
**MIRANDA: TO GIVE OR NOT TO GIVE, THAT
IS THE QUESTION—AT LEAST WITH REGARD
TO THE NON-AFGHAN DETAINEES BEING
HELD IN AFGHANISTAN**

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ABSTRACT

*As the war in Afghanistan winds down, the United States is faced with a myriad of difficult decisions, one of which is what to do with the non-Afghan detainees currently detained there. While it appears the United States is willing to repatriate some of these detainees, it seems that it is set on trying at least a few of them. Because of the sensitive nature of some of the evidence gathered against these detainees, prosecutors presumably will have to rely on the ability of law enforcement to secure admissible statements and confessions, which raises the question: Is law enforcement going to have to Mirandize the detainees to whom they speak? There are a number of existing theories as to why Miranda should not apply, but they are heavy on rhetoric and light on the law. Part II of this Article highlights the shortcomings of the current theories and demonstrates that the answer to whether Miranda applies is tied to the location where the detainees are ultimately tried (not what type of judicial forum they are tried in), their status as an alien and suspected terrorist, or where they were interrogated. Part III addresses the question of whether law enforcement must give detainees a rights advisement, even if Miranda applies. Part IV discusses what other rules are in place that may impact detainee cases involving incriminating statements. This Article concludes, based on *Howes v. Fields* and a handful of other post-Miranda cases, by proposing that law enforcement should be able to question the non-Afghan detainees in Afghanistan without first Mirandizing them.*

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I. INTRODUCTION

During the Afghan War, a number of non-Afghan detainees were held by the United States at Bagram Air Field in Afghanistan.¹ This fact, coupled

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1. See, e.g., Adam Goldman, *U.S. Quietly Whittles Down Foreign Detainee Population at Facility in Afghanistan*, WASH. POST (Feb. 25, 2014), http://www.washingtonpost.com/world/national-security/us-quietly-whittles-down-foreign-detainee-population-at-facility-in-afghanistan/2014/02/25/ea52adfc-9a43-11e3-b931-0204122c514b_story.html (reporting that 49 non-Afghan detainees were being held at Bagram Air Field); *Sentence Goes on for Pakistani Detainees in Bagram*, EXPRESS TRIB. (June 12, 2013), <http://tribune.com.pk/story/562220/sentence-goes-on-for-pakistani-detainees-in-bagram/> (reporting that detention of non-Afghans at Bagram “has prompted comparisons with detainees at the US prison at Guantanamo Bay in Cuba”); Kevin Sieff, *In Afghanistan, a Second Guantanamo*, WASH. POST (Aug. 4, 2013), http://articles.washingtonpost.com/2013-08-04/world/41067331_1_detention-center-afghanistan-guantanamo-bay (reporting that 67 non-Afghan detainees were held at Bagram). In March 2013, The United States turned over control of the detention facility at Bagram Air Field to the Afghan government. See Karen DeYoung, *Parwan Prison to be Returned to Afghans*, WASH. POST (Mar. 23, 2013), http://www.washingtonpost.com/world/national-security/parwan-prison-to-be-returned-to-afghans/2013/03/23/7bc51b24-9402-11e2-ba5b-550c7abf6384_story.html; see also *U.S. Says It No Longer Has Any Detainees in Afghanistan*,

with the current drawdown,² leads one to wonder what the United States is going to do with these detainees in the long term. Presumably, the United States intends to prosecute at least some of them,³ as opposed to merely releasing and repatriating them.⁴ Assuming this is true, what will the cases

EXPRESS TRIB. (Dec. 11, 2014), <http://tribune.com.pk/story/805184/us-says-it-no-longer-has-any-detainees-in-afghanistan/>. It is estimated that 3,000 Afghan detainees are being held by Afghanistan officials on their side of the facility. *See, e.g.*, Fakhar ur Rehman & Jamieson Lesko, *Bagram prison: Another Guantanamo in the making?*, NBCNEWS.COM (Sept. 4, 2013), <http://www.nbcnews.com/news/other/bagram-prison-another-guantanamo-making-f1C11073569>.

2. *See, e.g.*, President Barack Obama, Address Before a Joint Session of Congress on the State of the Union, 2014 DAILY COMP. PRES. DOC. 50 (Jan. 28, 2014) (“With Afghan forces now in the lead for their own security, our troops have moved to a support role. Together with our allies, we will complete our mission there by the end of this year, and America’s longest war will finally be over.”).

3. *See, e.g.*, Goldman, *supra* note 1 (reporting that U.S. officials stated that “the number of people being looked at for prosecution is in the single digits”); Adam Goldman & Karen DeYoung, *Foreign Detainees from Afghanistan Are Being Considered for Military Trial in U.S.*, WASH. POST (Dec. 17, 2013), http://www.washingtonpost.com/world/national-security/foreign-detainees-from-afghanistan-are-being-considered-for-military-trial-in-us/2013/12/17/d38f9254-6723-11e3-a0b9249bbb34602c_story.html (“The Obama administration is actively considering the use of a military commission in the United States to try a Russian who was captured fighting with the Taliban several years ago and has been held by the U.S. military at a detention facility near Bagram air base in Afghanistan, former and current U.S. officials said.”); Catherine Herridge, *Administration Aims to Bring Detainee to US for Military Trial, Sources Say*, FOXNEWS.COM (May 31, 2013), <http://www.foxnews.com/politics/2013/05/31/administration-aims-to-bring-detainee-to-us-for-military-trial-sources-say/> (reporting that “[t]he Obama Administration is looking to transfer a detainee who is being held overseas and is said to have ‘blood on his hands’ to the U.S. for a military trial”). The significance of prosecuting at least some of the detainees cannot be overstated, as “[a]n important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war.” *In re Yamashita*, 327 U.S. 1, 11 (1946) (citing *Ex parte Quirin*, 317 U.S. 1, 28 (1942)). Furthermore, simply returning the detainees to their country of origin at the stated conclusion of the conflict in Afghanistan may have the unintended consequence of eroding the distinction between lawful-privileged and unlawful-unprivileged enemy belligerents. *See Ex parte Quirin*, 317 U.S. at 31 (stating that unlawful combatants are “subject to trial and punishment by military tribunals for acts which render their belligerency unlawful”).

4. Fairly recently, the United States released a number of detainees from the detention facility at Bagram Air Base. *See, e.g.*, Rana Tanveer, *Released from Bagram, Six Pakistanis Held in Incommunicado Detention, Claim Lawyers*, EXPRESS TRIB. (Nov. 19, 2013), <http://tribune.com.pk/story/633857/released-from-bagram-six-pakistanis-held->

against the detainees look like? In seeking to protect sensitive intelligence sources and methods, it is foreseeable that the intelligence community may not allow prosecutors to use informant testimony, surveillance data, or other classified evidence that it gathered against detainees before placing them in detention.⁵ Therefore, it seems that detainee prosecutors are going to have to rely, at least partially, on law enforcement's ability to secure admissible statements and confessions.

In the domestic context, one of the biggest perceived impediments to receiving admissible statements and confessions is the Self-Incrimination Clause of the Fifth Amendment,⁶ which provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”⁷ In *Miranda v. Arizona* and the cases that have followed it, the U.S. Supreme Court has interpreted this Clause to mean that, typically, before U.S. law enforcement officials interrogate a person who is in their custody, they must first advise the person of the following: (1) they have the right to remain silent, and anything they *do* say may be used against them in court; (2) they have the right to consult with an attorney and have that attorney present during questioning; and (3) if they cannot afford an attorney, one will be provided to them at no cost.⁸ Failure to provide such an advisement before interrogation usually results in suppression of any subsequent statement,

in-incommunicado-detention-claim-lawyers/ (stating that six Pakistani detainees had been released and repatriated to Pakistan, “but the [Pakistani] government has not disclosed their custody and have kept the six men in incommunicado detention”).

5. See Oona Hathaway et al., *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT'L L. 123, 172 (2013) (“Opponents of federal criminal law prosecution and detention of suspected terrorists often point to two evidentiary concerns: (1) the inability to utilize sensitive national security information for fear of exposure, and (2) adherence to the Federal Rules of Evidence, which makes it impossible for the government to present probative evidence in terrorism cases.”); Nathan Alexander Sales, *Share and Share Alike: Intelligence Agencies and Information Sharing*, 78 GEO. WASH. L. REV. 279, 295–303 (2010) (highlighting the “diverse—and, at times, contradictory—policy visions” that the intelligence and law enforcement communities may have regarding information sharing and information use).

6. See, e.g., Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1132 (1998) (describing *Miranda* as “the single most damaging blow inflicted on the nation's ability to fight crime in the last half century”).

7. U.S. CONST. amend. V.

8. *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966); see also, e.g., *Dickerson v. United States*, 530 U.S. 428, 435 (2000) (quoting *Miranda*, 384 U.S. at 479).

regardless of whether it was voluntarily given.⁹

Because of *Miranda*'s perceived challenges, there is an ever-present desire to limit its application, especially in the detainee context.¹⁰ In fact, in Section 1040 of the National Defense Authorization Act for Fiscal Year 2010, Congress declared that no member of the Department of Defense (DoD) is to provide advice on *Miranda* rights to any foreign national captured or detained outside of the United States as an enemy belligerent.¹¹

9. See *Oregon v. Elstad*, 470 U.S. 298, 307 (1985) (“Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*.”). Needless to say, there are a number of exceptions to this rule. See generally *New York v. Quarles*, 467 U.S. 649 (1984) (public safety exception); *Harris v. New York*, 401 U.S. 222 (1971) (impeachment exception). Additionally, the physical fruits of a defendant’s unwarned, voluntary statements likely do not require suppression. See, e.g., *United States v. Lara-Garcia*, 478 F.3d 1231, 1235–36 (10th Cir. 2007) (holding that *Miranda* “protects against violations of the Self-Incrimination Clause, which, in turn, is not implicated by the introduction at trial of physical evidence resulting from voluntary statements” (quoting *United States v. Patane*, 542 U.S. 630, 634 (2004) (plurality opinion) (internal quotation mark omitted))).

10. See, e.g., Questioning of Terrorism Suspects Act of 2010, H.R. 5934, 111th Cong. § 3 (2010) (stating that the public safety exception should allow “unwarned interrogation of terrorism suspects for as long as is necessary to protect the public from pending or planned attacks when a significant purpose of the interrogation is to gather intelligence and not solely to elicit testimonial evidence”); Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, S. 3801, 111th Cong. § 3(b)(3) (2010) (declaring that an “unprivileged enemy belligerent shall not . . . be informed of any rights that the individual may or may not have to counsel or to remain silent consistent with *Miranda v. Arizona*”); Bridget Miller & Edwin Mora, *Reading Miranda Rights to Terrorists Is ‘Crazy’ and ‘Stupid,’ Say GOP Congressmen*, CNSNEWS.COM (June 17, 2009), <http://cnsnews.com/news/article/reading-miranda-rights-terrorists-crazy-and-stupid-say-gop-congressmen> (reporting that the policy of Mirandizing terrorist suspects “has sparked outrage among several Republicans in Congress”).

11. See National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1040(a)(1), 123 Stat. 2190, 2454 (2010). Congress specifically exempted the Department of Justice, which encompasses the Federal Bureau of Investigation (FBI), from this moratorium. See *id.* § 1040(a)(2). The Department of Justice has demonstrated an intent, though, to limit its application of *Miranda* in cases involving suspected terrorists. See, e.g., Memorandum from the FBI on Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Inside the United States (Oct. 21, 2010) [hereinafter FBI Memorandum], available at <http://www.nytimes.com/2011/03/25/us/25miranda-text.html> (“There may be exceptional cases in which, although all relevant public safety questions have been asked, agents nonetheless conclude that continued unwarned interrogation is necessary to collect valuable and timely intelligence not related to any immediate threat, and that the government’s

However, because “*Miranda* announced a constitutional rule that Congress may not supersede legislatively,”¹² neither Congress’s proscription nor similar legislative and executive efforts can answer the question of what role *Miranda* will ultimately play in the prosecution of the non-Afghan detainees in Afghanistan.¹³ This Article attempts to provide some guidance on the matter by addressing three key questions: (1) whether *Miranda* is even applicable in the detainee context; (2) if it is, whether law enforcement must give the detainees “*Miranda*-like” warnings;¹⁴ and (3) outside of *Miranda*,

interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation.”); see also Joanna Wright, Note, *Mirandizing Terrorists? An Empirical Analysis of the Public Safety Exception*, 111 COLUM. L. REV. 1296, 1296–97 (2011) (discussing the implications of the FBI’s decision not to Mirandize the “Times Square Bomber” or the “Christmas Day Bomber” before interrogating them); Kevin Cullen, *Dzhokhar Tsarnaev Admits to Setting Bombs with Brother, Source Says*, BOS. GLOBE (Apr. 23, 2013), <http://www.bostonglobe.com/metro/2013/04/23/source-marathon-bombing-suspect-admitted-that-and-brother-detonated-bombs-killed-police-officer/B rBQCAOsqpFU2ShoJ4YoQM/story.html> (reporting that Dzhokhar Tsarnaev admitted he was behind the Boston Marathon bombings before he was Mirandized, while being treated for multiple gunshot wounds).

12. *Dickerson*, 530 U.S. at 444. This is not to say, though, that a failure to give a *Miranda* advisement necessarily amounts to a violation of the Fifth Amendment. See, e.g., *Patane*, 542 U.S. at 641 (“Our cases also make clear the related point that a mere failure to give *Miranda* warnings does not, by itself, violate a suspect’s constitutional rights or even the *Miranda* rule.”); *Dickerson*, 530 U.S. at 439–41 (recognizing that there are some instances when no *Miranda* advisement is necessary); *id.* at 450 (Scalia, J., dissenting) (“[T]he Court has (thankfully) long since abandoned the notion that failure to comply with *Miranda*’s rules is itself a violation of the Constitution.”); Joëlle Anne Moreno, *Faith-Based Miranda?: Why the New Missouri v. Seibert Police “Bad Faith” Test Is a Terrible Idea*, 47 ARIZ. L. REV. 395, 397 (2005) (“*Dickerson*, for all of its constitutional trappings, did not change the essential fact that a violation of *Miranda* does not violate the Fifth Amendment.”).

13. See *Dickerson*, 530 U.S. at 436, 444 (majority opinion) (invalidating 18 U.S.C. § 3501(a), which was Congress’s overt attempt to overrule *Miranda*, on the ground that *Miranda* announced a constitutional rule that may not be superseded legislatively). This is not to say, though, that Congress’s attempts to limit the extension of *Miranda* are irrelevant, as they may nevertheless play some role in determining whether the Executive Branch’s actions during a time of war are legitimate. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 637 (1952) (Jackson, J., concurring) (noting that “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress,” and that presidential acts executed “pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation”).

14. Throughout this Article, the term “*Miranda*-like warnings” is used instead of “*Miranda* warnings.” The reason for this is that it is unclear what should be included in a rights advisement given to an alien questioned abroad. Only one federal circuit court

whether other rules may affect the admissibility of a detainee's statements. In the end, this Article concludes that if the detainees are tried stateside or somewhere the United States exercises total control, the detainees will probably qualify for *Miranda* protection. But, in light of their continued detainment, and recent developments in *Miranda* case law, law enforcement likely will not have to Mirandize them.

II. DOES *MIRANDA* MATTER?

A fundamental issue concerning the detainees' questioning is whether *Miranda* even applies to them.¹⁵ As of now, there are three primary bases for arguing that *Miranda* is inapplicable. Part I.A discusses and dismisses the basis that seems to be discussed most by the legal community: the Constitution and the rules that flow from it do not apply to prosecutions before a military commission. Part I.B dispatches the most politically popular basis: detainees should not be given *Miranda*-like warnings because of their status as aliens and suspected terrorists. Part I.C dismantles the contention that *Miranda* does not apply when the detainees are interviewed overseas. In sum, Part II shows that if detainees are tried in a location under the total control of the United States, *Miranda* must be considered.

of appeals has dealt with the issue, and the district court and appellate court disagreed on what was required. *In re Terrorist Bombings of U.S. Embassies in E. Afr. (In re Terrorist Bombings III)*, 552 F.3d 177, 188, 205–08 (2d Cir. 2008).

15. See, e.g., Hon. Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 830 (2013) (footnote omitted) ("It is widely accepted that *Reid [v. Covert]*, 354 U.S. 1 (1957) establishes that U.S. citizens interrogated abroad are entitled to the Fifth Amendment's protections. This leaves open the question whether aliens are due similar treatment—a question that the Supreme Court has not yet answered."). Another fundamental question, at least in the Article III context, is how the *McNabb–Mallory* rule—which typically mandates suppression of voluntary confessions that are taken more than six hours after arrest and before the arrestee has been presented before a judicial officer—will be applied. See *Corley v. United States*, 556 U.S. 303, 309–10, 322 (2009) (finding that 18 U.S.C. § 3501(c) leaves *McNabb–Mallory* inapplicable to confessions given within the first six hours following arrest). Some have called for the rule to be relaxed in the terrorism context. See, e.g., Benjamin Wittes, *President Obama Needs More Legal Tactics Against Terrorists*, WASH. POST (May 14, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/13/AR2010051303541.html>. While Congress has yet to act, at least one federal circuit court of appeals has indicated that lengthy delays do not necessarily violate procedural rights that have time requirements. See *United States v. Ghailani*, 733 F.3d 29, 46, 51 (2d Cir. 2013) (finding that the Speedy Trial Clause of the Sixth Amendment was not violated despite the fact that nearly five years had passed between when the terrorist was captured and when he was presented for trial).

A. *The “They’ll Be Tried in Front of a Commission” Argument*

Some have argued that if the detainees are tried in front of a military commission, there are no *Miranda* concerns raised by failing to give a rights advisement.¹⁶ This argument is problematic for a couple of reasons. First, it is unlikely that *all* the detainees will be tried by a commission.¹⁷ Thus, at best, this justification covers only some of the detainees. Second, and more

16. See Geoffrey Corn & Chris Jenks, *Strange Bedfellows: How Expanding the Public Safety Exception to Miranda Benefits Counterterrorism Suspects*, 41 *FORDHAM URB. L.J.* 1, 4 (2013) (“[T]he government may now both question in violation of the *Miranda* warning and waiver requirement and then . . . prosecute via a legislatively created military commission employing perpetually evolving, and less rigorous procedures, than an Article III court.”); Catherine L. Guzelian, Note, *Following the Flag: The Application of the Fifth Amendment Self-Incrimination Clause and the Miranda Warnings to Overseas Confessions*, 3 *GEO. J.L. & PUB. POL’Y* 341, 357 (2005) (“In these commissions, confessions that have not undergone the stringent standards of *Miranda* may still be introduced as probative evidence.”); Bryan William Horn, Note, *The Extraterritorial Application of The Fifth Amendment Protection Against Coerced Self-Incrimination*, 2 *DUKE J. COMP. & INT’L L.* 367, 371 n.38 (1992) (citing *Ex parte Quirin*, 317 U.S. 1, 38–39 (1942)) (“It is important to note that neither the Fifth nor the Sixth Amendments appl[y] in trials before a Military Commission.”); Wittes, *supra* note 15 (“In the military system, one can interrogate people for long periods; there is no pressure to read *Miranda* rights”); Memorandum from Jay S. Bybee, Assistant Attorney Gen., Dep’t of Justice to William J. Haynes II, Gen. Counsel, Dep’t of Def. on Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan 1 (Feb. 26, 2002), available at <http://www.justice.gov/olc/docs/memo-constraints-feb2002.pdf> (“[T]he Self-Incrimination Clause (and hence *Miranda*) does not apply in the context of a trial by military commission for violations of the laws of war. Accordingly, military commissions may admit statements made by a defendant in a custodial interrogation conducted without *Miranda* warnings.”).

17. See, e.g., Terry Carter, *Meet the Man Who Would Save Guantanamo*, *ABA J.* (Mar. 1, 2013), http://www.abajournal.com/magazine/article/the_man_who_would_save_guantanamo/ (“We don’t seek to displace the federal courts in international terrorism cases, . . . but there is a narrow category of cases where counterterrorism professionals, prosecutors, intelligence and law enforcement officers might determine that the best forum is a military commission.” (quoting Brigadier General Martins) (internal quotation marks omitted)); Brigadier General Mark Martins, Chief Prosecutor for Military Comm’ns, Address at Harvard Law School: Legitimacy, Officer Juries, and the Limits of Command in Reformed Military Commissions (Apr. 3, 2012), available at <http://www.lawfareblog.com/2012/04/mark-martins-address-at-harvard-law-school/> (stating that “[i]n most cases, federal courts will likely be the most appropriate venue” for prosecuting international terrorism cases); Presidential Statement on Military Commissions, 2009 *DAILY COMP. PRES. DOC.* 364 (May 15, 2009) (“In addition, we will work with the Congress on additional reforms that will permit commissions to prosecute terrorists effectively and be an avenue, along with Federal prosecutions in Article III courts, for administering justice.”).

importantly, there is a strong reason to believe that the Self-Incrimination Clause, and hence *Miranda*, will be found applicable in the context of military commissions. While Congress has expressed an intent that *Miranda* not be extended to the commissions-bound detainees,¹⁸ again, it is the Court, not Congress, that will ultimately decide what constitutional protections are to be afforded to the detainees.¹⁹

Unfortunately, the Court has provided little precedent regarding the application of these protections to enemy belligerents tried before military commissions. In fact, the guiding principles emanate primarily from only two World War II-era cases: *Ex parte Quirin*²⁰ and *In re Yamashita*.²¹ In *Ex parte Quirin*, the defendants, mostly German citizens,²² were trained as saboteurs and sent into the United States with the intent to destroy war industries and facilities.²³ Luckily, the defendants were never able to act, as all eight were captured shortly after their arrival.²⁴ On July 2, 1942, approximately 15 days after their capture, the President convened a military commission.²⁵ On July 8, the defendants' trial began, and by July 27, all the evidence had been presented.²⁶ For the entirety of this time, the state and federal courts in the areas where the defendants were captured and detained had remained open.²⁷ Indeed, as they were being tried, the defendants' petitions for habeas corpus were percolating up to the Supreme Court, which denied them on July 31, 1942.²⁸ As noted in the July 31 order, as well as in more detail in the Court's full order that was filed months later, the defendants lodged a host of attacks on

18. See, e.g., Military Commissions Act of 2009, 10 U.S.C. § 948b (c)–(d) (stating that the procedures for military commissions are based on those set forth in the Uniform Code of Military Justice (UCMJ) but that the UCMJ's requirement that all defendants be given a rights advisement before questioning does not apply).

19. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

20. *Ex parte Quirin*, 317 U.S. 1 (1942).

21. *In re Yamashita*, 327 U.S. 1 (1946).

22. One defendant was quite likely a U.S. citizen. This possibility was of no importance to the Court, which found it unnecessary to resolve the question of whether the defendant was a citizen of Germany or of the United States. See *Ex parte Quirin*, 317 U.S. at 20.

23. *Id.* at 21.

24. *Id.*

25. *Id.* at 22.

26. *Id.* at 23.

27. *Id.* at 23–24.

28. *Id.* at 19–20.

their prosecution.²⁹ The one most germane to the matter at hand, though, contended that the defendants' trial before a commission violated the grand jury and petit jury requirements set forth in the Fifth and Sixth Amendments.³⁰ The Court disagreed, basing its rejection on the combination of common law tradition permitting the use of military tribunals,³¹ the "cases arising in the land or naval forces" exception expressly included in the Fifth Amendment and read into the Sixth,³² and earlier congressional action construing military tribunals to be outside the intended scope of those provisions of the Fifth and Sixth Amendments.³³

Approximately four years after *Ex parte Quirin*, the Court decided *In re Yamashita*.³⁴ In that case, the former Commanding General of the Japanese forces in the Philippines, who held command at a time when Japanese soldiers carried out a number of atrocities against the then-occupied Filipino population, was tried before a military commission a mere eight weeks after he surrendered.³⁵ Yamashita's five-week trial included numerous motions for continuances, of which nearly all were denied,³⁶ 286 witnesses, who gave more than 3,000 pages of testimony,³⁷ and 423 exhibits,³⁸ some of which were apparently "ex parte affidavits and depositions" prepared by the prosecution.³⁹ Following that, the commission effectively found the defendant guilty of the seemingly novel law of war violation of failing to exercise adequate control over his force of 260,000 men scattered

29. *Id.*

30. *Id.* at 38–39.

31. *Id.* at 39–40.

32. *Id.* at 40–41.

33. *See id.* at 41–42.

34. *In re Yamashita*, 327 U.S. 1, 33 (1946).

35. *See id.* at 13–17, 33 (Murphy, J., dissenting), 57–61 (Rutledge, J., dissenting). *See generally* George F. Guy, *The Defense of Yamashita*, 4 WYO. L.J. 153 (1949) (discussing, from the defense perspective, the fast-paced trial of General Yamashita). The defendant was tried in the Philippine Islands, which was occupied by U.S. forces in the aftermath of World War II. *See In re Yamashita*, 327 U.S. at 27 (Murphy, J., dissenting) ("The trial was ordered to be held in territory which the United States has complete sovereignty."); *cf.* Guy, *supra*, at 167–71 (discussing the author's participation in filing and arguing Yamashita's Writ of Habeas Corpus and Writ of Prohibition in front of the Supreme Court of the Philippines, both of which were denied).

36. *In re Yamashita*, 327 U.S. at 58–61 (Rutledge, J., dissenting), 27–28 (Murphy, J., dissenting).

37. *See id.* at 5 (majority opinion).

38. *Id.* at 44 n.4, 50 (Rutledge, J., dissenting).

39. *See id.* at 53–54.

over “several thousand islands of the Philippine Archipelago.”⁴⁰ On habeas appeal, the defendant made a number of arguments. Of the arguments, the most relevant to the detainee cases was the one raised regarding the Fifth Amendment’s Due Process Clause, which the Court made short shrift of by stating,

[f]or reasons already stated we hold that the commission’s rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied. Nothing we have said is to be taken as indicating any opinion on the question of the wisdom of considering such evidence, or whether the action of a military tribunal in admitting evidence, which Congress or controlling military command has directed to be excluded, may be drawn in question by petition for habeas corpus or prohibition.⁴¹

Although the Court, in its opaque and brief discussion of this argument, did not explicitly state that it was premising its rejection of the due process argument on its belief that no constitutional protections apply to a person in the defendant’s position, at least one Justice concluded that to be precisely what the Court was doing.⁴²

The precedential value of *Ex parte Quirin* and *In re Yamashita* is questionable to say the least.⁴³ With that said, however, they have yet to be overturned.⁴⁴ Thus, in a commissions case in which the defendant claims he

40. *Id.* at 49–54; *see id.* at 32 (Murphy, J., dissenting).

41. *See id.* at 23 (majority opinion).

42. *See id.* at 45–46, 79 (Rutledge, J., dissenting).

43. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 618 (2006) (noting, in a different context, that the precedential value of *In re Yamashita* “has been seriously undermined by post-World War II developments”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting) (remarking that *Ex parte Quirin* “was not this Court’s finest hour”); *cf. Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (explaining that the doctrine of “[s]tare decisis is not an inexorable command” and that its demand for consistency is weakest in “constitutional cases”).

44. *See, e.g., Harlan Grant Cohen, “Undead” Wartime Cases: Stare Decisis and the Lessons of History*, 84 TUL. L. REV. 957, 961 & n.20 (2010) (describing *Ex parte Quirin* and *In re Yamashita* as being “undead”—“the passage of time and reflection having sapped them of their vigor”—while noting that “the Court has generally declined to overrule these decisions outright in the ‘War on Terror’ cases, instead straining to distinguish their facts”).

was deprived of the right against self-incrimination due to law enforcement's failure to give a rights advisement prior to questioning, the Court must answer, either explicitly or implicitly, the question of whether its brevity on the due process issue in *In re Yamashita* was either a product of its conclusion that enemy belligerents tried before a military commission are altogether beyond the reach of constitutional protection or merely an attempt to sweep difficult facts and issues under the proverbial rug in order to find a sister branch's expedient conduct constitutional.⁴⁵ Until such a determination is made, it appears that the best approach is to operate under the assumption that the latter is the likely result.

To start, in *Ex parte Quirin*—a case that the *In re Yamashita* majority clearly relied upon⁴⁶—the Court premised its conclusion regarding the inapplicability of unrelated clauses in the Fifth and Sixth Amendments on reasons that were specific to those clauses,⁴⁷ which is significant for two reasons. First, it suggests that certain constitutional amendments *can* apply in the commissions context; if that were not the case, there would not have been any need for the Court to perform an individualized analysis and it could have simply stated that the Constitution does not apply to commissions. Second, it means that the Court's cursory treatment of the due process issue in *In re Yamashita* cannot be justified on the ground that *Ex parte Quirin* had already decided it, as the Court in that case was deciding the applicability of two separate provisions.

Outside of the holding in *Ex parte Quirin*, both the political environment existing at the time *In re Yamashita* was decided as well as the Court's cursory treatment of the due process issue in that case indicate that the Court in *In re Yamashita* was merely deferring to the executive branch at a time when emotions were running understandably high.⁴⁸ It is easy to

45. See, e.g., *id.* at 997 (“Judges [during wartime], paralyzed by a want of information and afraid to put Americans at risk, scrap their customary scrutiny of Executive acts and defer.”).

46. The majority opinion in *In re Yamashita* cited to *Ex parte Quirin* no less than seven times. See *In re Yamashita*, 327 U.S. at 7, 8, 9, 11, 13 n.2, 20 (majority opinion).

47. See *Ex parte Quirin*, 317 U.S. 1, 40–45 (1942).

48. See, e.g., Guy, *supra* note 35, at 153 (recounting how “[a]ll across the nation they screamed, yes even across the world press they shouted the exultant and triumphant message . . . ‘YAMASHITA DIES’ . . .” (alterations in original)). Even members of Yamashita's defense team initially struggled with the task they had been given:

The war was so recently over that it was difficult to regard any Japanese other than as an enemy and it was particularly difficult to regard the

see how a Justice—especially one like Justice Felix Frankfurter, who was well aware of the Court’s political limitations⁴⁹—would be reluctant to overturn the conviction of a Japanese war criminal whose subordinates tortured, raped, and killed thousands of Filipino civilians during a war that caused the death and injury of hundreds of thousands of Americans.⁵⁰ Furthermore, the fact that the Court devoted only three sentences of its 26-page opinion to the due process argument, despite the obvious fairness concerns,⁵¹ indicates that it was uncomfortable with what it was doing; yet, due to the prevailing political winds, the Court was unwilling to choose a different route.

Lastly, the Court, in a separate but somewhat-related context presented by a fairly recent case, has intimated its belief that “the procedures

Commanding General of the Japanese Forces in the Philippines as anything but the representative of all that was repugnant and brutal and cruel and treacherous in the Japanese system—as the prime standard bearer of that inhuman power that had looted, burned, murdered and raped Manila, the “Pearl of the Orient” and her sister cities of the Philippines.

Id. at 154. Following September 11, 2001, America’s feelings toward those suspected of committing terrorist acts were no doubt similar, both in kind and degree, to those felt toward Yamashita immediately after his capture. *See, e.g.*, TIME, May 20, 2011, cover (placing a giant red “X” over Osama Bin Laden’s face), available at <http://content.time.com/time/magazine/0,9263,7601110520,00.html>. However, as time goes on, it appears that America’s strong feelings may be waning. *E.g.*, CNN Poll: *Afghanistan War Arguably Most Unpopular in U.S. History*, CNN (Dec. 30, 2013), <http://politicalticker.blogs.cnn.com/2013/12/30/cnn-poll-afghanistan-war-most-unpopular-in-u-s-history/> (“Just 17% of those questioned say they support the 12-year-long war, down from 52% in December 2008.”). As a result, the Court may be less willing to overlook claims that the Executive Branch has acted unconstitutionally. *See, e.g.*, Cohen, *supra* note 44, at 1010 (citing ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 51 (2007)) (“Posner and Vermeule have argued that the higher judicial scrutiny in *Boumediene* [*v. Bush*] than in *Hamdi* [*v. Rumsfeld*] reflects the former’s longer distance from the original emergency—that is, September 11.”).

49. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”).

50. *See, e.g.*, Christopher J. Casillas et al., *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74, 86 (2011) (“The prevailing tides of public sentiment create an active, meaningful constraint on many of the tangible policies that emanate from the U.S. Supreme Court.”).

51. *See, e.g.*, *In re Yamashita*, 327 U.S. at 27 (Murphy, J., dissenting) (“The failure of the military commission to obey the dictates of the due process requirements of the Fifth Amendment is apparent in this case.”); Guy, *supra* note 35, at 161–62 (highlighting the differences between Yamashita’s commission and a typical criminal trial).

governing trials by military commission historically have been the same as those governing courts-martial.”⁵² And it is well established that courts-martial defendants are entitled to *Miranda*-like warnings before being interrogated.⁵³ In light of these facts, as well as those stated above, the argument that detainees are going to be tried in front of a commission, by itself, lacks legal traction as a ground for discarding *Miranda*-like warnings.

B. *The “They Are Alien Terrorists so They Have No
Constitutional Rights” Argument*

The second basis for arguing that it is not necessary to give rights advisements to the detainees is that based on their status as aliens or enemy belligerents, they are not entitled to any of the protections afforded by *Miranda*.⁵⁴ This rationale, standing alone, is destined to fail. To begin with,

52. *Hamdan v. Rumsfeld*, 548 U.S. 557, 617 (2006). “As recently as the Korean and Vietnam wars, during which use of military commissions was contemplated but never made, the principal of procedural parity was espoused as a background assumption.” *Id.* (citing Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1, 3–5 (2002)).

53. See UCMJ art. 31(b) (2005) (codified at 10 U.S.C. § 831(b) (2006)); see also, e.g., *Hicks v. Hiatt*, 64 F. Supp. 238, 245 (M.D. Pa. 1946) (“The provisions of the Fifth Amendment and Article 24 of the Articles of War guaranteed [the defendant] protection from self-incrimination [at his court-martial.]”); *United States v. Wilson*, 8 C.M.R. 48, 55 (C.M.A. 1953) (finding that incriminating statements made by an Army corporal and private should have been suppressed at their courts-martial because the *Miranda*-like warnings mandated by Article 31(b) of the UCMJ were not given); Gilbert A. Bartlett, *Partial Protection from Self-Incrimination in Military Justice*, 9 WM. & MARY L. REV. 844, 850 (1968) (recognizing that the U.S. Court of Military Appeals “handed down a series of decisions on the issue of the right to counsel during the investigative stages which have assured the accused of his right to remain silent”); see also Captain Manuel E.F. Supervielle, *Article 31(b): Who Should Be Required to Give Warnings?*, 123 MIL. L. REV. 151, 151 (1989) (noting that Article 31(b) has been in effect since May 31, 1951).

54. See, e.g., *United States v. Hamdan*, 1 M.C. Rptr. 121, 128–35 (M.C. 2008), available at <http://www.scribd.com/doc/60447251/1MC> (determining that an unlawful combatant held in Guantanamo Bay was not entitled to Fifth Amendment protection), *rev’d on other grounds*, 696 F.3d 1238 (D.C. Cir. 2012); Senator John McCain et al., *McCain, Graham, Ayotte Statement on Sulaiman Abu Ghayth* (Mar. 8, 2013), http://www.ayotte.senate.gov/?p=press_release&id=861 (“A foreign member of al Qaeda should never be treated like a common criminal and should never hear the words ‘you have a right to remain silent.’”); see also Jeffrey Addicott, *Good News About GTMO and Bagram*, JURIST (Feb. 1, 2010), <http://jurist.org/forum/2010/02/good-news-about-gtmo-and-bagram.php> (asserting that individuals who are unprivileged enemy belligerents “are not entitled to *Miranda* rights”); Kasie Hunt, *Lieberman Rips FBI on Miranda Rights*, POLITICO (Jan. 25, 2010), <http://www.politico.com/news/stories/0110/31969.html>

the language of the Clause the *Miranda* rule emanates from does not support such a conclusion. Again, the Self-Incrimination Clause provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”⁵⁵ The use of the word “person,” as opposed to “citizen”—a term that is employed in the Eleventh, Fourteenth, Fifteenth, Twenty-Fourth, and Twenty-Sixth Amendments—is significant.⁵⁶ The use of a different term suggests that the Framers intended for the Self-Incrimination Clause to be broad in scope.⁵⁷

Additionally, and possibly more importantly, caselaw supports an inclusive application of the Self-Incrimination Clause, and thus *Miranda*, as courts have repeatedly stated that the underlying protection applies in cases involving aliens who are tried in the United States⁵⁸ and even extends to

(noting Senator Joe Lieberman’s displeasure with the FBI’s decision to Mirandize Umar Farouk Abdul Mutallab, a “foreign terrorist”).

55. U.S. CONST. amend. V.

56. See U.S. CONST. amends. XI, XIV, XV, XXIV, & XXVI.

57. Cf. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) (plurality opinion) (“Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.” (citing *Russello v. United States*, 464 U.S. 16, 23 (1983))); *Bailey v. United States*, 516 U.S. 137, 145–46 (1995) (stating that, if Congress uses one term in a particular place and a different term elsewhere, it is to be assumed that each term has a “particular, nonsuperfluous meaning”); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (relying, at least in part, on the Fourteenth Amendment’s use of the word “person” rather than “citizen” in concluding that its application and protections were not limited to American citizens).

58. See, e.g., *United States v. Balsys*, 524 U.S. 666, 671 (1998) (“Resident aliens such as Balsys are considered ‘persons’ for purposes of the Fifth Amendment and are entitled to the same protections under the Clause as citizens.”); *Plyler v. Doe*, 457 U.S. 202, 212 (1982) (“In concluding that ‘all persons within the territory of the United States,’ including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government, we reasoned from the understanding that the Fourteenth Amendment was designed to afford its protection to all within the boundaries of a State.” (quoting *Wong Wing v. United States*, 163 U.S. 228, 238 (1896))); *United States v. Moya*, 74 F.3d 1117, 1119 (11th Cir. 1996) (“[A]liens at the border are entitled to *Miranda* warnings before custodial interrogation.”); *United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1979) (“Therefore, an alien who is within the territorial jurisdiction of this country, whether it be at the border or in the interior, in a proper case and at the proper time, is entitled to those protections guaranteed by the Fifth Amendment in criminal proceedings which would include the *Miranda* warning.” (citing *Wong Wing*, 163 U.S. at 235)); cf. *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 994 (9th Cir. 2012) (“It is well established that aliens legally within the United States may challenge the constitutionality of federal and state actions.”); *Bustos-Torres v. INS*, 898 F.2d 1053, 1057 (5th Cir. 1990) (“Because deportation hearings must conform to due

aliens who have committed terrorist-like acts.⁵⁹ As a result, it seems that neither a detainee's nationality nor suspected crimes, in isolation, can preclude him from falling underneath *Miranda*'s protective umbrella.

C. *The "Our Constitution Does Not Apply to Government Action Taken Abroad" Argument*

The third and last basis for denying *Miranda* protections is as follows: the Constitution's reach is generally limited to government action that transpires within the United States' boundaries—and because the detainee questioning will take place abroad, the Constitution does not capture it.⁶⁰ While this premise is well-founded,⁶¹ it is important to note that it has

process standards, however, an alien's involuntary statements cannot be used against him in a deportation hearing.”).

59. See, e.g., *In re Terrorist Bombings III*, 552 F.3d 177, 201 (2d Cir. 2008) (concluding that Fifth Amendment protections applied to “foreign nationals interrogated overseas but tried in the civilian courts of the United States” who participated in the August 7, 1998, bombings of the American Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania); *United States v. Clarke*, 611 F. Supp. 2d 12, 28–30 (D.D.C. 2009) (assuming that *Miranda* applied to statements made by an alien in Trinidad that related to a criminal conspiracy surrounding a hostage-taking resulting in the death of an American, because “the Fifth Amendment privilege against self-incrimination protects nonresident aliens facing a criminal trial in the United States even where the questioning by United States authorities takes place abroad”); *United States v. Bin Laden*, 132 F. Supp. 2d 168, 187 (S.D.N.Y. 2001) (“[A] defendant’s statements, if extracted by U.S. agents acting abroad, should be admitted as evidence at trial only if the Government demonstrates that the defendant was first advised of his rights and that he validly waived those rights.”), *aff’d sub nom. In re Terrorist Bombings III*, 552 F.3d 177.

60. Cf. Mark A. Godsey, *Miranda’s Final Frontier—The International Arena: A Critical Analysis of United States v. Bin Laden, and a Proposal for a New Miranda Exception Abroad*, 51 DUKE L.J. 1703, 1781 (2002) (arguing that “American law enforcement officials should be required to advise a suspect only of the rights that he actually enjoys in the country in which the interrogation occurs”).

61. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (“Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.”); *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) (“[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.”); *United States v. Ali*, 71 M.J. 256, 268 (C.A.A.F. 2012) (“Thus we find no precedent, and the parties have not provided any law, which mandates granting a noncitizen Fifth and Sixth Amendment rights when they have not ‘come within the territory of the United States and developed substantial connections with this country.’” (quoting *Verdugo-Urquidez*, 494 U.S. at 271)); see also *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“It is well established that certain constitutional

significant limitations. For starters, it is well-established that constitutional limitations apply to government action against American citizens that occurs abroad.⁶² Additionally, in order to circumvent constitutional limitations, the government action in question and the alleged constitutional violation must be “fully accomplished” on foreign soil.⁶³ For some actions, such as searching a home in Mexico without either a warrant or an exigency, this is not an issue because the alleged violation is clearly completed outside the United States.⁶⁴ However, with regard to interrogations where *Miranda* warnings are not given, the alleged violation does not arise at the time the interview occurs; rather, the violation occurs when the government attempts to admit its verbal fruits at trial, as the constitutional right upon which *Miranda* rests is a trial right.⁶⁵ Therefore, if a detainee is tried within the physical

protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”).

62. *See Reid v. Covert*, 354 U.S. 1, 5 (1957) (“At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights.”); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (“Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our citizens . . .”).

63. *Verdugo-Urquidez*, 494 U.S. at 264 (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974)).

64. *See, e.g., id.* at 262–63.

65. *See Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion) (citation omitted) (“[I]t is not until [compelled statements are] use[d] in a criminal case that a violation of the Self-Incrimination Clause occurs.”); *Verdugo-Urquidez*, 494 U.S. at 264 (citation omitted) (“The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial.”); *In re Terrorist Bombings III*, 552 F.3d at 199 (“[A] violation of the Fifth Amendment’s right against self-incrimination occurs only when a compelled statement is offered at trial against the defendant.”); *Charlotte E. ex rel. Deshawn E. v. Safir*, 156 F.3d 340, 346 (2d Cir. 1998) (“Even if it can be shown that a statement was obtained by coercion, there can be no Fifth Amendment violation until that statement is introduced against the defendant in a criminal proceeding.”); *Godsey, supra* note 60, at 1723–24 (“Most importantly, the privilege against self-incrimination is a trial right only; it is triggered at the time of trial in the United States, not at the time of the pretrial interrogation in a foreign country.”). While it is fairly clear what remedy is available in criminal cases for defendants who were compelled to make incriminating statements, the same cannot be said for civil cases, as there is currently a circuit split as to when a cause of action arises: some circuits hold that the cause of action arises when compelled statements are offered at trial, while others find it arises at some earlier point in time when the government uses a compelled statement to initiate or continue a criminal case. *Compare Burrell v. Virginia*, 395 F.3d 508, 513–14 (4th Cir. 2005) (only at trial), *and Renda v. King*, 347 F.3d 550, 559 (3d Cir. 2003) (same), *with Stoot v. City of*

boundaries of the United States, the U.S. Supreme Court would likely find that the challenged action and the constitutional violation occurred domestically, and as a result, the detainee would qualify for *Miranda* protection, irrespective of where he or she was initially questioned.⁶⁶

With regard to venues outside the United States, the question is more open, at least for some locations. Based on existing law, it appears there are at least three categories of potential trial sites: (1) U.S. territories;⁶⁷ (2) locations abroad where the United States lacks de jure sovereignty but nevertheless exercises total control, such as Guantanamo Bay;⁶⁸ and (3)

Everett, 582 F.3d 910, 925 (9th Cir. 2009) (earlier point in time, determined by earliest use of statements in ongoing prosecution).

66. See, e.g., *In re Terrorist Bombings III*, 552 F.3d at 201 (“[F]oreign nationals interrogated overseas but tried in the civilian courts of the United States are protected by the Fifth Amendment’s self-incrimination clause.”); *United States v. Heller*, 625 F.2d 594, 599–600 (5th Cir. 1980) (mentioning, but not relying upon, the proposition that un-Mirandized statements that are the product of an American-run investigation are subject to exclusion at a stateside trial, even when statements were made overseas); *Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir. 1980) (same); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976) (same); Godsey, *supra* note 60, at 1726 (“[W]hether the interrogation occurs within the borders of the United States or abroad becomes immaterial to the applicability of the privilege if the suspect later stands trial in the United States.”); Bybee, *supra* note 16, at 6 (“Any violation of the right [against self-incrimination] would occur at the trial conducted here in the United States when statements made by the accused were offered into evidence.”); cf. *Rasul v. Bush*, 542 U.S. 466, 486 (2004) (Kennedy, J., concurring) (interpreting the Court’s decision in *Johnson v. Eisentrager* to mean that “[p]hysical presence in the United States ‘imply[es] protection’” (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777–78 (1950))).

67. See generally *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901). Territories fall into two categories: incorporated and unincorporated. “The first group comprises those that are destined to become States; to those the Constitution of the United States applies in full. Included in the other group are those areas that are not intended for statehood; to those only fundamental parts of the Constitution apply of their own force.” Federal Foreign Affairs Authority, 1991–1999 DIGEST § B.1, at 809–10; Arnold H. Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 GEO. L.J. 219, 240–43 (1967).

68. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (“The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government.”); *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in judgment) (indicating that Guantanamo Bay is not properly considered “abroad” because it is “in every practical sense a United States territory” within the constant jurisdiction of the United States). As the Court noted in *Boumediene* and *Rasul*, the United States occupies Guantanamo Bay pursuant to a 1903 lease agreement which states, in relevant part, that “the Republic of Cuba consents during the

locations abroad where the United States has some control but lacks both de jure jurisdiction and total, exclusive control. Based on its holdings in both *Rasul v. Bush* and *Boumediene v. Bush*, it appears that the Court will view the first two categories as one and the same.⁶⁹ In *Rasul*, the Court strongly implied that Guantanamo Bay was to be considered within the territorial jurisdiction of the United States because of the contractual agreement between the United States and Cuba that gave the United States “complete jurisdiction and control” over Guantanamo Bay.⁷⁰ In *Boumediene*, the Court went one step further and formally declared that it viewed Guantanamo Bay as part of the United States’ sovereign territory⁷¹ and extended a constitutional privilege to the enemy belligerents housed there.⁷² In light of these holdings, as well as the fact that the application of a constitutionally based protection is generally tied to the location of the challenged action in relation to the jurisdictional boundaries of the United States, it is likely that the Court would find the detainees in Afghanistan eligible for *Miranda*-like warnings if they were tried in a court located in the United States, a U.S. territory, or even Guantanamo Bay.⁷³

period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.” *Rasul*, 542 U.S. at 471 (majority opinion) (quoting Lease of Lands for Coaling and Naval Stations, art. III, U.S.-Cuba, Feb. 23, 1903, T.S. No. 418).

69. See generally *Boumediene*, 553 U.S. 723; *Rasul*, 542 U.S. 466. The reason for this is the principle that the greater subsumes the lesser. If the Constitution grasps U.S. officials’ conduct that occurs in a land where a foreign country maintains sovereignty, undoubtedly it would also grasp conduct that occurs in an unincorporated territory where the United States exercises sovereignty. See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO/HRD 91-18, U.S. INSULAR AREAS, APPLICABILITY OF RELEVANT PROVISIONS OF THE U.S. CONSTITUTION 4 (1991) (“Unincorporated areas are under the sovereignty but are not considered an integral part of the United States.”).

70. See *Rasul*, 542 U.S. at 480 (indicating that Guantanamo Bay was a quasi-American territory and stating that the presumption against extraterritorial application of a statute was not applicable in that case). But see, e.g., *id.* at 500–02 (Scalia, J., dissenting) (describing the majority’s treatment of Guantanamo Bay as a “puzzlement” and rejecting its reasoning).

71. See *Boumediene*, 553 U.S. at 769 (“In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.”).

72. See *id.* at 771 (“We hold that Art. I, § 9, cl. 2, of the Constitution [the Suspension Clause] has full effect at Guantanamo Bay.”).

73. There is at least one potential counterargument: because the detainees do not have a significant voluntary connection with the United States, they are not entitled to any protection that flows from the Fifth Amendment. See Bybee, *supra* note 16, at 6 (raising, but ultimately dismissing, the argument that “the Self-Incrimination Clause does not apply to a trial of an alien whose only connections to this country consist of the

As for the third category of sites, though, it seems *Miranda* will not apply.⁷⁴ Before diving too deep into these waters, it is important to discuss the composition of the Court in the Guantanamo Bay cases, in particular, *Rasul* and *Boumediene*. In *Rasul*, six Justices (John Paul Stevens, Sandra Day O'Connor, David Souter, Ruth Bader Ginsburg, Stephen Breyer, and Anthony Kennedy) believed, based on the indefinite lease agreement

commission of a federal crime (perhaps taking place entirely abroad) and involuntary transportation to this country to stand trial"). The notion that such a requirement exists was first put forward in *United States v. Verdugo-Urquidez*. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270–75 (1990); see also *id.* at 282 n.5 (Brennan, J., dissenting) (stating that the "significant voluntary connection with the United States" test propounded by the majority was unfounded in precedent and that voluntariness "is not a sensible requirement when our Government chooses to impose our criminal laws on others"). Since its inception, the "significant voluntary connection" standard has received mixed reviews when applied to government action that occurs stateside. Compare *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006) ("There may be cases in which an alien's connection with the United States is so tenuous that he cannot reasonably expect the protection of its constitutional guarantees; the nature and duration of Martinez-Aguero's contacts with the United States, however, are sufficient to confer Fourth Amendment rights."), *United States v. Gutierrez-Casada*, 553 F. Supp. 2d 1259, 1266 (D. Kan. 2008) ("Because the record in the present case lacks any evidence that this previously deported felonious defendant was legally present in the United States at the time of the search, he cannot establish a connection substantial enough to invoke the protection of the Fourth Amendment."), *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254, 1273–74 (D. Utah 2003) (denying the defendant's motion to suppress because he lacked "a substantial sufficient connection" to the United States), *aff'd* 386 F.3d 953, 955 (10th Cir. 2004), and *Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 59–60 & n.17 (D.D.C. 1998) (finding that the plaintiffs had not developed "substantial connections" with the United States and thus were not entitled to certain Fifth Amendment protections), with *In re Terrorist Bombings III*, 552 F.3d 177, 201 (2d Cir. 2008) (rejecting the claim that the Self-Incrimination Clause should not apply to aliens here involuntarily for purposes of trial), and Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 GEO L.J. 851, 881 (2003) ("If a non-American who confessed abroad is later tried in the United States, the question in such a case is not whether the privilege applies abroad, but whether non-Americans located *within the boundaries of the United States*, for the purpose of attending their criminal trial, are protected by the privilege. Undoubtedly, they are.").

74. See *Al Maqaleh v. Hagel*, 738 F.3d 312, 337 (D.C. Cir. 2013) (finding that the Suspension Clause did not apply to detainees held in the detention facility at Bagram Air Field); *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010) (same). *But see* *United States v. Tiede*, 86 F.R.D. 227, 247, 259–60 (U.S. Court for Berlin 1979) (extending the Sixth Amendment right to a jury trial to a foreign national captured and tried in Germany).

between the United States and Cuba, that Guantanamo Bay was within the territorial reach of the United States, despite the fact that the United States lacks de jure sovereignty over it.⁷⁵ The three dissenting Justices (William Rehnquist, Antonin Scalia, and Clarence Thomas) reached the opposite conclusion by discounting the value of the lease agreement and focusing on the notion of sovereignty.⁷⁶ Since *Rasul* was decided, Justices Rehnquist, O'Connor, Stevens, and Souter have been replaced by Chief Justice John Roberts and Justices Samuel Alito, Sonia Sotomayor, and Elena Kagan. And in *Boumediene*, Chief Justice Roberts and Justice Alito joined Justice Scalia's dissent, which stated "[t]here is simply no support for the Court's assertion that constitutional rights extend to aliens held outside U.S. sovereign territory."⁷⁷ Thus, the post-*Rasul* personnel change has likely created four solid votes for the proposition that constitutionally based protections should not be extended to defendants in a less-than-total-control case. Regarding the remaining five Justices, based on Justice Ginsburg's and Justice Breyer's respective dissents in *United States v. Balsys*,⁷⁸ Justice Sotomayor's and Justice Kagan's prior decisions regarding individual liberties and government action,⁷⁹ and the fact that these four Justices routinely agree with each others' position,⁸⁰ Justices Ginsburg, Breyer,

75. See *Rasul*, 542 U.S. at 485 (majority opinion).

76. See *id.* at 489–506 (Scalia, J., dissenting).

77. *Boumediene*, 553 U.S. at 841 (Scalia, J., dissenting).

78. *United States v. Balsys*, 524 U.S. 666, 702 (1998) (Ginsburg, J., dissenting) (“As a restraint on compelling a person to bear witness against himself, the Amendment ordinarily should command the respect of United States interrogators, whether the prosecution reasonably feared by the examinee is domestic or foreign.”); *id.* at 702–03 (Breyer, J., dissenting) (“[T]he Fifth Amendment’s privilege against self-incrimination should encompass not only feared domestic prosecutions, but also feared foreign prosecutions where the danger of an actual foreign prosecution is substantial.”).

79. See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2460–75 (2012) (writing for the majority, Justice Kagan stated that the mandatory imposition of a life without parole sentence on a 14-year-old violates the Eighth Amendment’s prohibition against cruel and unusual punishment); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2398–08 (2011) (writing for the majority, Justice Sotomayor expanded the one-size-fits-all, reasonable person custody standard to include consideration of age, a personal characteristic). *But see*, e.g., Glenn Greenwald, *Justice Kagan Sides with the Right on Miranda*, SALON (Feb. 21, 2012), http://www.salon.com/2012/02/21/justice_kagan_sides_with_the_right_on_miranda/ (lamenting the fact that Justice Kagan joined the “5 right-wing justices” in *Howes v. Fields*, 132 S. Ct. 1181 (2012), a case limiting the application of *Miranda* in the context of prisons).

80. See, e.g., Kedar Bhatia, *Final October Term 2012 Stat Pack*, SCOTUSBLOG (June 26, 2013), <http://www.scotusblog.com/2013/06/final-october-term-2012-stat-pack/>

Sotomayor, and Kagan are likely to find that *Miranda* applies in an area where the United States exercises some but not total control. As for Justice Kennedy, he will likely be the swing vote.

Predictably, it is somewhat difficult to forecast what Justice Kennedy's vote will be in a less-than-total-control case. Based on his earlier opinions, though, a few points may be distilled. First, it appears that Justice Kennedy does not believe that just because the United States is prosecuting someone that constitutional protections necessarily apply.⁸¹ Second, it seems that Justice Kennedy is of the impression that *all* major events in a case—apprehension, detention, questioning, trial, and imprisonment—must occur outside of the United States in order for the defendant to be considered “abroad” for constitutional purposes.⁸² Third, Justice Kennedy does not think *Johnson v. Eisentrager* was wrongly decided.⁸³ In light of these facts, Justice Kennedy would likely apply a multifactor test that he contends emanates from *Eisentrager*.

In *Eisentrager*, following World War II, the United States tried 21 German nationals in China for committing certain violations of the laws of war.⁸⁴ Following their convictions, the German nationals filed writs of habeas corpus, claiming their continued imprisonment violated a litany of constitutional provisions.⁸⁵ Eventually, the writs made their way to the U.S. Supreme Court, which denied them on the grounds that the requests were not properly before the Court.⁸⁶ Specifically, the Court stated that because the petitioners “at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction

(indicating that Justices Ginsburg, Kagan, Breyer, and Sotomayor had an extremely high rate of agreement during the Court's 2012 term and that Justices Ginsburg and Kagan voted together in “ninety-six percent of all cases, or in seventy-two out of seventy-five cases in which they both voted”).

81. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 276–78 (1990) (Kennedy, J., concurring) (choosing not to adopt the dissent's position that the application of the Constitution is unavoidably connected to government action).

82. See *Boumediene*, 553 U.S. at 762–64 (suggesting, based on its discussion of the relevant facts and precedent, that it is a given that the extraterritorial analysis only applies when the defendant is not in the United States for any portion of the case).

83. See *id.* at 762–64, 766–70 (discussing and applying *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

84. See *Eisentrager*, 339 U.S. at 765–66.

85. See *id.* at 767.

86. See *id.* at 777–79.

of any court of the United States,” they had no “standing to demand access to our courts.”⁸⁷

If Justice Kennedy’s test remains faithful to *Eisentrager*, *Miranda* will likely be found not to apply in the detainee cases. Assuming that the detainees are kept at a location that is clearly outside of the United States’ total control, the facts of these cases should parallel those in *Eisentrager*. Justice Kennedy’s decision to eschew a strictly sovereignty-based test in *Boumediene* in favor of a practical consideration test is disconcerting because it affords him the ability to distinguish existing precedent based on any factual deviation, even one that is seemingly insignificant.⁸⁸ However, ultimately, if the government tries, convicts, and imprisons the detainees at Bagram Air Field in Afghanistan or at some other place over which the United States has less than total control,⁸⁹ because the detainees were captured in a foreign country during a time of war, were detained in a foreign country, were questioned in a foreign country, and never set foot in the United States at any point, Justice Kennedy will be hard-pressed to reach a conclusion that is both adverse to the government’s position and consistent with *Eisentrager* and his other opinions on the matter.⁹⁰ Thus, it is likely there are at least five votes for the proposition that detainees who never leave the Middle East do not qualify for *Miranda*-like warnings.

Principled reasons exist for not extending *Miranda* to detainees who never leave the Middle East. For starters, such a decision would be the one most in line with existing case law.⁹¹ *Eisentrager* stands for the proposition

87. *Id.* at 777–78.

88. *See Boumediene*, 553 U.S. at 843 (Scalia, J., dissenting) (“The ‘functional’ test [adopted by Justice Kennedy] usefully evades the precedential landmine of *Eisentrager* but is so inherently subjective that it clears a wide path for the Court to traverse in the years to come.”).

89. *Al Maqaleh v. Hagel*, 738 F.3d 312, 335 n.15 (D.C. Cir. 2013) (“On its face, the President’s choice to detain in central Asia aliens captured in that area of the world instead of transporting them across the globe hardly arouses suspicion.”).

90. *See, e.g., Al Maqaleh v. Gates*, 605 F.3d 84, 97–99 (D.C. Cir. 2010) (“It is undisputed that Bagram, indeed the entire nation of Afghanistan, remains a theater of war. Not only does this suggest that the detention at Bagram is more like the detention at Landsberg [Germany] than Guantanamo, the position of the United States is even stronger in this case than it was in *Eisentrager*.”).

91. *See, e.g., Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“[E]ven in constitutional cases, the doctrine [of stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some ‘special justification.’” (quoting *United States v. Int’l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996)) (internal quotation marks omitted)).

that trying aliens in a foreign country is not only judicially palatable, but also, by virtue of the Court denying the alien defendants one of the most fundamental rights of all, the right to civilian judicial review,⁹² aliens who are captured, detained, questioned, tried, convicted, and imprisoned in a foreign country are not entitled to any constitutional protections.⁹³ Additionally, as demonstrated above, the applicability of constitutionally based protections has historically been pegged to a defendant's nationality or location at the time that the alleged violation occurred.⁹⁴ Thus, if a person is a foreign national and was detained at a location over which the United States exercises less than total control at the time the challenged action occurred, then the Bill of Rights and the protections that spawn from it would not apply.

Claims that it is overly simplistic to base *Miranda's* applicability on the alleged violation's location ring hollow. Our American experience is replete with examples showing that in constitutional law, like in real estate, location matters.⁹⁵ For instance, federal military resources generally cannot be used to enforce laws domestically;⁹⁶ however, they have been utilized in such a

92. See, e.g., *Boumediene*, 553 U.S. at 739 (describing the writ of habeas corpus as a "vital instrument" for ensuring "freedom from unlawful restraint"); *Ex parte Yerger*, 75 U.S. 85, 95 (1868) ("The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom."). The right against self-incrimination is, at least arguably, not of the same pedigree. See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937) ("[I]mmunity from compulsory self-incrimination . . . might be lost, and justice still be done. . . . Justice . . . would not perish if the accused were subject to a duty to respond to orderly inquiry."). *But see* *Malloy v. Hogan*, 378 U.S. 1, 7–8 (1964) ("[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege [against self-incrimination] is its essential mainstay.").

93. See *Johnson v. Eisentrager*, 339 U.S. 763, 783–84 (1950).

94. See *Boumediene*, 553 U.S. at 755–64; Guzelian, *supra* note 16, at 358.

95. *Cf.* *Demore v. Kim*, 538 U.S. 510, 522 (2003) ("[S]ince *Mathews*, this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." (referring to *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976))).

96. See, e.g., 10 U.S.C. § 375 (2012) (same); Posse Comitatus Act, 18 U.S.C. § 1385 (2012) (prohibiting, in most cases, the direct use of members of the U.S. Army and Air Force to enforce the domestic law); *United States v. Walden*, 490 F.2d 372, 373–76 (4th Cir. 1974) (concluding that a domestic, undercover investigation primarily carried out by several Marines violated a U.S. Navy regulation that effectively made the Posse Comitatus Act applicable to the Navy and the Marines); *Wrynn v. United States*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961) (finding that the use of an Air Force helicopter to assist a local sheriff's office locate an escaped prisoner in New York was "forbidden"); *State*

capacity abroad,⁹⁷ where military personnel may perform arrests⁹⁸ and participate in various drug interdiction efforts.⁹⁹ Additionally, federal law enforcement officials may listen in on calls made by non-Americans who are reasonably believed to be located outside of the United States without probable cause,¹⁰⁰ which is something that they undoubtedly could not do if those foreign nationals were stateside.¹⁰¹ Location also dictates which remedies, if any, are available to those who challenge the constitutionality of actions taken by government actors.¹⁰² Thus, utilizing a location-driven

v. Pattioay, 896 P.2d 911, 918–22 (Haw. 1995) (determining that joint civilian–military investigations targeting civilian drug dealers that were not primarily driven by a military purpose violated the Posse Comitatus Act); *State v. Danko*, 548 P.2d 819, 821–22 (Kan. 1976) (holding that the participation of U.S. Army military police personnel in the search of a domestic vehicle violated the Posse Comitatus Act).

97. See CHARLES DOYLE & JENNIFER K. ELSEA, CONG. RESEARCH SERV., R42659, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 61–62 (2012) (“It seems unlikely that the Posse Comitatus Act, by itself, applies beyond the confines of the United States, its territories, and possessions.”).

98. See, e.g., *United States v. Yunis*, 924 F.2d 1086, 1093–94 (D.C. Cir. 1991) (upholding the “passive” role that the U.S. Navy played in the FBI-led apprehension of a Palestinian terrorist hijacker in the Mediterranean Sea as permissible under the Posse Comitatus Act); *D’Aquino v. United States*, 192 F.2d 338, 347–48, 351 (9th Cir. 1951) (rejecting the defendant’s claim that her arrest by military personnel and subsequent transfer from Japan to San Francisco was unlawful); *Chandler v. United States*, 171 F.2d 921, 927–28, 936 (1st Cir. 1948) (affirming the defendant’s conviction, despite the fact that he was captured by members of the U.S. Army overseas).

99. See Lowell A. Keig, Note, *A Proposal for Direct Use of the United States Military in Drug Enforcement Operations Abroad*, 23 TEX. INT’L L.J. 291, 308–11 (outlining a number of ways the U.S. military has assisted in combating drug trafficking through activities abroad).

100. See, e.g., Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a (2012); *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138, 1144 (2013) (“Unlike traditional FISA surveillance, § 1881a does not require the Government to demonstrate probable cause that the target of the electronic surveillance is a foreign power or agent of a foreign power. And, unlike traditional FISA, § 1881a does not require the Government to specify the nature and location of each of the particular facilities or places at which the electronic surveillance will occur.” (citations omitted)).

101. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (“If the search [of the alien defendant’s home] had occurred in a residence within the United States [as opposed to Mexico], I have little doubt that the full protections of the Fourth Amendment would apply.”).

102. Compare *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 623–25 (5th Cir. 2006) (holding that an alien who was in the United States at the time she was the subject to the use of excessive force could maintain a *Bivens* action against the offending officer), with

test for determining whether *Miranda* should apply would not be unprecedented but in fact would fall comfortably within past and present practices.

In addition to affording proper deference to the established case law and existing practices, which the Executive Branch has undoubtedly relied upon in developing its detention policy for suspected terrorists,¹⁰³ *Miranda* protections should not be extended in a less-than-total-control case because to do so would interfere with power that is properly reserved for the Executive Branch, and, to a lesser extent, Congress.¹⁰⁴ While it is certainly true that “concerns of national security and foreign relations do not warrant abdication of the judicial role,”¹⁰⁵ the Court should nevertheless be leery of trudging into such waters.¹⁰⁶ It is well established that courts owe a “heightened deference to the judgments of the political branches with

Harbury v. Deutch, 233 F.3d 596, 602–04 (D.C. Cir. 2000) (concluding that the plaintiff had no basis for a *Bivens* claim, even assuming that her allegation that CIA agents tortured and murdered her husband was true, because the alleged misconduct occurred in Guatemala), *rev'd on other grounds*, 536 U.S. 403 (2002).

103. See *Rasul v. Bush*, 542 U.S. 466, 488–89, 498–99 (2004) (Scalia, J., dissenting) (noting that the Executive Branch has “undoubtedly relied” upon *Eisentrager* in formulating its war-fighting strategy).

104. See, e.g., *id.* at 487 (Kennedy, J., concurring in judgment) (“The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs.”); *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976) (“[T]he conduct of foreign relations [and] the war power . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1982))); *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative.”); *Ex parte Quirin*, 317 U.S. 1, 12 (1942) (“The fact is that ordinary constitutional doctrines do not impede the Federal Government in its dealings with enemies. The President’s power over enemies who enter this country in time of war, as armed invaders intending to commit hostile acts, must be absolute.” (citations omitted)).

105. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010).

106. See, e.g., *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (recognizing the fact that “courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs” (quoting *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988)) (internal quotation marks omitted)); *Haig v. Agee*, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”).

respect to matters of national security,”¹⁰⁷ which terrorism most assuredly is. Furthermore, when situations that threaten important American interests arise—“situations which in the view of the political branches of our Government require an American response with armed force”—restrictions on such responses, especially those responses that take place on foreign land, “must be imposed by the political branches through diplomatic understanding, treaty, or legislation.”¹⁰⁸ Therefore, absent a strong justification for doing so, the Court should abstain from inserting itself into issues relating to national security and foreign relations in a time of war.¹⁰⁹

In the detainee cases, no such strong justification exists. Currently, in addition to being involved in a massive construction and aid effort in the Middle East, the United States and its allies are engaged in active hostilities.¹¹⁰ The fact that the United States is attempting to accomplish both of these feats at the same time creates an even stronger justification for abstention than there was in *Eisentrager*, which primarily involved a reconstruction effort following the suppression of enemy forces and occupation of enemy territory.¹¹¹ Additionally, aliens abroad historically have not been afforded constitutional protection. Thus, there is no pressing need for the Court to inject itself into the process because a well-established right is not being infringed upon. As a result, with regard to the interrogation

107. *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001).

108. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990).

109. *See, e.g., Ex parte Quirin*, 317 U.S. at 25 (“But the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.”); *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (“A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”).

110. *See, e.g., Al Maqaleh v. Hagel*, 738 F.3d 312 (D.C. Cir. 2013) (“‘Bagram remains in a theater of war’ against a formidable and determined foe.” (quoting *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010))).

111. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 769–70 (2008) (“In addition to supervising massive reconstruction and aid efforts the American forces stationed in Germany faced potential security threats from a defeated enemy. In retrospect the post-War occupation may seem uneventful. But at the time *Eisentrager* was decided, the Court was right to be concerned about judicial interference with the military’s efforts to contain ‘enemy elements, guerilla fighters, and “werewolves.”’” (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950))); *cf. Munaf*, 553 U.S. at 689 (indicating that cases involving “issues [that] arise in the context of ongoing military operations conducted by American Forces overseas,” the Court must proceed with greater circumspection).

of non-Afghan detainees in Afghanistan, assuming they are interrogated in the Middle East and never reach territory totally controlled by the United States, the Court needs to be more trusting of its coequal counterparts' ability to embrace and fulfill their independent duty not to abuse their power.

To conclude, the question of whether *Miranda* applies to the non-Afghan detainees in Afghanistan likely hinges upon whether the detainees set foot in the United States, a U.S. territory, Guantanamo Bay, or someplace similar at any point between when they are captured and when they complete their prison sentence. If they do not, there is a very strong likelihood that the Court will find that the detainees do not qualify for *Miranda*'s protections.

III. IF *MIRANDA* DOES APPLY, MUST LAW ENFORCEMENT GIVE A RIGHTS ADVISEMENT?

Assuming for the moment that *Miranda* applies in the detainee context, the question becomes whether *Miranda*-like warnings must be given in order for detainees' statements to be admissible. As alluded to above, two main requirements must be met before such warnings are necessary: first, the person must be in custody, and second, law enforcement must be interrogating the person.¹¹² In the detainee context, the second requirement will likely not be litigated, as the main purpose of the law-enforcement interviews will be to elicit incriminating testimonial evidence. However, because of the detainee's involuntary confinement during detention, the first requirement will likely be in play. Part III.A shows why this is the case by discussing the U.S. Supreme Court's recent decision in *Howes v. Fields* and how the case should enable law enforcement to elicit un-Mirandized statements and confessions from detainees that will be admissible in proceedings convened anywhere in the world, including the United States. Part III.B addresses the counterarguments that may be made against using *Howes* in the detainee context. Part III.C highlights some of the additional issues that may arise in cases where a detainee's incriminating statements made to law enforcement are used against the detainee. In short, Part III demonstrates that *Howes* provides a solid foundation for believing that there is no need to advise the non-Afghan detainees currently detained in Afghanistan, assuming certain facts listed below are met.

112. See, e.g., *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) ("We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.").

A. *Narrowing the Scope of Miranda*

The *Howes* Court asked whether the admission of incriminating statements made during an un-Mirandized interrogation of a confined prisoner violated *Miranda*.¹¹³ In *Howes*, a Michigan state prisoner named Randall Fields was escorted from his cell to a comfortable, “well-lit, average-sized conference room” in the other section of the facility for questioning.¹¹⁴ To get to the conference room, a corrections officer had to escort Fields down one floor and through a locked door that separated the facility’s two sections.¹¹⁵ Once he arrived in the conference room, Fields was questioned by two sheriff deputies about criminal sexual activity that he had allegedly engaged in prior to his confinement and unrelated to his original sentence.¹¹⁶ At the beginning of the five-to-seven-hour interview, and then again sometime thereafter, the deputies told Fields that he was free to return to his cell whenever he wanted.¹¹⁷ Throughout the interview, Fields was not restrained, the door to the conference room was opened periodically, and Fields was offered food and water.¹¹⁸ Fields was not given his nightly antidepressant and kidney transplant antirejection medication during the interview, though.¹¹⁹ Additionally, Fields allegedly told the deputies more than once that he did not want to speak with them anymore.¹²⁰ Furthermore, approximately halfway through the encounter, “after Fields had been confronted with the allegations of abuse, he became agitated and began to yell.”¹²¹ In response, “one of the deputies, using an expletive, told [Fields] to sit down and said that ‘if [he] didn’t want to cooperate, [he] could leave.’”¹²² Fields did not leave and eventually confessed to committing the alleged sex crime.¹²³ Twenty minutes after his confession, and “well after the hour when he generally retired,” Fields was led back to his cell.¹²⁴ At trial, Fields’s confession was used against him, and he was ultimately convicted of the

113. *See generally* *Howes v. Fields*, 132 S. Ct. 1181 (2012).

114. *See id.* at 1185–86, 1193.

115. *See id.* at 1185–86.

116. *See id.* at 1186.

117. *See id.*

118. *See id.* at 1186, 1193.

119. *See id.* at 1195 n.* (Ginsburg, J., dissenting).

120. *See id.* at 1186 (majority opinion).

121. *Id.*

122. *Id.* (second and third alterations in original).

123. *Id.*

124. *Id.*

charged sex offense.¹²⁵

On appeal, Fields argued that because the deputies never advised him of his *Miranda* rights, his confession should have been suppressed.¹²⁶ The Sixth Circuit agreed, stating that “*Miranda* warnings must be administered when law enforcement officers remove an inmate from the general prison population and interrogate him regarding criminal conduct that took place outside the jail or prison.”¹²⁷ The U.S. Supreme Court reversed.¹²⁸ The Court began by declaring the Sixth Circuit’s categorical rule simply wrong.¹²⁹ Next, it set forth a two-step test that must be applied for interrogations in the context of prisons.¹³⁰ The first step is to perform the “freedom of movement inquiry,” which includes review of the following factors: the location of the questioning, the duration of the interview, the type of statements made during the interview, the presence or absence of physical restraints during questioning, and whether the interviewee is released at the conclusion of the questioning.¹³¹ After completing this threshold inquiry, the second step is to ask “whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.”¹³² The Court emphasized that “imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*.”¹³³ The Court offered three distinct grounds for this conclusion: first, questioning a prisoner does not involve the same amount of shock that is normally associated with arresting and questioning a nonprisoner, as the prisoner is already acclimated to law enforcement-controlled environments; second, prisoners are less likely to be motivated by a desire for a quick release because they realize that they will be returned to their cell, as opposed to their home, upon the conclusion of the interview; and third, those in prison have a better understanding of what power or authority the interrogators

125. *See id.*

126. *Id.*

127. *Fields v. Howes*, 617 F.3d 813, 820 (6th Cir. 2010).

128. *See Howes*, 132 S. Ct. at 1194.

129. *See id.* at 1187–89 (“[I]t is abundantly clear that our precedents do not clearly establish the categorical rule on which the Court of Appeals relied, *i.e.*, that the questioning of a prisoner is always custodial when the prisoner is removed from the general prison population and questioned about events that occurred outside the prison.”).

130. *See id.* at 1189–91.

131. *See id.* at 1189.

132. *Id.* at 1190.

133. *Id.*

have over them.¹³⁴ Applying the facts in *Howes* to its just-announced, two-part test, the Court concluded that Fields was not technically in custody at the time of questioning, and as a result, *Miranda* warnings were not required.¹³⁵

The holding in *Howes* suggests that a rights advisement may be unnecessary in these detainee cases. To help ensure a result similar to *Howes* is reached, though, law enforcement must take the following steps. First, it needs to stay within the factual parameters set out in *Howes*: the interview should occur at a time when the detainee would be confined in his cell anyway; the interview room should be comfortable, well-lit, and spacious; the door to the room should be left open as much as possible; the detainee should be told at least once that he may return to his cell at any time;¹³⁶ the detainee should have no restraints on during the interview; the interviewers should not brandish firearms; food, water, and bathroom breaks should be offered frequently; the interview should not last longer than seven hours; and intimidating language and actions should be kept to a minimum.¹³⁷ Second, law enforcement should also avoid taking any of the following actions: interviewing the detainee at abnormal times (e.g., a time typically used for sleeping or prayer); interviewing the detainee within days of arriving in confinement;¹³⁸ or depriving the detainee of usual medication.

134. *See id.* at 1190–91.

135. *See id.* at 1192–94.

136. It should go without saying, but if a detainee does attempt to exercise this ability, law enforcement should respect it. *See Maryland v. Shatzer*, 559 U.S. 98, 113 n.8 (2010). Following such an invocation, the Author would recommend waiting at least 14 days before reengaging him. *See id.* at 114–17.

137. *See Howes*, 132 S. Ct. at 1185–86, 1193. Absent from this recommendation is any advice regarding the location of the interview. As noted above, the majority opinion in *Howes* referenced the fact that, in order for Fields to get to the interview room, he had to go down one floor and pass through a locked door that separated the two sections of the facility. *See id.* at 1185–86. It is not entirely clear what the Court was hoping to accomplish by mentioning this fact. In its discussion of the key facts upon which its holding was based, this fact is absent. *See id.* at 1193. However, inclusion of this fact in the opinion itself suggests it is of some significance. In light of this uncertainty, detainees should not be interviewed in their cell or in a common area just outside of it. With that said, the chosen location should not be so far away that it would make a reasonable person feel that they are entering into a place where they are about to be subjected to a new, more extreme layer of coercion. Furthermore, the path to the location should be well-lit and free of any suggestion that the destination they are headed to is one that should be feared or viewed with apprehension.

138. It is unknown how long Fields was incarcerated before he was interviewed. However, his incarceration must have been less than 45 days, as that was the length of

Third, the interview should be recorded.¹³⁹ Fourth, the intelligence community's relevant cultural knowledge should be utilized. Principally, law enforcement should learn what the detainee would expect during a casual encounter, based on the detainee's culture, and then implement reasonable measures that will help meet those expectations.

B. Arguments for Why Howes Should Not Apply in the Detainee Context

Because of the factual distinctions between the detainee cases and *Howes*, mirroring or exceeding the protective actions taken by law enforcement in the *Howes* case will not cure the detainee cases' susceptibility to arguments that *Howes* should not apply. The most glaring differences between the two are (1) the detainees, unlike Fields, are not currently imprisoned because of a criminal conviction; and (2) the detainees are aliens who are, at least ostensibly, less familiar with the American justice system than domestic detainees.¹⁴⁰ At first blush, both of these facts seem significant; however, a closer review of the *Howes* factors and the detainees' circumstances reveals that any differences likely will not be dispositive.

his original sentence. See Brief for Respondent at 1, *Howes v. Fields*, 132 S. Ct. 1181 (2012) (No. 10-680), 2011 WL 2688997, at *1.

139. In the detainee context, the practice of recording interviews should prove invaluable, as it will help to fend off the inevitable claims that the detainee did not understand the questioner's questions or that the questioner engaged in coercive conduct. See, e.g., *State v. Hajtic*, 724 N.W.2d 449, 454 (Iowa 2006) (describing how a recording helps to resolve a *Miranda* challenge); *State v. Jerrell* (*In re Jerrell*), 699 N.W.2d 110, 121–23 (Wis. 2005) (same); *State v. Godsey*, 60 S.W.3d 759, 772 (Tenn. 2001) (“There can be little doubt that electronically recording custodial interrogations would reduce the amount of time spent in court resolving disputes over what occurred during the interrogation.”). In addition to their benefits relating to suppression issues, recordings are also useful because they (1) provide a prosecutor with a piece of evidence whose “persuasive power [is] unrivaled by contradictory testimonial evidence,” *State v. Lockhart*, 4 A.3d 1176, 1193 (Conn. 2010) (quoting *State v. Barnett*, 789 A.2d 629, 632 (N.H. 2001)); (2) protect law enforcement officials from allegations of misconduct, see, e.g., *id.* at 1194; *Jerrell*, 699 N.W.2d at 121; *Stephen v. State*, 711 P.2d 1156, 1161 (Alaska 1985); and (3) relieve some of the pressure that law enforcement feels to take copious notes, thus enabling the questioner to be more engaged and responsive during the interrogation, see *Lockhart*, 4 A.3d at 1194–95; *Godsey*, 60 S.W.3d at 772.

140. If a detainee's case involved enhanced interrogation techniques (EITs), it obviously would be distinguishable from *Howes* on another ground. With that said, it is arguable that if a significant amount of time passed between when the EITs were utilized and the subsequent interview occurred that *Howes* could nevertheless apply. Cf. *Shatzer*, 559 U.S. at 110 (holding that the passage of time can be sufficient to “shake off any residual coercive effects of [a] prior custody”).

To begin with, the prisoner–detainee dichotomy has no bearing on the Court’s first ground for concluding that imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*. The same lack of disruption in the interviewee’s life present in *Howes* will also be present in the detainee cases. Presumably, like the prisoner in *Howes*, the detainees will have been in confinement for some time before questioning and their interrogations will not cut them off from their normal lives or abruptly transport them from civilian life into a law enforcement-dominated atmosphere.¹⁴¹ Thus, in the detainee cases, the disruption effect that courts usually worry about in the context of custodial interrogations should be just as low as it was in *Howes*.

As for the second ground cited in *Howes*—the lure of release from custody as a motivating factor compelling speech—it too seems to apply with equal force in the detainee cases. Again, the detainees likely will have been confined for a period of time before they are interviewed. Furthermore, they will know or should know they are being housed in a detainment facility that is at least partially run by Americans and contains individuals suspected of supporting or participating in terrorist acts. Thus, like the prisoner in *Howes*, the detainees will have no reason to believe that answering interrogators’ questions will set them free.¹⁴² Therefore, based on their unique circumstances, the detainees should realize the prospect of returning home after their interview is low, assuming they even entertain such a thought. Accordingly, the second ground from *Howes* should militate in favor of applying *Howes* in the detainee cases.¹⁴³

The third ground from *Howes*—“a prisoner, unlike a person who has not been convicted and sentenced, knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence”¹⁴⁴—should as well. Of all the grounds articulated in *Howes*, this is the most perplexing and it is not entirely clear what message the Court is trying to convey with it. Based on its discussion of this factor, at least three interpretations are possible. The first and most obvious is that the Court is expressing the thought that prisoners are less likely to feel compelled to speak because they believe that the official questioning them will not be able to affect them in any way, favorably or unfavorably. Support for this

141. *See Howes*, 132 S. Ct. at 1190–91.

142. *See id.* at 1191.

143. *See id.*

144. *Id.*

interpretation is found where the Court discusses the third basis and quotes extensively from *Illinois v. Perkins*,¹⁴⁵ which concluded that a confidential informant need not advise a defendant of his or her Fifth Amendment rights because there is no possibility of coercion in an exchange between the two.¹⁴⁶ Such an interpretation cannot be what the Court intended, though, because the underlying thought is unsound. Assuming prisoners act reasonably, which is what the *Howes* Court's analysis appears to suggest,¹⁴⁷ prisoners should know that the official questioning them during the subsequent interview has the same ability to affect them as the first interviewer. While it is certainly true that the later investigator will not be able to impact what sentence is given for the already adjudicated offense, as that has already occurred, the investigator may nevertheless affect the sentence that will be imposed for the offense for which the prisoner is now being interviewed about by, among other things, indicating whether the prisoner took responsibility for his misconduct.¹⁴⁸ Furthermore, it is reasonable to believe that prisoners will think that their interviewer may provide a very influential testimony before any parole boards convened in the future.¹⁴⁹ Thus, the Court cannot mean that a prisoner will feel no compulsion to speak because they do not perceive the person they are talking to as having any power over them.

145. *See id.*

146. *See Illinois v. Perkins*, 496 U.S. 290, 296–99 (1990).

147. *See Howes*, 132 S. Ct. at 1189 (“In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of ‘the objective circumstances of the interrogation,’ a ‘reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.’” (alteration in original) (citations omitted)).

148. *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2012) (granting a defendant a reduction in sentence if they demonstrate “acceptance of responsibility” by truthfully admitting to committing a crime); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(c)(1)(B) (2012) (allowing the defense to present evidence during sentencing to “furnish grounds for a recommendation of clemency”).

149. *See, e.g., Parole Hearings*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/uspc/parole-hearings> (last visited Feb. 14, 2015) (“Hearings conducted by the Parole Commission rely greatly on the testimony of victims, witnesses and law enforcement.”); Janelle Stecklein, *Utah Man Vindicated After Serving 15 Years For Child Sexual Abuse*, SALT LAKE TRIB. (May 15, 2013), <http://www.sltrib.com/sltrib/news/55960859-78/peters-on-richards-prison-served.html.csp> (implying that law enforcement's report to a parole board that the defendant was “in total denial and laying ‘guilt trips’ on [his] children for making accusations against him” impacted the board's decision not to vote to release him).

The second, more cynical interpretation is that prisoners, by virtue of being convicted and sentenced to prison, will feel no compulsion to speak because they have acquired the commonsense knowledge that when law enforcement says they are here to help, that is not really the case. Such reasoning seems to collapse under its own weight. Again, assuming that prisoners are reasonable, if they believe that speaking to law enforcement will not benefit them to some extent, they will not talk. If they do not talk, there is no question whether *Miranda* applies because there is nothing to which to apply it. If there is no *Miranda* issue, there is no need to perform a *Howes* analysis. As a result, the second interpretation cannot be the correct one.

The third and most sensible interpretation is that the Court is conveying the thought that prisoners as a group, based on personal experience, observations, and hearsay, have gained an insight into how the game is played and what powers the various actors hold that nonprisoners simply do not have. Stated another way, prisoners should be better able to perform a cost-benefit analysis in a law enforcement-controlled environment. This interpretation is not only the most logically appealing but also the most consistent with the relevant case law.¹⁵⁰ Therefore, in light of this fact, as well as the fact that the detainees, compared to their non-imprisoned brethren, should have a truer understanding of the amount of authority that their interrogators have, it seems the third ground also weighs in favor of applying *Howes* in the detainee cases.

The fact that the detainees are aliens should not stand in the way of applying *Howes*. Unlike the prisoner-detainee dichotomy, which focuses on class characteristics, alienage focuses on a personal characteristic of a particular person. Specifically, it looks at the individual in question and asks whether a person from their culture and with the experiences and knowledge that flow therefrom would believe they were in custody at the time of questioning. But such an inquiry has no place in the *Miranda* custody

150. See, e.g., *United States v. Nguyen*, 608 F.3d 368, 375 (8th Cir. 2010) (citing the defendant's previous experience with the criminal justice system as support for its conclusion that the defendant understood what he was doing when he waived his *Miranda* rights); *Smith v. Mitchell*, 567 F.3d 246, 258 (6th Cir. 2009) (same); *United States v. Lopez-Garcia*, 565 F.3d 1306, 1319 (11th Cir. 2009) (same); *Smith v. Mullin*, 379 F.3d 919, 934 (10th Cir. 2004) (same); *United States v. Johnson*, 94 F. App'x 964, 966 (3d Cir. 2004) (same); *United States v. Piazza*, 60 F. App'x 12, 14 (9th Cir. 2003) (same); *United States v. Vilar*, No. 97-1310, 1998 WL 105771, at *2 (2d Cir. Mar. 9, 1998); *Blackmon v. Blackledge*, 541 F.2d 1070, 1073 (4th Cir. 1976).

analysis. It is well-established that, for adults, the Court does not consider individual differences; rather, it holds all adults to the same, reasonable person standard.¹⁵¹ Thus, if the objective factors relating to an interview—its length and location, whether law enforcement used force, whether physical restraints were used, and whether the interviewee was told they were free to leave at any point—would establish in a reasonable person’s mind that he was free to end the encounter, then he was not in custody for purposes of *Miranda*, regardless of how the interrogated individual may have actually perceived the event and irrespective of his alienage.¹⁵²

151. See, e.g., *Howes*, 132 S. Ct. at 1189 (“In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of ‘the objective circumstances of the interrogation,’ a ‘reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.’” (alteration in original) (citations omitted)); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402 (2011) (“The test, in other words, involves no consideration of the ‘actual mindset’ of the particular suspect subjected to police questioning.” (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 667 (2004))); *Yarborough*, 541 U.S. at 668–69 (stating that the custody test does not require officers to consider “contingent psychological factors” because such an “inquiry turns too much on the suspect’s subjective state of mind and not enough on the ‘objective circumstances of the interrogation’” (quoting *Stansbury v. California*, 511 U.S. 318, 323 (1994) (per curiam))); *Stansbury*, 511 U.S. at 325 (indicating that when determining whether an adult is in custody for purposes of *Miranda*, courts are to ask “how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her ‘freedom of action’” (quoting *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984))); *Berkemer*, 468 U.S. at 423, 439–40 (ignoring the fact that the adult defendant had been drinking and smoking marijuana and applying an objective standard to determine whether he was in custody for purposes of *Miranda*); *California v. Beheler*, 463 U.S. 1121, 1124–25 (1983) (per curiam) (eschewing a test that would consider an adult’s level of intoxication and emotional state and applying one that simply asks “whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest” (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977))). *But see* *United States v. Beraun-Panez*, 812 F.2d 578, 581 (9th Cir. 1986) (applying a “reasonable person who was an alien” standard), *modified by* 830 F.2d 127 (9th Cir. 1987).

152. See, e.g., *United States v. Salyers*, 160 F.3d 1152, 1159 (7th Cir. 1998) (declining to consider the defendant’s “military experience, wherein he ‘was trained to obey orders from those in authority,’ as a factor in analyzing whether or not [he] believed he was free to leave during the ‘kitchen table’ conversations” with police); *United States v. Macklin*, 900 F.2d 948, 949–51 (6th Cir. 1990) (disregarding the fact that the defendants were “classified as mildly mentally retarded” in coming to its conclusion that law enforcement’s encounters with them were not custodial in nature); *United States v. Chalan*, 812 F.2d 1302, 1306–07 (10th Cir. 1987) (rejecting the argument that the Native American defendant was “in custody for *Miranda* purposes because, by custom, obedience to tribal authorities was expected of all tribal members”).

To be sure, the Court did recently state in *J.D.B. v. North Carolina* that one particular individual characteristic, age, may be considered.¹⁵³ However, it did so in a case involving interrogation of a minor,¹⁵⁴ and stressed that it was establishing a limited exception, not a new general rule.¹⁵⁵ As noted by the majority, children “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,”¹⁵⁶ and “are more vulnerable or susceptible to . . . outside pressures.”¹⁵⁷ In response to this issue, the law has placed a number of legal restrictions on them, such as “limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent.”¹⁵⁸ Because the exception that the *J.D.B.* Court carved out of the one-size-fits-all custody rule was limited to age alone, a number of circuit courts have declined to expand it for other individual characteristics.¹⁵⁹

153. *J.D.B.*, 131 S. Ct. at 2406.

154. *See id.* at 2399.

155. *Id.* at 2404 (stating that “a child’s age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person’s understanding of his freedom of action”).

156. *Id.* at 2403 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion)) (internal quotation marks omitted).

157. *Id.* (alteration in original) (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)) (internal quotation marks omitted).

158. *Id.* at 2403–04. Outside of the restrictions that the law places on minors, the Court has recently created a number of age-based restrictions on actions that the government may take to impose punishment on criminal defendants. *See, e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (declaring “that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibitions on ‘cruel and unusual punishments’”); *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (holding that offenders under the age of 18 cannot be sentenced to life imprisonment without parole for nonhomicide offenses); *Roper*, 543 U.S. at 578 (holding that it is unconstitutional to impose capital punishment for crimes committed before the defendant reaches the age of 18).

159. *See, e.g.*, *United States v. Perrin*, 659 F.3d 718, 719, 721 (8th Cir. 2011) (citing *J.D.B.*, 131 S. Ct. at 2402 (refusing to modify the custody test to take into account the fact that the defendant was of “sub-average intelligence”); *United States v. FNU LNU*, 653 F.3d 144, 146–47, 154–55 (2d Cir. 2011) (declining, in a post-*J.D.B.* case, to take into account that the defendant had just gotten off a flight from the Dominican Republic, was detained with a false passport, and required a translator while being questioned by a Customs and Border Patrol officer—indicators that the defendant was not American—when deciding whether the defendant was in custody for purposes of *Miranda*); *United States v. Littledale*, 652 F.3d 698, 701 n.1 (7th Cir. 2011) (expressing doubt that *J.D.B.* requires courts to consider the fact that an adult defendant has Asperger’s Syndrome when performing the custody analysis).

J.D.B. does not warrant an exception for individuals like the detainees. Generally, the law does not view adult aliens differently in terms of capacity, and as a result, does not typically afford them more protection than it affords to adult citizens.¹⁶⁰ Furthermore, as is true of a suspect's prior interrogation history with law enforcement, there is "no objectively discernible relationship"¹⁶¹ between a person's nationality and that person's understanding of his or her freedom to act.¹⁶² The fact that someone is from

160. See, e.g., *Carlisle v. United States*, 83 U.S. 147, 155 (1872) (quoting former Secretary of State Daniel Webster's assertion that "an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be *punished for treason* or other crimes as a native-born subject might be" in support of its conclusion that domiciled aliens are "amenable to the laws of the United States"); *United States v. Tomono*, 143 F.3d 1401, 1403–04 (11th Cir. 1998) (reversing the district court's departure from the then-mandatory sentencing guidelines, in a case involving a Japanese national, on the ground of his "cultural differences"); *United States v. Moncini*, 882 F.2d 401, 402–06 (9th Cir. 1989) (upholding the conviction of an Italian citizen on charges of mailing child pornography, notwithstanding his claimed ignorance of the applicable law because transporting child pornography was legal in his home country); *United States v. Natal-Rivera*, 879 F.2d 391, 393 (8th Cir. 1989) ("Historically, a difference in cultural background has been consistently rejected as an excuse for criminal activity."); *State v. Pablo-Ramirez*, 61 So. 3d 488, 492 (Fla. Dist. Ct. App. 2011) ("But apart from any question regarding the accuracy of Pablo-Ramirez's self-serving assertions regarding Guatemalan culture, any cultural misunderstandings that he may have had do not bear on the voluntariness of his confession or the criminal nature of his conduct under Florida law."); *S.D. v. M.J.R.*, 2 A.3d 412, 427 (N.J. Super. Ct. App. Div. 2010) ("We are also concerned that the judge's view of the facts of the matter may have been colored by his perception that, although defendant's sexual acts violated applicable criminal statutes, they were culturally acceptable and thus not actionable—a view that we have soundly rejected."); *In re Barronet & Allain*, (1852) 118 Eng. Rep. 337, 338 (Q.B.) (Lord Campbell C.J.) ("These two gentlemen are foreigners; but, having come to this country, they are in precisely the same position as if they were native subjects; and they must meet with the same measure of justice that would be given to native subjects, even of the highest rank."); cf. *United States v. Dire*, 680 F.3d 446, 474–75 (4th Cir. 2012) (affirming the district court's denial of Somali pirates' motion to suppress their incriminating statements and rejecting their claim that they did not knowingly and intelligently waive their rights because there was a language barrier between them and the interrogator, because they were unfamiliar with the American legal system, because the social and political conditions in their native Somalia were abysmal, and because they were illiterate and lacked education).

161. *J.D.B.*, 131 S. Ct. at 2404.

162. See *Dire*, 680 F.3d at 475 (stating that even though a defendant "may not have grasped the nature and processes of the United States judicial system," they can still understand their right to remain silent and their right to counsel as communicated through a translator (quoting *United States v. Hasan*, 747 F. Supp. 2d 642, 671 (E.D. Va.

Pakistan, Yemen, or (you fill in the blank) simply does not tell law enforcement whether such experience would lead a reasonable person to “feel free to walk away [or] to feel compelled to stay in place.”¹⁶³ Thus, for courts to consider a person’s nationality when determining whether they were in custody for *Miranda* purposes would necessarily “place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question,”¹⁶⁴ which would be an untenable result. Accordingly, *J.D.B.* should not impact the Court’s decision regarding whether to apply *Howes* in detainee cases.

In conclusion, the Court’s holding in *Howes* establishes a two-part test for un-Mirandized interrogations of confinees. Based on the similarities between *Howes* and the detainee cases, there is a strong basis for believing that the *Howes* decision applies in the detainee-case context. Furthermore, because there do not appear to be any latent equity concerns, as the detainees are currently being lawfully detained,¹⁶⁵ and there is no apparent

2010)) (internal quotation marks omitted)).

163. *J.D.B.*, 131 S. Ct. at 2404 (citing *Yarborough v. Alvarado*, 451 U.S. 652, 668 (2004)).

164. *Berkemer v. McCarty*, 468 U.S. 420, 442 n.35 (1984) (quoting *People v. P.*, 233 N.E.2d 255, 260 (1967)) (internal quotation marks omitted). The difficulty of this task is heightened in terrorism cases because assumptions that typically hold true for a domestic criminal investigation—including the assumption that suspects will attempt to conceal their criminal activity—are likely untrue for those suspected of committing acts of terrorism. See Wadie E. Said, *The Message and Means of the Modern Terrorism Prosecution*, 21 *TRANSNAT’L L. & CONTEMP. PROBS.* 175, 179–81 (2012) (distinguishing between how stateside criminals typically interact with government officials and how members of terrorist groups like al-Qaeda, who have “some interest in broadcasting its message and confronting its enemy—in this case the United States,” behave in interrogation contexts and pointing out that a number of terror suspects have spoken to law enforcement even after being Mirandized). *But see* William J. Stuntz, *Local Policing After the Terror*, 111 *YALE L.J.* 2137, 2189 (2002) (arguing that approximately a year and a half after September 11, “[t]errorists tend not be easily cowed or confused; they are therefore less likely to agree to talk to the police than are average suspects”).

165. As pointed out by the Court in *Boumediene v. Bush*, five Justices in *Hamdi v. Rumsfeld* had already

recognized that detention of individuals who fought against the United States in Afghanistan “for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.

Boumediene v. Bush, 553 U.S. 723, 733 (2008) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion)); *see Hamdi*, 542 U.S. at 521 (“The United States may

basis to believe that the DoD has kept these detainees indefinitely in hopes of breaking them down and extracting confessions,¹⁶⁶ there is no independent basis for the Court to abstain from extending its holding in *Howes* to the interrogations of the non-Afghan detainees in Afghanistan. As a result, *Howes* seems to provide a reason to believe that the Court would uphold the practice of interrogating the detainees without *Miranda* warnings, regardless of where they are tried.¹⁶⁷

C. Other Miranda-Based Issues That May Arise While Prosecuting Detainees

In some cases in which *Howes* applies, compliance with *Howes* will be a necessary, but not sufficient, condition for the admission of unwarned confessions. Specifically, in cases where the detainee has been interviewed more than once, at least two additional issues must be addressed: (1) was the detainee previously Mirandized and did the detainee previously invoke those rights?; and (2) does the interview raise a *Seibert*-like problem?

The first issue spawns from the fact that it appears the FBI has already Mirandized a “handful” of the detainees.¹⁶⁸ Assuming at least some of the detainees invoked the rights they were told they had, the question becomes whether law enforcement is free to subsequently reengage the detainees.¹⁶⁹ The U.S. Supreme Court’s recent decision in *Maryland v. Shatzer* indicates

detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who ‘engaged in an armed conflict against the United States.’”); *id.* at 592 (Thomas, J., dissenting) (“The Government’s asserted authority to detain an individual that the President has determined to be an enemy combatant, at least while hostilities continue, comports with the Due Process Clause.”).

166. See *Hamdi*, 542 U.S. at 521 (plurality opinion) (stating “that indefinite detention for the purpose of interrogation is not authorized”). If such a detention did occur, there would likely be grave constitutional issues, as the Court loathes action that it perceives to be an attempt to obtain ill-gotten gains. See, e.g., *Missouri v. Seibert*, 542 U.S. 600, 608, 611–13 (2004).

167. See *supra* notes 140–41 and accompanying text.

168. Daniela Sicuranza, *FBI’s Reading of Rights to Terrorists Riles Some Lawmakers*, FOXNEWS.COM (June 25, 2009), <http://www.foxnews.com/politics/2009/06/25/fbis-reading-rights-terrorists-riles-lawmakers/>; accord Milica Trpevska, *Policy on Miranda Warnings for Afghan Detainees Provokes Debate in House Committee*, SCRIPPS HOWARD FOUND.WIRE (June 30, 2009), <http://www.shfwire.com/policy-miranda-warnings-afghan-detainees-provokes-debate-house-committee> (reporting that a “handful” of the detainees in Afghanistan have been Mirandized).

169. See *Maryland v. Shatzer*, 559 U.S. 98, 105–06 (2010).

that interrogators should be able to do so at some point.¹⁷⁰ In that case, a police detective attempted to question Michael Shatzer, who was already imprisoned for an unrelated offense, about allegations that he had sexually abused his son.¹⁷¹ Shatzer invoked his *Miranda* rights, and the interrogation ended.¹⁷² Approximately two-and-a-half years later, while Shatzer was still incarcerated, a different detective questioned Shatzer about the same offense.¹⁷³ This time, Shatzer waived his rights and eventually made incriminating statements that were later used against him at trial.¹⁷⁴

On appeal, Shatzer argued his statements should have been suppressed because they were taken in violation of *Edwards v. California*, which purportedly provided that once a defendant invokes his right to counsel, a valid waiver of that right can occur only after counsel has been provided or after the defendant initiates further contact.¹⁷⁵ The *Shatzer* Court disagreed by noting the *Edwards* rule was a “judicially prescribed prophylaxis,” and, as such, its application must be justified.¹⁷⁶ Stated another way, the rule should be used only when its benefit, which is primarily its ability to thwart law enforcement’s efforts to badger or coerce someone who has already expressed a refusal or an incapacity to deal with them into waiving their previously asserted rights, outweighs its cost in terms of the exclusion of voluntarily given confessions.¹⁷⁷ After performing this analysis, the *Shatzer* Court concluded that the *Edwards* rule applies only to interviews that occur within 14 days of when the earlier custodial interview ended.¹⁷⁸ In light of this conclusion and the Court’s determination that a release of a prisoner back to general population constitutes a break in custody,¹⁷⁹ the Court found that Shatzer’s interrogators did not violate *Edwards*, and, as a result, Shatzer’s incriminating statements were admissible.¹⁸⁰

Based on its holding, *Shatzer* likely enables law enforcement to reinitiate contact with those detainees who were previously Mirandized and

170. *See id.* at 106–07.

171. *Id.* at 100–01.

172. *Id.* at 101.

173. *Id.* at 101–02.

174. *Id.* at 102.

175. *Edwards v. California*, 451 U.S. 477, 484–85 (1981).

176. *See Maryland v. Shatzer*, 559 U.S. 98, 107–08 (2010).

177. *See id.* at 108–09.

178. *See id.* at 110–11.

179. *See id.* at 112–14.

180. *See id.* at 117.

either requested counsel or asserted a right to remain silent, assuming such detainees exist. While there are some differences between *Shatzer* and the detainees' cases, these differences are superficial. To begin with, as noted earlier, even though the detainees have not been convicted of any offense, they are nevertheless being lawfully detained.¹⁸¹ Furthermore, there is no indication that the detainees are being held in an attempt to break them down and exact a confession.¹⁸² Therefore, the fact that the detainees have been incarcerated before being found guilty of any crime should be of no consequence.

It also matters little that the detainees in Afghanistan may have less contact with others than general population inmates in domestic prisons, for two reasons. First, there is no indication that the detainees are continuously being held in isolation or deprived of the ability to establish a meaningful daily routine.¹⁸³ Second, as Justice Stevens pointed out in his concurrence in *Shatzer*, contact with others cannot be the driver for the majority's decision because it is not guaranteed that a domestic defendant will have an opportunity to meet with others in the 14 days that follow an initial interrogation.¹⁸⁴ Thus, the fact that the Afghanistan detainees may have less interaction with others, relative to their domestic counterparts, does not weigh against extending the *Shatzer* ruling to the detainee cases.

Lastly, the fact that the detainees, unlike *Shatzer*, will not be Mirandized prior to their law-enforcement interview, assuming law enforcement officials reach the same conclusion as the Author, is a nonmover. It is true that the *Shatzer* Court repeatedly referenced the fact that *Shatzer* was Mirandized before he was reinterviewed.¹⁸⁵ But these references must be put into context; in *Shatzer*, neither party challenged the position that law enforcement owed the defendant a *Miranda* warning before the reinterview.¹⁸⁶ Thus, the Court had no occasion to pass on the question of how *Miranda* and *Edwards* apply in a case where law

181. See *supra* note 166 and accompanying text.

182. See *supra* text accompanying note 175.

183. See, e.g., *US Detention Related to the Fight Against Terrorism—The Role of the ICRC*, INT'L COMM. OF THE RED CROSS (Mar. 4, 2009), <http://www.icrc.org/eng/resources/documents/misc/united-states-detention-240209.htm> (noting that the detainees at Bagram Air Field can make a 20-minute video call every two months and that "families have been allowed to meet their detained relatives face-to-face").

184. See *Shatzer*, 559 U.S. at 126–28 (Stevens, J., concurring).

185. See *id.* at 102, 114–17 (majority opinion).

186. See *id.* at 112.

enforcement would not be required to give a defendant a rights advisement before the second interview. Furthermore, and more importantly, the *Shatzer* decision was premised not on the fact that the defendant was re-Mirandized before the second custodial interrogation, but rather on the fact that he had an opportunity to return to his normal life for at least 14 days following the first interrogation.¹⁸⁷ This is evident not only from the Court's language in *Shatzer* but also from the Court's subsequent decision in *Howes*.¹⁸⁸ As alluded to before, the defendant in *Howes* most assuredly had at least two encounters with law enforcement, and at least two occasions to be Mirandized, as he was serving out a jail sentence when the challenged interview occurred.¹⁸⁹ As a result, if the Court believed that a rights advisement must precede all law enforcement-initiated custodial interviews of a defendant who has previously been Mirandized, there would have been some discussion in *Howes* about why law enforcement did not have to give a warning in the given context; however, no such discussion is included in the *Howes* decision.¹⁹⁰ This silence speaks volumes. It indicates that the combination of time and opportunity for normalcy, not a subsequent *Miranda* warning, is the key for reinterviewing previously Mirandized persons. Therefore, as long as 14 days pass between the two interviews and law enforcement does not take actions engineered to coerce a confession during that time, *Shatzer* should enable law enforcement to reinitiate contact with the previously Mirandized detainees and question them.

The second issue stems from *Missouri v. Seibert*.¹⁹¹ In *Seibert*, law enforcement arrested the defendant at 3:00 a.m., while she was sleeping at the hospital where her son was receiving care.¹⁹² After bringing her to the local police station, law enforcement officers, pursuant to their orders, questioned her for 30 to 40 minutes without advising her of her *Miranda* rights.¹⁹³ Twenty minutes after she confessed, the same law enforcement officials started a tape recorder, Mirandized the defendant, and questioned her until she confessed again.¹⁹⁴ Notably, law enforcement performed both parts of the interrogation in the same location, never advised the defendant

187. *See id.*

188. *See Howes v. Fields*, 132 S. Ct. 1181, 1187–88 (2012).

189. *See* discussion *supra* Part III.A.

190. *See generally Howes*, 132 S. Ct. 1181.

191. *Missouri v. Seibert*, 542 U.S. 600 (2004) (plurality opinion).

192. *Id.* at 604.

193. *Id.* at 604–05.

194. *Id.* at 605.

that her prior statements would not be used against her, and used the defendant's earlier statements to prompt incriminating responses during the second interview.¹⁹⁵ On appeal, the government argued that *Oregon v. Elstad*, a case in which the defendant made an incriminating statement in response to a brief law enforcement inquiry before being Mirandized and writing out his confession,¹⁹⁶ justified law enforcement's questioning technique in the case in question.¹⁹⁷ Five Justices disagreed; however, they traversed three separate paths to reach this conclusion.¹⁹⁸ Justice Souter, writing for the plurality, set forth the following five-part test for determining whether the subsequent interview was sufficiently cleansed of the taint of the initial interrogation: (1) the "completeness and detail of the questions and answers" during the first interrogation; (2) "the overlapping content of the two statements"; (3) the "timing and setting" of the first and second interrogations; (4) "the continuity of police personnel"; and (5) "the degree to which the interrogator's questions treated the second round as continuous with the first."¹⁹⁹ Justice Breyer, on the other hand, opined that a statement made during the second stage of the two-step interrogation technique should be suppressed if the failure to initially Mirandize the defendant was not a good faith mistake.²⁰⁰ Lastly, Justice Kennedy stated that in cases where law enforcement deliberately uses a two-step interrogation technique in order to undermine the *Miranda* warning and no subsequent curative action is taken before the statement in question is made, the statement should be suppressed.²⁰¹

Since deciding *Seibert*, the Court has not formally adopted any of the aforementioned approaches, which needless to say has "sown confusion in federal and state courts."²⁰² Based on existing case law, it appears that most

195. *See id.* at 616–17.

196. *See Oregon v. Elstad*, 470 U.S. 298, 300–02, 315–16 (1985).

197. *See Seibert*, 542 U.S. at 614.

198. *See id.* Justice Souter wrote for the plurality and was joined by Justices Stevens, Ginsburg, and Breyer; Justice Breyer and Justice Kennedy each filed a concurring opinion. *See id.* at 617–18 (Breyer, J., concurring); *id.* at 618–22 (Kennedy, J., concurring in judgment).

199. *Id.* at 615 (plurality opinion).

200. *Id.* at 617–18 (Breyer, J., concurring).

201. *Id.* at 621–22 (Kennedy, J., concurring).

202. *State v. O'Neill*, 936 A.2d 438, 453 (N.J. 2007); *accord* *United States v. Pacheco-Lopez*, 531 F.3d 420, 427 n.11 (6th Cir. 2008) ("Because the Supreme Court divided 4–1–4 in *Seibert*, there has been some confusion about whether the plurality or concurring opinion controls."). It is true that in *Bobby v. Dixon* the Court did have occasion to

lower courts have adopted one of two approaches in question-first cases: the approach set forth in the plurality opinion²⁰³ or one derived from Justice Kennedy's concurrence.²⁰⁴ Of these approaches, the latter has gained the

determine if a lower court had properly granted a motion to suppress on the grounds that law enforcement had used an impermissible two-step interrogation. *See Bobby v. Dixon*, 132 S. Ct. 26, 27–29 (2011) (per curiam). In *Dixon*, law enforcement officers feared that the defendant would refuse to talk to them about a forgery if he were Mirandized and questioned. *See id.* at 28. Following the defendant's confession to committing forgery, the officers took the defendant to a local correctional facility for booking. *See id.* Approximately four hours later, the officers brought the defendant back in, Mirandized him, and questioned him about a related murder. *See id.* Eventually, the defendant confessed to the murder, and this confession was used against him at trial. *Id.* at 28–29. On habeas review, the Sixth Circuit held that the trial court erred in admitting the second confession because, among other things, it violated the ruling in *Seibert*. *See id.* at 30–31 (citing *Dixon v. Houk*, 627 F.3d 553, 557 (6th Cir. 2010)). The Supreme Court disagreed, stating that “no two-step interrogation technique of the type that concerned the Court in *Seibert* undermined the *Miranda* warnings *Dixon* received.” *Id.* at 31. While *Dixon* does exhibit the Court's unwillingness to expand its holding in *Seibert* beyond the facts presented there, it provides little other guidance on how the Court will decide *Seibert*-like cases in the future. To begin with, the *Dixon* decision is per curiam; thus, it says nothing about the views of any particular Justice. Thus, it is unclear whether Justice Kennedy has abandoned his subjective intent standard. *Compare id.* at 32, with *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring). Furthermore, the facts in *Dixon* are very different from those in *Seibert*; most notably, unlike in *Seibert*, there was “no nexus” between *Dixon*'s unwarned admission to forgery and his later, warned confession to murder,” *Dixon*, 132 S. Ct. at 31 (quoting *State v. Dixon*, 805 N.E.2d 1042, 1050 (Ohio 2004)), and there was a significant break in time between the two interrogations. *See id.* at 32. Accordingly, *Dixon* does little to dissolve the confusion that *Seibert* has created.

203. *See, e.g.*, *Crawford v. State*, 100 P.3d 440, 450 (Alaska Ct. App. 2004); *State v. Farris*, 849 N.E.2d 985, 994 (Ohio 2006); *Martinez v. State*, 204 S.W.3d 914, 918–19 (Tex. Ct. App. 2006).

204. *See, e.g.*, *United States v. Williams*, 681 F.3d 35, 43–45 (2d Cir. 2012); *United States v. Shaird*, 463 F. App'x 121, 124–25 (3d Cir. 2012); *United States v. Thomas*, 664 F.3d 217, 223 (8th Cir. 2011); *United States v. Street*, 472 F.3d 1298, 1313–14 (11th Cir. 2006); *United States v. Courtney*, 463 F.3d 333, 338–39 (5th Cir. 2006); *United States v. Williams*, 435 F.3d 1148, 1157–58 (9th Cir. 2006); *United States v. Mashburn*, 406 F.3d 303, 308–09 (4th Cir. 2005). A handful of federal circuits have explicitly declined the invitation to adopt one particular approach. *See, e.g.*, *United States v. Widi*, 684 F.3d 216, 221 (1st Cir. 2012) (“This court has not settled on a definitive reading but the statements here at issue pass either version of the *Seibert* test.”); *United States v. Johnson*, 680 F.3d 966, 978–79 (7th Cir. 2012) (“We have yet to determine which test governs in this circuit.”); *United States v. Crisp*, 371 F. App'x 925, 929 (10th Cir. 2010) (“We need not determine which of these three tests controls here, because we conclude that under any of the tests the district court did not commit clear or obvious error”); *Pacheco-Lopez*, 531 F.3d at 427 n.11 (“We do not need to resolve this issue because regardless of the applicable framework *Lopez*'s statement must be suppressed.”). *But see* *United*

most traction, as the majority of courts that have decided the issue believe that Justice Kennedy's opinion represents the narrowest grounds of agreement.²⁰⁵ But some have questioned the soundness of this proposition, contending that the narrowest-opinion rule has no applicability in the *Seibert* context because Justice Kennedy's subjective intent test was rejected by both the plurality and the dissent.²⁰⁶ While this argument raises an interesting point, it appears to be purely theoretical, as any pro-*Miranda* decision will necessarily require Justice Kennedy's vote.²⁰⁷ As a result, Justice Kennedy's opinion in *Seibert* should be treated as controlling.

On first approach, the tie between *Seibert* and the detainee cases may not be obvious; the former dealt with the specific question of whether, in a case where a *Miranda* warning is required, the government can use statements made during a two-step interrogation technique in which law enforcement initially withholds the warning in hopes of undermining its

States v. Rogers, 659 F.3d 74, 79–80 (1st Cir. 2011) (stating that Justice Kennedy's opinion is "controlling"); United States v. Stewart, 388 F.3d 1079, 1091 (7th Cir. 2004) ("If the sequential interrogation process was used in deliberate circumvention of *Miranda* and there is insufficient separation in time and circumstances between the unwarned and warned confessions, then the warned confession was improperly admitted and Stewart's conviction cannot stand.").

205. See Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion))).

206. See, e.g., United States v. Heron, 564 F.3d 879, 884 (7th Cir. 2009) ("Although Justice Kennedy provided the crucial fifth vote for the majority, we find it a strain at best to view his concurrence taken as a whole as the narrowest ground on which a majority of the Court could agree."); United States v. Carrizales-Toledo, 454 F.3d 1142, 1151 (10th Cir. 2006) ("[A]rguably Justice Kennedy's proposed holding in his concurrence was rejected by a majority of the Court."); United States v. Rodriguez-Preciado, 399 F.3d 1118, 1138–41 (9th Cir. 2005) (Berzon, J., dissenting in part); Lee Ross Crain, Note, *The Legality of Deliberate Miranda Violations: How Two-Step National Security Interrogations Undermine Miranda and Destabilize Fifth Amendment Protections*, 112 MICH L. REV. 453, 479–82 (2013) (positing that the narrowest-opinion rule may not apply to *Seibert* and thus "*Seibert* has no precedential holding and lower courts can apply their own analyses to two-step interrogations").

207. The reason for this is, based on their votes in four recent *Miranda* cases, it appears that Chief Justice Roberts and Justices Scalia, Thomas, and Alito would be staunchly opposed to applying *Miranda* in a context that does not already clearly demand it. See generally *Howes v. Fields*, 132 S. Ct. 1181 (2012); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2408 (2011) (Alito, J., dissenting); *Berghuis v. Thompkins*, 560 U.S. 370 (2010); *Maryland v. Shatzer*, 559 U.S. 98 (2010).

effect during its encounter with the defendant. Taking a step back, though, reveals that what the Court was really dealing with in *Seibert* was a spillover issue; the conclusion it reached on the matter was that, at trial, the government must be able to clearly separate those interviews that are permissible from those that are not.²⁰⁸ Failure to do so will most likely result in suppression of the challenged statements. This broader principle is what makes *Seibert* relevant in the detainee cases and demands that it be considered.

However, based on the available information, *Seibert* should not pose a problem in the detainee cases. To begin with, the detainees may not be entitled to *Miranda* warnings at all, which would necessarily alleviate any *Seibert* issue.²⁰⁹ Again, *Howes* should cover later interviews because of the detainees' detention status, and as a result, no *Miranda* warnings will be needed for them as long as they are conducted correctly.²¹⁰ As for earlier interviews, assuming they were conducted for an intelligence-gathering purpose,²¹¹ there is an argument that under the public safety exception espoused in *New York v. Quarles*, the detainees were not entitled to *Miranda* warnings then either.²¹² This aggressive position seems susceptible to attack

208. *Missouri v. Seibert*, 542 U.S. 600, 614 (2004) (plurality opinion).

209. *See supra* Part II.

210. *See supra* Part III.A–B.

211. *See* Peter Finn, *Somali's Case a Template for U.S. as It Seeks to Prosecute Terrorism Suspects in Federal Court*, WASH. POST (Mar. 30, 2013), http://www.washingtonpost.com/world/national-security/Somalis-case-a-template-for-us-as-it-seeks-to-prosecute-terrorism-suspects-in-federal-court/2013/03/30/53b38fd0-988a-11e2-814b-063623d80a60_story.html (highlighting the fact that the questioning of suspected terrorists generally takes place in two parts: the first, which is un-Mirandized, relates to intelligence gathering; the second, which may be Mirandized, relates to a criminal prosecution); Benjamin Weiser, *Man Offers Guilty Plea, Upending Terror Case*, N.Y. TIMES (June 13, 2012), <http://www.nytimes.com/2012/06/14/nyregion/man-who-trained-with-somalis-offers-guilty-plea-ending-pivotal-case.html> (indicating that the Obama Administration's policy is to question captured terrorists for intelligence purposes without providing *Miranda* warnings first and then send in a second team to perform a law enforcement interview after a rights advisement is given); *see also* *Officials Describe Arrest of Christmas Day Bomber for First Time*, FOXNEWS.COM (Jan. 24, 2010), <http://www.foxnews.com/us/2010/01/24/officials-arrest-christmas-day-bomber-time/>.

212. *See* *New York v. Quarles*, 467 U.S. 649, 657 (1984); *see also* M. Katherine B. Darmer, *Miranda Warnings, Torture, the Right to Counsel and the War on Terror*, 10 CHAP. L. REV. 631, 632 (2007) (“[T]he ‘public safety’ doctrine should be expanded in the terrorism context, as terrorism cases present a much more compelling need for addressing public safety than does the discovery of a gun in a supermarket.” (footnote omitted)).

on numerous fronts, however. First, based on the language in *Quarles*, it appears that the public safety exception applies only when there is an immediate threat.²¹³ Thus, interrogators questioning a detainee who is far removed from the battlefield—or even the streets for that matter—could be problematic.²¹⁴ Second, even if an immediate threat exists, it seems that the questioning must specifically relate to it.²¹⁵ Therefore, officials likely will not be able to claim the public safety exception for statements stemming from questions relating to the detainees' membership in a terrorist organization or prior misconduct.²¹⁶

Irrespective of whether the public safety exception applies, though, *Seibert* should not be an issue if law enforcement takes the curative actions that follow. First, interrogators should punctuate the interviews, at a

213. See *Quarles*, 467 U.S. at 653 (indicating that it was recognizing an “exigency exception”); *id.* at 658 (“The exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it.”); *id.* at 659 n.8 (distinguishing *Quarles* from another case on the grounds that, in the other case, “there was no exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime”). As noted by one commentator, though, it appears that the circuits have split on how broadly to define the exception. See Rorie A. Norton, Note, *Matters of Public Safety and the Current Quarrel Over the Scope of the Quarles Exception to Miranda*, 78 *FORDHAM L. REV.* 1931, 1948 (2010) (concluding that the First, Eighth, and Ninth Circuits have interpreted the *Quarles* exception broadly while the Second, Fourth, Fifth, Sixth, and Tenth Circuits have interpreted it narrowly).

214. *But see* *United States v. Abdulmutallab*, No. 10-20005, 2011 WL 4345243, at *5–6 (E.D. Mich. Sept. 16, 2011) (suggesting that the public safety doctrine would cover any interrogation of an al-Qaeda member, even when there is no identifiable imminent threat, because “the agents logically feared that there could be additional, imminent aircraft attacks in the United States and elsewhere in the world”).

215. See, e.g., FBI Memorandum, *supra* note 11 (“After all applicable public safety questions have been exhausted, agents should advise the arrestee of his Miranda rights and seek a waiver of those rights before any further interrogation occurs . . .”).

216. While the government may not be able to claim the public safety exception to admit incriminating statements where there was no immediate threat or where the questioning went outside of the scope of the threat, it may nevertheless cite the exception as a basis for arguing that law enforcement’s actions were not driven by an ill motivation and, thus, no curative measures were needed. See, e.g., *United States v. Williams*, 681 F.3d 35, 43–44 (2d Cir. 2012); *United States v. Moore*, 670 F.3d 222, 231 n.5 (2d Cir. 2012); *cf.* *United States v. Carter*, 489 F.3d 528, 535–36 (2d Cir. 2007) (finding that there can only be a *Seibert* issue if “a deliberate, two-step strategy was used by law enforcement to obtain the postwarning confession”); *United States v. Briones*, 390 F.3d 610, 613–14 (8th Cir. 2004) (denying a *Seibert*-based appeal because “[n]othing in the record suggests that [law enforcement] used a deliberate strategy of staged interrogations to circumvent Briones’ Fifth Amendment rights”).

minimum, by more than 14 days.²¹⁷ During that pause, the detainees should be afforded the opportunity to get back into a daily rhythm. In cases in which the detainee has been interviewed a number of times, more time should be given between the interviews, so as to solidify in the detainee's mind that the later interview is not a mere continuation of the earlier interviews.²¹⁸ Second, the location of the interviews should change periodically, and the interviewers should rotate as well.²¹⁹ Third, no content from the first interview should be specifically referenced during the second interview. Fourth, assuming there are strong constitutional concerns with any earlier interviews, it should be clearly conveyed during the later interview that anything earlier said to interrogators will not be used against the detainee at trial.²²⁰

IV. REGARDLESS OF WHETHER *MIRANDA* APPLIES, ARE THERE OTHER REQUIREMENTS THAT MUST BE MET BEFORE A CONFESSION IS ADMITTED?

Even if *Miranda* does not apply, other requirements must be met before the detainees' statements and confessions can be admitted. For instance, if the detainees are tried stateside, the right against self-incrimination would likely preclude the admission of any incriminating statements obtained by force.²²¹ Additionally, if the detainees are brought

217. See *Missouri v. Seibert*, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring) (listing "a substantial break in time and circumstances" as a possible curative measure); see also *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010).

218. See, e.g., *United States v. Courtney*, 463 F.3d 333, 339 (5th Cir. 2006) ("A reasonable person would have concluded that the third interview, given more than one year later and in an entirely different setting, was not a continuation of the earlier interrogation but a 'new and distinct experience' that would allow the *Miranda* warnings to function effectively and present a real choice 'whether to follow up on the earlier admission.'" (quoting *Seibert*, 542 U.S. at 615–16 (plurality opinion))).

219. It appears that, at least in some cases, separate teams of investigators are already being used to interview suspected terrorists. See, e.g., Benjamin Weiser, *Hearing on Terror Suspect Explores Miranda Warning*, N.Y. TIMES (Dec. 12, 2011), http://www.nytimes.com/2011/12/13/nyregion/us-terror-hearing-explores-use-of-miranda-warning.html?_r=0 (discussing the use of clean and dirty interrogating teams in the case against Mohamed Ibrahim Ahmed).

220. See *Seibert*, 542 U.S. at 618 (Breyer, J., concurring) (indicating that if all of the recommendations in this paragraph are implemented, there would be no *Miranda* issue because the *Miranda* warnings' effectiveness would be restored).

221. See, e.g., Godsey, *supra* note 73, at 856, 876, 896, 911 (contending that the Fifth Amendment would prevent law enforcement from admitting statements in a United

before a military commission, irrespective of where it is convened, Rule 304 of the Military Commission Rules of Evidence (MCRE) would require the nonbattlefield statement be free of torture or other cruel, inhuman, or degrading treatment; be reliable; and be voluntarily made.²²² Because it is fairly obvious what the first requirement entails, this Article will briefly focus on the last two.

The reliability requirement spawns, at least in part, from the fear that “‘weakness of the accused under the strain of suspicion’ may cause the accused to give a false, even if voluntary, confession.”²²³ Since 1954, to combat this perceived danger, American courts have applied what is commonly referred to as the corroboration rule, which, in essence, prevents defendants from being convicted of a crime based solely on their own words.²²⁴ In light of this established tradition, courts will likely apply the rule when assessing reliability in detainee cases. Under the corroboration rule, “the quantity and type of independent evidence necessary to corroborate a confession depends upon the facts of each case.”²²⁵ Although this is a case-by-case analysis, there is guidance about how the issue will be decided. First, the corroboration rule does not mandate that every part of the confession be supported by independent evidence.²²⁶ Stated another way, the independent evidence “merely [has to] fortif[y] the truth of the confession” and does not bear the burden of “independently establishing the crime charged.”²²⁷

States court that were obtained through brute force or torture).

222. See MILITARY COMM’N R. EVID. 304(a)(2)(B)(i) (providing that statements “made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement,” are admissible, regardless of whether they are voluntary, if “the interests of justice would best be served by admission of the statement into evidence”). However, in the detainee-case context, this provision likely will have little impact, as the statements will be the product of jailhouse interrogations, not battleground questioning.

223. *United States v. Brown*, 617 F.3d 857, 860 (6th Cir. 2010) (alteration in original) (quoting *Opper v. United States*, 348 U.S. 84, 90 (1954)).

224. See *id.*; accord *United States v. Kirk*, 528 F.3d 1102, 1111 (8th Cir. 2008) (“The rule that an uncorroborated confession cannot, on its own, support a criminal conviction has its roots in a healthy skepticism of the accuracy of confessions.”).

225. *Kirk*, 528 F.3d at 1112.

226. See, e.g., *United States v. Ramirez*, 635 F.3d 249, 256 (6th Cir. 2011); *United States v. Facey*, 386 F. App’x 910, 914 (11th Cir. 2010).

227. *Wong Sun v. United States*, 371 U.S. 471, 489 (1963); accord *Brown*, 617 F.3d at 860 (“Unlike the *corpus delicti* rule, the government need not introduce evidence independent of the accused’s confession to establish that the *crime* occurred. The government instead generally may satisfy the rule if it introduces ‘substantial

Second, the independent “evidence need not be criminal in and of itself” to provide corroboration.²²⁸ Third, the more elaborate and detailed a confession is, the less independent corroboration is needed.²²⁹ Thus, the more details officials are able to pull out of the detainees regarding their misconduct, the better.

The voluntariness requirement is concerned with ensuring that a person’s decision to confess to a crime is an exercise of free will, as opposed to being the product of unfair coercion.²³⁰ MCRE 304(a)(4) states that voluntariness depends on the totality of the circumstances, including:

- (A) the details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities;
- (B) the characteristics of the accused, such as military training, age, and education level; and
- (C) the lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.²³¹

Caselaw also provides guidance on the issue.²³² First, the visible presence of a holstered firearm does not, in itself, create a situation so

independent evidence which would tend to establish the trustworthiness of the *statement*’” (citations omitted) (quoting *Opper*, 348 U.S. at 93)); *United States v. Paracha*, 313 F. App’x 347, 350 (2d Cir. 2008) (“[T]he ‘modern corroboration rule requires only that there be substantial independent evidence which would tend to establish the trustworthiness of the statement.’” (quoting *United States v. Bryce*, 208 F.3d 346, 354 (2d Cir. 2000))).

228. *Kirk*, 528 F.3d at 1112 n.10 (quoting *United States v. Todd*, 657 F.2d 212, 216 (8th Cir. 1981)).

229. See *id.* at 1112.

230. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26 (1973) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

231. MILITARY COMM’N R. EVID. 304(a)(4)(A)–(C).

232. While case law may provide guidance on the matter, it is important to note that, with regard to detainees interviewed abroad, the requirement that a confession be voluntary is statutorily based—not constitutionally required. As discussed above, the application of the Constitution is usually contingent upon where the challenged government action occurred in relation to the borders of the United States. See *supra* Part II.C. If a statement is given abroad, which would almost assuredly be the case with an interrogation that procured an involuntary confession, then the Constitution is arguably of no help to the alien. See *Godsey*, *supra* note 60, at 867–73.

coercive that any statement that the detainee makes will be found to be involuntary.²³³ Second, law enforcement should refrain from making promises of leniency that they do not intend to keep.²³⁴ Third, law enforcement should refrain from lying to such a degree that it would appear to the detainee that there is no option but to confess.²³⁵ Fourth, law enforcement does not need to inform the detainees of all of the relevant facts they know in order for the detainee's statement to be voluntary.²³⁶ Fifth, there must be no threats of violence.²³⁷ Sixth, the conditions leading up to the confession cannot be so bad that they are tantamount to psychological torture.²³⁸

Independent of the evidentiary rules and existing case law on reliability and voluntariness, law enforcement officials should also take into account the factors listed earlier in the *Howes* discussion.²³⁹ Consideration of these factors should help to create the type of environment that will be the most conducive to obtaining admissible confessions.

233. See, e.g., *United States v. Drayton*, 536 U.S. 194, 205 (2002) (“The presence of a holstered firearm [carried by a uniformed officer] . . . is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon.”).

234. See, e.g., *United States v. Siler*, 526 F. App'x. 573, 575 (6th Cir. 2013).

235. See, e.g., *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (finding the fact that police had falsely told a suspect that his accomplice had already confessed was relevant to the voluntariness inquiry); *Escobedo v. Illinois*, 378 U.S. 478, 481 (1964) (excluding a confession where police incorrectly told the suspect, who had asked to see his lawyer, that his lawyer had refused to see him).

236. See *Moran v. Burbine*, 475 U.S. 412, 422 (1986) (“Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.”).

237. See, e.g., *Hutto v. Ross*, 429 U.S. 28, 30 (1976); *Sims v. Georgia*, 389 U.S. 404, 407 (1967).

238. See, e.g., *Brooks v. Florida*, 389 U.S. 413, 414–15 (1967) (finding that a confession was involuntary where the defendant was held in brutally restrictive confinement for 14 days, “saw not one friendly face from outside the prison,” and “was completely under the control and domination of his jailers”); *Stidham v. Swenson*, 506 F.2d 478, 481 (8th Cir. 1974) (discussing the fact that the defendant had been housed in solitary confinement for 18 months in “subhuman conditions,” denied contact with his family and counsel, questioned persistently by armed guards for four days—during which time he was deprived of food and water—as support for its conclusion that the defendant's confession was not voluntary).

239. See discussion *supra* Part III.A.

V. CONCLUSION

Whether the non-Afghan detainees in Afghanistan are eligible for *Miranda* protection is a question that the U.S. Supreme Court has yet to answer. It appears, though, that if the detainees are tried stateside or in another location over which the United States exercises total control, the Court will conclude they are entitled to *Miranda* protection. With that said, somewhat ironically, due to the rather unique situation that the detainees are currently in—prolonged detainment—the Court’s recent decision in *Howes* likely provides law enforcement officials with an avenue to respect detainees’ constitutional rights, to accomplish legitimate law enforcement goals,²⁴⁰ and to abide by the political branches’ apparent desire not to provide enemy aliens *Miranda*-like warnings.²⁴¹

240. *See, e.g.*, *Maryland v. Shatzer*, 559 U.S. 98, 108 (2010) (“Voluntary confessions are not merely ‘a proper element in law enforcement,’ they are an ‘unmitigated good,’ ‘essential to society’s compelling interest in finding, convicting, and punishing those who violate the law.’” (citations omitted) (internal quotation marks omitted)).

241. Time is of the essence, though. Not only is it possible that the Court will view the war on terror as complete once the drawdown in Afghanistan has concluded, thus presumably dissolving the basis for detaining the detainees without charges, but as noted above, it also appears that the Court may be more inclined to apply a higher level of scrutiny to Executive Branch action the further out we get from September 11. *See, e.g.*, Cohen, *supra* note 44, at 1010 (citing POSNER & VERMEULE, *supra* note 48, at 51).