutes.").

13. *Id.* at 264 (characterizing the right against self-incrimination as a "fundamental trial right of criminal defendants").

14. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

15. *See generally* Brown v. Mississippi, 297 U.S. 278, 285 (1936); Hopt v. Utah, 373 U.S. 503, 508–11 (1884) (discussing situations where *Miranda* bolsters the probability that confessions are reliable).

16. Lisenba v. California, 314 U.S. 219, 240 (1941).

17. *See* Haynes v. Washington, 373 U.S. 503, 507 (1963).

These values should be no different whether the stationhouse is a foreign or domestic one. If anything, one might suspect that courts would be *more* skeptical of confessions obtained abroad, especially by regimes that are known to engage in torture. But precisely the opposite has occurred. Foreign interrogation practices are subject to far fewer constraints than domestic ones.[18] Whereas scholars have previously assumed that statements obtained by torture cannot be admitted in U.S. courts, that assumption is now open to question as courts have, in recent years, admitted statements of terrorism suspects (or evidence derived therefrom) notwithstanding claims of torture.[19] Moreover, executive agencies have concocted elaborate techniques for circumventing *Miranda*, some of which have been blessed by Article III courts. Such tactics include posing questions through foreign interrogators without the benefit of *Miranda* warnings,[20] engaging in two-step interrogation techniques in which those warnings are purposefully omitted from initial "intelligence only" interrogations,[21] and recasting the public safety exception to allow for broad questioning regarding any and all terrorist threats.[22] Although this Article's focus is on extraterritorial interrogations, it is worth noting that these tactics have begun to make inroads into the domestic sphere as well.[23]

This Article is divided into three Parts. In Part I, I explain how the Supreme Court's pre-incorporation jurisprudence has much to teach us

---

18. *See infra* Part II.

19. *See, e.g.*, United States v. Ahmed, 94 F. Supp. 3d 394, 440 (E.D.N.Y. 2015), *reconsideration denied*, No. 12-CR-661 (SLT)(S-2), 2015 WL 1636827 (E.D.N.Y. Apr. 10, 2015) (declining to hold "taint" hearing despite defendants' unchallenged assertion that they were tortured while in Djiboutian custody, and where the government agreed not to seek admission at trial of any statements obtained by U.S. or Djiboutian officials); United States v. Abu Ali, 528 F.3d 210, 234 (4th Cir. 2008) (upholding district court's decision to admit statements of terrorism suspect who claimed to have been tortured by Saudi officials); United States v. Marzook, 435 F. Supp. 2d 708, 777 (N.D. Ill. 2006) (admitting statements of Palestinian terrorism suspect notwithstanding claims of torture at hands of Israeli officials). *But see* United States v. Ghailani, 743 F. Supp. 2d 261, 287 (S.D.N.Y. 2010) (refusing to permit witness testimony where government's knowledge of witness's identity was a fruit of defendant's torture).

20. *Abu Ali*, 528 F.3d at 225.

21. *See infra* Part III.B.

22. *See* Memorandum from the Acting Deputy Att'y Gen. on Custodial Interrogations and Intelligence-Gathering for Operational Terrorists Arrested Inside the United States (Oct. 19, 2010), http://www.justice.gov/oip/docs/dag-memo-ciot.pdf.

23. Witness the prosecutions of Times Square would-be bomber Faisal Shazhad, the "underwear bomber" Umar Farouk Abdulmutallab, and most recently, Dzhokhar Tsarnaev. Emily Bazelon has provided a succinct description of the current state of the law in a 2013 *Slate* article. *See* Emily Bazelon, *Why Should I Care That No One's Reading Dzhokhar Tsarnaev His Miranda Rights?*, SLATE (Apr. 19, 2013, 11:29 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/04/dzhokhar_tsarnaev_and_miranda_rights_the_public_safety_exception_and_terrorism.html; *see also* United States v. Abdulmutallab, No. 10-20005, 2011 WL 4345243, at *2–3 (E.D. Mich. Sept. 16, 2011) (admitting statements of terrorism suspect under the so-called "public-safety exception" notwithstanding that suspect "suffered third degree burns to his lower extremities, was transported to the hospital, was given 350 micrograms of fentanyl, and then interrogated for approximately 50 minutes by federal agents while he was in the burn care unit").

about the current legal complexities regarding confessions obtained abroad. Specifically, I describe the voluntariness standard courts formerly applied to confessions obtained by state law enforcement agencies. I also examine the pre-incorporation "silver platter" doctrine that allowed federal courts to admit evidence seized by states in contravention of Fourth Amendment principles so long as federal officials neither directed nor participated in the search.[24] Although these doctrines seem antiquated, they are actually highly relevant to assessing the admissibility of statements obtained abroad.

Parts II and III focus on the particular dilemmas raised by overseas interrogations. Part II begins with a brief discussion of *Miranda* and its aftermath. My aim is to show that *Miranda* embodies a constitutional, rather than merely prophylactic, rule. That is to say, contrary to the decision's critics, *Miranda* does not "sweep[] more broadly than the Fifth Amendment itself."[25] Instead, it is better understood as recognizing custodial interrogations for the inherently compulsive environments that they are.[26] Accordingly, under *Miranda*'s logic, extracting statements in such settings without the benefit of warnings runs afoul of the Self-Incrimination Clause. Only a valid waiver can make a custodial interrogation constitutional by ensuring that either a criminal suspect has voluntarily submitted to its compulsive forces, or that the coercive atmosphere has itself dissipated.[27]

Courts typically approach statements obtained by foreign governments very differently. Such statements are not subject to *Miranda*'s protections at all, but are instead judged according to the older, pre-incorporation voluntariness standard.[28] Overseas interrogations by U.S. law enforcement, by contrast, are subject to *Miranda*, albeit in modified form.[29] As Part III explains, taken together, these doctrines create a perverse incentive that encourages U.S. officials to use foreign governments in order to circumvent *Miranda*'s requirements. But even where U.S. officials choose to conduct an interrogation themselves, we should be skeptical that *Miranda* provides any meaningful restraint on their actions. That is because an increasingly common technique of "two-step" interrogations has evolved, whereby an initial "dirty" un-*Mirandized* interrogation, supposedly conducted for intelligence purposes only, is followed by a *Mirandized* interrogation intended to "cleanse" the statements of their earlier taint so they can be

24. Lustig v. United States, 338 U.S. 74, 78–79 (1949).

25. Withrow v. Williams, 507 U.S. 680, 702 (1993) (O'Connor, J., concurring) (citing Oregon v. Elstad, 470 U.S. 298, 306 (1985)).

26. Miranda v. Arizona, 384 U.S. 436, 458 (1966) ("Unless adequate protective devices are employed to dispel *the compulsion inherent in custodial surroundings*, no statement obtained from the defendant can truly be the product of his free choice." (emphasis added)).

27. *Id.*

28. *See infra* Part II.

29. *Id.*

admitted at trial.[30] Moreover, the government's broadened view of the "public safety" exception purports to allow it to use even those statements that are unwarned.[31]

All of these practices have become commonplace in the last decade. As a consequence, Fifth Amendment protections for terrorism suspects have been severely diminished. For those inclined to think in cost-benefit terms, courts' willingness to countenance false positives in terrorism investigations might be welcomed as a logical reflection of terrorism's severity. But even if one accepts this sliding-scale approach to constitutional rights, the lack of a limiting principle should be troubling. And while the tactics used in terrorism cases have yet to be deployed regularly in ordinary criminal investigations, the likelihood of that happening increases substantially with each passing judicial opinion sanctifying their use. The pressure for courts to approve such techniques will only intensify as the Obama administration seeks to try more suspects in domestic courts. This realization ought to give proponents of Article III courts some pause before touting the supposed virtues of our criminal justice system.

I. The Law of Coerced Confessions Before *Miranda*

A. The Pre-Incorporation Voluntariness Standard

Those who supported the Self-Incrimination Clause's inclusion in the Bill of Rights saw it as embodying a long-standing Anglo-American tradition prohibiting the admission of statements procured through torture.[32] At first glance, then, it is puzzling that the Supreme Court for much of its history analyzed the admissibility of confessions under the Due Process Clause.[33] The solution only begins to reveal itself when one realizes that the Self-Incrimination Clause was not incorporated against

30. *See* Defendant Mohamed Ibrahim Ahmed's Post-Hearing Memorandum in Support of His Motion to Suppress Post-Arrest Statements at 44–65, United States v. Ahmed, No. 10-cr-131, 2012 WL 1805050 (S.D.N.Y. Feb. 28, 2012) (discussing that the two-step interrogation technique apparently evolved in the late 1990s to deal specifically with terrorism investigations); *see* Roberto Suro, *FBI's 'Clean' Teams Follow 'Dirty' Spy Work*, Wash. Post (Aug. 16, 1993), http://www.washingtonpost.com/wp-srv/national/daily/aug99/dirty16.htm; Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, The New Yorker, Feb. 15, 2010, at 52 (discussing how a "clean team" was used with the aim of allowing the U.S. government to use Khalid Sheikh Mohammed's statements against him in federal court, though the Obama administration's efforts to do so were eventually frustrated by congressional republicans).

31. Memorandum from the Acting Deputy Att'y Gen. on Custodial Interrogations, *supra* note 22.

32. *See* Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 865 n.20 (1995).

33. *See, e.g.*, Aschcraft v. Tennessee, 322 U.S. 143, 154–55 (1944); Brown v. Mississippi, 297 U.S. 278, 285–87 (1936).

the states until 1964 and was generally thought to apply to in-court proceedings only.[34]

Although the drafting history of the Fifth Amendment's Self-Incrimination Clause is surprisingly "sparse and ambiguous,"[35] two related but distinct rationales seem to have provided the impetus behind its ratification. One was a common law rule that excluded coerced confessions on the basis of their apparent unreliability.[36] The other was a rule that acknowledged individual autonomy by prohibiting courts from compelling witnesses to testify under oath by threatening them with contempt.[37] In an 1897 decision, *Bram v. United States*, the Supreme Court found both values embodied in the Self-Incrimination Clause.[38] The question before the Court in *Bram* was whether a law enforcement officer's implicit threat to imprison a suspect until he submitted to interrogation constituted compulsion under the Fifth Amendment.[39] The Court found that it did, and therefore, the officers could not use Bram's statements against him because they "must necessarily have been the result of either hope or fear, or both, operating on the mind."[40] *Bram*, however, had virtually no effect on the law of coerced confessions prior to *Miranda*.[41] For the next sixty plus years, the Supreme Court opted to review both state and federal confessions through a due process framework instead.[42] This approach reflected the Court's belief, contrary to *Bram*, that the Self-Incrimination Clause only prohibited compelled in-court testimony and, therefore, did not apply to statements made during custodial interrogations.[43]

---

34. *See generally* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment from abridgment by the states").

35. Ronald J. Allen, Essay, Miranda*'s Hollow Core*, 100 Nw. U. L. REV. 71, 73 (2006).

36. *Id.*

37. *Id.* at 73–74.

38. Bram v. United States, 168 U.S. 532, 543–49 (1897).

39. *Id.* at 562 ("It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that, if he remained silent, it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person; and it cannot be conceived that the converse impression would not also have naturally arisen that, by denying, there was hope of removing the suspicion from himself.").

40. *Id.*

41. Allen, *supra* note 35, at 74.

42. *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199, 210 (1960); Payne v. Arkansas, 356 U.S. 560, 561 (1958); Fikes v. Alabama, 352 U.S. 191, 197 (1957); Aschcraft v. Tennessee, 322 U.S. 143, 154–55 (1944); Lisenba v. California, 314 U.S. 219, 236 (1941); Chambers v. Florida, 309 U.S. 227, 228–29 (1940); White v. Texas, 310 U.S. 530, 530–31 (1940); Brown v. Mississippi, 297 U.S. 278, 285–87 (1936).

43. Miranda v. Arizona, 384 U.S. 436, 510 (1966) (Harlan, J., dissenting) ("Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved; indeed, 'the history of the two principles is wide apart, differing by one hundred years in origin, and derived through separate lines of precedents.'" (citing 8 J. WIGMORE, EVIDENCE, § 2266, at 401 (McNaughton rev. 1961))).

When it came to reviewing the actions of state officials prior to the incorporation of the Bill of Rights against the states, the Supreme Court could rely on neither the Self-Incrimination Clause nor its inherent supervisory powers over lower federal courts to invalidate confessions. The Court, however, frequently found itself confronted with instances of abhorrent state behavior. Nowhere was the conduct more egregious than in the 1936 case of *Brown v. Mississippi*.[44] The appellants in *Brown* were black tenant farmers who confessed to murder only after police officers, with the assistance of a white mob, hanged and whipped one of the defendants until he confessed.[45] The State argued that the trial court's decision to admit the confession was immune from attack because the sole protection against coerced confessions was the Self-Incrimination Clause, which only constrained federal officials and only applied to in-court witness testimony.[46] The Court's Justices, understandably appalled by the facts before them, unanimously rejected Mississippi's argument. In so doing, they distinguished "[c]ompulsion by torture to extort a confession" from the sort of nonphysical, in-court compulsion thought at the time to be the object of the Self-Incrimination Clause.[47] Although the state was free to regulate its court process however it saw fit, it could not dispense with "due process of law."[48] Even if the State was within its rights to radically depart from traditional procedure by, say, abolishing the jury, it could not "substitute trial by ordeal" in its place or rely on the "rack and torture chamber" in place of the witness stand.[49] *Brown* marked the beginning of an era in which the Court began reviewing state confessions by invoking a "voluntariness" standard embedded in fundamental notions of due process.[50]

44. *See Brown*, 297 U.S. 278, 279–80.

45. Jenny-Brooke Condon, *Extraterritorial Interrogation: The Porous Border Between Torture and U.S. Criminal Trials*, 60 RUTGERS L. REV. 647, 660 (2008).

46. *Brown*, 297 U.S. at 285.

47. *Id.*

48. *Id.*

49. *Id.* at 285–86.

50. Dickerson v. United States, 530 U.S. 428, 433–34 (2000) ("While *Bram* was decided before *Brown* and its progeny, for the middle third of the 20th century our cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process. We applied the due process voluntariness test in 'some 30 different cases decided during the era that intervened between *Brown* and *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L.Ed.2d 977 [(1964)].'" (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973)).

Voluntariness, however, proved to be a concept more easily defined in theory than in practice. The Court in *Culombe v. Connecticut* provided a succinct, if not particularly helpful, "test" for voluntariness:

> Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.[51]

But as the more than thirty Supreme Court opinions issued between *Brown* and *Miranda* attest, the Court had great difficulty reaching a consensus on what kinds of practices were sufficient to render a confession involuntary.[52] Justice Frankfurter, for his part, felt compelled to acknowledge that "[t]he notion of 'voluntariness' is itself an amphibian."[53] The Court elaborated in *Schneckloth v. Bustamonte*:

> Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are "voluntary" in the sense of representing a choice of alternatives. On the other hand, if "voluntariness" incorporates notions of "butfor" [sic] cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.[54]

Faced with these two extremes, the Court opted for a middle ground approach in which it balanced the autonomy interests of individuals and general notions of fairness against law enforcement's need for information. The laundry list of relevant factors the Court used to gauge voluntariness—the length of the detention; whether the suspect had been advised of any of his constitutional rights; the accused's age, intelligence, and education level; the circumstances of the questioning, including threats of physical punishment; deprivation of food or sleep; etc.—rarely produced agreement between the Court's liberal and conservative members.[55] Perhaps that lack of consensus is why the Court never

---

51. Culombe v. Connecticute, 367 U.S. 568, 602 (1961).

52. *Id.* at 601 ("In light of our past opinions and in light of the wide divergence of views which men may reasonably maintain concerning the propriety of various police investigative procedures not involving the employment of obvious brutality, this much seems certain: It is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions.").

53. *Id.* at 605.

54. *Schneckloth*, 412 U.S. at 224 (quoting Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 72–73 (1966)).

55. M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319, 337 (2003) (noting that while the "*Brown* decision was unanimous," the Court's later opinions evidenced "a deeply fractured Court").

developed a clear formula for assessing the relative weight of the test's various inputs.

In *Ashcraft v. Tennessee*, for instance, the Court held by a 6–3 vote that a confession was the result of a violation of the Fourteenth Amendment's Due Process Clause when it was procured primarily through psychological, rather than physical, compulsion.[56] The suspect in *Ashcraft* had been held "incommunicado, without sleep or rest" for thirty-six hours following his arrest, at the end of which "relays of officers, experienced investigators, and highly trained lawyers questioned him without respite."[57] Such a process, according to the Court, appeared "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear."[58] But to the dissenters, on whose behalf Justice Jackson wrote, the majority's approach amounted to deeming a confession unconstitutional merely because the process by which it was obtained consisted of "conduct which we may personally disapprove."[59] To avoid such value-driven judgments, Justice Jackson would have drawn a bright line between physical abuse and the kind of mental coercion he viewed to be an inherent (and acceptable) aspect of police interrogation. Moreover, Justice Jackson warned that "the principles by which we may adjudge when [police questioning] passes constitutional limits are quite different from those that condemn police brutality, and are far more difficult to apply."[60]

Notwithstanding Justice Jackson's reservations, the Court took a further step towards invalidating psychological pressure tactics in *Spano v. New York*.[61] There, it found a due process violation when the police ignored a suspect's persistent refusal to submit to interrogation as well as his repeated requests to speak with counsel over an eight-hour interrogation session.[62] The suspect only confessed after his childhood friend, then a cadet at the police academy, falsely told the suspect that he had gotten the friend "in a lot of trouble."[63] Writing for the majority, Chief Justice Warren explained that the Court's decision was not merely a reflection of the "inherent untrustworthiness"[64] of such confessions, but also the "deep-rooted feeling that the police must obey the law while enforcing the law."[65] While acknowledging that the Court had not been

56. Aschcraft v. Tennessee, 322 U.S. 143, 153 (1944).
57. *Id.*
58. *Id.* at 154.
59. *Id.* at 158 (Jackson, J., dissenting).
60. *Id.* at 160.
61. Spano v. New York, 360 U.S. 315 (1959).
62. *Id.* at 323–24.
63. *Id.* at 322–23.
64. *Id.* at 320.
65. *Id.*

presented with interrogations involving physical brutality since *Brown*, Chief Justice Warren noted that the more "sophisticated" methods used to obtain confessions made the Court's "duty to enforce federal constitutional protections" more difficult and invited "more delicate judgments to be made."[66] In placing the emphasis on the suspect's overborne will,[67] the Court showed more concern for the individual's right to choose whether to confess than it did for the reliability of the confession itself.[68]

The logical next step was for the Court to conclude, as it did in *Miranda*, that custodial interrogations are constitutionally problematic because their inherent coerciveness compels suspects to speak against their will.[69] Accordingly, the proper rubric for analyzing coerced confessions became the Fifth Amendment's Self-Incrimination Clause rather than the Due Process Clause of the Fifth or Fourteenth Amendments.[70] Incorporation, of course, made such a move practically feasible. As is argued further in Part II, *Miranda* is best understood as recognizing a constitutional rule, not inventing a prophylactic one, as its detractors often claim. That is because *Miranda* interpreted the Self-Incrimination Clause as affording criminal suspects the right to be free from custodial interrogation. Like most other constitutional rights, this "right to remain silent" is waivable by the individual.[71] Hence, law enforcement is not prohibited from conducting interrogations full stop, but they must simply obtain an individual's consent before proceeding to do so. Statistical studies indicate that roughly eighty percent of criminal suspects submit to interrogation voluntarily.[72]

Although the *Miranda* warning/waiver framework has replaced the voluntariness test for domestic criminal interrogations, the latter is not entirely obsolete. In addition to overseas interrogations by foreign governments, the voluntariness inquiry continues to guide courts' analysis in two important areas. First, *Miranda* waivers themselves have predictably given rise to allegations of coercion. Accordingly, courts continue to employ the voluntariness test in determining whether waivers were validly executed.[73] Second, in the Fourth Amendment context, questions often arise as to whether a search of a suspect's person

66. *Id.* at 321.

67. *Id.* at 323.

68. *Id*. at 320.

69. Miranda v. Arizona, 384 U.S. 436, 458 (1966).

70. *Id.* at 459.

71. *See generally* Alfred Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050, 1055 (1978) (discussing the forfeitures that arise from procedural defaults in the assertion of constitutional rights in criminal cases).

72. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 868 (1996).

73. Moran v. Burbine, 475 U.S. 412, 421 (1986).

or property was consensual. In 1973, the Burger Court rejected the invitation to extend *Miranda*'s rationale to such searches.[74] Consequently, officers need not issue any warnings prior to asking for consent to search one's person or property. Instead, courts look to the traditional voluntariness test to judge whether such consent was obtained free of undue coercion.

The voluntariness test is obviously weaker than the bright-line rule laid down in *Miranda*. Indeed, one suspects this is why the Burger Court favored its adoption in the search context over the objections of the Court's more liberal members.[75] Because it invites courts to engage in a balancing of variables, the inclusion and relative weight of which are both easily manipulated, determinations of admissibility are likely to reflect judges' preexisting policy preferences.

As Part II explains, this is problematic in the coerced confessions context because judges are likely to favor wide latitude for government actors seeking to prevent future terrorist attacks. Indeed, there are already voices in the academy complaining that the voluntariness standard is too stringent and will handicap legitimate law enforcement efforts. UCLA Professor Norman Abrams, for instance, has remarked that the Court's voluntariness doctrine "appears to bar the police from using a number of techniques and practices in ordinary crime cases that do not approach an 'extremely cruel' standard, or even a cruel method."[76] He goes on to argue that "[t]he use of such non-extreme techniques to ferret out information, while violating standards of how we want the police to behave in ordinary criminal cases, should not be prohibited when there is exigency and the interrogation is directed to obtaining intelligence to prevent terrorism actions."[77]

Abrams' argument, that terrorism suspects can, or ought to be, treated differently, finds little support in the Constitution. But, there is undeniable merit to his observation that, in the absence of a cabined exception for terrorism cases, ad hoc judicial lawmaking under a voluntariness standard will lead courts to stretch preexisting doctrine.[78] Indeed, as this Article argues in Parts II and III, several courts have already done just that.

---

74. Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973).

75. *Accord* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 241 (1983) ("At the doctrinal level, Burger Court decisions that have relaxed the 'waiver' standard for fourth and fifth amendment rights reflect this crime control theme. The Court has slighted concerns about whether the individual intelligently relinquished these rights by refusing to give them any dispositive weight.").

76. Abrams, *supra* note 5, at 92–93.

77. *Id.* at 93.

78. *Id.* at 112–13.

B. Information-Sharing Between Sovereigns: The Origins of the "Joint Venture" Doctrine

The joint venture doctrine is another remnant of pre-incorporation law whose relevance has been resuscitated by the legal complexities arising from the war on terrorism. Although originally invented to deal with problems arising out of the Fourth Amendment's prohibition on unreasonable searches, its rationale is equally applicable to the modern Fifth Amendment law of overseas confessions. Regrettably, courts have yet to apply the lessons of this pre-incorporation doctrine to contemporary joint investigations between the United States and foreign nations. As Part III suggests, that failure is likely a reflection of judicial policy preferences. The joint venture doctrine as it existed during the Prohibition was designed to elicit adherence to the Constitution. In contrast, courts in terrorism prosecutions have expressed a preference for encouraging cooperation between the United States and foreign governments by freeing law enforcement from constitutional restraints.[79]

As was true of confessions law, prior to incorporation, state officials were not subject to the constitutional limitations of the Fourth Amendment. In fact, the Court had explicitly rejected efforts to incorporate the Fourth Amendment's exclusionary rule against the states[80] until it reversed course in 1961 when it decided *Mapp v. Ohio*.[81] But, unlike pre-incorporation confessions law, in which the same due process standard governed both federal and state interrogations, searches and seizures by federal and state authorities were judged by different measures. This created a host of problems for courts tasked with interpreting the legality of joint state-federal operations. The obvious concern was that federal law enforcement would have state officials do their bidding for them in order to circumvent constitutional safeguards.[82]

The problem became most pronounced during Prohibition. State and federal officials would often work together investigating organized criminal enterprises involved in alcohol smuggling and a host of other criminal activity that was primarily local in character. Consequently, issues frequently arose over whether to admit evidence obtained by state officers where the methods those officers employed, while perhaps legal

79. *See infra* Part II.A.

80. Wolf v. Colorado, 338 U.S. 25, 33 (1949).

81. Mapp v. Ohio, 367 U.S. 643, 660 (1961).

82. *See, e.g.*, United States v. Falloco, 277 F. 75, 81–82 (W.D. Mo. 1922) (noting that "the Fourth Amendment to the Constitution of the United States is not directed to individual conduct of state officials," but suppressing evidence where "there were conferences between state and federal authorities" that "were held with a view to a closer co-operation between the two jurisdictions in the enforcement of the prohibitory law" and where the state-federal cooperation was "systematic and frictionless").

under state law, offended Fourth Amendment notions of reasonableness.[83] In making those determinations, the Court had to decide whether the level of federal involvement was enough to convert the operation into a joint venture subject to the Fourth Amendment's probable cause and particularity requirements. Put differently, did any federal participation render the Fourth Amendment applicable, or did state actors have to act as the federal government's agents?

The Court first excluded evidence obtained as the result of a joint venture in 1927. *Byars v. United States* was a case in which local officials obtained a valid state law search warrant, but one that would have run afoul of the Fourth Amendment, both because it failed to establish probable cause, and because it lacked a particularized description of the items to be seized.[84] The joint venture problem arose when local officials, after first obtaining the warrant from a municipal judge, invited a federal agent to participate in the search.[85] As was true of many joint venture cases from the period, *Byars* involved an investigation into alcohol offenses. The federal Prohibition agent who accompanied the local officials on the search acknowledged that he "had no authority for going into the house other than the search warrant that the officers had secured from the state authorities."[86] The search resulted in the discovery of counterfeit strip stamps used on bottled-in-bond whiskey, evidence federal prosecutors subsequently used to convict Byars.[87]

Writing on behalf of a unanimous Court, Justice Sutherland deemed the search illegal and reversed Byars' conviction. He explained that while "mere participation" by a federal officer in a state search "does not render it a federal undertaking," such participation does require the Court to "scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods."[88] In the instant case, the Court found that the federal agent had participated "upon the chance, which was subsequently realized, that something would be disclosed of official interest to him as such agent."[89] Moreover, the state official had invited the federal official to join him, as opposed to a fellow local officer, precisely because he suspected they would uncover evidence of federal criminal wrongdoing.[90] Indeed, the

83. Irvin B. Nathan & Christopher D. Man, *Coordinated Criminal Investigations Between the United States and Foreign Governments and Their Implications for American Constitutional Rights*, 42 VA. J. INT'L L. 821, 823 (2002).

84. Byars v. United States, 273 U.S. 28, 29 (1927) ("The warrant clearly is bad if tested by the Fourth Amendment and the laws of the United States.").

85. *Id.* at 29, 30–31.

86. *Id.* at 31.

87. *Id.* at 29.

88. *Id.* at 32.

89. *Id.*

90. *Id.*

federal officer took possession of all evidence seized and held it in his exclusive possession.[91] Given these facts, the Court concluded that the federal official participated "under color of his federal office," thereby rendering the search "in substance and effect . . . a joint operation of the local and federal officers."[92]

The Court decided another joint venture case involving alcohol offenses that same year, in *Gambino v. United States*.[93] In *Gambino*, New York state troopers stopped the defendants' car at the Canadian border without a search warrant and seized liquor, which they subsequently turned over to federal officials.[94] The *Gambino* Court framed the question as "whether, although the state troopers were not agents of the United States, their relation to the federal prosecution was such as to require the exclusion of the evidence wrongfully obtained."[95] Recognizing that no federal officials participated directly in the search itself, the Court nonetheless deemed the evidence inadmissible. In doing so, it emphasized that the "sole" purpose of the stop was to aid federal officials in the enforcement of the National Prohibition Act.[96] The state troopers had no valid basis for the seizure or subsequent search under state law, but rather, felt bound to aid in the enforcement of the Prohibition Act.[97] While acknowledging that the troopers did not "act[] under the directions of the federal officials in making the arrest and seizure," the Court held that "the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such co-operation as by the state officers acting under direction of federal officials."[98] Consequently, the evidence seized should not have been admitted in the defendants' federal trial because the state officers had lacked probable cause as required by the Fourth Amendment.

Byars and *Gambino* combined to form a robust barrier to the admission in federal trials of evidence seized in contravention of the Fourth Amendment. Read together, the cases mandated exclusion whenever either a federal official had participated in the search or state officials had conducted the search with the sole purpose of aiding the enforcement of federal law.[99]

The Court went a step further in *Lustig v. United States* by creating a bright-line rule against admission whenever a federal official "had a hand

91. *Id.* at 32–33.
92. *Id.* at 33.
93. Gambino v. United States, 275 U.S. 310 (1927).
94. *Id.* at 312–13.
95. *Id.* at 314.
96. *Id.* at 315.
97. *Id.*
98. *Id.* at 316.
99. Nathan & Man, *supra* note 83, at 828.

in" the search.[100] Justice Frankfurter's plurality opinion explained what came to be known as the "silver platter doctrine":

> The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to federal authorities on a silver platter. The decisive factor in determining the applicability of the *Byars* case is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means.[101]

In *Lustig*, the Court concluded that a Fourth Amendment violation had occurred where a Secret Service agent had observed suspicious activity through the keyhole of a suspect's hotel room and tipped off state officials.[102] After obtaining a local search warrant, those officials invited the agent to help inventory the contents of the room, which included evidence later used to convict the suspect of federal counterfeiting violations.[103]

Later, in *Elkins v. United States*, decided in 1960, explicitly overruled the silver platter doctrine of *Lustig*, but left intact the jurisprudence that had preceded it.[104] While those earlier cases may have produced a rule that was "difficult and unpredictable,"[105] the silver platter doctrine went too far in encouraging federal officials to turn a blind eye to behavior that was offensive to constitutional principles. The Court explained:

> Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered.[106]

Between *Lustig* and *Elkins*, the Court had determined that the Fourth Amendment was applicable to the states through the Fourteenth Amendment, but declined to adopt the exclusionary rule as a constitutionally mandated remedy.[107] The *Elkins* Court, therefore, relied on its supervisory power over lower federal courts to repudiate the silver platter doctrine.[108]

---

100. Lustig v. United States, 338 U.S. 74, 78 (1949).

101. *Id.* at 78–79.

102. *Id.* at 76, 79–80.

103. *Id.* at 76–77.

104. Elkins v. United States, 364 U.S. 206, 223–24 (1960).

105. *Id.* at 212.

106. *Id.* at 221–22.

107. Wolf v. Colorado, 338 U.S. 25, 33 (1949).

108. *Elkins*, 364 U.S. at 216 ("What is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts, under which the Court has 'from the very

Elkins' relevance to domestic investigations turned out to be short-lived. Scarcely a year after the opinion was issued, the Court decided in *Mapp v. Ohio* that the exclusionary rule was constitutionally mandated in both state and federal proceedings.[109]

The joint venture doctrine's usefulness lives on, however, in the context of foreign interrogations. Although the Supreme Court has never directly addressed the issue, several lower courts have described international investigations between the United States and foreign governments as joint ventures that may, under certain conditions, implicate constitutional protections.[110] With respect to the Fourth Amendment, the international joint venture doctrine has lost much of its importance given the Court's holding in *United States v. Verdugo-Urquidez*: That foreign nationals do not enjoy Fourth Amendment protections in their persons or possessions outside the United States, even when the United States is the relevant government actor directing the investigation.[111] The Fifth Amendment, however, is a different matter altogether. Significantly, it applies to all "persons" as opposed to "the people."[112] Perhaps more importantly, as the *Verdugo-Urquidez* majority recognized, the Self-Incrimination Clause has been interpreted as primarily a trial right,[113] meaning violations of the clause occur at the time the government seeks to introduce the statements into evidence.[114] Consequently, a statement may be deemed compelled regardless of where its words are spoken.

But, because statements obtained by foreign governments are not subject to *Miranda* and are instead adjudged according to the lower voluntariness standard described above, the locus of a statement's recording actually matters a great deal in practice. In the absence of a robust international joint venture doctrine, U.S. officials are incentivized

---

beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions.'" (citing McNabb v. United States, 318 U.S. 332, 341 (1943))).

109. Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

110. *See, e.g.*, United States v. Abu Ali, 528 F.3d 210, 268–69 (4th Cir. 2008); United States v. Vilar, No. S305-cr-621 KMK, 2007 WL 1075041 (S.D.N.Y. Apr. 4, 2007); United States v. Maturo, 982 F.2d 57, 61 (2d Cir. 1992); United States v. Peterson, 812 F.2d 486 (9th Cir. 1987); United States v. Heller, 625 F.2d 594 (5th Cir. 1980); United States v. Emery, 591 F.2d 1266 (9th Cir. 1978); Cranford v. Rodriguez, 512 F.2d 860, 863–64 (10th Cir. 1975); United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972); United States v. Dopf, 434 F.2d 205, 207 (5th Cir. 1970).

111. United States v. Verdugo-Urquidez, 494 U.S. 259, 274–75 (1990).

112. *Compare* U.S. CONST. amend. V, *with* U.S. CONST. amend. IV (distinguishing between "persons" in the Fifth Amendment and "people" in the Fourth Amendment).

113. *Verdugo-Urquidez*, 494 U.S. at 264 ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants.").

114. *Id.* ("Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." (citing Kastigar v. United States, 406 U.S. 441, 453 (1972))).

to "outsource" interrogations to foreign governments. As Part III argues, this is precisely what has occurred.

II. Interrogations Abroad

Interrogations abroad take three basic forms. First, there are matters that are exclusively investigated by foreign governments with an eye towards prosecuting violations of those governments' domestic laws. Occasionally, such investigations will uncover evidence of criminal wrongdoing that violates U.S. law, and the foreign government, if it is so inclined, will alert U.S. authorities and share incriminatory statements provided by the accused.[115] Second, there are interrogations conducted exclusively by U.S. authorities as part of a U.S. criminal investigation, or intelligence gathering effort.[116] Depending on the circumstances, foreign governments may or may not be involved in providing U.S. officials with logistical support. Between these two extremes lies a more common third scenario: joint investigations that entail cooperation between the United States and foreign governments.[117] In theory, at least, joint investigations ought to pose the greatest difficulties for courts. those difficulties are addressed extensively in Part III. For the time being, however, I focus my attention on the two extremes, for that is where courts have thus far had the most to say.

This Part is comprised of two Subparts. Subpart A explains the law of coerced confessions as it applies to statements elicited by foreign governments. Subpart B, in turn, considers what rules apply when U.S. officials conduct overseas interrogations, at least insofar as they seek to admit statements procured during those interrogations at subsequent criminal trials.

A preliminary word must be said about the nature of the *Miranda* decision. For much of the last fifty years, scholars and jurists have fiercely debated whether *Miranda* embodies a constitutional rule coextensive with the Fifth Amendment or a judge made prophylactic rule that overprotects constitutional rights in order to achieve effective deterrence of unlawful police behavior.[118] Which side one takes in this

115. *See, e.g.*, United States v. Bary, 978 F. Supp. 2d 356, 373 (S.D.N.Y. 2013) *("*Instead, the U.K. police conducted a 'completely British operation' in which Abdel Bary was arrested and interviewed. As this operation was not a joint venture with the U.S. government, no *Miranda* warnings were required.").

116. Fred Medick, *Exporting* Miranda: *Protecting the Right Against Self-Incrimination When U.S. Officers Perform Custodial Interrogations Abroad*, 44 Harv. C.R.-C.L. L. Rev. 173 (2009) (explaining the *Mirandized* U.S. interrogation of Zeinab Taleb-Jedi, an American citizen accused of materially supporting MeK).

117. For example, see United States v. Abu Ali, 528 F.3d 210, 268–69 (4th Cir. 2008).

118. *Compare* Rhode Island v. Innis, 446 U.S. 291, 299 (1980) (refusing to interpret *Miranda* "narrowly" and noting that "[t]he concern of the Court in *Miranda* was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination"), *with* New York v. Quarles, 467 U.S. 649, 654 (1984) ("The prophylactic Miranda warnings therefore are 'not themselves rights protected by the

debate is likely to determine how one views the constitutionality of the coerced confessions doctrine as it has been applied abroad.

The Supreme Court, for its part, has taken great pains to confuse the matter. With ample reason, scholars have described the Court's jurisprudence in this area as "internally inconsistent" and "incoherent."[119] In the three decades after *Miranda* was decided, the Court expended much effort debating the nature of its commands. In 1984, the Court's conservative wing scored a victory when, in a 5–4 decision, it described *Miranda* as a prophylactic rule that could be dispensed with whenever "overriding considerations of public safety" justified doing so.[120] This led many commentators to suspect *Miranda* was nearing its death. But then in 2000, the Court's liberal and conservative wings reached a sort of pragmatic détente. By holding that *Miranda* was a "constitutional decision," the Court refuted Congress's attempt to statutorily will it out of being.[121] At the same time, however, the Court reaffirmed the continuing vitality of *Miranda* exceptions like *Quarles*, essentially freezing the doctrine in place.[122]

In what follows, this Article unapologetically adopts the view that *Miranda* was not merely a "constitutional decision"—whatever that means—but the recognition of a constitutional rule that custodial interrogations are per se unconstitutional absent *Miranda* warnings. Under any fair reading, *Miranda* cannot be characterized as merely prophylactic. Indeed, as Justice O'Connor, ordinarily no friend of *Miranda*, felt obligated to recognize in her *Quarles* concurrence, *Miranda* "held unconstitutional, because inherently compelled, the admission of statements derived from in-custody questioning not preceded by an explanation of the privilege against self-incrimination and the consequences of forgoing it."[123] Although she disagreed with that holding, O'Connor at least recognized it for what it was. The same cannot be said for the Court's more conservative members, who instead launched a sideways assault on *Miranda* by purposefully distorting its meaning.

Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974))) (illustrating the Court's inconsistent interpretations of Fifth Amendment jurisprudence as either being rooted in the Constitution or constructed by judges).

119. Mark A. Godsey, Miranda*'s Final Frontier—The International Arena: A Critical Analysis of* United States v. Bin Laden*, and a Proposal for a New* Miranda *Exception Abroad*, 51 DUKE L.J. 1703, 1750 (2002); M.K.B. Darmer, *Lessons from the* Lindh *Case: Public Safety and the Fifth Amendment*, 68 BROOK. L. REV. 241, 245 n.27 (2002).

120. *Quarles*, 467 U.S. at 651.

121. Dickerson v. United States, 530 U.S. 428, 432 (2000).

122. *Id.* at 441 ("These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision.").

123. *Quarles*, 467 U.S. at 660 (O'Connor, J., concurring in part and dissenting in part).

One must nevertheless concede the success of that assault. Today, the Supreme Court routinely labels *Miranda* a prophylactic rule.[124] The implicit assumption is that its requirements ought to be subject to a general balancing test that weighs society's need for information against the individual's right to be free from compulsion.[125] And yet, in contrast to the Fourth Amendment's reasonableness requirement, there is nothing in the text of the Self-Incrimination Clause that would permit courts to engage in such a balancing test. As I argue here, the confusion around *Miranda*'s nature has produced a perverse outcome. Judges appear to be in fact applying a balancing test, though they avoid naming it as such. Terrorism suspects, of course, are almost always destined to come out on the losing end of such tests. The result is law that speaks more generally about what law enforcement is permitted to do in the context of international investigations, but which nearly always favors expansive interpretations of government power.

A. Interrogations by Foreign Governments

If one accepts the premise that *Miranda* deems custodial interrogations inherently coercive, then U.S. courts should not admit incriminating statements absent some indication that the suspect has affirmatively made a knowledgeable and voluntary waiver of his or her right not to speak. Of course, that is not to say confessions may only be admitted if foreign governments adhere to a specific articulation of *Miranda* warnings. The *Miranda* Court itself stipulated that its decision was not intended to create a "constitutional straitjacket" and that "other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it" would be constitutionally permissible.[126]

At a minimum, it would seem that if one takes seriously the idea that custodial interrogation is inherently coercive, then to be admissible, statements made to foreign governments would have to at least be preceded by a warning that the suspect need not speak. The question of whether counsel must be provided upon request is a more difficult one. Both the *Miranda* and *Edwards* courts laid great stress on a suspect's

124. *See, e.g.*, J.D.B. v. North Carolina, 564 U.S. 261, 269 (2011) ("[T]his Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination."); Chavez v. Martinez, 538 U.S. 760, 772 (2003) ("We have likewise established the *Miranda* exclusionary rule as a prophylactic measure to prevent violations of the right protected by the text of the Self-Incrimination Clause—the admission into evidence in a criminal case of confessions obtained through coercive custodial questioning."); *Dickerson*, 530 U.S. at 437 (noting that the Court has repeatedly referred to the *Miranda* warnings as "prophylactic").

125. *See, e.g.*, Mark A. Godsey, *Reformulating the* Miranda *Warnings in Light of Contemporary Law and Understandings*, 90 Minn. L. Rev. 781, 790 (2006) ("Today, the *Miranda* warnings are most accurately considered a judge-made, prophylactic rule, the application of which can be subjected to a balancing test.").

126. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

ability to confer with counsel,[127] so it would be reasonable to conclude that the availability of counsel is a necessary precursor to any valid waiver of one's right against self-incrimination. But different cultures have different legal traditions, and it may be a step too far to assume that custodial interrogations abroad are always compulsory in the absence of counsel.

In any event, the foregoing is largely a matter of academic curiosity because U.S. courts have uniformly declined to apply the *Miranda* warning/waiver framework to statements made to foreign officials.[128] The logic of these decisions rests on two erroneous assumptions. First, courts that view *Miranda* as representing a prophylactic rule against unlawful police behavior reason that the exclusion in an American trial of statements obtained abroad will have no deterrent effect on foreign officials.[129] While that is probably overstating the matter slightly, the general sentiment is logical. However, as previously explained, such reasoning misunderstands the nature of *Miranda*. If waivers are required because custodial interrogations are inherently coercive, then deterrence is largely beside the point. Second, courts have sometimes said that the United States "cannot dictate the protections provided to criminal suspects by foreign nations."[130] True enough, but the relevancy of this observation to the issue of a confession's admissibility is unclear. If meant to suggest law enforcement officials must either use the unwarned statements or forego introducing a confession altogether, it represents a false choice. Under ordinary circumstances, U.S. law enforcement personnel remain free to question a suspect themselves. The Supreme Court has never held, and no commentator as far as I know has ever suggested, that the taint of an earlier unwarned interrogation is incurable, particularly if that taint was caused by an entirely different law enforcement agency.

---

127. *Id.* at 469 ("[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today."); Arizona v. Edwards, 451 U.S. 477, 485–86 (1981) ("The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation.").

128. *See, e.g.*, United States v. Abu Ali, 528 F.3d 210, 227 (4th Cir. 2008) ("[V]oluntary statements obtained from a defendant by foreign law enforcement officers, even without *Miranda* warnings, generally are admissible."); United States v. Yousef, 327 F.3d 56, 145 (2d Cir. 2003) ("[T]he law is settled that statements taken by foreign police in the absence of *Miranda* warnings are admissible if voluntary.").

129. *See, e.g.*, *Abu Ali*, 528 F.3d at 227 (noting "deterrence of unlawful police activity—is absent when foreign agents direct an interrogation"); United States v. Martindale, 790 F.2d 1129, 1132 (4th Cir. 1986) ("[T]he exclusionary rule has little or no effect upon the conduct of foreign police."); United States v. Bin Laden, 132 F. Supp. 2d 168, 182 n.9 (S.D.N.Y. 2001), *aff'd sub nom.*, In re Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 177 (2d. Cir. 2008) ("[T]he deterrent rationale of the exclusionary rule, it is posited, has little force with respect to a foreign sovereign.").

130. *Abu Ali*, 528 F.3d at 227.

All of this is to say that courts' refusal to apply the principles of *Miranda* to statements that are the product of custodial interrogations by foreign officials is misguided. The voluntariness standard that courts employ when analyzing such statements permits not only a host of nonphysical coercive tactics, but significantly increases the chances that statements coerced by torture will be admitted as well.

Consider *United States v. Abu Ali*[131] and *United States v. Marzook*.[132] The defendants in both cases credibly claimed that their statements to foreign officials were the product of torture. The claims seemed plausible, in part, because the governments to which they gave the statements—Saudia Arabia and Israel—were widely known to engage in torture.[133] Indeed, the U.S. State Department has issued reports acknowledging as much.[134] But neither the *Abu Ali* nor the *Marzook* court was willing to give any weight to such pattern and practice evidence in deciding whether the defendants' respective statements should be suppressed.[135] Instead, they focused their attention on a selective hodgepodge of factors previously identified by the Supreme Court as relevant to the inquiry, while downplaying or ignoring others. Moreover, in conducting the voluntariness inquiry, they focused their attention almost exclusively on physical, as opposed to psychological, coercion.

The cases indicate the dangers of allowing courts to make ad hoc determinations of voluntariness in terrorism cases. In the absence of *Miranda*'s application to foreign-led interrogations, courts should at least subject such interrogations to a level of scrutiny equivalent to that which federal courts applied to state confessions prior to incorporation. As others have already recognized, they can do so, first, by acknowledging credible pattern or practice evidence that suggests a country routinely engages in torture,[136] and second, by demanding that the U.S. government meet a higher evidentiary burden in order to admit the statements as proof of guilt at trial.[137]

131. United States v. Abu Ali, 395 F. Supp. 2d 338 (E.D. Va. 2005).

132. United States v. Marzook, 435 F. Supp. 2d 708 (N.D. Ill. 2006).

133. *See, e.g.*, High Court of Justice [HCJ] May 26, 1999, 5100 HCJ 94 (Isr.), http://www.btselem.org/download/hc5100_94_19990906_torture_ruling.pdf (finding unconstitutional techniques commonly used by Israel General Security Service throughout the 1990s, including use of stress positions and sleep and sensory deprivation).

134. H.R. COMM. ON INT'L RELATIONS & S. COMM. ON FOREIGN RELATIONS, 108TH CONG., REP. ON COUNTRY HUMAN RIGHTS PRACTICES FOR 2003 (Comm. Print, vol. II, 2004); *2003 Country Reports on Human Rights Practices*, U.S. DEP'T OF STATE, http://www.state.gov/j/drl/rls/hrrpt/2003/index.htm (last visited Aug. 5, 2016).

135. AMNESTY INT'L, USA: THE TRIAL OF AHMED ABU ALI—FINDINGS OF AMNESTY INTERNATIONAL'S TRIAL OBSERVATION 5 (2005).

136. Wadie E. Said, *Coercing Voluntariness*, 85 IND. L.J. 1, 46 (2010); Condon, *supra* note 45, at 688–89.

137. Said, *supra* note 136, at 46.

What stands out about the *Abu Ali* and *Marzook* cases, besides the allegations of torture, is that in each case the prosecution relied heavily on the defendants' confessions. Ahmad Omar Abu Ali was born in Houston, Texas, and raised in Falls Church, Virginia.[138] In 2000, Abu Ali withdrew from the University of Maryland, where he was a freshman, to travel to Saudi Arabia to study Islamic theology.[139] While there, he allegedly became associated with a group of Islamic radicals, including members of Al Qaeda.[140] In June of 2003, Saudi officials arrested Abu Ali in the aftermath of the previous month's Riyadh suicide bomb attacks that killed nine Americans.[141] Abu Ali spent the next forty-seven days in incommunicado detention, during which time he was continually interrogated by Saudi officials and, according to his testimony, subjected to physical torture.[142] Upon request, Saudi officials allowed U.S. officials to observe one of Abu Ali's interrogation sessions, at which time they asked him American-drafted questions.[143] Eventually, Abu Ali made a videotaped confession in which he "confess[ed] that he plotted to hijack civilian planes and conspired to assassinate President Bush."[144] For several months, the U.S. government declined to state why Abu Ali had been arrested and whether charges had been or would be filed against him.[145] That caused his family to file a habeas petition nearly a year after his arrest, claiming the U.S. government had orchestrated Abu Ali's incarceration in Saudi Arabia for the purpose of torturing him.[146] When Judge John D. Bates of the D.C. District Court rejected the government's attempt to dismiss the petition, and ordered the commencement of discovery,[147] the government suddenly reversed course and produced Abu Ali for trial in the Eastern District of Virginia.[148] That court ultimately rejected Abu Ali's suppression motion, after which he was tried, convicted, and sentenced to thirty years in prison. The Fourth Circuit, however, considered the sentence too lenient and remanded for resentencing.[149] Consequently, Abu Ali was given a life term.

---

138. United States v. Abu Ali, 395 F. Supp. 2d 338, 343 (E.D. Va. 2005).

139. David Stout, *Man Charged in Alleged Plot to Kill President Bush*, N.Y. TIMES (Feb. 22, 2005), http://www.nytimes.com/2005/02/22/national/man-charged-in-alleged-plot-to-kill-president-bush.html.

140. *Abu Ali*, 395 F. Supp. 2d at 343.

141. *Id.*

142. *Id.* at 371.

143. *Id.* at 343.

144. Condon, *supra* note 45, at 648.

145. Caryle Murphy & John Mintz, *Va. Man's Months in Saudi Prison Go Unexplained*, WASH. POST (Nov. 22, 2003), https://www.washingtonpost.com/archive/politics/2003/11/22/va-mans-months-in-saudi-prison-go-unexplained/327bd225-9907-4d2e-b778-9179813e63b/.

146. *Id.*

147. Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 30 (D.C. Cir. 2004).

148. Condon, *supra* note 45, at 648.

149. United States v. Abu Ali, 528 F.3d 210, 265 (4th Cir. 2008) (finding that "the district court abused its discretion when it compared Abu Ali's case to those of Lindh and of McVeigh and Nichols, respectively, and used those comparisons as a basis for its sentence").

Marzook was an odd case in that it involved the prosecution of a man accused of materially supporting Hamas based on statements he had given to Israeli security agents more than ten years prior.[150] The defendant, Muhammad Hamid Khalil Salah, had been arrested at a checkpoint between Gaza and Israel on January 25, 1993.[151] Israeli authorities repeatedly interrogated him for nearly two months.[152] Salah claimed that his statements were involuntary because they had been elicited through torture. He described his conditions of confinement as follows:

> [Israeli interrogators] placed a "filthy, foul-smelling hood" over his head, handcuffed him behind his back, and forced him to sit in a "slanted child-sized chair in a position that caused excruciating pain between [his] shoulder blades and in [his] back"—a technique known in Israel as "waiting periods." While in this position, he claims that he was subjected to "deafening music and the sounds of people screaming in pain," and that someone slapped him on his head and face. In addition, Salah claims they handcuffed him to a metal bar behind his back in a "dark, freezing, closet-sized cell in which [he] could not stand upright, sit or lie down.[153]

Although the Israeli interrogators who testified at Salah's suppression hearing acknowledged routinely using such techniques on detainees, they claimed not to have done so with Salah because they received a directive from the head of the Israel Securities Authority instructing them to "treat Muhammad Salah differently than other detainees."[154] Based in part on this uncorroborated testimony, the trial court ruled the majority of Salah's statements voluntary and, therefore, admissible.[155]

It is impossible to know with any certainty, of course, whether Abu Ali or Salah's claims of torture are meritorious. As a general matter, it would not be unheard of for a criminal defendant to distort the circumstances surrounding his confession, though it is worth noting that, even post-trial, both Abu Ali's and Salah's lawyers have been steadfast in their conviction that their clients were, in fact, tortured.[156] But putting to the side whether or not the *Abu Ali* and *Marzook* courts reached the right outcome, the deficiencies of the processes they employed in getting there should trouble everyone.

---

150. United States v. Marzook, 435 F. Supp. 2d 708, 712 (N.D. Ill. 2006).

151. *Id.*

152. *Id.*

153. *Id.* at 739.

154. *Id.* at 717.

155. *Id.* at 762.

156. *See, e.g.*, Michael E. Deutsch & Erica Thompson, *Secrets and Lies: The Persecution of Muhammad Salah (Part I)*, 37 J. PALESTINE STUD. 38, 39 (2008) (noting Salah's acquittal and describing it as "a victory for opponents of torture, government secrecy, and the U.S. government's uncritical and unconditional support for Israel").

Both the *Abu Ali* and *Marzook* courts ignored or heavily discounted pattern and practice evidence documenting the widespread use of coercive techniques by both Saudi Arabian and Israeli intelligence agencies. In *Abu Ali*, the trial court denied defense lawyers the opportunity to present evidence concerning "Saudi Arabia's human rights record, its record on torture, and even particularly on the record of the Mabahith al-Amma," the agency that interrogated Abu Ali.[157] The court would not even permit the testimony of two British witnesses who were housed in the same prison as Abu Ali at the time of his incarceration, and could presumably speak to the conditions of his confinement.[158] The *Marzook* court, by contrast, did permit two defense witnesses to testify about Israeli interrogation practices and human rights abuses. But, it proceeded to give that testimony almost no weight because the witnesses did not personally observe Salah's interrogations and spoke mostly of Israeli treatment of Palestinian, as opposed to American, detainees.[159] Instead, the court credited the Israeli interrogators' unsubstantiated assertion that Israeli policy prohibited subjecting U.S. citizens like Salah to ordinary torture techniques.[160] Indeed, the court specifically found Salah's American citizenship to be "significant."[161] The court made that finding despite the fact that Salah's assertions of torture were hardly new—he had described them to American consular officials on February 12, 1993, eighteen days into his custodial interrogation.[162] In discounting Salah's corroborated affidavit, the court placed great emphasis on the fact that he had self-reported to consular officials that the period in which he was "hooded, tied with his hands behind him and forced to sit on a low stool" had lasted *only* two days.[163]

The problematic nature of the voluntariness analysis is underscored by the *Marzook* and *Abu Ali* courts' reliance on the lack of physical markers to corroborate the defendants' allegations. Both courts thought it highly significant that physical examinations failed to uncover definitive evidence of torture. The court's approach in *Abu Ali* was, in fact, highly disingenuous. Abu Ali's medical witness testified that he observed ten scars on his back in corroboration of Abu Ali's claims of physical torture.[164] In contrast, the government presented a dermatologist that had never physically examined Abu Ali, but who claimed, based entirely on high-resolution photographs, that the markings on Abu Ali's back were not scars, but pigmentation discolorations that "may [have

157. AMNESTY INT'L, *supra* note 135, at 4.
158. *Id.*
159. *Marzook*, 435 F. Supp. 2d at 760.
160. *Id.*
161. *Id.* at 753.
162. *Id.* at 755.
163. *Id.*
164. United States v. Abu Ali, 395 F. Supp. 2d 338, 375 (E.D. Va. 2005).

been] caused by intentional or non-intentional trauma."[165] The court nevertheless characterized the suppression hearing as consisting of "disparate medical opinions" concerning Abu Ali's allegations.[166] Ultimately, the court expressed its "reservations" about the diagnosis offered by Abu Ali's physician, and concluded that "[i]n the end, judges, not physicians, have to make the ultimate determination of the credibility of all of the testimony." Relying on the testimony of the Saudi agents, it found the government had met its burden of proving voluntariness.[167]

In reviewing *Abu Ali* and *Marzook* it is hard to avoid the conclusion that the courts characterized the evidence in such a way as to fit a predetermined preference for admissibility. A more charitable reading would recognize that determinations of torture are incredibly difficult in the absence of definitive physical proof. That is one of the many reasons why the voluntariness standard is so troubling. Because ad hoc voluntariness inquiries permit courts to consider a hodgepodge of factors and assign them whatever weight they wish, decisions over admissibility are likely to mirror the policy preferences or prejudices of the individual factfinder. Moreover, courts are far removed from the custodial interrogation setting. Finding out "what really happened" may be a practical impossibility, made no easier for courts by the government's constant invocation of secrecy and defendants' general unwillingness to testify at suppression hearings for fear of subjecting themselves to sentencing enhancements should the court find their testimony perjurious. Avoiding these difficulties, of course, was precisely the point of *Miranda*. By creating a bright-line rule requiring a knowing, intelligent, and voluntary waiver prior to questioning, the Court hoped to avoid so many of the contentious issues that had divided it in the pre-incorporation era.[168]

A fifth, and final, criticism of the *Marzook* and *Abu Ali* decisions bears mentioning. Within the conversation surrounding torture, it is easy to forget that the voluntariness inquiry does not rest on findings of physical coercion. In the domestic setting, courts have found confessions involuntary where they occurred in circumstances that involved prolonged periods of incommunicado detention without charge,[169] solitary confinement,[170] sleep deprivation,[171] threats,[172] and even promises of leniency.[173] By ignoring, or at

165. *Id.*
166. *Id.* at 376.
167. *Id.* at 374.
168. Miranda v. Arizona, 384 U.S. 436, 444 (1966).
169. Chambers v. Florida, 309 U.S. 227, 227 (1940).
170. Harris v. South Carolina, 338 U.S. 68, 69 (1949).
171. Reck v. Pate, 367 U.S. 433 (1961).
172. Arizona v. Fulminante, 499 U.S. 279, 287 (1991); Payne v. Arkansas, 356 U.S. 560, 560, 567 (1958).
173. Leyra v. Denno, 347 U.S. 556, 560 (1954).

least heavily discounting such factors, the *Marzook* and *Abu Ali* courts have created an inconsistency in the way voluntariness is measured at home compared to abroad.

B. Interrogations by U.S. Officials

The Supreme Court has not had occasion to decide whether the Fifth Amendment's Self-Incrimination Clause applies to custodial interrogations conducted by U.S. officials abroad. Several lower courts, however, have either concluded or assumed that it does.[174] Their reasoning is primarily based on linguistic differences between the Fourth and Fifth Amendment's text. In contrast to the Fourth Amendment's invocation of the term "the people," which the Court in *Verdugo-Urquidez* divined to be a "term of art" referencing some "class of persons who are part of a national community,"[175] the Fifth Amendment speaks more generically of "persons."[176] Perhaps more to the point, the Self-Incrimination Clause is frequently spoken of as a "trial right,"[177] meaning violations occur only when testimony is admitted in a domestic criminal proceeding. Violations of the Fourth Amendment, by contrast, are "'fully accomplished' at the time of an unreasonable governmental intrusion."[178] Finally, courts have concluded that the policies that support *Miranda* and the Self-Incrimination Clause, described above as individual autonomy, deterrence, and reliability, are equally implicated when U.S. law enforcement officials interrogate a foreign national overseas as they are when those same officials interrogate an American citizen in a local stationhouse.[179] Taken together, these considerations

174. *See, e.g.*, In re Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 177 (2d Cir. 2008); United States v. Hassan, 747 F. Supp. 2d 642 (E.D. Va. 2010); United States v. Karake, 443 F. Supp. 2d 8 (D.D.C. 2006); United States v. Bin Laden, 132 F. Supp. 2d 168, 168 (S.D.N.Y. 2001).

175. United States v. Verdugo-Urquidez, 494 U.S. 259, 259–60 (1990).

176. U.S. Const. amend V.

177. Chavez v. Martinez, 538 U.S. 760, 760 (2003).

178. *Verdugo-Urquidez*, 494 U.S. at 264.

179. Those policies were eloquently described by Justice Goldberg, who Judge Sand cited in his *Bin Laden* opinion:

> [O]ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

Bin Laden, 132 F. Supp. 2d at 185; In re Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 177, 200 (2d Cir. 2008) (citing United States v. Balsys, 524 U.S. 666, 690 (1998)).

have led every court that has considered the issue to conclude that *Miranda* applies to U.S. agencies operating abroad.

But what exactly does compliance with *Miranda* mean? Judge Leonard Sand offered perhaps the most robust version of *Miranda*'s application overseas in evaluating the confession of Mohamed Rasheed Daoud al-Owhali, a Saudi national accused, and eventually convicted of, participating in the 1998 Nairobi Embassy bombing. In the aftermath of the bombing, al-Owhali had been picked up by FBI agents and their Kenyan counterparts and questioned for nearly two weeks before finally confessing.[180] According to the Assistant U.S. Attorney who prosecuted him, "[w]ithout the confession, it is highly unlikely there would have been a case against him."[181] FBI agents had, in fact, *Mirandized* al-Owhali in Kenya. But, they had modified the right-to-counsel portion of the warnings to read:

> In the United States, you would have the right to talk to a lawyer to get advice before we ask you any questions and you could have a lawyer with you during questioning. In the United States, if you could not afford a lawyer, one would be appointed for you, if you wish, before any questioning. Because we are not in the United States, we cannot ensure that you will have a lawyer appointed for you before any questioning.[182]

The court was therefore faced with two questions: (1) does *Miranda* apply abroad to custodial interrogations conducted by FBI agents; and (2) must a suspect be informed that he has the right to counsel if the host country does not provide such counsel as a matter of right?

Judge Sand swiftly dismissed the government's argument that al-Owhali had no Fifth Amendment rights because his only connection to the United States was his desire to attack it.[183] In addition to the reasons listed above, Judge Sand noted that the Supreme Court had previously held the Fifth Amendment Due Process Clause applicable to both resident and nonresident aliens.[184] As to the second question, Judge Sand found the modified warnings wanting. He began by recognizing that U.S. agents could not "compel a foreign sovereign to accept blind allegiance to American criminal procedure, at least when U.S. involvement in the foreign investigation is limited to mutual cooperation."[185] But, "to the maximum extent reasonably possible," U.S. officials should be required to make efforts "to replicate what rights would be present if the

180. *Bin Laden*, 132 F. Supp. 2d at 174–75.

181. Andrew C. McCarthy, *The Global Fifth Amendment: Obama Goes to Court, Part II: Miranda Meets Al-Qaeda*, NAT'L REVIEW (June 16, 2009), http://www.nationalreview.com/node/227705/print.

182. *Bin Laden*, 132 F. Supp. 2d at 180.

183. *Id.* at 181.

184. *Id.* at 183 (citing Mathews v. Diaz, 426 U.S. 67, 77 (1976); Jean v. Nelson, 472 U.S. 846, 873 (1985)).

185. *Id.* at 188.

interrogation were being conducted in America."[186] In this regard, Judge Sand believed al-Owhali's interrogators had failed.[187] He found that the advice-of-rights form presented to the defendant wrongly conveyed to al-Owhali that, "due to his custodial situs outside the United States, he currently possesse[d] no opportunity to avail himself of the services of an attorney before or during questioning by U.S. officials."[188] In fact, there was some evidence that, had U.S. officials inquired into the possibility of locating counsel for al-Owhali, Kenyan authorities might have complied.[189]

Judge Sand's opinion has been subjected to attack from all quarters. There are those who believe the opinion did not go far enough in recognizing the indispensability of a suspect's right to speak with counsel before submitting to custodial interrogation.[190] To Judge Sand's critics it seems inconceivable that the scope of a suspect's right against self-incrimination could turn on the vagaries of foreign law.[191] On the other hand, Judge Sand himself eventually backpedaled from his original decision to exclude al-Owhali's statements, perhaps cognizant of the fact that suppression would have effectively ended the government's case.[192] Judge Sand maintained the contention that U.S. authorities have an obligation to familiarize themselves with local law and comply with *Miranda* to the fullest extent possible, but he ultimately found al-Owhali's statements admissible on the alternative grounds that one of the FBI agents had orally advised him of his right to an attorney.[193] One wonders whether Judge Sand's opinion, which was issued in 2000, would have looked the same had it been written after the events of September 11th.

When the Second Circuit eventually got around to reviewing Judge Sand's decision eight years later, it rejected his reasoning.[194] The court, while noting that *Miranda*'s "deterrence rationale retains its force" in the international setting as applied to U.S. agents, nonetheless refused to even confirm Judge Sand's assessment that *Miranda* applies abroad.[195] Instead, the Second Circuit chose to critique his reasoning while simply assuming that *Miranda* "might" apply extraterritorially.[196] In contrast to Judge Sand's skepticism over the advice-of-rights form, the Second

186. *Id.*
187. *Id.* at 190.
188. *Id.*
189. *Id.*
190. *See, e.g.*, David T. Henek, *Ensuring* Miranda*'s Right to Counsel in U.S. Interrogations Abroad*, 57 N.Y. L. SCH. L. REV. 557, 562 (2013).
191. *Id.* at 578.
192. McCarthy, *supra* note 181.
193. *Bin Laden*, 132 F. Supp. 2d at 192.
194. In re Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 177, 203 (2d. Cir. 2008).
195. *Id.*
196. *Id.* at 198.

Circuit was far more forgiving of the agents' efforts to comply with the law. According to the court, U.S. law enforcement personnel need only make "an honest, good faith effort to provide accurate information," not "advocate on behalf of suspects."[197] The Second Circuit further noted that *Miranda* had previously been "applied in a flexible fashion to accommodate the exigencies of local conditions."[198] The Court relied in particular on *Duckworth v. Eagan*, a decision that upheld a state warning that accurately informed criminal suspects that they had the right to speak with an attorney, but that they would only be provided one "if and when" they went to court.[199] The Second Circuit was also apparently worried about the burden that Judge Sand's opinion would have on law enforcement officers operating overseas. In the court's words, "U.S. agents acting overseas need not become experts in foreign criminal procedure in order to comply with *Miranda*."[200]

Although problematic in that it does not recognize *Miranda*'s applicability abroad, the Second Circuit's criticism of Judge Sand's decision is hard to disagree with. The agents in al-Owhali appear to have made a good faith effort to comply with *Miranda*, and took care not to mislead al-Owhali as to the nature of his rights. Judge Sand also appears to have gone too far in requiring FBI agents to familiarize themselves with the local laws of whatever jurisdiction they happen to be operating in at any given time. It is true that since the African embassy bombings, the number of FBI attaché offices have expanded exponentially.[201] But, the character of the working relationship between Kenya and the U.S. intelligence communities at the time of al-Owhali's arrest is less clear. In any event, Judge Sand's opinion appears to too easily disregard incentives. The harder you make it for U.S. officials to comply with *Miranda*, the more likely they are to defer to the parallel system of largely unregulated, foreign-led interrogations.

This brings up a more troubling reality that the Second Circuit raised, but did not resolve:

197. *Id.* at 208.
198. *Id.* at 205.
199. Duckworth v. Eagan, 492 U.S. 195, 197 (1989).
200. In re Terrorist Bombings, 552 F.3d at 198.
201. Condon, *supra* note 45, at 667.

> We are aware that, as defendants urge, foreign detainees may run the risk of refusing to speak to U.S. officials only to find themselves forced to speak to their foreign jailors. This would be so, however, even if U.S. agents made efforts to secure counsel on their behalf and those efforts proved fruitless. The risk of being forced to speak to their foreign jailors would also exist, moreover, if U.S. agents were not involved at all. Of course, statements obtained under these circumstances could not be admitted in a U.S. trial if the situation indicated that the statements were made involuntarily.[202]

That last statement largely misses the mark given the relatively low bar that the voluntariness threshold poses for the admission of internationally obtained confessions. But the Court, perhaps unwittingly, spoke to the real problem: What choice does a suspect have but to talk to U.S. officials when he is detained in a foreign jail in some third world country?

Although a lot of academic commentary has been devoted to Judge Sand's decision and the Second Circuit's follow-up, neither opinion really speaks to the actual coercion that suspects experience in foreign custody. Even if some form of *Miranda* warnings are required, that will hardly solve the problem of coerced statements abroad. That is because the U.S. government has exploited certain loopholes in the *Miranda* warnings/waiver framework. Those loopholes are the subject of Part III of this Article.

III. CIRCUMVENTING *MIRANDA*

A. JOINT VENTURES

As has been made clear at this point, a major disconnect exists in the law of coerced confessions. *Miranda*, in some form at least, appears to apply to the actions of U.S. law enforcement abroad. But, statements elicited by foreign officials are governed by a much looser voluntariness standard. While some might hope for district courts to more stringently enforce the voluntariness standard by, say, increasing the evidentiary burden for admission or acknowledging pattern and practice evidence, such hopes do not appear realistic. The problem is that the voluntariness standard too easily lends itself to judicial policy preferences masquerading as law.

So long as U.S. courts view interrogations in a binary U.S./non-U.S. manner, the law of coerced confessions is likely to provide little protection to criminal defendants who have the misfortune of being questioned overseas. Moreover, if U.S. courts insist on *Miranda*'s application whenever U.S. officials engage in questioning, it is likely there will be an acceleration in the outsourcing of interrogations to foreign governments.

---

202. In re Terrorist Bombings, 552 F.3d at 208.

The joint venture doctrine offers a readymade way out of the morass, but I am skeptical that courts will embrace its lessons. After all, that doctrine was fashioned in the context of Prohibition. One need not be a full-fledged legal realist to understand that courts are likely to view the threat of bathtub gin differently than that of improvised explosive devices. In the pre-incorporation era, skeptical federal courts seemed principally concerned with ensuring federal officials did not circumvent constitutional safeguards. By contrast, those same courts today display an eager willingness to defer to national security concerns of which they know little and, consequently, are more worried about freeing federal officials from constitutional restraints than using those restraints to bind them.

Abu Ali provides a case in point. The level of Saudi-U.S. cooperation remains something of a mystery because the U.S. government repeatedly invoked national security as a basis for denying both the court and defense counsel access to information about the nature of the relationship. We do know, however, that Saudi officials granted a U.S. government request to attend one of Abu Ali's interrogations.[203] At that same interrogation, Saudi agents asked Abu Ali six of thirteen questions prepared by American intelligence officials.[204] It is not clear why Saudi officials omitted the other seven questions. In any event, Abu Ali moved to suppress his statements during that interrogation session on the basis of joint venture. The district court denied his request.

Interestingly, joint venture is the only issue that divided the Fourth Circuit when it decided Abu Ali's appeal. Judges Traxler and Wilkinson found no evidence of joint venture, which they recast as a doctrine requiring "a significant degree of investigative control or authority."[205] The court found it highly significant, for instance, that the Saudis refused to ask seven of the thirteen questions posed by American intelligence officials, a "majority" as the court pointed out.[206] Judge Motz countered by pointing out that such formalism would provide easy cover for U.S. and foreign governments to circumvent *Miranda*.[207]

Judges Traxler and Wilkinson, however, went on to forthrightly acknowledge the policy considerations motivating their position. First, adopting a more stringent joint venture doctrine would "contravene the well-established notion that *Miranda*, which is intended to regulate only the conduct of *American* law enforcement officers, does not apply extraterritorially to foreign officials absent significant involvement by

203. United States v. Abu Ali, 528 F.3d 210, 225 (4th Cir. 2008).
204. *Id.*
205. *Id.* at 229 n.5.
206. *Id.*
207. *Id.* at 230 n.6.

American law enforcement."[208] Never mind that this begs the question of what "significant involvement" means. For Judge Motz, the significant level of U.S. involvement in Abu Ali's interrogation was not difficult to discern: "Whatever else 'active' or 'substantial' participation may mean, when United States law enforcement officials propose the questions propounded by foreign law enforcement officials, and those questions are asked in the presence of, and in consultation with United States law enforcement officials, this must constitute 'active' or 'substantial' participation."[209]

The second concern held by Judges Traxler and Wilkinson's was that "a broad per se holding could potentially discourage the United States and its allies from cooperating in criminal investigations of an international scope."[210] While perhaps true, the judges put forward no explanation for how such a concern related to their duty to pass on the constitutional rights of criminal suspects. Indeed, this was precisely the type of argument thrust upon the Supreme Court in its pre-incorporation joint venture cases, one that it flatly—and repeatedly—rejected as inconsistent with its duty to speak to individual rights.[211] In any event, it seems hyperbolic to suggest that cooperation between U.S. and foreign law enforcement agencies will come to a grinding halt simply because foreign officials are required to Mirandize suspects prior to asking them questions posed by the United States.

B. Two-Step Interrogations

In November 2009, agents of the Nigerian State Security Service arrested Mohamed Ibrahim Ahmed, a Swedish permanent resident of Eritrean dissent.[212] Ahmed subsequently pled guilty to providing material support to al-Shabaab, a militant Islamic organization.[213] Prior to his guilty plea, Ahmed faced more serious charges and sought to suppress various statements he had made to Nigerian and U.S. officials. I was a member of Ahmed's defense team while in law school and helped draft the post-hearing brief in support of his motion to suppress.

As recounted in our brief, Ahmed alleged that Nigerian officials had held him incommunicado for over 100 days without charging him with a crime or bringing him before a Nigerian court.[214] During the period of his

208. *Id.* at 229 n.5.

209. *Id.* at 230 n.6.

210. *Id.* at 229 n.5.

211. *See supra* Part I.B.

212. Transcript of Suppression Hearing at 105, United States v. Ahmed, No. 10-cr-131, 2012, WL 1805050 (S.D.N.Y. 2012).

213. Benjamin Weiser, *Man Offers Guilty Plea, Upending Terror Case*, N.Y. Times (June 13, 2012), http://www.nytimes.com/2012/06/14/nyregion/man-who-trained-with-somalis-offers-guilty-plea-ending-pivotal-case.html.

214. *See* Defendant's Post-Hearing Memorandum, *supra* note 30, at 44–65.

confinement, Nigerian and American officials allegedly interrogated him no fewer than nineteen times.[215] Ahmed further alleged that his Nigerian jailers had denied him access to an attorney, his family, or Swedish consular officials.[216]

The U.S. Government subsequently sought to introduce statements it had procured from Ahmed as part of a deliberate two-step interrogation strategy. In December 2009, American officials received permission from their Nigerian counterparts to interrogate Ahmed.[217] Prior to the initial interrogation, those same officials devised a two-step interrogation plan admittedly designed to evade the requirements of *Miranda*. The plan involved a so-called "dirty" interrogation in which U.S. interrogators purposefully avoided administering *Miranda* warnings so that Ahmed would more freely "confess," followed by the insertion of a second team of interrogators to purportedly "clean" Ahmed's prior statements of their taint so they could be used against him in a criminal trial.[218] Ahmed was never informed by the "clean" team of the inadmissibility of his prior statements or the reason for the two interrogations.

The same tactic has been used on other foreign detainees. The Obama administration has increasingly favored a hybrid model of detention in which terrorism suspects are temporarily detained on naval ships before being brought to the United States. This occurred with both Ahmed Abdulkhadir Warsame and Abu Anas al-Libi.[219] In Warsame's case, a "dirty" team interrogated him for two months before providing him with *Miranda* warnings.[220] Al-Libi's interrogation lasted a shorter time only because he had hepatitis C and U.S. officials were concerned about his declining health.[221]

Ahmed moved to suppress the statements obtained by U.S. interrogators as the product of an illicit two-step interrogation under the Supreme Court's 2004 holding in *Missouri v. Seibert*.[222] The district court never reached the merits of Ahmed's motion, however, because Ahmed ultimately accepted a plea deal that permitted him to serve less than ten

215. *Id.* at 1.

216. *Id.*

217. *Id.* at 2.

218. *Id.*

219. Peter Finn, *Somali's Case a Template for U.S. as It Seeks to Prosecute Terrorism Suspects in Federal Court*, WASH. POST (Mar. 30, 2013), http://www.washingtonpost.com/world/national-security/somalis-case-a-template-for-us-as-it-seeks-to-prosecute-terrorism-suspects-in-federal-court/2013/03/30/53b38fdo-988a-11e2-814b-063623d80a60_story.html.

220. *Id.*

221. Shaun Waterman, *Al-Libi's Capture Revives Debate over Trying Terrorist Suspects*, WASH. TIMES (Oct. 15, 2013), http://www.washingtontimes.com/news/2013/oct/15/al-libis-capture-revives-debate-over-trying-terror/?page=all. Al-Libi subsequently died in U.S. custody while awaiting trial.

222. Missouri v. Seibert, 542 U.S. 600, 620 (2004).

years in prison.[223] Absent the deal, Ahmed would have faced a potential life sentence if convicted.

While we do not know how the district court would have ruled, the facts of Ahmed's case tell us much about how the government is conducting the war on terror with one eye on the prospective admissibility of confessions and one eye on intelligence gathering. The government claimed that it had not violated Ahmed's rights, and *Seibert* was not applicable because the sole purpose of the unwarned interrogation had been to procure intelligence information.[224]

If Ahmed had not accepted a plea deal, the admissibility of his confession would have turned on an interpretation of *Seibert*, a case that produced no majority opinion. A brief review of *Seibert*'s facts may prove helpful. The defendant in *Seibert* was believed to be involved in the murder of her twelve-year-old, physically handicapped son.[225] The arresting officer's superior instructed him to refrain from administering *Miranda* warnings pursuant to the department's question-first interrogation policy.[226] During the subsequent un-*Mirandized* interrogation, the defendant implicated herself in her son's murder.[227] After providing her with a brief twenty-minute break, the officer administered *Miranda* warnings and obtained a signed waiver of rights.[228] At no time did he inform the defendant that her prior statements were inadmissible. During this second interrogation, she proceeded to repeat her prior, un-*Mirandized* statements.[229]

Seibert provided the Court with an opportunity to revisit the holding of an earlier case, *Oregon v. Elstad*.[230] The *Elstad* Court had declined to rule a *Mirandized* confession inadmissible where it had been preceded by a *Miranda* violation. *Elstad*'s holding, in favor of admissibility, may fairly be characterized as resting on the unintentional nature of the *Miranda* violation at issue in that case.[231] The initial Miranda violation in *Elstad* occurred at the time of the defendant's arrest, rather than in a formal custodial interrogation setting. Officers had gone to the defendant's home with the intention of executing an arrest warrant.[232] When they arrived, the officers made "a brief stop in the living room" where one

223. Weiser, *supra* note 213.

224. Post-Hearing Reply Memorandum by the Government in Opposition to Defendant's Motion to Suppress at 29–30, United States v. Ahmed, No. S1-10-cr-131, 2012 WL 6061229 (S.D.N.Y. Mar. 12, 2012).

225. *Seibert*, 542 U.S. at 604 (plurality opinion).

226. *Id.*

227. *Id.* at 605.

228. *Id*.

229. *Id*.

230. Oregon v. Elstad, 470 U.S. 298 (1985).

231. *Seibert*, 542 U.S. at 615 ("[I]t is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally.").

232. *Elstad*, 470 U.S. at 300.

spoke with the defendant who made an incriminating admission.[233] The purpose of the arresting officers' stop in the living room "was not to interrogate the suspect but to notify his mother of the reason for his arrest."[234] The officers' failure to administer *Miranda* warnings was not deliberate, but rather an "oversight" that "may have been the result of confusion as to whether the brief exchange qualified as 'custodial interrogation' . . . ."[235] The *Elstad* Court was careful to limit the scope of its holding by noting "that, *absent deliberately coercive or improper tactics in obtaining the initial statement*, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion."[236] Indeed, the Court rejected as unfounded Justice Brennan's concern that the Court's opinion served to validate question-first interrogation tactics. Brennan's criticism, the majority wrote, "distorts the reasoning and holding of our decision, but, worse, invites trial courts and prosecutors to do the same."[237]

In *Seibert*, Justice Kennedy began his enigmatic concurrence by noting that the "scope of the *Miranda* suppression remedy depends . . . on whether admission of the evidence under the circumstances would frustrate *Miranda*'s central concerns and objectives."[238] He understood *Miranda*'s goals to be deterrence of police misconduct and assurance of the reliability of confessions.[239] Accordingly, there is some reason to believe Justice Kennedy's primary concern was differentiating unintentional *Miranda* violations from intentional ones.[240]

But, Justice Kennedy disregarded the plurality's invocation of an objective test that would have treated all violations of *Miranda* similarly. Instead, he endorsed a "narrower test applicable only in the infrequent case . . . in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning."[241] The government, therefore, argued that *Seibert* was irrelevant where the purpose of the unwarned interrogation was to gather intelligence information, not statements admissible for prosecution.[242] Such an argument is at least consistent with Justice Kennedy's view that the *Seibert* technique was

233. *Id*. at 315.
234. *Id.*
235. *Id*. at 315–16.
236. *Id.* at 314 (emphasis added).
237. *Id.* at 318 n.5.
238. Missouri v. Seibert, 542 U.S. 600, 619 (Kennedy, J, concurring).
239. *Id.*
240. *Id*. at 619, 620 (quoting *Elstad*, 470 U.S. at 308).
241. *Id*. at 622.
242. Post-Hearing Reply Memorandum by the Government, *supra* note 224, at 6 ("[A]n initial un-*Mirandized* interrogation of the defendant by United States Government officials on Dec. 31, 2009, followed by *Mirandized* interviews, was not a deliberate effort to undermine or weaken the *Miranda* warnings later provided to the defendant, within the meaning of *Missouri v. Seibert*, 542 U.S. 600 (2004), and therefore the *Mirandized* statements are admissible.").

problematic because it did not "serve any legitimate objectives that might otherwise justify its use."[243] One could readily argue, as the government did, that intelligence gathering is a "legitimate objective."

The foregoing discussion is merely intended to highlight another method the government has used to circumvent *Miranda* in the terrorism context. Unlike the other techniques discussed herein, two-step interrogations have yet to receive judicial sanction. But, given Justice Kennedy's ambiguous concurrence, it may not be too long before Article III courts give their judicial blessing.

CONCLUSION

This Article serves as a wake-up call to those who sing the praises of Article III courts. If commentators continue to focus on those courts' virtues, without considering their vices, we are doomed to witness profound changes to our criminal procedure law, not just for terrorists, but for all persons charged with criminal offenses.

Government lawyers have spent much of the last decade developing methods to circumvent *Miranda*—deferring to foreign governments, devising two-step interrogation techniques, and expanding the public safety exception. Opinions written by conservative judges hostile to *Miranda*'s theory of custodial interrogations have provided them with the ammunition to accomplish this task. The project may be too far underway to reverse the tide. But all hope is not lost. We have endured darker periods in our history only to emerge as a stronger and wiser nation. Let us hope that the current administration's commitment to ending incommunicado detention and trying terrorism suspects in Article III courts is real and immediate. But let us also hope that a few judges of sturdy character will have the courage to stand up for what the Constitution demands.

243. *Seibert*, 542 U.S. at 621.