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Requiring Miranda Warnings for the Christmas Day Bomber and Other Terrorists

Malvina Halberstam

REQUIRING *MIRANDA* WARNINGS FOR THE CHRISTMAS DAY BOMBER AND OTHER TERRORISTS

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I. INTRODUCTION

Just before noon on December 25, 2009, Umar Farouk Abdulmutallab, a 23-year-old Nigerian man, tried to detonate a bomb on a Northwest flight from Amsterdam to Detroit carrying 278 passengers.[1] Fortunately, the device malfunctioned; although it caused a fire, the airplane did not explode.[2] The man, dubbed the Christmas Day Bomber ("CDB") by the media, was subdued by other passengers and arrested when the plane landed in Detroit.[3] FBI agents questioned him for approximately fifty minutes and he was reportedly cooperating.[4] The questioning was stopped to give him medical treatment for the burns he had sustained; when he returned he was given *Miranda* warnings and refused to answer any further questions.[5] In response to criticism, the Attorney General said that the officers questioning the CDB were legally required to give him *Miranda* warnings.[6]

Were they required to do so? Are law enforcement officers required to give terrorists the warnings set forth by the Supreme Court in *Miranda*? This paper suggests several lines of reasoning that might have led government officials to question the Christmas Day Bomber without giving him *Miranda* warnings and might lead government officials in future cases to question terrorists apprehended while attempting an attack without *Miranda* warnings.

II. THE PUBLIC SAFETY EXCEPTION

In *New York v. Quarles*, decided in 1984, the United States Supreme Court established a "public safety" exception to *Miranda*.[7] In that case, a woman approached police officers and told them she had just been raped.[8] She described the man who had raped her, and told the

* Malvina Halberstam is a professor of law at the Benjamin N. Cardozo School of Law, Yeshiva University. She served as an Assistant District Attorney in New York County and as Counselor on International Law in the U.S. Department of State, Office of the Legal Adviser. The author would like to thank Ann-Margret Gidley, Cardozo 2012, for her assistance with the research for this paper. An earlier version of this paper was presented at a conference on Lawfare: The Use of Law as a Weapon of War, held at the New York County Lawyer's Association, March 11, 2010.

[1] Anahad O'Connor & Eric Schmitt, *Terror Attempt Seen as Man Tries to Ignite Device on Jet*, N.Y. TIMES, Dec. 25, 2009, http://www.nytimes.com/2009/12/26/us/26plane.html.

[2] *Id.*

[3] *Id.*

[4] *See Abdulmutallab in 50 Minutes*, WALL ST. J., Jan. 26, 2010, http://online.wsj.com/article/SB10001424052748703808904575025231056290438.html.

[5] *See* Richard Serrano & David Savage, *Officials OKd Miranda Warning for Accused Airline Plotter*, L.A. TIMES, Feb. 2, 2010, http://articles.latimes.com/2010/feb/01/nation/la-na-terror-miranda1-2010feb01.

[6] Letter from Att'y Gen. Eric Holder to Mitch McConnell, U.S. S. Minority Leader (Feb. 3, 2010) [hereinafter Holder Letter], *available at* http://www.justice.gov/cjs/docs/ag-letter-2-3-10.pdf.

[7] 467 U.S. 649, 655-56 (1984).

[8] *Id.* at 651.

officers that he ran into a supermarket nearby and that he had a gun.[9] The officers went with the woman to the supermarket and saw someone fitting the description she had given.[10] When the suspect saw the officer, he ran to the back of the supermarket and the officer gave chase.[11] He apprehended the suspect, frisked him, and discovered that he was wearing an empty shoulder holster.[12] After he handcuffed the suspect, the officer asked him where the gun was.[13] The suspect responded, "the gun is over there," pointing in the direction of some empty cartons.[14]

The New York Court of Appeals ruled that the statement and gun were inadmissible because the defendant had not been given *Miranda* warnings.[15] The United States Supreme Court reversed.[16] The Court stated: "[W]e conclude today that there are limited circumstances where the judicially imposed strictures of *Miranda* are inapplicable."[17] "We believe that this case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."[18] "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."[19]

Applying these principles to the case before it, the Court said,

> 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 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.
>
> In such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding. 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*. We decline to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds,

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[9] *Id.* at 651-52.

[10] *Id.* at 652.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] People v. Quarles, 58 N.Y. 2d 665, 666 (N.Y. Ct. App. 1982), *rev'd*, 467 U.S. 649 (1984).

[16] *Quarles*, 467 U.S. 649.

[17] *Id.* at 653.

[18] *Id.*

[19] *Id.* at 656.

> 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.[20]

Given that in the past al Qaeda attacks have involved several attacks simultaneously or in close proximity — the 9/11 attacks,[21] the London subway attacks,[22] the Spanish train attacks[23] — the likelihood that other airplanes were in danger of being blown up was at least as great as the likelihood that an accomplice might make use of the gun, or that a customer or store employee might later find the gun (and presumably hurt himself or others accidently) in the *Quarles* case.

And, "if the police are required to recite the familiar *Miranda* warnings before asking" about other attacks planned or in progress, a suspect in the CDB's position "might well be deterred from responding,"[24] as he in fact was.[25] While there might be some question about the danger posed in the *Quarles* case, as was strongly argued by the dissent,[26] there can be no question that there was a real danger that similar attacks on other airplanes were planned or even in progress when the CDB was arrested. And, in Justice Rehnquist's words, here, too, "had *Miranda* warnings deterred" the CDB "from responding . . . the cost would have been something more than merely the failure to obtain evidence useful in convicting" him.[27] How many lives might have been saved if one of the 9/11 hijackers had been apprehended and questioned before the attacks? Should law enforcement officials have been required to give him *Miranda* warnings and take the risk that he would refuse to talk? It would be difficult to find a clearer case for the application of the public safety exception than a terrorist apprehended as he was about to or in the process of committing an attack.

III. *MIRANDA*

Although it is frequently stated that law enforcement officials are required to give *Miranda* warnings before questioning a suspect in custody, it is not a violation of *Miranda* for police to question a suspect without first giving him the warnings set forth in that case.[28] It is only

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[20] *Id.* at 657-58 (emphasis added).

[21] *See* THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS ON THE UNITED STATES 1-35 (W.W. Norton & Co. 2004), *available at* http://govinfo.library.unt.edu/911/ report/911Report.pdf (discussing the terrorist attacks on the United States of September 11, 2001).

[22] COULD 7/7 HAVE BEEN PREVENTED? REVIEW OF THE INTELLIGENCE ON THE LONDON TERRORIST ATTACKS ON 7 JULY 2005 13-14 (2009), *available at* http://www.cabinetoffice.gov.uk/sites/default/files/resources/20090519_77review.pdf (discussing the bombing of London's public transportation system on July 7, 2005).

[23] *See Madrid Train Attacks*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/guides/457000/457031/html/ (last visited Nov. 30, 2010). *See also Atentados Terroristas Del Día 11 De Marzo De 2004 En Madrid* [Terrorist Attacks of March 11, 2004 in Madrid] Central Criminal Court of Spain Summary Number 20/2004 1,6 (2004), http://www.elmundo.es/documentos/2006/04/11/autohtml/index.html?cual=1 (discussing the bombings of four commuter trains in Madrid on March 11, 2004).

[24] *See Quarles*, 467 U.S. at 657.

[25] Warren Richey, *Holder Letter: Why We Read Christmas Day Bomber His Rights*, THE CHRISTIAN SCIENCE MONITOR (Feb. 2, 2010), http://www.csmonitor.com/USA/Justice/2010/0203/Holder-letter-why-we-read-Christmas-Day-bomber-his-rights; see O'Conner and Schmitt, *supra* note 1.

[26] *Quarles*, 467 U.S. at 674-78 (Marshall, J., dissenting).

[27] *See id.* at 657.

[28] United States v. Patane, 542 U.S. 630, 641 (2004) (plurality opinion).

a violation to use the incriminating statements in evidence against him at trial.[29] The Supreme Court has stated in many cases that *Miranda* is a prophylactic rule[30] designed to protect the Fifth Amendment provision that no one shall be compelled to be a witness against himself. The violation of the Fifth Amendment occurs at trial, not when the questions are asked.[31] However, the right not to be compelled to testify at trial would be of little value if the person could be compelled to answer questions before trial and the answers could be used against him at trial.[32] Therefore, the Supreme Court long ago held that to be admissible at trial, a pre-trial confession must be voluntary.[33] *Miranda* goes one step further: it prohibits the use at trial of any incriminating statement by the defendant unless police inform him prior to questioning him that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[34] The purpose of the warnings is "to dispel the compelling atmosphere of the interrogation."[35]

Thus, questioning someone without first giving the warnings set forth in *Miranda* is not a violation of the law; *the violation is the use of the answers to incriminate him at the trial.*[36] In this respect, the Fourth and Fifth Amendments are very different. Although the exclusionary rule applies to both, a violation of the Fourth amendment occurs at the time of search; a violation of the Fifth Amendment occurs when the evidence is used in court.[37] This difference stems from the difference in the language of the two amendments.

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[38] The Fifth Amendment provides, in pertinent part, "[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . ."[39] A search that is "unreasonable," or without a warrant in situations where a warrant is required, violates the Fourth Amendment regardless of whether the evidence is used at trial or not.[40] The Fifth Amendment is only violated

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[29] *Id.*

[30] *See, e.g.*, *id.* at 636; Chavez v. Martinez, 538 U.S. 760, 770 (2003) (plurality opinion); Duckworth v. Eagan, 492 U.S. 195, 203 (1989); Michigan v. Tucker, 417 U.S. 433, 439 (1974).

[31] *Patane*, 542 U.S. at 641 ("A mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule . . . potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial."); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) ("A constitutional violation occurs only at trial.").

[32] *See Patane*, 542 U.S. at 632.

[33] *See* Bram v. United States, 168 U.S. 532, 542–43 (1897) ("[A] confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.").

[34] Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[35] *Id.* at 465.

[36] *See Patane*, 542 U.S. at 641 (2004).

[37] *See* United States v. Calandra, 414 U.S. 338, 354 (1974); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right…a constitutional violation occurs only at trial." (citing Malloy v. Hogan, 378 U.S. 1 (1964))).

[38] U.S. CONST. amend. IV.

[39] U.S. CONST. amend. V.

[40] *See e.g.*, *Calandra*, 414 U.S. at 354 (holding that unreasonable government intrusions are "fully accomplished by the original search without probable cause.").

by the use of the "compelled" testimony at trial.[41] The Supreme Court has emphasized this distinction in a number of cases. For example, in the *Verdugo* case, the Court said:

> [T]he Fourth Amendment . . . operates in a different manner than the Fifth Amendment . . . [A] constitutional violation [of the Fifth Amendment] occurs only at trial . . . . The Fourth Amendment functions differently. It prohibits "unreasonable searches and seizures" whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is "fully accomplished" at the time of an unreasonable governmental intrusion.[42]

In *Quarles,* Justice O'Connor, who concurred in part and dissented in part, stated, "The harm caused by failure to administer *Miranda* warnings relates only to admission of testimonial self-incriminations . . . ."[43] Justice Marshall, who dissented, was even more emphatic that questioning a suspect without giving him *Miranda* warnings is not a violation of the Fifth Amendment or of *Miranda*:

> The irony of the majority's decision is that the public's safety can be perfectly well protected without abridging the Fifth Amendment. If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. Such unconsented questioning may take place . . . when police officers . . . believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information . . . . *[N]othing in the Fifth Amendment or our decision in Miranda v. Arizona proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.*[44]

This was not changed by the Supreme Court decision in *Dickerson*,[45] which characterized *Miranda* as a "constitutional rule."[46] In *United States v. Patane*, decided after *Dickerson,* the Court said, "[A] mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule."[47]

Generally, law enforcement officers give *Miranda* warnings because they want to be able to use the defendant's statement in court to convict him. In the case of the CDB, who was caught red-handed, his incriminating statements were probably not even needed to convict him.[48] Moreover, in the usual criminal case, conviction is the main goal. However, in the case of a terrorist who is a member of a group such as al Qaeda, getting information about the terrorist organization, or other terrorist acts that are being planned, may be far more important than convicting any one terrorist. It might, therefore, be necessary to question him even where the other evidence is not overwhelming.

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[41] *See* Chavez v. Martinez, 538 U.S. 760, 767 (2003) (plurality opinion) ("[I]t is not until [the use of compelled testimony] in a criminal case that a violation of the Self-Incrimination Clause occurs." (citing Brown v. Mississippi, 297 U.S. 278, 286 (1936); *Verdugo-Urquidez*, 494 U.S. at 264)).

[42] *Verdugo-Urquidez,* 494 U.S. at 264.

[43] New York v. Quarles, 467 U.S. 649, 669 (1984).

[44] *Id.* at 686 (emphasis added).

[45] Dickerson v. United States, 530 U.S. 428 (2000).

[46] *Id.* at 444 ("In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively.").

[47] 542 U.S. 630, 641 (2004) (plurality opinion). The Court further stated, "[P]olice do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*." *Id.*

[48] *See* O'Connor & Schmitt, *supra* note 1.

In response to a letter from Senator Mitch McConnell, the Senate minority leader, (joined by other Senators),[49] Attorney General Eric Holder wrote, "both before and after 9/11, the consistent, well-known, lawful, and publicly-stated policy of the FBI has been to provide *Miranda* warnings prior to any custodial interrogation conducted inside the United States."[50] He went on to say that the FBI manual for Domestic FBI Operations "provides explicitly that . . . [w]ithin the United States, *Miranda* warnings are required to be given prior to custodial interviews . . . ."[51] The implication of the Attorney General's letter and of the FBI Manual appears to be that FBI agents are legally required to give *Miranda* warnings prior to interrogation.[52] As noted earlier, questioning a suspect without giving *Miranda* warnings is not a violation of the Fifth Amendment or of *Miranda*. Only use of incriminating statements elicited as a result of such interrogation is a violation of *Miranda*.[53] The provision in the FBI handbook apparently reflects a policy decision by the Justice Department to require FBI agents to give *Miranda* warnings before questioning a suspect in order to ensure that any incriminating statements elicited are admissible at the trial.[54] Its application to interrogation of terrorists, particularly those believed to be affiliated with a terrorist organization such as al Qaeda, needs to be reconsidered.

The letter from Mr. Holder also quotes, in a footnote, a section from the *FBI Legal Handbook for Special Agents*:

> The warning and waiver of rights is not required when questions which are reasonably prompted by a concern for public safety are asked. For example, if Agents make an arrest in public shortly after the commission of an armed offense, and need to make an immediate inquiry to determine the location of the weapon, such questions may be asked, even of an in-custody suspect, without first advising the suspect of [his *Miranda* rights].[55]

While this is correct, it conveys the impression that the public safety exception is limited to very brief questioning immediately after the arrest. Although that was the situation in the *Quarles* case, the reasoning of the case is not so limited. *Quarles* permits use of evidence obtained by questioning a suspect without giving *Miranda* warnings, whenever "concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."[56] Reasonably interpreted, questioning a terrorist – especially one captured in the process of committing, or about to commit, an attack – without *Miranda* warnings does not bar use of evidence thus obtained at trial, as long as it is plausible to believe the suspect has information that might avert another terrorist attack.

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[49] Letter to Att'y Gen. Eric Holder from GOP Sens. Kit Bond, Susan Collins, Jeff Sessions, & John McCain, *available at* http://sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord_id=7066ef42-0cf1-49d1-5dc3-2055844d365e.

[50] Holder Letter, *supra* note 6.

[51] *Id.*

[52] *See* FEDERAL BUREAU OF INVESTIGATION, LEGAL COUNSEL DIVISION, *FBI Legal Handbook for Special Agents* [hereinafter *FBI Legal Handbook*], § 7-2 (rev. 2003), *available at* http://foia.fbi.gov/filelink.html?file=/legal_handbook_spec_agent/legal_handbooks_spec_agent.pdf.

[53] *See* United States v. Patane, 542 U.S. 630, 641 (2004) (plurality opinion) ("[A] mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule . . . potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial."); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) ("[A] constitutional violation occurs only at trial.").

[54] *See FBI Legal Handbook,* § 7-3.2(6).

[55] Holder Letter, *supra* note 6, n.2 (quoting *FBI Legal Handbook*, §7-2).

[56] New York v. Quarles, 467 U.S. 649, 653 (1984).

In hearings before the Senate Select Committee on Intelligence, in response to a question by Senator Snowe, FBI Director Robert S. Mueller III testified,

> [I]n the initial interview, we had to determine whether there were other bombs on the plane, whether there were other airplanes that had similar attacks contemplated [*sic*], wanted to understand who the bomb maker was, who had directed him. All of that came in the first series of questions.[57]

Following that initial questioning, Mr. Mueller testified, the CDB was given *Miranda* warnings.[58] When Senator Snowe persisted, "I don't understand why we'd want to issue the *Miranda* rights when we're worried about whatever other subsequent events that might be occurring,"[59] Mr. Mueller replied, "Because we also want to utilize his statements to effectively prosecute him."[60]

Implicit in this answer are two assumptions:

1. The public safety exception did not apply to any questioning after the initial questioning, *and*
2. Obtaining evidence that could be used to prosecute him was more important than gathering further intelligence.

Neither assumption is necessarily correct. The first cannot be assessed without knowing what information the FBI agents had obtained in the initial questioning. For example, were they absolutely sure that no other attacks were being planned? If not, then at least arguably, further questioning was necessary to ensure public safety and any statements elicited without *Miranda* warnings would be admissible. The second — that obtaining admissible evidence was more important than the intelligence that might be acquired by further questioning — seems to be clearly wrong in this case, given the numerous witnesses to the attempted attack.

The FBI Manual and Guidelines should be amended to make clear: (1) that *Miranda* does not prohibit interrogation without first providing the warnings, but only the use of the evidence obtained without *Miranda* warnings at trial; (2) that in the case of terrorist attacks, the evidence obtained might be admissible even if no *Miranda* warnings were given under the public safety exception; (3) that whether to give *Miranda* warnings in situations where it is believed the public safety exception would not apply is a policy decision that should be made by weighing the need for intelligence that might be acquired by questioning the suspect against the need to use any incriminating statement he might make at trial; and (4) that, if time permits, those decisions should be made by the Attorney General and the Director of National Intelligence, or someone specifically designated by them for that purpose, not the agent who happens to be at the scene.

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[57] *Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence*, 111th Cong. 33 (2010) (statement of Director Robert S. Mueller III, Director, Federal Bureau of Investigation).

[58] *Id.*

[59] *Id.*

[60] *Id.*

IV. GRAND JURY

The Fifth Amendment protects against self-incrimination.[61] It does *not* protect against incriminating others.[62] A witness can be legally compelled to give evidence that incriminates others, either at trial or before a Grand Jury.[63] If he refuses to do so, he can be held in contempt and imprisoned.[64] There is no requirement that a witness called before a Grand Jury be given *Miranda* warnings.[65] The Justice Department could convene an investigative Grand Jury — a Grand Jury to investigate al Qaeda or the threat of terrorist attacks in the United States — and ask questions about al Qaeda, its organization, its activities or, more generally, about terrorist attacks. A witness before a Grand Jury has the right to invoke the privilege against self-incrimination if the answer "might" incriminate him.[66] The CDB, or another terrorist, might do so, even if he is not given *Miranda* warnings; but he might not. Moreover, if he does invoke the privilege against self-incrimination, the United States Attorney could give him use immunity[67] — which means that only the answers he gives and any evidence obtained as a result cannot be used against him.

V. THE MONTREAL CONVENTION

Lastly, an attempt to blow up an airplane is a violation of the Montreal Convention on Airplane Sabotage,[68] which the United States has ratified.[69] Under that Convention several States have jurisdiction to try the alleged offender: the State in whose territory the act is committed; the State in which the airplane is registered; the State of nationality of the offender; and the State in which he is found.[70] The Convention provides that the State in which he is found is obligated to

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[61] U.S. CONST. amend. V, cl. 3.

[62] *See* United States v. Mandujano, 425 U.S. 564, 572 (1976) (plurality opinion) ("The [Fifth Amendment] privilege cannot . . . be asserted by a witness to protect others from possible criminal prosecution." (citing Rogers v. United States, 340 U.S. 367, 371 (1951), which held that the privilege against self-incrimination is "solely for the benefit of the witness," and is "purely a personal privilege of the witness") (internal footnotes omitted)).

[63] *See, e.g.*, United States v. Calandra, 414 U.S. 338, 345 (1974) ("[T]he power of a federal court to compel persons to appear and testify before a grand jury is . . . firmly established.") (citing Kastigar v. United States, 406 U.S. 441, 443 (1972)).

[64] *See* United States v. Wilson, 421 U.S. 309, 316 (1975) (holding in contempt two witnesses who refused to testify and stating that the "face-to-face refusal to comply with the court's order itself constituted an affront to the court, and when that kind of refusal disrupts and frustrates an ongoing proceeding . . . summary contempt must be available to vindicate the authority of the court . . . .") (internal footnote omitted).

[65] *See Mandujano*, 425 U.S. at 579 (holding *Miranda* warnings inapplicable to Grand Jury testimony).

[66] *Calandra*, 414 U.S. at 346.

[67] *See* Kastigar v. United States, 406 U.S. 441, 453 (1972) ("Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom . . . prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.").

[68] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *ratified by the United States* Nov. 1, 1972, 24 U.S.T. 564, 974 U.N.T.S. 178, *available at* http://treaties.un.org/doc/db/Terrorism/Conv3-english.pdf.

[69] *Id.* at 178 n.1.

[70] *Id.* art. 5(1) ("Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases: (a) when the offence is committed in the territory of that State; (b) when the offence is committed against or on board an aircraft registered in that State . . . ."); art. 5(2) ("Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences . . . in the case where the alleged offender is present in its territory. . . .").

try him or to extradite him to another State that has jurisdiction.[71] Since most States do not exclude incriminating statements elicited without *Miranda* warnings, the United States might have the option of extraditing him to another State that would not be barred from using his incriminating statements; whether the United States would choose to do so would, of course, depend on a number of factors. It is not suggested that the United States do so, particularly not in cases such as that of the CDB, where there is unquestionably sufficient evidence to convict without using any self-incriminating statements he might have made, but only that it should not be ruled out in advance for all cases.

The United States has been criticized for sending suspects to countries where they were tortured.[72] The two situations are not analogous. Failure to give *Miranda* warnings is not comparable to engaging in torture. Torture is a crime under the domestic law of most states,[73] including the United States,[74] and a violation of a treaty ratified by 147 States,[75] including the United States.[76] Use of incriminating statements elicited without *Miranda* warnings is not a crime, nor a violation of international law.

VI. SUMMARY AND CONCLUSION

In sum, a suspect in custody may be questioned without being given *Miranda* warnings, though use of the evidence obtained as a result of such questioning at the trial may be barred.[77] In the case of a terrorist, such as the CDB, the evidence obtained would probably be admissible under the public safety exception of *Quarles*.[78] Indeed, the CDB case is a far more compelling case for application of the public safety exception than the *Quarles* case, in which it was

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[71] *Id*. art. 7 ("The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its component authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."); art. 8(1) ("The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them.").

[72] *See* Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails*, N.Y. TIMES, Mar. 6, 2005, http://www.nytimes.com/2005/03/06/politics/06intel.html (last visited Nov. 1, 2010) ("[F]ormer government officials say that since the Sept. 11 attacks, the C.I.A. has flown 100 to 150 suspected terrorists from one foreign country to another, including to Egypt, Syria, Saudi Arabia, Jordan and Pakistan. Each of those countries has been identified by the State Department as habitually using torture in its prisons . . . [and that these programs] ha[ve] been bitterly criticized by human rights groups.").

[73] *See, e.g.*, Canada Criminal Code, R.S.C., ch. C-46 § 269.1 (1985) (defining torture in accordance with the definition contained in Article 1 of the *Convention Against Torture* and stating that any statement obtained as a result of torture is inadmissible as evidence in any proceeding over which the Canadian Parliament has jurisdiction); Schweizerisches Strafgesetzbuch [StGB], Swiss Criminal Code, Dec. 21,1937, art. 264*a* (Switz.) as amended by Gesetz, Pct. 4, 1991, AS 2465 (1992), art. 264a (f) (defining torture as "inflict[ing] severe pain or suffering or a serious injury, whether physical or mental, on a person in his or her custody or under his or her control"); Code pénal [C. pén.] art. 212-1 (Fr.) (making torture punishable by life imprisonment); Nihonkoku Kenpō [Kenpō] [Constitution], art. 36 (Japan) ("The infliction of torture by any public officer and cruel punishments are absolutely forbidden.").

[74] *See* 18 U.S.C. § 2340.

[75] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10. 1984, 1465 U.N.T.S. 85, 113* (entered into force June 26, 1987), *available at* http://www.state.gov/documents/organization/100296.pdf. The Convention has 147 parties as of Apr. 2, 2011.

[76] *Id*.

[77] *See supra* notes 28-31, 36-47 and accompanying text.

[78] *See supra* notes 24, 26-27 and accompanying text.

established. But, even if the evidence would not be admissible, in terrorist cases acquiring further intelligence may well be more important than reading the suspect the *Miranda* warnings, to ensure that if he makes any incriminating statements they would be admissible at trial. At present Justice Department policy and the FBI Manual and Guidelines interpret the public safety exception narrowly and require FBI agents to give *Miranda* warnings prior to questioning a suspect in custody, without weighing the need for ensuring that the evidence will be admissible at trial against the importance of acquiring further intelligence.[79] Whatever the pros and cons of this policy with respect to routine investigations, it should be reconsidered and changed with respect to those suspected of terrorist attacks.

The government also has the option of getting further information about the terrorist organization and attacks being planned by questioning the suspect before an investigative Grand Jury, with or without use immunity.[80] Lastly, if evidence was obtained without *Miranda* warnings in a case where the public safety exception does not apply — very unlikely in the case of terrorist attacks — and that evidence is necessary for conviction, the United States might consider extraditing him to another State that has jurisdiction under the applicable treaty and does not bar use of such evidence.[81]

VII. EPILOGUE

In May 2010, the Attorney General stated that the government would ask Congress to enact legislation to permit FBI agents to question terrorist suspects without giving *Miranda* warnings and that this was "a new priority for the administration."[82] In an interview on Meet The Press, Mr. Holder said:

> MR. HOLDER: We want to work with Congress to come up with a way in which we make our public safety exception more flexible and, again, more consistent with the threat that we face. And yes, this is, in fact, big news. This is a proposal that we're going to be making and that we want to work with Congress about.
>
> MR. GREGORY: So a new priority for the administration.
>
> MR. HOLDER: It is a new priority.[83]

In the many months that have elapsed since the Attorney General's statements, no such legislation has been enacted.[84] While such legislation might be politically helpful, it is not legally

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[79] *See supra* notes 52-53, 55 and accompanying text.

[80] *See supra* Part IV.

[81] *See supra* Part V.

[82] On May 9, 2010, Attorney General Eric Holder, on ABC's "This Week" and on NBC's "Meet the Press," stated that the Obama administration is open to modifying Miranda protections to deal with the "threat[s] that we now face." Holder continued, "I think we have to give serious consideration to at least modifying that public safety exception." "That's one of the things that I think we're going to be reaching out to Congress to do, to come up with a proposal that is both constitutional, but that is also relevant to our time and the threat that we now face." Charlie Savage, *Holder Backs a Miranda Limit for Terror Suspects,* N.Y. TIMES, May 9, 2010, *available at* http://www.nytimes.com/2010/05/10/us/politics/10holder.html (last visited Mar. 7, 2011); Anne E. Kornblut, *Obama Administration Looks into Modifying Miranda Law in the Age of Terrorism*, WASH. POST, May 10, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/05/09/AR2010050902062.html (last visited Mar. 7, 2011).

[83] Transcript of Eric Holder Interview, *Meet the Press* (May 9, 2010), http://www.msnbc.msn.com/id/37024384/ns/meet_the_press/page/2/.

[84] Two bills were proposed in Congress following the Attorney General's statements. On May 27, 2010, Kansas Congressman Todd Tiahrt proposed H.R. 1413, entitled "Expressing the sense of the House of

necessary. The Justice Department has apparently come to the same conclusion.[85] An FBI memorandum dated October 21, 2010, but first made public March 24, 2011,[86] states,

> In light of the magnitude and complexity of the threat often posed by terrorist organizations, particularly international terrorist organizations, and the nature of their attacks, the circumstances surrounding an arrest of an operational terrorist may warrant significantly more extensive public safety interrogation without *Miranda* warnings than would be permissible in an ordinary criminal case.[87]

Representatives that the holding in *Miranda v. Arizona* may be interpreted to provide for the admissibility of a terrorist suspect's responses in an interrogation without administration of the Miranda warnings, to the extent that the interrogation is carried out to acquire information concerning other threats to public safety." H.R. Res. 1413, 111th Cong., 2d Sess. (2010). The bill stated,

> [I]t is [the] sense of the House of Representatives that the "public safety"exception announced in *New York v. Quarles* . . . may be interpreted such that the responses of a person interrogated in connection with an act of terrorism who has not been administered the warnings described in Miranda are admissible as evidence against that person in a criminal prosecution, to the extent that the interrogation is carried out because of a reasonable concern that the person has information about other threats to public safety.

Id. The bill was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties on July 26, 2010. The proposed bill was cleared from the books when the 111th Congressional Session ended. On July 29, 2010, California Congressman Adam Schiff proposed H.R. 5934, entitled "Questioning of Terrorism Suspects Act of 2010." H. Res. 5934, 111th Cong., 2d Sess. (2010). The bill stated,

> It is the sense of Congress that the public safety exception to the constitutional requirement for what are commonly called Miranda warnings allows unwarned interrogation of terrorism suspects for as long as is necessary to protect the public from pending or planned attacks when a significant purpose of the interrogation is to gather intelligence and not solely to elicit testimonial evidence. . . .
>
> In the case of an individual who is a terrorism suspect, upon ex parte application made by the Government within 6 hours immediately following the person's arrest or other detention, that individual may be taken before a magistrate not later than 48 hours after arrest or other detention and any confession made within those 48 hours shall not be considered inadmissible solely because the individual was not presented to a magistrate earlier.

Id. The bill was referred to both the Subcommittee on the Constitution, Civil Rights, and Civil Liberties and the Subcommittee on Crime, Terrorism, and Homeland Security on Sept. 20, 2010. The proposed bill was cleared from the books when the 111th Congressional Session ended. Prior to the Attorney General's statements, Senators John McCain and Joe Lieberman introduced S. 3081, the "Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010." S. 3081, 111th Cong., 2nd Sess. (2010). The bill proposed requiring an individual suspected of engaging in hostilities against the United States or its coalition partners through an act of terrorism who may be an unprivileged enemy belligerent to be placed in military custody for purposes of initial interrogation and determination of status. The proposed bill would have allowed the detention and interrogation of such individuals for a reasonable time after capture or coming into custody and defines "unprivileged enemy belligerent" as an individual who: (1) has engaged in hostilities against the United States or its coalition partners; (2) has purposely and materially supported hostilities against the United States or its coalition partners; or (3) was a part of al Qaeda at the time of capture. Id. This bill was also cleared from the books when the 111th Congressional Session ended.

[85] *See* Charlie Savage, *Delayed Miranda Warning Ordered for Terror Suspects*, N.Y. TIMES, Mar. 24, 2011, *available at* http://www.nytimes.com/2011/03/25/us/25miranda.html (last visited Apr. 2, 2011); Evan Perez, *Rights Are Curtailed for Terror Suspects*, WALL STREET JOURNAL, Mar. 24, 2011, *available at* http://online.wsj.com /article/SB10001424052748704050204576218970652119898.html (last visited Apr. 2, 2011).

[86] An FBI internal memorandum, dated Oct. 21, 2010 – which, according to the New York Times, the Justice Department had earlier refused to make public – was quoted in the Wall Street Journal and the New York Times on March 24, 2011. *See* Savage, *supra* note 85. The New York Times article states that, following the publication of the Wall Street Journal article, the Times "obtained access to a full copy" of the memorandum. *Id.* The article does not state whether access was provided by the Justice Department or the New York Times "obtained access" through other means. *See id.*

[87] FBI Memorandum, *Terrorists in the United States* (Oct. 21, 2010), http://www.nytimes.com/2011/03/25/ us/25miranda-text.html (last visited Apr. 2, 2011) ("In these instances, agents should seek SAC approval to

The memorandum instructs FBI agents to "ask any and all questions that are reasonably prompted by an immediate concern for the safety of the public or the arresting agents without advising the arrestee of his *Miranda* rights."[88]

It goes on to say,

> There may be exceptional cases in which, although all relevant public safety questions have been asked, agents nonetheless conclude that continued unwarned interrogation is necessary to collect valuable and timely intelligence not related to any immediate threat, and that the government's interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation.[89]

It is difficult to understand why it took the government almost a year to reach these conclusions, and not at all clear why it initially refused to release the information. But, at least it will no longer bar questioning terrorists engaged in or attempting attacks on the United States and risk losing information that might save countless lives based on the Supreme Court's decision in *Miranda*.[90]

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proceed with unwarned interrogation after the public safety questioning is concluded. Whenever feasible, the SAC will consult with FBI-HQ (including OGC) and Department of Justice attorneys before granting approval.").

[88] *Id.*

[89] *Id.*

[90] Editor's Note: On October 12, 2011, Abdulmutallab unexpectedly pled guilty to all federal charges, following the prosecution's opening statement at trial. For a discussion of the *Miranda* issue in light of the guilty plea, see Charlie Savage, Developments Rekindle Debate Over Best Approach for Terrorism Suspects, N.Y. Times, Oct. 13, 2011, available at http://www.nytimes.com/2011/10/14/us/debate-is-renewed-over-approach-for-terrorism-suspects.html.