Stop Taking The Bait: The Dilution of Miranda Does Not Make America Safer From Terrorism

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Abstract

On December 25, 2009, a Nigerian tried to blow up a plane over Detroit, Michigan. On May 1, 2010, an American tried to set off explosives in New York's Times Square. Neither man succeeded. After both arrests, lawmakers clamored for more flexibility to interrogate terror suspects and for the suspension (if not elimination) of their Miranda rights. The Supreme Court subsequently decided three cases that severely dilute Miranda protections and Fifth Amendment rights. An examination of these decisions reveals that they fail to make America safer from terrorism.

Worse still, the dilution of American citizens' rights sends a dangerous message to budding terrorists, that as long as they attempt to harm Americans, the American people will be scared and the government will use that fear to restrict liberties. Continuing to react in this manner will increase the number of attempted terrorist attacks, creating demand for more oppressive laws to fight this increase in terrorism, which in turn will beget more terrorist attacks. If this cycle is not broken, America could wind up becoming the type of repressive regime it is fighting so hard against.

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One of the primary goals of terrorism is to promote fear, and in so doing “[h]arass, weaken, or embarrass government security forces so that the government overreacts and appears repressive.”¹

Unfortunately, that is precisely what has happened in America in 2010. On December 25, 2009, Nigerian Umar Abdulmutallab tried to blow up a plane from Amsterdam heading to Detroit.² A little over four months later, American Faisal Shahzad attempted to detonate a car full of what he believed to be explosives in New York’s Times Square.³ As a direct result of these two attempted bombings, members of Congress and the U.S. government began asking for legal reforms to the questioning of suspects to (1) provide the government with more flexibility in prosecuting the war on terror and (2) make America “safer” from terrorism.

The U.S. Supreme Court subsequently handed down three decisions that severely weaken Miranda rights, to allow for more flexibility in questioning suspects. There are three notable problems with these decisions. First, the decisions weaken Miranda rights for all U.S. citizens. Second, these changes fail to make America safer from terrorism. Third, by changing the law to take away rights from all Americans, in the wake of terrorist attacks and political criticism, the United States is allowing the terrorists to succeed. We are repressing our own citizens as a knee jerk reaction to so-called “failed”

¹Teaching Fellow, California Western School of Law. I am grateful for all of those at California Western who provided incisive and invaluable comments, including Associate Dean and Professor of Law William J. Aceves.
terrorist attacks in which no bombs went off and no one was killed. On second thought, perhaps the attempted bombings in Detroit and Times Square did not fail after all.

Killing people is only a short term goal of radical jihadist terrorists. The broader goal of implementing fear and a more repressive regime – not unlike the fundamentalist Islam they believe in – is the broader overarching goal of radical Islamic terrorism against the West.

I. Introduction

The argument for the weakening of Miranda rights is that Americans need to sacrifice some freedoms in order to make us safer. In international law circles this is commonly referred to as the liberty/security trade-off. Inherently, there is nothing wrong per se with the liberty/security trade-off paradigm. The problem is in its application. For example, Judge Richard Posner agrees with the liberty/security tradeoff concept, assuming, as many scholars do, that liberty and security are the like the mythical scales of justice where: “[o]ne pan contains individual rights, the other community safety, with the balance needing and receiving readjustment from time to time.” But this overstates the cause and effect relationship between reducing liberties and increasing security. “Because liberty is often identified with the rules that restrict and discipline executive authority, the tradeoff metaphor also implicitly corroborates the misleading insinuation that, during national security emergencies, the costs of following the rules

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5 But see the American Civil Liberties Union (ACLU), http://www.aclu.org/national-security (last visited August 7, 2010). The ACLU currently has a “safe and free” campaign deploring the sacrifice of individual liberties in order to make America safer from terrorism. “They who can give up essential liberty to obtain a little temporary safety, deserve neither.” Id.
6 Posner, supra note 4, at 152.
exceed the benefits of following the rules.” ⁷ It is a misconception that taking away rights automatically makes Americans safer. That is not the case. ⁸ As Al Pacino notoriously noted in Scarface “[y]ou need people like me to point your fingers and say ‘that’s the bad guy.’ But what [does] that make you? Good?” ⁹ One does not necessarily beget the other.

Nonetheless, thinking about promoting national security under the liberty/security trade-off paradigm has a certain common sense appeal. For example, if we Mirandize a terror suspect by informing him of his right to remain silent, then he may not talk. Likewise, if we Mirandize a terror suspect and inform him of his right to an attorney, he may ask for one, thereby ceasing the interrogation altogether. In so doing, the fear is we might lose the chance to extract otherwise unobtainable information that might enable us to disrupt an ongoing terrorist plot. ¹⁰ In sum, most proponents of the liberty/security trade-off feel that “we cannot let a terrorist go free in the short term for the sake of improving relations with the Muslim community in the long term.” ¹¹

Since 2001, much of the U.S. strategy in the war on terror has indeed failed to focus on improving relations with the Muslim community in the long term, or short term for that matter. Many feel no need to improve relations at all, much less at the expense of “letting terrorists go free” by “giving them” certain rights. President Barack Obama almost failed to win the democratic nomination in part because his father was a Muslim,

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⁷ Stephen Holmes, In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror, 97 Cal. L. Rev. 301 at 313 (2009). The American Civil Liberties Union (ACLU) currently has a “safe and free” campaign deploring the sacrifice of individual liberties in order to make America safer from terrorism. “They who can give up essential liberty to obtain a little temporary safety, deserve neither.” http://www.aclu.org/national-security (last visited August 7, 2010).
¹⁰ Holmes, supra note 7, at 314.
¹¹ Holmes, supra note 7, at 314.
and many Americans continue to portray him as a Muslim. Even those who do not go that far still believe improved relations with the Muslim community should not be a priority of U.S. national security strategy. For example, the Bush administration had a policy of “not negotiating with terrorists,” a policy that again makes the U.S. seem tough on crime, and one that the Obama administration has continued.

This is a time of war for America and wartime often requires sacrifices and the relinquishment of some liberties, in order to ensure public safety. The concept “is also easy to illustrate anecdotally and, as a consequence, has entered too deeply into our public lexicon to be refuted or uprooted by a theoretical analysis.” The problem, in short, is not that the liberty/security trade-off paradigm is always wrong. The problem is that policy and lawmakers begin from a place that assumes it is always right. Thus, continually viewing all proposed changes that restrict rights as reflexively improving national security “remains a highly distorting lens with which to view the overall war on terror.”

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12 For example, videos that splice together various Obama speeches and interviews have appeared all over the internet in an attempt to portray him as a Muslim, with the clear implication being that if he is, he is consequently a radical jihadist terrorist (or very close to it). See “Obama Admits He Is A Muslim,” http://www.youtube.com/watch?v=tCAffMSWSzY. As of June 7, 2010, this clip, which concludes with a photo montage from the aftermath of September 11, 2001 in New York, had almost 2.5 million viewings. (Last visited, June 7, 2010.)


14 Holmes, supra note 7, at 314.

15 Id.
Nevertheless, if utilized correctly, the liberty/security tradeoff paradigm can be a useful tool in analyzing changes in the law relating to the war on terror. For example, instead of beginning with the assumption that if a change in the law restricts liberty, it must inherently and proportionally make Americans safer, the first question should be whether the change in the law actually makes Americans safer. Then, if it is determined that this new law makes America safer in some substantial way, we can move onto a discussion of whether the restriction of liberties is worth this likelihood of increased safety. Too many times, however, policy-makers and the general public both become subject to fear, and adopt a “must do something” mentality to stop terrorists.

This Article will examine the Supreme Court’s recent decisions that abrogate the constitutional protections enumerated in the landmark decision *Miranda v. Arizona.*\(^\text{16}\) Those decisions are *Florida v. Powell, Maryland v. Shatzer* and *Berghuis v. Thompkins.*\(^\text{17}\) This Article will first provide a timeline of the events: the attempted bombings, subsequent backlash and the resulting Supreme Court decisions. Second, to provide the proper background, there will be a discussion of *Miranda v. Arizona* and two of its progeny, *New York v. Quarles* and *Dickerson v. United States.*\(^\text{18}\) The Article will then examine the two attempted bombings and the subsequent outcry from political leaders and Congressman calling for *Miranda* reform. This section will also look at proposed changes to *Miranda* and why such changes would only succeed in the reduction of civil liberties, while failing to make America safer from terrorism.

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Following this discussion, the Article will examine the three Supreme Court decisions themselves, and the particular ways in which they abrogate Miranda rights, to determine if these reduction in liberties make America safer from terrorism. Finally, the Article will conclude with the realization that because these attempted terrorist attacks fostered an immediate reaction from our government limiting the rights of our citizens, it is difficult to call them a failure even though no Americans were killed. Our reaction sets a dangerous precedent for future would be terrorists, who can now accomplish their goal of making our government more repressive by simply attempting a terrorist attack.

II. Timeline of Events

The timeline of events is as follows: on Christmas Day, 2009, Abdulmutallab attempted to blow up a plane from Amsterdam as it was about to land over Detroit, Michigan.\textsuperscript{19} Abdulmutallab was detained, questioned and Mirandized.\textsuperscript{20} Shortly following his arrest, in January 2010, several Republican Congressman complained that Miranda was hindering the investigation of highly dangerous terror suspects such as Abdulmutallab.\textsuperscript{21} On February, 23, 2010, the Supreme Court decided Florida v. Powell, holding that the Miranda warnings do not have to be verbatim across the U.S.\textsuperscript{22} On February 24, 2010, the Court decided Maryland v. Shatzer, holding that (1) being in prison can constitute a sufficient break in custody for purposes of Miranda, and (2) after a suspects invokes his or her right to counsel, the State can repeatedly return and attempt

\textsuperscript{19} Krolicki and Pelofsky, supra note 2.
\textsuperscript{20} Schapiro, supra note 3.
\textsuperscript{22} Powell, 130 S.Ct. at 1195.
to interrogate the suspect every 14 days, without re-Mirandizing the suspect and without a lawyer present.  

Five weeks later on May 1, 2010, proclaimed terrorist Shahzad attempted to blow up Times Square in New York.  

Like the Detroit bomber, he was arrested, interrogated and *Mirandized* shortly thereafter.  

In the weeks following Shahzad’s capture and ongoing interrogation, Attorney General Eric Holder called for *Miranda* to be weakened, if not suspended altogether, for terror suspects.  

On June 1, 2010, the Court decided *Berghuis v. Thompkins*, holding that (1) Thompkins’ waiver of his Miranda rights was valid despite ambiguity over whether he understood them, and (2) in order to obtain the right to remain silent, a suspect must verbally assert it.  

Thus, from Christmas day, 2009 through June 1, 2010, a pattern developed. A terrorist tries to kill Americans but fails. He is apprehended, interrogated and *Mirandized*. After his capture and interrogation, political leaders and policymakers clamor for more leeway in interrogations and for the loosening of *Miranda*. After their complaints, the Supreme Court comes down with a decision (or two) weakening *Miranda*. Independent of motivation, these are the facts.  

If even “failed” terrorist attacks can spawn repressive changes in American law, this could result in an increase in terrorist attacks against the U.S.

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23 *Shatzer*, 130 S.Ct. at 1213.  
27 *Berghuis*, 130 S.Ct. at 2259 – 2264; 2266.  
III.  *Miranda and its Progeny*

Before delving into the events that triggered the dilution of *Miranda*, it is important to discuss the basic underpinnings of *Miranda* and how it has evolved through its progeny *Quarles* and *Dickerson*.  

A.  *Miranda v. Arizona*

The Miranda warnings are comprised of a list of statements that police must read to all apprehended suspects before any questioning can commence. Though the precise wording may legally differ slightly by state, the basic Miranda warning that must be given after someone is placed in a custodial situation is as follows: “[Y]ou have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be appointed to you. Do you understand these rights as they have been read to you?”

These warnings arose from the landmark 1966 decision of *Miranda v. Arizona*. There, the Supreme Court focused on the rights enumerated by the Fifth Amendment, in particular the right against self incrimination: “The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way.” The Court elaborated: “that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be

30 *Miranda*, 384 U.S. at 479.
31 *Miranda*, 384 U.S. at 477.
employed to protect the privilege.”32 One such safeguard is *Miranda*’s requirement that any waiver of the right to remain silent or speak without a lawyer must be “made voluntarily, knowingly and intelligently.”33

Initially, this was the primary interpretation of the *Miranda* warnings, nothing more than procedural safeguards protecting fundamental constitutional rights under the Fifth Amendment. Thus, they were not initially interpreted by the Court as constitutionally guaranteed rights in and of themselves, but rather they seen as more prophylactic in nature. This allowed the Court greater flexibility in creating exceptions to *Miranda*, as it is easier to change a prophylactic rule as opposed to constitutionally protected rights. Indeed, “in the three decades since Miranda was decided, the Supreme Court had articulated a number of so-called exceptions to Miranda’s exclusionary rule.”34

B. *New York v. Quarles*

One such exception was delineated in *New York v. Quarles*.35 A brief discussion of *Quarles* is instructive. On September 11, 1980, in New York, a woman hastily approached two police offers on the street and told them that she had just been raped by a man carrying a gun, and that assailant had just fled into a nearby supermarket.36 Officer Kraft entered the store, spotted the assailant, and ordered him to put his hands up.37 The assailant complied, and Officer Kraft went over and frisked him, and noticed the assailant had an empty shoulder holster.38 Officer Kraft then asked the assailant where the gun

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32 *Miranda*, 384 U.S. at 478-479.
33 *Miranda*, 384 U.S. at 444.
35 *Quarles*, 467 U.S. at 649.
36 *Quarles*, 467 U.S. at 651, 652.
37 *Quarles*, 467 U.S. at 652.
38 *Quarles*, 467 U.S. at 652.
was, the assailant told him, and then Officer Kraft retrieved the gun, and then read the assailant his Miranda rights.\textsuperscript{39} It was then that the assailant admitted the gun was his.\textsuperscript{40}

Nevertheless, the trial court excluded all of the assailant’s initial statement about where the gun was located because the assailant had not been given the Miranda warnings.\textsuperscript{41} The trial court also excluded the subsequent statement regarding gun ownership as tainted evidence from the Miranda violation.\textsuperscript{42} The New York Supreme Court and Court of Appeals upheld the trial court’s decision.\textsuperscript{43}

But the Supreme Court reversed, holding otherwise: “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.”\textsuperscript{44} The Court adopted a more practical approach, and could not find fault with what Officer Kraft did in this situation - where a public safety issue is involved - regardless of his true motivation.\textsuperscript{45} Moreover, the Court explained that part of the reason behind the Miranda warnings is to prevent coercion by the police of the suspect’s testimony.\textsuperscript{46} The Court then noted that there is no reason to suspect the testimony in this case was in any way coerced.\textsuperscript{47} Furthermore, even if there were coercive tactics utilized before Miranda was issued, the worst that usually happens is that testimony cannot be used against the Defendant at his or her trial. But here, “the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. Officer Kraft needed

\textsuperscript{39} Quarles, 467 U.S. at 652.
\textsuperscript{40} Quarles, 467 U.S. at 652.
\textsuperscript{41} Quarles, 467 U.S. at 652, 653.
\textsuperscript{42} Quarles, 467 U.S. at 652, 653.
\textsuperscript{43} Quarles, 467 U.S. at 653
\textsuperscript{44} Quarles, 467 U.S. at 653.
\textsuperscript{45} Quarles, 467 U.S. at 656-657. In other words, if the public is in danger, you can utilize the exception to \textit{Miranda}, even if your true motivation is to get the suspect to confess or otherwise cooperate.
\textsuperscript{46} Quarles, 467 U.S. at 656-657.
\textsuperscript{47} Quarles, 467 U.S. at 656-657.
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.”48 It is precisely because of that special circumstance in this case that the Miranda warnings are allowed to be delayed due to a public safety exception. Put another way, the Court simply declined
to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the Miranda warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.49

*Quarles*, however, was not the only Supreme Court case to provide exceptions to *Miranda*. Numerous other cases emerged throughout the 1970s and 1980s underscored the notion that *Miranda* was just a prophylactic rule. “‘Miranda was merely ‘prophylactic’ rather than an interpretation of the Fifth Amendment itself, and thus statements obtained absent compliance with the Miranda rule were not really obtained in violation of the Constitution.”50 Moreover, in addition to Supreme Court cases that were interpreting *Miranda*, Congress also got involved by passing 18 U.S.C. Section 3501. This bill essentially allowed the police to bypass *Miranda* altogether, by instead establishing a voluntariness test, in which, regardless of whether a suspect's Miranda rights had been violated, the “voluntariness of the confession” was all that mattered. In

48 *Quarles*, 467 U.S. at 657.
49 *Quarles*, 467 U.S. at 657-658.
50 *Id.; See Harris v. New York*, 401 U.S. 222 (1971) (holding that unwarned statements could be used to impeach a defendant’s testimony); *Michigan v. Tucker*, 417 U.S. 433 (1974) (explaining that the question whether the “police conduct complained of directly infringed upon respondent’s right against compulsory self-incrimination” was a “separate question” from “whether it instead violated only the prophylactic rules developed to protect that right”); *Nix v. Williams*, 467 U.S. 431, 442 (1984) (Miranda violations were not full-fledged constitutional violations); *Oregon v. Elstad*, 470 U.S. 298 (1985) (holding that Miranda waiver’s is not necessarily tainted by prior admission in response to unwarned questioning.)
short, if the confessions seemed voluntary, the absence of proper Miranda warnings was of no effect. Essentially, 18 U.S.C. Section 3501 was Congress’ end run around the Miranda rule. And “[f]or various reasons, the question of whether Congress could in essence ‘overrule’ Miranda's warning requirements did not reach the Supreme Court for thirty-two years.”\(^\text{51}\) But the issue was finally posed in Dickerson.\(^\text{52}\)

C. **Dickerson v. United States**

In the year 2000, the Court addressed the issue of whether Congress could dilute *Miranda* in *Dickerson v. United States*.\(^\text{53}\) Dickerson was “indicted for bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence.”\(^\text{54}\) Dickerson moved to suppress a statement he made to the FBI, “on the grounds that he had not received ‘Miranda warnings’ before being interrogated.”\(^\text{55}\) The Fourth Circuit agreed that Dickerson had not received Miranda warnings before making his statement, “but it went on to hold that § 3501, which in effect makes the admissibility of statements such as Dickerson's turn solely on whether they were made voluntarily, was satisfied in this case.”\(^\text{56}\) As such, it concluded that “since our decision in *Miranda* was not a constitutional holding, therefore, Congress could by statute have the final say on the question of admissibility.”\(^\text{57}\) The Supreme Court reversed.\(^\text{58}\)

In deciding that “Congress may not legislatively supersede our decisions interpreting and applying the Constitution”\(^\text{59}\) the Court held “that the Miranda rule was

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\(^{51}\) Caminker, *supra* note 34, at 3, 4.

\(^{52}\) Caminker, *supra* note 34, at 4.

\(^{53}\) 530 U.S. 428 (2000).

\(^{54}\) *Dickerson*, 530 U.S. at 432.

\(^{55}\) *Dickerson*, 530 U.S. at 432.

\(^{56}\) *Dickerson*, 530 U.S. at 432.

\(^{57}\) *Dickerson*, 530 U.S. at 432.

\(^{58}\) *Dickerson*, 530 U.S. at 432.

\(^{59}\) *Dickerson*, 530 U.S. at 437.
not a mere prophylaxis against constitutional violations but was itself a constitutional rule. 60 This marked the first time the Court held that Miranda warnings themselves were “constitutionally based rule[s]” and as such Congress could not create law to circumvent them. 61 As such, the only vehicle left for abrogating Miranda would seem to be the Supreme Court.

This is a critical point to understand before examining the Court’s current abrogation of the rights afforded by Miranda. The Court, with its recent decisions of Powell, Shatzer, and Berghuis is not simply re-interpreting a prophylactic rule to make it less protective. By diluting Miranda, the Court is weakening what it has determined are fundamental constitutionally based rights afforded to all American citizens. Now, these actions are of course within the purview of the Court, but the question is why it finds it necessary to diminish rights just ten years it ago it forbade Congress to do? Why is the Court taking such an immense step give more power to the government in interrogations? This Article proposes that the answer might be some sort of a veiled response to the recent attempted terrorist attacks and subsequent complaints about the interrogation of those terror suspects. Before an examination of the Court’s recent 180-degree turn, however, the attempted terrorist attacks are worth exploring. 62

60 Samuel Estreicher and Daniel P. Weick, Opting For a Legislative Alternative to the Fourth Amendment Exclusionary Rule, 78 UMKC L. Rev. 949, 959 (Summer, 2010).
61 Dickerson, 530 U.S. at 438 (“Miranda is a constitutional decision”), 440 (“Miranda is constitutionally based”), 444 (“Miranda announced a constitutional rule”).
62 Notably, Chief Justice Rehnquist delivered the opinion for the Court in Dickerson, to which only Justices Scalia and Thomas dissented. Dickerson, 530 U.S. at 430. In other words, this is not a case of a liberal Court suddenly becoming conservative. A conservative Court ruled that Miranda protections were constitutionally based and Congress could not, by law, override or dilute them. Dickerson, 530 U.S. at 432.
IV. **December 25, 2009 Detroit Attempted Bombing and Calls For Reform**

On December 25, 2009 23 year-old Umar Farouk Abdulmutallab boarded a flight in Amsterdam. Born and raised in Nigeria, Abdulmutallab had an upper middle class, if not wealthy, upbringing. Somewhat surprisingly, several months prior to Christmas 2009, his own father reported him to the U.S. government for having radical jihadist tendencies. That is because Abdulmutallab had been recruited by al Qaeda in London and met with a radical American Muslim cleric in Yemen. As a result of his father’s report, the U.S. promptly placed him on the no-fly list for terror suspects. The only problem was that the list was not reviewed by the proper airline authorities. As a consequence, Abdulmutallab was allowed to board flight 253 from Amsterdam. Abdulmutallab waited almost the entire flight until the plane was over American soil near Detroit, Michigan before he attempted to blow it up by lighting himself on fire.

What often gets lost in this and other attempted terrorist stories is the fact that they were attempts. Abdulmutallab did not succeed. He was apprehended, arrested and immediately taken into custody by the F.B.I. Before reading him his Miranda rights, however, F.B.I. interrogators questioned Abdulmutallab at length. In fact, according to

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64 Krolicki & Pelofsky, *supra* note 2.
65 Schapiro, *supra* note 3.
68 Krolicki & Pelofsky, *supra* note 2; *Id.*
70 Perez and Gorman, *supra* note 21.
71 Perez and Gorman, *supra* note 21.
the Justice Department, as a result of that Christmas Day interrogation of Abdulmutallab, the FBI “obtained intelligence that has already proven useful in the fight against Al Qaeda.”

Despite obtaining this valuable intelligence, the handling of Abdulmutallab’s case came under heavy criticism. Some Republican Congressman said the government squandered a chance to get intelligence from Abdulmutallab by not immediately placing him in military custody as an enemy combatant. Instead, the Obama administration chose to treat Abdulmutallab, (as it has done with many suspected terrorists) using the American criminal justice system. This decision, of course, triggered the need for Miranda warnings. This was part of the concern of the officials that criticized the Obama administration, as they did not like the lost potential for prime information from interrogation before telling the suspect that he had the right to remain silent. The clear implication being that if Nigerian born Abdulmutallab knew of his right to remain silent, he would certainly invoke it, and the U.S. would lose out on valuable intelligence. The Supreme Court in _Miranda_, however, anticipated and addressed such criticism:

A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. See, e.g., _Chambers v. State of Florida_, 309 U.S. 227, 240-241, 60 S.Ct. 472, 478-479, 84 L.Ed. 716 (1940). The whole thrust of our

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72 Perez and Gorman, _supra_ note 21.
73 Perez and Gorman, _supra_ note 21.
74 Terry Frieden and Chris Kokenes, _Accused 9/11 Plotter Khalid Sheikh Mohammed faces New York Trial_, November 13, 2009, CNN, www.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed/index.html (last visited July 20, 2010). In addition, in August of 2009 the Obama administration announced it would set up a special interrogation task force, titled the “High-Value Detainee Interrogation Group” (HIG) to handle the interrogation of suspected terrorists. Anne Kornblut, _New Unit to Question Key Terror Suspects: Move Shifts Interrogation Oversight from the CIA to the White House_, August 24, 2009, www.washingtonpost.com/wp-dyn/content/article/2009/08/23/AR2009082302598.html (last visited July 20, 2010). The group, however, was not yet fully formed at the time of Abdulmutallab’s attempted bombing on December 25, 2009, and therefore did not question him at that time. Perez and Gorman, _supra_ note 28. Regardless, the mere existence of the HIG is an example of another effort by the Obama administration to take interrogations away from the CIA and/or strictly military officials.
75 Perez and Gorman, _supra_ note 21.
The foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged.76

Despite the clear language of Miranda, over time an exception to the rule has developed that the warnings must be issued immediately upon arrest and/or custodial interrogation. In short, if public safety is at issue, the warnings can be delayed. The FBI has been utilizing this exception to Miranda, in particular, with respect to the interrogation of terrorist suspects. In fact, this exception was utilized with great success in the interrogation of Abdulmutallab. He was detained and questioned at length, and in was only later on “after the interrogation had already yielded intelligence, that he was read his Miranda rights.”77 Thus, the criticism would seem to be unfounded, thanks to the public safety exception to Miranda.78

Consequently, if there is a delineated public safety exception to Miranda that it is currently being employed by the FBI and government officials in the interrogation of terrorist suspects, why was the Obama administration being so heavily criticized for its handling of the Christmas Day bomber’s case? As noted earlier, the fact that the suspect was only read his Miranda rights “after the interrogation had already yielded intelligence”

76 Miranda, 384 U.S. at 479.
77 Perez and Gorman, supra note 21. Notably, Abdulmutallab still cooperated with authorities after he was apprehended and proudly and willingly told them about his training in Yemen, his ties to al Qaeda, and his reasons for attempting to blow up the plane. As will be examined in more detail later, this type of pride in attacking the U.S. is a common theme amongst radical jihadists, one that is often overlooked by those who seek to abrogate Miranda and other civil liberties of Americans. In short, many apprehended suspects are not shy about what they have tried to do or have done, and therefore are undeterred by Miranda, making inconsequential the further erosion of such rights in the quest to make America safer. See Perez and Gorman, supra note 21.
78 Quarles, 467 U.S. at 650.
should have quelled the issue.\textsuperscript{79} Perhaps government officials want more leeway to conduct investigations with terrorism suspects, want more time to indefinitely detain and interrogate them at will, until most of the dictates of \textit{Miranda} and the Fifth Amendment are gone altogether. Such a policy is eerily reminiscent of Bush era interrogation and detention policies that were so heavily criticized worldwide and gave the U.S. a seriously poor reputation in the eyes of the world.\textsuperscript{80} The Obama administration certainly does not want to return to that sort of a regime. Though judging from the following Supreme Court decisions, decided only five weeks after the attempted Christmas day bombing, one wonders if anything is different.

\textbf{V. The Times Square Attempted Bombing and Calls For \textit{Miranda} Reform}

About four months later, a recently laid off American living in Connecticut took a trip to New York. Like many struggling Americans, his home was in foreclosure and he had, according to friends, seemingly turned to religion for comfort.\textsuperscript{81} The only problem here was that he sought the comfort and advice of radical jihadist militants. Based in part on the teachings of those jihadists, on May 1, 2010 American Faisal Shahzad attempted to blow up a car bomb in New York City’s Times Square.\textsuperscript{82} The would-be bomber packed the car with more than 100 pounds of fertilizer, but mistakenly failed to use the

\textsuperscript{79} Perez and Gorman, \textit{supra} note 21.
\textsuperscript{80} "The bottom line is these techniques have hurt our image around the world," Blair said in the statement. "The damage they have done to our interests far outweighed whatever benefit they gave us and they are not essential to our national security." Joby Warrick, \textit{Intelligence Chief Says Methods Hurt U.S.}, \textit{THE WASHINGTON POST}, April 22, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/04/21/AR2009042104334.html (last visited July 20, 2010).
\textsuperscript{81} Nina Bernstein, \textit{supra} note 24.
\textsuperscript{82} \textit{Id.}
kind that would explode. Had Shahzad chosen the right kind of fertilizer, the bomb
would have had the force of more than 100 pounds of TNT. 83

In sum, the plot failed in large part because Shahzad purchased the wrong
explosives. 84 And with it coming only four months after the attempted Christmas day
bombing in Detroit, Shahzad’s attempted bombing raised concerns that the U.S. was just
“getting lucky.” Many believed it was only a matter of time before a terrorist
successfully killed Americans again. 85 Furthermore, the situation became increasingly
ominous as more details of the attempted attack emerged.

For example, within two days of the attempted bombing Shahzad was arrested on
a plane leaving from New York’s John F. Kennedy airport to Dubai. 86 It was discovered
that Shahzad is an American citizen. Traditionally, since September 11 anyway, most
Americans probably think of terrorists as “foreigners.” Shahzad, in fact, was born in
Pakistan, but he had lived in America for more than a decade before this attempted

83 Id.
84 Schapiro, supra note 3.
85 Mike Lupica, Times Square Car Bomb Scare: Disaster Averted Thanks to Alert New Yorkers – and Some
03_someone_saw_something_said_something__and_disasters_averted.html (last visited July 20, 2010).
86 Mark Mazzetti, Sabrina Tavernise and Jack Healy, Suspect, Charged, Said to Admit to Role in Plot, THE
NEW YORK TIMES, May 4, 2010, http://www.nytimes.com/2010/05/05/nyregion/05bomb.html (last visited
July 20, 2010). It is important to note here that Mr. Shahzad was not arrested attempting to board a plane
to Dubai, but rather he was arrested after he had already gotten on the plane and it was about to take off.
Mr. Shahzad was able to purchase a ticket, with cash, and board a plane to Dubai despite being on the
“target of a major terrorism investigation” and all the New York airports being on high alert. Id. “He had
been added to the no-fly list at 12:30 p.m. that day, when airlines were directed to check the list for
updates. But Emirates airline did not look at the updated list, and sold Mr. Shahzad a ticket for cash at 7:35
p.m. on Monday.” Mark Mazzetti and Scott Shane, Evidence Mounts For Taliban Role in Bomb Plot, THE
July 20, 2010). Airlines were only required to check the no-fly list for updates only every 24 hours, so they
missed Mr. Shahzad. Id. Of all the drama surrounding the attempted New York Times Square bombing,
this is perhaps the most under-reported scariest moment. Perhaps before rushing to enact new laws that
deprive American citizens of freedoms in order to combat terrorism, the U.S. might want to focus on the
laws and mechanisms that all already in place and ensure they are functioning properly. (In a small step in
the right direction, since this incident the Department of Homeland Security has implemented a new rule
requiring airlines to check to no-fly list within two hours of receiving notification that a high-priority name
has been added to the list.) Id.

But, on May 15 the New York Times released more information detailing Shahzad’s deep discontent.\footnote{Id.} In the year preceding the attempted bombing, Shahzad, like many Americans, was facing grave financial difficulties. Shahzad recently had lost his job and the bank was about to foreclose on his home.\footnote{Id.} Friends and family believed that Shahzad blamed the U.S. for his troubles and subsequently took a much greater interest in religion.\footnote{Id.} If one stopped the story right there, Shahzad does not sound so different from scores of Americans adversely affected by the deep recession since 2007 that turned to religion for strength and guidance.\footnote{Id.}

The problem is that Shahzad did not just turn to Christianity or Judaism or Islam – he began following radical Islamic jihadism. This well-known religious ideology, recently popularized by al Qaeda, often blames the West for the problems in the world and therefore wants to bring destruction to democracies and capitalist nations.

\footnote{Mr. Shahzad also felt discriminated against at work and in every day life here in America since September 11. “He felt that American Muslims were treated differently after 9/11,” said a classmate of Mr. Shahzad’s. \textit{Id.} “He used to say that when they refer to us, they say ‘Americans of Pakistani origin’ — they don’t say ‘Americans with German origin,’ the relative recalled. Elliot, Tavernise and Barnard, supra note 87. “These kinds of things, they were all the time cooking in his head.” \textit{Id.}}
worldwide. Shahzad went so far as to visit Pakistan in late 2009 to put his newfound radical beliefs into practice, and it was there that the Pakistani Taliban supplied Shahzad with both weapons training and funding for a terrorist attack on the U.S.

In December 2009, Shahzad received explosives training in Waziristan, Pakistan, from explosive trainers affiliated with Tehrik-e-Taliban, a militant extremist group based in Pakistan. On Feb. 25, 2010, Shahzad received approximately $5,000 in cash in Massachusetts sent from a co-conspirator (CC-1) in Pakistan whom Shahzad understood worked for Tehrik-e-Taliban. Approximately six weeks later, on April 10, 2010, Shahzad received an additional $7,000 in cash in Ronkonkoma, N.Y., which was also sent at CC-1’s direction.

With this financial backing and training, Shahzad set out to blow up as many people as he could in Times Square.

Yet no bomb was detonated in Times Square on May 1, 2010. Shahzad was captured by the FBI two days later. Notably, Shahzad was questioned at length before he was read his Miranda rights, utilizing the long existing public safety exception to Miranda. This was the same exception utilized – quite successfully – by the government in the questioning of Abdulmutallab, the Christmas Day Detroit plane bomb suspect. Once again the efficacy and necessity of diluting Miranda is called into question.

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93 Gallup Press Release, supra note 19; Mazzetti, Tavernise and Healy, supra note 86.
95 Mazzetti, Tavernise and Healy, supra note 86.
96 Mazzetti, Tavernise and Healy, supra note 86.
97 Perez & Gorman, supra note 21. Notably, Shahzad also was questioned by the recently formed HIG, which, as noted earlier, is “the elite team of investigators from the FBI, CIA and Defense Department [which] was set up to question terror suspects as soon as possible after an arrest.” Kimberly Dozier, WH adviser: Elite terror interrogation team questions Times Square suspect, others, May 27, 2010, http://www.680news.com/news/world/article/56600--wh-adviser-elite-terror-interrogation-team-questions-times-square-suspect-others (last visited July 22, 2010). “The idea is to quickly extract information from a would-be terrorist to head off any plots that might be about to unfold and track down anyone who might have aided the suspect.” Id.
Additionally, Shahzad kept talking to government officials before and after being read his Miranda rights.\textsuperscript{98} In the days following his capture, Shahzad even “waived his right to a speedy arraignment” so he could keep on cooperating with government interrogators.\textsuperscript{99} The information provided by Shahzad lead to two more arrests and the uncovering of his terrorist plot.\textsuperscript{100} This further adds to questioning the necessity of increased flexibility to interrogate terror suspects to make America safer.

A. \textbf{Responses to the Times Square Attempted Bombing}

Many policy and lawmakers, however, did not have wonder, for they were certain the government needed the law relaxed in order to effectively prosecute the war on terror. Immediately following Shahzad’s capture, several Congressman and other government officials set out to pass new laws that would provide government agencies with never before seen authority in interrogating suspects. The first such suggestion came just days of Shahzad’s attempted attack and was proposed by Senators Joseph Lieberman and Scott Brown. They suggested that all suspected terrorists be stripped of their American citizenship, under a new act entitled the Terrorist Expatriation Act.\textsuperscript{101} Though seemingly drastic, allowing the State Department to unilaterally strip Americans of their citizenship on mere suspicion of terrorism, the (ironically) abbreviated T.E.A. garnered initial support from Republicans and Democrats alike, including Speaker of the House Nancy Pelosi and Secretary of State Hillary Clinton.\textsuperscript{102} As of the date of this Article the T.E.A.

\begin{itemize}
\item \textsuperscript{98} Mazetti and Shane, \textit{supra} note 86.
\item \textsuperscript{99} Mazetti and Shane, \textit{supra} note 86.
\item \textsuperscript{100} Mazetti and Shane, \textit{supra} note 86; Justice Department Press Release, \textit{supra} note 94.
\item \textsuperscript{101} Terrorist Expatriation Act of 2010, 111\textsuperscript{th} Cong. §2 (2010).
\end{itemize}
had yet to pass into law, and many commentators (including this Author) have noted the potential hazardous consequences if it ever became law.\textsuperscript{103} Perhaps more disturbingly, however, was the response of Attorney General Eric Holder and the Obama Administration. Just days after Shahzad continued talking and cooperating with law enforcement \textit{after} he had been fully Mirandized, Holder began publically clamoring to modify Miranda rights for terror suspects. In particular, Holder argued for the “necessary flexibility” to, \textit{at a minimum}, broaden the “public-safety exception” to \textit{Miranda}.\textsuperscript{104} At a maximum, it appears Holder wishes the government had the flexibility to forgo Mirandizing terror suspects altogether until the government, FBI, or whomever, is done interrogating them, whenever that may be.\textsuperscript{105} President Obama publically supported Holder’s calls to further erode \textit{Miranda} in order to provide the government with more flexibility in interrogating terror suspects.\textsuperscript{106} Holder stressed this increased need for flexibility because “[W]e are now dealing with international terrorism.”\textsuperscript{107} But does that mean it is necessary to change fundamental constitutionally based domestic laws in order to combat “international terrorism?” And are the greatest threats to America’s national security international in nature?

\textbf{B. Problems With The Proposed Dilution of \textit{Miranda}}

As noted earlier, \textit{Miranda v. Arizona} was decided in 1966. It is therefore not a recent decision, and it is easy to see the appeal of a “new foes” call for “new laws” type of argument. But in \textit{Miranda} the Court recognized that the right to counsel before

\begin{footnotesize}
\textsuperscript{104} Pitney, \textit{supra} note 26.
\textsuperscript{105} Id.
\textsuperscript{107} Id.
\end{footnotesize}
interrogation began and the right to remain silent were constitutionally protected rights granted to all citizens.\textsuperscript{108} “The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.”\textsuperscript{109} Policymakers should carefully consider the long-term ramifications of their actions when they start advocating for the erosion of fundamental privileges all Americans share in the hopes that it might make it easier to interrogate suspected terrorists.

Moreover, is international terrorism the greatest threat to American National Security? Eric Holder made these remarks along with the new foes, new laws argument after the capture of Shahzad. He stressed that Shahzad was in communication with the Pakistani Taliban – which he apparently was.\textsuperscript{110} But Shahzad is also an American citizen, and had been living on a quiet street in Connecticut for more than a decade right up until the attack. That is hardly the profile of an international terrorist. In fact, since September 11, there have been no civilian causalities on U.S. soil as a result of a terrorist attack. And only one attack resulted in multiple causalities and that was done by our own military against our own military, when Major Nidal Hasan went on a shooting rampage at Fort Hood Texas in 2009.\textsuperscript{111} Notably, Major Hasan is an American, born and raised in Virginia.\textsuperscript{112}

\textsuperscript{108} \textit{Miranda}, 348 U.S. at 475-479.
\textsuperscript{109} \textit{Miranda}, 348 U.S. at 476.
\textsuperscript{110} Pitney, supra note 26.
\textsuperscript{111} Lieberman Announces Senate Investigation into Ft. Hood Shootings, Fox News, Nov. 8, 2009, http://www.foxnews.com/politics/2009/11/08/lieberman-announces-investigation-fort-hood-shooting/ (last visited July 22, 2010). Although other acts of terrorism have been attempted, this is the first fully executed terrorist attack on American soil since 9/11.
Moreover, on June 3 2010 it was reported that another senior al-Qaeda operative was killed by a drone strike in Pakistan.\textsuperscript{113} He was an Egyptian named Mustafa al-Yazid, and “Obama Administration sources claim he was No. 3 in al-Qaeda.”\textsuperscript{114} Robert Baer, a former CIA agent was on the phone with an FBI agent working counter-terrorism when news about Yazid broke.\textsuperscript{115} The agent’s initial reaction to Yazid death was, "Does it really matter?"\textsuperscript{116} Baer continued:

My FBI friend had spent the weekend in the office, Memorial Day, time he had hoped to spend with his family. He said he was doing what he’d been doing for the last couple of years: tracking down homegrown terrorists — people living in this country drawn to jihad by Internet blogs, the self-recruited. None has any direct connections to al-Qaeda. It's people like the failed Times Square car bomber, Faisal Shahzad, who worry the FBI far more than al-Qaeda's leadership does.\textsuperscript{117}

Thus, the most prominent and likely terrorist threat is not from international terrorism but rather from homegrown American citizens. For policymakers and politicians, this, understandably, may not be the most prudent position to adopt politically. The goal of this Article is not to criticize them for not telling the American people they need to be most afraid of themselves. One goal is, however, to acknowledge the danger when policymakers advocate to change the law based on these politically friendly assertions (foreigners are the ones attacking us), when those assertions are not supported factually. This can lead to unnecessary reduction in liberties. For example, international terrorism is not a new threat, nor is it the one that the FBI counter terrorism experts are most concerned about. The focus is not on radical jihadists from Afghanistan,
fearing they will fly more planes into buildings. The focus is on American citizens that turn to terrorism after being seduced by radical jihadist rhetoric. There have been numerous instances of this too, including after Shahzad’s attempted Times Square bombing.\footnote{Matthew Barakat, 'South Park' critic faces unrelated terror charge, July 22, 2010, http://apnews.excite.com/article/20100722/D9H4246O0.html (last visited July 22, 2010).} Emasculating Miranda to better interrogate foreign terrorist suspects does not make America safer if the main threat is not from international terrorists.

Furthermore, Miranda warnings are also a safeguard against police and government abuse of process and abuse of rights. Throughout the last decade of the “war on terror” the United States government, whether through its military, the CIA, or other agencies, has repeatedly come under fire for using undue intimidation and tortuous interrogation techniques.\footnote{Tim Reid, Torture Memo has Put US in Danger, CIA tells Barack Obama, TIMES ONLINE, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6135965.ece (last visited July 22, 2010).} The complaints of abuse are so numerous that President Obama campaigned on a pledge to shutdown Guantanamo Bay in order “to make sure that the procedures we set up are ones that abide by our Constitution.”\footnote{Ed Henry, Obama to Order Guantanamo Bay Prison Closed, CNN, Jan. 12, 2009, http://www.cnn.com/2009/POLITICS/01/12/obama.gitmo/ (last visited July 22, 2010).} There can scarcely be a situation where a greater need for protection against police and government abuse exists than that of the detention and interrogation of a terrorist suspect. Yet instead of ensuring that Miranda warnings are maintained, Holder and the Obama administration want to do just the opposite.
This type of logic is as similarly flawed as the common use and understanding of the liberty/security tradeoff paradigm.\footnote{Holmes, supra note 7, at 314, 315.} In the liberty/security tradeoff paradigm, for many it is assumed that if liberty is reduced, security is automatically increased.\footnote{Holmes, supra note 7, at 314.} Like the scales of justice – reducing the privileges of American citizens on one end automatically, and proportionally, raises the safety level of the country on the other end. There are obvious dangers with this way of thinking, chief among them that there is no liberty/security scale. Taking away rights does not automatically make us safer.\footnote{Williams, supra note 8.} In that same vein, further diluting \textit{Miranda} to give government agencies more flexibility to interrogate terror suspects does not necessarily mean America is safer. This is, after all, an after the fact remedy. It only comes into effect after you have already apprehended the alleged terrorist. It is that act, the actual capturing of the alleged terrorist that makes America safer.

The opposing view, of course, is that as a national strategy, America needs to uncover deep, long-term terrorist plots and infiltrate and destroy the terrorist networks and organizations. The belief is this can only happen with good intelligence, the kind that comes from captured suspects. Assuming this is true and this long term approach is the best plan, does diluting \textit{Miranda} to give the government agencies more flexibility in questioning to accomplish that goal? The Government already has the public-interest exception, which delays the reading of Miranda warnings to suspects. This was successfully utilized to uncover valuable information from both Abdulmutallab and Shahzad, before Miranda ever took effect. It is not a stretch to argue that the law in its current iteration, with the exceptions already in place, adequately safeguards America.
There is also the seemingly puzzling issue of Shahzad’s continued cooperation with the government. After he was read his Miranda rights, Shahzad kept on talking. He actually would not stop talking about all the reasons America was evil and what he and his friends were going to do to America.\textsuperscript{124} In fact, Shahzad’s prolonged discussion with government officials and detainment without an arraignment drew the ire of civil rights advocates.\textsuperscript{125} At first glance, this would appear to debunk the earlier argument that neither low level nor high level terrorists would cooperate with the government. But herein lies a key aspect of the war on terror that is missing from the U.S. national security strategy, and that is that there should be a greater focus on the enemy. Al Qaeda members, and radical Islamic jihadists alike, are often proud of plotting against America and trying to kill Americans. Shahzad was in fact detained for weeks and subject to incessant interrogation, in no small part because he waived his right to a speedy arraignment.\textsuperscript{126} He willingly waxed poetic about his prior plans because he was not ashamed of what he was trying to do – make the corrupt America suffer. “One has to understand where I'm coming from,” Shahzad said calmly at his June 20, 2010 arraignment.\textsuperscript{127} “I consider myself ... a Muslim soldier.”\textsuperscript{128} This should not have come as

\begin{itemize}
\item \textsuperscript{125} In a letter to Chief Judge Loretta A. Preska dated May 18 2010, defense attorney Ronald Kuby called Shahzad’s weeks-long interrogation without a court appearance “unprecedented.” Jill Colvin and Shayne Jacobs, \textit{Faisal Shahzad Arraigned Tuesday in Manhattan Federal Court}, DNAINFO, May 18, 2010, http://dnainfo.com/20100518/manhattan/faisal-shahzad-be-arraigned-tuesday-manhattan-federal-court?gclid=CPvl6Mmm1aICFRBBLgwodVJ7uwg (last visited July 22, 2010). He described Shahzad as “a suspect buried in the bowels of a Manhattan version of Guantanamo,” and said that holding him “in an undisclosed location, squeezing him for information” is a violation of procedure rules and against the law. \textit{Id.}
\item \textsuperscript{126} Mazetti and Shane, \textit{supra} note 86.
\item \textsuperscript{127} Hays and Neumeister, \textit{supra} note 124.
\item \textsuperscript{128} Hays and Neumeister, \textit{supra} note 124.
\end{itemize}
a surprise to American intelligence officials. Radical jihadists often consider themselves
dutiful soldiers; “Davids” in the fight against the mighty “Goliath” of America.  

Shahzad proudly proclaimed:

I am part of the answer to the U.S. terrorizing the Muslim nations and the Muslim people. And, on behalf of that, I'm avenging the attack. Living in the United States, Americans only care about their own people, but they don't care about the people elsewhere in the world when they die.  

This is quite different, however, than cooperating with the government and providing good intelligence about future terrorist operations. To be sure, Shahzad did not stop talking after he was Mirandized. From the numerous comments he has made in Court we do not have to guess at the nature of his statements – his message is clear. He wants everyone who will listen to know that he was avenging an attack on the U.S., since Americans are unlawfully “terrorizing” Muslim nations every day.  

Thus, is diluting Miranda further really going to make America any safer if suspects like Shahzad continue to cooperate with officials after they are Mirandized? Is it really going to lead to an abundance of material information that otherwise would not have been unearthed because terror suspects are normally so reticent? Holder proposes his new foes, new laws argument for diluting Miranda on the heels of the Shahzad case. Is that really the best test case? It seems like a difficult case to make when the most

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129 Mr. Shahzad, when asked if he knew that the people in Times Square were just regular citizens responded "[W]ell, the drone hits in Afghanistan and Iraq, they don't see children, they don't see anybody. They kill women, children, they kill everybody. It's a war, and in war, they kill people. They're killing all Muslims." Hays and Neumeister, supra note 124.  
130 Hays and Neumeister, supra note 124.  
131 It is also true that others, who helped him with this particular offense, have been captured. But that information was apparently gathered during the first several hours of questioning, before Shahzad was even read his Miranda rights. Mark Hosenball, Obama Officials on Shahzad Case: We did it Right, NEWSWEEK, May 6, 2010, http://www.newsweek.com/blogs/declassified/2010/05/06/obama-officials-on-shahzad-case-we-did-it-right.html (last visited July 22, 2010).  
132 Hays and Neumeister, supra note 124.
recent high profile suspect was proud to tell anyone who would listen what he was up to and waived a speedy arraignment in order to do so, all after being Mirandized.\textsuperscript{133}

Thus, even assuming that there is a great deal of valuable information from all of these terror suspects that simply will not be uncovered during either the public interest exception phase or the post-\textit{Miranda} phase, it still is not clear that the U.S. needs to further dilute \textit{Miranda} in order to make America safer. This is especially true, given the high social costs of such a proposal.

C. The High Costs of the Further Abrogation of Miranda Rights

\textbf{For Terror Suspects}

Proponents of Holder’s view that \textit{Miranda} should be indefinitely delayed or eliminated altogether may argue that such a proposal would come at very little social cost. That is because Holder’s proposal would only weaken or eliminate \textit{Miranda} for terror suspects. One problem with this suggested change, however, is who gets to decide what constitutes a “terror suspect.” It appears that the State Department, or some government agency, would have the unilateral authority to determine whether someone is a terror suspect. Though in theory no one who is not legitimately a terror suspect should be affected, the potential for abuse of power is staggering. “Presumptively taking away Americans’ rights because they seem like terrorists is beyond a slippery slope; it’s a BP oil leak down the entire mountain.”\textsuperscript{134}

In \textit{Miranda} the Court noted that: “[t]his Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) and we reassert these standards as applied to in custody

\textsuperscript{133} Mazzetti and Shane, \textit{supra} note 86.
\textsuperscript{134} Williams, \textit{supra} note 8.
To now presumptively take away those rights because the State Department thinks that the person might be a terrorist is to punish someone before any determination of guilt is made. It literally throws the innocent until proven guilty maxim on its head. The rights protected by *Miranda* should not be so fungible as to rest solely on the unilateral determination of any governing body. “The requirement of warnings and waiver of rights is fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.”¹³⁶ These rights are not predicated on the type of alleged crime committed. This proposed law is especially troubling because

> it is not saying, for example, that all potential murderers are not entitled to Miranda rights. It is saying all potential murderers who look like they might be terrorists are not entitled to Miranda rights – they have to wait. It penalizes according to the perception of the type of person committing the crime, instead of the crime itself.¹³⁷

Allowing the government to adopt a system where certain fundamental rights apply only to certain groups of people and not others is a bad idea. Allowing the government to unilaterally determine who falls into which group is potentially disastrous. Non-terrorist individuals could find themselves being detained and interrogated for a crime they did not commit, without all the traditional protections of *Miranda*. In addition to being a gross violation of those individuals Fifth Amendment rights, this would also result in precisely the type of coercive atmosphere that *Miranda* was set out to prevent. In *Miranda* the Court established measures to protect a suspect's Fifth Amendment right

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¹³⁵ *Miranda*, 348 U.S. at 475.
¹³⁶ *Miranda*, 348 U.S. at 476.
¹³⁷ Williams, *supra* note 8.
from the “inherently compelling pressures” of custodial interrogation. The Court observed that “incommunicado interrogation” in an “unfamiliar,” “police-dominated atmosphere,” involves psychological pressures “which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.” Consequently, the Court reasoned, “[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.”

And that may be the crux of the issue. Do we, as Americans, want to unduly coerce statements from individuals the State Department believes might be terrorists? If the answer is yes, how accurate is that information likely to be? Studies show that coerced statements are far less likely to be accurate, and for good reason. The detained suspect, now without Miranda rights, would be inclined to say anything just to stop the prolonged interrogation, with whatever enhanced techniques the government agency may be utilizing. Furthermore, the adoption of this proposed change in the law could result in a dramatic increase in the number of people on the U.S. official terror suspect list. Borderline cases, or, in the worst case scenario, cases that have nothing to do with terrorism at all, could be alleged to have some terrorist implications as an excuse to deny a suspect Miranda warnings to pursue indefinite detention and interrogation. The

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138 Miranda, 348 U.S. at 467.
139 Miranda, 348 U.S. at 456-457, 467.
140 Miranda, 348 U.S. at 458.
incentive for abuse is high and the oversight of the decision of who constitutes a terror suspect is low.\textsuperscript{142}

Worse still, the ramifications for coercing statements in such a manner are drastic. This would essentially violate the basic principles upon which the United States justice system was established. Indeed, the Court has already considered such an argument and dismissed it:

A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. [citations omitted]. The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. \textbf{That right cannot be abridged.}

As Mr. Justice Brandeis once observed:

\begin{quote}
‘Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. \textbf{To declare that in the administration of the criminal law the end justifies the means} * * * would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.’ (citation omitted).\textsuperscript{143}
\end{quote}

\textsuperscript{142} The State Department may very well have sufficient evidence that someone is a terrorist, and therefore that person correctly ends up on a terror suspect list, but a great deal of the time much of that information is classified – and understandably so. I am not advocating that the State Department, or the CIA, or any government agency divulge State Secrets in order to prove someone is worthy of being a terror suspect. But the fact remains that because so much of the information gathered is private and confidential, there inherently remains a cloud of mystery behind the determination process. Thus, allowing a mysterious determination process of whether one is a terror suspect, and then taking away rights on that basis alone, is problematic at best and unconstitutional at worst.

\textsuperscript{143} \textit{Miranda}, 348 U.S. at 479–480 (emphasis added.)
Thus, following Holder’s suggestions regarding Miranda rights for terror suspects, a sort of “ends justify the means” approach to combating terrorism, would bring “terrible retribution” and is antithetical to the very notion of American democracy.  

If that is the case, then perhaps no changes were made based on Holder’s suggestions? Perhaps the Supreme Court decided these wholly domestic cases on solely domestic factors. There is nothing in Powell, Shatzer, or Berghuis that would imply they were decided in a reaction to government outcry or as a response to terrorism.  

And yet, if the Supreme Court were going to decide to dilute Miranda beyond what is necessary for an individual domestic case, to respond to international terrorism, would it indicate so in the opinions? Thus, judging the Court’s intent by looking for an overt mention of terrorism may not be looking in the right place. The more effective inquiry is to examine the factors surrounding the Supreme Court’s decisions and from there surmise possible motives for its decisions.  

VI. Florida v. Powell  

Less than two months of the attempted Detroit bombing on Christmas day 2009 and requests for more flexibility in interrogating terror suspects, the Supreme Court decided Florida v. Powell. In Powell, law enforcement officers in Tampa, Florida, seeking to apprehend Kevin Powell in connection with a robbery investigation, entered Powell's girlfriend’s apartment. “After spotting Powell coming from a bedroom, the officers searched the room and discovered a loaded nine-millimeter handgun under the bed.” Powell was then apprehended and taken to the Tampa Police headquarters.

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144 Miranda, 348 U.S. at 479-480.  
145 Powell, 130 S.Ct. at 1195.  
146 Powell, 130 S.Ct. at 1200.  
147 Powell, 130 S.Ct. at 1200.
Before asking Powell any questions, the officers read to him the standard Tampa Police Department Consent and Release Form. The form states:

You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.150

This, of course, does not exactly conform to the warning as espoused by the Court in Miranda. The trial court and the Florida Supreme Court found the last line particularly confusing. Can the suspect Powell use any of these rights only one time during the interview? How does he use them? Do they last for the entire custodial interrogation? More specifically, the Florida Supreme court found that the advice Powell received was misleading because it suggested that he could “only consult with an attorney before questioning” and did not convey Powell's entitlement to counsel's presence throughout the interrogation.151 Also, the court held that the final catchall warning—“[y]ou have the right to use any of these rights at any time you want during this interview”—failed to cure the defect the court perceived in the right-to-counsel advice: “[t]he catch-all phrase did not supply the missing warning of the right to have counsel present during police questioning,” for “a right that has never been expressed cannot be reiterated.”152

The Miranda warnings were designed to provide “certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and

148 Powell, 130 S.Ct. at 1200.
149 Powell, 130 S.Ct. at 1200.
150 Powell, 130 S.Ct. at 1200.
151 State v. Powell, 998 So.2d 531, 541 (Fla. 2008).
152 Id. at 541.
Fourteenth Amendments before commencing custodial interrogation.”

Responsive to that concern, the Court in *Miranda*, as “an absolute prerequisite to interrogation,” stated that an individual held for questioning “must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.”

In *Powell*, the Court felt that the last sentence, “catch all” phrase did accurately convey to Powell that he could request a lawyer at any time during the interrogation. In short, the Court held that the exact language espoused in *Miranda* need not be repeated verbatim if the essential message is being conveyed.

Notably, Powell admitted that he understood the warnings, willingly agreed to waive them, and did so by signing the Tampa Police’s warning statement and then started talking about his crime. It was only afterwards, after retaining an attorney that he complained about an improper *Miranda* warning. The Court did not find this after the fact, form-over-substance argument persuasive and overturned the Florida Supreme Court’s decision.

Likewise, if Section 3501 was still valid, Powell’s confession would have passed the voluntariness test. This is precisely the type of case where Section 3501 would overrule a strict reading of *Miranda*. But in 2000, the Court in *Dickerson* repealed Section 3501 and held that Congress cannot pass any laws that legislate around or weaken *Miranda*. This is in part why the trial court and the Florida Supreme Court held for Powell. *Miranda* is the law regarding custodial interrogations and having a

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154 Miranda, 348 U.S. at 471.
155 Powell, 130 S.Ct. at 1204.
156 Powell, 130 S.Ct. at 1204.
157 “Acknowledging that he had been informed of his rights, that he ‘understood them,’ and that he was ‘willing to talk’ to the officers, Powell signed the form. He then admitted that he owned the handgun found in the apartment.” Powell, 130 S.Ct. at 1200.
158 Estreicher and Weick, supra note 60, at 959.
confusing warning violates *Miranda*. The fact that Powell actually understood his rights before waiving them in this instance, should not grant the government a license to provide confusing warnings in all cases. Yet that is the result of the *Powell* decision.

*Powell*, however, was only the beginning of the Court’s 2010 dilution of *Miranda*. The very next day, the Court decided *Maryland v. Shatzer*, a decision far more detrimental and damaging to the rights of suspects during custodial interrogation.159

VII. *Maryland v. Shatzer*

A. Factual Background

In August 2003, Michael Shatzer (a U.S. Citizen) was serving time in prison for a sexually abusing a child. On August 7, detective Shane Blankenship visited Shatzer to interview him about allegations of another, different sexual abuse crime, that of Shatzer’s 3 year-old son.160 Before asking any questions, “Blankenship reviewed Shatzer's Miranda rights with him, and obtained a written waiver of those rights.”161 When Blankenship stated he was there to question Shatzer about allegations of sexually abusing his son, “Shatzer expressed confusion – he had thought Blankenship was an attorney there to discuss the prior crime for which he was incarcerated.”162 Once detective Blankenship clarified the purpose of his visit, Shatzer declined to say another word without an attorney present.163 As a result, the interview ended and Shatzer was released back into the general prison population.164

159 *Shatzer*, 130 S.Ct. at 1213.
160 *Shatzer*, 130 S.Ct. at 1217.
161 *Shatzer*, 130 S.Ct. at 1217.
162 *Shatzer*, 130 S.Ct. at 1217.
163 *Shatzer*, 130 S.Ct. at 1217.
164 *Shatzer*, 130 S.Ct. at 1217.
Incredulously, for the next two and a half years, no one came to interview Shatzer about allegedly molesting his son, or about the crime for which he was in prison. But in 2006, a different detective, detective Paul Hoover, came to interview Shatzer about molesting his son. Shatzer was surprised, as he assumed the investigation into that matter had concluded. Hoover then read Shatzer his Miranda rights and obtained a signed waiver of them. Hoover then returned five days later, this time with no further Miranda warnings, to re-interrogate Shatzer. It was in this interrogation that Shatzer made incriminating statements about molesting his son.

The main issue in this case dealt with the invocation of Fifth Amendment rights protected by Miranda. In other words, was Shatzer’s initial request for an attorney still valid two and a half years later? On the surface, it is not difficult to see how the Court ruled that it was not. Two and a half years is a long time.

But in Miranda the Court held that its warnings are necessary because once arrested and taken into custody, the suspect is subjected to an “incommunicado interrogation” in an “unfamiliar,” “police-dominated atmosphere.” Regarding the subject of waiver, the Court established a very high bar for the government – “[I]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or

165 Shatzer, 130 S.Ct. at 1217.
166 Shatzer, 130 S.Ct. at 1218.
167 Shatzer, 130 S.Ct. at 1218.
168 Shatzer, 130 S.Ct. at 1218.
169 Shatzer, 130 S.Ct. at 1218.
170 Shatzer, 130 S.Ct. at 1218.
171 Miranda, 348 U.S. at 456-457.
appointed counsel.”¹⁷² Fifteen years after *Miranda*, however, the Court added a “second layer of prophylaxis” to the issue of waiver.¹⁷³ In the case of *Edwards v. Arizona*, the Court held that:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.... [He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.¹⁷⁴

In sum, once a suspect’s requests the presence of counsel, he or she cannot be subjected to further interrogation without counsel present, even if it is two and a half years later. Under the *Edwards* rule, even a normally valid waiver of *Miranda* would not be sufficient at the time of subsequent interview attempts “if the suspect initially requested the presence of counsel.”¹⁷⁵ The Court in *Edwards* espoused this rule because then-suspect Edwards was arrested and taken to a police station where he was interrogated until he requested counsel.¹⁷⁶ The police then terminated the interrogation and placed Edwards in the county jail for the night, only to resume the interrogation with different officers the following morning.¹⁷⁷ The Court held that since there was no break in custody, his invocation of his Miranda rights was still sufficient.¹⁷⁸ One need not continuously invoke *Miranda* to protect the Fifth Amendment right to counsel – once is enough.

¹⁷² *Miranda*, 348 U.S. at 475.
¹⁷⁵ *Shatzer*, 130 S.Ct. at 1219.
Thus, the Edwards’ rule about Miranda rights should have been dispositive in Shatzer. Shatzer was initially confused during the first attempted interrogation but once he understood what he was being investigated for, he immediately requested an attorney. It was only later, after a different detective returned two and a half years later, that he relented and spoke without counsel present. Though two and a half years is a long time, but at no point was Shatzer released from prison. He remained in the custody of the State, subjected to a “police-dominated atmosphere.”\textsuperscript{179} Thus, his initial assertion of his right to counsel should have still been in effect.

B. \textit{Shatzer’s Potential Impact on National Security Law}

The Court did not see it that way. The Court held that (1) being in prison can constitute a sufficient break in custody for purposes of \textit{Miranda} and (2) the Edwards rule of not allowing further interrogation after invoking one’s right to counsel does not apply if a break in custody lasting 14 days or more has occurred.\textsuperscript{180} An assessment of each holding will show that the Court went beyond the call of the question to unnecessarily dilute the rights of suspects in custodial interrogations.

First, the Court found that Shatzer’s return to prison constituted a break in custody. Custody implies a lack of free will and police domination, something that prison most certainly garners. In fact, the Court has already established a test to determine whether a suspect is in custody, asking whether “there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with formal arrest.”\textsuperscript{181} Even the \textit{Shatzer} Court admits “[T]his test, no doubt, is satisfied by all forms of

\textsuperscript{179} \textit{Miranda}, 348 U.S. at 456-457.
\textsuperscript{180} \textit{Shatzer}, 130 S.Ct. at 1213.
\textsuperscript{181} \textit{Quarles}, 467 U.S. at 655.
incarceration.” 182 But the Court reasons this away, claiming that Shatzer was used to it and that when prisoners go back to their cells “they regain the degree of control they had over their lives prior to the interrogation.” 183 One wonders just what degree of control over their lives prisoners have while in prison. Part of the stated rationale behind the high bar for Miranda waiver is that that suspect has a lack of freedom of movement and is in a “police dominated atmosphere.” 184 That is precisely where Shatzer returned after his initial interrogation in 2003. But the Court held otherwise, saying prison does not present the same coercive pressures as being in custody. 185

Second, the Court admitted that it arbitrarily held two weeks should be enough time to satisfy Edwards and constitutes a break in custody. 186 The police now can, after ending one interrogation because the suspect invoked his right to counsel under Miranda, come back two weeks later, re-approach the suspect, and ask “[A]re you now willing to speak without a lawyer present?” 187 No additional Mirandizing is required. 188 Moreover, the police do not have to provide a lawyer in the interim. “I want a lawyer” has transformed from a constitutionally protected right into a non-necessity. This is a significant abrogation of the Fifth Amendment right to counsel. The police only have to stop questioning for two weeks before they can return to interrogate a suspect.

The slippery slope implications of this ruling are numerous. The Court does not make it clear whether the government can keep coming back to a suspect every two

182 Shatzer, 130 S.Ct. at 1224.
183 Shatzer, 130 S.Ct. at 1224.
184 Miranda, c 456-457.
185 Shatzer, 130 S.Ct. at 1224-1225.
186 The majority defends its arbitrary two week timeline by criticizing Justice Thomas’ concurrence, which did not recommend having an arbitrary bright-line timeline, by stating “[f]ailure to say where the line falls short of 2 ½ years, and leaving that for future case-by-case determination, is certainly less helpful, but not at all less arbitrary.” Shatzer, 130 S.Ct. at 1226.
187 Shatzer, 130 S.Ct. at 1225.
188 Shatzer, 130 S.Ct. at 1225, 1126.
weeks and badgering him about speaking with them, though that appears to be the case. Must a suspect continually assert his rights forever? Imagine the scenario where a suspect is released from the initial custodial interrogation after invoking *Miranda* and allowed to return home. Two weeks later the FBI shows up at the suspect’s job, walks over to his cubicle and asks him “are you now willing to speak without a lawyer present regarding the alleged subway bombing last month?” The FBI wouldn’t have to come back to the suspect’s job in another two weeks, because he would likely no longer have one.

And what if the FBI kept showing up at the suspect’s residence afterwards? The suspect has only two choices to get the government agency to stop: 1) waive *Miranda* and speak to them without counsel present or 2) attempt to sue the government. Neither of those choices comports to a democratic system that presumes innocence before guilt. Is this not precisely the type of inherent coercive pressure that the Court was so concerned about protecting in *Miranda*?

In addition, the previous hypotheticals presume a clear release from custody. What if the suspect remains in custody? This is where *Shatzer* has even greater national security law implications. A terror suspect could be detained somewhere and invoke *Miranda* and his Fifth Amendment right against self-incrimination and/or right to counsel, only now the FBI or CIA can attempt to re-interrogate him every two weeks, until the suspect finally gets worn down and decides to waive *Miranda* and confess. The voluntariness and validity of such a confession would be substantially dubious under those circumstances, severely diminishing the value of any such information.

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189 *Shatzer*, 130 S.Ct. at 1225.
There are also signs that the Court’s decision to weaken *Miranda* in *Shatzer* was not a coincidence. First, there is the timing of the decision. *Shatzer* was decided on February 25, 2010, precisely two months after the attempted Christmas day bombing in Detroit, where the Obama administration was criticized for not eliciting enough information out of Abdulmutallab before he was read the Miranda warnings.\(^{190}\) Second, *Shatzer* lessens the power of *Miranda* unnecessarily. The Court did not have to impose the arbitrary two-week rule to reach the same result. The Court could have simply ruled that it was unreasonable for Shatzer to expect his initial *Miranda* request for counsel back in 2003 to still be valid in 2006, without any additional reassertion in the interim. Instead the Court held that not only is two and a half years too long, two weeks is too long.\(^{191}\) Perhaps its decision to go that far in this domestic setting is evidence that the Court had its eye on attempting to eliminate terrorism, by attempting to give the government flexibility to gather intelligence from terror suspects.

C. **Problems with *Shatzer***

To some, many of the aforementioned hypotheticals involving the *Shatzer* decision sound reasonable. Maybe the government should have the right to detain terror suspects for long periods of time and continue to come back every two weeks to interrogate them, even after they have invoked *Miranda*. Critics of how the Obama administration handled Abdulmutallab’s interrogation would likely be very pleased by the *Shatzer* ruling and the seemingly increased flexibility it provides for repeated interrogations of terror suspects. The government interrogators get another bite at the apple even after *Miranda*.

\(^{190}\) Perez & Gorman, *supra* note 21.

\(^{191}\) *Shatzer*, 130 S.Ct. at 1213.
However, one should not assume all laws that restrict rights automatically and inherently make Americans safer from terrorism.192 Here, the Court’s decision undoubtedly lessens the rights of all American citizens. After Shatzer, requesting a lawyer and invoking one’s Fifth Amendment right to counsel now only lasts two weeks.193 Does this new development in the law make America safer in the war on terror? Does it add a substantial tool to the government’s arsenal to weed out terrorist plots and weaken the threat against Americans? The answer is complicated, but it essence, the government should not gain much by the two week rule if its behavior comports with domestic and international law regarding enhanced interrogation techniques and torture.

For example, the FBI (or any government agency) does not lose its ability to question a subject once they have invoked the Fifth Amendment right to counsel – it only loses it for two weeks. After that time, the FBI can return to wherever the suspects may be and ask them “are you now willing to speak without a lawyer present?”194 One must consider how suspects are likely to respond. Are they likely to change their minds in that two-week period, and suddenly waive Miranda? It is certainly possible. Suspects might consider the charges against them, might consult with their families and decide they do not want a lawyer, and do not want to remain silent and instead want to talk. This is a possible, but unlikely scenario. There is simply no motivation, after two weeks, to not invoke Miranda and the right to counsel a second time, especially after the government interrogators left after the first time. It is thus unlikely that suspects will suddenly change their minds and waive Miranda upon the government agency’s return to questioning.

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192 See Holmes, supra note 7.
193 Shatzer, 130 S.Ct. at 1213.
194 Shatzer, 130 S.Ct. at 1225.
This ruling, therefore, takes away rights of Americans while providing the government very little extra in terms of quality questioning capability. These extra bites of the apple are not likely to produce any results for national security purposes.

Of greater concern with this decision is the potential for abuse. The FBI or some other government agency may attempt to use the *Shatzer* two-week window to exact undue pressure on the suspect to make them change their mind and waive Miranda on reapproach. It is this indirect effect of the *Shatzer* ruling that is most troubling.

For example, as explained above, it is unlikely that suspects will suddenly change their minds and decide not to invoke *Miranda* the second or third time they are questioned. There simply is not incentive to do so.\(^{195}\) Unless of course they have been subjected to improper pressure, directly or indirectly, by the government. The two-week window may inadvertently invite the police or government agency to inflict some undue and illegal pressure on suspects to get them to change their mind, knowing that without such pressure their response is unlikely to change. Had there been no *Shatzer* rule, the government agency would know it was not allowed to come back ever until a lawyer was present, and thus there would not be that incentive to try and change the suspect’s mind about waiver. There would be no point.

Now, however, this two week window creates a disincentive to follow domestic and international law by encouraging improper and illegal interrogation techniques. The government would be inclined to violate certain suspect’s Fifth Amendment rights

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\(^{195}\) *In Shatzer*, the defendant was imprisoned for almost two years on another charge before the police returned to interrogate him, and they were asking about his son. *Shatzer*, 130 S.Ct. at 1218. Most terror suspects will not 1) have a two year gap between visits from the interrogators, nor will they 2) be asked questions about crimes they may feel morally guilty about, like molestation of their children. On the other hand, radical jihadists, as will be shown later, generally are very proud of their attempts to perpetrate crimes against America and the West. They do not appear the slightest bit ashamed, and further rumination over their crimes will not likely result in the same sort of increased desire to spontaneously confess. *See* Mazetti and Shane, note 86.
against self-incrimination and interrogation without counsel. Various international laws could be implicated and abused here as well, most obviously the United Nations Convention Against Torture (CAT). Article 1 of the CAT defines torture as:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

If the police or a government agency uses this two-week period to intimidate, or inflict physical or mental pain on a terror suspect, that could constitute torture and result in a violation of the CAT to which the U.S. is a signatory. Unfortunately, the notion of the U.S. torturing terror suspects for information is not so far-fetched. Since 2001 and continuing through 2010, the reports of American agencies torturing terror suspects are numerous. An increase in the use of torture-like interrogation techniques could be a dramatically negative unintended consequence of *Shatzer*.

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197 Id. at Article 1.1 (emphasis added.)
198 Id.
An increase the use of torture is also more likely because of *Shatzer*. *Shatzer* could be utilized to provide a legal cloak to potentially torturous activities by the U.S. government. For example, imagine a relatively high level terrorist suspect, “Suspect A” is apprehended. The Obama administration is still committed to treating terror suspects criminally and thus Suspect A is interrogated for a few hours immediately upon apprehension (under the public exception to Miranda) and then read his Miranda rights. Upon hearing his rights, Suspect A claims that he will not say anything further without an attorney present. But then an agency of the U.S. government unduly intimidates, threatens and/or terrorizes the suspect for the next two weeks. When the agency revisits the interrogation 14 days later, the suspect is miraculously willing to speak without counsel. The government has plausible deniability – they read him his Miranda rights the first time, and Suspect A asserted them, so he must have understood them. If Suspect A happened to change his mind in the interim, that is his prerogative.

One might argue that if the police are going to torture a suspect, they are going to do so regardless of *Shatzer*. That is true. The problem is that sometimes, if a rule is created that can be easily or stealthily circumvented by government agencies, it might inadvertently legitimize otherwise facially criminal conduct. Here, the *Shatzer* rule incentivizes the use of terror tactics to get suspects to cooperate. But even if it did not, creating a rule that can be easily circumvented is worse than having no rule at all. Now, post- *Shatzer*, if the government wishes to torture a terror suspect, it can do so in between readings of Miranda, paradoxically giving the government another layer of protection under the law. The government can always claim, if it were subjected to scrutiny or claims of brutality and torture, that the suspect was properly Mirandized. The fact that he

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200 *Quarles*, 467 U.S. at 650.
chose to assert his right to counsel the first two times it visited is proof he understood them. Thus, when questioned a third time, the suspect’s waiver of *Miranda* is that much more likely to have occurred “knowingly,” thereby providing greater legitimacy for whatever confession ensued (even if he was subjected to torture in the interim). This is how the *Shatzer* rule could be used as something akin to plausible deniability – the government agency has another legal leg to stand on, even if that leg turns out to be a wooden mirage, a front for violations of international and domestic law.

This is the true danger of the *Shatzer* decision. By going farther than it need to, the Court established a rule that can be utilized to legitimize otherwise blatantly criminal conduct.

**VIII. Do Powell and Shatzer Make America Safer?**

As noted earlier, a common misperception when viewing every national security decision through a liberty/security paradigm is to assume that every time liberty is sacrificed, security is automatically and reciprocally enhanced.\(^{201}\) But the first question that should be addressed (assuming whatever change made was legal) was does this change actually make America safer? More specifically, is America safer from terrorism as a result of *Powell* and *Shatzer*? If so, we can then examine whether the loss of freedoms and fundamental rights was worthwhile because it makes America substantially safer.

As a result of *Powell*, Miranda warnings do not have to be uniformly given and can now be somewhat ambiguously stated.\(^{202}\) The next day, the Court decided *Shatzer*, which amazingly holds that being in prison may not constitute being in custody for

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\(^{201}\) Holmes, *supra* note 7, at 314.

\(^{202}\) *Powell*, 130 S.Ct. at 1206.
purposes of *Miranda* and that the police/government can repeatedly come back and attempt to interrogate a suspect every two weeks – without providing an attorney - even after the suspect has demanded an attorney. This will create, as explained above, an incentive to unduly coerce and/or torture terror suspects (and others?) during each two-week interval, in an attempt to get them to waive their Miranda rights.

It is difficult to comprehend precisely how these two decisions make America safer. Notably, both are after the fact changes that only come into effect after a suspect has already been apprehended. They do *nothing* in the way of preventing the particular crime or terrorist act in the first instance. As such, the only conceivable way they could help make America safer is if a suspect provides valuable intelligence, about a future crime, that he would not normally have provided if not for the fact that: (1) he was provided arguably ambiguous Miranda warnings or (2) the government returned to question the suspect two weeks later and then he decided to change his mind and provide invaluable intelligence. This does not seem to be a very plausible (or palatable) scenario. These decisions fail to make America safer unless the suspected terrorists America apprehends have otherwise unobtainable intelligence about other terrorists. In essence, these decisions strip away citizens’ rights in order to provide the government more leeway to question suspected terrorists, but the leeway will rarely (if ever) cause America to be safer.

For example, logically, the people with the most knowledge of how any terrorist organization works or of future terrorist attacks on American soil are the leaders, the ones in control. They are also, therefore, least likely to be the suicide bomber on the airplane. Thus, the suspects we apprehend attempting to commit these terrorist attacks, are by

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203 *Shatzer*, 130 S.Ct. at 1227.
design going to be primarily low level people, and low level people by design have low level information. This is common in most organizations; al Qaeda and other affiliated radical jihadist groups are no different in this respect. Additionally, what makes the interrogation of true al Qaeda members and radical jihadists uniquely difficult, is because they are often more than willing to die for the cause. They want to die for the cause, volunteer to die for the cause, and the more well known the al Qaeda operative is, the more likely their death will lead to martyrdom, especially if it is at the hands of Americans.

Noted scholar and al Qaeda historian Lawrence Wright has argued that he hopes the U.S. never accomplishes one of its main goals in the war on terror, to find and kill Osama bin Laden. Wright feels that doing so would make Bin laden a martyr of epic proportions, making him far more influential in death than in life, and leading more people to join the jihadist’s cause against America for generations to come.

Thus, even if America apprehended a high level leader of a radical jihadist terrorist organization, loosening the rules of interrogation is meaningless in terms of ultimately making America safer. They are not going to talk anyway because they simply do not fear the repercussions of whatever the government agency will do to them. Worse still, they may even welcome improper treatment and torture; welcome becoming a martyr for the cause. Accordingly, it is difficult to accept the idea that Powell and Shatzer’s abrogation of Miranda makes Americans safer from terrorism.

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205 Id. at 28.
207 Id.
One counter argument is the Supreme Court, while deciding *Powell* and *Shatzer*, may not have been trying to make America safer. It may not have taken into account national security implications at all. After all, these are both wholly domestic cases on the facts. Yet even if one believes the timing of these decisions is merely a coincidence, and the Court was in no way consciously or subconsciously influenced by either the attempted plane bombing on Christmas day or the outcry for a dilution of *Miranda* for terrors suspects that followed, the decisions still have national security implications.

Government agencies can still utilize these two week periods, after a terror suspect has invoked his right to counsel, to 1) not provide counsel and 2) find creative (and illegal) ways to make the suspect change his mind when they return for formal questioning two weeks later. Worse still, the government can utilize these two week periods to do the same thing with non-terror suspects. Regardless of the Court’s intentions, the *Powell* and *Shatzer* decisions have implications for how the government might perpetrate the war on terror and how it might administer justice in domestic cases. It invites the use of torture while providing plausible deniability.

However, the Court was not finished diluting *Miranda*. One month after another attempted terrorist attack in April 2010, the Court decided *Berghuis v. Thompkins*.

**IX. Berghuis v. Thompkins**

On January 10, 2000, a shooting occurred outside a mall.\(^{208}\) The police tracked down suspect Thompkins in Ohio.\(^{209}\) The Michigan police officers arrested Thompkins and placed him in an 8 by 10 foot room and questioned him for three hours straight.\(^{210}\) But before the questioning began, the police handed Thompkins a form titled

\[^{208}\textit{Berghuis}, 130 S.Ct. at 2256.\]
\[^{209}\textit{Berghuis}, 130 S.Ct. at 2256.\]
\[^{210}\textit{Berghuis}, 130 S.Ct. at 2256.\]
“Notification of Constitutional Rights and Statement” that was derived from the Miranda rule. It stated:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have a right to talk to a lawyer before answering any questions and you have the right to have a lawyer present with you while you are answering any questions.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
5. You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.

Unquestionably, for any suspect to effectively waive his Miranda rights, such waiver must be intelligent and knowing. Presumably with that in mind, the detectives asked Thompkins to read the fifth point/warning out loud. The other four Miranda warnings were read aloud to Thompkins and he was asked to “sign the form to demonstrate that he understood his rights.” His signature would have all but assured the police that if Thompkins started answering questions afterwards, it would be at as a result of a knowing (and therefore valid) waiver of his Fifth Amendment rights. But Thompkins never signed the form. He thus failed to clearly “demonstrate[d] that he

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211 Berghuis, 130 S.Ct. at 2256.
212 Berghuis, 130 S.Ct. at 2256. (some capitalization omitted).
213 Miranda, 348 U.S. at 478-479. “Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights.”
214 Berghuis, 130 S.Ct. at 2256. More specifically, they wanted to know if he understood English and could read. Berghuis, 130 S.Ct. at 2256. If he could not read or did not understand English, they would be unlikely to secure a knowing and intelligent waiver.
215 Berghuis, 130 S.Ct. at 2256.
understood his rights.” Furthermore, the Court admitted and failed to resolve the fact that the record contained conflicting evidence as to whether Thompkins later verbally confirmed that he understood the rights listed on the form.

This admitted ambiguity with police over whether Thompkins understood his rights did not stop the police from questioning Thompkins for the next three hours straight. It was not until the two hour and forty-five minute mark that Thompkins finally broke down and answered one of their questions, implicating himself in the shootings. Until then, Thompkins had “largely” remained silent, refusing to answer the police questions for the entire two hours and forty-five minutes. Nevertheless, with Thompkins’ final breakdown and implicating statement at the three hour mark, he was convicted of the shootings and sentenced to life in prison without parole. Thompkins appealed, claiming that for more than two and a half hours he had invoked his right to remain silent and the United States Court of Appeals for the Sixth Circuit agreed. The Supreme Court granted certiorari and heard oral arguments on March 1, 2010. In May Shahzad attempted to bomb Times Square, followed by Holder’s requests to dilute Miranda for terror suspects. On June 1, the Court announced its decision diluting Miranda. It reversed the Sixth Circuit’s ruling by holding that despite ambiguity, Thompkins’ waiver was knowing and voluntary, and that in order to obtain the right to remain silent, one has to verbally assert it.

216 Berghuis, 130 S.Ct. at 2256.  
217 Berghuis, 130 S.Ct. at 2256.  
218 Berghuis, 130 S.Ct. at 2256.  
219 Berghuis, 130 S.Ct. at 2257.  
220 Berghuis, 130 S.Ct. at 2256, 2257.  
221 Berghuis, 130 S.Ct. at 2257, 2258.  
222 Berghuis, 130 S.Ct. at 2258.  
223 Pitney, supra note 26; Horton, supra note 106.  
224 Berghuis, 130 S.Ct. at 2259 – 2264; 2266.
Whether one agrees with the Court’s decision or not, it undoubtedly severely weakens the protections afforded by *Miranda* in a myriad of ways. Many of the potential difficulties with the *Berghuis*’ decision and its abrogation of *Miranda* are explained in Justice Sonia Sotomayor’s dissent.

A. The Dilution of “Waiver”

Justice Sotomayor explains that *Miranda* has held that only an express and knowing waiver of Miranda rights is effective. “Even when warnings have been administered and a suspect has not affirmatively invoked his rights, statements made in custodial interrogation may not be admitted as part of the prosecution's case in chief ‘unless and until’ the prosecution demonstrates that an individual ‘knowingly and intelligently waive[d][his] rights.’”225 Moreover, “a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.”226

Sotomayor also recognizes that this fundamental tenant of waiver goes back even farther than *Miranda* - “the government must satisfy the ‘high standar[d] of proof for the waiver of constitutional rights [set forth in] Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).’”227

In sum, past Supreme Court case law explains the concept of waiver and the government’s high bar and burden to show it was knowing and intelligent. The Court changed all that in *Berghuis*. The fact that Thompkins eventually relented and made incriminating statements – after almost three consecutive hours of interrogation and refusing to sign the *Miranda* acknowledgement sheet – does not validate the decision.

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225 *Berghuis*, 130 S.Ct. at 2268; *Miranda*, 348 U.S. at 479.
226 *Berghuis*, 130 S.Ct. at 2268; *Miranda*, 348 U.S. at 475.
227 *Berghuis*, 130 S.Ct. at 2268.
Under *Miranda* “a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.”\(^{228}\) Whether Thompkins’ understood that he had a right to remain silent and the right to counsel before any further questioning was unclear, as the Court admitted that there was “conflicting evidence” about whether Thompkins “confirmed that he understood the rights listed on the form.”\(^{229}\) Yet despite all of the above, the Court still deemed Thompkins’ waiver as knowing and intelligent.

Such a finding has great implications for national security law and interrogation of terror suspects. As noted, there has been criticism from some policymakers and political leaders that the *Miranda* laws need to be loosened and diluted in order to provide the government “greater flexibility” in questioning alleged terror suspects.\(^{230}\) Attorney General Eric Holder’s concern is that we are now dealing with “international terrorism,” and therefore need new laws to fight these new foreign enemies.\(^{231}\) If one assumes the accuracy of Holder’s premise, it is not difficult to comprehend how drastically minimizing the requirements for a “knowing and express” waiver of Fifth Amendment rights might benefit the government in suspected terrorist interrogations.

For example, if they truly are foreign terrorists, then they may be less likely to understand English. But with the Court’s elimination of the need for a clear knowingly intelligent waiver, government agencies can continue with prolonged detentions and questioning, without fear that a confession would be suppressed at trial, even if it occurred several hours (or days) later. As noted earlier, however, according to the FBI

\(^{228}\) *Miranda*, 348 U.S. at 475.
\(^{229}\) *Berghuis*, 130 S.Ct. at 2256.
the greatest terrorist threat is not foreigners but rather homegrown Americans that are resorting to terrorism. These American terrorists understand English, and whatever potential flexibility that is gained from reducing the knowing requirement of waiver likely is eviscerated when dealing with an American citizen. This is a common theme with many of these law changes that purport to make America safer – they only seem palatable at the surface level. More in depth liberty/security analysis is necessary to truly assess their worth to determine if they accomplish their goal of making Americans safer from terrorism.

B. The Liberty/Security Trade-off and Waiver Under Berghuis

In examining the first part of the Berghuis’ decision under the more critical interpretation of the liberty/security paradigm, it appears, at first blush, that the change would make America safer from terrorism. By lowering the bar for waiver, Berghuis’ arguably provides government agencies with more flexibility to question terror suspects by making it significantly easier for them to – knowingly or otherwise – waive their Fifth Amendment rights against self-incrimination. It is hard to argue that such an outcome is detrimental to national security. If it is easier for terrorists to waive the right to remain silent, then more terrorists are likely to answer questions and reveal potentially valuable information about ongoing terrorist plots.

This, unfortunately, is often the end of the inquiry. But doing so ignores the gravity of such a change in the law, the change in constitutional rights. Perhaps the greatest overarching problem with Berghuis and the Court’s decisions in Powell and Shatzer as well, is that they apply to all American citizens, not just terrorists. These decisions that abrogate Miranda and thereby dilute the Fifth Amendment rights of

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232 Baer, supra note 113.
suspected terrorists also abrogate and dilute the Constitutional rights of every suspect we capture. These new interpretations of the law take away fundamental rights from every American citizen – not just terror suspects.

This change in the waiver laws, in essence, abrogates fundamental constitutionally protected rights of all Americans in the hopes that, after terror suspects are captured (and the threat has thereby been diminished or extinguished altogether) they: 1) turn out to actually be terrorists; 2) waive their rights and answer questions; 3) have knowledge of ongoing terrorist plots, beyond those which the CIA, NSA and all other government agencies have uncovered; 4) are willing to share such knowledge to sabotage any future strikes; and 5) are only willing to do so because of the reduced standard of waiver as espoused in Berghuis. Thus, too many counterintuitive and unlikely events have to take place for this change to make America safer. This, coupled with the public-safety exception already in place, and how the handling of the Detroit and Times Square attempted bombers unfolded, makes this change in the law superfluous to fighting the war on terror.

Conversely, the cost of enacting such a law has potentially staggering consequences. As explained earlier, the Fifth Amendment rights protected by Miranda were established to help even the playing field between our government and civilians who are only suspected of a crime.\textsuperscript{233} Moreover, Miranda itself is a constitutionally protected right.\textsuperscript{234} Even assuming the changes did substantially make America safer, they are not narrowly tailored to terror suspects. These changes substantially diminish the constitutionally protected rights of all citizens. The cost, therefore, greatly outweighs any

\textsuperscript{233} Miranda, 348 U.S. at 445.
\textsuperscript{234} Dickerson, 530 U.S. at 438, 440 and 444.
potential benefit the new waiver rules might provide in the fight against terror. But the ease of waiver is not the only way Fifth Amendment rights of Americans have been weakened by Berghuis. Berghuis also counterintuitively imposed the requirement that one must verbally assert the right to remain silent.

C. The (Verbal) Right to Remain Silent

The Berghuis decision is also significant in that it held that suspects no longer have an inherent right to remain silent. The Court analogized to the suspect’s right to an attorney, claiming that in order to get this right, it must be verbally and affirmatively asserted by the suspect.\(^{235}\) “The Court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal, but there is no principled reason to adopt different standards for determining when an accused has invoked the Miranda right to remain silent and the Miranda right to counsel at issue in Davis.”\(^{236}\) In Davis v. United States the Court held that in the context of invoking the Miranda right to counsel, a suspect must do so “unambiguously.”\(^{237}\) The Court explained as follows:

There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of Miranda rights results in an objective inquiry that ‘avoid[s] difficulties of proof and ... provide[s] guidance to officers’ on how to proceed in the face of ambiguity. [citations]. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression ‘if they guess wrong.’\(^{238}\)

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\(^{235}\) Berghuis, 130 S.Ct. at 2268.


\(^{237}\) Davis, 512 U.S. at 459.

\(^{238}\) Berghuis, 130 S.Ct. at 2260, citing Davis, 512 U.S. at 458-459, 461.
In essence, the Court is saying that ambiguity is problematic. It leads to false conclusions and problems if the police “guess wrong.” This is a powerful argument, as police seemingly need to be in the best position to not get it wrong but “get it right.” But here is where the law appears to be hypocritical. Ambiguity in the suspect’s assertion of his rights is not allowed, but ambiguity over whether a suspect understands his rights is allowed? When it comes to waiver, the Court seems content with the fact that a suspect may or may not know his Fifth Amendment rights. But now when it comes to asserting those rights, then there can be no ambiguity. In order to invoke the Fifth Amendment right to say nothing it must be clear, and equivocally asserted or the suspect actually loses the right. This seemingly double standard in favor of the government goes against all the rights the Fifth Amendment and Miranda sought to protect and insure. It also ignores the fact that “the State is responsible for establishing the isolated circumstances under which the interrogation takes place” and therefore has, inherently, the upper-hand in the interrogation process.

Furthermore, the Court’s decision to rely primarily on Davis and analogize to the right to counsel, when dealing with the right to remain silent, is problematic. There is a basic difference between the right to remain silent and the right to an attorney. One involves actually being silent – i.e., saying nothing at all, and the other does not. In the past, the Court has held that this right to remain silent, naturally, need not be verbally asserted. As Justice Sotomayor notes in her dissent, any suspect who wishes to invoke his right to remain silent “must, counterintuitively, speak - and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the

239 Berghuis, 130 S.Ct. at 2256.  
240 Miranda, U.S. 348 at 479-480.  
241 Miranda, U.S. 348 at 475.
police.”²⁴² “Both propositions mark a substantial retreat from the protection against compelled self-incrimination that Miranda v. Arizona, 384 U.S. 436, 479 (1966) has long provided during custodial interrogation.”²⁴³ This counterintuitive approach is in direct contrast to what the Court has held for more than fifty years. For example, Miranda held that:

[W]hatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege.²⁴⁴

After Berghuis, this is no longer the case. Here, Thompkins eventually made a statement after being “incommunicado” for a lengthy period of time, but the Court held that this is no longer “inconsistent with any notion of a voluntary relinquishment of the privilege.”²⁴⁵ That right to remain silent does not attach until the suspect verbally asserts it.²⁴⁶ This is another way the Berghuis decision undermines Miranda and in the process the Fifth Amendment rights it protects.

D. The Liberty/Security Trade-off and the Right to Remain Silent

The counter argument, however, is that the government authorities need to treat the right to remain silent as the same as the right to counsel, and need this “double standard” regarding ambiguity in order to combat the newfound challenges of international terrorism. Under this line of reasoning, ambiguity should be resolved in

²⁴² Berghuis, 130 S.Ct. at 2266.
²⁴³ Berghuis, 130 S.Ct. at 2266.
²⁴⁴ Miranda, U.S. 348 at 476.
²⁴⁵ Miranda, U.S. 348 at 476.
²⁴⁶ Berghuis, 130 S.Ct. at 2266.
favor of the police when it comes to waiver, and against the suspect when it comes to asserting his rights.

Like the other recent changes in the *Miranda* laws, how does forcing all suspects to verbally assert the right to remain silent make America safer from terrorism? It is unclear how this will aid in the war on terror in any specific, concrete fashion. Indeed, forcing a suspect to be clear and unambiguous about asserting his right to remain silent may appear at first glance to be a harmless and sound idea. But the costs, as delineated above, are great. And, more pointedly, in what scenario does it make America safer? Despite being told otherwise, a suspect may reasonably believe they in fact do not have the right to remain silent, after being questioned for a number of hours consecutively with seemingly with no end in sight. In other words, the only way to cease the interrogation (and perhaps get food, water, sleep) is to talk. The only benefit, from a national security perspective, to making suspects affirmatively assert the right to remain silent is that they fail to do so, allowing for a prolonged interrogation until the suspect “breaks.” This indefinite detention and interrogation could once again incentive improper and illegal interrogation techniques. Prolonged interrogation without breaks and without counsel present could bring America perilously close (if not directly in) to the type of previously discussed improper torture-type techniques that are forbidden under international law and the CAT.247

Thus, as with the *Shatzer* decision, the weakening of *Miranda* protections is this manner creates a greater potential for government abuse. For example, assume a suspect is read his Miranda rights, and he believes he has the right to remain silent. Yet the CIA continues to question him for 18 hours straight – at some point, he may start to question

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247 *See* CAT, *supra* note 196.
the validity of the rights they initially told him he had. Or, worse still, the suspect will become too confused, tired and/or delirious to remember them altogether.

Allowing, if not subtly promoting, this type of conduct would represent a severe loss of liberty to all Americans. First and foremost, there is no guarantee that this treatment would be reserved to only terror suspects. Changes in *Miranda* affect all citizens, and as such anyone could be subject to the above described scenario. The right to remain silent has been effectively eviscerated. If the police can continue questioning a silent, non-cooperative suspect until they speak, the suspect no longer has the right to remain silent. It is similar to *Shatzer*’s right to counsel – suspects have a right to an attorney, but not in reality – the government can continuously come back every two weeks to try and interrogate them without counsel present.248 Similarly here, a suspect technically never has to speak, but if the government can detain and question them at length until they speak, then Americans no longer effectively have the right to remain silent. This paradox is a subtle yet powerful mechanism of diluting *Miranda* without overturning it. Through the decisions examined herein the Court has found a way to eradicate the protection of fundamental, constitutional rights without officially eliminating them.249 This is an enormous cost to pay for something that does not make America safer from terrorism.

248 *Shatzer*, 130 S.Ct. at 1223-1226.
249 Commenting on the gravity of these decisions, a writer at The Huffington Post quipped, “*y*ou have the right to remain silent, but only if you tell the police that you're remaining silent. *You* have a right to a lawyer – before, during and after questioning, even though the police don't have to tell you exactly when the lawyer can be with you. If you can't afford a lawyer, one will be provided to you. Do you understand these rights as they have been read to you, which, by the way, are only good for the next two weeks?” Holland, *supra* note 28.
X. What if Those Decisions Were Not Supposed to Make us Safer?

The most obvious counter arguments to the liberty/security analysis above is that perhaps the Supreme Court, in deciding *Powell*, *Shatzer*, and *Berghuis* was not trying to make America safer at all. Perhaps it was just handling each domestic case individually, in the best manner it thought possible.

However, there is one additional point that makes that interpretation suspect. In addition to the fact that the Supreme Court announced these decisions weakening *Miranda* immediately following attempted terrorist attacks and calls to weaken *Miranda*, there is another, more legal reason the Court may have had an eye towards terrorism when it took it upon itself to dilute *Miranda* – because it had to.

The U.S. Constitution entrusts Congress with the right to make the law.\(^{250}\) If the people have a problem or a concern about an existing law or regulations, they can, through Congress, propose a bill or amendment to change the law. Thus, if Attorney General Eric Holder wants to reform the laws concerning Miranda rights for terror suspects, presumably he would consult members of Congress and to have a bill proposed weakening *Miranda*. Yet as of the time of this Article that has not happened. Nor has any Congressman (and there were many who clamored for reform) proposed such a bill.\(^{251}\) This is true despite the fact that Holder’s call for the weakening of *Miranda* has

\(^{250}\) U.S. Const. art. 1, §§ 7, 8.

\(^{251}\) In the wake of these attempted attacks only two Congressional bills were actually proposed regarding *Miranda*, but they only seek clarification regarding what the Supreme Court has already held, that the public safety exception is in place. See United States. Cong. House. 111th Congress, 2nd Session, H.Res.1413, proposed May 27, 2010, http://www.opencongress.org/bill/111-hr1413/show (“Expressing the sense of the House of 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.”); United States. Cong. House. 111th Congress, 2nd Session, H.R.5934, proposed July 29, 2010, http://www.opencongress.org/bill/111-h5934/show (“To declare the sense of Congress that the public safety exception to the constitutional requirement for what are commonly called Miranda
the support of President Obama and Hilary Clinton, not to mention many Republicans as well. It is not difficult to surmise that a bi-partisan bill would have a good chance of passing and becoming law.

But that has not happened because it cannot happen. Congress previously passed a bill, shortly after Miranda was decided, that severely diluted Miranda and it was overturned by the Court in Dickerson on the grounds that “Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”\textsuperscript{252} In so holding, the Court pronounced “that the Miranda rule was not a mere prophylaxis against constitutional violations but was itself a constitutional rule.”\textsuperscript{253} The Court held that Miranda warnings themselves were “constitutionally based rule[s]” and as such Congress could not create laws to circumvent them.\textsuperscript{254} Thus, there is little point in proposing a bill that would weaken Miranda rights as Holder suggests, because the Court has already declared such a bill will fail. If Miranda is going to be diluted, members of Congress and the President cannot use Congress to pass a bill that does so. Any weakening of Miranda has to come from the Supreme Court.\textsuperscript{255}

\textsuperscript{252} Dickerson, 530 U.S. at 437.
\textsuperscript{253} Estreicher and Weick, supra note 60, at 959.
\textsuperscript{254} Dickerson, 530 U.S. at 438 (“Miranda is a constitutional decision”), 440 (“Miranda is constitutionally based”), 444 (“Miranda announced a constitutional rule”).
\textsuperscript{255} The Supreme Court could always overrule its 2000 holding in Dickerson and completely re-interpret Miranda to how it was seen before, as a mere prophylactic rule and not a constitutionally based right itself. But coming to the exact opposite conclusion a decade later would be extremely difficult and would lead to perceived instability in the Court. If the Court wanted to weaken Miranda, the much simpler, less obvious way to do so would be to incrementally reduce the protections of Miranda over time, without officially overruling Miranda or Dickerson. The Court has taken a similar tact with abortion, as Roe v. Wade 93 S.Ct. 705 (1973) is still good law, but over the years the Court has significantly watered down its protections. See Alex Markels, Supreme Court’s Evolving Rulings On Abortion, NPR, November 30, 2005, http://www.npr.org/templates/story/story.php?storyId=5029934 (last visited August 14, 2010).
If members of the Court agreed with the President, the Attorney General, and other members of Congress that *Miranda* needed to be abrogated in order to provide the American government with more flexibility in fighting terrorism, it knew the only way that would happen was through the Court. The fact that the Court then proceeded to methodically abrogate *Miranda* after each attempted terrorist attack and calls for reform is at a minimum intriguing and at a maximum sign that the Court also wanted reform.

**XI. Conclusion**

Regardless of the motivations of the Court, the fact remains that *Powell, Shatzer,* and *Berghuis* all significantly reduce previously constitutionally protected rights afforded to all Americans, on the heels of calls to reduce those exact same rights. These resulting changes in the law succeed only in taking away rights and liberties of Americans, and provide very little, if any, additional safety from terrorism. Americans need to be more aware of the subtle ways in which their Constitutional rights are being diluted and why. Only then can we begin to successfully prosecute the war on terror.

Furthermore, the reason for the clamoring in the reduction of Miranda rights is because of the two attempted terrorist attacks, four months apart. As noted earlier, perhaps the characterization of these attacks as “attempted” or “failed” is a misnomer. One of the ultimate goals of terrorism is to induce fear and induce the targeted government into overreactions and appearing “repressive.” By repressing constitutionally protected rights of Americans in the wake of these attacks, one could argue these terrorists were successful. This also sends a dangerous message to budding terrorists – they do not have to kill anyone to succeed in their mission. As long as they “attempt’ to harm Americans, the American people will be scared and the government

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256 *See Goals and Motivations of Terrorists, supra* note 1.
will use that fear to make the laws more restrictive. If America continues to overreact in this manner, the number of attempted terrorist attacks will increase, creating demand for more oppressive laws to fight this increase in terrorism, which in turn will beget more terrorist attacks. If this cycle it is not broken, America could wind up becoming the type of repressive regime against which it is fighting so hard.