

## **STOP TAKING THE BAIT: DILUTING THE MIRANDA DOCTRINE DOES NOT MAKE AMERICA SAFER FROM TERRORISM**

Ryan T. Williams\*

### **ABSTRACT**

*On December 25, 2009, a Nigerian citizen attempted to blow up a plane over Detroit, Michigan. On May 1, 2010, an American attempted to detonate explosives in New York's Times Square. Neither man was successful. Following their arrests, lawmakers clamored for greater flexibility when interrogating terror suspects and for the suspension (if not elimination) of their Miranda rights. The Supreme Court subsequently decided three cases that severely dilute the Miranda protections. Yet an examination of these decisions reveals that they fail to make America safer.*

*Worse still, the dilution of American citizens' rights sends a dangerous message to budding terrorists, that being so long as they attempt to harm Americans, the seemingly pervasive threat of harm will work to instill fear in the American people, and the government will use that fear to further restrict our liberties. If America continues to restrict the liberties of American people after each attempted terrorist attack, it could encourage more terrorist attacks, thus creating demand for more oppressive laws to fight this increase in terrorism, which in turn will beget more terrorist attacks. If this cycle is not broken, America could devolve into the type of repressive regime it is fighting so hard to defeat.*

---

\* Teaching Fellow, California Western School of Law. I am grateful for everyone at the California Western School of Law who provided incisive and invaluable comments, including William J. Aceves, Andrea Freeman, and Leslie P. Wallace.

## TABLE OF CONTENTS

I. INTRODUCTION.....	909
II. TIMELINE OF EVENTS.....	913
III. <i>MIRANDA</i> AND ITS PROGENY .....	914
A. <i>MIRANDA V. ARIZONA</i> .....	914
B. <i>NEW YORK V. QUARLES</i> .....	915
C. <i>DICKERSON V. UNITED STATES</i> .....	917
IV. THE 2009 CHRISTMAS DAY ATTEMPTED BOMBING AND SUBSEQUENT CALLS FOR <i>MIRANDA</i> REFORM .....	918
V. THE 2010 TIMES SQUARE ATTEMPTED BOMBING AND SUBSEQUENT CALLS FOR <i>MIRANDA</i> REFORM .....	921
A. RESPONSES TO THE ATTEMPTED BOMBING IN TIMES SQUARE .....	924
B. PROBLEMS WITH THE PROPOSED DILUTION OF <i>MIRANDA</i> .....	925
C. THE HIGH COSTS OF FURTHER DILUTING <i>MIRANDA</i> RIGHTS FOR TERROR SUSPECTS .....	930
VI. <i>FLORIDA V. POWELL</i> .....	933
VII. <i>MARYLAND V. SHATZER</i> .....	935
A. FACTUAL BACKGROUND .....	935
B. <i>SHATZER</i> 'S POTENTIAL IMPACT ON NATIONAL SECURITY LAW.....	937
C. PROBLEMS WITH <i>SHATZER</i> .....	940
VIII. DO <i>POWELL</i> AND <i>SHATZER</i> MAKE AMERICA SAFER? .....	943
IX. <i>BERGHUIS V. THOMPKINS</i> .....	944
A. THE DILUTION OF "WAIVER" .....	946
B. THE LIBERTY/SECURITY TRADE-OFF AND WAIVER UNDER <i>BERGHUIS</i> .....	948
C. THE (VERBALLY ASSERTED) RIGHT TO REMAIN SILENT .....	949
D. THE LIBERTY/SECURITY TRADE-OFF AND THE RIGHT TO REMAIN SILENT.....	951
X. WHAT IF THE SUPREME COURT DID NOT INTEND TO MAKE US SAFER?.....	952
XI. CONCLUSION .....	954

## I. INTRODUCTION

A primary goal of terrorism is to promote fear, and in so doing, to “[h]arass, weaken, or embarrass government security forces so that the government overreacts and appears repressive.”<sup>1</sup>

On December 25, 2009, Nigerian Umar Abdulmutallab tried to blow up a plane flying from Amsterdam to Detroit.<sup>2</sup> A little over four months later, American Faisal Shahzad attempted to detonate a car filled with what he believed to be explosives in New York City’s Times Square.<sup>3</sup> As a direct result of these two attempted bombings, members of Congress and the federal government advocated legal reforms to the process of questioning detained suspects. The desired effects of these suggested reforms include (1) providing the government with more flexibility in prosecuting the war on terror and (2) making America “safer” from terrorism.

The U.S. Supreme Court subsequently handed down three decisions with wholly domestic implications. These decisions severely weakened the protections afforded by the *Miranda* doctrine to allow for greater flexibility when questioning suspected criminals. These decisions, and their timing, are problematic for three main reasons. First, these decisions unfortunately and unnecessarily dilute the rights of all Americans, not just terror suspects. Second, and potentially more troubling, is the possibility that these factually non-terror related Supreme Court decisions were made with an eye to the anti-terrorist political environment and an ear toward the call of Congress and the President to weaken *Miranda* protections in light of the recent attempted terrorist attacks. If the Court is stripping away the fundamental rights of all citizens as a result of a few attempted terrorist attacks, it has failed to establish why this is necessary.

Third, because these decisions unnecessarily dilute the *Miranda* rights of all citizens, and were decided after each major attempted terrorist attack

---

1. *Goals and Motivations of Terrorists*, TERRORISMRESEARCH.COM, <http://www.terrorism-research.com/goals/> (last visited Feb. 9, 2011); see AUDREY KURTH CRONIN, ENDING TERRORISM: LESSONS FOR DEFEATING AL-QAEDA 17 (2008) (noting that purposes of terrorism include “elicit[ing] an overreaction from the state” and “divid[ing] a population and delegitimis[ing] a government”).

2. Kevin Krollicki & Jeremy Pelofsky, *Nigerian Charged with Trying to Blow up U.S. Jet*, REUTERS (Dec. 26, 2009), <http://www.reuters.com/article/idUSLDE5BP03M20091226>.

3. Nina Bernstein, *Bombing Suspect’s Route to Citizenship Reveals Limitations*, N.Y. TIMES, May 7, 2010, at A15, available at <http://www.nytimes.com/2010/05/08/nyregion/08immig.html>; Rich Schapiro, *Flight 253 Terrorist Umar Farouk Abdulmutallab Led Life of Luxury in London Before Attempted Attack*, NYDAILYNEWS.COM (Dec. 27, 2009), [http://www.nydailynews.com/news/national/2009/12/27/2009-12-27\\_untitled\\_\\_2london27m.html](http://www.nydailynews.com/news/national/2009/12/27/2009-12-27_untitled__2london27m.html).

last year, terrorists may believe they have accomplished their goal of attaining governmental overreaction, even if they have not. Thus, it may appear to the terrorists that their attacks prompted *Miranda*'s dilution. This could foster a belief among would-be terrorists that, by attacking America or American interests, their actions can result in a nationwide dilution of rights, in which all Americans suffer the loss of liberties. If even a "failed" terrorist attack can cause such a monumental reflex, an increase of attacks could lead to more dramatic results. The American government should take steps to eliminate the potential for sending that message by recognizing that the further dilution of *Miranda* is unnecessary.

The chief obstacle to eliminating this unintended message is the belief that, in times of war, certain rights must be sacrificed to make the country safer. In international law circles, this is commonly referred to as the liberty/security trade-off.<sup>4</sup> Inherently, there is nothing *per se* wrong with this paradigm.<sup>5</sup> The problem arises in its application. For example, Judge Richard Posner agrees with the liberty/security trade-off concept and assumes, as many scholars do, that liberty and security are like the mythical scales of justice where "[o]ne pan contains individual rights, the other community safety, with the balance needing and receiving readjustment from time to time."<sup>6</sup> But this overstates the cause and effect relationship of reducing liberties with increasing security. "Because liberty is often identified with the rules that restrict and discipline executive authority, the tradeoff metaphor also implicitly corroborates the misleading insinuation that, during national-security emergencies, the costs of following the rules exceed the benefits of following the rules."<sup>7</sup> However, taking away rights does not automatically make Americans safer.<sup>8</sup> One does not necessarily beget the other.

Nevertheless, promoting national security under the liberty/security trade-off paradigm has a certain common sense appeal. For example, if law enforcement officials *Mirandize* a terror suspect by informing him of his

---

4. RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 148, 152 (2006).

5. *But see National Security*, THE AMERICAN CIVIL LIBERTIES UNION, <http://www.aclu.org/national-security> (last visited Feb. 9, 2011). The ACLU currently has a "safe and free" campaign deploring the sacrifice of individual liberties in order to make America safer from terrorism. *See id.* "They who can give up essential liberty to obtain a little temporary safety, deserve neither." *Id.*

6. POSNER, *supra* note 4, at 148.

7. Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CAL. L. REV. 301, 313 (2009).

8. Ryan T. Williams, *Would They Make Us Safer?*, SAN DIEGO UNION-TRIBUNE (May 16, 2010), <http://www.signonsandiego.com/news/2010/may/16/would-they-make-us-safer/>.

right to remain silent, then he may not talk. Likewise, if agents Mirandize a terror suspect and inform him of his right to an attorney, he may ask for one, thereby ending the interrogation altogether. In so doing, interrogators might lose the chance to extract otherwise unobtainable information that could ultimately help to disrupt an ongoing terrorist plot.<sup>9</sup> In sum, most proponents of the liberty/security trade-off feel that “we cannot let a nuclear terrorist go free in the short term for the sake of improving relations with the Muslim community in the long term.”<sup>10</sup>

Since 2001, much of the U.S. strategy in the war on terror has indeed failed to adequately consider either long or short-term relations with the Muslim community. Many feel no need to improve relations at all, much less at the expense of “letting terrorists go free” by “giving them” certain rights. President Barack Obama almost failed to win the democratic nomination in part because his father was a Muslim, and many Americans continue to portray him as a Muslim.<sup>11</sup> Even those who do not go that far still believe improved relations with the Muslim community should not be a priority of the U.S. national security strategy. But unless America starts making a concerted effort to improve relations with the Muslim community, it will continue to struggle in the war on terror. So far, however, that has not happened. For example, the Bush administration had a policy of “not negotiating with terrorists,” a policy that again makes the U.S. seem tough on crime, and one that the Obama administration has perpetuated.<sup>12</sup>

This backdrop of difficult relations with Muslims makes it easier to assume these sacrifices of rights, in the midst of the war on terror, are necessary. America is at war, and wartime policies often require sacrifices and the relinquishment of some liberties in order to ensure public safety. This concept “is also easy to illustrate anecdotally and, as a consequence, has entered too deeply into our public lexicon to be refuted or uprooted by a

---

9. Holmes, *supra* note 7, at 314.

10. *Id.*

11. For example, videos that splice together various Obama speeches and interviews have appeared all over the internet in an attempt to portray him as a Muslim, with the clear implication being that if he is, he is consequently a radical jihadist terrorist (or very close to it). See FeelTheChangeMedia, *Obama Admits He Is a Muslim*, YOUTUBE (Aug., 7, 2009), <http://www.youtube.com/watch?v=tCAffMSWSzY>. As of January 7, 2011, this clip, which concludes with a photo montage from the aftermath of September 11, 2001, in New York, had over 3.5 million viewings. See *id.*

12. President George W. Bush, *The World Finds Itself at a Critical Moment* (Apr. 4, 2002), available at <http://archives.cnn.com/2002/US/04/04/bush.transcript/>; Toby Harnden, *US Accused of Negotiating with Iraqi Terrorists over Murdered Hostages*, THE TELEGRAPH (July 4, 2009), <http://www.telegraph.co.uk/news/5733135/US-accused-of-negotiating-with-Iraqi-terrorists-over-murdered-hostages.html>.

theoretical analysis.”<sup>13</sup> The problem, in short, is not that the liberty/security trade-off paradigm is always wrong. The problem is that policy and lawmakers begin by assuming it is always right. Thus, to assume that proposed rights restrictions reflexively improve national security is “a highly distorting lens with which to view the overall war on terror.”<sup>14</sup>

Nevertheless, if utilized correctly, the liberty/security trade-off paradigm can be a useful tool in analyzing changes in the law relating to the war on terror. Instead of making questionable assumptions as to a law’s efficacy, the first step should be to examine whether the change in the law actually makes Americans safer. Then, if there is determined to be a substantial likelihood that this new law makes America safer, the next step is to ask whether the likelihood of increased safety is worth the restriction of liberties. Too often, however, policy-makers and the general public both become subject to fear and adopt a “must do something” mentality to challenge terrorism. Because inaction is often perceived as weakness, this mentality prevails even when the “something” achieves nothing more than restricting our fundamental liberties.

This Article examines the Supreme Court’s recent decisions that diminish the constitutional protections enumerated in its landmark decision of *Miranda v. Arizona*.<sup>15</sup> These recent decisions are *Florida v. Powell*, *Maryland v. Shatzer*, and *Berghuis v. Thompkins*.<sup>16</sup>

This Article will first provide a timeline of the events: the attempted bombings, the subsequent backlash, and the resulting Supreme Court decisions. Next, there will be a discussion of *Miranda v. Arizona* and two of its progeny: *New York v. Quarles* and *Dickerson v. United States*.<sup>17</sup> The Article will then examine the two attempted bombings and the later outcry from political leaders and Congressmen calling specifically for *Miranda* reform. This section will also look at proposed changes to *Miranda* and explains why such changes would succeed only in reducing civil liberties, while failing to make America safer from terrorism.

The Article will then analyze the Court’s three decisions and the particular ways in which they weaken the protections afforded by *Miranda*. Finally, the Article will conclude by asserting that America’s knee-jerk

---

13. Holmes, *supra* note 7, at 314.

14. *Id.*

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

16. *Florida v. Powell*, 130 S. Ct. 1195 (2010); *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010); *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010).

17. *New York v. Quarles*, 467 U.S. 649 (1984); *Dickerson v. United States*, 530 U.S. 428 (2000).

reaction to these attacks sets a dangerous precedent for would-be terrorists; even an attempted attack could potentially help to achieve American suffering through the government's reactive dilution of Americans' rights and liberties.

## II. TIMELINE OF EVENTS

On Christmas Day, 2009, Umar Abdulmutallab attempted to blow up a plane over Detroit, Michigan as it was about to land.<sup>18</sup> Immediately after the plane landed, Abdulmutallab was detained, questioned, and Mirandized.<sup>19</sup> In January 2010, several Republican Congressmen complained that *Miranda* was hindering the investigation of highly dangerous terror suspects, such as Abdulmutallab.<sup>20</sup> On February 23, 2010, the Supreme Court decided *Florida v. Powell*, holding that the language of *Miranda* warnings need not be given verbatim.<sup>21</sup> On February 24, 2010, the Court decided *Maryland v. Shatzer*, holding that (1) being in prison can constitute a sufficient break in custody for purposes of *Miranda* and (2) after a suspect invokes his or her right to counsel, the State can repeatedly return and attempt to interrogate the suspect every fourteen days, without re-Mirandizing the suspect and without a lawyer present.<sup>22</sup>

Five weeks later on May 1, 2010, Faisal Shahzad attempted to detonate a bomb in New York City's Times Square.<sup>23</sup> Like the Detroit bomber, he was arrested, interrogated, and Mirandized shortly thereafter.<sup>24</sup> In the weeks following Shahzad's capture and ongoing interrogation, Attorney General Eric Holder called for a weakening, if not total suspension, of *Miranda*'s protections for terror suspects.<sup>25</sup> On June 1, 2010, the Court decided *Berghuis v. Thompkins*, holding that (1) the defendant's waiver of his *Miranda* rights was valid despite ambiguity over whether he understood them and (2) to obtain the right to remain silent, a

---

18. Krolicki & Pelofsky, *supra* note 2.

19. Walter Pincus, *Christmas Day Bomb Suspect Was Read Miranda Rights Nine Hours After Arrest*, WASHINGTON POST (Feb. 15, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/14/AR2010021404062.html>.

20. Evan Perez & Siobhan Gorman, *Interrogation Team Is Still Months Away*, WALL ST. J. (Jan. 22, 2010), <http://online.wsj.com/article/SB10001424052748704423204575017760430119880.html>.

21. *Florida v. Powell*, 130 S. Ct. 1195, 1206 (2010).

22. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1223-24 (2010).

23. Nina Bernstein, *Bombing Suspect's Route to Citizenship Reveals Limitations*, N.Y. TIMES, May 7, 2010, at A15, available at <http://www.nytimes.com/2010/05/08/nyregion/08immig.html>.

24. Pincus, *supra* note 19.

25. Nico Pitney, *Eric Holder: Miranda Rights Should Be Modified for Terror Suspects*, HUFFINGTON POST (May 9, 2010), [http://www.huffingtonpost.com/2010/05/09/eric-holder-miranda-right\\_n\\_569244.html](http://www.huffingtonpost.com/2010/05/09/eric-holder-miranda-right_n_569244.html).

suspect must verbally assert it.<sup>26</sup>

Thus, from Christmas Day 2009 through June 1, 2010, one can see a pattern begin to emerge. A terrorist attempted to kill Americans but ultimately failed. He is apprehended, interrogated, and Mirandized. After his capture and interrogation, political leaders and policymakers clamor for greater interrogational leeway and for the loosening of *Miranda*'s strictures. The Supreme Court then issues numerous decisions that effectively weaken the overall impact of the *Miranda* doctrine. Independent of motivation, these are the facts.<sup>27</sup>

### III. *MIRANDA* AND ITS PROGENY

Before delving into the events that triggered *Miranda*'s dilution, it is important to discuss the basic underpinnings of the doctrine and its evolution through its progeny.<sup>28</sup>

#### A. *MIRANDA V. ARIZONA*

*Miranda* warnings are comprised of a list of statements that police must read to all suspects in custody before any questioning can commence.<sup>29</sup> Though the precise wording may differ slightly by state, the basic *Miranda* warning is as follows:

[Y]ou have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be appointed to you. Do you understand these rights as they have been read to you?<sup>30</sup>

These warnings arose from the landmark 1966 decision of *Miranda v. Arizona*. In *Miranda*, the Supreme Court focused on the rights enumerated by the Fifth Amendment. In particular, the Court targeted the right against self-incrimination: "The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any

---

26. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259-64, 2266 (2010).

27. Jesse J. Holland, *Miranda Rights Trimmed Down By Supreme Court*, HUFFINGTON POST (Aug. 2, 2010), [http://www.huffingtonpost.com/2010/08/02/Miranda-rights-trimmed-do\\_n\\_667023.html](http://www.huffingtonpost.com/2010/08/02/Miranda-rights-trimmed-do_n_667023.html).

28. *See* *New York v. Quarles*, 467 U.S. 649 (1984); *Dickerson v. United States*, 530 U.S. 428 (2000).

29. *See* *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

30. *See id.* The example above is not a quote from the case.

significant way.”<sup>31</sup> The Court elaborated “that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege . . . .”<sup>32</sup> One such safeguard is *Miranda*’s requirement that any waiver of the right to remain silent or to speak without a lawyer must be knowing, voluntary, and intelligent.<sup>33</sup>

Initially, the *Miranda* warnings were viewed as nothing more than procedural safeguards protecting fundamental constitutional rights under the Fifth Amendment. Thus, the Court did not initially interpret them as constitutionally guaranteed rights in and of themselves, but instead viewed them as more prophylactic in nature. This afforded the Court greater flexibility in creating exceptions to *Miranda*, as it is easier to alter a prophylactic rule as opposed to amending a constitutionally-protected right. Indeed, since *Miranda* was decided over forty years ago, the Supreme Court has elucidated a number of exceptions to *Miranda*’s exclusionary rule.<sup>34</sup>

#### B. NEW YORK V. QUARLES

One such exception was delineated in *New York v. Quarles*.<sup>35</sup> On September 11, 1980, a woman hastily approached two police officers on the street and informed them that she was raped by a man (Quarles) carrying a gun who fled into a nearby supermarket.<sup>36</sup> Officer Kraft entered the store, spotted the suspect, and ordered him to put his hands up.<sup>37</sup> Quarles complied, and Officer Kraft approached and frisked him, noticing that he had an empty shoulder holster.<sup>38</sup> When asked, Quarles told Kraft where he hid his gun.<sup>39</sup> Once Officer Kraft retrieved the gun, he read Quarles his *Miranda* rights, after which Quarles admitted that the gun was his.<sup>40</sup>

Nevertheless, the trial court excluded all of Quarles’ initial statements about where the gun was located because he had not been given the *Miranda* warnings prior to being asked about the location of his gun.<sup>41</sup> The

---

31. *Miranda v. Arizona*, 384 U.S. 436, 477 (1966).

32. *Id.* at 478-79.

33. *See id.* at 444.

34. Evan H. Caminker, *Miranda and Some Puzzles of “Prophylactic” Rules*, 70 U. CIN. L. REV. 1, 4 (2001).

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

36. *Id.* at 651-52.

37. *Id.* at 652.

38. *Id.*

39. *Id.*

40. *Id.*

41. *New York v. Quarles*, 467 U.S. 649, 652-53 (1984).

trial court also excluded the subsequent statement regarding gun ownership as tainted by the *Miranda* violation.<sup>42</sup> The New York Supreme Court and Court of Appeals upheld the trial court's decision.<sup>43</sup>

But the Supreme Court reversed, stating "we believe that this case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."<sup>44</sup> The Court adopted a more practical approach and was unable to find fault with Officer Kraft's actions—where a public safety issue was involved—regardless of his true motivation.<sup>45</sup> Moreover, the Court reasoned that the purpose behind the *Miranda* warnings is to prevent police coercion of the suspect's testimonial statements.<sup>46</sup> The Court then noted that there was no reason to suspect coercion in this case.<sup>47</sup> Furthermore, the Court acknowledged that, even if coercive tactics were utilized before *Miranda* was issued, the highest sanction available is to exclude the incriminating statements at trial.<sup>48</sup> But here, the Court reasoned that the cost would have been greater than "merely the failure to obtain evidence useful in convicting Quarles. Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area."<sup>49</sup> It is precisely because of the special circumstance of ensuring public safety that the delay in giving *Miranda* warnings was permissible. The Court stated simply:

We decline to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.<sup>50</sup>

---

42. *New York v. Quarles*, 467 U.S. 649, 653 (1984).

43. *Id.* (citing *People v. Quarles*, 447 N.Y.S.2d 84 (N.Y. App. Div. 1981), *aff'd* 444 N.E.2d 984 (N.Y. App. Div. 1982), *rev'd* *New York v. Quarles*, 467 U.S. 649 (1984)).

44. *Id.*

45. *Id.* at 656-57. In other words, if the public is in danger, you can use the exception to *Miranda*, even if the true motivation is to elicit the suspect's confession to wrongdoing.

46. *Id.*

47. *Id.* at 654.

48. *New York v. Quarles*, 467 U.S. 649, 654-55 (1984).

49. *Id.* at 657.

50. *Id.* at 657-58.

*Quarles*, however, was not the only Supreme Court case to provide an exception to the *Miranda* doctrine. Numerous other cases emerged throughout the 1970s and 1980s underscoring the notion that *Miranda* was merely a prophylactic rule.<sup>51</sup>

In addition to Supreme Court jurisprudence interpreting *Miranda*, Congress became involved by passing 18 U.S.C. § 3501. This statute essentially allowed police to bypass *Miranda* warnings altogether by establishing a voluntariness test in which, regardless of whether a suspect's *Miranda* rights had been violated, the "voluntariness of the confession" was the paramount inquiry.<sup>52</sup> In short, if the confessions seemed voluntary, the absence of proper *Miranda* warnings was of no effect. Essentially, § 3501 was Congress's end run around the *Miranda* rule. And "[f]or various reasons, the question of whether Congress could in essence 'overrule' *Miranda*'s warning requirements did not reach the Supreme Court for thirty-two years."<sup>53</sup>

### C. *DICKERSON V. UNITED STATES*

In 2000, the Court addressed the issue of whether Congress could permissibly dilute *Miranda* in *Dickerson v. United States*.<sup>54</sup> *Dickerson*, indicted for bank robbery and related offenses, moved to suppress various incriminating statements made to the FBI on the grounds that he did not receive *Miranda* warnings prior to interrogation.<sup>55</sup> The Fourth Circuit agreed, but held that "§ 3501, which in effect makes the admissibility of statements such as *Dickerson*'s turn solely on whether they were made voluntarily, was satisfied in this case."<sup>56</sup> As such, the court concluded that because *Miranda* was not a constitutional holding, Congress could legislate

---

51. See Caminker, *supra* note 34, at 4 (The "*Miranda* rule was merely 'prophylactic' rather than an interpretation of the Fifth Amendment itself, and thus statements obtained absent compliance with the *Miranda* rule were not really obtained in violation of the Constitution"); see also *Oregon v. Elstad*, 470 U.S. 298 (1985) (holding that *Miranda* waiver is not necessarily tainted by prior admission in response to unwarned questioning); *Nix v. Williams*, 467 U.S. 431, 442 (1984) (ruling that *Miranda* violations were not full-fledged constitutional violations); *Michigan v. Tucker*, 417 U.S. 433, 439 (1974) (explaining that the question whether the "police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination" was a separate question from "whether it instead violated only the prophylactic rules developed to protect that right"); *Harris v. New York*, 401 U.S. 222 (1971) (holding that unwarned statements could be used to impeach a defendant's testimony).

52. Samuel Estreicher & Daniel P. Weick, *Opting For a Legislative Alternative to the Fourth Amendment Exclusionary Rule*, 78 UMKC L. REV. 949, 959 (2010).

53. Caminker, *supra* note 34, at 3-4.

54. *Dickerson v. United States*, 530 U.S. 428 (2000).

55. *Id.* at 432.

56. *Id.*

admissibility requirements.<sup>57</sup>

The Supreme Court reversed.<sup>58</sup> In deciding that “Congress may not legislatively supersede our decisions interpreting and applying the Constitution,”<sup>59</sup> the Court held “that the *Miranda* rule was not a mere prophylaxis against constitutional violations but was itself a constitutional rule.”<sup>60</sup> This marked the first time the Court held that *Miranda* warnings were themselves “constitutionally based,” and as such Congress could not legislate to circumvent them.<sup>61</sup>

The understanding that *Miranda* rights are constitutional is critical to the examination of the Court’s latest steps toward their dilution. With its recent decisions of *Powell*, *Shatzer*, and *Berghuis*, the Court is not simply re-interpreting a prophylactic rule to make it less protective. By diluting *Miranda*, the Court is weakening what it has previously determined to be a constitutionally-protected right afforded to all American citizens. Now, these actions are undeniably within the purview of the Court, but questions remain. Why does the Court find it necessary to diminish *Miranda*’s force in a manner that it forbade Congress to diminish just ten years prior? And why is the Court taking such an immense step to give more power to the government when conducting interrogations? This Article proposes that the answer might be a veiled response to the recent attempted terrorist attacks and complaints about the subsequent interrogation of those terror suspects. Before an examination of the Court’s recent 180-degree turn, however, the attempted attacks are worthy of exploration.<sup>62</sup>

#### IV. THE 2009 CHRISTMAS DAY ATTEMPTED BOMBING AND SUBSEQUENT CALLS FOR *MIRANDA* REFORM

On December 25, 2009, twenty-three year-old Umar Farouk Abdulmutallab boarded a flight in Amsterdam.<sup>63</sup> Born and raised in Nigeria, Abdulmutallab had an upper middle class, if not wealthy,

---

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

58. *Id.*

59. *Id.* at 437 (citing *City of Boerne v. Flores*, 521 U.S. 507, 517-21 (1997)).

60. Estreicher & Weick, *supra* note 52, at 959.

61. *Dickerson*, 530 U.S. at 438 (“*Miranda* is a constitutional decision.”). The Court reiterated this point by writing that “*Miranda* is constitutionally based,” *Id.* at 440, and that “*Miranda* announced a constitutional rule.” *Id.* at 444.

62. Notably, Chief Justice Rehnquist delivered the opinion for the Court in *Dickerson*, to which only Justices Scalia and Thomas dissented. *Dickerson v. United States*, 530 U.S. 428, 430 (2000). In other words, this is not a case of a shift in ideology among the justices. A conservative Court ruled that *Miranda* protections were constitutionally based, and Congress could not, by law, override or dilute them. *Id.* at 432.

63. Krolicki & Pelofsky, *supra* note 2.

upbringing.<sup>64</sup> Somewhat surprisingly, several months prior to Christmas 2009, his own father reported him to the U.S. government for having radical jihadist tendencies.<sup>65</sup> Abdulmutallab had been recruited by al-Qaeda in London and met with a radical American Muslim cleric in Yemen.<sup>66</sup> As a result of his father's report, the U.S. promptly placed him on a list of terror suspects that "warranted further research."<sup>67</sup> The only problem was that Abdulmutallab was never added to the no-fly list.<sup>68</sup> Consequently, Abdulmutallab was allowed to board flight 253 from Amsterdam.<sup>69</sup> Abdulmutallab waited until the plane was over American soil near Detroit, Michigan, before he attempted to blow it up.<sup>70</sup>

What often gets lost in this, and other attempted terrorist stories, is the fact that they were *attempts*. Abdulmutallab did not succeed.<sup>71</sup> He was apprehended, arrested, and immediately taken into custody by the FBI.<sup>72</sup> Before reading him his *Miranda* rights, however, FBI interrogators questioned Abdulmutallab at length.<sup>73</sup> In fact, according to the Justice Department, as a result of Abdulmutallab's Christmas Day interrogation, the FBI "obtained intelligence that has already proved useful in the fight against Al-Qaeda."<sup>74</sup>

Despite obtaining this valuable intelligence, the handling of Abdulmutallab's case came under heavy scrutiny. Some Republican Congressmen suggested that the government squandered a chance to extract intelligence from Abdulmutallab by not immediately placing him in military custody as an enemy combatant.<sup>75</sup> Instead, the Obama

---

64. See Schapiro, *supra* note 3; see also Krolicki & Pelofsky, *supra* note 2.

65. Krolicki & Pelofsky, *supra* note 2.

66. *Abdulmutallab: Cleric Told Me to Bomb Jet*, CBSNEWS.COM (Feb. 5, 2010), <http://www.cbsnews.com/stories/2010/02/04/national/main6174780.shtml>.

67. Dan McDougall et al., *Umar Farouk Abdulmutallab: One Boy's Journey to Jihad*, TIMES (Jan. 3, 2010), [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article6974073.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article6974073.ece).

68. *Id.*

69. See Krolicki & Pelofsky, *supra* note 2.

70. *Id.*

71. The heroism displayed by the passengers, including Jasper Schuringa who put out the fire on Mr. Abdulmutallab, cannot be overstated. Soraya Roberts, *Jasper Schuringa Subdued Alleged Terrorist Umar Farouk Abdulmutallab on Northwest Airlines 253*, NYDAILYNEWS.COM (Dec. 26, 2009), [http://www.nydailynews.com/news/national/2009/12/26/2009-12-26\\_jasper\\_schuringa\\_helped\\_subdue\\_alleged\\_terrorist\\_umar\\_farouk\\_abdulmutallab\\_on\\_no.html](http://www.nydailynews.com/news/national/2009/12/26/2009-12-26_jasper_schuringa_helped_subdue_alleged_terrorist_umar_farouk_abdulmutallab_on_no.html).

72. Pincus, *supra* note 19.

73. Perez & Gorman, *supra* note 20 (quoting Matthew Miller, a Justice Department spokesman).

74. Perez & Gorman, *supra* note 20 (quoting Matthew Miller, a Justice Department spokesman).

75. *Id.*

administration chose to prosecute Abdulmutallab (as it has done with many suspected terrorists) using the American criminal justice system.<sup>76</sup> This decision, of course, triggered the need for *Miranda* warnings. Officials critical of this decision worried about the lost potential for obtaining prime information from interrogation before warning of the right to remain silent.<sup>77</sup> The clear implication being that if Nigerian-born Abdulmutallab knew of his right to remain silent, he would certainly invoke it, and the U.S. would lose the opportunity to obtain valuable intelligence. The *Miranda* Court, however, anticipated and addressed such criticism:

A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged.<sup>78</sup>

Despite the *Miranda* Court's unambiguous language, exceptions to the rule have emerged. In short, if public safety is at issue, the warnings can be delayed. The FBI has been utilizing this exception to *Miranda*, in particular, with respect to the interrogation of terrorism suspects. In fact, this exception was utilized with great success in the interrogation of Abdulmutallab. He was detained and questioned at length, and it was only "after the interrogation had already yielded intelligence, that he was read his *Miranda* rights."<sup>79</sup> Thus, the need to dilute *Miranda* further would

---

76. Terry Frieden & Chris Kokenes, *Accused 9/11 Plotter Khalid Sheikh Mohammed Faces New York Trial* (Nov. 13, 2009, 2:01 PM), CNN.COM, [www.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed/index.html](http://www.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed/index.html). In addition, in August 2009, the Obama administration announced it would set up a special interrogation task force, titled the "High-Value Detainee Interrogation Group" (HIG) to handle the interrogation of suspected terrorists. Anne Kornblut, *New Unit to Question Key Terror Suspects: Move Shifts Interrogation Oversight from the CIA to the White House* (Aug. 24, 2009), WASHINGTON POST, [www.washingtonpost.com/wp-dyn/content/article/2009/08/23/AR2009082302598.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/08/23/AR2009082302598.html). The group, however, was not yet fully formed at the time of Abdulmutallab's attempted bombing on December 25, 2009 and therefore did not question him at that time. See Perez & Gorman, *supra* note 20. Regardless, the mere existence of the HIG is an example of another effort by the Obama administration to take interrogations away from the CIA and military officials, or both.

77. See Perez & Gorman, *supra* note 20.

78. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (citations omitted).

79. Perez & Gorman, *supra* note 20 (quoting Matthew Miller, a Justice Department Spokesman). Notably, Abdulmutallab still cooperated with authorities after he was apprehended and proudly and willingly told them about his training in Yemen, his ties to al Qaeda, and his reasons for attempting to blow up the plane. David Dayen, *Interrogation Debate Re-Opens On News That Abdulmutallab Cooperating With Authorities*, FDL NEWS DESK (Feb. 3, 2010, 6:32

seem to be unfounded, thanks to *Miranda*'s public safety exception.<sup>80</sup>

Consequently, if the FBI or other government officials are currently employing a delineated public safety exception to *Miranda*, why was the Obama administration so heavily criticized for its handling of the Christmas Day bomber's case? As noted earlier, the fact that the suspect was read his *Miranda* rights only "after the interrogation had already yielded intelligence" should have quelled the outcry.<sup>81</sup> Perhaps government officials desire more leeway when investigating terrorism suspects and more time to indefinitely detain and interrogate them at will, until most of the dictates of *Miranda* and the Fifth Amendment are gone altogether. Such a policy is eerily reminiscent of Bush era interrogation and detention policies that were so heavily criticized throughout the world.<sup>82</sup> The Obama administration certainly does not wish to perpetuate that sort of a regime. However, judging from these recent Supreme Court decisions, decided only five weeks after the attempted Christmas day bombing, one wonders if anything has actually changed.

#### V. THE 2010 TIMES SQUARE ATTEMPTED BOMBING AND SUBSEQUENT CALLS FOR *MIRANDA* REFORM

About four months later, an American citizen living in Connecticut took a trip to New York.<sup>83</sup> Like many struggling Americans, he was suffering from "financial stress" and he had, according to friends, seemingly turned to religion for comfort.<sup>84</sup> The only problem was that he sought the comfort and advice of radical jihadist Muslims. Based in part on the teachings of those jihadists, on May 1, 2010, Faisal Shahzad attempted to detonate a car bomb in New York City's Times Square.<sup>85</sup> "The would-be bomber packed the car with more than 100 pounds of fertilizer," but

---

AM), <http://news.firedoglake.com/2010/02/03/interrogation-debate-re-opens-on-news-that-abdulmutallab-cooperating-with-authorities/>. As will be examined in more detail, this is a common theme amongst radical jihadists, one that is often overlooked by those who seek to abrogate *Miranda* and other civil liberties of Americans. In short, many apprehended suspects are not shy about their intended goal, and therefore are undeterred by *Miranda*, making inconsequential the further erosion of such rights in the quest to make America safer. *See id.*

80. *See New York v. Quarles*, 467 U.S. 649, 665-69 (1984).

81. Perez & Gorman, *supra* note 20.

82. "'The bottom line is these techniques have hurt our image around the world,' Blair said in the statement. 'The damage they have done to our interests far outweighed whatever benefit they gave us and they are not essential to our national security.'" Joby Warrick, *Intelligence Chief Says Methods Hurt U.S.*, WASHINGTON POST (Apr. 22, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/21/AR2009042104334.html> (quoting Dennis C. Blair, Director of National Intelligence).

83. Bernstein, *supra* note 23.

84. *Id.*

85. *Id.*

mistakenly failed to use the kind that would explode.<sup>86</sup> Had Shahzad chosen the right kind of fertilizer, the bomb would have had the force of more than 100 pounds of TNT.<sup>87</sup>

In sum, the plot failed in large part because Shahzad purchased the wrong explosive material.<sup>88</sup> And with it coming only four months after the attempted Christmas Day bombing in Detroit, Shahzad's attempted bombing raised concerns that the U.S. was avoiding disaster out of good fortune rather than great security. Many believed it was only a matter of time before a terrorist plot was once again successful.<sup>89</sup> Furthermore, the situation became increasingly ominous as more details of the attempted attack emerged.

For example, within two days of the attempted bombing, Shahzad was arrested on a plane leaving from New York's John F. Kennedy airport to Dubai.<sup>90</sup> It was also discovered that Shahzad is an American citizen. Traditionally, or at least since September 11, most Americans probably think of terrorists as "foreigners." Shahzad, in fact, was born in Pakistan, but he had lived in America for more than a decade before the attempted

---

86. Richard Esposito et al., *Faisal Shahzad: Times Square Bomb Suspect Charged*, ABC NEWS (May 4, 2010), <http://abcnews.go.com/Blotter/times-square-bomb-pakistan-migr-connecticut-arrested-times/story?id=10546387>.

87. *Id.*

88. *Id.*

89. Mike Lupica, *Times Square Car Bomb Scare: Disaster Averted Thanks to Alert New Yorkers—and Some Luck*, NYDAILYNEWS.COM (May 2, 2010), [http://www.nydailynews.com/news/ny\\_crime/2010/05/03/2010-05-03\\_someone\\_saw\\_something\\_said\\_something\\_and\\_disasters\\_averted.html](http://www.nydailynews.com/news/ny_crime/2010/05/03/2010-05-03_someone_saw_something_said_something_and_disasters_averted.html).

90. Mark Mazzetti et al., *Suspect, Charged, Said to Admit to Role in Plot*, N.Y. TIMES, May 4, 2010, <http://www.nytimes.com/2010/05/05/nyregion/05bomb.html>. It is important to note here that Mr. Shahzad was not arrested *attempting* to board a plane to Dubai, but rather he was arrested after he had already boarded the plane and it preparing to take off. Mr. Shahzad was able to purchase a ticket with cash, and board a plane to Dubai despite being on the "target of a major terrorism investigation" and with all the New York airports on high alert. *Id.* The New York Times noted that "[h]e had been added to the no-fly list at 12:30 p.m. that day, when airlines were directed to check the list for updates. But Emirates airline did not look at the updated list, and sold Mr. Shahzad a ticket for cash at 7:35 p.m. on Monday." Mark Mazzetti & Scott Shane, *Evidence Mounts For Taliban Role in Bomb Plot*, N.Y. TIMES, May 5, 2010, <http://www.nytimes.com/2010/05/06/nyregion/06bomb.html>. Airlines were only required to check the no-fly list for updates every twenty-four hours, so they missed Mr. Shahzad. *Id.* Of all the drama surrounding the attempted New York Times Square bombing, this is perhaps the most under-reported and frightening moment. Perhaps before rushing to enact *new* laws to combat terrorism, the U.S. should instead focus on the laws and mechanisms already in place to ensure they function properly. Since this incident, the Department of Homeland Security has implemented a specific change to improve a notably deficient process. Airlines are now required to check the no-fly list within two hours of receiving notification that a high-priority name has been added to the list. *Id.*

bombing.<sup>91</sup> He attended Southeastern University in Washington D.C. in 1997 and 1998 before transferring to the University of Bridgeport in Connecticut in 2000.<sup>92</sup> He had been living and working in Connecticut ever since.<sup>93</sup>

On May 15, the New York Times released more information detailing Shahzad's deep discontent.<sup>94</sup> In the year preceding the attempted bombing, Shahzad, like many Americans, was facing grave financial uncertainty. He had recently lost his job and his home was facing foreclosure.<sup>95</sup> Friends and family believed that Shahzad blamed the U.S. for his troubles and subsequently took a much greater interest in religion.<sup>96</sup> If the story stopped there, Shahzad would not sound so different from the scores of Americans that turned to religion for strength and guidance as a result of the recession.<sup>97</sup> Unfortunately, Shahzad began to follow radical Islamic jihadism. This well-known religious ideology, recently popularized by al-Qaeda, often blames the West for the world's problems and therefore seeks the destruction of democracies and capitalist nations worldwide.<sup>98</sup> Shahzad went so far as to visit Pakistan in late 2009 to put his newfound radical beliefs into practice, and it was there that the Pakistani Taliban supplied Shahzad with both weapons training and funding to conduct a terrorist attack in the U.S.<sup>99</sup> With this financial backing and training, Shahzad set

---

91. Andrea Elliot et al., *For Times Sq. Suspect, Long Roots of Discontent*, N.Y. TIMES (May 15, 2010), <http://www.nytimes.com/2010/05/16/nyregion/16suspect.html>.

92. *Id.*

93. *See id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Mr. Shahzad also "felt that American Muslims were treated differently after 9/11," said a classmate of Mr. Shahzad's. Elliot et al., *supra* note 91. "He used to say that when they refer to us, they say "Americans of Pakistani origin"—they don't say "Americans with German origin," the relative recalled.'" *Id.* (quoting Shahzad's relative). "These kinds of things, they were all the time cooking in his head.'" *Id.* (quoting Shahzad's relative).

Prophetically, the totality of the media coverage since Mr. Shahzad's arrest has consistently referred to him as a "Pakistani-born American citizen." Associated Press, *Times Square Car Bomber Details Chilling Plot*, FOXNEWS.COM (June 22, 2010), <http://www.foxnews.com/us/2010/06/21/american-pleads-guilty-times-square-terror-plot/>. Any American who is also part Pakistani or Afghan can probably relate to this type of categorization, a type that people from Canada or England are less likely to face. *See Williams, supra* note 8.

98. *Military*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/para/al-qaida.htm> (last visited Feb. 9, 2011).

99. Press Release, Dep't of Justice, *Faisal Shahzad Pleads Guilty in Manhattan Federal Court to 10 Federal Crimes Arising from Attempted Car Bombing in Times Square* (June 21, 2010), *available at* <http://newyork.fbi.gov/dojpressrel/pressrel10/nyfo062110.htm>.

In December 2009, Shahzad received explosives training in Waziristan, Pakistan, from explosive trainers affiliated with Tehrik-e-Taliban, a militant extremist group based in Pakistan. On Feb. 25, 2010, Shahzad received approximately \$5,000 in cash in

out to carry out his attack in Times Square.

Yet no bomb was detonated in Times Square on May 1, 2010. Shahzad was captured by the FBI two days later.<sup>100</sup> Notably, Shahzad was questioned at length before he was read his *Miranda* rights, utilizing the long existing public safety exception to *Miranda*.<sup>101</sup> This was the same exception utilized—quite successfully—by the government in the questioning of Abdulmutallab, the Christmas Day Detroit plane bomb suspect.<sup>102</sup>

Additionally, Shahzad kept talking to government officials before and after being read his *Miranda* rights.<sup>103</sup> In the days following his capture, Shahzad even “waived his right to a speedy arraignment” so he could continue cooperating with government interrogators.<sup>104</sup> The information provided by Shahzad led to two additional arrests and the uncovering of his terrorist plot.<sup>105</sup> This outcome further calls into question the necessity of diluting *Miranda* to make America safer.

#### A. RESPONSES TO THE ATTEMPTED BOMBING IN TIMES SQUARE

Many policy and lawmakers, however, were certain the government needed the *Miranda* protections relaxed to effectively prosecute the war on terror. Immediately following Shahzad’s capture, several Congressmen and other government officials pushed for new laws to provide government agencies with previously unparalleled authority when interrogating suspects. The first such suggestion came from Senators Joseph Lieberman and Scott Brown just days after Shahzad’s attempted attack. They proposed that all suspected terrorists be stripped of their American citizenship under a

---

Massachusetts sent from a co-conspirator (CC-1) in Pakistan whom Shahzad understood worked for Tehrik-e-Taliban. Approximately six weeks later, on April 10, 2010, Shahzad received an additional \$7,000 in cash in Ronkonkoma, N.Y., which was also sent at CC-1’s direction.

*Id.*

100. See Mazzetti et al., *supra* note 90.

101. Mazzetti et al., *supra* note 90.

102. See Perez & Gorman, *supra* note 20. Notably, Shahzad also was questioned by the recently formed HIG, which, as noted earlier, is “[t]he elite team of investigators from the FBI, CIA and Defence Department [which] was set up to question terror suspects as soon as possible after an arrest.” Kimberly Dozier, *WH Adviser: Elite Terror Interrogation Team Questions Times Square Suspect, Others*, 680NEWS (May 27, 2010), <http://www.680news.com/news/world/article/56600--wh-adviser-elite-terror-interrogation-team-questions-times-square-suspect-others>. “The idea is to quickly extract information from a would-be terrorist to head off any plots that might be about to unfold and track down anyone who might have aided the suspect.” *Id.*

103. Mazzetti et al., *supra* note 90.

104. Mazetti & Shane, *supra* note 90.

105. Mazetti et al., *supra* note 90; Press Release, *supra* note 99.

new act titled the Terrorist Expatriation Act (TEA).<sup>106</sup> Though seemingly drastic—allowing the State Department to unilaterally strip Americans of their citizenship on mere suspicion of terrorism—the TEA initially garnered support from Republicans and Democrats alike, including Speaker of the House Nancy Pelosi and Secretary of State Hillary Clinton.<sup>107</sup> Nevertheless, the TEA is still pending before Congress, and many commentators (including this Author) have noted the potentially hazardous consequences if enacted.<sup>108</sup>

Perhaps more disturbingly, however, was the response of Attorney General Eric Holder and the Obama Administration. Just days after Shahzad continued talking and cooperating with law enforcement *after* he had been fully Mirandized, Holder began publicly urging Congress to modify *Miranda* rights for terror suspects.<sup>109</sup> In particular, Holder argued for the “necessary flexibility” to, *at a minimum*, modify the “public-safety exception” to *Miranda*.<sup>110</sup> It appears Holder would prefer that the government had the flexibility to forgo Mirandizing terror suspects altogether until the government is finished interrogating them, whenever that may be.<sup>111</sup>

President Obama publically supported Holder’s calls to further erode *Miranda*.<sup>112</sup> Holder stressed the need for increased flexibility because “[w]e’re now dealing with international terrorism.”<sup>113</sup> But does that make it necessary to change constitutionally-based domestic laws to combat “international terrorism?” And are international threats the greatest threats to America’s national security?

## B. PROBLEMS WITH THE PROPOSED DILUTION OF *MIRANDA*

As noted earlier, *Miranda v. Arizona* was decided in 1966. It is therefore not a recent decision, and it is easy to see the appeal of a “new

---

106. Terrorist Expatriation Act, S. 3327, 111th Cong. § 2 (2010).

107. Charlie Savage & Carl Hulse, *Bill Targets Citizenship of Terrorists’ Allies*, N.Y. TIMES, May 7, 2010, at A12, available at <http://www.nytimes.com/2010/05/07/world/07rights.html>.

108. Williams, *supra* note 8; *Fear Itself*, N.Y. TIMES, May 6, 2010, at A32, available at <http://www.nytimes.com/2010/05/06/opinion/06thu1.html?scp=1&sq=fear%20itself&st=cse>.

109. Pitney, *supra* note 25.

110. *See id.*

111. Pitney, *supra* note 25.

112. Greg Sargent, *Obama Wants “Limited Flexibility” on Miranda*, WASHINGTON POST (May 11, 2010, 3:55 PM), [http://voices.washingtonpost.com/plum-line/2010/05/is\\_the\\_obama\\_team\\_really\\_going.html](http://voices.washingtonpost.com/plum-line/2010/05/is_the_obama_team_really_going.html).

113. Scott Horton, *Holder Proposes a Legislated Change to Miranda*, HARPERS (May 10, 2010, 8:38 AM), <http://harpers.org/archive/2010/05/hbc-90007015> (quoting Eric Holder, U.S. Attorney General).

foes call for new laws” type of argument. But in *Miranda*, the Court recognized the right to remain silent and the right to have counsel present during interrogation were recognized as constitutionally protected interests granted to all citizens.<sup>114</sup> Policymakers should carefully consider the long-term ramifications of their actions when advocating for the erosion of fundamental rights shared by all Americans, even in the hope that such an adjustment might make it easier to interrogate suspected terrorists.

Moreover, one must consider whether international terrorism is the greatest threat to American National Security? After the capture of Shahzad, Eric Holder made these remarks along with the “new foes–new laws” argument. He stressed that Shahzad was in communication with the Pakistani Taliban, which he apparently was.<sup>115</sup> But Shahzad is also an American citizen who had been living on a quiet street in Connecticut for more than a decade prior to the attack. That is hardly the profile of an international terrorist. In fact, since September 11, there have been no civilian casualties on U.S. soil as a result of a terrorist attack. In fact, only one attack has resulted in multiple casualties; Major Nidal Hasan, a U.S. military officer, went on a shooting rampage at Fort Hood, Texas in 2009.<sup>116</sup> Notably, Major Hasan is an American, born and raised in Virginia.<sup>117</sup>

Moreover, on June 3, 2010, the media reported that “[a]nother senior al-Qaeda operative was killed by a drone strike in Pakistan.”<sup>118</sup> He was an Egyptian named Mustafa al-Yazid, and “Obama Administration sources claim he was No. 3 in al-Qaeda.”<sup>119</sup> Robert Baer, a former CIA agent was on the phone with an FBI agent working counter-terrorism when he heard the news about Yazid.<sup>120</sup> The agent’s initial reaction to Yazid’s death was,

---

114. *Miranda v. Arizona*, 384 U.S. 436, 475-79 (1966) (“The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.”). *Id.* at 476.

115. Pitney, *supra* note 25.

116. *Lieberman Announces Senate Investigation into Fort Hood Shootings*, FOXNEWS.COM (Nov. 8, 2009), <http://www.foxnews.com/politics/2009/11/08/lieberman-announces-investigation-fort-hood-shooting/>. It is also debatable as to whether Major Nadal is in fact a terrorist. Assuming, *arguendo*, that he is, though other acts of terrorism have been attempted, this is the first fully executed and most destructive terrorist attack on American soil since 9/11.

117. Matt Chittum & Jorge Valencia, *Suspected Fort Hood Shooter Maj. Nidal Malik Hasan: Social Awkwardness Kept with Him into Adulthood*, ROANOKE.COM (Nov. 6, 2009), <http://www.roanoke.com/news/roanoke/wb/225310>.

118. Robert Baer, *The Killing of al-Qaeda’s No. 3: Does It Matter?*, TIME (June 3, 2010), <http://www.time.com/time/nation/article/0,8599,1993601,00.html#ixzz0uSQdEQM2>.

119. *Id.*

120. *Id.*

“Does it really matter?”<sup>121</sup> Baer continued:

My FBI friend had spent the weekend in the office, Memorial Day, time he had hoped to spend with his family. He said he was doing what he'd been doing for the last couple of years: tracking down homegrown terrorists—people living in this country drawn to jihad by Internet blogs, the self-recruited. None has any direct connections to al-Qaeda.

People like the failed Times Square car bomber, Faisal Shahzad, worry the FBI far more than al-Qaeda's leadership.<sup>122</sup>

Thus, the most likely terrorist threat is not likely to be from international terrorism, but rather from natural-born American citizens. Understandably, for policymakers and politicians, this may not be the most prudent political position to adopt. The goal of this Article is not to chastise politicians for failing to warn the American people about their fellow citizens. Instead, one goal is to acknowledge the dangers associated with advocating changes to the law based on these politically-friendly assertions—that foreigners are the ones attacking us—when those assertions are not supported factually.<sup>123</sup> International terrorism is neither a new threat, nor is it the center of concern for FBI counter-terrorism experts. The focus is not on radical jihadists from Afghanistan, fearing they will fly more planes into buildings.<sup>124</sup> Instead, the focus is on American citizens that turn to terrorism after being seduced by radical jihadist rhetoric.<sup>125</sup> For this reason, the erosion of *Miranda* to interrogate foreign terrorist suspects does not necessarily make America safer, especially if the main threat is not from international terrorists.

---

121. Baer, *supra* note 118.

122. *Id.*

123. There has not been an international terrorist attack since 9/11. The most recent, high profile attempts have been from American citizens, including the Portland teenager who tried to blow up a bomb at a Christmas tree lighting in December 2010. See Caryn Brooks, *Portland's Bomb Plot: Who is Mohamed Mohamud?*, TIME, available at <http://www.time.com/time/nation/article/0,8599,2033372,00.html> (last visited Mar. 2, 2011).

124. Baer, *supra* note 118.

125. See *id.* See also Matthew Barakat, 'South Park' Critic Faces Unrelated Terror Charge, ABC NEWS (July 22, 2010), <http://abcnews.go.com/Entertainment/wireStory?id=11224306&page=2>. “Zachary A. Chesser, 20, of Oakton, Va., told FBI agents that he twice tried to travel to Somalia to join al-Shabab as a fighter.” *Id.* “According to the affidavit, Chesser expected he would be asked to serve as a propagandist[.]” and “Chesser . . . also told authorities that he used several online profiles to spread terrorist propaganda.” *Id.* Chesser had a Facebook page and graduated from Oakton High, a public high school in Virginia, in 2008. *Id.* He was even enrolled at George Mason University. *Id.* “This case exposes the disturbing reality that extreme radicalization can happen anywhere, including northern Virginia” *Id.* (quoting Neil MacBride, U.S. Attorney for the Eastern District of Virginia).

Furthermore, *Miranda* warnings are also a safeguard against police and governmental abuse. Throughout the last decade of the War on Terror, the United States government, whether through its military, the CIA, or other agencies, has repeatedly come under fire for using undue intimidation and tortuous interrogation techniques.<sup>126</sup> Complaints of abuse are so numerous that President Obama campaigned on a pledge to shutdown Guantanamo Bay “to make sure that the procedures we set up are ones that abide by our Constitution.”<sup>127</sup> There is no more obvious situation where a greater need for protection against police and government abuse exists than that of the detention and interrogation of an alleged terrorist. Yet, instead of ensuring that *Miranda* warnings are maintained, Holder and the Obama administration propose to do the opposite.

This type of logic is nearly as flawed as the common use and understanding of the liberty/security trade-off paradigm.<sup>128</sup> In that paradigm, it is assumed that if liberty is reduced, security is automatically increased.<sup>129</sup> There are obvious dangers associated with this mode of thinking; chief among them, there is no liberty/security scale. Taking away rights does not automatically increase safety.<sup>130</sup> In the same vein, further diluting *Miranda* does not necessarily mean America is safer. This is, after all, an after-the-fact remedy. It comes into effect only after already having apprehended the alleged terrorist. It is the act of capturing the suspect that makes America safer.

The opposing view, of course, is that as a national strategy, America needs to uncover deep, long-term terrorist plots and to infiltrate and destroy terrorist networks and organizations. The belief is that this can only happen with good intelligence, the kind that typically comes from questioning captured suspects. Assuming this is true, and the long-term approach is the best plan, does diluting *Miranda* to allow the government agencies more latitude during interrogations accomplish that goal? The Government already has the public-interest exception. This was successfully utilized to uncover valuable information from both Abdulmutallab and Shahzad. It is therefore not a leap of faith to conclude that the law in its current iteration, with the exceptions already in place, adequately safeguards America.

---

126. See Tim Reid, *Torture Memo Has Put U.S. in Danger, CIA Tells Barack Obama*, TIMES (Apr. 21, 2009) [http://www.timesonline.co.uk/tol/news/world/us\\_and\\_americas/article6135965.ece](http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6135965.ece).

127. Ed Henry, *Obama to Order Guantanamo Bay Prison Closed*, CNNPOLITICS.COM (Jan. 12, 2009), <http://www.cnn.com/2009/POLITICS/01/12/obama.gitmo/> (quoting Barack Obama, U.S. President).

128. Holmes, *supra* note 7, at 314-15.

129. *Id.* at 314.

130. See Williams, *supra* note 8.

There is also the puzzling issue of Shahzad's continued cooperation with the government. After he was read his *Miranda* rights, Shahzad kept talking.<sup>131</sup> In fact, Shahzad's prolonged discussion with government officials and his detention without an arraignment drew the ire of civil rights advocates.<sup>132</sup> At first glance, this would appear to debunk the assertion that neither low-level nor high-level terrorists would cooperate with the government.

But the incessant interrogation of Shahzad throughout his weeks-long detention was in no small part due to his decision to waive his right to a speedy arraignment.<sup>133</sup> Additionally, Shahzad described his *prior* plans because he was not ashamed of what he was attempting to accomplish. "One has to understand where I'm coming from," Shahzad said calmly at his June 20, 2010, arraignment.<sup>134</sup> "I consider myself . . . a Muslim soldier."<sup>135</sup> This should not have come as a surprise to American intelligence officials. Radical jihadists often consider themselves dutiful soldiers: Davids in the fight against the mighty Goliath of America.<sup>136</sup> Shahzad proudly proclaimed:

I am part of the answer to the U.S. terrorizing the Muslim nations and the Muslim people. And, on behalf of that, I'm avenging the attack. Living in the United States, Americans only care about their own people, but they don't care about the people elsewhere in the world when they die.<sup>137</sup>

This is quite different, however, than cooperating with the government and providing good intelligence about *future* terrorist operations. To be sure,

---

131. Tom Hays & Larry Neumeister, *NYC Car Bomb Suspect Pleads Guilty, Calls it 'War,'* ABC NEWS (June 21, 2010), <http://abcnews.go.com/US/wireStory?id=10967459>.

132. In a letter to Chief Judge Loretta A. Preska dated May 18, 2010, defense attorney Ronald Kuby called Shahzad's weeks-long interrogation without a court appearance "unprecedented." Jill Colvin & Shayne Jacobs, *Faisal Shahzad Arraigned Tuesday in Manhattan Federal Court*, DNAINFO.COM (May 18, 2010), <http://dnainfo.com/20100518/manhattan/faisal-shahzad-be-arraigned-tuesday-manhattan-federal-court?gclid=CPvl6Mmm1aICFRBLgwodVj7uwg>. He described Shahzad as "a suspect buried in the bowels of a Manhattan version of Guantanamo," and said that holding him "in an undisclosed location, squeezing him for information" is a violation of procedure rules and against the law. *Id.*

133. Mazetti & Shane, *supra* note 90.

134. Hays & Neumeister, *supra* note 131.

135. *Id.*

136. Mr. Shahzad, when asked if he knew that the people in Times Square were just regular citizens responded, "[W]ell, the drone hits in Afghanistan and Iraq, they don't see children, they don't see anybody. They kill women, children, they kill everybody. It's a war, and in war, they kill people. They're killing all Muslims." *Id.*

137. *Id.*

Shahzad did not stop talking after he was Mirandized.<sup>138</sup> From the numerous comments he made in Court, his message is clear: his attack on the U.S. was an act of revenge, since Americans unlawfully “terrorize” Muslim nations every day.<sup>139</sup>

Thus, if suspects like Shahzad continue to cooperate after they are Mirandized, is it really necessary to dilute *Miranda* further? Is it going to uncover an abundance of material information that otherwise would not have been unearthed because terror suspects are normally so reticent? Holder proposes his “new foes-new laws” argument on the heels of the Shahzad case. Is this incident really the best test case, considering the suspect vocalized that he was proud of his conduct, and waived his right to a speedy arraignment in order to do so, all after being Mirandized?<sup>140</sup>

Even assuming that valuable information cannot be obtained from terror suspects through either the public interest exception or during the post-*Miranda* phase, it remains unclear whether the weakening of *Miranda*’s protections will make America safer.

### C. THE HIGH COSTS OF FURTHER DILUTING *MIRANDA* RIGHTS FOR TERROR SUSPECTS

Proponents of the view that *Miranda* should be indefinitely delayed or eliminated altogether may argue that such a proposal would produce minimal social costs. That is because Holder’s proposal would only weaken or eliminate *Miranda* for terror suspects. One problem with this suggested change, however, is defining “terror suspect.” It is likely that the State Department or some government agency would be given unilateral authority to determine whether someone is a suspected terrorist. Though, in theory, one who is not a legitimate terror suspect should not be affected, the potential for mistake and abuse of power is staggering. “Presumptively taking away Americans’ rights because they seem like terrorists is beyond a slippery slope; it’s a BP oil leak down the entire mountain.”<sup>141</sup>

In *Miranda*, the Court noted: “This Court has always set high standards of proof for the waiver of constitutional rights, and we reassert

---

138. It is also true that others who helped him with this particular offense have been captured. But that information was apparently gathered during the first several hours of questioning, before Shahzad was read his *Miranda* rights. Mark Hosenball, *Obama Officials on Shahzad Case: We did it Right*, NEWSWEEK.COM (May 6, 2010), <http://www.newsweek.com/blogs/declassified/2010/05/06/obama-officials-on-shahzad-case-we-did-it-right.html>.

139. Hays & Neumeister, *supra* note 131.

140. Mazzetti & Shane, *supra* note 90.

141. Williams, *supra* note 8.

these standards as applied to in-custody interrogation.”<sup>142</sup> To presumptively strip away *Miranda*'s protection simply because the State Department asserts that a person might be a terrorist is to punish someone preemptively, before any judicial determination can be made as to whether there is probable cause to support that assertion. The rights protected by *Miranda* should not be cast aside based on the unilateral determination of any governing body. “The requirement of warnings and waiver of rights is fundamental with respect to the *Fifth Amendment* privilege and not simply a preliminary ritual to existing methods of interrogation.”<sup>143</sup> These rights are not predicated on the type of alleged crime committed. This proposed law is especially troubling:

[I]t is not saying, for example, that all potential murderers are not entitled to *Miranda* rights. It is saying all potential murderers who look like they might be terrorists are not entitled to *Miranda* rights—they have to wait. It penalizes according to the perception of the type of person committing the crime, instead of the crime itself.<sup>144</sup>

Allowing the government to adopt a system in which certain fundamental rights apply only to certain groups of people and not to others is unwise. Non-terrorist individuals could find themselves detained and interrogated for a crime they did not commit, without all the traditional protections of *Miranda*.

This would also result in precisely the type of coercive atmosphere that *Miranda* set out to prevent. The *Miranda* Court established measures to protect a suspect's Fifth Amendment right from the “inherently compelling pressures” of custodial interrogation.<sup>145</sup> The Court observed that “incommunicado interrogation” in an “unfamiliar,” “police-dominated atmosphere” involves psychological pressures “which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.”<sup>146</sup> Consequently, the Court reasoned, “[u]nless 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.”<sup>147</sup>

This leads to a broader question about the American justice system as

---

142. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (internal citation omitted).

143. *Id.* at 476.

144. Williams, *supra* note 8.

145. *Miranda*, 384 U.S. at 467.

146. *Id.*

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

a whole. Do we, as Americans, wish to endorse the coercion of statements from individuals believed by the State Department to be terrorists? If the answer is yes, how accurate is that information likely to be? Studies show that coerced statements are far less likely to be accurate.<sup>148</sup> The detained suspect, now without *Miranda* rights, would be inclined to say anything to cease a prolonged interrogation. Furthermore, this proposed change in the law could result in a dramatic increase in the number of people on the United States' official terror suspect list. Borderline cases or, in the worst case scenario, cases that have no relation to terrorism at all, could be alleged to have terrorism implications as a pretext for denying a suspect *Miranda* warnings to pursue indefinite detention and interrogation. The incentive for abuse is high and oversight of the decision of who constitutes a terror suspect is minimal.<sup>149</sup>

Worse still, the ramifications associated with coercing statements in such a manner are drastic. This essentially violates the basic principles upon which the United States justice system was established. Indeed, the Court has already considered such an argument and dismissed it:

A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. *That right cannot be abridged.* As Mr. Justice Brandeis once observed: "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government

---

148. See generally Timothy Weathersbee, Policy for Treatment of Detainees by the United States Military (Mar. 15, 2006) (Strategy Research Project for US Army War College), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA448461>.

149. The State Department may very well have sufficient evidence that someone is a terrorist. That person correctly ends up on a terror suspect list. But much of that information is often classified—and understandably so. This Article is not advocating that the State Department or the CIA or any government agency should divulge State Secrets in order to prove someone is deserving of being labeled a terror suspect. But the fact remains that because so much of the information gathered is private and confidential, a cloud of mystery hovers over the determination process. Allowing a mysterious process for determining whether someone is a terror suspect and then taking away rights on that basis alone is problematic at best and unconstitutional at worst.

becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. *To declare that in the administration of the criminal law the end justifies the means \* \* \* would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.*<sup>150</sup>

Thus, following Holder's suggestions regarding *Miranda* rights for terror suspects, a sort of "ends justify the means" approach to combating terrorism, would bring "terrible retribution" and is antithetical to the very notion of American democracy.<sup>151</sup>

Nevertheless, there is nothing about *Powell*, *Shatzer*, or *Berghuis* that would imply these cases were decided as a reaction to government outcry or as a response to terrorism. And yet, if the Supreme Court did use these decisions as a vehicle to dilute *Miranda* beyond what is necessary for domestic cases as a response to international terrorism, would it indicate as much in the opinions? Judging the Court's intent by scanning the opinions for an overt mention of terrorism may not be very useful given the circumstances. Instead, it may be more effective to examine the factors surrounding these decisions to uncover possible motives for their holdings.

#### VI. FLORIDA V. POWELL

Less than two months after the attempted bombing on Christmas Day 2009, the Supreme Court decided *Florida v. Powell*.<sup>152</sup> Police entered the apartment of Kevin Dwayne Powell's girlfriend, seeking to apprehend Powell in connection with a robbery investigation.<sup>153</sup> Upon seeing Powell emerge from a bedroom, police searched the room and found a loaded nine-millimeter handgun under the bed.<sup>154</sup> Powell was then apprehended and taken to the Tampa Police headquarters.<sup>155</sup> Police read Powell the standard Tampa Police Department Consent and Release Form before asking him any questions.<sup>156</sup> The form states:

"You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be

---

150. *Miranda v. Arizona*, 384 U.S. 436, 479-80 (1966) (emphasis added) (citations omitted).

151. *Id.* at 479-80.

152. *Florida v. Powell*, 130 S. Ct. 1195 (2010).

153. *Id.* at 1200.

154. *Id.*

155. *Id.*

156. *Id.*

appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.”<sup>157</sup>

This, of course, does not exactly conform to the warning as espoused by the Court in *Miranda*. The Florida Supreme Court found that the advice Powell received was misleading because it suggested that he could “only consult with an attorney before questioning” and did not convey Powell’s entitlement to counsel’s presence throughout the interrogation.<sup>158</sup> Additionally, both the trial court and the Florida Supreme Court found the last line particularly confusing. Can the suspect Powell use any of these rights only one time during the interview? How does he use them? Do they last for the entire custodial interrogation? The Florida Supreme Court held that this final warning failed to cure the defect the court perceived in the right-to-counsel advice: “[t]he catch-all phrase did not supply the missing warning of the right to have counsel present during police questioning because a right that has never been expressed cannot be reiterated.”<sup>159</sup>

The *Miranda* warnings were designed to provide “certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation.”<sup>160</sup> Responsive to that concern, the Court in *Miranda*, as “an absolute prerequisite to interrogation,” stated that an individual held for questioning “must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.”<sup>161</sup>

In *Powell*, the Supreme Court reversed the Florida Supreme Court and determined that the catch-all phrase accurately conveyed to Powell that he could request a lawyer at any time during the interrogation.<sup>162</sup> In short, the Court held that *Miranda*’s exact language need not be repeated verbatim if the essential message is conveyed.<sup>163</sup>

Notably, Powell admitted that he understood the warnings, willingly agreed to waive them, signed the Tampa Police’s warning statement and subsequently began discussing his crime.<sup>164</sup> It was only after retaining an

---

157. Florida v. Powell, 130 S. Ct. 1195 (2010).

158. State v. Powell, 998 So. 2d 531, 541 (Fla. 2008), *rev’d*, Florida v. Powell, 130 S. Ct. 1195 (2010).

159. *Id.*

160. Duckworth v. Eagan, 492 U.S. 195, 201 (1989).

161. Miranda v. Arizona, 384 U.S. 436, 471 (1966).

162. Florida v. Powell, 130 S. Ct. 1195, 1204 (2010).

163. *Id.*

164. *Id.* at 1200 (“Acknowledging that he had been informed of his rights, that he ‘underst[oo]ld them,’ and that he was ‘willing to talk’ to the officers, Powell signed the form. He then admitted

2010]

**Stop Taking the Bait**

935

attorney that he complained about an improper *Miranda* warning.<sup>165</sup> The Court did not find this after the fact, form-over-substance argument persuasive and overturned the Florida Supreme Court's decision.<sup>166</sup>

Likewise, if 18 U.S.C. § 3501 were still valid, Powell's confession would have passed the voluntariness test. This is precisely the type of case where § 3501 would overrule a strict reading of *Miranda*. But in 2000, the Court ruled § 3501 was unconstitutional in *Dickerson* by holding that Congress cannot pass laws that legislate around or weaken *Miranda*.<sup>167</sup> This is in part why the trial court and the Florida Supreme Court held for Powell. *Miranda* is the law regarding custodial interrogations, and a confusing warning violates *Miranda*. The fact that Powell actually understood his rights before waiving them should not grant the government a license to give confusing warnings in all cases. Yet that is the result of the *Powell* decision.

*Powell*, however, was only the beginning of the Court's 2010 attack on *Miranda*. The very next day, the Court decided *Maryland v. Shatzer*, a decision far more detrimental and damaging to the rights that protect suspects during custodial interrogation.<sup>168</sup>

**VII. MARYLAND V. SHATZER****A. FACTUAL BACKGROUND**

In August 2003, Michael Shatzer was serving time in prison for sexually abusing a child.<sup>169</sup> On August 7, 2003, Detective Shane Blankenship visited Shatzer to interview him about allegations of a different sexual abuse crime—that of Shatzer's three-year-old son.<sup>170</sup> Prior to questioning, the detective read Shatzer his *Miranda* rights and obtained a written waiver of those rights.<sup>171</sup> But when the detective began to question Shatzer about molesting his son, Shatzer became confused.<sup>172</sup> Shatzer thought he was being questioned about his prior child abuse conviction, the one for which he was incarcerated.<sup>173</sup> Once detective Blankenship clarified that the purpose of his visit was for a separate incident, Shatzer declined to

---

that he owned the handgun found in the apartment.”).

165. *Florida v. Powell*, 130 S. Ct. 1195, 1200 (2010).

166. *Id.*

167. *Estreicher & Weick*, *supra* note 52, at 959.

168. *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010).

169. *Id.* at 1217.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

say another word without an attorney present.<sup>174</sup> As a result, the interview ended and Shatzer was returned to the prison population.<sup>175</sup>

Incredibly, for the next two and a half years, no one interviewed Shatzer about the alleged molestation of his son or about the crime for which he was in prison.<sup>176</sup> But in 2006, a different detective, Paul Hoover, went to the prison to interview Shatzer about molesting his son.<sup>177</sup> Shatzer was surprised, as he assumed the investigation into that matter had concluded.<sup>178</sup> Hoover read Shatzer his *Miranda* rights again, but failed to extract any significant information during the first interrogation.<sup>179</sup> Hoover returned five days later to re-interrogate Shatzer.<sup>180</sup> No lawyer was present during either interrogation. Shatzer subsequently broke down and made incriminating statements about the molestation of his son.<sup>181</sup>

The main issue in this case was whether Shatzer's initial request for an attorney was still valid two and a half years later? On the surface, it is not difficult to see how the Court ruled that it was not—two and a half years is a long time.

But in *Miranda*, the Court explicitly stated that warnings are necessary because, once arrested and taken into custody, the suspect is subjected to an “incommunicado interrogation” in an “unfamiliar,” “police-dominated atmosphere.”<sup>182</sup> Regarding the subject of waiver, the Court established a very high bar for the government: “[I]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.”<sup>183</sup>

Fifteen years after *Miranda*, however, the Court added a “second layer of prophylaxis” to the issue of waiver.<sup>184</sup> In the case of *Edwards v. Arizona*, the Court held:

[W]hen an accused has invoked his right to have counsel present

---

174. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1217 (2010).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1217 (2010).

181. *Id.*

182. *Miranda v. Arizona*, 384 U.S. 436, 445 (1966).

183. *Id.* (citing *Escobedo v. Illinois*, 378 U.S. 478 (1964)).

184. *See McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991).

during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.<sup>185</sup>

Under the *Edwards* rule, once a suspect requests the presence of counsel, he cannot be subjected to further interrogation without counsel being present, even two and a half years later. A normally valid waiver of *Miranda* would not be “sufficient at the time of subsequent interview attempts if the suspect initially requested the presence of counsel.”<sup>186</sup> The *Edwards* Court espoused this rule because then-suspect Edwards was arrested and taken to a police station where he was interrogated until he requested counsel.<sup>187</sup> The police then terminated the interrogation and placed Edwards in the county jail for the night, only to resume the interrogation with different officers the following morning.<sup>188</sup> The Court held that because there was no break in custody, the initial invocation of his *Miranda* rights remained sufficient to protect him from any further police-initiated interrogation in counsel’s absence.<sup>189</sup>

Thus, the *Edwards*’ rule regarding *Miranda* rights should have been dispositive in *Shatzer*. *Shatzer* was initially confused during the first interrogation in 2003, but once he understood what the nature of the investigation, he immediately requested an attorney. It was only after a different detective returned two and a half years later that he relented and spoke without counsel present. Though the lapse of time was substantial, at no point was *Shatzer* released from prison. He remained in the custody of the State, subject to a “police-dominated atmosphere.”<sup>190</sup> Thus, the initial assertion of his *Miranda* right to counsel should have remained effective.

#### **B. SHATZER’S POTENTIAL IMPACT ON NATIONAL SECURITY LAW**

The Court, however, did not agree. Instead it held that (1) being in prison can constitute a sufficient break in custody for purposes of *Miranda*, and (2) the *Edwards* rule does not apply if a break in custody lasting at least

---

185. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

186. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1219 (2010).

187. *Edwards*, 451 U.S. at 478-79.

188. *Id.*

189. *Id.* at 487.

190. *Miranda v. Arizona*, 384 U.S. 436, 456-57 (1966).

fourteen days has occurred.<sup>191</sup> An assessment of each holding will show that the Court went beyond the question presented to unnecessarily eviscerate *Miranda*'s protection.

First, the Court found that Shatzer's return to prison constituted a break in custody.<sup>192</sup> Custody implies police domination and a lack of free will, characteristics that prison most certainly calls to mind. The Court has a test to determine whether a suspect is "in custody;" it must be asked whether "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with formal arrest."<sup>193</sup> Even the *Shatzer* Court admitted that "[t]his test, no doubt, is satisfied by all forms of incarceration."<sup>194</sup> But the Court reasoned away *Shatzer*'s incarceration, claiming that Shatzer had grown accustomed to prison life and that when prisoners go back to their cells, "they regain the degree of control they had over their lives prior to the interrogation."<sup>195</sup> Part of the stated rationale behind *Miranda*'s high bar for waiver is that a suspect's freedom of movement is restricted while in a "police-dominated atmosphere."<sup>196</sup> That is precisely the scenario to which *Shatzer* returned after his initial interrogation in 2003. But the Court held otherwise, saying that being in actual prison does not present the same coercive pressures as being in custody.<sup>197</sup>

Second, the Court acknowledged that two weeks is an arbitrary time frame for a break in custody.<sup>198</sup> The police can now evade running afoul of the constitution by approaching a suspect who has invoked his *Miranda* right to counsel by simply returning two weeks later and asking, "[A]re you now willing to speak without a lawyer present?"<sup>199</sup> No additional *Mirandizing* is required.<sup>200</sup> Moreover, the police do not have to provide a lawyer in the interim. "I want a lawyer" has been transformed from a constitutionally-protected right into a prophylactic rule.

---

191. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1223 (2010).

192. *Id.* at 1224-25.

193. *New York v. Quarles*, 467 U.S. 649, 655 (1984) (citing *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)).

194. *Shatzer*, 130 S. Ct. at 1224.

195. *Id.*

196. *Miranda v. Arizona*, 384 U.S. 436, 456-57 (1966).

197. *See Maryland v. Shatzer*, 130 S. Ct. 1213, 1223 (2010).

198. *Id.* at 1226. The majority defends its arbitrary two week timeline by criticizing Justice Thomas' concurrence, which did not recommend an arbitrary bright-line timeline, by stating "[f]ailure to say where the line falls short of 2½ years, and leaving that for future case-by-case determination, is certainly less helpful, but not at all less arbitrary." *Id.*

199. *Id.* at 1225.

200. *Id.* at 1225-26.

The potential negative implications of this ruling are numerous. The Court did not clarify whether the government is free to question a suspect every two weeks to badger and antagonize him. Must a suspect assert his rights in perpetuity? Imagine a scenario where a suspect is released from the initial custodial interrogation after invoking *Miranda* and is allowed to return home. Two weeks later the FBI shows up at the suspect's job, walks over to his cubicle, and asks him, "Are you now willing to speak without a lawyer present regarding the alleged subway bombing last month?"<sup>201</sup>

And what if the FBI continued to show up at the suspect's residence afterwards? The suspect will have only two choices to stop the harassment: he can (1) waive *Miranda* and speak to them without counsel present or (2) attempt to sue the government. Is this not precisely the type of coercive pressure that the *Miranda* Court sought to prevent?

In addition, the previous hypotheticals presume a clear release from custody. What if the suspect remains in custody? In such a situation, *Shatzer* has even greater national security law implications. While detained, a terror suspect could invoke *Miranda* to protect his Fifth Amendment right against self-incrimination, his right to counsel, or both; however, now the FBI or CIA can attempt to re-interrogate him every two weeks. The voluntariness and validity of any confession obtained as a result would be substantially dubious under those circumstances, severely diminishing the value of any such information.

The Court's decision to weaken *Miranda* in *Shatzer* may not have been a coincidence. First, the timing of the decision indicates otherwise. *Shatzer* was decided on February 25, 2010, precisely two months after the attempted Christmas Day bombing. Also, the Obama administration was criticized for failing to elicit more information from Abdulmutallab before reciting his *Miranda* warnings.<sup>202</sup> Second, the Court could have simply ruled that it was unreasonable for *Shatzer* to expect his initial *Miranda* request for counsel back in 2003 to still be valid in 2006, without any additional reassertion in the interim. Instead the Court held that not only is two and a half years too long for the effect of a *Miranda* request to linger, it found that a mere two weeks is too long.<sup>203</sup> Perhaps this decision, grounded in a wholly domestic setting, is evidence that the Court was listening to politicians and policymakers and their cries for greater government flexibility when trying to gather intelligence from terror suspects.

---

201. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1225 (2010).

202. See *Perez & Gorman*, *supra* note 20.

203. *Shatzer*, 130 S. Ct. at 1224-25.

### C. PROBLEMS WITH *SHATZER*

To some, many of the aforementioned hypotheticals involving the *Shatzer* decision sound reasonable. Maybe the government should be permitted to detain terror suspects for long periods of time and conduct interrogations every two weeks, regardless of whether *Miranda* was invoked. The *Shatzer* ruling likely pleased critics of how the Obama administration handled Abdulmutallab's interrogation. It seemingly grants the government increased flexibility for the repeated interrogation of terror suspects.

For example, the FBI (or any government agency) does not lose its ability to question a subject once they have invoked the Fifth Amendment right to counsel—it is only lost for two weeks. After that time, the FBI can return to wherever the suspects may be and ask them, “Are you now willing to speak without a lawyer present?”<sup>204</sup> One must consider how suspects are likely to respond. Are they likely to change their minds in that two-week window and suddenly waive their *Miranda* rights? Suspects might consider the charges against them, consult with their families, and decide to proceed without a lawyer or to remain silent. This is a possible, but unlikely, scenario. There is simply no motivation not to invoke *Miranda* and the right to counsel a second time, especially when the government interrogators left after the initial invocation. This ruling, therefore, does great domestic harm, and yet actually provides the government with very little extra in terms of quality questioning capability.

Of greater concern with this decision is the potential for abuse. The FBI or some other government agency may attempt to use the *Shatzer* two-week window to exact undue pressure in an attempt to make them change their mind and waive *Miranda*. It is this indirect effect of the *Shatzer* ruling that is most troubling.

For example, as explained above, it is unlikely that suspects will suddenly change their minds and decide not to invoke *Miranda* the second or third time they are questioned. There is simply no incentive to do so, unless of course the government has subjected them to improper pressure, either directly or indirectly.<sup>205</sup> The two-week window may inadvertently

---

204. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1225 (2010).

205. In *Shatzer*, the defendant was imprisoned for almost two years on another charge before the police returned to interrogate him and ask about his son. *Shatzer*, 130 S. Ct. at 1218. It is unlikely that terror suspects will (1) have a two-year gap between visits from the interrogators, or (2) be asked questions regarding crimes about which they may feel morally guilty. On the other hand, radical jihadists are generally very proud of their attempts to perpetrate crimes against America and the West. They do not appear to suffer from shame, and further rumination over their crimes will not likely result in the same sort of increased desire to spontaneously confess.

invite the police or a government agency to use questionable methods on suspects to influence them to change their mind, knowing that without such pressure their response is unlikely to change. Without the *Shatzer* rule, government interrogators would know it was impermissible to return until a lawyer was present, and thus there would be no incentive to try to change the suspect's mind about waiver. There would be no point.

Now, this two-week window creates a disincentive to follow domestic and international law by implicitly encouraging improper or illegal interrogation techniques. Various international agreements could be implicated here as well, most obviously the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).<sup>206</sup> Article 1 of CAT defines torture as:

[A]ny act by which severe pain or suffering, whether *physical or mental*, is intentionally inflicted on a person for such purposes as obtaining from him or a third person *information or a confession*, punishing him for an act he or a third person has committed or is suspected of having committed, or *intimidating or coercing him* or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>207</sup>

If the two-week period is systematically endorsed as a tool for intimidation or for inflicting physical or mental pain on a terror suspect, such an approach could potentially violate our international legal obligations.<sup>208</sup> Unfortunately, the notion of the U.S. torturing terror suspects for information is not so far-fetched. Since 2001, reports of American agencies torturing terror suspects have been numerous.<sup>209</sup> An increase in the use of

---

*See Mazetti & Shane, supra* note 90.

206. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Apr. 18, 1988, 1465 U.N.T.S. 113.

207. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1.1, Apr. 18, 1988, 1465 U.N.T.S. 113 (emphasis added).

208. *See* MICHAEL JOHN GARCIA, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES 2 (2008), available at <http://fpc.state.gov/documents/organization/101750.pdf>. The author explains that the United States ratified CAT, subject to certain reservations, declarations, and understandings and while the treaty was not self-executing, Congress has enacted implementing legislation). *Id.*; *see also* 18 U.S.C. §§ 2340, 2340A (2006).

209. *See* Faye Bowers & Philip Smucker, *U.S. Ships Al Qaeda Suspects to Arab States*, CHRISTIAN SCIENCE MONITOR, July 26, 2002, <http://www.csmonitor.com/2002/0726/p01s03->

torture-like interrogation techniques could be an unintended negative consequence of *Shatzer*.

For example, imagine a relatively high-level terrorist suspect is apprehended. The Obama administration is committed to treating terror suspects as criminals. The suspect is interrogated for a few hours immediately upon apprehension (under the public exception to *Miranda*) and then read his *Miranda* rights.<sup>210</sup> Upon hearing his rights, the suspect claims that he will not say anything further without an attorney present. But then an agency of the U.S. government unduly intimidates, threatens, or terrorizes the suspect for the next few weeks. When the agency revisits the interrogation fourteen days later, the suspect is miraculously willing to speak without counsel. The government has plausible deniability: they read him his *Miranda* rights the first time, and the suspect asserted them, so he must have understood them. If the suspect happened to change his mind in the interim, that was his prerogative.

One might argue that if the police are going to torture a suspect, they are going to do so regardless of *Shatzer*. That is true. The problem is that sometimes, if a rule is created that can be circumvented by government agencies, it might inadvertently legitimize otherwise facially unlawful conduct. Here, the *Shatzer* rule incentivizes the use of torture tactics to force suspects to cooperate. But even if it did not, creating a rule that can be so easily circumvented is worse than having no rule at all. Now, post-*Shatzer*, if the government wishes to intimidate or bully a terror suspect, it can do so in between *Miranda* warnings, paradoxically giving the government another layer of protection under the law. The government can claim, if it were subjected to scrutiny or claims of brutality and torture, that the suspect was properly *Mirandized*. The fact that he chose to assert his right to counsel the first two times he was visited is proof he understood them. Thus, when questioned a third time, the suspect's waiver of *Miranda* is that much more likely to have occurred "knowingly," thereby providing greater legitimacy to whatever confession ensued.

---

usju.html; David Johnston, *U.S. Says Rendition to Continue, but with More Oversight*, N.Y. TIMES, Aug. 24, 2009, <http://www.nytimes.com/2009/08/25/us/politics/25rendition.html>; Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, available at [http://www.newyorker.com/archive/2005/02/14/050214fa\\_fact6](http://www.newyorker.com/archive/2005/02/14/050214fa_fact6); Richard Norton-Taylor, *Tortured Terror Suspects Get Official Inquiry at Last*, GUARDIAN.CO.UK (July 5, 2010, 20:34), <http://www.guardian.co.uk/law/2010/jul/05/torture-terror-suspects-inquiry-guantanamo>; *U.S. Terror Suspects in Pakistan Allege FBI Torture*, FOXNEWS.COM (Feb. 2, 2010), <http://www.foxnews.com/world/2010/02/02/terror-suspects-pakistan-allege-fbi-torture/>.

210. *New York v. Quarles*, 467 U.S. 649, 650-51 (1984).

### VIII. DO *POWELL* AND *SHATZER* MAKE AMERICA SAFER?

As noted earlier, a common misperception when viewing every national security decision through a liberty/security paradigm is to assume that every time liberty is sacrificed, security is automatically and reciprocally enhanced.<sup>211</sup> But the first question to address (assuming whatever change made was legal) is whether these change to *Miranda* actually makes America safer. More specifically, is America safer from terrorism as a result of *Florida v. Powell*<sup>212</sup> and *Maryland v. Shatzer*?<sup>213</sup> If so, we can then examine whether the diminution of constitutional rights is a worthwhile cost.

As a result of *Powell*, *Miranda* warnings will pass muster even when stated ambiguously.<sup>214</sup> *Shatzer* held that being in prison may not constitute being in custody for purposes of *Miranda* and that the police/government can return to interrogate a suspect every two weeks—without providing an attorney—even after the suspect has demanded one.<sup>215</sup>

It is difficult to comprehend precisely how these two decisions make America safer. Notably, both are after the fact changes that come into effect only after a suspect has already been apprehended. They do *nothing* in the way of preventing the particular crime or terrorist act in the first instance. Instead, these decisions actually fail to make America safer unless the suspected terrorists have otherwise unobtainable intelligence about other terrorists. For example, those with the most knowledge of a terrorist organization's inner workings or of potential terrorist attacks on American interests are the leaders, the ones in control. They are also, therefore, least likely to be the individual carrying out the attack (e.g., the hijacker on the airplane). Thus, suspects apprehended while attempting to commit these terrorist attacks are going to be primarily low-level people, who by design have low-level information. This is common in most organizations; al-Qaeda and other affiliated radical jihadist groups are no different in this respect.<sup>216</sup> Additionally, what makes the interrogation of true al-Qaeda members and radical jihadists uniquely difficult is that they are often willing to die for their cause. They volunteer for these missions, and the more well known the al-Qaeda operative is, the more likely their death will

---

211. Holmes, *supra* note 7, at 313.

212. *Florida v. Powell*, 130 S. Ct. 1195 (2010).

213. *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010).

214. *See Powell*, 130 S. Ct. at 1206.

215. *Shatzer*, 130 S. Ct. at 1227.

216. *See* DECISION SUPPORT SYSTEMS, INC., HUNTING THE SLEEPERS: TRACKING AL-QAIDA'S COVERT OPERATIVES 5 (2001), available at <http://www.metatempo.com/huntingthesleepers.pdf>.

lead to martyrdom, especially if it occurs at the hands of Americans.<sup>217</sup>

Noted scholar and al-Qaeda historian Lawrence Wright has indicated his hope that the U.S. never accomplishes one of its main goals in the war on terror: to find and kill Osama bin Laden.<sup>218</sup> Wright asserts that doing so would make bin Laden a martyr of epic proportions, making him far more influential in death than in life, thereby prompting future generations to join the jihadist's cause against America.<sup>219</sup>

Thus, even if America apprehended a high level leader of a radical jihadist terrorist organization, loosening the rules of interrogation is meaningless in terms of making America safer from future attacks. They are unlikely to talk because they often do not fear the repercussions of remaining quiet. Worse still, they may even *welcome* improper treatment and torture, as such suffering may well be perceived as increasing the likelihood they will be viewed by followers as a martyr for the cause. Accordingly, it is difficult to accept the idea that *Powell* and *Shatzer's* diminution of *Miranda* makes Americans safer from terrorism.

One counter argument is that the Supreme Court, while deciding *Powell* and *Shatzer*, may not have been influenced by concerns about America's safety. It may not have considered national security implications at all. After all, the facts of these cases concern wholly domestic disputes. Yet even if the timing of these decisions is merely a coincidence and the Court was influenced neither consciously nor subconsciously by the outcry for changes to *Miranda* for terrorism suspects, the decisions still have profound national security implications.

The Court's attack on *Miranda*, however, was not over. One month after the attempted Times Square bombing in April 2010, the Court decided *Berghuis v. Thompkins*.<sup>220</sup>

### IX. BERGHUIS V. THOMPKINS

On January 10, 2000, a shooting occurred outside a mall.<sup>221</sup> The

---

217. See DECISION SUPPORT SYSTEMS, INC., HUNTING THE SLEEPERS: TRACKING AL-QAIDA'S COVERT OPERATIVES 27-28 (2001), available at <http://www.metatempo.com/huntingthesleepers.pdf>.

218. See Lawrence Wright, *The Man Behind Bin Laden*, NEW YORKER, Sept. 16, 2002, available at [http://www.newyorker.com/archive/2002/09/16/020916fa\\_fact2](http://www.newyorker.com/archive/2002/09/16/020916fa_fact2).

219. See *id.* at 25-26; see generally LAWRENCE WRIGHT, THE LOOMING TOWER: AL QAEDA AND THE ROAD TO 9/11 (2006).

220. *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010).

221. *Id.* at 2256.

police tracked down the suspect in Ohio.<sup>222</sup> The police officers arrested Van Chester Thompkins, placed him in small room, and questioned him for three straight hours.<sup>223</sup> Before the questioning began, the police handed Thompkins a form, derived from the *Miranda* doctrine, titled “Notification of Constitutional Rights and Statement.”<sup>224</sup> It stated:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have a right to talk to a lawyer before answering any questions and you have the right to have a lawyer present with you while you are answering any questions.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
5. You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.<sup>225</sup>

Unquestionably, for any suspect to effectively waive his *Miranda* rights, such waiver must be knowing and intelligent.<sup>226</sup> Presumably with that in mind, the detectives asked Thompkins to read the fifth point out loud.<sup>227</sup> The other four *Miranda* warnings were read aloud to Thompkins and he was asked to “sign the form to demonstrate that he understood his rights.”<sup>228</sup> His signature would have all but assured the police that if Thompkins started answering questions afterwards, it would be the result of a knowing (and therefore valid) waiver of his Fifth Amendment rights. But Thompkins never signed the form.<sup>229</sup> He thus failed to clearly “demonstrate that he understood his rights.”<sup>230</sup> Furthermore, the Court admitted and failed to resolve the fact that the record contained conflicting evidence as to

---

222. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2256 (2010).

223. *Id.*

224. *Id.*

225. *Id.* (quoting Brief for Petitioner 60).

226. *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966) (“Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights . . .”).

227. *Berghuis*, 130 S. Ct. at 2256. More specifically, they wanted to know if he understood English and could read. *Id.* If he could not read or did not understand English, they would be unlikely to secure a knowing and intelligent waiver.

228. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2256 (2010).

229. *Id.*

230. *Id.*

whether Thompkins later verbally confirmed that he understood the rights listed on the form.<sup>231</sup>

This admitted ambiguity over whether Thompkins understood his rights did not prevent police from questioning him for the next three hours.<sup>232</sup> It was not until the two hour and forty-five minute mark that Thompkins finally broke down and answered one of their questions, implicating himself in the shootings.<sup>233</sup> Until then, Thompkins had “largely” remained silent, refusing to answer the police questions for the entire two hours and forty-five minutes.<sup>234</sup> Nevertheless, Thompkins’ statement was used at trial to convict him of the shootings, and he was sentenced to life in prison without parole.<sup>235</sup> Thompkins appealed, claiming that for more than two and a half hours he had invoked his right to remain silent and the United States Court of Appeals for the Sixth Circuit agreed.<sup>236</sup> The Supreme Court granted certiorari and heard oral arguments on March 1, 2010.<sup>237</sup> In May, Shahzad attempted to bomb Times Square, after which Attorney General Holder suggested changes to *Miranda* for terror suspects.<sup>238</sup> On June 1, the Court announced its decision. It reversed the Sixth Circuit’s ruling by holding that despite ambiguity, Thompkins’ waiver was knowing and voluntary, and to obtain the right to remain silent, one has to verbally assert it.<sup>239</sup>

Whether one agrees with the Court’s decision or not, it undoubtedly weakens the protections afforded by *Miranda* in myriad ways. Many of the potential difficulties with the *Berghuis* decision and its abrogation of *Miranda* are explained in Justice Sonia Sotomayor’s dissent.<sup>240</sup>

#### A. THE DILUTION OF “WAIVER”

Justice Sotomayor explained that *Miranda* has held that only an express and knowing waiver of *Miranda* rights is effective.<sup>241</sup> “Even when warnings have been administered and a suspect has not affirmatively invoked his rights, statements made in custodial interrogation may not be

---

231. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2256 (2010).

232. *Id.*

233. *Id.* at 2257.

234. *Id.* at 2256-57.

235. *Id.* at 2257-58.

236. *Id.* at 2258.

237. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2256 (2010).

238. See Pitney, *supra* note 25; see also Horton, *supra* note 113.

239. *Berghuis*, 130 S. Ct. at 2259-64, 2266.

240. See *id.* at 2266-78 (Sotomayor, J., dissenting).

241. *Id.* (Sotomayor, J., dissenting).

admitted as part of the prosecution's case in chief 'unless and until' the prosecution demonstrates that an individual 'knowingly and intelligently waive[d] [his] rights.'"<sup>242</sup> Moreover, "'a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.'"<sup>243</sup> Sotomayor also recognized that this fundamental tenet of waiver extends further back than *Miranda*—"the government must satisfy the 'high standar[d] of proof for the waiver of constitutional rights [set forth in] *Johnson v. Zerbst* . . . .'"<sup>244</sup>

In sum, Supreme Court precedent explains the concept of waiver and the government's high burden to show it was knowing, voluntary, and intelligent.<sup>245</sup> The Court manipulated that burden in *Berghuis*. The fact that Thompkins eventually relented and made incriminating statements—after almost three consecutive hours of interrogation and refusal to sign the *Miranda* acknowledgement sheet—does not validate the decision. Under *Miranda*, "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."<sup>246</sup> Whether Thompkins understood his *Miranda* rights was unclear; even the Court admitted that there was "conflicting evidence" about whether Thompkins "confirmed that he understood the rights listed on the form."<sup>247</sup> Yet despite this, the Court still deemed Thompkins' waiver knowing and intelligent.

Such a finding has great implications for national security law in the context of interrogating terror suspects. Attorney General Eric Holder's concern is that the U.S. is dealing with "international terrorism," and therefore new laws are needed to fight these new foreign enemies.<sup>248</sup> If one assumes the accuracy of Holder's premise, it is not difficult to comprehend how drastically minimizing the requirements for a "knowing and express" waiver of Fifth Amendment rights might benefit the government when interrogating suspected terrorists.

---

242. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2268 (2010). (Sotomayor, J., dissenting) (quoting *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)).

243. *Id.* (Sotomayor, J., dissenting) (quoting *Miranda*, 384 U.S. at 475).

244. *Id.* (Sotomayor, J., dissenting) (quoting *Miranda*, 384 U.S. at 475); see generally *Johnson v. Zerbst*, 304 U.S. 458 (1938).

245. See, e.g., *Brown v. Wainwright*, 665 F.2d 607, 610 (1982); *Faretta v. California*, 422 U.S. 806, 835 (1975); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Carnley v. Cochran*, 369 U.S. 506, 513 (1962).

246. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

247. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2256 (2010).

248. Pitney, *supra* note 25.

For example, if they truly are foreign terrorists, they may be less likely to speak or understand English. But with the Court's elimination of the need for a knowing and intelligent waiver, government agencies may continue with prolonged or even indefinite detentions and questioning, without fear of repercussion from the courts.<sup>249</sup> But the FBI has also noted that the greatest terrorist threat is not from foreigners, but rather from homegrown Americans.<sup>250</sup> These American terrorists speak and understand English, and whatever potential flexibility gained from reducing the knowledge requirement of waiver is likely eviscerated when dealing with an American citizen. This is a common theme with many changes in law that purport to make America safer—they seem palatable only on the surface. A more in-depth analysis of the liberty/security paradigm is necessary to truly assess their worth to determine if they accomplish their goal.

## B. THE LIBERTY/SECURITY TRADE-OFF AND WAIVER UNDER *BERGHUIS*

In examining the first part of the *Berghuis* decision under the more critical interpretation of the liberty/security paradigm, it appears that the change would have the effect of keeping Americans safer from terrorist threats. By lowering the bar for waiver, *Berghuis* arguably provides government agencies with greater flexibility to question terror suspects by making it significantly easier for them to—knowingly or otherwise—waive their Fifth Amendment rights against self-incrimination. It is difficult to argue that such an outcome is detrimental to national security. If it is easier for terrorists to waive the right to remain silent, then more terrorists are likely to answer questions and reveal potentially valuable information about ongoing terrorist plots.

But that is only one potential by-product from this decision. The larger concern is the gravity and significance of its change to constitutional rights. Perhaps the greatest overarching problem with *Berghuis*, and the decisions of *Florida v. Powell*<sup>251</sup> and *Maryland v. Shatzer*<sup>252</sup> as well, is that they apply to all American citizens, not just terrorists.

This change in waiver jurisprudence weakens the constitutional rights of all Americans in the hopes that, after terror suspects are captured—and

---

249. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In *Hamdi*, the Court warned of the dangers and illegality associated with the indefinite detention of terror suspects, even in wartime. “Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.” *Id.* at 520-21. By relaxing the knowing and express waiver requirements, American officials could potentially circumvent indefinite detention concerns by claiming these individuals are criminals who have “waived” their rights.

250. Baer, *supra* note 118.

251. *Florida v. Powell*, 130 S. Ct. 1195 (2010).

252. *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010).

the threat has thereby been diminished or extinguished altogether—they will (1) turn out to be terrorists; (2) waive their rights and answer questions; (3) have knowledge of ongoing terrorist plots, beyond those which American intelligence agencies have uncovered; (4) are willing to share such knowledge to sabotage any future strikes; and (5) would do so only because of the reduced standard of waiver as espoused in *Berghuis*. Thus, too many counterintuitive and unlikely events have to take place for this change in the law to actually make America safer from terrorism. This, coupled with the public-safety exception already in place, and how the handling of the Detroit and Times Square attempted bombers unfolded, makes this change in the law seem superfluous.

Conversely, the cost of enacting such a law has potentially staggering consequences. As explained earlier, the *Miranda* doctrine was created to help level the playing field between our government and civilians suspected of committing a crime.<sup>253</sup> Moreover, *Miranda* itself is a constitutional safeguard, established to protect certain constitutional rights.<sup>254</sup> Even assuming the changes did make substantially America safer, they are not narrowly tailored to apply only to terror suspects. The cost, therefore, greatly outweighs any potential benefit. But the ease of establishing waiver is not the only manner by which American's Fifth Amendment rights were weakened by *Berghuis*. *Berghuis* also imposed the counter-intuitive requirement that one must verbally assert the right to remain silent.

### C. THE (VERBALLY ASSERTED) RIGHT TO REMAIN SILENT

The Court analogized the suspect's right to remain silent to the suspect's right to counsel, claiming that to exercise the latter, it must be verbally and affirmatively asserted by the suspect.<sup>255</sup> The Court has yet to state "whether an invocation of the right to remain silent can be ambiguous or equivocal, but there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*."<sup>256</sup> In *Davis v. United States*, the Court held that, in the context of invoking the *Miranda* right to counsel, a suspect must do so "unambiguously."<sup>257</sup> The Court explained as follows:

There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A

---

253. See *Miranda v. Arizona*, 384 U.S. 436, 445 (1966).

254. *Dickerson v. United States*, 530 U.S. 428, 438, 440, 444 (2000).

255. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010).

256. *Id.* (citing *Davis v. United States*, 512 U.S. 452 (1994)).

257. *Davis*, 512 U.S. at 459 (1994).

requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that “avoid[s] difficulties of proof and . . . provide[s] guidance to officers” on how to proceed in the face of ambiguity. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused’s unclear intent and face the consequence of suppression “if they guess wrong.”<sup>258</sup>

In essence, the Court is acknowledging that ambiguity is problematic. It leads to false conclusions and problems if the police “guess wrong.” But here is where the law appears to be hypocritical. Ambiguity in the suspect’s assertion of his rights is not allowed, but ambiguity over whether a suspect understands his rights is allowed. When it comes to *waiver*, the Court seems content with the fact that a suspect may or may not know his Fifth Amendment rights.<sup>259</sup> But when it comes to *asserting* those rights, there can be no ambiguity. To invoke the Fifth Amendment right to silence, it must be clearly and unequivocally asserted or the suspect actually *loses* the right. This double standard favors the government and seemingly ignores the rights protected by both the Fifth Amendment and *Miranda*.<sup>260</sup> It also ignores the fact that “the State is responsible for establishing the isolated circumstances under which the interrogation takes place” and already has the upper hand in the interrogation process.<sup>261</sup>

Furthermore, the Court’s decision to rely primarily on *Davis* and to analogize to the right to counsel with the right to remain silent is problematic. There is a basic difference between the right to remain silent and the right to an attorney. One involves actually staying silent—i.e., saying nothing at all—and the other does not. To date, the Court has never required that the right to remain silent must be verbally asserted for it to have effect.<sup>262</sup> As Justice Sotomayor noted in her strident dissent, any suspect who wishes to invoke his right to remain silent “must, counterintuitively, speak—and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the police.”<sup>263</sup> She also posited that “[b]oth propositions mark a substantial retreat from the protection against compelled self-incrimination that

---

258. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010) (citing *Davis*, 512 U.S. at 458-59, 461) (citation omitted).

259. *Id.* at 2256.

260. *Miranda v. Arizona*, 384 U.S. 436, 479-80 (1966).

261. *Id.* at 475.

262. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010).

263. *Id.* at 2266.

2010]

**Stop Taking the Bait**

951

*Miranda v. Arizona* has long provided during custodial interrogation.<sup>264</sup> The majority's approach stands in direct contrast to the Court's position for more than forty years. For example, *Miranda* held that:

[W]hatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege.<sup>265</sup>

After *Berghuis*, this is no longer the case. Here, Thompkins eventually made a statement after staying silent for a lengthy period of time, but the Court nevertheless held that such conduct is no longer "inconsistent with any notion of a voluntary relinquishment of the privilege."<sup>266</sup> As a result, the right to remain silent does not attach until explicitly asserted by the suspect.<sup>267</sup>

**D. THE LIBERTY/SECURITY TRADE-OFF AND THE RIGHT TO REMAIN SILENT**

The counter argument, however, is that government authorities need to treat the right to remain silent the same as the right to counsel, and that this "double standard" regarding ambiguity is needed to combat the newfound challenges of international terrorism. Under this line of reasoning, when it comes to waiver, ambiguity is resolved in favor of the police.

Indeed, forcing a suspect to be clear and unambiguous about asserting his right to remain silent may appear at first glance to be a sound proposition. But the costs are great. And, more pointedly, in what scenario does it make America safer? Despite being told otherwise, a suspect may reasonably believe they do not have the right to remain silent after being questioned incessantly for a number of hours. In other words, the only way to cease the interrogation (and perhaps to get food, water, and sleep) is to talk. From a national security perspective, the only benefit derived by making suspects affirmatively assert the right to remain silent is when they fail to do so, which allows for a prolonged interrogation. Such circumstances could incentivize improper and illegal interrogation

---

264. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010) (citation omitted).

265. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

266. *Id.*

267. *Berghuis*, 130 S. Ct. at 2266.

techniques. Prolonged interrogation without respite or presence of counsel could bring America perilously close to engaging in the type of improper torture-type techniques forbidden under international law and the CAT.<sup>268</sup>

Thus, the weakening of *Miranda*'s protections in this manner creates a greater potential for government abuse. For example, assume a suspect was read his *Miranda* rights, and he believed he has the right to remain silent. Yet the CIA continued to question him for eighteen hours straight; at some point, the suspect may doubt the validity of the rights to which he is supposedly entitled. Or, worse still, the suspect will become too confused, tired, or delirious to remember them altogether.

Allowing, if not subtly promoting, this type of conduct would represent a severe loss of liberty to all Americans. First and foremost, there is no guarantee that this treatment would be reserved only to terror suspects. Changes in *Miranda* affect all citizens, and as such anyone could be subjected to the scenario described above. The right to remain silent has been effectively eviscerated. If the police can continue questioning a silent, non-cooperative suspect until he speaks, the suspect no longer has the right to remain silent. This paradox is a subtle yet powerful mechanism for diluting *Miranda* without overturning it. Through the decisions examined herein, the Court has found a way to eradicate the protection of fundamental, constitutional rights without officially eliminating them.<sup>269</sup>

#### X. WHAT IF THE SUPREME COURT DID NOT INTEND TO MAKE US SAFER?

The most obvious counter arguments to the liberty/security analysis above is that perhaps the Supreme Court, in deciding *Powell*, *Shatzer*, and *Berghuis* was not concerned with making America safer from terrorism. Perhaps it was merely handling these domestic cases individually, in the best manner it thought possible.

However, there is one additional point that renders this interpretation suspect. The U.S. Constitution entrusts Congress with the right to make law.<sup>270</sup> If the people have a problem or a concern about an existing law or

---

268. See United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 1, Apr. 18, 1988, 1465 U.N.T.S. 113.

269. Commenting on the gravity of these decisions, a writer at The Huffington Post quipped:

You have the right to remain silent, but only if you tell the police that you're remaining silent. You have a right to a lawyer—before, during and after questioning, even though the police don't have to tell you exactly when the lawyer can be with you. If you can't afford a lawyer, one will be provided to you. Do you understand these rights as they have been read to you, which, by the way, are only good for the next two weeks?

Holland, *supra* note 27.

270. U.S. CONST. art. I.

regulation, they can, through Congress, propose a bill or amendment to change the law. Thus, if Attorney General Eric Holder wants to reform the laws concerning *Miranda* rights for terror suspects, presumably he would consult members of Congress to propose a bill. Yet this has not happened, and no Congressman (and there were many who clamored for reform) has proposed such a bill.<sup>271</sup> This is true despite the fact that Holder's call for the weakening of *Miranda* has the support of President Obama and Hilary Clinton, not to mention many Republicans as well. It is not difficult to surmise that a bipartisan bill would have a good chance of becoming law.

But remember that Congress previously enacted legislation shortly after *Miranda* was decided that severely curtailed *Miranda*'s power. That statute was subsequently overturned in *Dickerson* on grounds that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution."<sup>272</sup> In so holding, the Court pronounced "that the *Miranda* rule was not a mere prophylaxis against constitutional violations but was itself a constitutional rule."<sup>273</sup> The Court held that *Miranda* warnings themselves were "constitutionally based rule[s]" and as such Congress could not create laws to circumvent them.<sup>274</sup> Thus, there is little point for Congress to propose a bill that would weaken *Miranda* because the Court has already declared such legislation to be unconstitutional. If the *Miranda* doctrine is to be diluted, Congress and the President are unable to

---

271. In the wake of these attempted attacks, only two Congressional bills were actually proposed regarding *Miranda*, but they only seek clarification regarding what the Supreme Court has already held, that the public safety exception is in place. See H.R. Res. 1413, 111th Cong. (2010), available at <http://www.opencongress.org/bill/111-hr1413/show>. The proposed resolution states:

Expressing the sense of the House of Representatives that the holding in *Miranda v. Arizona* may be interpreted to provide for the admissibility of a terrorist suspect's responses in an interrogation without administration of the *Miranda* warnings, to the extent that the interrogation is carried out to acquire information concerning other threats to public safety.

*Id.*; H.R. 5934, 111th Cong. (2010), available at <http://www.opencongress.org/bill/111-h5934/show>. The proposed bill states:

To declare the sense of Congress that the public safety exception to the constitutional requirement for what are commonly called *Miranda* warnings allows for unwarned interrogation of terrorism suspects, and to amend section 3501 of title 18, United States Code, to assure the admissibility of certain confessions made by terrorism suspects, and for other purposes.

*Id.* No bills were proposed following Holder's suggestion that *Miranda* be weakened or suspended for terror suspects.

272. *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (citing *City of Boerne v. Flores*, 521 U.S. 507, 517-21 (1997)).

273. Estreicher & Weick, *supra* note 52, at 959.

274. *Dickerson*, 530 U.S. at 438 ("*Miranda* is a constitutional decision"), 440 ("*Miranda* is constitutionally based"), 444 ("*Miranda* announced a constitutional rule").

do so. Such a directive must come from the Supreme Court.<sup>275</sup>

## XI. CONCLUSION

Regardless of the Court's motivations, *Powell*, *Shatzer*, and *Berghuis* all significantly reduce constitutionally-protected rights afforded to all Americans. Moreover, they provide very little, if any, additional safety from terrorism. Americans must be made aware of the subtle ways in which their constitutional rights are being diluted and why.

Furthermore, the resulting pattern of events is extremely problematic. One of the ultimate goals of terrorism is to promote fear and induce the targeted government into overreacting and appearing "repressive."<sup>276</sup> The more the citizens of the target country suffer, the more successful the terrorist attack. Thus, even these wholly domestic cases were decided without concern for the enhancement of national security, the reality is that they came on the heels of clamor for *Miranda* reform. It could therefore appear that these three decisions were in response to the attempted attacks. The urging of *Miranda* reform could unwittingly provide the link between the attempted terrorist attacks and the actual dilution of the *Miranda* doctrine.

This sends a dangerous message to budding terrorists—neither death to the enemy, nor to themselves is necessary to achieve success. It now appears that so long as they attempt to harm Americans, the resulting atmosphere of alarm may cause a governmental backlash of restricting laws, thereby causing all Americans to suffer, albeit indirectly. If America continues to overreact in this manner, the number of attempted terrorist attacks could increase, creating demand for the enactment of more oppressive laws to fight this increase in terrorism, which in turn would beget more terrorist attacks. If this cycle it is not broken, America could devolve into the type of repressive regime it has persistently sought to defeat.

---

275. The Supreme Court could always overrule its 2000 holding in *Dickerson* and completely reinterpret *Miranda* to how it was seen before, as a mere prophylactic rule and not a constitutionally based right itself. But coming to the exact opposite conclusion a decade later would be extremely difficult and would lead to perceived instability in the Court. If the Court wanted to weaken *Miranda*, the much simpler, less obvious way to do so would be to incrementally reduce the protections of *Miranda* over time, without officially overruling *Miranda* or *Dickerson*. The Court has taken a similar tact with abortion, as *Roe v. Wade*, 410 U.S. 113 (1973), is still good law, but over the years the Court has significantly watered down its protections. See generally Alex Markels, *Supreme Court's Evolving Rulings on Abortion*, NPR, November 30, 2005, <http://www.npr.org/templates/story/story.php?storyId=5029934>.

276. See *Goals and Motivations of Terrorists*, *supra* note 1.