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# Self-Incrimination and the Non-Resident Alien

Roberto Iraola

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## Articles

### SELF-INCRIMINATION AND THE NON-RESIDENT ALIEN

Roberto Iraola\*

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\* Senior Legal Advisor to the FBI's General Counsel. J.D., Catholic University Law School 1983. The views expressed herein are solely those of the author and are not intended to reflect views of the FBI or the Department of Justice.

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## I. Introduction

On May 29, 2001, after a three-month trial and twelve days of deliberations, a federal jury in the Southern District of New York convicted four men, all foreign born, of offenses under a 302-count indictment relating to the August 1998 bombings of the American Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania.<sup>1</sup> The bombings resulted in the death of 224 people, including 12 Americans, and the wounding of 4,600 others.<sup>2</sup>

During the course of the trial, several of the defendants challenged the admission into evidence of their statements to American law enforcement officers.<sup>3</sup> In a matter of first impression, Judge Leonard B. Sand, who presided over the trial, ruled in *United States v. Bin Laden*<sup>4</sup> that, for purposes of a domestic criminal prosecution in an Article III court, foreign suspects who are interrogated abroad by American law enforcement officers are entitled to the same Fifth Amendment protections

1. *A Verdict Against Terrorism*, WASH. POST, May 30, 2001, at A18; Press Release, FBI, Verdict Rendered in the Trial of Four Individuals Associated with the 1998 Bombings of the U.S. Embassies in Kenya and Tanzania (May 29, 2001), available at <http://www.fbi.gov/pressrel/pressrel01.htm>. As reported by the press at the start of the trial:

The terrorism trial . . . present[ed] an extraordinary challenge to the impartial administration of justice in the United States. The four defendants [we]re accused of participating in a homicidal conspiracy of terror against the United States during much of the last decade, including the 1998 bombing of American embassies in Kenya and Tanzania. Because the attacks were so repugnant, and the defendants [we]re foreign-born, the prosecutors and the court b[ore] a special obligation to insure that the case [wa]s handled fairly and in full compliance with the rights that must be accorded to every defendant in a criminal case.

*The Embassy Bombings Trial*, N.Y. TIMES, Feb. 6, 2001, at A18. On October 18, 2001, the four men tried for the bombings were sentenced to life in prison without the possibility of parole. Michael Powell, *4 Bombers Get Life Sentences*, WASH. POST, Oct. 19, 2001, at A1.

2. *A Verdict Against Terrorism*, WASH. POST, May 30, 2001, at A18.

3. Benjamin Weiser, *U.S. Faces Tough Challenge to Statements in Terror Case*, N.Y. TIMES, Jan. 25, 2001, at A24; *Terror Suspect Pleaded to be Shot, Official Says*, N.Y. TIMES, Oct. 19, 2000, at A28; Benjamin Weiser, *Citing Police Tactics, Embassy Blast Suspect Tries to Suppress Statements*, N.Y. TIMES, July 13, 2000, at A23.

4. 132 F. Supp. 2d 168 (S.D.N.Y. 2001).

against self-incrimination as suspects who are questioned in the United States.<sup>5</sup> Additionally, Judge Sand ruled that statements obtained from such suspects by American law enforcement representatives must also meet the warning/waiver requirements under *Miranda v. Arizona*<sup>6</sup> before they are admitted into evidence in the government's case-in-chief at trial.<sup>7</sup>

The application of the Fifth Amendment to interrogations of foreign nationals abroad who are suspected or charged with violating American criminal laws presents a recurring legal issue. The criminal investigations surrounding the terrorist attacks on September 11, 2001,<sup>8</sup> and the bombings of the American destroyer USS Cole in Aden Harbor, Yemen in October 2000<sup>9</sup> and the Khobar Towers military complex in Saudi Arabia in 1996, present a few notable examples where this issue may arise again.<sup>10</sup>

The Supreme Court has not yet addressed whether the Fifth Amendment's protection against self-incrimination, as

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5. *Id.* at 181.

6. 384 U.S. 436 (1966).

7. *Bin Laden*, 132 F. Supp. 2d at 189.

8. See Dan Eggen & Brooke A. Masters, *U.S. Indicts Suspect In Sept. 11 Attacks*, WASH. POST, Dec. 12, 2001, at A1 (reporting return of first indictment in connection with the Sept. 11 attacks); David Johnson & Benjamin Weiser, *Ashcroft Is Centralizing Control Over the Prosecution and Prevention of Terrorism*, N.Y. TIMES, Oct. 10, 2001, at B9 (discussing the establishment of "9/11 Task Force" within the Department of Justice "to operate as the agency's central command structure for prosecuting terror cases and helping to prevent further acts of violence against the United States"); Brooke A. Masters, *Any Terror Trials May Be In Virginia*, WASH. POST, Nov. 21, 2001, at A10 (reporting how Department of Justice is "leaning heavily" toward prosecution of any conspirators involved in the September 11 attacks in Virginia rather than New York).

9. The investigation of the bombing of the USS Cole, which killed 17 sailors, has not yet resulted in the filing of any charges. See Kamran Khan & Rajiv Chandrasekaran, *Cole Suspect Turned Over By Pakistan*, WASH. POST, Oct. 28, 2001, at A1; Walter Pincus, *Yemen Hears Benefits of Joining U.S. Fight*, WASH. POST, Nov. 28, 2001, at A8; *U.S Seeks To Resume Probe of Cole Blast*, WASH. POST, August 22, 2001, at A15.

10. On June 21, 2001, nearly five years after a truck bomb ripped through the Khobar Towers military housing complex in Saudi Arabia killing 19 Americans and wounding 372 others, a 46-count indictment was returned against 13 members of the pro-Iran Saudi Hizballah or "Party of God" in the Eastern District of Virginia charging, in part, conspiracy to kill Americans and employees of the United States, use of weapons of mass destruction, and destruction of United States property, bombing, and murder. Press Release, FBI, Khobar Towers Release (June 21, 2001), available at <http://www.fbi.gov/pressrel/pressrel01.htm>.

shaped by *Miranda*, applies to a non-resident alien interrogated abroad by American law enforcement officials.<sup>11</sup> The developing case law, however, suggests that a confession elicited from a non-resident alien abroad by American law enforcement representatives must be voluntary before it is admitted into evidence in a United States court and that (at least) modified *Miranda* warnings must also be given to non-resident aliens who are interrogated abroad by American law enforcement officers.<sup>12</sup>

This article, which is divided into two parts, explores these issues. First, it provides a brief overview of the history, evolution, and goals of the Fifth Amendment privilege, together with a general discussion about the law governing confessions. The article then discusses the case law analyzing the admissibility of confessions when non-resident aliens and foreign law enforcement officials are involved.<sup>13</sup> Particular emphasis is placed on Judge Sand's ruling in *Bin Laden*, an opinion which may serve as the legal cornerstone for future cases that are confronted with the application of the self-incrimination clause to statements elicited from a non-resident alien who is interrogated abroad by American law enforcement representatives and thereafter prosecuted in an American court.

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11. Neither has the Supreme Court, for that matter, ruled on whether the remaining Fifth Amendment procedural guarantees of indictment by grand jury and bar on double jeopardy apply to a non-resident criminal defendant tried in an Article III court. *Bin Laden*, 132 F. Supp. 2d at 183.

12. On November 13, 2001, President Bush issued an order authorizing, at his discretion, the trial of non-U.S. citizens in military tribunals who are determined to be either present or former members of al Qaeda, associated with international acts of terrorism (including the attacks on September 11), or harbored such persons. 66 Fed. Reg. 57,833 (2001); see also William Glaberson, *Closer Look at New Plan for Trying Terrorists*, N.Y. TIMES, Nov. 14, 2001, at B6; George Lardner Jr. & Peter Slevin, *Military May Try Terrorism Cases Bush Cites 'Emergency'*, WASH. POST, Nov. 14, 2001, at A1. The use of the term "court" in this article, and the discussion of a non-resident alien's Fifth Amendment protection against self-incrimination, are presented strictly in the context of a criminal prosecution under an Article III court and not a military tribunal.

13. Throughout this article, the terms "statement," "admission," and "confession" are used interchangeably.

## II. Overview

### A. *History and Evolution of the Fifth Amendment Privilege*

The roots of the privilege against self-incrimination lie in medieval English common law.<sup>14</sup> By 1650, the privilege was established firmly in the common law of England.<sup>15</sup> By the early eighteenth century, the English common law courts applied the privilege to defendants and then to witnesses.<sup>16</sup>

During the second half of the seventeenth century, American "colonists began to recognize the privilege as a common law right. This recognition invariably coincided with movement by the British administrators to repress political dissidence."<sup>17</sup> Soon after the colonists declared their independence, eight of the thirteen colonies incorporated a privilege against self-incrimination in their state constitutions.<sup>18</sup> In 1791, the privilege

14. See Christine L. Reimann, *Fencing the Fifth Amendment in Our Own Backyard*, 7 PACE INT'L L. REV. 177, 178-79 (1995); Kevin Urick, *The Right Against Compulsory Self-Incrimination in Early American Law*, 20 COLUM. HUM. RTS. L. REV. 107, 108-15 (1988).

15. *Quinn v. United States*, 349 U.S. 155, 161 (1955). As explained by one commentator:

To ensure individuals answered truthfully, the English Ecclesiastical Courts required religious and political dissidents questioned by the infamous Star Chamber to swear to the oath *ex officio*. Refusing to take the oath was rare because it was the equivalent to a guilty plea. Due to zealous inquisitorial techniques, including torture, witnesses testifying under the oath inevitably disclosed everything under investigation. The Star Chamber, and the oath *ex officio* along with it, were abolished by the British Parliament in the seventeenth century. The abolishment gave rise to the right against self-incrimination in both ecclesiastical and common law courts. The rationale underlying the prohibition of the oath *ex officio* was the belief that it was fundamentally unfair to be forced to choose between liberty or violating the oath.

Anthony L. Osterlund, Comment, *Showdown at the Constitutional Corral: Self-Incrimination v. Potential Foreign Prosecution*, 67 U. CIN. L. REV. 615, 618 (1999); see also *Couch v. United States*, 409 U.S. 322, 327 (1973) ("The Court has thought the privilege necessary to prevent any recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.") (citation omitted).

16. See *United States v. Gecas*, 120 F.3d 1419, 1451 (11th Cir. 1997).

17. *Id.* at 1453. "For example, in 1677, the legislature of Virginia reaffirmed the ban on sworn interrogation after Governor Berkeley summarily executed a number of alleged participants in Bacon's Rebellion on the basis of confessions compelled through torture." *Id.*

18. *Id.* at 1454-55. The eight colonies were Virginia, Pennsylvania, Delaware, Maryland, Massachusetts, New Hampshire, Vermont and North Carolina. *Id.* In

against self-incrimination became part of the federal Bill of Rights.<sup>19</sup>

As part of the Fifth Amendment,<sup>20</sup> the common law right against self-incrimination was converted into a constitutional privilege which no state could modify through statutory enactments.<sup>21</sup> For well over fifty years, however, because the states and the federal government were deemed independent sovereigns, the law permitted each government to compel a witness to provide testimony, even though the witness would incriminate himself under the other sovereign's laws.<sup>22</sup> This changed with *Murphy v. Waterfront Commission of New York Harbor*,<sup>23</sup> when the Supreme Court ruled that a "state witness [could] not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits

most instances, the privilege applied only to criminal defendants. *Id.* See generally *Urick*, *supra* note 14, at 115-16.

19. *Quinn*, 349 U.S. at 161.

20. The Fifth Amendment states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

21. In *Counselman v. Hitchcock*, 142 U.S. 547 (1892), the Court made clear that "[l]egislation cannot detract from the privilege afforded by the Constitution." *Id.* at 565. It ruled that no statute which leaves a witness susceptible to prosecution after he incriminates himself can "supplant[] the privilege conferred by the Constitution of the United States." *Id.* at 585. A distinguished commentator described the incorporation of the principle that no one should be required to accuse himself as "one of the great landmarks in man's struggle to make himself civilized." *Ullman v. United States*, 350 U.S. 422, 426 (1956) (quoting ERWIN N. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7 (1955)).

22. See, e.g., *Knapp v. Schweitzer*, 357 U.S. 371, 379-80 (1958) (holding that states could compel a witness to give testimony that would incriminate him under federal law); *Hale v. Henkel*, 201 U.S. 43, 68-69 (1906) (recognizing that potential federal prosecution did not justify a witness's silence when immunity from state prosecution is afforded); see also Diego A. Rotsztain, *The Fifth Amendment Privilege Against Self-Incrimination and Fear of Foreign Prosecution*, 96 COLUM. L. REV. 1940, 1946-50 (1996).

23. 378 U.S. 52 (1964). The same day *Murphy* was decided, the Court ruled in *Malloy v. Hogan*, 378 U.S. 1 (1964), that the privilege against self-incrimination was applicable to the states through the Fourteenth Amendment.

[could] not be used in any manner by federal officials in connection with a federal prosecution against him.”<sup>24</sup>

### B. *Goals of the Self-Incrimination Clause*

The self-incrimination clause of the Fifth Amendment provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]”<sup>25</sup> When ascertaining the meaning of this clause, the Supreme Court has noted that it “must have a broad construction in favor of the right which it was intended to secure.”<sup>26</sup> In now familiar language, the Court in *Murphy* explained that the privilege embodied in the self-incrimination clause

reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of a crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requir-

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24. *Murphy*, 378 U.S. at 79. In *United States v. Balsys*, 524 U.S. 666 (1998), the Supreme Court ruled that a resident alien with a real and substantial fear of foreign prosecution could not invoke the Fifth Amendment privilege against self-incrimination when the government sought to compel his testimony because the “concern with foreign prosecution” was beyond the scope of the clause. *Id.* at 669. The Court “read the [c]lause contextually as apparently providing a witness with the right against compelled self-incrimination when reasonably fearing prosecution by the government whose power the [c]lause limits, but not otherwise.” *Id.* at 673-74.

25. U.S. CONST. amend. V.

26. *Counselman*, 142 U.S. at 562; accord *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Quinn*, 349 U.S. at 162. As observed by the court in *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962):

Because the right [against self-incrimination] is the result of successive accretions, it is not as severely bounded by historical origins, surveyed as of an early time, as are some legal institutions. It is more important to consider its *line of growth* as indicative of an expanding right capable of encompassing new and novel situations today as in the past. If the expansion of the individual's right of silence comes at the expense of the power and efficiency of the State, that is but in accord with the nature of the right and its historical development. [B]oth the safeguard of the Constitution and the common law rule spring alike from that sentiment of *personal self-respect, liberty, independence and dignity* which has inhabited the breast of the English speaking peoples for centuries, and to save which they have always been ready to sacrifice any governmental facilities and conveniences.

*Id.* at 150 (footnotes omitted; emphasis in original; quotation omitted).



ing the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and the right of each individual to a private enclave where he may lead a private life; our distrust for self-deprecatory statements; and our realization that the privilege while sometimes a shelter to the guilty, is often a protection of the innocent.<sup>27</sup>

Part of the inquiry then becomes whether the application of the privilege to a non-resident alien who is interrogated by American law enforcement officials abroad advances or is consistent with the policies and purposes of this privilege — respect for individual dignity and privacy, the preservation of an accusatorial system, and the prevention of governmental overreaching.<sup>28</sup>

### C. *Voluntariness and Miranda*

The early Supreme Court decisions regarding the admissibility of confessions in federal courts relied upon the common law rule<sup>29</sup> designed to protect a defendant from being convicted based on a false confession.<sup>30</sup> The rule originally was formulated, at least in part, in terms of whether there had been a forbidden inducement, threat, or promise.<sup>31</sup> The test was expanded so that the question became whether the confession

27. 378 U.S. at 55 (internal citations and quotations omitted).

28. See *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990) (“At its core, the privilege reflects our fierce unwillingness to subject those suspected of a crime to the cruel [choice] of self-accusation, perjury or contempt.”) (quotation omitted); *United States v. Noble*, 422 U.S. 225, 233 (1975) (“The Fifth Amendment privilege. . . protects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation.”) (quotation omitted).

29. This rule appears to have been first promulgated in *The King v. Warick-sall*, 168 Eng. Rep. 234, 233 L. Leach Cr. Cases 263 (K.B. 1783), where the court stated:

A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.

*Id.* quoted in 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE § 6.2(a), at 442 (2d ed. 1999).

30. LAFAVE ET AL., *supra* note 29, § 6.2(a), at 442.

31. See *Hopt v. Utah*, 110 U.S. 574, 585 (1884) (“there seems to have been no reason to exclude the confession of the accused; for the existence of any such in-

“was, in fact, voluntarily made.”<sup>32</sup> Early on, in federal prosecutions, exclusion of an involuntary confession was based on the Fifth Amendment privilege against self-incrimination where,<sup>33</sup> after some questioning,<sup>34</sup> it came to rest.<sup>35</sup>

Cases applying the voluntariness test in the context of confessions in state prosecutions, the admission of which the Court found violated the due process clause of the Fourteenth Amendment,<sup>36</sup> generally reflect three underlying concerns.<sup>37</sup> First, there is the concern that these confessions “are of doubtful reliability because of the practices used to obtain them.”<sup>38</sup> A second

duancements, threats or promises seems to have been negated by the circumstances under which it was made”).

32. *Ziang Sung Wan v. United States*, 266 U.S. 1, 14 (1924) (“In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made.”).

33. In *Bram v. United States*, 168 U.S. 532 (1897), the Court held:

In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the 5th Amendment to the Constitution of the United States, commanding that no person ‘shall be compelled in any criminal trial to be a witness against himself.]’

*Id.* at 542.

One commentator has remarked that that *Bram* “rested constitutional confessions law squarely upon the right against compulsory self-incrimination – not so surprisingly since that had been the rule at common law since 1658.” *Urick, supra* note 14, at 127 (footnote omitted).

34. *See United States v. Carigan*, 342 U.S. 36, 41 (1951) (questioning “[w]hether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment’s protection against self-incrimination, or from a rule that forced confessions are untrustworthy”).

35. LAFAYE ET AL., *supra* note 29, § 6.1(c), at 440; *Dickerson v. United States*, 530 U.S. 428, 433 (2000) (“[o]ver time . . . cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment”).

36. *Davis v. North Carolina*, 384 U.S. 737, 740 (1966) (“The standard of voluntariness which has evolved in state cases under the Due Process Clause of the Fourteenth Amendment is the same general standard which applied in federal prosecutions - a standard grounded in the policies of the privilege against self-incrimination.”).

37. LAFAYE ET AL., *supra* note 29, § 6.2(b), at 444; *see generally* Michael E. Gering, Note, *Colorado v. Connelly: The Demise of Free Will as an Independent Basis for Finding a Confession Involuntary*, 33 VILL. L. REV. 895, 898-907 (1988).

38. LAFAYE ET AL., *supra* note 29, § 6.2(b), at 446. *See, e.g.*, *Beecher v. Alabama*, 389 U.S. 35, 36 (1967) (holding a gun to a suspect’s head); *Brooks v. Florida*, 389 U.S. 413, 414 (1967) (keeping accused naked and depriving him of water); *Reck v. Pate*, 367 U.S. 433, 441-42 (1961) (depriving a suspect of adequate sleep);

concern stems from when the confessions “were obtained by offensive police practices even if reliability is not in question (for example, where there is strong corroborating evidence).”<sup>39</sup> Finally, there is concern where confessions “were obtained under circumstances in which the defendant’s free choice was significantly impaired, even if the police did not resort to offensive practices.”<sup>40</sup> Subsequently, however, the Court appears to have abandoned the third rationale for excluding confessions when it ruled that “[a]bsent police conduct causally related to the confession there is simply no basis for concluding that any state actor has deprived a defendant of due process of law.”<sup>41</sup>

In *Miranda*, the Court ruled that “[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from [a] defendant can truly be the product of his free choice.”<sup>42</sup> As a result, *Miranda* requires that before questioning a suspect in custody,<sup>43</sup> law enforcement officials must inform the suspect of his

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Payne v. Arkansas, 356 U.S. 560, 564-65 (1958) (threatening a suspect with mob violence and depriving him of food); *Malinsky v. New York*, 324 U.S. 401, 403 (1945) (accused stripped and kept naked); see also *LAFAVE ET AL.*, *supra* note 29, § 6.2(c), at 446 (discussing some of the practices which have been found to violate a suspect’s rights to due process).

39. *LAFAVE ET AL.*, *supra* note 29, § 6.2(b), at 446; see *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) (convictions based on coerced confessions must be overturned “not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial not an inquisitorial system”).

40. *LAFAVE ET AL.*, *supra* note 29, § 6.2(b), at 446; see, e.g., *Townsend v. Slain*, 372 U.S. 293, 308-09 (1963) (although confession was apparently reliable and no conscious police wrongdoing was involved, its use was impermissible since “[a]ny questioning by police officers which *in fact* produces a confession which is not the product of free intellect renders that confession inadmissible”).

41. *Colorado v. Connelly*, 479 U.S. 157, 163 (1986). “In essence, *Connelly* distinguished mental incapacity from coercion. *Connelly* held that as long as governmental officers have not induced a mentally ill suspect’s confession, the Constitution poses no bar to admitting this confession in evidence.” Albert W. Alschuler, *Constraint and Confession*, 74 *DENV. U. L. REV.* 957, 959 (1997). See generally Welsh S. White, *What is an Involuntary Confession Now?* 50 *RUTGERS L. REV.* 2001 (1998) (analyzing the treatment of involuntary discussions by the Supreme Court).

42. *Miranda*, 384 U.S. at 458.

43. *Miranda* warnings are required only when a suspect is both in custody and subject to interrogation. *Illinois v. Perkins*, 496 U.S. 292, 297 (1990). Whether a suspect is in custody turns on the degree to which restrictions on the suspect’s freedom of movement are “of the degree associated with a formal arrest.” *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984) (quoting *California v. Beheler*, 463

rights.<sup>44</sup> Before the government may introduce a suspect's incriminating statement in its case-in-chief,<sup>45</sup> it must prove that the accused voluntarily,<sup>46</sup> knowingly and intelligently waived his rights under *Miranda*.<sup>47</sup>

To recapitulate, the Fifth Amendment privilege against self-incrimination allows a defendant to move to suppress his confession if it was involuntary or obtained in violation of *Miranda*. While interrelated, these challenges to the admissibility of a confession are different.<sup>48</sup> If a defendant's confession was obtained by "techniques and methods offensive to due process' or under circumstances in which the suspect clearly had no opportunity to exercise 'a free and unconstrained will,'" his statement is inadmissible under the Fifth Amendment.<sup>49</sup> The

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U.S. 1121, 1125 (1983)). Furthermore, "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansburg v. California*, 511 U.S. 318, 323 (1994). Generally, interrogation has been defined as "express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980).

44. *Miranda* generally provides that before questioning a suspect who is in custody, law enforcement officials must inform the suspect that: (i) he has the right to remain silent; (ii) any statement he makes may be used against him at trial; (iii) he has the right to be represented by an attorney during questioning; and (iv) if he cannot afford an attorney, one will be appointed for him. *Miranda*, 384 U.S. at 478-79. Law enforcement officials must use this formulation or "other procedures [that] are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Id.* at 467.

45. Statements obtained in violation of *Miranda* may nonetheless be used for impeachment as long as they are voluntary. *See Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971).

46. The voluntariness standard governing a *Miranda* waiver is the same as that applied when assessing the voluntariness of a confession. *Connelly*, 479 U.S. at 169-70.

47. *See Edwards v. Arizona*, 451 U.S. 477, 481-84 (1981).

48. *See Tankleff v. Senkowski*, 135 F.3d 235, 242 (2d Cir. 1998). *See generally Dickerson v. United States*, 530 U.S. 428, 444 ("The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry.")

49. *Oregon v. Elstad*, 470 U.S. 298, 304 (1985) (quoting *Haynes v. Washington*, 373 U.S. 503, 515 (1963)). In determining whether a confession has been coerced, a court will look at a number of factors including: (i) the age, education and intelligence of the defendant; (ii) the length of the detention; (iii) the length and nature of the questioning; (iv) whether the defendant was advised of his constitutional rights; and (v) whether the defendant was subjected to physical punishment. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *see also* 18 U.S.C. § 3501 (2001) (admissibility of confessions). The admission into evidence of a confession determined to be involuntary is subject to harmless constitutional error analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 306-12 (1991).

prophylactic rule of *Miranda*, however, is broader and requires the suppression of some confessions that, while perhaps not actually involuntary, were obtained in the presumptively coercive environment of police custody.<sup>50</sup>

### III. The Application of the Self-Incrimination Clause To Confessions Given by Non-Resident Aliens To American Law Enforcement Officers

As discussed above, the admission into evidence of a statement by an accused typically will be subject to challenge on the grounds that it was not given voluntarily and that government agents did not comply with *Miranda* when eliciting the statement.<sup>51</sup> When the accused is a non-resident alien and the statement was provided to American law enforcement officials abroad, novel issues as to the application of the Fifth Amendment are presented.<sup>52</sup>

#### A. *The Self-Incrimination Clause and Voluntariness of a Confession*

The first significant post-*Miranda* case, which addressed the application of the Fifth Amendment's self-incrimination clause to the interrogation of a non-resident alien abroad by federal American law enforcement officials, was *United States v.*

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50. See, e.g., *Elstad*, 470 U.S. at 306-07; *New York v. Quarles*, 467 U.S. 649, 654 (1984) ("The *Miranda* Court . . . 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.") (footnote omitted); see also *Dickerson*, 530 U.S. at 444 ("The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result.").

51. As noted by the Court in *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984), however, "cases 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."

52. Resident aliens and other aliens within the jurisdiction of the United States are entitled to the same protections under the self-incrimination and due process clauses as American citizens. See *Balsys*, 524 U.S. at 672; *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953). See generally *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) (aliens enjoy First, Fifth, and Fourteenth amendment protection rights).

*Yunis*.<sup>53</sup> In *Yunis*, the defendant, a Lebanese citizen prosecuted for the hijacking of a Jordanian airplane in 1985, moved to suppress his confession on the grounds that it was obtained in violation of his rights under the Fifth Amendment,<sup>54</sup> and the provisions of 18 U.S.C. Section 3501(c) which prohibits unreasonable delay before presentment to a magistrate after a confession is obtained.<sup>55</sup> The district court granted the defendant's motion to suppress his confession and the government appealed.<sup>56</sup>

In reversing the district court's ruling suppressing the confession, the United States Court of Appeals for the District of Columbia Circuit accepted the parties' stipulation that the defendant, "despite his alien status," could claim the protection of the Fifth Amendment.<sup>57</sup> In his concurrence, however, Judge Mikva noted that the court was not "free to enter into constitu-

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53. 859 F.2d 953 (D.C. Cir. 1985).

54. *United States v. Yunis*, 681 F. Supp. 909 (D.D.C. 1988). With respect to the Fifth Amendment challenge to the confession, the court framed the inquiry in terms of whether defendant's confession complied with the standards of *Miranda* and "other like pronouncements of [the] Supreme Court." *Id.* at 922.

55. Under the rule established by the Supreme Court in *McNabb v. United States*, 318 U.S. 332 (1943) and *Mallory v. United States*, 354 U.S. 449 (1957), courts sometimes suppressed confessions obtained shortly after arrest on the grounds that there had been an unnecessary delay in the arraignment of the accused. Section 3501(c) sets forth two exceptions to the *McNabb-Mallory* rule. First, it provides that no confession will be excluded solely on the grounds of "unnecessary delay" if it was obtained within six hours of arrest. Second, this grace period may be extended if "the delay in bringing [the accused] before such magistrate . . . beyond such six hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available . . . magistrate[.]" 18 U.S.C. 3501(c).

56. *Yunis*, 681 F. Supp. 909. The district court ruled that Yunis's confession was involuntary, in part because it was elicited "in an oppressive environment" and was the result of "relentless interrogation[.]" *Id.* at 926. The court also "determined that the government purposely created the delay between arrest and the arraignment to interrogate [Yunis] and secure a statement. That deliberate action coupled with the lengthy and relentless interrogation was all to defendant's prejudice and detriment and violated the provisions of 3501(c)." *Id.* at 927.

57. *Yunis*, 859 F.2d at 957. The court observed:

The parties have stipulated that Yunis, despite his alien status, can claim the protection of the fifth amendment to the American Constitution for interrogation that occurred outside the territory of the United States. . . . Since the majority of the panel are of the view that such a stipulation is acceptable and the application of the fifth amendment can be assumed arguendo, we turn to the standard of review.

*Id.*

tional hypotheticals,” and explained why, in his view, the Fifth Amendment applied to non-resident aliens interrogated abroad by American law enforcement officers.

First, Judge Mikva noted that the focus of the Fifth Amendment’s protection against self-incrimination was “the use of compelled, self-incriminatory evidence against the defendant at trial.”<sup>58</sup> This use, Judge Mikva reasoned, occurs when the government seeks to introduce the statement of the accused at the trial. For this reason, and relying on *Brulay v. United States*,<sup>59</sup> where the defendant who was an American citizen sought to suppress his statements to Mexican officials on the grounds that they were involuntary,<sup>60</sup> Judge Mikva determined that: “if the statement is not voluntarily given, whether given to a United States or foreign officer-the defendant has been compelled to be a witness against himself when the statement is admitted.”<sup>61</sup> Judge Mikva further found support for his conclusion, by analogy, in Supreme Court precedent holding that compelled testimony under a grant of immunity may “not be put to any testimonial use whatever against [a defendant] in a criminal trial.”<sup>62</sup>

Between the time *Yunis* was decided and Judge Sand issued his ruling in *Bin Laden* (discussed in detail below), the Supreme Court held in *United States v. Verdugo-Urquidez*<sup>63</sup> that the Fourth Amendment is inapplicable to foreign searches by

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58. *Id.* at 970 (Mikva, J., concurring specially).

59. 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967).

60. *Id.* at 349.

61. *Yunis*, 859 F.2d at 971 (quoting *Brulay*, 383 F.2d at 349 n.5). In *United States v. Wolf*, 813 F.2d 970 (9th Cir. 1987), which also involved an American defendant who challenged the admissibility of his statement to Mexican authorities on self-incrimination and due process grounds, the court noted that there was “apparent tension” between *Brulay* and the Supreme Court’s ruling in *Connolly* that the introduction of evidence in a judicial proceeding did not by itself satisfy the state action requirement for triggering the constitutional protection against involuntary confessions. *Id.* at 972 n.3, 975 n.16. The parties had not briefed the issue, however, and the court “assume[d] without deciding that the constitutional protection against involuntary confessions applie[d] to confessions coerced by foreign police.” *Id.* at 972 n.3. *Yunis* was decided prior to *Connolly*, leaving open the validity of the court’s observation that if the involuntary statement was obtained by a foreign officer, its admission into evidence would violate the Fifth Amendment.

62. *Yunis*, 859 F.2d at 971 (quoting *Jersey v. Portash*, 440 U.S. 450, 459 (1979)).

63. 494 U.S. 259 (1990).

American law enforcement officials involving property of non-resident aliens with “no voluntary connection” to the United States.<sup>64</sup> The Court in *Verdugo-Urquidez* reasoned that unlike the Fifth Amendment which protects all “persons,” the Fourth Amendment protects only “the people” of the United States.<sup>65</sup> The term “people,” the Court found, “refer[red] to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”<sup>66</sup> Thus, the aftermath of *Verdugo-Urquidez* appears to be that citizens of foreign nations are not entitled to Fourth Amendment protection during foreign searches.<sup>67</sup>

In dictum, the Court in *Verdugo-Urquidez* noted that the Fifth Amendment did not apply extraterritorially to non-resident aliens.<sup>68</sup> For its dictum, the Court relied on *Johnson v. Eisentranger*.<sup>69</sup> In *Johnson*, a United States Military Commission convicted twenty-one German nationals, who had never been in United States territory, for attempting to inform the Japanese of United States troop movements before Japan’s surrender in World War II.<sup>70</sup> In their petition seeking a writ of habeas corpus, petitioners alleged that their trial, conviction, and imprisonment violated Articles I and III of the Constitution, as well as the Fifth Amendment.<sup>71</sup> The Court rejected this contention and ruled that “the Constitution d[id] not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.”<sup>72</sup>

In denying enemy alien war criminals the right to habeas corpus relief, it has been noted that the Court focused intently on the differences between the rights of friendly and enemy

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64. *Id.* at 261.

65. *Id.* at 265-66.

66. *Id.*

67. See *United States v. Barona*, 56 F.3d 1087, 1093-94 (9th Cir. 1995); *United States v. Inigo*, 925 F.2d 641, 656 (3d Cir. 1991).

68. See *Verdugo-Urquidez*, 494 U.S. at 269 (“we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States”).

69. 339 U.S. 763 (1950).

70. *Id.* at 766.

71. *Id.* at 767.

72. *Id.* at 785.



aliens, and that “[i]t was the existence of war between the United States and the alien’s [sic] homeland, not their alienage, which reduced the enemy alien’s rights. This reduction was justified because of the need to ensure war time security.”<sup>73</sup> Accordingly, some maintain that while *Johnson* “stands for the proposition that the courts may deny habeas corpus to enemy aliens in occupied territories during a declared war, the decision does not apply to the general treatment of non-enemy aliens abroad.”<sup>74</sup>

In the recent prosecution of several foreign nationals charged with the bombing of the American Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, Judge Sand ruled in *Bin Laden* that non-resident aliens were entitled to the same Fifth Amendment rights against self-incrimination as suspects questioned in the United States.<sup>75</sup> Notwithstanding the Supreme Court’s dictum in *Verdugo-Urquidez* that the Fifth Amendment did not apply to non-resident aliens extraterritori-

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73. Bryan William Horn, Note, *The Extraterritorial Application of the Fifth Amendment Protection Against Coerced Self-Incrimination*, 2 DUKE J. COMP. & INT’L L. 367, 378 (1992) (footnotes omitted); see also Leigh-Ann Patterson, Comment, *The Extraterritorial Application of the Fourth Amendment - United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990), 25 SUFFOLK U. L. REV. 289, 294 (1991) (the Court in *Johnson* “focused extensively on the special national security dangers posed by an enemy alien, narrowing its holding by noting that ‘enemy’ status, not ‘alien’ status, deprived aliens of both interterritorial and extraterritorial protections during war”) (footnote omitted).

74. John A. Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Actions*, 17 N.Y.U. J. INT’L L. & POL. 287, 302-03 (1985) (footnotes omitted); see Horn, *supra* note 73, at 379 (“[w]hile there may be wars on drugs or terrorism now, such campaigns are not the type envisioned by the holding in *Johnson*”) (footnote omitted). *But see* Harbury v. Deutch, 233 F.3d 596, 604 (D.C. Cir. 2000) (while *Johnson* concerned the rights of enemy aliens during wartime, “the Supreme Court’s extended and approving citation of [*Johnson*] in [*Verdugo-Urquidez*] suggests that its conclusions regarding extraterritorial application of the Fifth Amendment are not so limited”); Paul B. Stephan, III, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. J. INT’L L. 777, 781 n.14 (1980) (“[*Johnson*] involved enemy aliens who had borne arms against the United States. Although the Court regarded this fact as important, its opinion did not stress the distinction and much of the argument advanced therein applies with equal force to foreign nationals other than enemy aliens.”).

75. *Bin Laden*, 132 F. Supp. 2d at 181. *But see* *United States v. Raven*, 103 F. Supp. 2d 38, 39 (D. Mass. 2000) (relying on *Johnson* for the proposition that “[w]hen the questioning takes place overseas. . . foreign nationals do not benefit from the protections of the United States Constitution”).

ally, the court in *Bin Laden*, after a thorough analysis of this issue, reached a different conclusion.

To begin with, Judge Sand observed that the protective reach of the Fifth Amendment to persons located outside of the United States was not the issue since “any violation of the privilege against self-incrimination occurs, not at the moment law enforcement officials coerce statements through custodial interrogation, but when a defendant’s involuntary statements are actually used against him at an American criminal proceeding.”<sup>76</sup> In that regard, it is noteworthy that the majority in *Verdugo-Urquidez* agreed with the principle that the right against self-incrimination is triggered when an attempt is made to introduce the confession at trial. The Court there observed: “The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental 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.”<sup>77</sup>

Second, Judge Sand found that the “expansive language” used in the Fifth Amendment, in particular, the reference to “person” as opposed to “‘the people’ [found] in most of the other Amendments contained within the Bill of Rights,” suggested that its “protections seemingly apply with equal vigor to all defendants facing criminal prosecution at the hands of the United States, and without apparent regard to citizenship or community connection.”<sup>78</sup> Here again, it deserves mention that in his

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76. *Bin Laden*, 132 F. Supp. 2d at 181-82 (footnote omitted). Judge Sand further noted that if the opposite were true, “then no statute compelling witness immunity under grants of immunity could withstand constitutional challenge.” *Id.* at 182.

77. *Verdugo-Urquidez*, 494 U.S. at 264; see *Deshawn E. by Charolette 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.”). Precisely for this reason, Judge Sand found the government’s reliance on *Johnson* was “fundamentally misplaced” since the putative injury there occurred entirely abroad. *Bin Laden*, 132 F. Supp. 2d at 182 n.10. Additionally, Judge Sand distinguished *Johnson* on the ground that it involved “a specific kind of non-resident alien ‘the subject of a foreign state at war with the United States’” and also a trial and conviction under a military commission not an Article III court. *Id.* (quoting *Johnson* 339 U.S. at 769 n.2).

78. *Bin Laden*, 132 F. Supp. 2d at 183. When the person is an American citizen, the protections of the Fifth Amendment would attach with respect to conduct

concurring opinion in *Verdugo-Urquidez*, Justice Kennedy rejected the social compact theory as “irrelevant to any construction of the powers conferred or the limitations imposed” by the Constitution.<sup>79</sup> Describing the right of the defendant in that case, Justice Kennedy stated: “The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant.”<sup>80</sup>

Furthermore, Judge Sand observed that the Supreme Court has ruled that the right to due process under the Fifth Amendment applies to non-resident aliens who are tried in the United States irrespective of “their level of ‘insertion’ into American society.”<sup>81</sup> And, while “the Supreme Court has yet to rule affirmatively that the three remaining Fifth Amendment procedural guarantees – indictment by grand jury, bar on

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involving American law enforcement officials abroad. See *Reid v. Covert*, 354 U.S. 1, 10-14 (1956) (territorial boundaries cannot limit the Constitution’s full application to citizens abroad). See generally, Roszell D. Hunter, IV, Note, *The Extraterritorial Application of the Constitution - Unalienable Rights?* 72 VA. L. REV. 649, 662-64 (1986).

79. 494 U.S. at 276 (Kennedy, J., concurring). The compact theory advocates that aliens “abroad are neither parties to nor beneficiaries of the agreement between the federal government and its people embodied in the Constitution.” Stephan, *supra* note 74, at 782. And, the argument goes, “[e]xtending rights to [overseas] aliens, to individuals who are not parties to the compact between the federal government and its people, is contrary to this tradition and should be rejected unless it can be said that, by doing so, substantial benefits will inure to U.S. citizens.” *Id.* at 785. However, some have maintained that:

[t]his extension of social contract theory . . . takes a contract metaphor useful for describing the Framers’ view of the proper basis for the creation of government, and attempts to use it as a rigid rule for limiting constitutional protection. The Supreme Court . . . has moved beyond such a narrow construction of the Constitution in protecting aliens present in the United States. The social contract metaphor provides no valid reason why constitutional principles should not similarly restrict the government when it acts on aliens outside this country. Respect for the natural rights of all persons demands such restrictions.

Hunter, *supra* note 78, at 653 (footnotes omitted).

80. See *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

81. *Bin Laden*, 132 F. Supp. 2d at 183; see *Diaz*, 426 U.S. at 77 (“There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even those whose presence in this country is unlawful, involuntary, or transitory are entitled to that constitutional protection.”).

double jeopardy, and privilege against self-incrimination – apply to criminal defendants who are non-citizens” such a legal void was “emblematic, not of doctrinal reticence, but of widespread acceptance that these strictures apply universally to any criminal prosecution brought by the U.S. within its own borders.”<sup>82</sup> Indeed, in the context of the prosecution in *Bin Laden*, the parties had proceeded as if, in fact, the defendants possessed those rights.<sup>83</sup> For example, the government had sought a grand jury indictment nine times, the court reviewed the indictment which was ultimately returned for multiplicitous counts, and the wishes of the defendants not to testify at various hearings were honored.<sup>84</sup>

Finally, Judge Sand noted how the Supreme Court has urged that the privilege “‘not be interpreted in a hostile or niggardly spirit’”<sup>85</sup> and concluded that “the policies undergirding the Fifth Amendment privilege against self-incrimination are no less relevant when the criminal defendant at issue is an unconnected, non-resident alien.”<sup>86</sup> Conceding that these policies “may arguably lose their force when the fear of compelled self-incrimination points to a prospective foreign prosecution,” Judge Sand, relying on the fundamental and noble goals identified in *Murphy* as supporting the privilege,<sup>87</sup> found that when a defendant is “prosecuted within the United States, before a United States court, for alleged violations of United States law, having been previously and thoroughly interrogated by U.S. law enforcement – then the Government’s use of a coerced confession against him would still have the debilitating effect of infecting our criminal justice system.”<sup>88</sup>

But what if the statement is elicited by foreign law enforcement officials? Can a non-resident alien challenge the voluntariness of that statement on Fifth Amendment grounds if the government subsequently seeks to introduce it in a prosecution of the non-resident alien in an American court?

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82. *Bin Laden*, 132 F. Supp. 2d at 183 (citation omitted).

83. *Id.* at 184.

84. *Id.*

85. *Id.* at 185 (quoting *Ullmann*, 350 U.S. at 426).

86. *Id.* at 184.

87. See *supra* text accompanying note 27.

88. *Bin Laden*, 132 F. Supp. 2d at 184 (citation omitted).

There is support in the case law for the proposition that an American citizen, in a domestic prosecution, can challenge the admission of a statement given by him to foreign law enforcement officials on the grounds that it was not voluntarily made. Over one hundred years ago, in *Bram v. United States*,<sup>89</sup> the defendant challenged the admission into evidence of statements made by him to Canadian officials on voluntariness grounds, and the Court held that such statements had erroneously been admitted and reversed the conviction.<sup>90</sup> Subsequent federal cases, likewise, have found that the constitutional protection against coerced confessions applies when the statements at issue were made by citizens to foreign officials.<sup>91</sup>

Similarly, in at least one federal case involving the admissibility of statements made by a non-resident alien to foreign law enforcement officials, the court found that “[i]t could conceivably be argued that the prohibition against self-incrimination may still apply to a foreign interrogation even if the requirements of *Miranda* do not.”<sup>92</sup> The court then went on to rule that, assuming the standard governing voluntariness applied in

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89. 168 U.S. at 532.

90. *Id.*

91. See *United States v. Mundt*, 508 F.2d 904, 906 (10th Cir. 1974); *Kilday v. United States*, 481 F.2d 655, 656 (5th Cir. 1973); *Brulay*, 383 F.2d at 349. *But see Wolf*, 813 F.2d at 972 n.3 (assuming “without deciding that the constitutional protection against involuntary confessions applies to confessions coerced by foreign police”). *Brulay* relied on *Bram*. In a number of other cases after *Brulay*, federal courts have ruled that a statement obtained by foreign law enforcement officials abroad will not be admissible in a subsequent prosecution of the defendant in the United States unless the statement was made voluntarily. See, e.g., *United States v. Martindale*, 790 F.2d 1129, 1131 (4th Cir. 1986) (admissions by the defendant in interviews with British officers were admissible absent proof of duress); *United States v. Bagaric*, 706 F.2d 42, 69 (2d Cir. 1983) (no contention that admissions by defendant to Canadian officials obtained by duress or in violation of Canadian law); *United States v. Welch*, 455 F.2d 211, 213 (2d Cir. 1972) (“[w]henver a court is asked to rule upon the admissibility of a statement made to a foreign police officer, the court must consider the totality of the circumstances to determine whether the statement was voluntary”); *United States v. Chavarria*, 443 F.2d 904, 905 (9th Cir. 1971) (record contained no proof that statement by defendant to Mexican police was coerced). It is unclear from the opinions in those cases whether the defendant was an American citizen, permanent resident of the United States, or a foreign national.

92. *United States v. Molina-Chacon*, 627 F.Supp. 1253, 1263 (E.D.N.Y. 1986), *aff'd sub nom.*, *United States v. DiTomasso*, 817 F.2d 201 (2d Cir. 1987). The defendant in that case was a “Spanish National.” *Id.* at 1257.

the context of foreign interrogation, the statements were "clearly voluntary" and would not be suppressed.<sup>93</sup>

These cases, however, all arose prior to the Supreme Court's ruling in *Connelly* that the introduction of evidence in a judicial proceeding does not, by itself, satisfy the state action requirement.<sup>94</sup> Whether *Connelly's* rationale would foreclose an American citizen or non-resident alien from challenging the admissibility of a statement obtained by foreign government officials on Fifth Amendment grounds does not appear to have yet been decided by any court.<sup>95</sup> To the extent that foreign government officials are engaged in a joint venture with American law enforcement officials, an argument could be made by non-resident aliens (under *Yunis* and *Bin Laden*) and citizens that the protections of the Fifth Amendment attach to statements given to such officials.<sup>96</sup> Whether a viable challenge could be made on

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93. *Molina-Chacon*, 627 F. Supp. at 1263. In support of its ruling, the court relied on *Brulay* and the observation by the Supreme Court in *Elstad* that "[w]here an unwarned statement is preserved for use in situations that fall outside the sweep of the *Miranda* presumption, the primary criterion of admissibility [remains] the 'old' due process voluntariness test." *Id.* (quoting *Elstad*, 470 U.S. at 307-08 (quoting Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 877 (1981)).

94. *Connelly*, 479 U.S. at 163. The appeal in *Molina-Chacon* was argued the day after the Court issued its opinion in *Connelly* and in *DiTomasso*, which followed *Connelly*, did not address the voluntariness issue.

95. See *Wolf*, 813 F.2d at 972 n.3 (assuming "without deciding that the constitutional protection against involuntary confessions applies to confessions coerced by foreign police"); see also Stephen A. Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L L. 741, 775 (1980) (maintaining that the Constitution "require[s] that U.S. proceedings be conducted fairly. Unreliable evidence (such as coerced confessions) may be excluded in order to protect the fact finding process - not to control the activities of foreign law enforcement personnel"); Steve M. Kaplan, Note, *The Applicability of the Exclusionary Rule in Federal Court to Evidence Seized and Confessions Obtained on Foreign Countries*, 16 COLUM. J. TRANSNAT'L L. 495, 511 (1977) ("One important difference in the protection offered by the two amendments is that the Fifth Amendment's bar against self-incrimination creates a threshold criterion that a statement or confession must have been voluntarily given, regardless of whether there had been American participation in the questioning from which it resulted.").

96. See *Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir. 1980) ("[u]nder the joint venture doctrine, evidence obtained through activities of foreign officials, in which federal agents substantially participated and which violated the accused's Fifth Amendment or *Miranda* rights, must be suppressed in a subsequent trial in the United States"); *United States v. Covington*, 783 F.2d 1052, 1056 (9th Cir. 1986) ("[t]he extent of involvement of United States officials . . . becomes a vital inquiry").

the grounds that the confession was elicited by methods that shocked the conscience is unclear.<sup>97</sup>

### B. *Advice of Rights Under Miranda*

American law enforcement officials are bound by *Miranda* when they interrogate American citizens on foreign soil.<sup>98</sup> *Yunis*, as noted above, appears to be the first reported case where a court analyzed the extension of *Miranda* to foreign nationals interrogated by American law enforcement officials abroad.<sup>99</sup> The parties' stipulation in *Yunis* that a non-resident alien was entitled to the protections of *Miranda* directly led the court to an analysis of whether the defendant had voluntarily and intelligently waived his rights.

The court in *Bin Laden*, however, squarely confronted this question and ruled that *Miranda's* reach extended to the interrogation of non-resident aliens abroad by American law enforcement officials.<sup>100</sup> Judge Sand began his analysis by noting that

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97. See *United States v. Nagelberg*, 434 F.2d 585, 587 n.1 (2d Cir. 1970) ("There is no showing that the statement was coerced or taken in violation of the laws of Canada. There is no claim of 'rubbing pepper in the eyes,' or o[th]er shocking conduct."); *Molina-Chacon*, 627 F. Supp at 1262; see also Jessica W. Julian, *The Capture of a State Leader*, 34 A.F.L. Rev. 153, 186 (1991) (maintaining that "the general trend suggests that the right to a fair trial provided in the fifth amendment does extend to nonresident aliens being tried in an American tribunal and may be used to bar self-incriminating statements which were involuntarily made, even if made to foreign officers"); Kaplan, *supra* note 95, at 514 ("The 'shocking conduct' standard . . . like the other standards evolved in the areas of foreign-seized evidence and confessions, remains ambiguous; it is unclear precisely how shocking the conduct has to be before evidence obtained as a result of that conduct is excluded."); Saltzburg, *supra* note 95, at 775 (footnotes omitted) (arguing that "fundamental international norms of decency are incorporated in domestic law," and that "courts may want to exclude evidence obtained abroad by foreign officials in violation of such norms in order to demonstrate that no civilized nation should countenance violations of fundamental human rights").

98. See *Cranford v. Rodriguez*, 512 F.2d 860, 863 (10th Cir. 1975); *United States v. Dopf*, 434 F.2d 205, 206-07 (5th Cir. 1970).

99. Government agents in *Yunis* informed the defendant that "he would be afforded all the rights of a citizen of the United States and that he didn't have to be concerned with the fact that he wasn't an American. . . ." *Yunis*, 859 F.2d at 956. The confession was obtained while the defendant was aboard a naval warship in the Mediterranean in transit to the United States. *Id.* at 954.

100. *Bin Laden*, 132 F. Supp. 2d at 185-89. Judge Sand posited the question as follows:

Assume for purposes of this discussion these generalized facts: An individual held in custody of foreign police is suspected of having violated both local

the compulsion inherent in custodial surroundings — the heartland of *Miranda's* rationale — was “clearly no less troubling when carried out beyond our borders and under the aegis of a foreign station house.”<sup>101</sup> To the contrary, it was “far more likely that a custodial interrogation held in such conditions w[ould] present greater threats of compulsion since all that happens to the accused cannot be controlled” by the American law enforcement officials.<sup>102</sup> But what specific warnings should be given?<sup>103</sup> Judge Sand found that the first two traditional warnings — that the suspect must be told that he has the right to remain silent and that anything he says may be used against him — were uncontroversial.<sup>104</sup> That portion of the *Miranda* warnings addressing the assistance and presence of retained or publicly appointed counsel, however, presented a different question since those admonitions “may often be affected by the fact that the suspect is being interrogated overseas and that he is in the physical custody of a foreign nation.”<sup>105</sup> Those warnings,

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and U.S. criminal law. As a matter of global comity, U.S. law enforcement representatives are permitted inside the foreign stationhouse [sic] to pose their own questions to the suspect. U.S. agents eventually succeed in extracting inculpatory statements, and the suspect is thereafter transported to the United States for prosecution, with the consent of foreign authorities. By what standards should a domestic court admit the above statements as governmental evidence at trial?

*Id.* at 185. It should be noted, however, that in *Raven*, relying solely on *Johnson* and essentially with no discussion or analysis, the court ruled that the right to counsel implicated by the Fifth Amendment during questioning has no force when a foreign national is interviewed abroad by American law enforcement officials. *Raven*, 193 F. Supp. 2d at 39-40. To the extent that the court in *Raven* was referring to the *Miranda* admonition relating to the right to counsel, *Bin Laden* forcefully responds to why foreign nationals interrogated abroad by American law enforcement officials are entitled to receive *Miranda* warnings. *Bin Laden*, 132 F. Supp. 2d at 185-89.

101. *Bin Laden*, 132 F. Supp. 2d at 186.

102. *Id.* As to the government's contention that it was “positively perverse” that the admissibility of the statements by the defendants would not be subject to *Miranda* if they had been the product of questioning by foreign police, Judge Sand responded that there was “nothing at all anomalous in requiring *our own* Government to abide by the strictures of *our own* Constitution whenever it seeks to convict an accused, in *our own* courts, on the basis of admissions culled via an inherently coercive interrogation conducted by *our own* law enforcement.” *Id.* at 187 n.13.

103. See *supra* text accompanying note 44.

104. *Bin Laden*, 132 F. Supp. 2d at 187-88.

105. *Id.* at 188. Judge Sand made clear that “if the particular overseas context actually presents *no* obvious hurdle to the implementation of an accused's



Judge Sand reasoned, may be modified given the external considerations that arise from foreign custody. As Judge Sand explained:

The goal is to convey to a suspect that, with respect to any questioning by U.S. agents, his ability to exercise his right to the presence and assistance of counsel - a right ordinarily unqualified - hinges on two external considerations arising from the fact of his foreign custody. First, since there exists no institutional mechanism for the international provision of an American court-appointed lawyer, the availability of public counsel overseas turns chiefly on foreign law. Second, foreign law may also ban all manner of defense counsel from even entering the foreign station house, and such law necessarily trumps American procedure. Given these eventualities, U.S. law enforcement can only do the best they can to give full effect to a suspect's right to the presence and assistance of counsel, while still respecting the ultimate authority of the foreign sovereign. And if an attorney, whether appointed or retained, is truly and absolutely unavailable, and that result remains unsatisfactory to the suspect, he should be told that he need not speak to the Americans so long as he is without legal representation. Moreover, even if the suspect opts to speak without a lawyer present, he should know that he still has the right to stop answering questions at any time.<sup>106</sup>

In *Yunis and Bin Laden*, United States law enforcement representatives were responsible for the questioning of the foreign suspects. When foreign law enforcement officials are involved, however, courts unanimously have ruled that *Miranda* warnings are "not essential to the validity of a confession which has been given in a foreign country."<sup>107</sup> As the court explained in *United States v. Chavarria*:

*Miranda* was intended as a deterrent to unlawful police interrogations. When the interrogation is by the authorities of a foreign jurisdiction, the exclusionary rule has little or no effect upon the conduct of the foreign police. Therefore, so long as the trustwor-

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right to the assistance and presence of counsel, due care should be taken not to foreclose an opportunity that in fact exists." *Id.* (footnotes omitted).

106. *Id.* at 188-89 (footnotes omitted).

107. *Mundt*, 508 F.2d at 906; accord *Martindale*, 790 F.2d at 1131-32 (4th Cir. 1986); *Bagaric*, 706 F.2d at 69; *United States v. Nolan*, 551 F.2d 266, 273 (10th Cir. 1977). As noted earlier, it is unclear from the opinions in some of these cases whether the defendant was an American citizen, a resident alien, or a foreign national.

thiness of the confession satisfies legal standards, the fact that the defendant was not given *Miranda* warnings before questioning by foreign police will not, by itself, render his confession inadmissible.<sup>108</sup>

The courts in these cases based their analysis on the lack of application of the exclusionary rule, and not whether the Fifth Amendment is triggered at all, given that foreign law enforcement officials are involved.

The same principle regarding the exclusionary rule holds true if the statements obtained by the foreign law enforcement officials "violate the foreign law."<sup>109</sup> If, however, American and foreign law enforcement officials were engaged in a joint venture,<sup>110</sup> foreign law enforcement officers were acting as agents of the United States, or it appears that the American authorities willfully were attempting to evade the strictures of *Miranda* by employing foreign authorities, the requirements of *Miranda* may be applicable.<sup>111</sup>

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108. *Chavarria*, 443 F.2d at 905. "It is well established, of course, that the exclusionary rule, as a deterrent sanction, is not applicable where a private party or a foreign government commits the offending act." *United States v. Janis*, 428 U.S. 433, 455 n.31 (1976); see *Connelly*, 479 U.S. at 166 ("The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause."); *Knapp*, 357 U.S. at 380 ("purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the . . . Federal Government").

109. *Covington*, 783 F.2d at 1056 ("the exclusionary rule is not applicable if the statements are obtained by foreign officers in a foreign country even if it may violate the foreign law").

110. See *Pfeifer*, 615 F.2d at 877; *United States v. Emery*, 591 F.2d 1266, 1267 (9th Cir. 1978); *Molina-Chacon*, 627 F. Supp. at 1262; cf. *United States v. Shea*, 436 F.2d 740, 742 (9th Cir. 1970).

111. See *Martindale*, 790 F.2d at 1131-32; *Covington*, 783 F.2d at 1056; *United States v. Heller*, 625 F.2d 594, 599 (5th Cir. 1980). As to the agency distinction, some commentators have observed:

[I]n this context it will take a bit more to establish the requisite agency than when police obtain the assistance of private citizens in this country. This is because cooperative efforts among police agencies of different countries is a natural and desirable arrangement, and thus should not be inherently suspect as a likely effort to accomplish indirectly that which could not be done directly. At least where the foreign police were also serving law enforcement interests of their own country, it is not enough that American officers have played a substantial role in events leading to the arrest or that the cooperation has the character of a joint venture.

LAFAVE ET AL., *supra* note 29, § 6.10(e), at 625.

#### IV. Conclusion

The trend in the case law suggests that the Fifth Amendment privilege against self-incrimination extends to non-resident aliens interrogated abroad by American law enforcement officials. As a result, a statement elicited by American law enforcement officials from a suspect abroad who is a non-resident alien must be found to be voluntary before it is admitted into evidence against the suspect in a domestic federal criminal prosecution. The developing case law also indicates that at least modified *Miranda* warnings must be administered to foreign suspects who are interrogated by American law enforcement representatives abroad. How the Supreme Court would rule on these issues, however, is not at all clear.