Chapman Law Review

Volume 10 | Issue 3 Article 6

2007

Miranda Warnings, Torture, the Right to Counsel and the War on Terror

M. Katherine B. Darmer

Miranda Warnings, Torture, the Right to Counsel and the War on Terror

*M. Katherine B. Darmer**

INTRODUCTION

Forty years after the *Miranda*[1] decision, the crimes that rivet the nation are different than those that consumed the public in 1966. September 11 is in many ways a dividing line.[2] Before September 11, we believed torture was unthinkable; now we do not. Before September 11, we debated whether *Miranda* made sense from the perspective of law enforcement; now, the notion that terror suspects would be given *Miranda* warnings seems almost quaint. It is plain that the Bush Administration is treating the vast majority of terror suspects far outside the realm of ordinary law enforcement, where the protections of the Fourth, Fifth and Sixth Amendments are uncertain at best.

The *Miranda* decision was, in many ways, very much the product of its time. Decided in the same era as *Brown v. Board of Education*,[3] it was arguably motivated, in large part, by a desire to achieve greater equality in the criminal justice system, and to provide greater access to justice to the most disadvantaged members of society.[4] *Miranda* was a controversial decision

* Professor of Law, Chapman University School of Law. The author thanks Chapman University School of Law for a research stipend, all of the participants in this Symposium, and especially Roman E. Darmer, II, Donald J. Kochan and Lawrence Rosenthal for support and helpful comments. Special thanks are also due to the editorial board of the Chapman Law Review.

1 Miranda v. Arizona, 384 U.S. 436 (1966) (requiring the provision of warnings to a suspect in advance of custodial interrogation).

2 *See* M. Katherine B. Darmer, *Introduction* to CIVIL LIBERTIES VS. NATIONAL SECURITY IN A POST-9/11 WORLD 11, 11 (M. Katherine B. Darmer, Robert M. Baird & Stuart E. Rosenbaum eds., 2004).

3 347 U.S. 483 (1954). For a provocative and thorough discussion of *Miranda* in the context of the norms that influenced both that case and *Brown*, see Scott W. Howe, *The Troubling Influence in Constitutional Criminal Procedure: From* Brown *to* Miranda, Furman *and Beyond*, 54 VAND. L. REV. 359 (2001).

4 *See* Howe, *supra* note 3, at 393.

> The Warren Court's enthusiasm for prescriptive equality greatly influenced the holdings that form the basis of modern interrogation and confessions doctrine. The Court constructed this doctrine under the Sixth Amendment right to counsel and the Fifth Amendment privilege against compelled self-incrimination. Under these clauses, the Justices concluded that the poor and

when it was decided,[5] and it remained controversial during the subsequent eras of the Burger and Rehnquist Courts. Indeed, those Courts chipped away at *Miranda* until the decision became a mere remnant of its former self.[6] To the extent that the *Miranda* Court meant to fundamentally change the nature of police interrogation and significantly alter the dynamics of the stationhouse, that grand vision "soared only on the pages of the majority opinion, and foundered in the workaday world of competing considerations, such as crime control."[7] For example, in *New York v. Quarles*,[8] the Court held that a police officer did not violate the Fifth Amendment by asking an unwarned suspect simply about the location of a gun. The Court held that "concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."[9]

I have argued previously that the "public safety" doctrine should be expanded in the terrorism context,[10] as terrorism cases present a much more compelling need for addressing public safety than does the discovery of a gun in a supermarket. I have also advocated that courts should adopt a "foreign interrogation" exception to *Miranda* in the terrorism context.[11] This article picks up on those themes and argues even more broadly for exceptions to *Miranda* in the terrorism context. This position is

> ignorant should be made the equal of the rich and well-informed in their dealings with police interrogators. The Justices also concluded that the uncharged suspect who had not yet been to court should be treated as equal to the accused against whom adversary judicial proceedings had commenced. These notions of equality were crucial to the evolution of modern doctrine regulating interrogation and confessions practice.

Id. *See also id.* at 398 ("The forces that moved five Justices to endorse the *Miranda* opinion cannot be understood without an appreciation of the influence of the equality notion on the Court.").

5 *See id.* at 398 ("*Miranda* became the most controversial of all of the Warren Court's criminal-procedure decisions."); *see also* M.K.B. Darmer, *Beyond* Bin Laden *and* Lindh*: Confessions Law in an Age of Terrorism*, 12 CORNELL J. L. & PUB. POL'Y 319, 339–40 (2003) (noting that *Miranda* was decided by a 5–4 margin with strong dissenting opinions, and that both commentators and politicians denounced the opinion).

6 *See* M.K.B. Darmer, *Lessons from the* Lindh *Case*: *Public Safety and the Fifth Amendment*, 68 BROOK. L. REV. 241, 264–68 (2002).

7 *Id.* at 264; *see also* Mark A. Godsey, *Reformulating the* Miranda *Warnings in Light of Contemporary Law and Understanding*, 90 MINN. L. REV. 781, 803 (2006) (addressing in particular the right to counsel warnings aspect of *Miranda*, "None of the coercion-dispelling benefits that the *Miranda* Court imagined have come to fruition in the rough-and-tumble world of the stationhouse interrogation room").

8 467 U.S. 649 (1984). For a fuller discussion of *Quarles* and its placement within the Court's "prophylaxis" line of cases, see Darmer, *supra* note 6, at 264, 266–68.

9 467 U.S. at 653.

10 *See* Darmer, *supra* note 6, at 271–87 (discussing applicability of the *Quarles* rule to terrorism cases and specifically advocating an extension of the public safety exception to the so-called "*Edwards* rule," which bars police from asking any additional questions once a suspect has invoked the right to counsel).

11 Darmer, *supra* note 5, at 348 ("I would go even further . . . by carving out a 'foreign interrogation' exception to *Miranda* . . . .").

anchored in the view that *Miranda* is, in fact, a "prophylactic rule" which "sweeps more broadly than the Fifth Amendment itself."[12] Following this view, exceptions to the *Miranda* rules are permitted.

While *Miranda* may impose tolerable limits on ordinary law enforcement efforts, those same limits may be intolerable for a society facing very real threats of terrorism. As one panelist argued during this Symposium, the Bush Administration, ironically, might ultimately be thought of as a "great friend" of *Miranda* precisely because it has chosen not to proceed against the majority of terrorism suspects in conventional criminal courts.[13] In brief, that theory suggests that because it would be intolerable to abide by constraints such as *Miranda* in fighting the War on Terror, there is a grave risk that *Miranda* and other criminal procedure rights would simply be jettisoned along the way in conventional criminal courts, thereby having an impact far beyond the terrorism cases.

While the theory that protections in the realm of ordinary law enforcement are best preserved by keeping the terrorism cases outside of that realm, there are grave risks to a "shadow system" operating wholly outside of the ordinary criminal law enforcement structure. The U.S. government has declared a number of individuals to be "enemy combatants," and is holding them on that basis without access to the rights normally attendant to the criminal justice system. Many of those individuals are being held at Guantanamo Bay, Cuba. This article advocates for according fuller protections to those suspects, while recognizing that the full panoply of rights accorded to criminal defendants in cases like *Miranda* are not appropriately applied to such individuals.

Part I of the article takes up the question whether the *Miranda* warnings are "really required" by the Constitution, and, if not, what the implications of that are for the War on Terror, contrasting *Miranda* rights with more fundamental rights, such as the right to be free from torture.

Part II then addresses the fact that while *Miranda* serves to over-regulate confessions in important respects, it also fails to fully vindicate core concerns of the Fifth Amendment. *Miranda* presumes that all custodial interrogation involves compulsion,

12 Withrow v. Williams, 507 U.S. 680, 702 (1993) (O'Connor, J., concurring in part) (quoting Oregon v. Elstad, 470 U.S. 298, 306 (1985)).

13 *See* Joan Larsen, Visiting Professor of Law, Univ. of Mich. Law Sch., Remarks at the Chapman Law Review Symposium: *Miranda* at 40: Applications in a Post-Enron, Post-9/11 World (Jan. 26, 2007), *available at* http://www.chapman.edu/LawReview/symposium2007_webcast.asp (follow "Click here for Panel #1" hyperlink).

and regulates custodial interrogation by requiring that warnings be given before a statement can be elicited at trial. If a statement is ultimately compelled, however, based on abusive interrogation techniques, the Court analyzes the problem under the Due Process Clause, which has a narrower scope in some respects than does the Self-Incrimination Clause. For example, the Due Process Clause has not been interpreted to limit the conduct of foreign agents. Thus, if a foreign agent were to use torture to extract a confession, that confession could potentially be admissible at a trial in the United States. In my view this is a violation of core Fifth Amendment concerns.

In Part III, the article then turns to the "right to counsel" aspect of *Miranda*, arguing that it is beyond the scope of the Fifth Amendment and should be eliminated.

Part IV then turns to the Sixth Amendment right to counsel during adversarial proceedings and argues that that right is so fundamental to basic fairness that it should be recognized, even with respect to terrorism cases and enemy combatants. Finally, this article addresses the fact that proceedings at Guantanamo Bay currently permit coerced statements to be introduced into evidence, and argues that those provisions substantially undermine the fairness of those proceedings.

I. ARE THE *MIRANDA* WARNINGS REALLY REQUIRED?

The *Miranda* Court held that "compulsion" is "inherent in custodial surroundings"[14] and further held that, without protection against that compulsion, "no statement obtained from the defendant can truly be the product of his free choice."[15] Thus, unless other equally effective protective measures are employed, a suspect in custody must be given the following warnings: "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."[16] If such warnings are not given, any statement made by the defendant is inadmissible in a later criminal trial.[17]

Much has already been said on the subject of whether the *Miranda* warnings are "really required" by the Constitution or whether, instead, the *Miranda* Court's warnings requirement represented a "prophylactic rule" designed to ensure protection of

14 Miranda v. Arizona, 384 U.S. 436, 458 (1966).
15 *Id*.
16 *Id*. at 444.
17 *Id.*

the Fifth Amendment.[18] Justice Rehnquist explicitly described the *Miranda* warnings as prophylactic thirty-three years ago in *Michigan v. Tucker*,[19] which involved the admissibility of the testimony of a witness who had been identified in unwarned statements. The Court consistently repeated that characterization of *Miranda*[20] until *Dickerson v. United States*, when the Court held, anomalously, that *Miranda* was a "constitutional decision" despite "language in some of our opinions" to the contrary.[21] The line of cases describing *Miranda* as prophylactic, according to the Court, illustrated simply that "no constitutional rule is immutable."[22] Following *Dickerson*, the Court continued to describe *Miranda* as "prophylactic."[23] Indeed, in *United States v. Patane*, a plurality of the Court specifically noted that "nothing in *Dickerson*, including its characterization of *Miranda* as announcing a constitutional rule, changes any of these observations," including those regarding the prophylactic nature of *Miranda*,[24] a proposition with which the majority of the Court agreed.[25]

In this Symposium, however, my colleague Larry Rosenthal provocatively argues—contrary to the views taken by the Court and most commentators—that *Miranda* is not prophylactic at all.[26] Rather, Professor Rosenthal argues that *Miranda* properly concluded that custodial interrogation inherently involves Fifth Amendment compulsion. Thus, he continues, "*Miranda* is not prophylactic—its warnings are required only when a suspect is

18 *See* Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 1 (2001) ("*Miranda* kicked off an energetic debate over the legitimacy of the Court's creation of so-called prophylactic rules . . . ."); *see also* Lawrence Rosenthal, *Against Orthodoxy:* Miranda *Is Not Prophylactic and the Constitution Is Not Perfect*, 10 CHAP. L. REV. 579, 581 nn.16–17 (2007) (collecting conflicting authority). The broader question of the legitimacy of prophylactic rules is beyond the scope of this article.

19 417 U.S. 433, 446 (1974). For a more complete discussion of *Tucker*, see Darmer, *supra* note 6, at 265.

20 *See, e.g.,* New York v. Quarles, 467 U.S. 649, 653 (1984) ("[T]his 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*."); Withrow v. Williams, 507 U.S. 680, 690–91 (1993).

21 Dickerson v. United States, 530 U.S. 428, 438 (2000). For a fuller discussion of *Dickerson* and why I believe its reasons are anomalous in light of the Court's prior jurisprudence, see Darmer, *supra* note 6, at 268–71. The Michigan Law Review devoted a symposium to the *Dickerson* decision shortly after it was decided, in which a number of prominent scholars criticized the opinion. *See* Symposium, Miranda *after* Dickerson*: The Future of Confession Law*, 99 MICH. L. REV. 879 (2001).

22 *Dickerson*, 530 U.S. at 441.

23 *See*, *e.g.*, United States v. Patane, 124 S. Ct. 2620 (2004).

24 *Id*. at 2628 (plurality opinion) (citation omitted).

25 *Id.* (plurality opinion) (noting the "prophylactic nature of *Miranda*"). The plurality opinion was written by Justice Thomas, and joined by Chief Justice Rehnquist and Justice Scalia. See also *id.* at 2631 (Kennedy, J., concurring in the judgment), where Justice Kennedy, joined by Justice O'Connor, agreed with the plurality that *Dickerson* "did not undermine" precedents noting *Miranda* as prophylactic.

26 *See* Rosenthal, *supra* note 18, at 585.

compelled to incriminate himself, and they ensure that incriminating statements are received in evidence only when a suspect has validly waived the right to be free from compelled self-incrimination."[27]

While Professor Rosenthal musters powerful arguments for his position, ultimately I believe he overstates the compulsion *inherent* in custodial interrogation, as the *Miranda* Court itself overstated that inherent compulsion. The dictionary defines "compel" as "[t]o constrain[:] force,"[28] but most modern custodial interrogation involves efforts to persuade rather than the use of force. As Symposium participant Mark Godsey has persuasively established, "the Framers adopted the self-incrimination clause to ban certain penalties, such as physical punishments . . . ."[29] In the pre-*Miranda* case *Brown v. Mississippi*, decided under the Due Process Clause, the Court reached unanimity in condemning the use of brute force to obtain a confession.[30] *Miranda*, on the other hand, fractured the Court, in part because of the somewhat novel proposition that more-or-less routine custodial interrogation, without warnings, was unconstitutional, even absent earmarks of abuse.

Indeed, even the *Miranda* majority asserted somewhat gingerly that there is compulsion inherent in custodial interrogation. While the Court did state unequivocally that "[u]nless adequate protective devices are employed to dispel the *compulsion inherent* in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice,"[31] elsewhere the Court used less bold language. Describing defendant Ernesto Miranda's circumstances, for example, the majority noted that the "*potentiality* for compulsion is forcefully appar-

27 *Id*. at 575.

28 WEBSTER'S II NEW RIVERSIDE DICTIONARY (1984); *see also* Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465, 492 (2005) ("'Compel' has been defined as 'to drive or urge forcefully' and 'to cause to do or occur by overwhelming pressure.'" (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 253 (11th ed. 2003))).

29 Godsey, *supra* note 28, at 505. The clause was also intended to ban "deprivations of liberty, and divine retribution via the oath ex officio, used by ecclesiastical tribunals." *Id*.; *see also id*. at 479–81 (collecting historical support). Professor Rosenthal focuses on the use of compelled oaths enforced by threat of criminal contempt as being an underlying concern of the privilege. Rosenthal, *supra* note 18, at 589–90. While the history underlying the Fifth Amendment is complicated and somewhat opaque, *see generally* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968), the prevention of torture was one of its important features. As Levy says, "That it was a ban on torture and a security for the criminally accused were the most important of its functions, as had been the case historically, but these were not the whole of its functions." *Id*. at 430.

30 297 U.S. 278 (1936). For a particularly compelling discussion of the case, see Morgan Cloud, *Torture and Truth*, 74 TEX. L. REV. 1211 (1996).

31 Miranda v. Arizona, 384 U.S. 436, 458 (1966) (emphasis added).

ent . . . ."[32] The description of custodial interrogation as "potentially" compulsive is, it seems to me, more intellectually honest that describing it as inherently, or inevitably, compulsive. The latter description ignores the real differences among interrogators, and among suspects. While it is certainly true that interrogators are generally motivated to get answers from suspects, some are much more dogged and effective than others. Similarly, some suspects are virtually immune to tactics of persuasion. Some suspects simply do not talk, even when subjected to skillful and prolonged interrogation. Surely the fact that not all suspects talk proves that custodial interrogation does not necessarily involve compulsion. If it did, then every suspect would confess.

Professor Rosenthal argues that the *Miranda* decision is well-grounded in the nineteenth-century Supreme Court decision of *Bram v. United States*.[33] In *Bram*, the Court, applying the Fifth Amendment Self-Incrimination Clause for the first time to a confession in a federal case, held that a confession was compelled when the suspect had been stripped of his clothing, and a detective told the suspect that another person had witnessed him commit a murder and implied that the suspect could help himself by talking.[34] The Court held that such circumstances "perturb[] the mind and engender[] confusion of thought,"[35] interpreting the detective's statements as a "promise of leniency" that resulted in a violation of the Self-Incrimination Clause.[36] As I have previously argued, "[i]f taken seriously, the language of *Bram* suggests that the Fifth Amendment places extraordinary limits on the scope of permissible interrogations."[37] *Bram* itself has been the subject of criticism,[38] but even if one accepts both the relative

32 *Id*. at 457; *see also id*. at 461 ("An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak."). This language raises the question of whether an individual who is (1) intimately familiar with the surroundings of a police station (such as a police officer who is himself a suspect), (2) questioned by a single officer in a friendly tone, or (3) not subjected to "techniques of persuasion" but simply asked a single question in a straightforward way, has really been subjected to "compulsion."

33 168 U.S. 532 (1897). For Professor Rosenthal's discussion of the *Bram* case, see Rosenthal, *supra* note 18, at 586–92, 601–02, 612. For a further discussion of the case, see Darmer, *supra* note 5, at 325–28.

34 *See* 168 U.S. at 562–64.

35 *Id*. at 564.

36 Steven D. Clymer, *Are the Police Free to Disregard* Miranda*?*, 112 YALE L.J. 447, 480 (2002).

37 Darmer, *supra* note 5, at 326.

38 *See*, *e.g.*, *id.* at 327; Rosenthal, *supra* note 18, at 588 n.51 (citing others). For an extended criticism of *Bram*, see Godsey, *supra* note 28, at 477–88 (arguing that the Court "erred simply by choosing voluntariness as the touchstone for confession admissibility under the self-incrimination clause" and "conflat[ed] the common law voluntariness doctrine with the self-incrimination clause."). *See also* Clymer, *supra* note 36, at 480 & n.140. Entering into the historical debate about *Bram* is beyond the scope of this article.

breadth of *Bram* and its reliance on the Fifth Amendment Self-Incrimination Clause as being correct, as Professor Rosenthal does, *Miranda* took *Bram* a significant step further by determining that *all* custodial interrogation involves compulsion—even interrogation that does not involve the relatively slight pressure at issue in *Bram*.

As Professor Steven D. Clymer has put it, "[h]ere, the *Miranda* Court broke new ground. In *Bram*, an implied promise of leniency had contributed to the compulsion. In contrast, the *Miranda* Court concluded from its assessment of police interrogation manuals" that compulsion is inherent in custodial interrogation "even absent any physical violence, threats, or promises."[39] That is a significant innovation.[40]

As Justice Harlan noted in dissent, the newly-designed *Miranda* rules appeared designed instead to eliminate any "pressures" on a suspect and to "discourage any confession at all."[41] While the *Miranda* opinion actually consolidated four different cases,[42] Justice Harlan focused on the facts of Ernesto Miranda's case itself, which were representative.[43] In that case, Miranda made both an oral and written confession, having been subjected to interrogation for less than two hours, and without being subjected to "force, threats or promises."[44] The confessions, Justice Harlan noted, "are now held inadmissible under the Court's new rules. One is entitled to feel astonished that the Constitution can be read to produce this result."[45] Miranda confessed "during brief, daytime questioning conducted by two officers and un-

39 Clymer, *supra* note 36, at 481–82 (citations omitted); *see also* Miranda v. Arizona, 384 U.S. 436, 528 (1966) (White, J., dissenting) (arguing that the *Bram* case itself rejected the notion that custodial interrogation was itself inherently suspect). "The question in *Bram* was whether a confession, obtained during custodial interrogation, had been compelled, and if such interrogation was to be deemed inherently vulnerable the Court's inquiry could have ended there." *Id*.

40 *Cf*. Godsey, *supra* note 28, at 499–501 (noting that the Court shifted gears from a due process analysis to the Self-Incrimination Clause, recognizing that "the correct test for confession admissibility in the Bill of Rights is compulsion," but defining compulsion "very broadly"). "The *Miranda* decision represented a monumental departure from the past, in several important respects." *Id.* at 499.

41 384 U.S. at 505 (Harlan, J., dissenting).

42 The Court consolidated the cases of *Miranda v. Arizona*, *Vignera v. New York*, *Westover v. United States*, and *California v. Stewart*. 384 U.S. at 436 (majority opinion).

43 *See id*. at 518 (Harlan, J., dissenting) ("[I]t may make the analysis more graphic to consider the actual facts of one of the four cases reversed by the Court. *Miranda v. Arizona* serves best, being neither the hardest nor easiest of the four under the Court's standards.").

44 *Id*. at 518; *see also id*. at 491–93 (majority opinion) (discussing the facts of Ernesto Miranda's case, which describes the length of interrogation and makes no references to the use of force, threats, or promises); *id.* at 457 (discussing the facts of the *Miranda* and *Stewart* cases, noting that "the records do not evince overt physical coercion or patent psychological ploys.").

45 *Id*. at 518 (Harlan, J., dissenting).

marked by any of the traditional indicia of coercion."[46] Previously, by contrast, the Court had suppressed confessions under the Due Process Clause[47] on a case-by-case approach by taking into account such specific circumstances as "threats or imminent danger, physical deprivations . . . , repeated or extended interrogation, limits on access to counsel or friends, length and illegality of detention under state law, and individual weakness or incapacities."[48]

Similarly, Justice White pointed out that, until the *Miranda* decision, it had never been suggested that custodial interrogation "was so coercive and accused persons so lacking in hardihood that the very first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will."[49] Famously, Justice White noted that under the *Miranda* rule, if the police ask a defendant "a single question such as 'Do you have anything to say?' or 'Did you kill your wife?' his response, if there is one, has somehow been compelled . . . ."[50] Quoting this language in his article, Professor Rosenthal points out that "[m]ost commentators seem to find this point unanswerable."[51] Professor Rosenthal, however, does not. Rather, he argues that compulsion does exist because the questioner has a badge and a gun and holds the suspect's liberty in his hands. Even if there is just "a bit" of compulsion as in Justice White's hypothetical, there is compulsion.[52]

Professor Rosenthal acknowledges, as he must, that not all suspects will succumb to this compulsion; some will have the "fortitude" to resist it.[53] In that case, "there has been no Fifth Amendment violation because the suspect has not been compelled to become a witness against himself."[54] When a suspect does respond, however, that response is compelled, a fortiori, "by virtue of the compulsive power of custody and the inherent threat that it will continue unless the jailer is somehow satisfied."[55]

---

46 *Id*. at 518–19.

47 The vast majority of the Court's prior cases arose under the Due Process Clause, because most of those cases came up through the state courts before the Fifth Amendment Self-Incrimination Clause had been held to apply to the states. For an extended discussion of the due process cases, see Catherine Hancock, *Due Process before* Miranda, 70 TUL. L. REV. 2195 (1996). The Supreme Court ultimately held that the Fifth Amendment applied to the states via the Fourteenth Amendment in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), which set the stage for *Miranda*.

48 *Miranda*, 384 U.S. at 508 (citations omitted).

49 *Id*. at 535 (White, J., dissenting).

50 *Id*. at 533.

51 Rosenthal, *supra* note 18, at 591.

52 *Id*. at 580–82.

53 *Id*. at 581.

54 *Id*.

55 *Id*.

Surely this overstates the case; however, the *Miranda* Court itself overstated the case. Imagine, for example, a prison inmate who has been well-integrated into the complex social fabric of his prison. Suddenly, he finds himself released on parole, with no job, no friends and no family on "the outside." Seeking a return to the world he knew, he commits a flagrant crime in the presence of a uniformed officer. The officer arrests the parolee, placing him in handcuffs.[56] The officer does not read any *Miranda* warnings but instead simply turns to his arrestee and asks, "Why did you do that?" If the man responds, "I did that because I want to go back to prison," surely that response was not compelled within either the meaning of the Fifth Amendment or under any commonsense understanding of the term. Yet *Miranda* posits that such a statement has been compelled, and Professor Rosenthal, presumably, would agree.

In later cases, the Court backed off this absolutist position, drawing a distinction between those cases in which a suspect has been "really compelled" (i.e., through the use of brute force) and those cases which represent simply a technical non-compliance with *Miranda*. The *Quarles* decision is emblematic of this dichotomy. In that case, in which a suspect ran into a grocery store and ditched his gun, prompting the police to ask about its whereabouts, the Court emphasized that there was no evidence that the defendant's response regarding the gun's location was "actually compelled."[57] Because the statement was not "actually compelled," but was compelled only in the sense that it would have been presumed compelled under *Miranda*, the Court held that "concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."[58] If, by contrast, the officer on the scene had thrown Quarles to the ground and beaten him until he told police where the gun was, his answer would have been deemed compelled or,

56 In this regard, the case differs in an important way from *Colorado v. Connelly*, in which the Court found no constitutional violation when the lower court admitted a confession that the defendant made after walking in voluntarily to a police station. 479 U.S. 157 (1986). The Court found that "the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" *Id*. at 170 (quoting Oregon v. Elstad, 470 U.S. 298, 305 (1985)). While arguably the defendant parolee in my hypothetical is quite similar to Connelly, in that both were self-motivated to confess, *Miranda* would draw a distinction between the two because, in my case, the defendant was technically in custody and subject to interrogation, meaning that he should have been given warnings under *Miranda*. While mine might be an extreme example, surely there are numerous examples of defendants in custody who are motivated to confess and are not really *compelled* to do so simply by virtue of being in custody and being asked questions.

57 New York v. Quarles, 467 U.S. 649, 652, 654 (1984). For further discussion of the case, see Darmer, *supra* note 6, at 266–68.

58 *Quarles*, 467 U.S. at 653.

more likely, involuntary under the auspices of the Due Process Clause. Because it was not "really compelled" however, the Court carved out an exception to the *Miranda* rules.

The dissent pointed out the doctrinal incoherence endemic to this approach, noting that the majority had failed to "deal with the constitutional presumption established" in *Miranda*.[59] In the dissent's view, the police really did nothing wrong, but the Court did, by failing to accord full weight to *Miranda*'s presumption of compulsion. As long as the police act consistently with the dictates of due process, "[i]f 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."[60] However, any answers given to such unadvised statements are inadmissible, because they are presumptively compelled.[61] Justice O'Connor made a similar point in her concurring opinion: "When police ask custodial questions without administering the required warnings, *Miranda* quite clearly requires that the answers received be presumed compelled and that they be excluded from evidence at trial."[62]

While adherence to the underlying rationale of *Miranda* may indeed have required exclusion of Quarles's statement, it is my position that the Fifth Amendment does not, in fact, require the exclusion. In the interest of preventing compelled confessions, *Miranda* over-regulates in the confessions context. This over-regulation may be tolerable in the majority of cases, but it is intolerable where imminent danger to the public safety is at stake. Understood as a prophylactic rule, *Miranda* is certainly vulnerable to criticism, including that the original *Miranda* Court did not describe it that way, and that the later understanding of *Miranda* as "prophylaxis" is inconsistent with its original rationale. However, a prophylactic *Miranda* is more politically palatable and stable than one that recognizes no exception. Moreover, a jurisprudence that allows "unwarned" statements but excludes "really compelled" ones is more consistent with core concerns of the Fifth Amendment. In its post-*Miranda* jurisprudence, the Court essentially created, de facto, a two-tiered system. In cases where confessions are "really compelled," those confessions cannot be used for any purpose.[63] In those cases where the confes-

59 *Id*. at 684 (Marshall, J., dissenting).

60 *Id*. at 686.

61 *See id*.

62 *Id*. at 664 (O'Connor, J., concurring in part). O'Connor dissented from that part of the Court's holding that found that the statements did not need to be suppressed. She agreed with the Court that the physical fruit of the statement—the gun itself—need not be suppressed. *Id.* at 665.

63 Joseph D. Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor*

sion is compelled only in the sense that it is presumed compelled under *Miranda*, then the warnings may be dispensed with (as in the public safety cases), or, if required but not given, can result in statements that can be used to impeach the defendant if he testifies,[64] or in the admission of the fruits of the statement (such as the physical evidence mentioned by a suspect in an uncoerced statement that nevertheless violated the dictates of *Miranda*).[65]

Rejecting the notion of *Miranda* as a prophylactic rule has serious implications for the terrorism cases. If un-Mirandized statements are deemed compelled, then they cannot be used for any purpose. As Professor Clymer argues, "the privilege flatly prohibits the use of compelled statements in criminal cases, no matter how badly or for what purpose the government may need the information that the compelled statement imparts."[66] Using the example of the threatened use of the contempt sanction in order to force testimony, he points out that a prosecutor choosing to invoke that sanction in order to learn details regarding a bombing plot could do so "only at the cost of exclusion of any resulting statement in a criminal prosecution of the suspected terrorist."[67] Similarly, he suggests, the cost of obtaining the information from Quarles about his gun in the grocery store should have been exclusion of the evidence. In Clymer's view, the public safety exception is simply "impossible to reconcile" with the Fifth Amendment privilege.[68]

But it is only impossible to reconcile with the Fifth Amendment privilege as interpreted by *Miranda*, which I have argued is overly broad and over-regulates confessions. That overly broad interpretation was subscribed to by only a bare majority of the *Miranda* Court and has been narrowed, appropriately, by subsequent decisions. Because this narrower conception is, in fact, justified, the public safety exception should be broadly applied in the terrorism cases.[69] If such an exception were broadly applied, agents would be free to question terrorism suspects without giving *Miranda* warnings. Agents would bear the risk that the suspect was not in fact a potential terrorism suspect, and if questions yielded information only about unrelated conventional

Schulhofer, 55 U. CHI. L. REV. 174, 177 (1988).

64 Harris v. New York, 401 U.S. 222 (1971).

65 United States v. Patane, 124 S. Ct. 2620, 2627–28 (2004) (plurality opinion).

66 Clymer, *supra* note 36, at 549.

67 *Id*.

68 *Id*.

69 *Cf*. United States v. Padilla, No. 04-60001-CR-COOKE, 2006 WL 3678567 (S.D. Fla. Nov. 17, 2006) (finding that *Miranda* did not apply in the questioning of terrorism suspect Padilla at O'Hare airport, on the theory that the interrogation was not "custodial" when applying looser standards for questioning at the border).

crimes, the information would have to be suppressed.

Such an exception does not mean that terrorism suspects are left without constitutional protections. Unfortunately, however, as set forth below, the Court's modern jurisprudence suggests a narrower scope of protection than that suggested by the Constitution for "truly compelled" statements.

II. *MIRANDA* AND "REALLY COMPELLED" STATEMENTS

Under the Court's prior jurisprudence, the Due Process Clause provides primary protection against the use of torture or brute force, because due process is required before the deprivation of "life, liberty, or property."[70] Thus, that phrase has been interpreted to prevent the *infliction* of brutality,[71] at least by agents within the jurisdiction of the United States,[72] whereas the Self-Incrimination Clause of the Fifth Amendment protects only against the introduction of compelled statements at trial.[73] On the one hand, I have argued that the Court's interpretation of the Fifth Amendment in *Miranda* leads to an "over-regulation" of confessions law; but on the other hand, the Court's exclusive reliance on the Due Process Clause in deciding whether a confession is involuntary under-regulates "truly compelled" statements.[74]

Professor Godsey has persuasively established in his prior work the fact that the Supreme Court, over time, has "unmoored" the *Miranda* warnings from their original justification (Fifth Amendment compulsion) and now uses them as a first step in determining whether a confession is "voluntary" under a due process analysis.[75] As Professor Godsey puts it,

> [T]he Court, in the last four decades, has slowly moved away from *Miranda*'s original compulsion theory as the underlying justification for the warnings. Instead of requiring the warnings to dispel inherent coercion as described in the *Miranda* decision, the Court now uses the warnings as a prophylactic rule to make easier the task of determining the "voluntariness" of a confession in the due process sense of that term.[76]

---

70 U.S. CONST. amends. V, XIV.

71 *See* New York v. Quarles, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting) (noting that the Due Process Clause places limits on police behavior); *cf.* Brown v. Mississippi, 297 U.S. 278 (1936) (holding that a conviction obtained in reliance on a confession extracted by torture violated due process). For a compelling discussion of the *Brown* case, see Cloud, *supra* note 30.

72 *Cf.* Darmer, *supra* note 5, at 366 (suggesting that the Due Process Clause does not constrain the acts of foreign agents).

73 Chavez v. Martinez, 538 U.S. 760 (2003).

74 *See* Darmer, *supra* note 5, at 357–372 (discussing the limits of the due process standard).

75 Godsey, *supra* note 7, at 793–816.

76 *Id.* at 810 (citing Mark A. Godsey, Miranda*'s Final Frontier—The International*

Under the modern approach to the due process voluntariness test, however, the Court has narrowed its focus in asking whether a confession is "involuntary," as compared to the due process inquiry that was in place before *Miranda*.[77] In *Colorado v. Connelly*,[78] the Court rejected a claim that a confession was involuntary when made by a mentally deluded individual who walked into a police station and confessed. The fact that the confession may have been utterly unreliable did not lead to exclusion, despite the fact that reliability had historically been a factor in assessing the voluntariness of a confession.[79] In *Connelly*, the Court focused strictly on the question whether police overreaching had resulted in the confession: "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause . . . ."[80]

Specifically, the *Connelly* Court rejected the notion that the trial court's admission into evidence of the defendant's potentially unreliable statement was tantamount to the type of state action sufficient to implicate the Due Process Clause. Rather, in order to establish a due process violation, the defendant had to establish an "essential link between coercive activity of the State" and the defendant's actual confession.[81] In that case, because the state had contributed in no way whatever to the defendant's underlying confession, the Court found no due process violation.

I have argued previously that *Connelly* has serious implications for the terrorism cases. *Connelly* suggests that where there is no "bad act" by U.S. agents, there would be no basis under the Court's current jurisprudence to exclude a confession obtained through force by foreign agents:

Arena: A Critical Analysis of United States v. Bin Laden*, and a Proposal for a New* Miranda *Exception Abroad*, 51 DUKE L.J. 1703, 1734–52 (2002); Godsey, *supra* note 28, at 505–15; Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 GEO. L.J. 851, 863–67 (2003) [hereinafter Godsey, *New Frontier*]).

77 *See* Darmer, *supra* note 5, at 357–59 (describing the de facto dilution of the due process voluntariness test, and providing possible explanations for the weakened standard).

78 479 U.S. 157 (1986).

79 *See* Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2009–14 (1998); *see also* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 65 (1993) (describing concerns with both reliability and offensive police practices); Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM J. CRIM. L. 309, 313 (1998) (describing three concerns that underlie the historic due process voluntariness test, including the unreliability of certain confessions). A further discussion of *Connelly* and reliability can be found in this Symposium issue. Mark A. Godsey, *Reliability Lost, False Confessions Discovered*, 10 CHAP. L. REV. 611 (2007).

80 *Connelly*, 479 U.S. at 167.

81 *Id*. at 165.

> If the due process clauses prevent the admission into evidence of only those confessions caused by deterrable police misconduct, then no conditions or pressure entirely independent of such conduct would render a confession "involuntary" for purposes of the Constitution. This is true even if pressure were imposed, externally, by foreign agents . . . , rather than by internal psychological conditions, such as those present in *Connelly*. In the Ninth Circuit case of *United States v. Wolf*, for example, the court suggested that *Connelly* "cast into serious doubt" the "continuing vitality" of an earlier Ninth Circuit case holding that an involuntary confession obtained by Mexican police would be inadmissible in an American court. This is because, after *Connelly*, with its emphasis on wrongful, deterrable state action, there is necessarily no due process violation in the absence of wrongful conduct by a state actor that U.S. courts can hope to control.[82]

An overly robust application of the *Miranda* rules in the terrorism context could lead American agents to have a "perverse incentive" to turn terrorism suspects over to rogue foreign agents, unconstrained by limits on such tactics as torture.[83] Because the Due Process Clause has been interpreted to prevent only bad acts committed by agents within the jurisdiction of American courts, moreover, the Due Process Clause would not forbid the introduction into evidence of forcibly extracted confessions obtained overseas. The Fifth Amendment itself, however, should prevent the introduction of such "truly compelled" statements into evidence at any trial, but the Court thus far has dealt with claims that a confession was "truly compelled" by applying a weakened version of the historic due process voluntariness test rather than the privilege against self-incrimination.[84] As Godsey has argued, "[F]rom textual and doctrinal standpoints, the privilege seems the more appropriate provision with which to regulate confessions, as it speaks directly to the issue of compulsory self-incrimination, while the Due Process Clauses are silent on the matter."[85] In its modern jurisprudence, however, the Court has unfortunately relegated the Self-Incrimination Clause to the foundation for its resolution of *Miranda* claims.[86]

---

82 Darmer, *supra* note 5, at 365 (citations omitted). The Court has likewise held that aliens are not entitled to Fourth Amendment protections for seizures occurring outside the United States, or Fifth Amendment protections for statements never admitted at trial. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

83 Darmer, *supra* note 5, at 354.

84 *Id.* at 360.

85 Godsey, *New Frontier*, *supra* note 76, at 863; *see also* Godsey, *supra* note 28, at 499–515 (making a sustained argument that *Miranda* properly moored confessions law in the Self-Incrimination Clause, but that post-*Miranda* jurisprudence made an improvident return to the due process voluntariness test while retaining the *Miranda* warnings).

86 Darmer, *supra* note 5, at 354; *cf.* Godsey, *supra* note 28, at 508 (describing *Miranda* warnings as simply a "first-step litmus test" for determining whether a confession is voluntary in the due process sense of the term).

Thus, *Miranda* not only over-regulates in harmful ways, but ultimately under-regulates in an even more damaging way. Surely, whatever else it does, the Self-Incrimination Clause should prevent the introduction into trial of a statement obtained by torture. But with the Court's alternative focus on warnings and waiver under *Miranda*, this core concern of the Fifth Amendment has not been vindicated.

It is now plain that the risk that terrorist suspects will be turned over to rogue foreign agents is not just theoretical but real. American agents have participated in turning over suspects for torture pursuant to the practice known as "extraordinary rendition."[87] To be sure, the reasons for this practice are complex, and it is not just the constraints posed by *Miranda* that have contributed to it; in fact, *Miranda* may have played no role whatsoever, particularly if the suspects who have been subjected to extraordinary rendition would not have been part of the conventional criminal court system in this country.[88] Moreover, it could be argued that if American agents participated actively in turning a suspect over to agents knowing that torture would be employed, the American agents' participation would be significant enough to constitute "state action," triggering the Due Process Clause—at least if an American citizen were involved. However, foreign citizens would almost certainly receive no protection under a due process analysis.[89] And, presumably, a statement coerced by foreign agents could then be introduced into a conventional criminal trial of a terrorism suspect in the United States. This is inconsistent with the plain language of the Fifth Amendment, which provides that "No person . . . shall be compelled in any criminal case to be a witness against himself."[90] Any statement produced by torture, brute force or coercion should be inadmissible by virtue of the Fifth Amendment, regardless of any way around its inadmissibility under a due process analysis.[91] It is unfortunate that the Court's focus on waivers under *Miranda* has moved the emphasis away from other more troubling aspects

87 *See* David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, HARV. HUM. RTS. J. 123 (2006).

88 *See generally infra* Part IV. Indeed, it may be that Fourth Amendment limits on investigations in the United States may play a more critical role in the decision to resort to this practice. There may be situations, for example, where the Government has a basis to believe that someone is involved in terrorism, but does not have "probable cause" to conduct searches that could help establish the case or to make an arrest in a conventional criminal case. I am grateful to Larry Rosenthal for making this point.

89 *See* Godsey, *New Frontier*, *supra* note 76, at 895–96 (noting the particular vulnerability of non-citizens after *Connelly*).

90 U.S. CONST. amend. V.

91 *See* Godsey, *supra* note 28, at 505 (noting that the Fifth Amendment was designed by the Framers to ban physical abuse, among other things).

of interrogation.

III. *MIRANDA*'S RIGHT TO COUNSEL APPROACH

Miranda's provision of a "right to counsel" may be its most acutely problematic feature.[92] While the Sixth Amendment provides the right to counsel at criminal trials,[93] *Miranda* held for the first time that suspects should be told that they also have the right to have counsel present during any custodial interrogation.[94] In practice, if a suspect invokes his right to counsel, counsel is almost never provided to assist him during the interrogation. Instead, the interrogation is simply terminated.[95]

Professor Rosenthal defends the right to counsel aspect, arguing that "if one rigorously applies the rule that indulges every reasonable presumption against waiver, it is quite defensible to conclude that suspects cannot be expected to make knowing and intelligent decisions if they are unaware of the availability of expert legal advice."[96] Taking a somewhat unorthodox approach, Professor Rosenthal's focus on *Miranda*'s waiver structure leads him to conclude that by waiving his *Miranda* rights, the suspect is actually agreeing to be subject to *compulsion*, not just agreeing to be subject to questioning.[97] Presumably, because he is aware of the right to seek expert legal advice before making that determination, the waiver is valid.

Under the more orthodox view of *Miranda*, however, the warnings do not serve as a vehicle for a subject to waive his right to be subject to compulsion, but instead the warnings are designed to *dispel* the compulsion inherent in the custodial interrogation environment. Indeed, the *Miranda* Court itself noted that the warnings are a "prerequisite in *overcoming* the inherent pressures of the interrogation atmosphere."[98] Under this view, because the warnings have "already dispelled" the compulsion inherent in custodial interrogation, a suspect who waives his rights and agrees to submit to questioning is not agreeing to submit to compulsion per se, but rather just to submit to ques-

92 *See* Rosenthal, *supra* note 18, at 597 (describing the right to counsel as "perhaps the most debatable of the *Miranda* rights").

93 U.S. CONST. amend. VI.

94 *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

95 Godsey, *supra* note 7, at 797–98. For a discussion of the fact that invoking the right to counsel leads to greater protections for the suspect than invoking the right to remain silent, see Darmer, *supra* note 6, at 260–63.

96 Rosenthal, *supra* note 18, at 597.

97 *Id*. at 587 ("[W]hile *Miranda* does not eliminate the compulsion inherent in custodial interrogation, it instead produces a valid waiver of the right to be free from that compulsion."); *see also id*. at 575 (noting that a suspect can "validly waive[] his right to be free from compelled self-incrimination").

98 *Miranda*, 384 U.S. at 468 (emphasis added).

tioning now purged of the taint of compulsion. As the Court noted in a unanimous decision authored by Justice Marshall, "We do not suggest that compliance with *Miranda* conclusively establishes the voluntariness of a subsequent confession. But 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."[99]

I have already argued that the Court's *Miranda* jurisprudence has been inadequate in terms of protecting against real compulsion, and doubtless the mere recitation of warnings and a suspect's waiver are not enough to dispel compulsion. But to the extent that *Miranda* both over-regulates and under-regulates, the right to counsel has particular earmarks of both. The warning over-regulates insofar as it encourages a suspect *not* to talk, and instead to seek legal advice, even in circumstances where submitting to unwarned interrogation would not violate the Constitution. It under-regulates because a suspect may hear the right, waive it, and still end up subject to compelling pressures.

In the terrorism context, advising a suspect that he has the right to counsel is an intolerable limit on the need to gather information. The Fifth Amendment surely limits what the government can do to obtain a confession, but just as surely it does not impose an affirmative obligation on the government to provide a lawyer to a suspect during interrogation as *Miranda* sought to do. That requirement is tantamount to asking the government to "thwart its own investigations,"[100] as it is well-recognized that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."[101] Despite the fact that post-*Miranda* practice has been simply to shut down interrogation after the invocation of the right to counsel, rather than to provide counsel immediately, the fact that the Court later elevated the right-to-counsel strand to provide greater protections for a suspect who invokes this right rather than the right to silence[102] makes *Miranda*'s right to counsel strand particularly pernicious.

Even if suspects should be advised of their right to remain silent—a right which is at least *related* to the Fifth Amendment—the right to counsel during interrogation is wholly foreign to the text of the Self-Incrimination Clause and should not form a part

99 Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984).

100 Darmer, *supra* note 6, at 258–59.

101 Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part).

102 Darmer, *supra* note 6, at 261.

of the Court's Fifth Amendment jurisprudence. This aspect of *Miranda*'s prophylactic rules should be changed, not just in the terrorism context, but in all cases.

IV. DENIAL OF SIGNIFICANT RIGHTS TO GUANTANAMO BAY DETAINEES: COERCED STATEMENTS AND LIMITS ON THE RIGHT TO COUNSEL

While the *Miranda* "right to counsel" is controversial, the right to appointed trial counsel established by a unanimous Supreme Court in *Gideon v. Wainwright*[103] has been far less so. Among other things, *Gideon* is much more closely tethered to the text of the Sixth Amendment than is *Miranda* to the Fifth. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."[104] Thus, in terrorism cases that proceed in conventional courts, such as the cases involving John Walker Lindh and Zacarias Moussaoui, the defendants are plainly entitled to counsel.[105]

When the Government operates outside the conventional criminal court system, however, the Sixth Amendment arguably does not apply. The Sixth Amendment provides for counsel in "criminal prosecutions," not in Combatant Status Review Tribunals ("CSRTs") such as those that have been established for determining "enemy combatant" status,[106] or in Military Commission proceedings.[107] Constitutional right to counsel aside, the question whether counsel should be provided to Guantanamo Bay detainees—for example, as a matter of legislative grace or even through the efforts of committed volunteer lawyers—has not received government support.[108] Indeed, a high-level member of the Bush Administration recently made headlines by representing that it was "unpatriotic" for counsel to step in to represent "enemies" and even suggesting that other clients of corporate law

103 372 U.S. 335 (1963).

104 U.S. CONST. amend. VI.

105 *See* Darmer, *supra* note 6, at 243 (noting that Lindh "had a small army of privately retained defense counsel advising him when he entered his guilty plea"); *cf.* Michael C. Dorf, Column, *Why the Military Commissions Act is No Moderate Compromise*, FINDLAW.COM, Oct. 11, 2006, http://writ.lp.findlaw.com/dorf/20061011.html (pointing out that, historically, terrorism suspects such as those charged in the 1993 World Trade Center bombing and Moussaoui were charged in conventional courts, and advocating for greater use of the conventional courts).

106 *See* Gary Williams, *Indefinite Detention and Extraordinary Rendition: Recent Court Decisions Throw into Doubt the Executive's Claims for Extraordinary Authority over Enemy Combatants*, L.A. LAWYER, Sept. 2006, at 44, 49; *see also infra* notes 112–18 and accompanying text.

107 Williams, *supra* note 106, at 49.

108 *See, e.g.*, Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 127, 146–47 (2006).

firms should pressure the firms to stop providing pro bono assistance to such individuals.[109]

A complicated issue arises when determining the scope of rights constitutionally required to be provided to detainees at Guantanamo Bay—particularly those who are non-citizens. Initially, the Government took the position, in essence, that those detainees had no right to challenge their detention pursuant to writs of habeas corpus. The Supreme Court rejected that position in *Rasul v. Bush*,[110] holding that statutory habeas rights extended to the Guantanamo Bay detainees based upon the district court's jurisdiction over those who had custody of the detainees.[111]

Following the Court's decision in *Rasul* and the related case of *Hamdi v. Rumsfeld*,[112] involving the rights of a so-called citizen "enemy combatant," the U.S. Government established CSRTs to determine whether or not those held at Guantanamo were properly classified as enemy combatants.[113] Classification of an individual as an "enemy combatant" has important implications, including the potential for long-term detention without formal charge.[114]

The CSRTs were deeply flawed from the perspective of providing meaningful hearings to the detainees, as documented in a paper prepared by Mark Denbeaux and his team of student researchers.[115] Among many other significant limitations was the fact that the detainees had no right to counsel. As Denbeaux documented:

> The CSRT procedures recommended that the Government have an attorney present at the hearing; the same procedures deny the detainees any right to a lawyer.
>
> Instead of a lawyer, the detainee was assigned a "personal representative"—whose role, both in theory and practice, was minimal.

109 *See* Laurie L. Levenson, *Calibrating Ethics in Criminal Law*, L.A. DAILY J., Feb. 2, 2007, at 6 (noting that it was "particularly appalling" that a high-level official would suggest that it was "unpatriotic to represent detainees and those designated as 'enemies' of the state").

110 124 S. Ct. 2686 (2004).

111 *See id*. at 2698–99.

112 124 S. Ct. 2633 (2004).

113 Joseph Blocher, Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667, 670 n.15 (2006). Blocher's comment provides a helpful analysis of whether the CSRTs properly denied prisoner-of-war status to the detainees for purposes of applying the Geneva Convention.

114 *See Hamdi*, 124 S. Ct. at 2636 ("The Government contends that Hamdi is an 'enemy combatant,' and that this status justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted.").

115 MARK DENBEAUX, ET AL., NO-HEARING HEARINGS: CSRT: THE MODERN HABEAS CORPUS? (2006), *available at* http://law.shu.edu/news/guantanamo_reports.htm.

> . . . .
>
> At the end of the hearing, the personal representative failed to exercise his right to comment on the decision in 98% of the cases . . . .
>
> . . . .
>
> In the 52% of the cases where the personal representative did make substantive comments, those comments sometimes advocated for the Government.[116]

In light of the other significant shortfalls of the CSRTs, including the fact that the CSRTs permitted hearsay from anonymous sources[117] and evidence obtained through torture,[118] the fact that there was no right to counsel takes on even more significant ramifications. While an attorney could point to the serious limits of such evidence, the detainee himself or his personal representative would be far less equipped to do so.

Based on recent legislation, it is now plain that Congress intended to strip detainees held as enemy combatants of their right to seek judicial review of those determinations pursuant to writs of habeas corpus.[119] In addition, while the Military Commissions Act of 2006 ("MCA") contemplates that some enemy combatants will be provided with trial-like proceedings before Military Commissions, those proceedings provide vastly more limited protections than do either ordinary criminal trials or traditional military courts martial.[120] Of specific importance to this article, the MCA, while purporting to ban the use of statements obtained by "torture," does contemplate the use of statements obtained from detainees where the amount of "coercion" used is the subject of

---

116 *See id*. at 3 (paragraph numbering omitted); *see also id*. at 14–18 (documenting further the limits on the assistance provided by "personal representatives").

117 *See*, *e.g.*, *id*. at 34.

118 *See* Boumediene v. Bush, Nos. 05-5062 to 05-5064, 05-5095 to 05-5116, 2007 WL 506581 (D.C. Cir. Feb. 20, 2007).

> Additionally, and more significant still, continued detention may be justified by a CSRT on the basis of evidence resulting from torture. Testimony procured by coercion is notoriously unreliable and unspeakably inhumane. . . . The DTA [Detainee Treatment Act ("DTA")] implicitly endorses holding detainees on the basis of such evidence by including an anti-torture provision that applies only to future CSRTs. DTA § 1005(b)(2), 119 Stat. at 2741. Even for these future proceedings, however, the Secretary of Defense is required only to develop procedures to assess whether evidence obtained by torture is probative, not to require its exclusion. *Id*. § 1005(b)(1), 119 Stat. at 2741.

Id. at *19 (Rogers, J., dissenting) (first citation omitted).

119 *See id*. at *9 (finding the court to be without jurisdiction) (citing the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2740 (2005)).

120 *See, e.g.*, Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2608 (2006) (to be codified at 10 U.S.C. § 949a) (permitting evidence generally not admissible in a criminal trial to be used).

dispute.[121]

Thus, statements can be introduced if obtained by coercive means falling short of "torture," a term which the Administration has defined narrowly in other contexts.[122] Being adjudged guilty under the MCA of certain crimes can lead to the ultimate penalty of death.[123]

Moreover, the MCA does not guarantee military commission proceedings for all detainees. This means that individuals deemed "enemy combatants" under the severely truncated CSRT proceedings can potentially be held indefinitely.[124] Ultimately, the United States may be executing, imprisoning and holding indefinitely vast numbers of detainees based upon procedures that are strikingly different and less protective than those accorded to criminal defendants.

Finally and perhaps most significantly, the MCA sought to strip federal courts of jurisdiction to hear claims[125] under the statutory provision for habeas corpus, 28 U.S.C. § 2241. In *Boumediene v. Bush*, a split panel of the District of Columbia Court of Appeals upheld the provisions of the MCA, finding that Congress had plainly intended to strip the courts of jurisdiction under the habeas corpus statute and that no constitutional right to habeas corpus could be claimed by aliens lying outside the territorial jurisdiction of the United States.[126]

In deciding *Rasul*, the Supreme Court held earlier that aliens held at Guantanamo Bay had a statutory right to habeas corpus.[127] Now that Congress has amended the statute expressly to remove the courts' jurisdiction to hear aliens' claims under the statute, the Court will have to determine whether Congress violated the Suspension Clause. That Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[128]

---

121 *Id.*, 120 Stat. at 2607 (to be codified at 10 U.S.C. § 948r). For a further discussion of this point, see Linda M. Keller, *Alternatives to* Miranda*: Preventing Coerced Confessions via the Convention Against Torture*, 10 CHAP. L. REV. 743, 749 (2007).

122 *See* Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to the Honorable Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020801.pdf.

123 *See* § 3, 120 Stat. at 2616 (to be codified at 10 U.S.C. § 949m).

124 *See id.*, 120 Stat. at 2603 (to be codified at 10 U.S.C. § 948d) ("Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title.").

125 *Id.* § 7(a), 120 Stat. at 2635–36 (amending 28 U.S.C. § 2241 (2000)).

126 Boumediene v. Bush, Nos. 05-5062 to 05-5064, 05-5095 to 05-5116, 2007 WL 506581, at *3, *6 (D.C. Cir. Feb. 20, 2007).

127 Rasul v. Bush, 124 S. Ct. 2686, 2698 (2004).

128 U.S. CONST. art. I, § 9, cl. 2.

Whether the War on Terror, now in its seventh year, constitutes a "Rebellion or Invasion" is dubious. While the Executive Branch has relied on wartime precedent for the notion that battlefield detainees are not entitled to constitutional protections, the Guantanamo Bay detainees are in a different position than those captured and held on the battlefield. Perhaps more significantly, given our control over the facilities at Guantanamo Bay, the length of time we have been holding detainees, and the conditions in which the world knows they have been held, the detaining authorities are in a different position than battlefield commanders who must make rapid decisions in the heat of battle and who are necessarily diverted by the daily constraints of war.

Analyzing the scope of the constitutional protections available to Guantanamo Bay detainees is beyond the scope of this article.[129] But we must recognize that the "shadow system" we are engaged in is deeply problematic. We are using coerced confessions and we are holding prisoners indefinitely who have had none of the protections of an adversarial system to challenge their status as "enemy combatants." This is inconsistent with the spirit of the rights provided by our Constitution, even if there is an argument that executive authority in wartime is broad enough to justify this system. We should be deeply concerned about a system that has generated much global criticism. If we lose moral authority, we lose the power to persuade on the world stage. As my colleague Donald J. Kochan has recently noted, persuasion is an important "'soft power' weapon that has a place in the plan in the war on terror."[130] The utility of that power, however, "is directly proportional to a nation's credibility to make claims that there is quality in the intellectual and ideological commodities it has to offer."[131]

CONCLUSION

Forty years after *Miranda*, we must recognize that *Miranda* is an imperfect solution to the problem of coerced confessions. Particularly in the context of terrorism cases, we do not have the luxury of according its prophylactic protections, especially when

129 For a recent article that analyzes the constitutionality of the jurisdiction-stripping provisions of the MCA, see Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. (forthcoming 2007), *available at* http://ssrn.com/abstract=935368.

130 *See* Donald J. Kochan, *The Soft Power and Persuasion of Translations in the War on Terror: Words and Wisdom in the Transformation of Legal Systems*, 110 W. VA. L. REV. (forthcoming 2008) (manuscript at 2, *available at* http://ssrn.com.abstract=977547); *see also id.* (manuscript at 10) ("Soft power is the means of leveraging popularity, power, prestige, prosperity, envy, enlightenment and experience to affect foreign nationals and foreign policy.").

131 *Id.*

not tethered to the Constitution. On the other hand, we must recognize that the right against self-incrimination is absolute, and that truly compelled statements should form no part of our criminal justice system. Outside of the criminal justice system, in the context of military detentions, the applicability of constitutional protections is far less certain. But we have learned much in the criminal justice system about the dangers and unfairness of coerced confessions and the vital role played by counsel. Any system that does not provide such core protections should be viewed with skepticism.