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Strange Bedfellows: How Expanding the Public Safety Exception to Miranda Benefits Counterterrorism Suspects

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STRANGE BEDFELLOWS: HOW EXPANDING THE PUBLIC SAFETY EXCEPTION TO *MIRANDA* BENEFITS COUNTERTERRORISM SUSPECTS

Geoffrey Corn & Chris Jenks***

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The last thing we may want to do is read Boston [Marathon bombing] suspect Miranda Rights telling him to ‘remain silent.’... If captured, I hope [the] Administration will at least consider holding the Boston suspect as enemy combatant for intelligence gathering purposes.¹

[The Boston Marathon Bombing] is Exhibit A of why the homeland is the battlefield.²

INTRODUCTION

The Boston Marathon bombing, along with the prior “shoe”³ “underwear”⁴ and “Times Square”⁵ bombers, has prompted debate⁶

1. Lindsey Graham, *@GrahamBlog*, TWITTER, <http://www.twitter.com/GrahamBlog> (Apr. 19, 2013 at 4:40 PM and 4:33 PM), cited in Aaron Blake, *Lindsay Graham: Boston Bomber Could Be Held as Enemy Combatant*, WASH. POST POLITICS BLOG (Apr. 19, 2013, 5:49 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/04/19/lindsey-graham-boston-bomber-could-be-held-as-enemy-combatant>.

2. Jennifer Rubin, *Sen. Lindsey Graham: Boston Bombing “Is Exhibit A of Why the Homeland Is the Battlefield”*, WASH. POST RIGHT TURN BLOG (Apr. 19, 2013, 4:44 PM), <http://www.washingtonpost.com/blogs/right-turn/wp/2013/04/19/sen-lindsey-graham-boston-bombing-is-exhibit-a-of-why-the-homeland-is-the-battlefield/> (quoting Telephone Interview by Jennifer Rubin with Lindsey Graham, Sen., S.C. (Apr. 19, 2013)).

3. *United States v. Reid*, 211 F. Supp. 2d 366, 366 (D. Mass. 2002).

4. *United States v. Abdulmutallab*, No. 10-20005, 2011 WL 4345243, at *1 (E.D. Mich. Sept. 16, 2011) (denying the motion of the accused to suppress statements he made to law enforcement officials while at the University of Michigan hospital, and finding that the questioning of the accused by law enforcement before the recitation of *Miranda* rights fell within the public safety exception).

5. See Complaint, *United States v. Shahzad*, No. 10CR00928, 2010 WL 1759461 (S.D.N.Y. 2010).

6. See David Ashenfelter & Tresa Baldas, *Judge’s Ruling on Miranda Rights in Underwear Bomber Terrorism Case Touches Off Legal Debate*, DETROIT FREE PRESS (Sept. 16, 2011), <http://www.freep.com/article/20110916/NEWS06/109160374/Judge-s-ruling-Miranda-rights-underwear-bomber-terrorism-case-touches-off-legal-debate>; Richard Brust, *Probing Questions: Experts Debate the Need to Create Exceptions to Rules on Coerced Confessions*, A.B.A. J. (June 1, 2012), http://www.abajournal.com/magazine/article/probing_questions_experts_debate_the_need_to_create_exceptions; Bernard Gwertzman, *Shahzad Arrest Ignites Liberties Debate*, COUNCIL ON FOREIGN REL. (May 7, 2010), <http://www.cfr.org/terrorism-and-the-law/shahzad-arrest-ignites-liberties-debate/p22073>; Charlie Savage, *Debate Over Delaying Miranda Warning*, N.Y. TIMES (Apr. 20, 2013), http://www.nytimes.com/2013/04/21/us/a-debate-over-delaying-suspects-miranda-rights.html?_r=0.

on the applicability of traditional criminal procedure principles to counterterrorism investigations and prosecutions. Much of the discussion focuses on the efficacy and even appropriateness of applying the public safety exception to the *Miranda* rights warning requirement. What is missing is underscored by Senator Graham's comments—the possibility of indefinite detention and trial by military commission fundamentally alters the implicit balance within the public safety exception.

In *New York v. Quarles*, the Supreme Court created what has come to be known as the Public Safety Exception (PSE) to the *Miranda* warning and waiver requirement: when a police questions a suspect in custody in response to an imminent threat of danger to the officer or the public, the confession will be admissible even if the officer failed to provide *Miranda* warnings and obtained a waiver.⁷ In her opinion in *Quarles*, concurring in part and dissenting in part, Justice O'Connor reminds us that *Miranda* does not prohibit public safety questioning; *Miranda* simply restricts using the statement as evidence.⁸ In essence, *Miranda* requires the government to make a choice—question a suspect without first advising them of the *Miranda* rights and obtaining a waiver of those rights in order to protect the public, or advise the subject and seek a waiver to protect a future prosecution. This Article challenges whether that choice remains valid.

Implicit in that formulation is that failing to advise a suspect questioned in a custodial setting of their *Miranda* rights may result in the government foregoing the opportunity to incapacitate the individual.⁹ This Article posits that the alternative “remedies” of indefinite detention and trial by military commission fundamentally alter the equation Justice O'Connor laid out in *Quarles*. This alternative option for incapacitating a suspected terrorist operative may, in certain situations (potentially even involving a U.S. citizen), eliminate the binary “warn and risk imminent danger, or don't warn and risk the ability to prosecute” choice equation that was central to the *Quarles* decision.

7. 467 U.S. 649, 655–56 (1984).

8. *Id.* at 664 (“*Miranda* has never been read to prohibit the police from asking questions to secure the public safety When police ask custodial questions without administering the required warnings, *Miranda* quite clearly requires that the answers received be presumed compelled and that they be excluded from evidence at trial.”).

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

Instead, the burden of risk associated with counter-terrorism questioning has substantially shifted to the terrorism suspect. Unlike the response options available to government law enforcement and prosecution agents prior to September 11, 2001, the government does not necessarily risk the ability to successfully prosecute (due to inadmissibility of the confession)—and thereby incapacitate—the terrorist suspect if a violation of *Miranda* results in inadmissibility of the suspect's confession. Rather, the government may now both question in violation of the *Miranda* warning and waiver requirement and then incapacitate the suspect through indefinite detention and/or alternatively prosecute via a legislatively created military commission employing perpetually evolving, and less rigorous procedures, than an Article III court.¹⁰

This Article argues that expanding the scope of the PSE to allow for more extensive interrogation of terrorism suspects will inure to the suspects' benefit. It will arguably incentivize the normal law enforcement disposition for suspected terrorist suspects, and thereby mitigate the likelihood that such suspects will be subjected to military administrative detention. This in turn will enhance the probability of finding resolution in an Article III court, rather than of subjecting the suspects to indefinite detention or trial by a military commission.

Part I juxtaposes the well-established *Miranda* holding against the dilemma of interrogating terrorism suspects. Part II then discusses *Quarles* and explains how public safety does not always equate to protecting the public. Part III explores indefinite detention and military commission alternatives to traditional prosecution in an Article III court. Part IV then explains how those alternatives undermine the *Quarles* equation. Part V reconciles expanding the *Quarles* PSE with *Miranda*, focusing on the risk of police calculation and then by analogizing. Part V then draws support for an expanded PSE by analogizing it with the special needs exceptions to the warrant and probable cause requirement of the Fourth Amendment, illustrating how an objective critique of the primary purpose of police questioning can effectively regulate the applicability of an expanded PSE. Part VI then outlines the contours of the proposed expansion of the PSE. Part VII concludes by detailing how such an expansion would incentivize the Article III court prosecution option and constitute a net gain for terror suspects.

By focusing on actual voluntariness, an expanded PSE would be consistent with the trend in the Supreme Court's *Miranda*

10. See *infra* Part III.

jurisprudence so long as the statement is actually voluntary. Ultimately, the price of denying the government critical counter-terrorism information and the risk of subjecting the suspect to unwarned questioning with subsequent preventive, indefinite, detention (because the statement is inadmissible) is not worth the benefit of compliance with a mere prophylactic rule, so long as the court validates that the statement was in fact voluntary.

I. *MIRANDA*, PUBLIC SAFETY, AND THE TERRORISM INTERROGATION DILEMMA

Few Supreme Court decisions in our nation's history have generated more controversy than *Miranda v. Arizona*.¹¹ In *Miranda*, the Supreme Court concluded that the then-existing due process "totality of the circumstances" test for assessing when a confession was actually coerced was insufficient to protect individuals from the inherently coercive environment of custodial interrogation.¹² The Court then concluded that this necessitated the imposition of a rights warning requirement to offset this inherent coercion.¹³ Furthermore, whenever an individual was subjected to custodial interrogation, the government would bear the "heavy burden" of proving a knowing and voluntary waiver of these noticed rights.¹⁴ This combined warning and waiver requirement would establish that the suspect's statement was not the product of this inherent coercion, thereby restoring confidence that the statement or confession was the product of a voluntary relinquishment of the privilege against compelled self-incrimination.¹⁵ Accordingly, a suspect's statements, both inculpatory and exculpatory,¹⁶ obtained during custodial interrogation would be

11. 384 U.S. 436; *see, e.g.*, James Oliphant & David S. Savage, *Controversy Over Miranda Warnings for Terrorism Suspect*, L.A. TIMES, May 5, 2010, <http://articles.latimes.com/2010/May/05/nation/la-na-ny-bomb-legalities-20100506>.

12. *See Miranda*, 384 U.S. at 467.

13. *Id.* at 467–68.

14. *Id.* at 475.

15. *Id.* at 471–72.

16. *Id.* at 476–77. The Court explained:

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no

admissible only when the government established a knowing and voluntary waiver of the required *Miranda* rights.¹⁷ Furthermore, effective waiver required police to prove that they informed the suspect of a series of rights articulated by the Court, rights that are today a ubiquitous aspect of American culture.¹⁸ According to the decision,

To summarize, we hold that, when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that, if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.¹⁹

Miranda therefore established a presumption-based rule of admissibility: statements made absent a valid waiver are presumed involuntary and therefore inadmissible; statements made following waiver, however, are presumed voluntary and are admissible.²⁰ Nevertheless, only one of these presumptions was conclusive: the presumption of involuntariness.²¹ The *Miranda* opinion provided for no exception to the exclusion of statements obtained absent valid waiver.²² In contrast, statements preceded by such a waiver, while

distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory."

Id.

17. *Id.* at 444; see also *Dickerson v. United States*, 530 U.S. 428, 433 (2000).

18. *Dickerson*, 530 U.S. at 443 (" *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

19. *Miranda*, 384 U.S. at 478–79.

20. *Id.* at 458.

21. See *id.* at 478–79.

22. See *id.* at 479.

presumptively voluntary, might still be excluded if actually coerced in violation of due process.²³

From inception, the conclusive involuntariness presumption and accordant exclusion triggered by a *Miranda* violation generated criticism. Contrary to initial dire predictions, however, the ruling never produced a debilitating effect on law enforcement.²⁴ Indeed, *Miranda* evolved to provide a net gain to law enforcement: police practices became more professional; extremely high waiver rates (in the range of eighty to ninety percent)²⁵ meant police continued to elicit confessions; the presumption of voluntariness resulting from waiver, while not conclusive, made due process challenges infrequent and almost impossible to sustain.²⁶

In 2000, the Supreme Court accepted the case of *Dickerson v. United States*.²⁷ In *Dickerson*, the Fourth Circuit held that Congress had properly superseded *Miranda* with a statute establishing a totality of the circumstances voluntariness test as the touchstone for confession admissibility.²⁸ *Dickerson* teed up the opportunity to overrule *Miranda*, a rule the Court had previously held swept more broadly than the privilege against self-incrimination itself.²⁹ In an opinion written by the Chief Justice, a seven-justice majority declined this opportunity, upholding the core *Miranda* rule.³⁰ The Court emphasized that *Miranda* had not produced the debilitating impact on law enforcement originally predicted, and as a result there was no

23. *Id.*

24. *Id.* at 504 (Harlan, J., dissenting) (warning that the decision would “entail[] harmful consequences for the country at large”).

25. Anthony J. Domanico et al., *Overcoming Miranda: A Content Analysis of the Miranda Portion of Police Interrogations*, 49 IDAHO L. REV. 1 (2012) (an analysis of the *Miranda* portion of a sample of electronically recorded interrogations revealed that more than ninety percent of suspects waived their *Miranda* rights and spoke with police); Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 792 (2006) (“[M]odern studies demonstrate that roughly eighty percent of suspects waive their *Miranda* rights and talk to the police.” (citation omitted)).

26. *Dickerson*, 530 U.S. at 443–44. The Court explained:

[O]ur subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief . . . [C]ases in which a defendant can make a colorable argument that a self-incriminating statement was ‘compelled’ despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.

Id.

27. 530 U.S. 428, 431–32 (2000).

28. *See id.* at 431–32.

29. *See Oregon v. Elstad*, 470 U.S. 298, 307 (1985).

30. *See Dickerson*, 530 U.S. at 444.

compelling reason to deviate from stare decisis and overturn the decision.³¹

Dickerson attributed the Court's adjustments to the original *Miranda* rule in a series of post-*Miranda* decisions to the fact that no rule, even a constitutional rule, is immutable. The Court also suggested that these adjustments to the scope of the original *Miranda* rule supported the conclusion that the tailored rule that emerged from these prior decisions served a legitimate constitutional purpose without a serious cost of over-breadth.³²

The first of these adjustments was the Court's endorsement of what came to be known as the public safety exception to *Miranda*. In *New York v. Quarles*, the Court held that statements made in response to police questions motivated by a primary public or police safety interest, even if made while in custody, do not implicate the concerns that resulted in the *Miranda* decision.³³ Accordingly, these statements are admissible even without complying with *Miranda*'s warning and waiver requirement.³⁴

As will be explained in more detail below, the precise scope of the *Quarles* PSE has never been totally clear. Was it *sine qua non* spontaneity in the face of an imminent threat? Or was it a primary objective of defusing that imminent threat? When the FBI questioned Umar Farouk Abdulmutallab on December 25, 2009 based on his apparent effort to ignite a bomb he concealed in his underwear during a transatlantic airline flight, this uncertainty came into sharp focus.³⁵ FBI agents conducted this questioning at the hospital where Abdulmutallab was being treated for burns resulting from his failed attempt.³⁶ The agents had been informed by Customs and Border Patrol agents of the attempt and that Abdulmutallab had been taken into custody at the airport. The questioning obviously occurred some time after the arrest, and lasted for approximately fifty minutes.³⁷ According to the district court's ruling denying Abdulmutallab's motion to suppress his statements:

[Defendant was asked] where he traveled, when he had traveled, how, and with whom; the details of the explosive device; the details

31. *Id.* at 443–44.

32. *See id.* at 442.

33. 467 U.S. 649, 657 (1984).

34. *See id.* at 657–58.

35. *United States v. Abdulmutallab*, No. 10-20005, 2011 WL 4345243, at *2–4 (E.D. Mich. Sept. 16, 2011).

36. *Id.* at *1.

37. *Id.* at *1.

regarding the bomb-maker, including where Defendant had received the bomb; his intentions in attacking Flight 253; who else might be planning an attack; whether he associated with, lived with, or attended the same mosque with others who had a similar mind-set as Defendant about jihad, martyrdom, support for al-Qaeda, and a desire to attack the United States by using a similar explosive device on a plane, and what these individuals looked like—all in an attempt to discover whether Defendant had information about others who could be on planes or about to board planes with explosive devices similar to the one Defendant used because, based upon his training, experience, and knowledge of earlier al-Qaeda attacks, this was not a solo incident and the potential for a multi-prong attack existed even if Defendant was unaware of any specific additional planned attack.³⁸

The trial court denied Abdulmutallab's motion, concluding that this questioning fell within the *Quarles* public safety exception.³⁹ Before his motion was even filed, however, the issue of applying the public safety exception to the questioning of suspected terrorists triggered a significant debate.⁴⁰ This debate was sparked not only by news reports of Abdulmutallab's questioning without a *Miranda* warning or waiver, but also by Attorney General Eric Holder's statement that the government might ask Congress to provide statutory authority for such unwarned questioning in future situations in order to bolster the government's legal posture.⁴¹ Holder asserted in numerous forums, including in his testimony before the Senate Judiciary Committee, that the public safety exception should be clarified to provide federal agents with necessary flexibility to permit unwarned questioning of terror suspects for sufficient duration to achieve their primary preventive purpose.⁴²

38. *Id.* at *5

39. *Id.* at *6 (“The circumstances present at the time of Defendant’s questioning fall within the public safety exception to *Miranda* recognized in *Quarles*.”).

40. See Terry Frieden, *Holder: Handling of Would-Be Bomber Consistent with Past Policy*, CNN (Feb. 3, 2010, 5:21 PM), <http://www.cnn.com/2010/POLITICS/02/03/holder.terror.charges/index.html>.

41. See Anne E. Kornblut, *Obama Administration Looks Into Modifying Miranda Law in the Age of Terrorism*, WASH. POST, May 10, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/09/AR2010050902062.html>.

42. See *Oversight of the U.S. Dep’t of Justice: Hearing Before the Committee on the Judiciary United States Senate*, 111 Cong. (2010) (questioning of Eric Holder, Att’y Gen. of the United States); see also Kornblut, *supra* note 41; Hanna F. Madbak, *Attorney General Holder to Engage Congress to Legislate on Miranda*, N.Y. ST. B. ASS’N (May 31, 2010, 10:46 AM), http://nysbar.com/blogs/ExecutiveDetention/2010/05/attorney_general_holder_to_eng_1.html.

The debate triggered by this proposal has focused almost exclusively on the scope of the original *Quarles* exception and the efficacy of the exception when restrictively interpreted.⁴³ Opponents to an expanded temporal scope argue that the threat of terrorism cannot be permitted to dilute core constitutional protections.⁴⁴ In an era where terrorism is viewed as a threat to both the safety of the country and the liberties established by our Constitution, this is unsurprising. What is absent from this debate, however, is an assessment of the options available to the government when confronting terrorist suspects taken into custody, and how those options impact an assessment of the relative merits of an expanded public safety exception.

Abdulmutallab's case is instructive. When taken into custody in Detroit,⁴⁵ government officials did not possess just one criminal law enforcement response option. Instead, like any other individual suspected of being a member of or associated with al-Qaeda, the government had two distinct response options to choose from in order to incapacitate Abdulmutallab. The first option was federal criminal process. This is the option the government obviously selected—an option that ultimately proved effective.⁴⁶ However, by questioning Abdulmutallab without first obtaining a *Miranda* waiver, the government assumed risk that his statements would be inadmissible. This appears to have been a calculated risk, because unlike the facts of *Quarles*, there was nothing spontaneous about the questioning.⁴⁷ Thus, when FBI agents conducted that questioning, they confronted the traditional risk continuum resulting from the *Quarles* decision: either the statements would fall within the public safety exception and be admissible, or they would not and could not be used in the government's case in chief. The latter outcome might not prevent Abdulmutallab's prosecution, but it would certainly make it more difficult.

43. See Joanna Wright, Note, *Mirandizing Terrorists? An Empirical Analysis of the Public Safety Exception*, 111 COLUM. L. REV. 1296 (2011).

44. See, e.g., Amos N. Guiora, *Creating an Exception to an Exception—Too Dangerous and Too Unwarranted*, JURIST (Apr. 2, 2011), <http://jurist.org/forum/2011/04/creating-an-exception-to-an-exception.php>. See generally 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 (2010).

45. *United States v. Abdulmutallab*, No. 10-20005, 2011 WL 4345243, at *1 (E.D. Mich. Sept. 16, 2011).

46. See *id.* at *6

47. See *id.*

Because of the advent of terrorist “enemy belligerent detention” associated with the U.S. military response to the terrorist attacks of September 11, 2001, the government had an alternate option to incapacitate Abdulmutallab: designate him an unprivileged enemy belligerent (UEB) and transfer him to the detention facility at Guantanamo Bay, Cuba for long-term preventive detention, and perhaps trial by military commission.⁴⁸ Although not invoked, a number of prominent lawmakers were demanding just such a course of action immediately following Abdulmutallab’s arrest.⁴⁹

Had the government invoked this option, concerns over *Miranda* would have been immediately nullified. Indeed, confessing to being affiliated with al-Qaeda and engaging in activity intended to cause death or destruction to U.S. persons or property would have facilitated the UEB designation. Furthermore, treating Abdulmutallab as an UEB would have allowed the government to conduct a long interrogation with no concern for *Miranda* compliance. Instead, the only consideration would have been protecting any statements from an assertion that they were coerced, and even then this would only be relevant in the event that the government chose to go beyond preventive detention and pursue criminal prosecution before a military commission.

This alternate option reveals that critics of extending the *Quarles* PSE to cases such as Abdulmutallab’s may not have fully contemplated the second order effects of a more restrictive application. It is unlikely that civil libertarians would consider the military detention and trial option preferable to trial in an Article III federal court. Accordingly, the broadened scope of the public safety exception applied in Abdulmutallab’s case, and advocated by the Attorney General, is actually an important protection for suspected terror operatives, for it will make the military incapacitation option less likely. This is not to suggest that permitting questioning pursuant to the exception will guarantee the civilian criminal option. Indeed, there may be cases where the statements obtained during the questioning will result in a decision to invoke the military option. But it does seem clear that a narrowly construed application of *Quarles* will always incentivize invoking the military option from the outset of

48. See 10 U.S.C. § 948a(7) (2012).

49. See generally Letter from Joseph I. Lieberman, Homeland Sec’y & Governmental Affairs Comm. Chairman, to Eric Holder, Att’y Gen. of the United States (Jan. 25, 2010), available at <http://www.hsgac.senate.gov/media/majority-media/lieberman-collins-urge-administration-to-move-abdulmutallab-into-military-custody>.

the investigatory response. Such an outcome is at odds with an effective balance between security and liberty that is at the core of both *Quarles*, and the broader government effort to respond to the threat of transnational terrorism.

II. *MIRANDA* AND *QUARLES*: WHY PUBLIC SAFETY DOES NOT ALWAYS MEAN PROTECTING THE PUBLIC

Prior to its decision in *Quarles*, the Supreme Court had already ruled that statements made in violation of *Miranda* could be used for impeachment purposes.⁵⁰ This decision was based on the Court's conclusion that *Miranda* had not been intended to arm a defendant with the ability to present false testimony.⁵¹ In *Quarles*, however, the Court confronted the question of whether all statements made in violation of *Miranda* were inadmissible in the prosecution's case in chief, a question that seemed foreclosed by *Miranda* itself.⁵²

Quarles involved a spontaneous police questioning in response to the realization that the suspect of a violent sexual assault just taken into custody had discarded his pistol in a small bodega.⁵³ After a woman approached two patrol officers and told them she had just been raped by a man who went into a supermarket, one officer called for assistance while the other, Officer Kraft, went to the supermarket to search for the suspect.⁵⁴ Kraft spotted a man matching the description of the assailant as soon as he entered the store.⁵⁵ The suspect, Benjamin Quarles, ran from Kraft towards the back of the market.⁵⁶ Kraft lost sight of Quarles, but then saw him again and ordered him to stop.⁵⁷ Quarles complied, and while frisking Quarles, Kraft realized Quarles was wearing an empty pistol holster.⁵⁸ Kraft immediately cuffed Quarles, and then asked him where the gun was.⁵⁹ Quarles nodded towards some boxes in the supermarket and said, "the gun is over there."⁶⁰ Kraft then read Quarles *Miranda* warnings,

50. See *Dickerson v. United States*, 530 U.S. 428, 452 (2000) ("A defendant's statement taken in violation of *Miranda* that was nonetheless *voluntary* could be used at trial for impeachment purposes." (citing *Oregon v. Hass*, 420 U.S. 714 (1975))).

51. See *id.*

52. See *New York v. Quarles*, 467 U.S. 649, 657–58 (1984).

53. *Id.* at 651–52.

54. *Id.* at 652.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

obtained a waiver, and asked Quarles additional questions.⁶¹ Quarles admitted the pistol was his.⁶²

Quarles moved to suppress both statements and the pistol prior to his trial.⁶³ Quarles asserted that *Miranda* dictated exclusion of the first statement, and that the pistol and second statement were fruit of the unwarned first statement⁶⁴ (a theory subsequently rejected by the Court in *Oregon v. Elstad*).⁶⁵ The trial court's decision to grant the Motion to Suppress was upheld by the intermediate appellate court and by the New York Court of Appeals.⁶⁶ These courts both rejected the Government's argument that public safety justified excusing the normal *Miranda* requirements.⁶⁷

Upon review, the Supreme Court disagreed, and created the public safety exception to the *Miranda* warning and waiver requirement.⁶⁸ Early in the opinion, the Court noted that “the *Miranda* Court, however, presumed that interrogation in *certain* custodial circumstances is inherently coercive and held that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights.”⁶⁹ The use of the “certain circumstances” qualifier set up the rationale for the exception the Court created.⁷⁰ The Court then emphasized *Miranda*'s original motivation: to protect suspects from the inherent coercion associated with custodial interrogation.⁷¹ The Court focused on *Miranda*'s extensive discussion of police ‘station house’ interrogation tactics, and concluded that when an officer like Kraft confronts an imminent danger to the public or other police officers—like the danger associated with a missing firearm in a location where confederates may be laying in wait for the police⁷²—

61. *Id.*

62. *Id.*

63. *Id.* at 652–653.

64. *Id.*

65. 470 U.S. 298 (1985).

66. *See Quarles*, 467 U.S. at 652–53.

67. *Id.*

68. *Id.*

69. *Id.* at 654 (second emphasis added).

70. *Id.*

71. *Id.* at 656.

72. *Id.* at 657. (“The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously

they will not have the opportunity to calculate tactics to coerce the suspect into confessing.⁷³ Accordingly, questioning a custodial suspect in a situation like the type Kraft confronted is not a “circumstance” involving the type of inherent coercion necessary to trigger *Miranda*’s concern, and therefore compliance with *Miranda* is not a necessary predicate to admissibility.⁷⁴ According to the Court, “[w]hatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.”⁷⁵

Public safety, however, was not the exclusive *ratio decidendi* of the opinion. In addition to the public safety motivation, the Court emphasized the questioning’s spontaneity, and how that spontaneity mitigated the risks associated with traditional custodial interrogation so central to the *Miranda* decision:

In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer.⁷⁶

The Court bolstered this spontaneity factor by also emphasizing the immediacy of the officer’s decision-making process, and the imminence of the threat confronted by the officer:

posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.”).

73. *See id.* at 656 (“In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer.”).

74. *See id.* at 657–58 (“We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination. We decline to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.”).

75. *Id.* at 656.

76. *Id.*

We decline to place officers such as Officer Kraft in the untenable position of having to consider, *often in a matter of seconds*, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.⁷⁷

Quarles's ultimate holding did not impose a strict spontaneity requirement. Instead, the Court opened the door to a balancing of interests that might justify invoking the exception in situations far less spontaneous than the one Kraft confronted:

Procedural safeguards which deter a suspect from responding were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost. Here, had *Miranda* warnings deterred *Quarles* from responding to Officer Kraft's question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting *Quarles*. Officer Kraft needed an answer to his question not simply to make his case against *Quarles* but to insure that further danger to the public did not result from the concealment of the gun in a public area.

We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination.⁷⁸

Subsequent application of the PSE presents a mixed bag of emphasis on both the imminent threat and the spontaneity aspect of *Quarles*. It seems clear that by opening the door to a safety oriented balance of relative interests to justify invoking the exception, the Court set the conditions for its ultimate application to the suspected terrorist context.

III. THE INDEFINITE DETENTION/MILITARY COMMISSION ALTERNATIVE

Confusion continues to surround, and cloud, U.S. counterterrorism detention policy and practice. The confusion flows from multiple sources, including the difficulty in defining battlefield and

77. *Id.* at 657–58 (emphasis added).

78. *Id.* at 657.

belligerents, but also inconsistent and often poorly explained U.S. counterterrorism policy. Yet it is the nature and purpose of detention in armed conflict coupled with that policy and practice that results in the specter of indefinite detention and implicit nullification of *Quarles*.

The U.S. Supreme Court, in considering the detention of a U.S. citizen during hostilities in Afghanistan, held that “[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’ The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.”⁷⁹

Capturing or detaining a member of an enemy force is based on their status as such, not on an individualized assessment of their threat. The law of armed conflict presumes that members of an enemy force “are part of the military potential of the enemy and it is therefore always lawful to attack [and thus to capture] them for the purpose of weakening that potential.”⁸⁰ As the International Committee of the Red Cross acknowledges, “Prisoners of war may be interned . . . for no individual reason. The purpose of this internment is not to punish them, but only to hinder their direct participation in hostilities and/or to protect them.”⁸¹

Because this detention incapacitates individuals to prevent their return to hostilities, the detention period lasts until the cessation of those hostilities.⁸² Unlike the clearly defined end of hostilities with Italy, Germany, and Japan during World War II, it is unclear when and if the cessation of hostilities between the United States and al-Qaeda would occur. Therein lie the seeds for the current indefinite

79. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (citation omitted). Similarly, during World War II the Court stated that “[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.” *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

80. Marco Sassóli & Laura M. Olson, *The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INT’L REV. RED CROSS 599, 606 (2008).

81. 1 MARCO SASSÓLI ET AL., HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW, chs. 6, 10 (3d ed. 2011), available at <http://www.icrc.org/eng/assets/files/publications/icrc-0739-part-i.pdf>.

82. Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

detention regimes in Guantanamo and Afghanistan.⁸³ Today, this indefinite detention regime is supported by statute, originally the Authorization for Use of Military Force (“AUMF”),⁸⁴ and later through a National Defense Authorization Act.⁸⁵

A. Authorization for Use of Military Force.

On September 14, 2001, the U.S. Congress passed the AUMF, which the President signed into law on September 18, 2001.⁸⁶ The AUMF states:

(a) IN GENERAL—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁸⁷

It was this language and its implications on detention that the Supreme Court addressed in *Hamdi*.⁸⁸ The Court found that where Congress has permitted the use of necessary and appropriate force,

83. The U.S. military’s continued detention system in Afghanistan has been overshadowed, understandably enough, by Guantanamo. Ostensibly, pursuant to an agreement between the United States and Afghanistan, the United States has transferred control of detention operations to the Government of Afghanistan. See Memorandum of Understanding on Transfer of U.S. Detention Facilities in Afghan Territory to Afghanistan, U.S.-Afg., Mar. 9, 2012, *available at* <http://www.mfa.gov.af/en/news/7671>; *US Military Gives Control of Its Last Detention Center to Afghans*, FOX NEWS (Mar. 25, 2013), <http://www.foxnews.com/politics/2013/03/25/us-military-to-hand-over-detention-facility-to-afghan-government/>. But in what one commentator styled a “second Guantanamo,” the United States is continuing to detain over sixty-five third-party nationals, in other words, non-Afghans, in Afghanistan. Kevin Sieff, *In Afghanistan, a Second Guantanamo*, WASH. POST, Aug. 4, 2013, http://www.washingtonpost.com/world/in-afghanistan-a-second-guantanamo/2013/08/04/e33e8658-f53e-11e2-81fa-8e83b3864c36_print.html. Sieff contends that the majority of the non-Afghan detainees are Pakistani and that essentially Afghanistan is allowing the United States to detain non-Afghans in exchange for having handed over the Afghan detainees. *Id.* These non-Afghan detainees include individuals captured in Afghanistan and Pakistan but also the Middle East, Europe, and Southeast Asia. *Id.*

84. See *generally* Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001).

85. See *generally* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011).

86. 115 Stat. 224 § 2; see *Bill Summary & Status 107th Congress (2001–2002)* S.J.RES. 23 *All Information*, LIBRARY CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SJ00023:@@@L&summ2=m&> (last visited Nov. 10, 2013).

87. 115 Stat. 224 § 2(a).

88. *Hamdi v. Rumsfeld*, 542 U.S. 507, 573 (2004).

“Congress has clearly and unmistakably authorized detention in the narrow circumstances [of Hamdi].”⁸⁹ Hamdi argued that the AUMF did not authorize his indefinite detention.⁹⁰ The Court interpreted Hamdi’s objection “to be not to the lack of certainty regarding the date on which the conflict [with al-Qaeda] will end, but to the substantial prospect of perpetual detention.”⁹¹ In response, the Court repeated the Government’s assertion that “the detention of enemy combatants during World War II was just as ‘indefinite’ while that war was being fought.”⁹²

The Court then acknowledged the viability of Hamdi’s concern of indefinite detention in a “war on terror,” stating:

We recognize that the national security underpinnings of the “war on terror,” although crucially important, are broad and malleable. As the Government concedes, “given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement.” The prospect Hamdi raises is therefore not far-fetched. If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi’s detention could last for the rest of his life.⁹³

Ultimately the Court ruled that under the AUMF, “[t]he United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who engaged in an armed conflict against the United States.”⁹⁴

89. *Id.* at 519.

90. *Id.*

91. *Id.* at 520.

92. *Id.*

93. *Id.*

94. *Id.* at 521. The Court’s analysis included referring to active and ongoing hostilities between the United States and the Taliban and that some 13,500 U.S. troops were deployed to Afghanistan. What then in 2014, when, according to President Obama, the U.S. “war in Afghanistan will be over”? Barack Obama, President of the United States, State of the Union Address (Feb. 12, 2013), <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>. With 13,500 troops in Afghanistan at the time of *Hamdi*, what if the United States has 10,000 or 5000 troops in Afghanistan after 2014? And even if the United States exercises what some are calling the “zero option”—removal of all U.S. troops from Afghanistan—what of the U.S. Army’s claim that the United States is in an era of “persistent conflict”? See Mark Mazetti & Matthew Rosenberg, *U.S. Considers Faster Pullout in Afghanistan*, N.Y. TIMES, Jul. 8, 2013, <http://www.nytimes.com/2013/07/09/world/asia/frustrated-obama-considers-full-troop-withdrawal-from-afghanistan.html?pagewanted=all> (describing range of U.S. withdrawal options from Afghanistan); see also *Strategic Context*, U.S. ARMY, http://www.army.mil/aps/08/strategic_context/strategic_context.html (last visited Nov.

But the use of force (and thus detention) under the AUMF is limited to “those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001”⁹⁵ The AUMF’s utility seemed to wane over time, following successful operations that killed or captured much of al-Qaeda’s leadership, coupled with the post-9/11 outgrowth of al-Qaeda cells and affiliated groups in different parts of the world.⁹⁶

What followed is additional legislation that authorizes (or reaffirms) the U.S. government’s authority to indefinitely detain and/or prosecute via military commission members of al-Qaeda and associated forces who commit belligerent acts against the United States.

B. National Defense Authorization Act § 1021

To counter any gaps in the AUMF or perceptions of its diminishing applicability, the U.S. Congress, as part of the 2012 National Defense Authorization Act, passed section 1021, entitled “Affirmation of Authority of the Armed Forces of the United States to Detain

10, 2013) (“We have looked at the future and expect a future of protracted confrontation among state, non-state, and individual actors who will use violence to achieve political, religious, and other ideological ends.”).

95. Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

96. See *Hearing to Receive Testimony on the Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force: Hearing Before the S. Comm. on Armed Services*, 113th Cong. (2013) (describing various views on the current utility of the AUMF); see also Joseph Straw, *Most of Al Qaeda’s Big Names Have Been Either Captured or Killed, But Some Remain*, N.Y. DAILY NEWS, July 21, 2013, <http://www.nydailynews.com/news/world/al-qaeda-decimated-obliterated-article-1.1405185>. Notable al-Qaeda groups are located in Yemen, Somalia, and a host of African countries. See JOHN ROLLINS, CONG. RESEARCH SERV., AL QAEDA AND AFFILIATES: HISTORICAL PERSPECTIVE, GLOBAL PRESENCE, AND IMPLICATIONS FOR U.S. POLICY 14–15, 19–22, 23–25 (2011); *The State of Al-Qaeda: The Unquenchable Fire*, ECONOMIST (Sept. 28, 2013), <http://www.economist.com/news/briefing/21586834-adaptable-and-resilient-al-qaeda-and-its-allies-keep-bouncing-back-unquenchable-fire>. Beginning with the U.S. war in Iraq, al-Qaeda focused considerable efforts there, which have continued to this day. See Ashish Kumar Se, *Al Qaeda Drives Iraq Toward Chaos; U.S. Withdrawal Left Door Open to Sectarian Battle for Power*, WASH. TIMES, Aug. 8, 2013, <http://www.washingtontimes.com/news/2013/aug/8/al-qaeda-drives-iraq-toward-chaos/#ixzz2d5ArhMBo>. And al-Qaeda’s presence in the civil war in Syria continues to grow. David Ignatius, *Al-Qaeda Affiliate Playing Larger Role in Syria Rebellion*, WASH. POST, Nov. 30, 2012, http://www.washingtonpost.com/blogs/post-partisan/post/al-qaeda-affiliate-playing-larger-role-in-syria-rebellion/2012/11/30/203d06f4-3b2e-11e2-9258-ac7c78d5c680_blog.html.

Covered Persons Pursuant to the Authorization for Use of Military Force.”⁹⁷ Under § 1021:

a) IN GENERAL.—Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.

(b) COVERED PERSONS.—A covered person under this section is any person as follows:

(1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.

(2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.

(c) DISPOSITION UNDER LAW OF WAR.—The disposition of a person under the law of war as described in subsection (a) may include the following:

(1) Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force.

(2) Trial under chapter 47A of title 10, United States Code (as amended by the Military Commissions Act of 2009 (title XVIII of Public Law 111-84)).⁹⁸

Section 1021 expands several aspects of the AUMF. Members of al-Qaeda and the Taliban remain “covered persons,” and § 1021 adds non-members who “substantially support” and forces associated with, al-Qaeda and the Taliban.⁹⁹ The definitions or parameters of substantial support and associated forces remain unclear.

Section 1021 makes clear that detention of covered persons may be without trial and last until the “end of the hostilities authorized by the Authorization for Use of Military Force.”¹⁰⁰ But as discussed previously, the hostilities that the AUMF authorized were against

97. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011).

98. *Id.*

99. *Id.* § 1021(b).

100. *Id.* § 1021(c)(1).

those who planned, authorized, committed, or aided the 9/11 attacks or harbored them.¹⁰¹ While § 1021 gives the impression that there is a temporal limitation on its detention provisions, the United States will never capture or kill everyone associated with 9/11. Given that is how long the § 1021 detention authority lasts, its provisions, absent repeal or modification, should be treated as operative for decades to come. And while the AUMF is retrospective in sense of the 9/11 attacks which had already occurred, the stated purpose of the AUMF is “*to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.*”¹⁰² Such a purpose, laudable that it is, is aspirational and seems completely, perpetually, open-ended.

A collection of journalists challenged the constitutionality of § 1021, claiming that § (b)(2)’s reference to “substantial support” was impermissibly vague and violated their First and Fifth Amendment Rights.¹⁰³ A federal district court agreed and issued a preliminary injunction enjoining the U.S. government from enforcing § 1021.¹⁰⁴ The U.S. Court of Appeals for the Second Circuit vacated the injunction.¹⁰⁵ The court held that § 1021 “says nothing about the government’s ability to detain citizens,” thus disposing of the citizen plaintiffs, and that the non-citizen plaintiff’s lacked standing.¹⁰⁶ Ultimately, the court ruled:

With respect to individuals who are not citizens, are not lawful resident aliens, and are not captured or arrested within the United States, the President’s AUMF authority includes the authority to detain those responsible for 9/11 as well as those who were a part of, or substantially supported, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners—a detention authority that Section 1021 concludes was granted by the original AUMF. But with respect to

101. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

102. *Id.* (emphasis added).

103. *Hedges v. Obama*, No. 12 Civ. 331 (KFB), 2012 U.S. Dist. LEXIS 68683, at *34 (S.D.N.Y. May 16, 2012). The plaintiffs’ concerns, at least in part, stemmed from *Holder v. Humanitarian Law Project*. *Id.* at *14–15. There, the Supreme Court ruled that a criminal statute that prohibited providing material support to terrorist groups was not void for vagueness. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

104. *Hedges v. Obama*, 890 F. Supp. 2d 424, 472 (S.D.N.Y. 2012).

105. *Hedges v. Obama*, 724 F.3d 170, 205 (2d Cir. 2013).

106. *Id.* at 204–05.

citizens, lawful resident aliens, or individuals captured or arrested in the United States, Section 1021 simply says nothing at all.¹⁰⁷

The result is that at a minimum, there is a category of individuals (non-citizens) who are not lawful resident aliens and not captured or arrested within the United States for whom indefinite detention and/or trial by military commission is possible. The court did not say other categories (citizens, lawful resident aliens, those captured in the United States) could not be indefinitely detained but that § 1021 is silent.¹⁰⁸

Because the government may now indefinitely incapacitate and/or try at least certain terror crime suspects via military commission, the *Quarles* balance has been fundamentally altered. The possibility of indefinite detention and/or trial by military commission results in the government no longer having to choose between public safety and prosecution. Indeed, the government has essentially acknowledged as much. As the former Attorney General explained:

The United States has every right to capture and detain enemy combatants in this conflict, and need not simply release them to the battlefield We have every right to prevent them from returning to kill our troops or those fighting with us, and to target innocent civilians. And this detention often yields valuable intelligence about the intentions, organization, operations, and tactics of our enemy. In short, detaining dangerous enemy combatants is lawful, and makes our Nation safer.

. . . .

[T]o suggest that the government must charge detainees with crimes or release them is to seriously misunderstand the principal reasons why we detain enemy combatants in the first place: it has to do with self-protection, because these are dangerous people who pose threats to our citizens and to our soldiers.¹⁰⁹

107. *Id.* at 192.

108. *Id.* President Obama, in a signing statement, stated, “I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens. Indeed, I believe that doing so would break with our most important traditions and values as a Nation.” President Barack Obama, Statement on H.R. 1540 (Dec. 31, 2011), <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>. The legal import of such statements remains unclear. At most, President Obama is binding his administration with this statement by policy, not law.

109 Michael Mukasey, Att’y Gen. of the United States, Remarks at the American Enterprise Institute for Public Policy Research, (July 21, 2008), http://www.aei.org/files/2008/07/21/20080721_DOJ.pdf.

The former Attorney General was referring to “enemy combatants” in his remarks.¹¹⁰ And while the terms enemy combatant and indefinite detention evoke foreigners and far off battlefields to some, as the article noted at the outset they have been hurled, however incorrectly, at U.S. citizens and for actions taken in the United States. The authority to indefinitely detain may lie dormant, for a time, but its significance should not be overlooked.

If—and realistically when—the Taliban, al-Qaeda or associated forces conduct another terrorist attack in the United States, and particularly one causing substantial loss of life, there will already be a statute which on its face allows for their indefinite detention. Future attacks are inevitable—as is the pressure to invoke the alternative incapacitation option, indefinite detention.

The existence of this indefinite detention option therefore undermines the *Quarles* equation. Expanding the public safety exception to apply to certain terrorist suspects is therefore necessary to preserve the balance between the need to ensure an effective response to an imminent public danger and protection of the criminal suspect *Quarles* was intended to achieve.

IV. RECONCILING AN EXPANDED *QUARLES* EXCEPTION WITH *MIRANDA*

Any proposed expansion of the *Quarles* PSE will inevitably be scrutinized against the underlying purpose of *Miranda* itself. Indeed, Justice O’Conner’s dissent in *Quarles* exposed the inherent inconsistency between the *Miranda* ruling and the very notion of an “exception” to that ruling.¹¹¹ Thus, while the PSE is now a firmly rooted exception to *Miranda*, it is the narrow nature of that exception that arguably led the *Quarles* majority to reject O’Conner’s argument. Each step of expansion, however, ostensibly exacerbates the inconsistency highlighted by Justice O’Conner.

A. The Evolution of the *Miranda* Rule: Focusing on the Core Concern of the Risk of Police Calculation

There has been an undeniable shift in the Court’s treatment of *Miranda* since *Quarles* was decided, a shift that suggests a much more significant tolerance for tailoring the impact of the *Miranda* rule to the realities of investigatory necessities. Indeed, almost as soon as *Miranda* was decided, the Supreme Court began to dilute the broad

110. *Id.*

111. *New York v. Quarles*, 467 U.S. 649, 670–72 (1984) (O’Connor, J. Dissenting).

sweep of the warning and waiver requirement. This was accomplished through a chain of decisions interpreting the meaning of key components of the *Miranda* decision, including the meaning of custody,¹¹² interrogation,¹¹³ voluntary waiver,¹¹⁴ and the consequence of a violation itself.¹¹⁵

Ironically, in *Oregon v. Elstad*, Justice O'Connor authored what was perhaps the most profound manifestation of the Court's conclusion that *Miranda*, as originally conceived, was constitutionally overbroad.¹¹⁶ In *Elstad*, the Court concluded that the "[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself."¹¹⁷ Accordingly, the Court rejected the assertion that a *Miranda* violation constitutes a "poisoned tree" for purposes of derivative fruits admissibility analysis because a *Miranda* violation was not *ipso facto* a constitutional violation, but instead merely the violation of a Court imposed "prophylactic" intended to protect the core constitutional privilege against self-incrimination.¹¹⁸

112. See *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (holding that *Miranda* applies when a suspect has been taken into formal police custody or otherwise deprived of his freedom of action).

113. See *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) ("[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."). This standard is commonly referred to as questioning or its "functional equivalent." *Id.* at 300–01.

114. See *North Carolina v. Butler*, 441 U.S. 369, 373–75 (1979). An accused's express statement can constitute a valid waiver, although such a statement is not required to find a waiver was voluntary. *Id.* at 373. In the absence of an express statement, whether a voluntary waiver is given is to "be determined on the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the [defendant]." *Id.* at 374–75 (internal quotation marks omitted).

115. *Oregon v. Elstad*, 470 U.S. 298, 317 (1985) ("When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief.").

116. 470 U.S. 298 (1985).

117. *Id.* at 306.

118. See *id.* at 307–08 ("[T]he *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted."). The Court elaborated by noting that unwarned questioning did not abridge respondent's constitutional privilege . . . but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege. Since there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed.

As a result of these decisions, the impact of *Miranda* on law enforcement questioning is much narrower today than when the rule was first imposed, and each of these cases reflects the willingness of the Court to engage in pragmatic tailoring of the rule. It is true that the Court did ultimately uphold *Miranda* when faced with a direct challenge to the ruling in *Dickerson*.¹¹⁹ Even that decision, however, expressly indicated that the continued vitality of *Miranda* is in large part the result of the fact that it has been tailored to more effectively balance the needs of law enforcement with the core protection it sought to enhance. According to Justice Rehnquist, “our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.”¹²⁰ Accordingly, while the *Dickerson* decision saved *Miranda* from ultimate demise, the nature of the protection for criminal suspects it saved was far more restrictive than that provided by the original *Miranda* decision.

Based on this tailoring trend, it is well within the realm of reason to anticipate that the Court would be inclined to support an extension of the PSE to address a genuine risk of imminent terrorist attack. Questioning motivated by preventing such an attack would be within the logical scope of the PSE. This motivation would ostensibly mitigate the risk that police agents would utilize the strategies that led the *Miranda* Court to impose the warning and waiver requirement to ensure a voluntary relinquishment of the Fifth Amendment privilege. Such questioning would also serve a compelling public interest distinct from merely discovering evidence for use against the suspect at trial.

B. Other Indicators of the Valid Influence of the Terrorism Threat: The Special Needs Doctrine Analogy

This latter aspect of an expanded PSE—justifying an exception to the normally applicable restriction on law enforcement activities when the primary purpose of those activities is not to discover evidence, but to protect the public from an imminent public danger—finds support by analogy in the special needs exception to the warrant

Id. at 308 (internal quotation marks omitted). The Court subsequently confirmed the inapplicability of *Wong Son* poison fruit analysis to a *Miranda* violation. *See* *United States v. Patane*, 542 U.S. 630, 643 (2004).

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

120. *Id.* at 443–44.

and probable cause requirement of the Fourth Amendment.¹²¹ While the special needs doctrine is limited to the Fourth Amendment and has never been applied in the context of police questioning, the underlying rationale of the doctrine does indicate a willingness of the Court to allow a broader scope of investigatory authority in response to such imminent public threats.

In the Fourth Amendment context, the special needs doctrine permits the use of minimally intrusive seizures and/or searches when necessary to deter or detect an imminent threat to public safety, so long as the scope of such intrusions is narrowly tailored to the threat.¹²² In *Michigan Dep't of State Police v. Sitz*, the Supreme Court extended this exception to the normal individualized suspicion requirement of the Fourth Amendment to sobriety checkpoints.¹²³ The Court concluded that the use of such checkpoints was motivated by a primary protective purpose, and not to search for evidence to use against the citizen.¹²⁴ This primary purpose rationale was central to the Court's subsequent decision in *City of Indianapolis v. Edmond*, where the Court rejected applicability of this exception to justify the use of drug detection checkpoints on public roads.¹²⁵

According to the Court, the key distinction between *Sitz* and *Edmond* was that in *Edmond*, the police objective was indistinguishable from the routine law enforcement objective of searching for criminal evidence.¹²⁶ In contrast, in *Sitz* the primary objective was not to search for evidence, but to protect the public from a serious danger.¹²⁷ Thus, in the context of search and seizure law, the Court has created a somewhat ironic "evidentiary use" equation: if police conduct a suspicionless search or seizure for the purpose of discovering evidence, it is a traditional "evidentiary" search triggering the individualized suspicion requirements of the Fourth Amendment. As a result, if police are successful, the evidence they discover may not be used in court because the lack of individualized suspicion renders the intrusion a violation of the Fourth Amendment. However, if the primary police objective is not to find evidence, but instead to avert an imminent and serious public

121. See U.S. CONST. amend. IV.

122. See generally *City of Indianapolis v. Edmond*, 531 U.S. 32 (2002); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

123. 496 U.S. at 455.

124. *Id.* at 420–21.

125. 531 U.S. at 44.

126. *Id.*

127. *Id.* at 39.

danger, the individualized suspicion requirement of the Fourth Amendment is inapplicable. As a result, any evidence they do discover may be used in court even though they lacked individualized suspicion.

The theory behind proposals for expanding the PSE to facilitate police questioning of terrorist suspects for the purpose of averting an imminent terrorist attack seems identical to the justification for the special needs doctrine. Unlike normal custodial interrogation, this type of questioning is not primarily intended to solve suspected crime and obtain a confession for use against the suspect. Instead, these are secondary byproducts of questioning motivated by a legitimate desire to protect the public from imminent threat. This common rationale seems to be an even more compelling justification for expanding the PSE. The PSE is premised in part on an analogous theory: that the desire to avert an imminent public danger mitigates the risk of the type of calculated police tactics that necessitated the imposition of the *Miranda* warning and waiver requirement.¹²⁸

This element of the PSE and the special needs doctrine also reveals what seems to be an equally significant aspect of both exceptions: the unwillingness of the Supreme Court to subject law enforcement personnel charged with protecting the public with a Hobson's Choice between ensuring evidence admissibility or protecting the public. In cases ranging from *Quarles* to *Sitz* to *Terry v. Ohio*, the Court has consistently demonstrated a willingness to balance the limits it imposes on police investigatory methods with the pragmatic realities of pressures confronted by law enforcement when dealing with an imminent public danger.¹²⁹ The Court's assessment in *Terry* of the limited efficacy of rules that fail to take these pressures into account¹³⁰ serves as an important reminder that this Hobson's Choice will almost always be resolved in favor of self-protection or protection of the public. As a result, law enforcement officers must remain cognizant of the distinction between intrusions conducted for the purpose of gathering evidence, and those conducted for the distinct purpose of

128. See *New York v. Quarles*, 467 U.S. 649, 656–58 (1984).

129. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 24 (1968) (“[I]n view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.”).

130. *Id.* at 9–15.

protecting officers or the public from imminent danger, and that an inflexible approach to such realities ultimately undermines respect for the law:

The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts, the rule is ineffective as a deterrent. Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime. Doubtless some police “field interrogation” conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.¹³¹

This certainly did not indicate that the Court would simply adopt interpretations of the Fourth (and by implication the Fifth) Amendment based solely on the interests of law enforcement. It did, however, indicate that where police intrusions were motivated by a genuine safety objective, the law must respond to ensure a pragmatic balance between the interests implicated by such intrusions.

The compelling government interest associated with protecting the public from imminent terrorist threats, coupled with the established Supreme Court pattern of tailoring constitutional protections to accommodate this interest, supports the logic of expanding the PSE to cover law enforcement questioning of terrorist suspects when the primary purpose of such questioning is preventing an imminent terrorist attack. Nevertheless, drawing from special needs jurisprudence, it also suggests that any such exception must be narrowly tailored to ensure that it is applied only to objectively

131. *Id.* at 13–14 (footnotes omitted).

genuine situations of imminent terrorist threats, and that the scope of questioning is limited to responding to such threats.

V. TAILORING A TERRORISM EXPANSION OF PUBLIC SAFETY TO A NARROW RANGE OF CASES WHERE THE CONFESSION IS CASE DISPOSITIVE

Expanding the PSE to justify all custodial interrogation of terrorist suspects cannot be reconciled with *Miranda's* core concerns. Such a blanket exception would be inconsistent with the underling rationale of *Quarles*, as well as the special needs doctrine. Instead, any valid expansion must be based on two essential pillars. First, there must be some method of objectively assessing the legitimacy of the asserted imminent public danger. Second, the scope of unwarned questioning must be limited to responding to that danger.

Imposing an objective assessment of a situation is a common practice in assessing police compliance with constitutional requirements. In the *Miranda* context, for purposes of triggering the *Miranda* rule, interrogation includes, according to *Rhode Island v. Innis*, both express questioning, and “words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.”¹³² This focus on the “likelihood” that police conduct will elicit an incriminating response requires courts to assess what an objective officer would have expected; the subjective expectations of the actual officer are not controlling. The same objective situation assessment is inherent in the existing *Quarles* PSE exception: a judicial determination that the questioning was necessary to secure the safety of the officer or public as a predicate for exempting the questioning from the *Miranda* requirement.¹³³

This objective assessment is also inherent in applying the special needs doctrine, as illustrated by the contrasting holdings of *Sitz* (sobriety checkpoints)¹³⁴ and *Edmond* (drug detection checkpoints).¹³⁵ In both cases, the government asserted the brief traffic stops were motivated by a concern for public safety.¹³⁶ However, in *Edmond*, the Court rejected that assertion, concluding that the asserted

132. 446 U.S. 291, 301 (1980) (footnote omitted).

133. *New York v. Quarles*, 467 U.S. 649, 657–58 (1984).

134. *See Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

135. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 41–43 (2000).

136. *Id.* at 40–41; *Sitz*, 496 U.S. at 449.

justification could not override the objective indicators that the drug stops were indistinguishable from general law enforcement stops.¹³⁷ According to the Court:

Petitioners propose several ways in which the narcotics-detection purpose of the instant checkpoint program may instead resemble the primary purposes of the checkpoints in *Sitz*

Petitioners also emphasize the severe and intractable nature of the drug problem as justification for the checkpoint program. There is no doubt that traffic in illegal narcotics creates social harms of the first magnitude But the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose. Rather, in determining whether individualized suspicion is required, we must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue. We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.¹³⁸

Similar objective “gate keeping” assessments must be built into any expansion of the PSE. Courts must be empowered to assess the objective validity of an asserted imminent terrorist threat. They should only allow use of statements obtained pursuant to the exception when it is established by the government that a reasonable officer would have expected that a failure to immediately question a suspect without first obtaining a *Miranda* waiver would subject the public to imminent danger of death, great bodily harm, or serious property damage. As with other reasonableness assessments, the officer should not be required to be accurate. Instead, so long as the judgment of imminent threat was reasonable, the exception should be validated. However, relying exclusively on the interrogating officer’s subjective perceptions should be regarded as insufficient. Only when those perceptions can be objectively validated should the exception apply.

Limiting the scope of questioning justified by the PSE should pose little difficulty for a reviewing court. Only statements made in response to questions related to discovering and preventing the anticipated threat of an imminent terrorist attack would be admissible. All other statements would fall outside the scope of the exception and be subject to the traditional *Miranda* warning and waiver requirement.

137. *Edmond*, 531 U.S. at 44.

138. *Id.* at 42–43 (citations omitted).

VI. HOW EXPANDING THE *QUARLES* EXCEPTION IS A NET GAIN
FOR TERROR SUSPECTS: INCENTIVIZING THE ARTICLE III
PROSECUTION OPTION

Any expansion of the PSE should justifiably trigger concern that the *Miranda* decision's core protections would be diluted. The Court in *Quarles* chose almost thirty years ago to endorse a rule that balanced the authority to engage in custodial interrogation with the need to protect the public from imminent danger. In the context of terrorism investigations, this justification seems almost more compelling than in the *Quarles* context. Unlike the officer who confronted Quarles, law enforcement agents questioning a terrorist suspect will often be under immense pressure to respond to a threat that can produce much more widespread harm to the public. Like *Quarles*, however, the nature of coordinated terrorist operations indicates that it will often be the case that information from the suspect may be the only viable means for averting this type of serious and widespread harm. One need only consider the case of Umar Farouk Abdulmutallab, where federal agents sought to establish whether other trans-Atlantic flights en route or about to depart from Europe were at risk of explosion.¹³⁹ Had this been the case, information from Abdulmutallab may have been the only way to avert catastrophic loss.

This is not the only consideration that compels adopting a terrorist-specific expansion of the PSE. As noted previously, whatever dilution of a suspect's protection from custodial interrogation that results from such an expansion will be offset by the decreased likelihood that the suspect will be transferred to military custody for prosecution by military commission.¹⁴⁰ The availability of this alternate option for dealing with the terrorist suspect fundamentally alters the Hobson's Choice equation. Unlike the officer who confronted Quarles, federal agents who today confront a terror suspect may not perceive a choice between protecting the public or an ability to prosecute.¹⁴¹ Instead, if the PSE is unavailable in such situations, the choice to question in violation of *Miranda* will not necessarily foreclose subsequent use of the statement to prosecute the suspect. But instead of prosecution in an Article III court, the suspect

139. *United States v. Abdulmutallab*, No. 10-20005, 2011 WL 4345243, at *1 (E.D. Mich. Sept. 16, 2011).

140. *See supra* Part III.

141. *See supra* Part III.

may find himself transferred to military custody for prosecution before a military commission.¹⁴²

The availability of the alternate “terrorist suspect” response option of military detention must ultimately tip the balance in favor of expanding the PSE to address the threat of international terrorism. Consistent with the President’s stated objective of minimizing reliance on military custody and trial by military commission,¹⁴³ any rule that renders such disposition of a terror suspect more likely should be reconsidered. That is precisely the effect of a narrow application of the PSE. Only by facilitating narrowly tailored questioning of international terror suspects in response to an imminent threat of terrorist attack will the likelihood of invoking this third rail option be diminished. Thus, it is the terror suspect himself that may actually be the primary beneficiary of an expanded PSE.

CONCLUSION

In *Quarles*, the Supreme Court eliminated the Hobson’s choice between ensuring public safety and ensuring admissibility of a suspect’s statement when responding to a situation where safety necessitated immediate questioning of a suspect taken into custody.¹⁴⁴ The Court held that a legitimate public safety concern justified an exception to the normal *Miranda* warning and waiver prerequisite for admissibility of such statements, but did not define the scope of the exception.¹⁴⁵ While an objectively credible concern for public safety was an essential element of the exception, it remained unclear whether only the type of spontaneous questioning that occurred in *Quarles* fell within the exception, or whether it extended to longer-term and more calculated questioning.

This uncertainty was starkly exposed when the government invoked the PSE to justify extended questioning of Umar Farouk Abdulmutallab after he was taken into custody following his failed attempt to destroy a trans-Atlantic commercial airliner. Applying the *Quarles* PSE to extended questioning of terror suspects should trigger criticism that this extension exceeds the scope of the PSE. Extended questioning is anything but spontaneous, and therefore extending the

142. See *supra* Part III.

143. See Barack Obama, President of the United States, Remarks at the National Defense University (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (renewing the President’s stated desire to close the military detention center at Guantanamo Bay, Cuba).

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

145. See *id.* at 679–80 (Marshall, J., dissenting).

exception to such situations unjustifiably dilutes *Miranda* protections for these suspects.

Critics of expanding the PSE fail to adequately consider the impact of the military incapacitation option for suspected terrorist operatives. This option has altered the balance of interests central to a narrow application of the PSE. Restricting the scope of the PSE to questioning (such as that in *Quarles*) will not necessarily accrue to suspects' benefit the way it did before the "War on Terror". Instead, such a restriction may compel the government to avoid the civilian criminal prosecution option altogether, and avoid all *Miranda*-related concerns by invoking the military incapacitation option.

The aftermath of a terrorist attack is chaotic and emotionally charged, and is exactly when clear rules for questioning suspects—and sanctions for over reaching—are needed most. The possibility of military detention—whether on a U.S. Navy warship or while in a Boston hospital bed—undermines the risk associated with a narrow application of the PSE. In the normal criminal investigation, a narrow application of the PSE would not tolerate long-term questioning of a suspect. Instead, police would have to choose between questioning without complying with *Miranda* and forfeiting the ability to use a suspect's statements, or complying with *Miranda* and losing potentially invaluable information. However, when the suspect is an individual who may be designated an enemy combatant and subjected to military detention and trial by commission, the choice is no longer binary. Instead, the government may invoke a third option: conduct long-duration questioning without complying with *Miranda*, obtain the information deemed necessary, and then incapacitate the suspect by designating him an enemy belligerent. As a result, an expanded application of the PSE may actually be in the suspect's best interest because it will incentivize reliance on the civilian criminal process.

The risk that the military incapacitation option may gain momentum in response to a future terrorist threat is not hypothetical. Indeed, it is not difficult to imagine an aggressive use of this option in response to another major terrorist attack on the nation. It is therefore essential to consider this possibility when assessing the relative risks and rewards associated with the scope of the PSE. Doing so in the calm light of day—before the next incident increases the calls for military detention of terrorism suspects—will facilitate a credible balance between the interests that lie at the core of the exception. Ultimately, expanding the scope of the PSE in certain counterterrorism investigations will incentivize normal law enforcement disposition. Expanding the PSE exception will also

inure to the terrorism suspect's benefit by increasing the probability that his case will be adjudicated in an Article III court, mitigating the risk of indefinite military detention.