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THE UNITED STATES CRIMINAL JUSTICE SYSTEM: PROTECTING CONSTITUTIONAL RIGHTS AND NATIONAL SECURITY

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INTRODUCTION

In late spring, on a bustling Saturday night in Times Square, Faisal Shahzad rigged a car with a homemade bomb and walked away, anticipating that it would explode once he had left the area.[1] Fortunately, the bomb was not properly made and it never inflicted the damage and injury that Mr. Shahzad intended.[2] Two days later, on May 3, 2010, Mr. Shahzad was arrested while on a plane about to depart from John F. Kennedy International Airport for Dubai.[3] Mr. Shahzad was taken into custody and charged with several terrorism-related crimes.[4] Mr. Shahzad was not initially read his *Miranda* rights.[5] Instead, he was interrogated

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1 Press Release, United States Attorney Southern District of New York, Faisal Shahzad Sentenced in Manhattan Federal Court to Life in Prison for Attempted Car Bombing in Times Square (Oct. 5, 2010) [hereinafter U.S. Attorney]; John B. Quigley, *Responses to the Ten Questions*, 37 WM. MITCHELL L. REV. 5174, 5176 (2011).

2 Jerry Markon, *Life Term for failed Times Square Bomber*, WASH. POST, Oct. 6, 2010, at A3; Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SECURITY L. & POL'Y 343, 344 (2010).

3 *Mark Mazzetti, Sabrina Tavernise & Jack Healy, Suspect, Charged, Said to Admit to Role in Plot*, N.Y. TIMES, May 5, 2010, at A1; Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L. 1, 17 (2010).

4 U.S. Attorney, *supra* note 1; David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, 16 (2011).

5 Peter Baker, *Arrest Renews Debate About Rights of Suspects in Terrorism Cases*, N.Y. TIMES, May 5, 2010, *available at* http://query.nytimes.com/gst/fullpage.html?res=9801E6DB153EF936A35756C0A9669D8B63; Ryan T. Williams, *Stop Taking the Bait; Diluting the Miranda Doctrine Does Not Make America Safer From*

under the public-safety exception to the Self-Incrimination Clause of the Fifth Amendment.[6] Once law enforcement officials established that Mr. Shahzad was not an immediate threat to public safety, he was read his *Miranda* rights and continued to cooperate with law enforcement.[7]

While many suspected terrorists in Mr. Shahzad's place would have been detained and eventually tried in military commissions, Mr. Shahzad was not eligible under the Military Commission Act (MCA)[8] because he is a naturalized U.S. citizen.[9] Many believe that military commissions are preferable for trying terrorists because they remove several procedural safeguards present in the criminal justice system to protect the constitutional rights of criminal defendants.[10] However, the federal criminal justice system is no less effective in prosecuting terrorists. Part I of this Note will discuss the differences between the MCA and the federal criminal justice system and reveal how the latter is in many ways more effective in maintaining national security.

Because the MCA's jurisdiction is limited to crimes related to terrorism,[11] this examination of the federal criminal justice system will focus on the prosecution of suspected domestic terrorists. Under federal statute, domestic terrorism is defined as activities that "involve acts dangerous to human life that are in violation of the criminal laws of the United States or of any State . . . and occur primarily within a territorial jurisdiction of the United States."[12] Additionally, a "terrorist act" is one that is committed with the intent to intimidate or coerce a civilian population or government.[13]

Since Mr. Shahzad never went to trial,[14] the courts have not confronted

Terrorism, 56 LOY. L. REV. 907, 924 (2010).

6 *Mazzetti, Tavernise & Healy,* supra *note 3; Jack King & Ivan J. Dominguez,* Diverse Coalition Urges Attorney General Holder to Reconsider His Call to Weaken Miranda Rights, *34-JUN CHAMPION 10, 11 (2010).*

7 *Mazzetti, Tavernise & Healy,* supra *note 3; King & Dominguez,* supra *note 6, at 11.*

8 10 U.S.C. § 948a (2009).

9 *See* 10 U.S.C. § 948c (2009) (stating that military commissions only apply to aliens); *see also* 10 U.S.C. § 948a (2009) (defining an "alien" as any person not a citizen of the U.S.).

10 *See* 10 U.S.C. § 948r (2009) (providing that statements of the defendant will be admissible in evidence if made voluntarily and found to be of probative value based on the totality of the circumstances); *see also* David Kris, Assistant Attorney Gen., Speech at the Brookings Institution (June 11, 2010), *available at* http://www.prnewswire.com/news-releases/remarks-as-prepared-for-delivery-by-assistant-attorney-general-david-kris-at-the-brookings-institution-96163109.html (pointing out that hearsay statements and confessions are admissible at a lower standard).

11 *See* 10 U.S.C. § 948c (stating that enemy belligerents are subject to trial by military commissions).

12 18 U.S.C. § 2331 (2010).

13 *See* Holly Fletcher, *Militant Extremists in the United States*, COUNCIL ON FOREIGN RELATIONS (Apr. 21, 2008), http://www.cfr.org/publication/9236/militant_extremists_in_the_united_states.html.

14 *See* Markon, *supra* note 2; *Shahzad Pleads Guilty to Times Square Bombing Charges*, CNN

the issue of whether his statements to law enforcement officials before he was read his *Miranda* rights would have been admissible against him under the public-safety exception. Part II will examine why the questioning of Mr. Shahzad was constitutionally proper through an analysis of Supreme Court cases that identify the policies and applications of the public-safety exception.

The public-safety exception was first identified in 1984 in *New York v. Quarles*.[15] There, the Court considered its controversial decision in *Miranda v. Arizona*,[16] which required law enforcement officials to inform a suspect taken into custody of certain fundamental rights in order to protect them from incriminating themselves.[17] However, in the twenty-seven years since *Quarles* was decided, the exception has been applied inconsistently and infrequently, with little direct guidance from the Court.[18] Incorporating this exception into law enforcement procedures would expand the approaches officials can take in confronting suspected terrorists. Specifically, such a tool would permit law enforcement to question terrorism suspects without having to advise them of their *Miranda* rights, and would preserve the opportunity to use such statements at trial.

The Obama Administration has stated that in light of Mr. Shahzad's case it would consider enacting legislation to extend the public-safety exception specifically to terrorism cases.[19] Part III-A explains why the interrogation of suspected terrorists fits within the existing framework of the public-safety exception; and Part III-B recommends how Congress should approach drafting legislation consistent with the *Miranda* line of jurisprudence.

Passing such legislation would be especially significant to opposing terrorism. One of the boldest statements the U.S. can make against terrorists is to try them in our criminal justice system. This system is the

(Jun. 21, 2010), http://articles.cnn.com/2010-06-21/justice/new.york.times.square.bomb_1_times-square-bomb-pakistan?_s=PM:CRIME.

15 467 U.S. 649 (1984).

16 384 U.S. 436 (1966).

17 *See id.* at 479 (identifying certain rights that custodial suspects must be informed of before being interrogated).

18 *See* Jeffrey S. Becker, Comment, *A Legal War on Terrorism: Extending* New York v. Quarles *and the Departure from Enemy Combatant Designations*, 53 DEPAUL L. REV. 831, 869 (2003) ("The Supreme Court has not addressed the scope of the public safety exception since its decision of Quarles in 1984. Because the Court's determination in Quarles focused on an imminent threat to public safety, one can only speculate what other circumstances would weigh in favor of a public safety exception."); *Quarles*, 467 U.S. 649.

19 *See* Charlie Savage, *Holder Backs a Miranda Limit for Terror Suspects*, N.Y. TIMES, May 10, 2010, at A1; *see also* Benjamin Weiser, *Hearing on Terror Suspect Explores Miranda Warning*, N.Y. TIMES, Dec. 12, 2011, *available at* http://www.nytimes.com/2011/12/13/nyregion/us-terror-hearing-explores-use-of-miranda-warning.html.

product of over two hundred years of democracy. For centuries the U.S. has stood for a criminal justice system that convicts the guilty while protecting certain fundamental rights for everyone.[20] Resorting to the MCA would reveal unnecessary distrust in this system, which is the backbone of a free nation.[21] Instead, focusing efforts on making the federal criminal justice system as powerful and effective as it can be will demonstrate unequivocally that the U.S. need not forfeit its democratic values in order to protect the nation.[22]

I. THE CRIMINAL JUSTICE SYSTEM IS A POWERFUL TOOL FOR PROSECUTING SUSPECTED TERRORISTS

In the years following the terrorist attacks on September 11, 2001, the Bush Administration developed alternative methods for prosecuting suspected terrorists.[23] One was the MCA, which permits non-citizen terrorists to be detained and tried under different legal rules and standards than those of the federal criminal justice system.[24] The MCA does not provide all of the procedural safeguards present in the federal criminal justice system to protect the interests and rights of the accused.[25] For instance, confessions may be admissible in a military commission without

[20] *See Military Commissions Act of 2006*, AMERICAN CIVIL LIBERTIES UNION (Mar. 13 2007), http://www.aclu.org/national-security/military-commissions-act-2006 ("Our Constitution is what distinguishes America from other countries. It's what makes us Americans. To do away with its protections makes us more like those we are fighting against.").

[21] *See* Eun Young Choi, *Veritas, Not Vengeance: An Examination of the Evidentiary Rules for Military Commissions in the War Against Terrorism*, 42 HARV. C.R.-C.L. L. REV. 139, 140 (2007) (noting that the Framers of the constitution were skeptical of military tribunals and free nations avoid it whenever necessary); *see also* Loving v. United States, 517 U.S. 748, 760 (1996).

[22] *See* Choi, *supra* note 21, at 146 (revealing that the criminal justice system maintains its balance of values, procedures, and substance through involvement of all three branches of government); *see also* Sarah Metha, AMERICAN CIVIL LIBERTIES UNION, *At Guantanamo: Enough Already* (Feb. 16, 2011), http://www.aclu.org/blog/national-security/guantanamo-enough-already ("We should use our tried and true federal courts, instead of perpetuating a discredited military commissions systems that is recognized as a dark stain on American history.").

[23] *See* Kim D. Chanbonpin, *Ditching "The Disposal Plan:" Revisiting Miranda in an Age of Terror*, 20 ST. THOMAS L. REV. 155, 156 (2008) (stating that President Bush repeatedly vowed to bring terrorists to justice); Michael Abramowitz and Colum Lynch, *In U.N. Speech, Bush Focuses on Terrorism*, WASH. POST, Sept. 24, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/09/23/AR2008092300114.html (documenting President Bush's speech to the U.N. focused on terrorism).

[24] *See* Kris, *supra* note 10 (pointing out that in military commissions non-capital cases only need two-thirds of the jurors for a conviction and hearsay is more easily admissible); *see also* David A. Love, *Military Tribunals are a Threat to the Constitution*, COMMON DREAMS (Dec. 1, 2001), *available at* http://www.commondreams.org/views01/1201-03.htm.

[25] *See* Chanbonpin, *supra* note 23, at 160 (noting that the reason for creating the military commissions was because "'it [was] not practicable to apply . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts'").

concern for Fifth Amendment rights as long as they are made voluntarily.[26] Additionally, when suspects are tried in military tribunals, they are often detained for much longer periods of time without a trial.[27] Circumventing these procedural safeguards that protect suspects' constitutional rights has caused considerable distrust of the U.S. government, which has negated many of the "benefits" of the MCA.[28]

Despite the mixed benefits of the MCA, the federal criminal justice system has several procedural advantages that should be acknowledged and appreciated. First, because the MCA is limited to non-citizens, there are several instances where it cannot be utilized. In those cases, use of the federal criminal justice system is necessary. Suspected terrorists who were born in the United States, like the Oklahoma City bombers, Timothy McVeigh and Terry Nichols, or have become naturalized citizens, like Mr. Shahzad, have been indicted in the federal criminal justice system without incident.[29]

Furthermore, the federal criminal justice system thwarts terrorist activity in one of three ways: disrupting terrorist plots by taking conspirators into custody; incapacitating convicted terrorists through incarceration; and providing a vehicle for gathering intelligence through interrogations.[30] These three methods are often interrelated. For instance, if law enforcement officials have a strong case that is likely to lead to a conviction at trial, the suspect may be more inclined to share information in exchange for a lesser sentence.[31] Conversely, the more information the prosecution can use

26 *See* Kris, *supra* note 10; *see also* 10 U.S.C. § 948c (2009).

27 *See* Louis Fisher, *Military Commissions: Problems of Authority and Practice*, 24 B.U. INT'L L.J. 15, 52 (2006) (noting that the Bush administration after 9/11 claimed it had the right to hold U.S. citizens as "enemy combatants" and detain them indefinitely without being charged or tried); Kris, *supra* note 10, at 21 ("Law of war detention is designed to take people out of the fight for the duration of the conflict. So, if the detention is lawful, they can be held until the end of the war.").

28 *See* Chanbonpin, *supra* note 23, at 156 (noting that the actions of the Bush administration have been "tainted with recurring allegations of torture"); Guantanamo Global Justice Initiative, *The Facts About the Military Commissions Act*, CENTER FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/files/MCA%20Factsheet%209-23-08.pdf (last visited Mar. 22, 2012) (asserting that the MCA stripped away the fundamental rights of those held in U.S. custody).

29 *See* Chanbonpin, *supra* note 23, at 174-75 (stating that district courts have successfully prosecuted suspected terrorists in the case of the 1993 World Trade Center bombing, the 1995 Oklahoma City bombing, the 1998 bombing of U.S. embassies in Kenya and Tanzania, and the twentieth 9/11 terrorist, Zacarias Moussaoui); Jo Thomas, *McVeigh Ends Appeal of His Death Sentence*, N.Y. TIMES, Dec. 13, 2000, at A18 (describing the trial and conviction of Terry Nichols).

30 *See* Josh White & Keith B. Richburg, *Terror Informant for FBI Allegedly Targeted Agents*, WASH. POST, Jan. 19, 2008, at A01 (describing the case of a terrorist who cooperated with law enforcement authorities, which led to valuable intelligence); Kris, *supra* note 10, at 11 (arguing that law enforcement disrupts terrorist pots through arrests, incapacitates terrorists through incarceration, and gathers intelligence from interrogation).

31 *See In re Sealed Case No. 02-001*, 310 F.3d 717, 724 (FISA Ct. Rev. 2002) (arguing that prosecuting terrorist agents might provide sufficient incentives for the agent to cooperate with the

against the suspect at trial, the longer the suspect will be incarcerated and thus unable to plot and/or commit any more terrorist acts.[32] These tactics are especially useful when put in the hands of U.S. Attorneys, law enforcement agents from intergovernmental terrorist task forces, and the Federal Bureau of Investigation, who are specially trained in maximizing opportunities to obtain intelligence and effectively prosecute terrorists.[33]

Another asset to the federal criminal justice system is its breadth. It provides many more offenses that a criminal defendant can be charged with. Conversely, in military commissions, the charges are limited to terror-related crimes.[34] The addition of criminal charges increases the likelihood of conviction and ensures longer periods of incarceration.[35] Likewise, the sentences for each crime the defendant is charged with in the federal criminal justice system will be subject to stricter and more well established sentencing guidelines.[36] In fact, these guidelines provide for mandatory higher sentences when the crimes are related to, or in furtherance of, an act of terrorism.[37]

government); Kris, *supra* note 10, at 12 ("[T]he fact is, when the government has a strong prosecution case in an Article 3 court, the defendant knows this, and he knows that he will spend a long time in a small cell, which creates powerful incentives for him to cooperate with us . . . .").

[32] *See* Evan Perez, *Miranda Issues Cloud Gitmo Cases*, WALL ST. J., June 12, 2009, at A4 (describing how the failure of FBI officials to administer the Miranda warnings to detainees might lead to legal challenges if the detainees's statements are introduced at trial); Kris, *supra* note 10, at 26-27 (stating that the use of Miranda warnings enhance the capacity to detain and incapacitate terrorists because they provide evidence that can be used at criminal trials).

[33] *See* U.S. Attorney, *supra* note 1 (crediting the conviction of Mr. Shahzad to the investigative efforts of the FBI's Joint Terrorism Task Force, the New York Police Department, the Justice Department's National Security Division, among other law enforcement agencies); Kris, *supra* note 10, at 11 ("Between September, 2001 and March, 2010, the Department of Justice convicted more than 400 defendants in terrorism related cases.").

[34] *See* Kris, *supra* note 10, at 20 (revealing that the federal criminal justice system has far more crimes that apply to everyone); *see generally* 10 U.S.C. §§ 948d, 950t (2006) (listing the various charges that can be brought in a military commission, and stating that military commission jurisdiction is limited only to charges listed in that statute).

[35] *See* Benjamin J. Priester, *Who Is a "Terrorist"? Drawing the Line Between Criminal Defendants and Military Enemies*, 2008 UTAH L. REV. 1255, 1257 (2008) (citing Department of Justice, *Introduction to National Security Division Statistics on Unsealed International Terrorism and Terrorism-Related Convictions*, http://www.fas.org/irp/agency/doj/doj032610-stats.pdf) (identifying other charges that suspected terrorists can have brought against them, including "fraud, immigration, firearms, drugs, false statements, perjury, and obstruction of justice")).

[36] *See* Kris, *supra* note 10 (noting that more certain and well-established rules of the federal criminal justice system will speed up the process and result in more reliable long-term incarceration); *see also* Colin A. Kisor, *The Need for Sentencing Reform in Military Courts*, 58 NAVAL L. REV. 39, 39 (2009) (arguing military court-martials often results in unreasonably light sentences and inconsistent results).

[37] *See* Transcript of Plea at *9-12, United States v. Shahzad, 10-CR-541, (S.D.N.Y. June 21, 2010), *available at* http://online.wsj.com/public/resources/documents/06l1shap.pdf (listing the charges against Mr. Shahzad which carry a maximum sentence of life in prison, and include attempted use of a weapon of mass destruction, conspiracy to use a weapon of mass destruction, conspiracy to commit an act of terrorism transcending national boundaries, and attempting an act of terrorism transcending national boundaries); *see also* 18 U.S.C. § 3A1.4 (2006) (providing increased sentencing for those convicted of a

In the years following September 11, 2001, the Bush Administration was heavily criticized for participating in anti-terrorism maneuvers that were constitutionally invalid.[38] Allegations of torture, wiretapping, and violation of Due Process were undeniable.[39] This has led to a national and international loss of confidence in the U.S. government.[40] This loss of confidence has tangible consequences. For example, many countries will not cooperate with the U.S. when the U.S. is holding one of its citizens under the MCA.[41] Unlike in the federal criminal justice system, the MCA does not provide assurances that its practices will comply with the Geneva Convention and other international treaties.[42] This is especially problematic because the cooperation of other countries is critical to maintain national security within our borders. The U.S. may be able to learn of other terrorist plots through the interrogation of the suspected terrorists held under the MCA, but without the assistance of other countries in investigating these leads and arresting suspects, the benefit of being able to interrogate without providing *Miranda* warnings diminishes considerably.[43]

federal crime of terrorism).

38 *See* Becker, *supra* note 18, at 848 (noting that President Bush has been criticized for committing an "unconstitutional deprivation of fundamental liberties") (citing Anne English French, Note, *Trials in Time of War: Do the Bush Military Commissions Sacrifice Our Freedoms?*, 63 OHIO ST. L.J. 1225, 1227 (2002)); *see also* Laurence H. Tribe, Letter to the Editor, *Military Tribunals: Too Broad A Power*, N.Y. TIMES, Dec. 7, 2001.

39 *See* Chanbonpin, *supra* note 23, at 156-57 (listing beatings, extreme isolation, hooding, mock executions, use of dogs, sleep deprivation, and waterboarding as the alternative procedures employed by the Bush administration); *see also* Dana Priest, *Officials Relieved Secret is Shared*, WASH. POST, Sept. 7, 2006 ("Prisoners were subjected to harsh interrogation techniques including feigned drowning, extreme isolation, slapping, sleep deprivation, reduced food intake, and light and sound bombardment -- sometimes in combination with each other.").

40 *See* Kris, *supra* note 10; *see also Why Torture Makes Us Less Safe*, HUMAN RIGHTS FIRST http://www.humanrightsfirst.org/our-work/law-and-security/torture-on-tv/less-safe/ (last visited Mar. 21, 2012) ("Cruel treatment leads to a loss of confidence and respect within the communities where U.S. forces operate . . . .").

41 *See* Kris, *supra* note 10 ("Unfortunately, some countries won't provide us with evidence we may need to . . . prosecute them in military commissions."); *see also* Sam Dillon & Donald G. McNeil Jr., *Spain Sets Hurdle for Extraditions*, N.Y. TIMES, Nov. 24, 2001, *available at* http://www.nytimes.com/2001/11/24/international/europe/24SPAI.html?ex=1007620920&ei=1&en=872fe48002d9dba6&pagewanted=print.

42 *See* 10 U.S.C. § 948b(e) (2009) (providing that the Geneva Convention is not a basis for a right of action when an enemy combatant thinks their rights under the convention have been violated due to the military tribunal process); *see also* Chanbonpin, *supra* note 23, at 174 (demanding that criminal tribunals that are used to try terror suspects must provide internationally recognized due process rights to the accused, which is not the case with the military commission system).

43 *See* Kris, *supra* note 10 (conceding that in some instances other countries will only extradite suspected terrorists on the condition that they are not tried in military commissions); *see also* Sam Dillon & Donald G. McNeil Jr., *Spain Sets Hurdle for Extradition*, N.Y. TIMES, Nov. 24, 2001 *available at* http://www.nytimes.com/2001/11/24/international/europe/24SPAI.html?ex=1007620920&ei=1&en=872fe48002d9dba6&pagewanted=print ("Spain will not extradite . . . unless the United States agrees that they would be tried by a civilian court and not by the military tribunals . . . .").

Furthermore, within the United States, the public's distrust of the administration is palpable. The controversial activities in Guantanamo Bay are particularly problematic. In addition to speculation about the interrogation tactics, the public was denied access to the proceedings, which further fueled suspicion.[44] In attempting to restore the public's faith in our system of government, the federal criminal justice system provides an open forum for the public to observe the proceedings. This would demonstrate to the national and international community that the U.S. respects the rights of the accused and is committed to the fundamental concept of the "presumption of innocence."[45]

The recent controversy over whether to hold the trial of the Khalid Sheikh Mohammed, the "9/11 Mastermind," in the Southern District of New York reinforces this proposition.[46] Many believe that holding the trial in New York would not be ideal, because its visibility would reopen the wounds of a city deeply affected by the events of 9/11 and create a security risk in the area.[47] At the same time, however, trying Mr. Mohammed in the Southern District of New York allows the public to be aware of how the case is proceeding. This would not be possible if the trial was held in Guantanamo Bay.

Therefore, in addition to being the only venue for trying terrorists of American citizenry, the federal criminal justice system provides distinct strategic advantages in investigating and trying terrorists.

II. THE PUBLIC-SAFETY EXCEPTION IS A CONSTITUTIONALLY VALID TOOL

While advocates of the MCA argue that it is the most effective way to secure confessions from suspected terrorists, the public-safety exception is a parallel tool of the federal court system that serves a similarly useful

44 *See* Metha, *supra* note 22 (expressing frustration that the details of a plea deal were kept under seal); *see also* Katherine Flanagan-Hyde, Note, *The Public's Right of Access to the Military Tribunals and Trials of Enemy Combatants*, 48 ARIZ. L. REV 585, 586 (2006) (arguing for the existence of a constitutional right of the public to trial proceedings under the First Amendment).

45 Hamdan v. Rumsfeld, 548 U.S. 557, 613 (2006).

46 *See* Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, THE NEW YORKER (Feb. 15, 2010), *available at* http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer; *see also* Administrator, *Rep. King: Continuing Debate Over 9/11 Trials 'Makes Us Look Foolish'*, THE HILL (Apr. 18, 2010, 3:30 PM), http://thehill.com/blogs/blog-briefing-room/news/92913-rep-king-debate-over-911-trials-makes-us-look-foolish.

47 *See* Mayer, *supra* note 46 (describing the strong emotions of the public in response to Mr. Mohammed's trial being held in New York); *see also* Baker, *supra* note 5 (stating that New York is a large terrorist target and having the trial there would increase that threat).

function. The public-safety exception became an issue subsequent to the Court's holding in *Miranda v. Arizona*. In that case, a 5-4 majority, heavily influenced by the criticism of the criminal justice process that were prevalent at the time,[48] departed from the established constitutional analysis of the Self-Incrimination Clause of the Fifth Amendment.[49] The Court referenced an investigation by the Civil Rights Commission from the early 1960's that revealed that police departments used physical force to obtain confessions from suspects,[50] and several police manuals that sanctioned the practice of inflicting mental and emotional abuse to achieve confessions.[51] The *Miranda* Court was particularly concerned with coercive interrogation techniques in custodial interrogations, that is, "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[52] The test prior to *Miranda* was a case-by-case, analysis, based on the totality of the circumstances, to determine whether a suspect's statements were made voluntarily or within the will of the defendant.[53] The *Miranda* Court believed there was no way to know if the statements were made voluntarily because the interrogations took place behind closed doors and psychological abuse would not be evident by a physical mark.[54] Based on this, Justice Warren revealed that this risk of coercion is not just a risk at

48 *See* Michael J. Roth, Note, Berkemer *Revisited: Uncovering the Middle Ground Between Miranda and the New Terry*, 77 FORDHAM L. REV. 2779, 2786 (2009) (identifying the political climate in 1966 as the peak of the criminal procedure revolution); *see also* M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in An Age of Terrorism*, 12 CORNELL J. L. & PUB. POL'Y 319, 338 (2003) (prefacing a discussion on *Miranda* by pointing out that the Court reviewed police manuals that employed procedures that encouraged confessions).

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

50 *Miranda*, 384 U.S. at 446; *see* Darmer, *supra* note 48, at 338.

51 *Miranda*, 384 U.S. at 448 (stressing that the modern practice of custodial interrogations are psychological rather than physical); *see* Darmer, *supra* note 48, at 338 (noting that the *Miranda* Court "surveyed police manuals that encouraged the police to use relentless questioning techniques and psychological ploys to encourage confessions").

52 *Miranda*, 384 U.S. at 444; *see* Fred Medick, *Exporting Miranda: Protecting the Right Against Self-Incrimination When U.S. Officers Perform Custodial Interrogations Abroad*, 44 HARV. C.R.-C.L. L. REV. 173, 178 (2009) (identifying a suspect being in custody to mean when a reasonable person in their position would believe that their freedom has been deprived in a significant way).

53 *See* George M. Dery III, *The "Illegitimate Exercise of Raw Judicial Power:" The Supreme Court's Turf Battle in* Dickerson v. United States, 40 BRANDEIS L.J. 47, 50 (2001) (stating that Fifth Amendment jurisprudence before *Miranda* was a voluntariness standard but upon realizing that the standard did not fit perfectly within the Fifth Amendment the standard began to veer toward a totality of the circumstances analysis); *see also* Bram v. United States, 168 U.S. 532, 542 (1897).

54 *See* Dery, *supra* note 53, at 53-54 (reasoning that the Court concluded that custodial interrogation created an atmosphere of coercion because the interrogation practices occur in secrecy and are psychologically, rather than physically, oriented); *see also* Roth, *supra* note 48, at 2789 (noting that the Court found suspects would be vulnerable when stuck in a private room with interrogators and no judicial supervision).

all, but in fact a guaranteed outcome: a suspect subjected to a custodial interrogation without being advised of his rights encounters *per se* coercion.[55]

Therefore, the Court held that in order to prevent self-incrimination, a barrier had to be raised in order to keep custodial interrogations free of coercion.[56] The Court's remedy was to inform the suspect of certain fundamental rights prior to questioning him: "the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him."[57] Only after this information was provided to the suspect could he waive these rights and continue the interrogation voluntarily.[58] The Court noted that the suggested method was not the only, or best, way to go about solving this problem.[59] In fact, the Court encouraged legislatures to use their own "creative" maneuvering to develop their own guidelines, as long as it complied with the constitutional minimum that "the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'"[60]

In the forty-four years since *Miranda*, subsequent cases have narrowed this holding considerably in order to accommodate competing policies of practicality and fairness.[61] These conflicting goals were addressed in *New York v. Quarles*, where the Court identified a public-safety exception within the framework of *Miranda*.[62] In *Quarles*, two police officers chased

55 *See Miranda*, 384 U.S. at 457 (stating that such an interrogation environment creates a "badge of intimidation"); *see also* Roth, *supra* note 48, at 2788-89 (pointing out that the underlying assumption in the Court's decision was that a custodial interrogation by definition has a coercive element); Darmer, *supra* note 48, at 338 (identifying one of the *Miranda* holdings is that stationhouse interrogation is inherently coercive).

56 *See Miranda*, 384 U.S. at 458 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."); *see also* Dickerson v. United States, 530 U.S. 428, 442 (referring to the rationale in *Miranda* that something more than the totality-of-the-circumstances test was necessary to account for involuntary custodial confessions).

57 *Miranda*, 384 U.S. at 479.

58 *See id.* (declaring that the suspect cannot waive the rights until he is informed of them).

59 *See id.* at 467 (perceiving that there are other possible measures that states and Congress could use to protect this privilege).

60 *Id.* at 460 (citing Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

61 *See* Dery, *supra* note 53, at 66 (noting that the Court has had the opportunity to analyze the *Miranda* holding in a variety of Fifth Amendment contexts in the decades since it was decided); *see e.g.*, Michigan v. Tucker, 417 U.S. 433, 436 (1974) (considering *Miranda* where incomplete warnings were given); Oregon v. Elstad, 470 U.S. 298, 305-07 (1985) (examining *Miranda* as it interacts with the concept of taint).

62 New York v. Quarles, 467 U.S. 649, 655-56 (1984) (holding that there is a public-safety exception to the requirement that *Miranda* warnings be given in order for a suspect's statements to be admissible at trial); *see* Roth, *supra* note 48, at 2792 (stating that the Court in *Quarles* created a public-safety exception to the *Miranda* warnings).

a man who matched the description of a suspected rapist into a supermarket late at night.[63] Once in the store, the police cornered the suspect and restrained him with handcuffs.[64] When one of the officers searched the suspect and found an empty gun holster, he asked the suspect where the gun was.[65] The suspect said, "the gun is over there," and nodded in the direction of some cartons.[66] The officer retrieved the gun and then informed the suspect of his *Miranda* rights.[67] When the defendant was indicted for criminal possession of a weapon, he argued that the use of his statements regarding the location of the gun violated his constitutional rights since he was in custody and had not been *Mirandized* when he made them.[68]

The *Quarles* Court was addressing the right against self-incrimination in a context far different from that considered in *Miranda*. In *Miranda*, the Court required that the warning be read to a suspect when he was in "an interrogation environment . . . created for no purpose other than to subjugate the individual to the will of his examiner."[69] However, that was not the situation in *Quarles*.[70] Here, the interaction between the officers and suspect was in the presence of bystanders, who would witness if the suspect were being coerced.[71] Additionally, in *Quarles*, the police were not primarily concerned with obtaining incriminating information, but instead were consumed with protecting the public from the dangers associated with a possibly loaded gun hidden in the store.[72] The *Quarles* Court reiterated that the *Miranda* warnings are not mandated by the constitution, but are simply one way of ensuring the right against self-incrimination is not violated.[73] Given the differences between the circumstances of *Quarles* and what the procedural safeguards in *Miranda* were intended to protect against, the Court implemented a balancing test in which the risk of the suspect being coerced into incriminating himself was weighed against the

63 *Quarles*, 467 U.S. at 651-52.
64 *Id.* at 652.
65 *Id.*
66 *Id.*
67 *Id.*
68 *Quarles*, 467 U.S. at 653.
69 *Miranda*, 384 U.S. at 457.
70 *Quarles*, 467 U.S. at 657.
71 *See* Roth, *supra* note 48, at 2793 (distinguishing *Quarles* from *Miranda* in that "the detention took place outside the police station, where the officer's conduct was exposed to public scrutiny").
72 *Quarles*, 467 U.S. at 656; *see* Roth, *supra* note 48, at 2793 (stating that the officers were not concerned with securing a conviction, but with averting an immediate danger).
73 *Quarles*, 467 U.S. at 654 ("The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution . . . .'").

risk to the public if the police officers did not get information from the suspect about the location of the gun.[74] In light of this analytical approach, the Court found that the police were justified in questioning the defendant before he was provided with his *Miranda* rights, and therefore the statements were admissible against him at trial.[75]

In so holding, the *Quarles* Court was conscious of the internal struggle a police officer goes through when confronted with such a situation, and "decline[d] to place the officers . . . in the untenable position" of having to decide between the immediate need to protect the public versus the long-term goal of convicting the criminal.[76] The Court expressed confidence that officers would be able to innately identify the situations where the exception was applicable, noting its intention to "free [police officers] to follow legitimate instincts when confronting situations presenting a danger to the public-safety."[77]

The Court also distinguished the facts of *Quarles* from those of *Orozco v. Texas*;[78] clarifying that the public-safety exception was not applicable in *Orozco* because "they did not in any way relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon."[79] Therefore, for the public-safety exception to apply there must be: 1) an objective belief by the officers that they needed to act in order to resolve; and 2) an immediate danger. If these conditions were met, then only those statements made by the suspect regarding the officer's attempt to neutralize an immediate danger would be admissible at trial.[80]

Unfortunately, because the Court stated that its holding was made "on

74 *Quarles*, 467 U.S. at 657 (concluding that the need for information regarding a threat to the public-safety outweighed the need for prophylactic rules protecting the Fifth Amendment right not to self-incriminate); *see* Roth *supra* note 48, at 2793 ("[E]nsuring that police officers carry out their peacekeeping duty during dangerous intervals, outweighed *Miranda's* concern regarding confessions produced through coercion.").

75 *Quarles*, 467 U.S. at 655-56 ("We hold that on these facts there is a 'public-safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence . . . .").

76 *Id.* at 657-58; *see* Medick, *supra* note 52, at 182 (identifying the circumstances in which the Court believed considerations of public policy justified not providing *Miranda* warnings); *see also* Joseph Yockey, Note, *The Case for a Sixth Amendment Public-Safety Exception After Dickerson*, 2004 U. ILL. L. REV. 501, 531 (2004) (revealing the desire of the Court to assist police officers confronted with "split-second" decisions).

77 *Quarles*, 467 U.S. at 659.

78 394 U.S. 324 (1969). In *Orozco*, the murder had been committed four hours before the officers entered the defendant's boardinghouse where he was sleeping and began interrogating him without informing him of his *Miranda* rights.

79 *Quarles*, 467 U.S. at 659, n. 8.

80 *See* Michigan v. Attebury, 624 N.W.2d 912, 916 (Mich. 2001) (noting that the statements at issue were regarding questions intended to locate a missing weapon).

these facts"[81] and that the public-safety exception is a narrow one,[82] it has led to a scarce application in the lower courts.[83] Specifically, out of fear that a broad interpretation would swallow *Miranda* whole, lower courts have limited the application of the public-safety exception solely to those cases that are factually similar to *Quarles*.[84] This narrow application of *Quarles* has likely made law enforcement officials hesitant to apply the public-safety exception. If the officer interrogates a suspect in custody under the presumption that the public-safety exception applies, and then it is later established at trial that the exception was inapplicable, then all statements made by the defendant, before and after he was read his *Miranda* rights, may be inadmissible.[85]

However, the *Quarles* Court did not intend for the exception to be restricted to its facts. The Court had broad goals of protecting public safety and allowing police officers the flexibility to act instinctively in "kaleidoscopic situations" without having their actions later questioned. In addition, the Court chose not to adopt the dissent's approach of avoiding a constitutional violation by eliminating the statements from trial because that would mean expanding *Miranda* beyond its intended purpose of preventing coerced confessions.[86] Automatically excluding the statement, when there is minimal risk of coercion, would unnecessarily punish the officers who were just trying to neutralize a dangerous situation.[87]

This theme of veering away from the bright-line *Miranda* rule in favor of a policy that would be favorable toward the public and the criminal justice

81 *Quarles*, 467 U.S. at 655.

82 *Id.* at 658.

83 *See* United States v. Rumble, 714 F. Supp.2d 388, 397 (N.D.N.Y. 2010) (holding that the public-safety exception did not apply because the government did not prove it was necessary to interrogate the suspect before *Mirandizing* him); *see also* United States v. Benjamin, No. 10-131, 2010 WL 2978042, at *8 (E.D. Pa. Jul. 26, 2010) (noting that the public-safety exception is narrow, and therefore cannot apply every time a weapon may be found during a search, or else it could swallow the rule in *Miranda*); *see also Attebury*, 624 N.W.2d at 917 (holding that the public-safety exception applied when the circumstances were similar to those of *Quarles*).

84 *Rumble*, 714 F. Supp.2d at 397.

85 Missouri v. Seibert, 542 U.S. 600, 612 (2004) (holding that the statements made by the suspect after the *Miranda* rights were given were not admissible because there was a pre-*Miranda* interrogation); *see* Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 327 (2003) (stating that prosecutors can argue that the public-safety exception applies but there is no guarantee that the court will accept the argument, and if it does not then the statements may not be admissible).

86 *Quarles*, 467 U.S. at 658 n.7 ("[A]bsent actual coercion by the officer, there is no constitutional imperative requiring the exclusion of the evidence that results from police inquiry of this kind; and we do not believe that the doctrinal underpinnings of *Miranda* require us to exclude the evidence, thus penalizing officers for asking the very questions which are the most crucial to their efforts to protect themselves and the public.").

87 *Id.*

system was not new at the time of *Quarles*. In *Harris v. New York*,[88] the Court addressed a situation where the defendant made statements to police that were not admissible under *Miranda*, but then chose to testify at trial, where he contradicted those statements.[89] The Court held that "the shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[90] Similar to the balancing test in *Quarles*, the *Harris* Court held that the risk of manipulation to the criminal justice system through perjury outweighed the risk that the defendant's constitutional rights would be violated.[91]

In a more recent decision, the Court again affirmed the approach of narrowing the scope of *Miranda*. In *United States v. Patane*,[92] a plurality of the Court held that because non-testimonial evidence cannot violate the Self-Incrimination Clause, physical evidence discovered as a product of the un-*Mirandized*, but voluntarily made, statements are admissible.[93] The *Patane* Court reasoned that the "characterization of *Miranda* as a constitutional rule does not lessen the need to maintain the closest possible fit between the Self-Incrimination Clause and any judge-made rule designed to protect it."[94]

III. CONGRESS IS CONSTITUTIONALLY JUSTIFIED IN PASSING LEGISLATION PERMITTING LAW ENFORCEMENT OFFICIALS TO IMPLEMENT THE PUBLIC-SAFETY EXCEPTION WHEN INITIALLY INTERROGATING SUSPECTED TERRORISTS

Guided by the principles underlying *Miranda* and *Quarles*, it is a natural transition to apply the public-safety exception to suspected domestic terrorists. Congress should pass legislation clarifying that law enforcement officials are permitted to interrogate domestic terrorists under the public-safety exception. In doing so, this would make even more effective the use

88 401 U.S. 222 (1971).

89 *Id.* at 223.

90 *Id.* at 226.

91 *Id.* at 224 (quoting Walder v. United States, 347 U.S. 62, 65 (1954)) ("It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.").

92 542 U.S. 630 (2004).

93 *Id.* at 639 ("[S]tatements taken without *Miranda* warnings (though not actually compelled) can be used to impeach a defendant's testimony at trial . . . .").

94 *Id.* at 643.

of the federal criminal justice system in the prosecution of terrorists.

A. The public-safety exception applies to suspected terrorists.

Most concerns regarding the application of the public-safety exception to the interrogation of suspected terrorists focus on the immediacy requirement. The immediacy requirement has been interpreted narrowly to find an immediate danger if the danger only is as temporally close to inflicting harm to the public as in *Quarles*.[95] This, however, should not inhibit the application of the exception to suspected terrorists for two reasons. First, the policy goals of the *Quarles* Court would not be achieved by a test that was entirely dependent upon the timing of the threat. Second, even if limited by a narrow application of the immediate threat requirement, the interrogation of a suspected terrorist still fits within the framework.

With respect to the timing of the threat, the *Quarles* Court stated that it was justified in modifying the bright-line *Miranda* rule to make it easier for police officers to know what they could do in high-risk situations to protect the public without forfeiting a conviction.[96] The Court believed that police officers would be able to instantaneously determine whether the exception applies, and opposed those determinations being critically scrutinized after the fact. Thus, such an approach gave a large amount of discretion to the intuition of police officers. Employing a test that would bring into doubt the appropriateness of the officers' actions based on whether the threat was immediate would contradict this approach.

Likewise, because the public-safety exception applies to custodial interrogations, the *Quarles* Court also relied on the judgment of law enforcement officials to determine whether a suspect should initially be taken into custody. To take a suspect into custody, there must be probable cause that the suspect committed, or attempted to commit, a crime.[97] In the

[95] *See Rumble*, 714 F. Supp.2d at 392 (noting that the public-safety exception is narrow, and therefore cannot apply every time a weapon may be found during a search, or else it could swallow the rule in *Miranda*); *see also* Sievert, *supra* note 85, at 324 (stating that the public-safety exception cases all relate to questioning regarding an "imminent identifiable threat").

[96] *Quarles*, 467 U.S. at 658 ("[W]e recognize here the importance of a workable rule 'to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" (quoting Dunaway v. New York, 442 U.S. 200, 213-14 (1979))).

[97] *See* Carroll v. United States, 267 U.S. 132, 161-62 (1925) ("'[G]ood faith is not enough to constitute probable cause. That faith must be grounded on facts within the knowledge of the . . . agent, which in the judgment of the court would make his faith reasonable."); *see also* Rodarte v. City of Riverton, 552 P.2d 1245, 1255 (Wyo. 1976) ("Mere suspicion coupled with the officers' good faith will not suffice as probable cause for arrest. The officer must possess a factual knowledge which leads him

case of a suspected terrorist, there must be probable cause of an act to "intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."[98] Such a grand goal is not often achieved through a single act, especially when there is a chance that that one plotted attack may be thwarted before its commission.[99] Therefore, when the officers have probable cause to take the suspect into custody for terrorist acts, it is a reasonable inference that the suspect is aware of other acts leading to the ultimate consummation of an act of terrorism.[100] The *Quarles* Court would permit the officers to interrogate a terrorist suspect under these circumstances because the Court noted that the exception applies when officers have an objectively reasonable belief that there is an immediate danger, which they would have in such situations.

The *Quarles* Court used a balancing test because in certain situations the risk of the danger to the public outweighs the risk that the suspect's constitutional right might be violated in the future. Given the potential magnitude of the injury that could result from a terrorist attack, the risk to the public's safety would be infinitely greater than the risk of coercion to the suspect, especially when law enforcement officials are concerned about stopping a possible terrorist attack and not trying to coerce the suspect to confess.

The *Quarles* Court also ensured that the public-safety exception would not be extended beyond its original purpose by limiting the admissibility of statements to only those made in response to questions asked by the officers to protect the public's safety. When the statements are introduced into evidence, the prosecution could identify the context in which the statements were made by providing a foundation of such.[101] Additionally, interrogations of this sort occur where the suspect is detained, which is

as a reasonable man to believe that his subject is committing or has committed a crime.").

98 *See* Fletcher, *supra* note 13.

99 *See* Jenna Baker McNeill, James Jay Carafano & Jessica Zukerman, *Thirty Terrorist Plots Foiled: How the System Worked*, 2405 BACKGROUNDER 1 (2010), *available at* http://thf_media.s3.amazonaws.com/2010/pdf/bg_2405.pdf (noting that thirty terrorist attacks against the U.S. have been foiled since September 11, 2001, 28 of them successfully prevented by law enforcement); *see also* Scott G. Erickson & Matt A. Mayer, *A Comprehensive Suspicious Activity Reporting (SAR) System Requires Action*, 2636 BACKGROUNDER 1 (2012) (attributing the success of law enforcement in the battle against terrorism to suspicious activity reporting).

100 *See* Kris, *supra* note 10 (stating that from interrogating suspected terrorists, law enforcement officials have learned information about plots to attack U.S. targets); Jonathan F. Lenzner, *From a Pakistani Stationhouse to the Federal Courthouse: A Confession's Uncertain Journey in the U.S.-led War on Terror*, 12 CARDOZO J. INT'L & COMP. L. 297, 298 (2004) ("Preventing terrorist attacks requires timely intelligence, often gained through confessions and physical evidence obtained from suspects.").

101 *See* FED. R. EVID. 901(b)(1) (instructing that testimony that an item is what it is claimed to be satisfies the requirement of authenticating or identifying an item of evidence).

likely to be in public where witnesses could corroborate the context of the conversation. In continuing to interpret the admissibility of the statements in court narrowly, broadening the immediacy requirement will prevent *Miranda* from being overwhelmed by the public-safety exception.[102]

Furthermore, even if the public-safety exception's application was restricted to a narrow construction of an immediate threat, this exception should still apply to suspected terrorists. The reason for the immediacy requirement is to ensure that the police act out of necessity to negate the threat. That is what ensures that there is minimal risk of a constitutional violation. Because of the complexity of terrorist acts, from delayed detonation of bombs to the involvement of numerous co-conspirators, it may be necessary to act immediately in order to stop a terrorist act even though the physical injury may not occur imminently.[103] Incorporating the magnitude and complexity of terrorist threats into the analysis to determine whether the threat is immediate would produce a more complete and realistic analysis of the situation.[104]

"[T]he defeat of the U.S. is imminent."[105] Mr. Shahzad declared this at his sentencing for his attempted terrorist attack in Times Square.[106] Mr. Shahzad had already attempted to detonate a bomb in the most populous area in the country, so it was reasonable for law enforcement officials to believe that he planned to commit, and would attempt to commit, another such act to ensure his goals were met. Given that the method in which he tried to detonate the previous bomb was through a delayed detonator, it was also reasonable to believe that Mr. Shahzad had another bomb waiting to explode after his plane had left the country. In fact, Mr. Shahzad actually admitted that he had plans to detonate another bomb two weeks later.[107]

[102] However, the Court's willingness to consistently narrow the *Miranda* holding indicates that it would not be especially concerned with the risk that *Miranda* would become nearly obsolete in its application.

[103] *See* Becker, *supra* note 18, at 869 (stating that it would be irrational for a bomb in a crowded building to be less of a threat to public-safety than a gun simply because it is going to detonate hours later); *see also* Charles Krauthammer, *Miranda Warnings and Public Safety*, NAT'L REV. ONLINE (May 7, 2010, 12:00 AM), http://www.nationalreview.com/blogs/print/229708 ("The public-safety exception should be enlarged to allow law enforcement to interrogate, without Mirandizing, those arrested in the commission of terrorist crimes (and make the answers admissible) – until law enforcement is satisfied that vital intelligence related to other possible plots and threats to public safety has been sufficiently acquired.").

[104] *See* Becker, *supra* note 18, at 869 (arguing that although the future of the public-safety exception is uncertain, there is no better situation for its validity to be tested than domestic terrorist attacks). *But see* Sievert, *supra* note 85, at 324-25 ("Currently, no precedent exists for extending the exception to admission of the results of detailed probing into long-term dangers.").

[105] Markon, *supra* note 2.

[106] *Id.*

[107] *Id.*

While two weeks would not be considered immediate under the facts of *Quarles*, it is likely that Mr. Shahzad was working with several other people that law enforcement officials would have to locate and detain in order to prevent the attack from happening. Therefore, the fact that Mr. Shahzad was arrested in far proximity from the bomb is irrelevant to the immediacy requirement, because his being distanced from the bomb does not affect the analysis of whether a physical threat is immediate.

In conclusion, because immediacy has a different meaning in the terrorism context, explicitly recommending use of the public-safety exception in the interrogation of terrorism suspects does not disturb the holding in *Quarles*.

B. Congress would be justified in, and should, enact legislation to permit the public-safety exception to apply to suspected terrorists per se.

For law enforcement officials to be able to uniformly utilize the exception to the extent of its power, Congress must enact legislation to that effect. Because Mr. Shahzad pled guilty, it will never be an issue for the courts whether the statements he made under the public-safety exception would be admissible against him in trial. However, this is not a satisfactory way to approach a task as crucial as protecting national security. Law enforcement officials should know definitively when they encounter a suspected terrorist that they are not damaging the chances of a conviction at the expense of attempting to ensure the safety of the public. The Court has given the Obama Administration all of the affirmation it needs to enact legislation to this effect.

Congress should take heed of the limitations of legislative discretion set forth in *Dickerson v. United States*.[108] In *Dickerson*, the Court considered the constitutionality of 18 U.S.C. § 3501,[109] which Congress passed shortly after *Miranda*, but went virtually unenforced for thirty years.[110] The

[108] 530 U.S. 428 (2000).

[109] 18 U.S.C. § 3501 (2006) ("(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances. (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession . . . .").

[110] *See* Dery, *supra* note 53, at 56 ("Sometimes the most devastating response to an action taken by another branch of government is simply to pretend it did not happen. This seems to be the approach taken [in this situation] by the two powers competing with Congress, the executive and judicial

legislative history revealed Congress' intent was to avoid *Miranda* by continuing to consider whether statements made in custodial interrogations were admissible based on whether they were voluntary.[111] The Court ruled that the statute was unconstitutional because it directly contravened its holding in *Miranda*.[112]

The holding in *Dickerson* indicates that Congress may legislate questioning procedures by law enforcement as long as it does not attempt to override *Miranda* and its progeny.[113] The *Dickerson* Court reiterated that the purpose of *Miranda* was to provide constitutional guidelines for the courts and law enforcement agencies to follow.[114] It noted that while the scope of *Miranda* has been narrowed by subsequent decisions, the "decision's core holding that unwarned statements may not be used as evidence in the prosecution's case in- chief" has been reaffirmed.[115] Therefore, as long as Congress does not take a blatantly contradictory approach to the Court's decisions and adheres to the policies the Court has followed for decades, a statute codifying the use of the public-safety exception with terrorism suspects and limiting the application of *Miranda* will be constitutional.

In drafting the legislation, Congress should enforce the principles discussed in Part III-A *supra*. The reasonable belief requirement should remain an objective standard, with the burden on the prosecution to show that a reasonable law enforcement official in the officer's position would have believed that there was a threat to the public. When considering whether this threat existed, courts can consider the factors that the *Quarles* Court used in its balancing test, such as the location of the parties at the time of the interrogation and what prompted the officers to take the suspect into custody in the first place. Furthermore, although there should remain an immediacy requirement, it should be consistent with the practicalities of terrorism-related crimes. Specifically, it should only require that the officials have a reasonable belief that it is necessary to get information

branches.").

111 *See Dickerson*, 530 U.S. at 435-36 (stating that the language of the statute reveals the intent of overruling *Miranda*); *see also* Dery, *supra* note 53, at 56 (pointing out the intention of the Congress, as indicated in the Senate report, was to reverse the holding of *Miranda* and return to the voluntariness test).

112 *See Dickerson*, 530 U.S. at 444 (holding that *Miranda* is a constitutional rule that cannot be trumped by statute).

113 *See* Dery, *supra* note 53, at 74, 76 (noting that in the *Dickerson* decision the Court was "marking its territory" and "defended its turf").

114 *Dickerson*, 530 U.S. at 439 (pointing out that the purpose of the *Miranda* decision was to give concrete constitutional guidelines for law enforcement agencies to follow).

115 *Id.* at 443-44.

from the suspect immediately in order to prevent future harm to the public. The magnitude and complexity of the act the suspect is believed to have committed would be relevant to determining the immediacy of the threat and the reasonableness of the belief. Lastly, the only statements admissible under the exception are those that are directly related to neutralizing the threat to the public's safety.

Upon challenge before the Supreme Court, the statute would be sustained as consistent with the Court's Fifth Amendment jurisprudence. The public-safety exception's codification to apply to suspected terrorists will comply with the intention of the Court to accommodate officers' needs to act instinctively and not have their actions questioned retroactively. It would also adhere to the ultimate goal of protecting public safety in situations where the risk of coercion is minimal. As a result, Congress will provide an effective interrogation tool to law enforcement in the wake of a palpable threat while upholding the principles that underlie our system of criminal justice.

CONCLUSION

The assignment of fundamental rights to criminal defendants makes the federal criminal justice system no less effective than military commissions. To the contrary, having a more balanced approach ensures public confidence in the system. In addition, the federal criminal justice system has many tools at its disposal to gather information from suspects and make the most of that information to protect the nation from future acts of terrorism.

One of the most beneficial, but underutilized, tools is the public-safety exception to the Fifth Amendment's Self-Incrimination Clause. It allows law enforcement officials to interrogate suspected criminals while maintaining the opportunity to use the statements made by the suspect at trial. The exception contemplates situations where the risk of public harm is so great that it would outweigh the need to protect against self-incrimination. In the terrorism context, the use of this exception is particularly effective, both as a matter of national security, but also as a matter of upholding the ideals underlying our criminal justice system. Therefore, Congress should codify a modified version of the public-safety exception to make the criminal justice system as powerful as it can constitutionally be.