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NOTE

Tailoring *Seibert*'s Intent Inquiry to Two-Step Counterterrorism Interrogations

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Abstract. In *Missouri v. Seibert*, the U.S. Supreme Court outlawed police officers' use of "question-first" tactics to obtain admissible confessions. But despite the government's increased efforts to incorporate a criminal justice component into counterterrorism strategy, the Court has never applied *Seibert* to two-step counterterrorism interrogations, nor considered the effect that a confession given during an intelligence interrogation might have on a suspect's ability to understand that he can, in fact, remain silent in response to subsequent questioning by law enforcement.

In 2017, two federal district courts issued the first recorded rulings on accused terrorists' motions to suppress warned confessions obtained through such a process. This Note is the first to scrutinize two-step counterterrorism interrogations in light of these initial rulings. A close analysis of the facts of the two cases reveals potential weaknesses in the intent-based approach to evaluating two-step interrogations set forth in Justice Kennedy's *Seibert* concurrence. When it comes to the intentions of intelligence interrogators, courts have critical blind spots.

By scrutinizing the logic of the two 2017 rulings and drawing on dynamics at work within the executive branch's counterterrorism apparatus, this Note seeks to provide a more nuanced way of evaluating two-step counterterrorism interrogations under *Seibert*. It proposes three key modifications to the inquiry into interrogators' subjective intent. First, courts should look for evidence of a deliberate intent to circumvent *Miranda*, not only at the point of the initial decision not to warn a suspect of his rights, but also throughout the unwarned phase of the interrogation. Second, courts should be more skeptical of an asserted pure intelligence-gathering motivation where the first-stage interrogators are

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closely tied to law enforcement. And finally, courts should be wary of the assertion that unwarned questioning was undertaken for intelligence purposes where there was no preexisting information indicating the suspect was of intelligence value. These guidelines preserve Justice Kennedy's focus on intent, but refine the inquiry to allow courts to more effectively ferret out violations of terrorism suspects' Fifth Amendment rights.

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Introduction

In October 2013, Abu Anas al-Libi[1] was a free man living in Tripoli, Libya. A federal grand jury in the Southern District of New York had indicted him thirteen years earlier for his role in the 1998 bombings of the U.S. embassies in Kenya and Tanzania; some of the highest-ranking members of al-Qaida at the time were his alleged co-conspirators.[2] But al-Libi had evaded capture on those charges for years, and had recently returned to Libya in the wake of Muammar Qaddafi's ouster.[3]

On October 5, 2013, a series of events was set in motion that would culminate in al-Libi's appearance before a federal judge to answer the charges against him. U.S. soldiers seized him as he was returning from prayers to his home in Tripoli and brought him aboard the U.S.S. San Antonio.[4] As the ship traversed the sea, "a cross-section of intelligence experts" interrogated al-Libi, no doubt hoping to obtain valuable intelligence from the accused veteran terrorist.[5] During that questioning, which allegedly took place in a room with no furniture over the course of a week,[6] al-Libi was not informed of his rights under *Miranda v. Arizona* to remain silent or to consult with an attorney.[7] What he said to those interrogators has not been released to the public.[8]

At some point, the goal of al-Libi's detention changed. Seven days after his capture, he was transferred to the custody of Federal Bureau of Investigation

1. Court documents commonly render his surname as "al Liby." *See, e.g.*, Government's Memorandum of Law in Opposition to Defendant al Liby's Motion to Suppress at 1, United States v. al Liby, 23 F. Supp. 3d 194 (S.D.N.Y. 2014) (No. S10 98 Crim. 1023 (LAK)) [hereinafter *al Liby* Government Brief]. This Note uses "al-Libi" in keeping with the Library of Congress's guide to romanization of Arabic script, which dictates that the final vowel sound in al-Libi's surname be transliterated using the letter "i." *See generally ALA-LC Romanization Tables*, LIBR. CONGRESS, https://perma.cc/CM6S-FG3J (last updated Nov. 28, 2017).

2. *See* Indictment ¶¶ 1, 12(bb)-(dd), *al Liby*, 23 F. Supp. 3d 194 (No. S10 98 Crim. 1023 (LAK)); *see also* David D. Kirkpatrick et al., *U.S. Raids in Libya and Somalia Strike Terror Targets*, N.Y. TIMES (Oct. 5, 2013), https://perma.cc/6UZH-P3JA.

3. *See* Carlotta Gall, *After Years on Run, Libyan Was Found with Family*, N.Y. TIMES (Oct. 7, 2013), https://perma.cc/8DEX-L9TU.

4. *See* Defendant al Liby's Memorandum of Law in Reply to Government's Response to Defendant's Motion to Suppress at 3, *al Liby*, 23 F. Supp. 3d 194 (No. S10 98 Crim. 1023 (LAK)) [hereinafter *al Liby* Reply Brief].

5. *See* Jennifer Daskal & Steve Vladeck, *The Case of Abu Anas al-Libi: The Domestic Law Issues*, JUST SECURITY (Oct. 10, 2013), https://perma.cc/Z2JX-6Y9H.

6. *al Liby* Reply Brief, *supra* note 4, at 3.

7. *See id.* at 3-4; *see also* Miranda v. Arizona, 384 U.S. 436, 478-79 (1966).

8. Al-Libi's suppression motion contended that the unwarned questioning "related to alleged al Qaeda links that the accused might have," but the motion did not disclose the information al-Libi supplied. *See al Liby* Reply Brief, *supra* note 4, at 8.

(FBI) agents.[9] Then, approximately one day after his final intelligence interview, the agents informed him of his *Miranda* rights and began questioning him anew.[10] Al-Libi waived his rights and continued talking; he would later claim that the week of intelligence interviews had deprived him of any "sense of asserting [his] own rights, or having the ability to independently determine if [he] wished to voluntarily speak."[11] But unlike the answers he gave to his intelligence interviewers, the statements al-Libi made during this second round of questioning—whether about his role in the 1998 bombings or his ties to al-Qaida leaders—were ripe for use against him in his impending prosecution.

Al-Libi was not the first suspected terrorist to be subjected to this questioning process—often referred to as a "two-step interrogation"—nor was he the last. As the government tries more terrorists in Article III courts rather than prosecuting them in military tribunals or detaining them indefinitely, agents increasingly are performing this intricate interrogation ritual, simultaneously treating suspects both as highly valuable intelligence assets and as criminal defendants.

In 2004, the U.S. Supreme Court in *Missouri v. Seibert* outlawed police officers' use of "question-first" tactics to obtain confessions.[12] But it has never applied *Seibert* to two-step counterterrorism interrogations, nor considered the effect that a confession given during an intelligence interrogation might have on a suspect's ability to understand that he can, in fact, remain silent in response to subsequent law enforcement questioning.

In fact, before mid-2017, despite the prevalence of this interrogation strategy, no lower court had issued a ruling applying *Miranda* and its progeny to two-step interrogations undertaken for intelligence purposes. In this vacuum of authority, commentators have put forward a range of views on the viability of the practice. One view is that confessions obtained through two-step counterterrorism interrogations should be admissible (at least when performed extraterritorially).[13] At the other end of the spectrum is the argument that focusing on the subjective intent behind the decision to pursue

9. *See id.* at 3, 9.

10. The parties disputed exactly how long the break was before questioning by the FBI began. *Compare id.* at 9 (specifying only that al-Libi was transferred to FBI custody at 9:00 AM on October 12), *with al Liby* Government Brief, *supra* note 1, at 12 (explaining that there was a break of at least twenty-two hours between al-Libi's final intelligence interview and his FBI interview).

11. *See al Liby* Government Brief, *supra* note 1, at 10 (quoting Declaration in Support of Motion ¶ 25, *al Liby*, 23 F. Supp. 3d 194 (No. S10 98 Crim. 1023 (LAK))).

12. *See* 542 U.S. 600, 617 (2004) (plurality opinion).

13. *See, e.g.*, FeiFei Jiang, Note, *Dancing the Two-Step Abroad: Finding a Place for Clean Team Evidence in Article III Courts*, 47 COLUM. J.L. & SOC. PROBS. 453, 458 (2014).

unwarned questioning—as Justice Kennedy's concurring opinion in *Seibert* requires—would leave too much room for interrogators to undermine suspected terrorists' Fifth Amendment rights in the name of intelligence.[14]

In 2017, two federal district courts became the first to decide whether terrorist suspects' warned confessions obtained through this kind of counterterrorism interrogation should be suppressed. These rulings provide observers with an opportunity to determine whether their speculation will be confirmed. Both decisions concluded that *Seibert* allowed the suspect's warned statements—obtained after prolonged unwarned questioning—to be admitted into evidence.[15]

This Note is the first to scrutinize two-step counterterrorism interrogations in light of these initial rulings. A close analysis of the facts of the two cases reveals potential weaknesses in the intent-based approach to evaluating two-step interrogations; when it comes to the intentions of intelligence interrogators, courts have critical blind spots. If these weaknesses are not addressed, judges seeking to learn from the two pioneering rulings may fall prey to the same misconceptions, and risk gutting what Fifth Amendment protection *Seibert* provides.

This Note proceeds in four Parts. Part I briefly summarizes the Fifth Amendment jurisprudence behind two-step interrogations in the criminal justice context. Part II examines the origins of two-step interrogations in counterterrorism operations. This history reveals a tension between prosecution and intelligence collection, the dual aims of modern counterterrorism investigations. Part III explores the two 2017 district court rulings, delving into the unique facts of each case to evaluate how the circumstances of each interrogation influenced the courts' respective decisions. Finally, Part IV seeks to provide a more nuanced way of evaluating two-step counterterrorism interrogations under *Seibert*. Given the widespread acceptance and pro-government logic of Justice Kennedy's *Seibert* framework, future cases will likely turn on the application of his approach. As a result, Part IV begins by contending that those concerned with safeguarding detainees' rights would do well not simply to advocate for alternatives to Justice Kennedy's approach, but also to construct meaningful doctrinal limits within it to more effectively guard against abuses. By scrutinizing the logic of the two 2017 rulings and

14. *See, e.g.*, Lee Ross Crain, Note, *The Legality of Deliberate* Miranda *Violations: How Two-Step National Security Interrogations Undermine* Miranda *and Destabilize Fifth Amendment Protections*, 112 MICH. L. REV. 453, 463, 488 (2013); *see also Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment).

15. *See* United States v. Abu Khatallah, 275 F. Supp. 3d 32, 38, 62 (D.D.C. 2017); United States v. Khweis, No. 1:16-cr-143, 2017 WL 2385355, at *1, *14 (E.D. Va. June 1, 2017).

drawing on dynamics at work within the executive branch's counterterrorism apparatus, Part IV then proposes three key modifications to Justice Kennedy's inquiry into interrogators' subjective intent.

First, courts should look for evidence of a deliberate intent to circumvent *Miranda*, not only at the point of the initial decision not to warn a suspect of his rights, but also throughout the unwarned phase of the interrogation. Second, courts should be more skeptical of an asserted pure intelligence-gathering motivation where the first-stage interrogators are closely tied to law enforcement. And finally, courts should be wary of the assertion that unwarned questioning was undertaken for intelligence purposes where there was no preexisting information indicating the suspect was of intelligence value. These guidelines preserve Justice Kennedy's focus on intent, but refine the inquiry to allow courts to more effectively ferret out the bad actors with which he was most concerned.

I. The Jurisprudence of Two-Step Interrogations

Despite their unconventional form, two-step counterterrorism interrogations are governed by the same body of law as more traditional forms of law enforcement interrogation. Like traditional interrogations, counterterrorism interrogations create the constitutional concern that a suspect might be coerced into waiving his Fifth Amendment privilege against self-incrimination. Understanding the boundaries of two-step counterterrorism interrogations, therefore, requires a brief foray into how the U.S. Supreme Court has handled interrogations in other contexts.

A. *Miranda v. Arizona*

The Court first drew the contours of modern Self-Incrimination Clause jurisprudence in *Miranda v. Arizona*.[16] Custodial interrogations, the Court declared for the first time, are inherently coercive.[17] Discerning a typical interrogation strategy from law enforcement handbooks, the Court discovered a disturbing trend of officers deliberately manipulating a subject's mind "to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty."[18] During this process, "[e]xplanations to the contrary are dismissed and discouraged."[19]

16. 384 U.S. 436 (1966).

17. *See id.* at 467.

18. *See id.* at 448-50 ("To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details.").

19. *Id.*

But it wasn't just the prevalence of manipulative police tactics that led the Court to conclude that custodial interrogations are coercive. Rather, it declared that the very process of undertaking a custodial interrogation is coercive, such that, in the absence of "proper safeguards," a suspect is subject to "inherently compelling 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."[20]

Miranda accordingly established a series of warnings that officers must provide to suspects at the outset of custodial interrogations to dispel this inherent coerciveness.[21] The warnings—which have become familiar to laypeople through popular depictions in television shows like *Law & Order*—inform the subject of his right to remain silent and his right to an attorney, as well as of the consequences of waiving those rights.[22] The goal of the Court's decision was "to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process."[23]

Miranda described these warnings as "prerequisites to the *admissibility* of any statement made by a defendant."[24] Once the warnings are administered, interrogation cannot continue until the subject has knowingly and intelligently waived his rights.[25] Absent such a waiver, a statement obtained during a custodial interrogation is inadmissible as evidence in the prosecution's case in chief. Subsequent holdings have clarified that officers can *question* individuals absent *Miranda* warnings without violating the Constitution, but when the government seeks to introduce the fruits of that questioning, the Fifth Amendment will stand in the way.[26]

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20. *Id.* at 467.

21. *See id.* at 467-73.

22. *See id.* at 467-71 ("The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it.").

23. *Id.* at 469.

24. *Id.* at 476 (emphasis added).

25. *See id.* at 475-76 (requiring warnings and an appropriate waiver "in accordance with our opinion today," or a "fully effective equivalent," as conditions for admissibility).

26. The Court later stated in dicta that the locus of a Fifth Amendment violation is not the place where a statement is coerced, but the place where the statement is offered against the defendant. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) ("Although conduct by law enforcement officials prior to trial may ultimately impair [the privilege against self-incrimination], a constitutional violation occurs only at trial."); *cf.* Chavez v. Martinez, 538 U.S. 760, 771-72 (2003) (plurality opinion) ("We have likewise established the *Miranda* exclusionary rule as a prophylactic measure to prevent violations of the right protected by the text of the Self-Incrimination Clause—the admission into evidence in a criminal case of confessions obtained through coercive custodial questioning."); *id.* at 778-79 (Souter, J., concurring in the judgment) (providing

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B. *Oregon v. Elstad*

Miranda laid down a broad rule about the consequences of failing to warn suspects of their rights. But that decision did not settle whether reading warnings to a suspect and obtaining a waiver would *always* guarantee that the ensuing statements would be admissible. In other words, the Supreme Court still needed to clarify how far *Miranda* warnings go toward dispelling the coercive effect of specific interrogation procedures or circumstances. In *Oregon v. Elstad*, the Court confronted the question whether an unwarned confession given *prior* to *Miranda* warnings could "taint" later admissions made voluntarily after a defendant had been fully apprised of his rights, rendering those later statements inadmissible.[27]

Officers arrived at eighteen-year-old Michael Elstad's home to question him about a burglary.[28] During a conversation in his living room, the officers questioned Elstad about the owner of the house that had been broken into.[29] In reply, he volunteered that "he heard that there was a robbery [there]"; when an officer then told him he believed Elstad was involved in the burglary, he replied, "Yes, I was there."[30] After officers had taken Elstad to the police station and administered *Miranda* warnings, he gave a signed statement to the same effect.[31]

Elstad ultimately convinced the Oregon Court of Appeals that his statement was inadmissible,[32] but the U.S. Supreme Court reversed. In doing so, the Court established a new voluntariness test for warned statements that follow unwarned confessions: The admissibility of the Mirandized statements turns on whether the initial, unwarned statement was obtained free of coercion.[33]

The Court acknowledged prior precedent stating that unwarned confessions can hamper an individual's ability to fully appreciate his right to remain silent: "[A]fter an accused has once let the cat out of the bag by confessing, no

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a fifth vote for the holding that merely obtaining an unwarned statement is not in and of itself a constitutional violation if the statement is not used in a judicial proceeding).

27. 470 U.S. 298, 300 (1985).

28. *Id.*

29. *See id.* at 300-01.

30. *Id.* at 301 (quoting Joint Appendix, *Elstad*, 470 U.S. 298 (No. 83-773), 1984 U.S. S. Ct. Briefs LEXIS 370, at *15-16).

31. *See id.*

32. *See* State v. Elstad, 658 P.2d 552, 555 (Or. Ct. App.), *review denied*, 670 P.2d 1033 (Or. 1983), *rev'd*, 470 U.S. 298.

33. *See Elstad*, 470 U.S. at 312 ("There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question, as in this case.").

matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag."[34] But the Court sought to limit the extent to which a previous confession can compromise the voluntariness of a subsequent waiver of *Miranda*'s protections, holding that as long as the unwarned statement was not in fact compelled, courts should assume that subsequent *Miranda* warnings can effectively dispel any coercive effect created by a prior confession.[35]

Focusing its inquiry on the voluntariness of his first admission, the Court concluded that Elstad's signed confession need not be suppressed.[36] Though the absence of *Miranda* warnings rendered his initial confession inadmissible,[37] it had clearly been given freely, and the Court found no evidence that the officers compelled him to admit he had been at the scene of the burglary.[38] Thus, although Elstad's first statement might have "let the cat out of the bag," because he had not been *compelled* to give it, the *Miranda* warnings that followed diffused its coercive effect, and it did not taint the voluntariness of his signed confession.[39]

C. *Missouri v. Seibert*

The *Elstad* decision avoided a key factual issue in the case: *why* the interrogating officers declined to administer *Miranda* warnings before questioning the suspect in his living room.[40] Nearly twenty years after that decision, the Court explored the limits of *Elstad*'s rule in a case in which police officers consciously withheld *Miranda* warnings in a deliberate attempt to elicit, and later confirm, a confession.[41]

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34. *Id.* at 311 (alteration in original) (quoting United States v. Bayer, 331 U.S. 532, 540 (1947)).

35. *See id.* at 312-14 ("This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver.").

36. *Id.* at 318 ("We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief.").

37. *See id.* at 307 ("[U]nwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded . . . .").

38. *See id.* at 315 ("The initial conversation took place at midday, in the living room area of respondent's own home, with his mother in the kitchen area, a few steps away.").

39. *See id.* at 311-14.

40. *See id.* at 315-16 (speculating that the omission "may have been the result of confusion as to whether the brief exchange qualified as 'custodial interrogation' or it may simply have reflected [the officer's] reluctance to initiate an alarming police procedure before [another officer] had spoken with [Elstad's] mother").

41. *See* Missouri v. Seibert, 542 U.S. 600, 604-06 (2004) (plurality opinion).

After one of her sons died in his sleep, Patrice Seibert's other sons devised a plan to burn down their mobile home to avoid allegations of neglect. With Seibert's knowledge, they also left Donald, a mentally ill young man who was living with the family, inside the home while they set the fire. The scheme resulted in Donald's death.[42]

Seibert was arrested five days later, and the arresting officer did not inform her of her *Miranda* rights.[43] After thirty to forty minutes of questioning, she admitted that Donald was meant to die in the fire.[44] At this admission, the interrogating officer allowed Seibert a twenty-minute break.[45] When he returned, he switched on a tape recorder and advised Seibert of her *Miranda* rights, which she waived.[46] The officer then proceeded to question Seibert by directly referencing what she had said during the earlier, unwarned session. He resumed his questioning by asking, "[W]e've been talking for a little while about what happened on Wednesday the twelfth, haven't we?"[47] The officer went on, parroting back the incriminating statements Seibert had made mere minutes earlier.[48] When Seibert intimated that she had meant for Donald to escape the fire, the officer retorted, "'Trice, didn't you tell me that he was supposed to die in his sleep?"[49] The officer later testified that he had made a "conscious decision" not to issue *Miranda* warnings, opting instead to question first, then provide *Miranda* warnings, and resume questioning "until [he] g[o]t the answer that she'[d] already provided once."[50]

The Supreme Court took the case to resolve a dispute among the courts of appeals as to the proper interpretation of *Elstad*.[51] In the end, five Justices agreed that the statements Seibert gave during the second phase of her interrogation were inadmissible, despite the waiver of her *Miranda* rights.[52]

42. *Id.* at 604.

43. *Id.* at 604-05.

44. *Id.*

45. *Id.* at 605.

46. *Id.*

47. *Id.* (quoting Joint Appendix, *Seibert*, 542 U.S. 600 (No. 02-1371), 2003 WL 22070771, at *66).

48. *See id.* ("[Y]ou told us that there was a[n] understanding about Donald." (second alteration in original) (quoting Joint Appendix, *supra* note 47, at *70)).

49. *Id.* (quoting Joint Appendix, *supra* note 47, at *70).

50. *Id.* at 605-06 (quoting Joint Appendix, *supra* note 47, at *31, *33). The Court noted that the technique used on Seibert was endemic: "An officer of [the] police department testified that the strategy of withholding *Miranda* warnings until after interrogating and drawing out a confession was promoted not only by his own department, but by a national police training organization and other departments in which he had worked." *Id.* at 609.

51. *See id.* at 607.

52. *See id.* at 617; *see also id.* at 618-22 (Kennedy, J., concurring in the judgment).

1. The plurality approach

The plurality, in an opinion authored by Justice Souter and joined by Justices Stevens, Ginsburg, and Breyer, rested its decision on the core objectives of *Miranda*'s protections. To the plurality, the purpose of *Miranda* and the admonitions it prescribed was to dispel the coercive impact of "interrogation practices . . . likely . . . to disable [an individual] from making a free and rational choice" about speaking to the police.[53] The plurality concluded that the threshold question as to whether a two-step interrogation was consistent with that purpose was "whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires."[54] In other words, would the provision of *Miranda* warnings "reasonably convey that [a subject] could choose to stop talking even if he had talked earlier?"[55]

The *Seibert* plurality determined that if warnings are withheld until after a confession, they likely "will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content."[56] A variety of factors, the plurality reasoned, might influence the effectiveness of *Miranda* warnings issued after an unwarned interrogation: (1) "the completeness and detail of the questions and answers in the first round of interrogation"; (2) "the overlapping content of the two statements"; (3) "the timing and setting of the first and the second" rounds; (4) "the continuity of police personnel"; and (5) "the degree to which the interrogator's questions treated the second round as continuous with the first."[57] The plurality also implied that in the context of a sequential interrogation, police may need to clarify a suspect's rights by providing an explicit amendment to the traditional *Miranda* warning that "anything you say can and will be used against you," lest the suspect entertain the "entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail."[58]

Applying these factors, the plurality easily concluded that the *Miranda* warnings read to Seibert were inadequate. First, "[w]hen the police were finished there was little, if anything, of incriminating potential left unsaid."[59] Second, "[t]he warned phase of questioning proceeded after a pause of only 15 to 20 minutes."[60] Third, the warned phase occurred "in the same place as the

53. *See id.* at 611 (plurality opinion) (alterations in original) (quoting Miranda v. Arizona, 384 U.S. 436, 464-65 (1966)).

54. *Id.* at 611-12.

55. *Id.* at 612.

56. *Id.* at 613.

57. *Id.* at 615.

58. *See id.* at 613.

59. *Id.* at 616.

60. *Id.*

unwarned segment."[61] Fourth, "the same officer who had conducted the first phase recited the *Miranda* warnings" and conducted the second phase of questioning.[62] Finally, touching on the plurality's heightened concern that *Miranda* warnings could mislead in such circumstances, the officer "said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited."[63] Taken together, these facts convinced the plurality that the warnings could not have effectively informed Seibert that she could be silent in the face of continued questioning.

2. Justice Kennedy's concurrence

Justice Kennedy, concurring in the judgment, took a different approach to evaluating two-step interrogations. Like the plurality, Justice Kennedy focused on the purpose behind *Miranda*.[64] But his approach explicitly sought to balance the Fifth Amendment interests embodied in the *Miranda* warnings against the law enforcement interests involved. In Justice Kennedy's reading of *Elstad*, the defendant's second, warned statement had been admissible because excluding it would have served "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence."[65] He observed that such a balancing explained why failing to issue *Miranda* warnings did not prevent prosecutors from using physical evidence obtained as a result of an unwarned interrogation[66] or from using unwarned statements to impeach witnesses.[67]

By contrast, the cardinal sin of the police department in *Seibert* was that its two-step interrogation amounted to a "deliberate violation" of *Miranda*'s goals: Its question-first strategy was "based on the assumption that *Miranda* warnings will tend to mean less when recited midinterrogation, after inculpatory statements have already been obtained."[68] Justice Kennedy's approach was directly at odds with the plurality's, which explicitly avoided considering

61. *Id.*

62. *See id.*

63. *Id.*

64. *See id.* at 619 (Kennedy, J., concurring in the judgment) ("Under these precedents, the scope of the *Miranda* suppression remedy depends on a consideration of those legitimate interests and on whether admission of the evidence under the circumstances would frustrate *Miranda*'s central concerns and objectives.").

65. *Id.* at 619-20 (quoting Oregon v. Elstad, 470 U.S. 298, 308 (1985)).

66. *See id.* at 619 (citing United States v. Patane, 542 U.S. 630 (2004)).

67. *See id.* (citing Harris v. New York, 401 U.S. 222 (1971)) ("These cases, in my view, are correct.").

68. *Id.* at 620.

interrogating officers' state of mind.[69] For his part, Justice Kennedy rejected the plurality's focus on the effectiveness of the *Miranda* warnings as too broad, fearing that requiring an effectiveness inquiry for every two-step interrogation would undermine the clarity *Miranda* intended to provide.[70]

Justice Kennedy's standard for two-step interrogations was as follows: "If the *deliberate* two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made."[71] With regard to the substance of these curative steps, Justice Kennedy's proposed test largely dovetailed with the objective indicators of effectiveness the plurality provided.[72] And like the plurality, Justice Kennedy emphasized how important an explicit reminder that a suspect's unwarned statements are inadmissible can be.[73] Ultimately, Justice Kennedy concluded that the officers questioning Seibert had deliberately sought to circumvent the protections of *Miranda*,[74] and concurred in the judgment based on his view that "[t]he technique used in this case distorts the meaning of *Miranda* and furthers no legitimate countervailing interest."[75]

Since *Seibert* was decided, the courts of appeals have split over which approach should govern the analysis of a two-step interrogation. Seven circuits have explicitly adopted Justice Kennedy's interpretation.[76] Five circuits have refrained from definitively adopting either test, instead applying various versions of both the plurality's "effectiveness" test and Justice Kennedy's intent-based approach.[77]

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69. *See id.* at 616 n.6 (plurality opinion) ("Because the intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation), the focus is on facts apart from intent that show the question-first tactic at work.").

70. *See id.* at 621-22 (Kennedy, J., concurring in the judgment).

71. *Id.* at 622 (emphasis added).

72. For example, Justice Kennedy suggested that a "substantial break in time and circumstances" might be sufficient. *See id.*

73. *See id.* (recommending "an additional warning that explains the likely inadmissibility of the prewarning custodial statement").

74. *See id.* at 618 ("The interrogation technique used in this case is designed to circumvent *Miranda* . . . .").

75. *Id.* at 621.

76. *See* United States v. Morgan, 729 F.3d 1086, 1091-92 (8th Cir. 2013); United States v. Capers, 627 F.3d 470, 476-77 (2d Cir. 2010); United States v. Street, 472 F.3d 1298, 1313 (11th Cir. 2006); United States v. Courtney, 463 F.3d 333, 338 (5th Cir. 2006); United States v. Williams, 435 F.3d 1148, 1157-58 (9th Cir. 2006); United States v. Kiam, 432 F.3d 524, 532 (3d Cir. 2006); United States v. Mashburn, 406 F.3d 303, 309 (4th Cir. 2005).

77. *See* United States v. Straker, 800 F.3d 570, 617 (D.C. Cir. 2015) (per curiam); United States v. Jackson, 608 F.3d 100, 103-04 (1st Cir. 2010); United States v. Heron, 564 F.3d

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II. The Use of Two-Step Interrogations in Joint Counterterrorism Investigations

The emergence of *Seibert*'s competing approaches coincides with the broadened role of federal law enforcement in counterterrorism. Indeed, *Miranda* and its progeny have gained salience as the government has sought to incorporate a criminal justice component into its counterterrorism strategy. This Part explores the expansion of federal law enforcement's involvement in counterterrorism and the attendant evolution of interrogation strategy to incorporate both intelligence collection and evidence gathering.

A. Law Enforcement's Growing Role in Counterterrorism

Before 2001, the Central Intelligence Agency (CIA) was the executive branch entity with primary responsibility for investigating international terrorist groups and their members.[78] After the attacks of September 11, however, a number of agencies saw their missions expand and evolve. The Department of Justice and the FBI, in particular, were increasingly drawn out of their traditional law enforcement missions into the historically intelligence-oriented counterterrorism field.[79] In early 2003, Attorney General John Ashcroft announced, "In order to fight and to defeat terrorism, the Department of Justice has added a new paradigm to that of prosecution—a paradigm of prevention."[80] By 2010, "[p]rotecting Americans against terrorism" was "the highest priority of the Department of Justice."[81]

Early versions of counterterrorism-specific two-step interrogations proved useful as the government began to move toward trying high-level terrorist suspects in Article III courts. As Gregory McNeal has explained, when officials first sought to bring Guantanamo Bay detainees to the United States for trial, it became evident that the government would need to collect evidence that would be admissible against the detainees in court (that is, not obtained through torture or other coercive methods).[82] And they would need to

879, 884-86 (7th Cir. 2009); United States v. Pacheco-Lopez, 531 F.3d 420, 427 n.11 (6th Cir. 2008); United States v. Carrizales-Toledo, 454 F.3d 1142, 1150-51 (10th Cir. 2006).

78. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 400-01 (2004), https://perma.cc/RVU2-T6D2.

79. *See* 2 DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS 2D § 24:2 (2012).

80. John Ashcroft, Attorney Gen., Remarks to the Council on Foreign Relations (Feb. 10, 2003) (emphasis omitted), https://perma.cc/H27J-HP93.

81. *United States Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 20 (2010) [hereinafter *DOJ Hearing*] (statement of Eric Holder, Att'y Gen., U.S. Dep't of Justice).

82. *See* Gregory S. McNeal, *A Cup of Coffee After the Waterboard: Seemingly Voluntary Post-Abuse Statements*, 59 DEPAUL L. REV. 943, 951-53 (2010).

dissipate the taint of any torture to which the detainees had been subjected.[83] To dispel any coercion involved in incognito military detention, those initial prosecution efforts relied on a strategy known as "clean team" investigations. "Clean" investigators would be kept isolated from the first-stage intelligence interrogators and have no knowledge of the information prior interviews had uncovered.[84] A prosecutor formerly involved in the still-ongoing case of Khalid Sheikh Mohammed—the alleged architect of the September 11 attacks—recounted:

> We hoped "clean" admissions would allow[] us to introduce the statements made to law enforcement personnel, using them as witnesses at trial, and eliminate or at least minimize CIA involvement in courtroom proceedings. The status quo outcome was the detainee would refuse to talk and we would proceed with what we already had in hand.[85]

The move away from indefinite military detention and toward prosecution in Article III courts meant agents needed a way to question suspected terrorists that would yield both valuable intelligence and admissible evidence.[86] These dual aims teed up a dilemma over the proper role of the Fifth Amendment and *Miranda* in counterterrorism investigations.

B. To Mirandize or Not to Mirandize?

Issuing *Miranda* warnings is a choice—not a requirement—in any investigation.[87] That choice is fraught with unique challenges and considerations in the counterterrorism context. David Kris and J. Douglas Wilson have described the operational dilemma of whether to Mirandize suspected terrorists as a tension between two goals: "neutralizing the current terrorist

83. Former Assistant Attorney General for National Security Kenneth Wainstein explained that prosecutors were engaged in "building cases and anticipating the challenges down the road." *Id.* at 952 (quoting Scott Shane & David Johnston, *U.S. Acts to Avert Tactic Expected in Qaeda Trial*, N.Y. TIMES (Feb. 13, 2008), https://perma.cc/YR2Z-VVY9); *see also* Shane & Johnston, *supra*.

84. Kenneth Roth has expressed doubt that this personnel separation is effective at counteracting the effects of a confession that was actually coerced. *See* Kenneth Roth, Tepoel Lecture & Keynote Address, *Why the Current Approach to Fighting Terrorism Is Making Us Less Safe*, 41 CREIGHTON L. REV. 579, 587-88 (2008) (acknowledging that the clean team is "supposedly not tainted by that coerced interrogation and therefore the evidence that they come up with can be used to prosecute the suspect," but noting that "[t]here is a big question whether that can work").

85. McNeal, *supra* note 82, at 952 (quoting Morris D. Davis, *Historical Perspective on Guantánamo Bay: The Arrival of the High Value Detainees*, 42 CASE W. RES. J. INT'L L. 115, 121 (2009)).

86. For a detailed first-person account of the decision to deploy clean teams prior to the first military trials at Guantanamo Bay, see Davis, *supra* note 85.

87. *See supra* notes 24-26 and accompanying text.

threat" and "gathering intelligence in order to neutralize future terrorist threats."[88] Arresting terrorist suspects and reading them their rights serves the former interest, but risks compromising the latter. If a suspect invokes his rights, he may not divulge (or may not timely divulge) some valuable intelligence necessary to disrupt a terrorist plot.[89]

Officials and scholars disagree over whether *Miranda* is a real obstacle to counterterrorism intelligence collection. Some lawmakers consider advising suspects of their *Miranda* rights to be bad counterterrorism policy.[90] The National Defense Authorization Act for Fiscal Year 2010, for example, expressly prohibited military members from providing *Miranda* warnings to foreign nationals held as enemy belligerents.[91] And the House of Representatives version of the proposed Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010 would have required approval from the Director of National Intelligence before officers could give *Miranda* warnings to high-value detainees.[92]

Some who argue that *Miranda* warnings should be given at the outset of custodial counterterrorism interrogations have suggested that doing so poses no real obstacle to collecting valuable intelligence because so many arrestees waive their rights.[93] Still, intelligence personnel—and perhaps the American

88. 2 KRIS & WILSON, *supra* note 79, § 24:21, at 83.

89. *See id.* § 24:21, at 86-87 ("Indulging the worst assumptions, [*Miranda* warnings] may inhibit short-term intelligence collection . . . .").

90. Some scholars have gone further still, arguing that due process restrictions on coerced confessions ought to be relaxed in the counterterrorism context. *See, e.g.*, Norman Abrams, *The Case for a Cabined Exception to Coerced Confession Doctrine in Civilian Terrorism Prosecutions*, *in* PATRIOTS DEBATE: CONTEMPORARY ISSUES IN NATIONAL SECURITY LAW 42, 44-51 (Harvey Rishikof et al. eds., 2012).

91. *See* Pub. L. No. 111-84, § 1040(a)(1), 123 Stat. 2190, 2454 (2009) ("Absent a court order . . . , no member of the Armed Forces and no official or employee of the Department of Defense or a component of the intelligence community (other than the Department of Justice) may read to a foreign national who is captured or detained outside the United States as an enemy belligerent and is in the custody or under the effective control of the Department of Defense or otherwise under detention in a Department of Defense facility the statement required by *Miranda v. Arizona* . . . ."). The Department of Justice, however, is not subject to the prohibition. *See id.* In case there is any confusion over who qualifies as an "enemy belligerent," the title of this section of the Act reads, "No *Miranda* Warnings for Al Qaeda Terrorists." *Id.*

92. *See* H.R. 4892, 111th Cong. § 3(a)(1)(D) (2010); *see also* CHARLES DOYLE, CONG. RESEARCH SERV., R41252, TERRORISM, *MIRANDA*, AND RELATED MATTERS 9 (2010),.

93. *See, e.g.*, Crain, *supra* note 14, at 486-87. Still, examples of immediate *Miranda* warnings in the counterterrorism context that result in waivers and cooperation are hard to come by. For example, Faisal Shahzad was arrested in May 2010 for attempting to detonate a bomb in Manhattan's Times Square. He waived his rights and continued providing information to authorities, but only after an hours-long unwarned interrogation. *See* Charlie Savage, *Holder Backs a* Miranda *Limit for Terror Suspects*, N.Y. TIMES (May 9, 2010), https://perma.cc/CT6Z-PPDW. Umar Farouk Abdulmutallab,

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public—may be less tolerant of the risk that the small fraction of those suspected terrorists who invoke their rights will conceal key information necessary to prevent an attack than they are of the risk that a nonterrorist criminal will be acquitted because he invoked his rights.[94] And to practitioners, this risk is far from abstract. In 2017, American forces took custody of a U.S. citizen who had been apprehended in Iraq on suspicion of fighting with the Islamic State of Iraq and Syria (ISIS).[95] Officials questioned him without *Miranda* warnings, but after he was informed of his rights, he stopped talking.[96] Proponents of lax *Miranda* standards for counterterrorism interrogations can point to such anecdotes as evidence of the risk that reading terrorists their rights will stymie key intelligence collection.

One way to assuage concerns that *Miranda* warnings would impede investigators from disrupting terrorist threats is the well-worn "public safety" exception to *Miranda* delineated in *New York v. Quarles*.[97] *Quarles* established an exception to *Miranda* that allows officers to question a suspect about potential imminent threats to public safety before issuing any *Miranda* warnings.[98] In that case, officers pursued a suspect through an open supermarket.[99] Upon apprehending the suspect, the officers discovered that the shoulder holster he was wearing was empty.[100] Without issuing *Miranda* warnings, they immediately asked about the gun's whereabouts, and the suspect indicated that it could be found in a nearby pile of cartons.[101] Officers then formally arrested him and read him his rights.[102]

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who attempted to detonate an explosive device on an airplane in December 2009, continued to cooperate with authorities after being informed of his *Miranda* rights, though not before his relatives coaxed him to do so. *See id.*

94. Polls taken in 2010 revealed that anywhere between 51% and 65% of American adults supported Mirandizing suspected terrorists. *See* Micah Cohen, *Small Majority Approved of* Miranda *Rights for Terror Suspects*, N.Y. TIMES: FIVETHIRTYEIGHT (Apr. 21, 2013, 12:18 PM), https://perma.cc/8VUG-K72H.

95. *See* Jacqueline Klimas, *ACLU Will Represent U.S. Citizen Detained in Iraq*, POLITICO (updated Jan. 5, 2018, 4:26 PM EST), https://perma.cc/5C3S-W2PW.

96. *See* Eric Schmitt & Charlie Savage, *American Held as ISIS Suspect, Creating a Quandary for the Trump Administration*, N.Y. TIMES (Oct. 6, 2017), https://perma.cc/M2XS-RYM4.

97. *See* 467 U.S. 649, 655-56 (1984).

98. *See id.* ("We hold that on these facts there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence . . . .").

99. *See id.* at 651-52.

100. *See id.* at 652.

101. *See id.*

102. *Id.*

In ruling that the unwarned statement about the gun's location was admissible, the Supreme Court reasoned that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for [*Miranda*'s] prophylactic rule."[103] The judgment rested largely on policy grounds: Reflecting on the split-second decisions law enforcement officers must make, the Court declined to place officers in the "untenable position" of having to decide in an instant either "to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible," or "to give the warnings . . . but possibly damage or destroy their ability to . . . neutralize the volatile situation confronting them."[104] As a result, when law enforcement officers choose to engage in unwarned questioning to disrupt an imminent threat to public safety, a suspect's answers are admissible, notwithstanding the broad mandate of *Miranda*.

Intuitively, the public safety exception is well suited to the questioning of terrorism suspects, especially those arrested after an attack or attempted attack. In effect, the exception gives legal form to the "ticking bomb" illustration often invoked in other settings to defend enhanced interrogation techniques.[105] Although the United Nations Convention Against Torture (to which the United States is a signatory) does not allow a threat to public safety, on its own, to justify enhanced interrogation techniques,[106] the Supreme Court in *Quarles* effectively held that such a threat may support the admissibility of the fruits of unwarned, noncoerced questioning. Indeed, the exception has been invoked in scenarios involving potential imminent terrorist threats.[107] But as the following Subpart explores, *Quarles* almost certainly cannot support all unwarned intelligence interrogations.[108]

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103. *Id.* at 657.

104. *Id.* at 657-58.

105. In this hypothetical illustration, a society that shuns torture may nonetheless accept it as a means to obtain key information about a bomb that is set to cause imminent, immense destruction. For a summary and thorough rejection of this "made up" scenario, see CHARLES FRIED & GREGORY FRIED, BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR 29-31 (2010).

106. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, ¶ 2, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85, 114 (entered into force for the United States Nov. 20, 1994) ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.").

107. *See infra* text accompanying notes 122-31.

108. Indeed, in the first two applications of *Seibert* to counterterrorism interrogations, the government did not attempt to argue that statements obtained during unwarned questioning were admissible under *Quarles*. *See infra* Part III.

C. Collecting Intelligence Beyond Imminent Threat Information

Ultimately, the public safety exception's utility for intelligence questioning is limited. *Quarles*, by its own terms, only allows into evidence statements obtained during questioning pursued to defuse a "volatile situation."[109] For example, officers invoked the exception to justify unwarned questioning of Boston Marathon bomber Dzokhar Tsarnaev when he was arrested after a citywide manhunt that had resulted in the death of his older brother and co-conspirator, Tamerlan.[110] Similarly, the exception supported the unwarned interrogation of Umar Farouk Abdulmutallab, who was arrested for attempting to detonate a bomb onboard a flight bound for Detroit in December 2009.[111] A federal judge determined that the approximately fifty-minute session was justified because Abdulmutallab claimed he was acting on behalf of al-Qaida; his interrogators were aware that al-Qaida had executed simultaneous airline attacks in the past; and, therefore, the officers "logically feared that there could be additional, imminent aircraft attacks in the United States and elsewhere in the world."[112]

Thus, although the exception may extend to questioning about imminent attacks or accomplices on the loose, it arguably does not allow officials to engage in unwarned questioning about other subjects: conditions on the ground, connections between suspected terrorists, the leadership structure or financial resources of terrorist groups, or long-term terrorist planning.[113]

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109. *See* 467 U.S. at 657-58.

110. *See* Alana Semuels, *Boston Marathon Bombing Suspect's Lawyers Say FBI Violated His Rights*, L.A. TIMES (May 7, 2014, 10:38 PM), https://perma.cc/TMS7-PUD5; *see also* Government's Opposition to Defendant's Motion to Suppress Statements at 3, United States v. Tsarnaev, 157 F. Supp. 3d 57 (D. Mass. 2016) (No. 13-10200-GAO), 2014 WL 5427193 (arguing that the officers had "reason to believe that the Tsarnaevs had accomplices and that they or others might have built additional bombs that posed a continuing danger to public safety").

111. *See* United States v. Abdulmutallab, No. 10-20005, 2011 WL 4345243, at *1, *5 (E.D. Mich. Sept. 16, 2011); *see also* Charlie Savage, *Christmas Day Bomb Plot Detailed in Court Filings*, N.Y. TIMES (Feb. 10, 2012), https://perma.cc/P93D-6K2X.

112. *Abdulmutallab*, 2011 WL 4345243, at *6; *see id.* at *1-2.

113. *Cf. DOJ Hearing*, *supra* note 81, at 52 (question posed by Rep. Lungren to Eric Holder, Att'y Gen., U.S. Dep't of Justice) ("[P]resumably we are trying to get more information than just the immediate danger. We are trying to solicit information with respect to perhaps a terrorist network."); Bruce Ching, *Mirandizing Terrorism Suspects?: The Public Safety Exception, the Rescue Doctrine, and Implicit Analogies to Self-Defense, Defense of Others, and Battered Woman Syndrome*, 64 CATH. U. L. REV. 613, 614, 644 (2015) (advancing a broader conception of the public safety exception that allows officers to rely on the threat existing in the lead-up to a suspect's arrest, but acknowledging that questioning related to a suspect's views "about Islam and U.S. foreign policy, as well as his sports activities, future career goals, and school history" would not fall within the exception's purview (quoting Motion to Suppress Statements at 5, *Tsarnaev*, 157 F. Supp. 3d 57 (No. 13-10200-GAO), 2014 WL 4542363)). *But see* Joanna Wright, Note, *Mirandizing*

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Indeed, the executive branch has publicly acknowledged that its ability to rely on the public safety exception is limited. In 2010, the Obama Administration asked Congress to codify a terrorism exception to *Miranda* that would extend the limits of *Quarles*.[114] The Administration, citing Faisal Shahzad's training with the Taliban in Pakistan, sought a rule that would provide greater flexibility for agents to question suspected terrorists.[115] Democratic Representative Adam Schiff took up the Administration's call, introducing the Questioning of Terrorism Suspects Act of 2010.[116] The bill, which never passed, included congressional findings that "[t]he initial hours and days after capture are often the most valuable from an intelligence collection perspective," and that "the public safety exception in the terrorism context is broad enough to include questioning necessary to protect the lives of troops *on the battlefield* from a *pending* or *planned* attack," not just an imminent threat to public safety.[117]

In 2010, the FBI issued new guidance on interrogating terrorist suspects held in U.S. custody to include explicit instructions for gathering intelligence that does not bear on imminent threats.[118] The FBI's guidelines now essentially codify *Quarles*'s rule,[119] but they also provide additional guidance for unwarned questioning of suspected terrorists.[120] In "exceptional cases," after all relevant questions regarding imminent threats to public safety have been exhausted, unwarned interrogation may continue if agents conclude that (1) such interrogation is "necessary to collect valuable and timely intelligence," and

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Terrorists?: An Empirical Analysis of the Public Safety Exception, 111 COLUM. L. REV. 1296 (2011) (conducting a review of the exception's application to a variety of terrorism and nonterrorism cases before 2012 and concluding that the "malleability" of the public safety exception keeps *Miranda* from obstructing counterterrorism investigations).

114. *See* Savage, *supra* note 93.

115. *See id.*

116. H.R. 5934, 111th Cong.

117. *Id.* § 2(4)-(5) (emphasis added).

118. *See* Charlie Savage, *Delayed* Miranda *Warning Ordered for Terror Suspects*, N.Y. TIMES (Mar. 24, 2011), https://perma.cc/6XCJ-LSCC; *see also F.B.I. Memorandum*, N.Y. TIMES (Mar. 25, 2011), https://perma.cc/9J4W-7EZ6 (reproducing the internal FBI memorandum).

119. FBI, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE § 18.5.6.4.1.4(A) & n.16 (2013), https://perma.cc/MW4Y-4GZ4 (advising agents to "ask any and all questions that are reasonably prompted by an immediate concern for the safety of the public or the arresting agents without advising the arrestee of his *Miranda* rights").

120. The guidance defines "operational terrorist" as "an arrestee who is reasonably believed to be either a high-level member of an international terrorist group; or an operative who has personally conducted or attempted to conduct a terrorist operation that involved risk to life; or an individual knowledgeable about operational details of a pending terrorist operation." *Id.* § 18.5.6.4.1.4 n.15.

(2) "the government's interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation."[121]

The FBI's policy reflects the distinct mechanisms of the public safety exception, on the one hand, and two-step intelligence interrogations, on the other. Because of the Court's decision in *Quarles*, the public safety exception only influences which unwarned statements prosecutors can admit into evidence; if the questioning pertains to an imminent threat to public safety, the subject's answers are admissible. But should investigators decide eventually to read a subject his rights and attempt to introduce a warned confession in court, *Seibert* calls for a backward-looking view at the entire interrogation, including the unwarned session. In other words, it asks whether the circumstances of the interrogation—and under Justice Kennedy's test, the interrogators' intent—create so much coercion that later, warned statements are rendered inadmissible.

The two-step format has been used in several high-profile counterterrorism investigations in recent years. The government has justified its approach by invoking either the public safety exception, broader intelligence-gathering aims, or both, depending on the facts of the case.

- In 2009, Mohamad Ibrahim Ahmed was arrested on suspicion of involvement with al-Shabaab, a terrorist group with links to al-Qaida.[122] U.S. government officials first questioned him for intelligence purposes; a few days later, after reading Ahmed his *Miranda* rights, FBI agents took over.[123]
- Umar Farouk Abdulmutallab trained with al-Qaida in Yemen before he attempted to detonate an explosive device onboard a Detroit-bound flight in December 2009.[124] After his arrest, Abdulmutallab was questioned first by FBI special agents while he was being treated in a local hospital. This unwarned session lasted about fifty minutes, and took place before the injured Abdulmutallab entered surgery.[125] When he did receive his *Miranda* warnings, he ceased cooperating for several weeks.[126]

121. *Id.* § 18.5.6.4.1.4(C). If these two conditions are met, unwarned interrogation can continue with approval from the special agent in charge. *See id.*

122. *See* Benjamin Weiser, *Ex-Somali Terrorist Helps a U.S. Prosecution*, N.Y. TIMES (May 13, 2012), https://perma.cc/J8BB-LPGW.

123. *See* Jiang, *supra* note 13, at 453-54.

124. *See* United States v. Abdulmutallab, No. 10-20005, 2011 WL 4345243, at *1 (E.D. Mich. Sept. 16, 2011); *see also* Savage, *supra* note 111.

125. *See* Charlie Savage, *Debate over Delaying of* Miranda *Warning*, N.Y. TIMES (Apr. 20, 2013), https://perma.cc/92T9-XZ8C.

126. *See id.*

- After Faisal Shahzad attempted to detonate an explosive device in Manhattan's Times Square in 2010, the FBI interrogated him for "three or four hours" without administering *Miranda* warnings; officers cited the public safety exception to justify his unwarned questioning about future attacks.[127] When interrogators determined there was "no imminent threat," they Mirandized Shahzad, who waived his rights and continued talking.[128]
- In 2011, U.S. officials interrogated suspected al-Shabaab operative Ahmed Abdulkadir Warsame for months aboard a naval vessel before bringing him to New York City for trial.[129] The intelligence phase of his interrogation ended about two months after his capture, and a visit from the Red Cross served as a break between the two phases of questioning.[130]
- In 2013, Abu Anas al-Libi, who had been indicted for his involvement in the 1998 al-Qaida bombings of the U.S. embassies in Kenya and Tanzania, was subjected to a two-step interrogation following his capture in Libya.[131]

These examples include only those two-step counterterrorism interrogations that made national news. As the following Part explores, courts are just beginning to probe the novel questions this common[132] strategy presents.

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127. *See* Savage, *supra* note 93.

128. *See* Peter Baker, *A Renewed Debate over Suspect Rights*, N.Y. TIMES (May 4, 2010), https://perma.cc/W4BX-7CVG.

129. *See* Charlie Savage, *U.S. Tests New Approach to Terrorism Cases on Somali Suspect*, N.Y. TIMES (July 6, 2011), https://perma.cc/T3VN-JPUA.

130. *See id.*

131. *See supra* notes 1-11 and accompanying text.

132. Whether the Trump Administration will abate the trend toward trying terrorists in Article III courts is still unclear, though some terrorism prosecutions that had begun by 2017 have continued. *See infra* Part III. Former Attorney General Jeff Sessions had expressed interest in transporting terrorism suspects apprehended overseas to be detained and tried in the military prison at Guantanamo Bay. *See* Sadie Gurman, *Benghazi Trial Could Undercut AG Sessions' Push for Gitmo Tribunals*, MIAMI HERALD (updated Sept. 26, 2017, 2:26 PM), https://perma.cc/ABF9-B9C6 (reporting Sessions's statement to a radio host that he "d[id]n't think we're better off bringing these people to federal court in New York and trying them in federal court where they get discovery rights to find out our intelligence, and get court-appointed lawyers and things of that nature").

President Trump signed an Executive Order in January 2018 affirming the Administration's intention to transfer additional detainees to Guantanamo "when lawful and necessary to protect the Nation." Exec. Order No. 13,823, § 2(c), 83 Fed. Reg. 4831, 4831 (Feb. 2, 2018). But the Administration's ability to effect widespread initiation of military commissions for detained suspected terrorists is up in the air; as one expert has noted, no additional detainees were moved to Guantanamo in 2017, and the

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III. Counterterrorism Decisions Applying *Seibert*

In 2017, federal district courts in Virginia and the District of Columbia issued the first known rulings on suppression motions pertaining to two-step counterterrorism interrogations.[133] Prior to 2017, defendants in isolated cases had raised *Seibert*-based arguments in their motions to suppress, but no orders had been issued.[134] These two cases, each with unique facts, presented the respective courts with the opportunity to determine the contours of *Seibert* as it applies outside the traditional criminal justice context.

A. *United States v. Khweis*

In 2015, Mohamed Khweis, a U.S. citizen, left his Virginia home to travel to Syria.[135] Three months into his journey, Kurdish forces arrested him in Iraq, where he had fallen in with ISIS fighters.[136] The next day, when Kurdish

Executive Order did not address the "various legal and policy obstacles" to doing so. *See* Charlie Savage, *Ordering Guantánamo to Stay Open Is One Thing, but Refilling It Is Another*, N.Y. TIMES (Jan. 31, 2018) (quoting Robert M. Chesney, Professor, Univ. of Tex. at Austin Sch. of Law), https://perma.cc/YGG3-HHKP.

133. Commentators have noted this vacuum of authority at least twice in the past five years. *See, e.g.*, Crain, *supra* note 14, at 457 ("While many lower courts have grappled with *Seibert* in the domestic criminal justice context, it appears that no court has actually determined what impact first-step national security interrogations have on the admissibility of second-step post-warning confessions."); Jiang, *supra* note 13, at 455 ("Currently, no court has specifically decided whether the government can introduce statements elicited from the second stage of such a two-step interview abroad in court, or whether all such evidence, pre- and post-*Miranda* warning, should be suppressed." (footnote omitted)). Searches of publicly available court records likewise uncovered no applications of *Seibert* to two-step counterterrorism interrogations before *Khweis* was decided in June 2017.

134. Mohamed Ibrahim Ahmed, for example, pleaded guilty before the court could issue its order on his suppression motion. *See* Crain, *supra* note 14, at 457 (citing Benjamin Weiser, *Man Offers Guilty Plea, Upending Terror Case*, N.Y. TIMES (June 13, 2012), https://perma.cc/NHF2-DN6Q). And Abu Anas al-Libi, who had moved to suppress statements he made in a two-step interrogation aboard a military ship, *see al Liby* Reply Brief, *supra* note 4, died shortly before his trial was set to begin, *see Libya Terror Suspect Anas al-Liby Dies Before US Trial*, BBC NEWS (Jan. 3, 2015), https://perma.cc/J9SE-W8CE, and no ruling on the motion is available. *See also* WADIE E. SAID, CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS 83 (2015) (explaining that when "the government bargains for a waiver of the right to appeal, as is standard in many guilty pleas, the likelihood that the FBI's granting itself the right to forego *Miranda* warnings for intelligence purposes will be subject to meaningful judicial review is small, at best").

135. *See* United States v. Khweis, No. 1:16-cr-143, 2017 WL 2385355, at *1 (E.D. Va. June 1, 2017).

136. *See id.* at *1, *3.

officials granted the local FBI attaché permission to visit Khweis, the attaché made a judgment call not to issue Khweis *Miranda* warnings before beginning his interrogation.[137]

Khweis was subjected to ten additional intelligence interviews over the course of a month.[138] The attaché led each interview and was accompanied by a State Department employee, a Kurdish official, and on some occasions, Department of Defense officials.[139] Khweis provided his interrogators with information on "his efforts to join ISIS," the identifications of "other ISIS members he encountered while in the organization," and his own views of "ISIS operations in the region."[140]

Meanwhile, however, the FBI attaché was sending colleagues emails suggesting he was using the interviews at least in part to prepare Khweis to give an admissible confession in a later stage of the interrogation. In his emails, the attaché described Khweis's conduct during the unwarned sessions as "a textbook case of getting a guy from a complete lie to a confession . . . he will not let me down."[141] He expressed delight at how much Khweis was talking, telling colleagues that "[h]e is going to be very easy to deal with from a clean team perspective."[142] And the attaché was not shy about giving himself credit for Khweis's forthright behavior; he explained that he had "really tee'd [Khweis] up for these guys i think. . . . that is the intel guys job. obliterate all his lies and get him comfortable with the truth."[143] The attaché had admonished Khweis that if U.S. authorities were to decide to extradite him—a fate Khweis preferred to remaining in the Iraqi justice system—his answers needed to be "consistently truthful."[144]

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137. *See id.* at *1-2. The attaché "acknowledged that this approach might jeopardize any future United States criminal prosecution, but [he] believed that [Khweis] could provide valuable intelligence about ISIS facilitation networks, organizational structure, and fighters." *Id.* at *2.

138. *Id.* at *2.

139. *See id.*

140. *Id.* at *3.

141. *Id.* (alteration in original) (quoting Government Exhibit 58, *Khweis*, 2017 WL 2385355 (No. 1:16-cr-143)).

142. *Id.* (quoting Government Exhibit 41, *Khweis*, 2017 WL 2385355 (No. 1:16-cr-143)).

143. *Id.* at *4 (second alteration in original) (quoting Government Exhibit 59, *Khweis*, 2017 WL 2385355 (No. 1:16-cr-143)); *see also id.* at *3 ("[T]he extensive time we took getting him comfortable with telling the truth will make it far easier for subsequent interviews here and in the US." (quoting Defense Exhibit A, *Khweis*, 2017 WL 2385355 (No. 1:16-cr-143))).

144. *See id.* at *3. In his motion to suppress, Khweis argued that he had repeatedly communicated to the attaché that he sought to be returned to the United States, and that he was told the government had not yet decided whether to file charges against him. *See* Defendant's Motion to Suppress at 8-10, *Khweis*, 2017 WL 2385355 (No. 1:16-cr-

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The same day the attaché sent these messages, two new FBI agents met with Khweis, marking the beginning of the law enforcement phase of his interrogation.[145] In addition to the fact that the agents advised Khweis of his *Miranda* rights before questioning him, several attributes of this phase were immediately different from what Khweis had experienced before: The interview was conducted in a different room in the Kurdish detention center; none of the Kurdish officials present during the attaché's interviews were there for the second stage; and agents provided a verbal cue that the two phases were separate, telling Khweis, "[Y]ou do not need to speak with us today just because you have spoken with others in the past."[146] (Khweis later asserted, however, that he was never told that his prior statements were inadmissible.)[147] Khweis waived his rights, and did so two additional times as he was reminded of them over the course of his lengthy interrogation.[148]

The Fourth Circuit, like the majority of its sister circuits, had adopted the test for two-step interrogations put forth in Justice Kennedy's concurring opinion in *Seibert*.[149] Ruling on Khweis's suppression motion, Judge O'Grady of the U.S. District Court for the Eastern District of Virginia concluded that the attaché had not set out to deliberately circumvent *Miranda* when he decided to forgo reading Khweis his rights.[150]

The court took a narrow view of what conduct amounts to "deliberate[]" avoidance of *Miranda*. It asked only whether the decision to *begin* an unwarned interrogation was consistent with any motivation other than eliciting a confession.[151] The court reasoned that the facts of Khweis's capture—a "United States citizen . . . arrested on suspicion of terrorism, in an active war zone, near ISIS-controlled territory"—"present[ed] unique intelligence opportunities," and accordingly, the decision to forgo *Miranda* warnings was sound.[152] The court concluded that the attaché's "subjective intent" did not include a desire to obtain a confession.[153] Rejecting Khweis's argument that the attaché's

143). That decision, he was told, depended on his story being "consistently truthful." *Id.* at 10 (emphasis omitted) (quoting FBI interview report).

145. *See Khweis*, 2017 WL 2385355, at *4.

146. *Id.* (quoting Government Exhibit 53, *Khweis*, 2017 WL 2385355 (No. 1:16-cr-143)).

147. *See* Defendant's Motion to Suppress, *supra* note 144, at 7.

148. *Khweis*, 2017 WL 2385355, at *4.

149. *See id.* at *13 & n.11 (citing United States v. Mashburn, 406 F.3d 303, 309 (4th Cir. 2005)).

150. *See id.* at *14 (characterizing the attaché's decisionmaking as "balanc[ing] future criminal prosecution against the need for intelligence" and "determin[ing] that the latter was a higher priority").

151. *See id.*

152. *See id.*

153. *See id.* at *14-15.

comments were a probative indicator of a scheme to undermine *Miranda*,[154] the court concluded that he had not engaged in a deliberate effort to circumvent *Miranda*, and found the standard admonitions sufficient to render Khweis's waiver valid. Khweis's suppression motion was denied,[155] and he was convicted in a jury trial.[156]

B. *United States v. Abu Khatallah*

Ahmed Abu Khatallah, a Libyan citizen, was charged with murder and other crimes related to the September 2012 attacks on the U.S. diplomatic compound in Benghazi, Libya.[157] In an operation that took nearly a year to plan, Abu Khatallah was violently ambushed at his home in Benghazi in June 2014, and brought—bound and gagged—to a vessel in the Mediterranean.[158] He was ultimately taken to the U.S.S. New York, a U.S. naval vessel, where he was housed in a makeshift "detention facility" made of four pods.[159] Upon arrival, Abu Khatallah's captors read him Article 3 of the Geneva Conventions; the provisions were posted on his wall for the duration of the trip.[160] He was then subjected to unwarned intelligence interrogations, but the exact details of those sessions are unknown to the public.[161]

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154. *See id.* at *14 (reasoning that the attaché's correspondences "do not disturb" the conclusion that the interrogation was not intended to circumvent *Miranda*).

155. *Id.* at *15-16.

156. *See* Verdict Form, *Khweis*, 2017 WL 2385355 (No. 1:16-cr-143).

157. *See* United States v. Abu Khatallah, 275 F. Supp. 3d 32, 38-39 (D.D.C. 2017).

158. *See id.* at 40, 42-43.

159. *See id.* at 43. A note about the conditions in Abu Khatallah's pod: "An arrow on the wall of the pod pointed west towards Mecca and for the initial phase of his transit he was provided a blanket, a Quran, and a prayer rug." *Id.*

160. *Id.* at 44. Article 3 governs nations' conduct in armed conflicts "not of an international character" and provides, in relevant part:

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . . .
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 3320.

161. The opinion ruling on Abu Khatallah's suppression motion contains a subsection entitled "Intelligence Interrogations," but it simply refers the reader to a "Classified

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At some point, the intelligence phase of his interrogation ceased, and an FBI team arrived on the ship. Those agents had "had no contact with the intelligence team before, during, or after Abu Khatallah's capture and interrogation—and [have] had no contact to this day."[162]

Two days passed between the cessation of the intelligence interviews and the FBI team's first questioning of Abu Khatallah.[163] During this pause, a number of circumstances changed. Abu Khatallah was moved to "new living quarters," and he was questioned in a "different interview room" in the pods, which "had identical dimensions to the intelligence-phase rooms, but were arranged differently."[164] The FBI added decor to both his living quarters and the interview room, and gave Abu Khatallah a notepad and pencil.[165] His routine was also changed: "He was able to shower once daily, and he started receiving three meals per day."[166] At no point was he told why these changes were made.[167]

After a health and welfare check, the FBI agents informed Abu Khatallah that he was under arrest, and that he was aboard a U.S. naval vessel.[168] He was then advised of his *Miranda* rights.[169] In addition to the traditional admonitions, the FBI's warnings included language "aimed at distinguishing [the FBI] interview" from the intelligence team sessions:

> We know that you met with other members of the U.S. Government in the past. We do not know whether you told them or they told you anything. Anything you stated in the past to other officials from the U.S. Government was not the subject of the criminal procedures levied against you in the United States, and probably will not be used against you in U.S. courts. We are now starting anew. You are not compelled to speak with us today just because you have already spoken with others in the past. If you decide to talk to us today, it is essential for you to know that anything you say could be used against you in U.S. courts.[170]

Insert." *See Abu Khatallah*, 275 F. Supp. 3d at 45; *see also id.* at 45 n.4 ("A supplement to this Memorandum Opinion with inserts containing classified information has been filed with [the] Department of Justice . . . for possible declassification or for filing in redacted form on the public docket.").

162. *Id.*

163. *See id.* at 64.

164. *Id.* at 45.

165. *See id.*

166. *Id.*

167. *Id.*

168. *Id.* at 46.

169. *Id.*

170. *Id.* (quoting Government Exhibit 220B, *Abu Khatallah*, 275 F. Supp. 3d 32 (No. 14-cr-00141 (CRC))).

Abu Khatallah signed a waiver of his rights.[171] Before the agents began questioning him in earnest, the lead interrogator apparently explained, "Mr. Khatallah, you realize this is voluntary. This is a voluntary statement, and . . . you can stop talking to us at any time."[172] Abu Khatallah agreed.[173]

The FBI team interrogated Abu Khatallah over the course of six days. *Miranda* warnings were repeated each day, and a reminder that the interviews were voluntary was repeated after each break.[174] The interviews primarily touched on (1) Abu Khatallah's background and biography; (2) any knowledge he had of participants in the Benghazi attacks; and (3) Abu Khatallah's own involvement in the attacks.[175] On the morning of the last day, agents informed Abu Khatallah that he had been indicted on a single count of "conspiracy to provide material support to a terrorist group, resulting in death."[176]

Abu Khatallah sought to suppress the statements he gave to the FBI team on the ground that the planned "two-step interrogation process undermined the voluntariness of his *Miranda* waiver."[177] Ruling on the motion, Judge Cooper of the U.S. District Court for the District of Columbia acknowledged the circuit split over the proper implementation of *Seibert*.[178] The court noted that "[t]he D.C. Circuit has 'not pick[ed] sides in [the] debate,'"[179] and proceeded to analyze the interrogation of Abu Khatallah under both *Seibert* tests.

First applying Justice Kennedy's test, the court considered both subjective and objective factors in determining whether Abu Khatallah's interrogators opted not to Mirandize him initially in an effort to circumvent *Miranda*'s protections.[180] It distinguished the subjective intent of the intelligence officers aboard the U.S.S. New York from that of the interrogating officers in *Seibert*, and concluded that "the intelligence team was acting not with a subjective intent to undermine *Miranda* or obtain incriminating evidence for use at trial, but rather to acquire information essential to protect national security interests."[181]

171. *See id.* at 47.

172. *Id.* (alteration in original) (quoting Transcript of Motions Hearing (Morning Session, May 12, 2017) at 603, *Abu Khatallah*, 275 F. Supp. 3d 32 (No. 14-cr-00141 (CRC))).

173. *Id.*

174. *Id.* at 48.

175. *See id.*

176. *Id.*

177. *See id.* at 38. He also raised separate arguments that his capture and interrogation violated his right to prompt presentment before a judge, that he had properly invoked his right to counsel, and that his statements were actually coerced. *See id.*

178. *See id.* at 62.

179. *Id.* (second and third alterations in original) (quoting United States v. Straker, 800 F.3d 570, 617 (D.C. Cir. 2015) (per curiam)).

180. *See id.* at 63-64 (citing United States v. Capers, 627 F.3d 470, 478 (2d Cir. 2010)).

181. *Id.* at 63.

Marshaling a variety of evidence about the operation, the court concluded that the unwarned phase of Abu Khatallah's interrogation was primarily oriented toward intelligence gathering. The court found that "[t]he government viewed Abu Khatallah as an international terrorist";[182] indeed, the court credited the government's assertion that the "purpose of the un-Mirandized interviews, in this case, was to explore the defendant's travel, background, his association with terrorists, and his knowledge about any imminent terrorist plots against the United States."[183] Moreover, contrary to what happened in *Khweis*, the interrogating officers were carrying out a plan that had been hatched months earlier,[184] and were "following orders from above—not their subjective whims."[185] Finally, the output of the unwarned intelligence phase—daily reports distributed to intelligence agencies—was consistent with the goal of pumping Abu Khatallah for valuable intelligence, not obtaining a backdoor confession.[186]

A number of objective factors bolstered the court's conclusion that Abu Khatallah's interrogators were not trying to circumvent *Miranda*. First, there was no overlap of personnel between the capture team and the FBI interrogation team.[187] Second, there was a "strict partition" between the two interrogation teams; the intelligence team departed the ship before the law enforcement team began its questioning.[188] Third, the content of the questioning in each phase was different: The court noted that "while there was some overlapping content between the interviews, the primary focus of the intelligence interviews . . . was imminent and future terrorist threats, rather than the [Benghazi] attack."[189] Fourth, the "two-day break" between the two phases of Abu Khatallah's interrogation "clearly communicated" that the two

182. *Id.*

183. *Id.* (quoting Government's Opposition to Defendant's Motion to Suppress Statements at 33-34, *Abu Khatallah*, 275 F. Supp. 3d 32 (No. 14-cr-00141 (CRC))).

184. *Compare id.* at 40 (explaining that there was "nearly a year of planning across multiple U.S. government agencies" before Abu Khatallah was arrested), *with supra* notes 135-37 and accompanying text (describing how there was no evidence of advanced planning on the part of the U.S. government before Mohamed Khweis was apprehended by Kurdish forces).

185. *Abu Khatallah*, 275 F. Supp. 3d at 63.

186. *See id.*

187. *Id.* at 64.

188. *Id.*

189. *Id.*

were distinct interviews.[190] These facts combined to convince the court that the claimed intelligence-gathering aims of Abu Khatallah's interrogators were genuine.[191]

Many of the same facts that supported the court's conclusion about the interrogators' intent to collect intelligence also led the court to conclude that the *Miranda* warnings Abu Khatallah received were likely to have been effective, as required by the plurality in *Seibert*.[192] The distinct content of the two sessions was a critical factor for the court; it reiterated that although the "questioning in the intelligence interviews was comprehensive and detailed," interrogators nonetheless "left much 'unsaid'" for the FBI interviewers to cover.[193] The firewall between the intelligence and FBI teams further supported the distinction between the content covered in each phase.[194] And the fact that the two phases were separated by two full days, the court reasoned, also made the *Miranda* warnings more effective.[195] The court also discussed the break in circumstances between the two phases more broadly, noting with approval the changes to Abu Khatallah's shower and meal privileges, the new wallpaper and rearranged furniture in the pods, and the injection of new faces into the interrogation process.[196] Finally, and perhaps most critically, each time conversations began, agents provided verbal confirmation that the law enforcement interviewers were different from the original interviewers, and the *Miranda* warnings were frequently repeated throughout the process.[197]

Focusing on the specific details of each phase, the court rejected Abu Khatallah's contention that the FBI phase of his interrogation was merely a "continuum of the first"—given that most of the surroundings were the same, and Abu Khatallah still "had no sense of time or location."[198] The court appeared to reject the notion that the entire second phase of the interrogation

190. *See id.* Indeed, this two-day break was much longer than the pause that Seibert was allowed. *See id.* at 65 (comparing the "significant break in time" between the stages of Abu Khatallah's interrogation with the insufficient "'[p]ause of only fifteen to twenty minutes' for a cigarette break" in *Seibert* (alteration in original) (quoting Missouri v. Seibert, 542 U.S. 600, 616 (2004) (plurality opinion))).

191. *See id.* at 64 (concluding that when combined with the subjective evidence of the interrogators' intentions, "[t]hese objective factors negate any deliberateness on the part of the interrogators to circumvent *Miranda*").

192. *See id.* at 64-65; *see also Seibert*, 542 U.S. at 611-12 (plurality opinion).

193. *Abu Khatallah*, 275 F. Supp. 3d at 65 (quoting *Seibert*, 542 U.S. at 616 (plurality opinion)).

194. *See id.*

195. *See id.*

196. *See id.*

197. *See id.* at 65-68.

198. *See id.* at 65-66.

was "meticulously planned to set up a constitutional 'Potemkin village'—creating the appearance of protecting the defendant's rights but not the reality."[199] Ultimately, taking into account the differences between the two phases and the repeated admonitions about his rights, the court concluded that a reasonable person in Abu Khatallah's situation "would have understood that he retained a choice about continuing to talk."[200]

A jury convicted Abu Khatallah of providing material support to terrorists, conspiring to do the same, and using or carrying a firearm during a crime of violence.[201] The jury returned verdicts of not guilty as to murder, attempted murder, and homicide in the course of an attack on a federal facility.[202]

IV. Tailoring *Seibert* to Two-Step Counterterrorism Interrogations

The *Khweis* and *Abu Khatallah* rulings were the first applications of *Seibert* to two-step interrogations in the counterterrorism context. Courts deciding suppression motions in similar cases are therefore likely to turn to them for guidance.[203] What should judges, particularly those sitting in circuits that have adopted Justice Kennedy's test, take away from these early rulings?

At a certain level of abstraction, these decisions stand for the proposition that any warned statement obtained through a two-step counterterrorism interrogation begun for intelligence purposes is admissible. Both the *Khweis* and the *Abu Khatallah* rulings credit the government's stated reason for conducting the unwarned interrogation: the "unique intelligence opportunities" presented.[204] The broadest possible lesson that might be taken from these cases is that if intelligence collection motivates—at least in part—the initial decision not to issue *Miranda* warnings to a suspected terrorist, *Seibert* is satisfied.

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199. *See* Spencer S. Hsu, *Benghazi Terror Suspect Is in U.S. Court. So Is an FBI Agent Who Captured Him.*, WASH. POST (May 10, 2017) (quoting Abu Khattalah's attorneys), https://perma.cc/R6V3-LVVK.

200. *Abu Khatallah*, 275 F. Supp. 3d at 66.

201. *See* Verdict Form, *Abu Khatallah*, 275 F. Supp. 3d 32 (No. 14-cr-00141 (CRC)), 2017 WL 5953493.

202. *See id.*; *see also* Adam Goldman & Charlie Savage, *Libyan Convicted of Terrorism in Benghazi Attacks but Acquitted of Murder*, N.Y. TIMES (Nov. 28, 2017), https://perma.cc/Y6NM-K6NW.

203. The *Abu Khatallah* ruling even cited *Khweis*, decided a few weeks earlier. *See Abu Khatallah*, 275 F. Supp. 3d at 63 (describing *Khweis* as "upholding two-step interrogation procedure in terrorism case where 'decision to not Mirandize Defendant before the first interview was driven by intelligence gathering needs'" (quoting United States v. Khweis, No. 1:16-cr-143, 2017 WL 2385355, at *14 (E.D. Va. June 1, 2017))).

204. *See Khweis*, 2017 WL 2385355, at *14; *accord Abu Khatallah*, 275 F. Supp. 3d at 63 (concluding that the unwarned phase was conducted to "acquire information essential to protect national security interests").

But that takeaway is both misleading and dangerous.[205] The U.S. intelligence apparatus is multifaceted, not monolithic. Treating "intelligence" as a magic word that justifies unwarned interrogation in this context both ignores the ways law enforcement interests intersect with the intelligence process and threatens to permit the exact end run around *Miranda* that the *Seibert* Court sought to outlaw. The two 2017 rulings themselves hint at a few blind spots courts may have in evaluating interrogators' intent. This Part seeks to equip courts with the key background they need to conduct a more nuanced, realistic analysis of two-step interrogations. Part IV.A argues that Justice Kennedy's standard, while not the option most protective of defendants' rights, is a productive starting point at which to begin constraining abuses of two-step interrogations in the counterterrorism context. By examining some dynamics at play in these interrogations, Part IV.B outlines how this framework can be fortified to weed out the most exploitative uses of the two-step model. Part IV.C completes the analysis with a brief discussion of the curative steps courts might look for if they find that interrogators have proceeded with impermissible intent.

205. To be sure, a more limited reading might be one that constrains the admissibility of warned statements obtained as a result of two-step counterterrorism interrogations to the facts of *Khweis* and *Abu Khatallah*. The problem with this reading is that the facts of *Khweis* in particular support a capacious conception of the intent investigators can permissibly harbor when they decide to pursue unwarned intelligence questioning of a suspected terrorist.

In *Abu Khatallah*, the government had an intelligence goal in mind for the interrogation months before Abu Khatallah was ever captured, *see infra* text accompanying notes 254-59, and subsequently took steps to create meaningful separation between the unwarned and warned interrogation phases, *see supra* Part III.B. Although we know little about the unwarned interrogations in either case, it is fair to say the FBI attaché's interrogation in *Khweis* shared none of these attributes. *See supra* Part III.A. Even if it were possible to read, say, a geographic limitation into the permissibility of the attaché's actions, *Khweis* would still stand for the proposition that a U.S. citizen's confession, obtained after prolonged, unwarned questioning during which the interrogating officer expresses an intent to prepare the individual to confess to a clean team, might be admissible as long as it is obtained near a war zone. *See Khweis*, 2017 WL 2385355, at *14; *see also infra* Part IV.B (arguing that the *Khweis* court's application of Justice Kennedy's approach to two-step interrogations fell short of a thoroughgoing examination of the interrogating officer's intent). This reading, based on the facts of *Khweis*, would scarcely be narrower than one allowing for the admission of warned statements following unwarned questioning so long as the unwarned questioning was undertaken for intelligence-gathering purposes.

A. Working Within Justice Kennedy's Approach

Critics have attacked the very existence of the two-step interrogation.[206] From a national security perspective, however, two-step interrogations ostensibly blend two desirable objectives: obtaining valuable intelligence about terrorist plans and facilitating the prosecution of suspected terrorists in Article III courts. To borrow Justice Kennedy's words, making it easier to admit the fruits of two-step counterterrorism interrogations arguably serves more "legitimate countervailing interest[s]"[207] than does encouraging question-first stationhouse interrogations.

Although trying suspected terrorists in Article III courts may now seem like the obvious course, it was long viewed as a radical alternative to military justice. When Attorney General Eric Holder testified before Congress in 2010 about the need for an expanded public safety exception for terrorism-related questioning, several lawmakers urged Holder to reverse the Obama Administration's decision to bring suspected terrorists into the civilian justice system.[208] Military detentions and commissions are not just creatures of the past; as of this writing, forty detainees remain at Guantanamo Bay, only nine of whom have been formally charged in military proceedings.[209] Foreclosing the admissibility of warned confessions, or, indeed, requiring *Miranda* warnings at the outset of interrogations, has the potential to shift suspected terrorists back into the military system, where they are afforded fewer procedural protections than in Article III courts.[210] As Senator Arlen Specter

206. *See, e.g.*, Crain, *supra* note 14, at 458 (arguing that admitting warned confessions obtained as a result of two-step counterterrorism interrogations "contravenes the spirit, if not the letter, of the Fifth Amendment").

207. Missouri v. Seibert, 542 U.S. 600, 621 (2004) (Kennedy, J., concurring in the judgment).

208. *See Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 3 (2010) [hereinafter *DOJ Oversight Hearing*] (statement of Sen. Sessions) (decrying the Obama Administration's "stunning conclusion" that it would give captured enemy combatants the presumption of a civilian trial); *id.* at 25 (statement of Sen. Graham) ("We are not fighting crime. We are not fighting the Mafia. We are fighting an international, sometimes unorganized, organization called al Qaeda who is bent on our destruction, and some of these people need to be held under our values, under the law of war, with due process, but we should not view what they did as a common crime but as a military threat.").

209. *See The Guantánamo Docket*, N.Y. TIMES, https://perma.cc/5YYX-X3WD (archived Oct. 29, 2018).

210. For a detailed comparison of the procedural safeguards provided to defendants in criminal trials with those afforded under the Military Commissions Act of 2009, see JENNIFER K. ELSEA, CONG. RESEARCH SERV., R40932, COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT 13-27 (2014). *See also* Military Commissions Act of 2009, Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574-614 (codified as amended at 10 U.S.C. §§ 802, 948a-950t (2017)). Notably absent from military tribunals are the right to a pretrial hearing; the right to a speedy and public

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put it, "if you had to make a choice between convicting and getting information which might preclude a subsequent terrorist attack, the balance would all be on getting the information."[211]

Just as defendants likely prefer the procedural protections of Article III courts to military detentions, counterterrorism officers undoubtedly prefer obtaining information from suspects to missing out on intelligence opportunities just because suspects have invoked their *Miranda* rights. Gathering intelligence about the plans and dynamics of terrorist groups is difficult. As Thomas Fingar, former Deputy Director of National Intelligence for Analysis, has explained, "[o]n a relatively small number of issues . . . such as terrorist plans, illicit transfers of biological agents, or black market arms sales, most of what we need to know can be obtained only by using clandestine collection."[212] For intelligence officers, capturing a suspected terrorist is a proverbial information jackpot; it allows them to directly question someone with information the intelligence community needs. And despite evidence that a majority of criminal defendants waive their rights,[213] the risk that a suspected terrorist will respond to *Miranda* warnings by invoking his right to remain silent, and thus stymie valuable intelligence inquiries, remains salient.[214]

Critics would be justified in arguing that two-step counterterrorism interrogations currently allow the government to have its cake and eat it too. But suggesting that suspected terrorists should, upon capture, immediately be advised of *Miranda*'s protections—even before they are interrogated for intelligence purposes—requires reckoning with difficult national security calculations. For instance, if the government must choose either to prosecute a suspected terrorist or to conduct an unwarned interrogation, when must that decision be made? Who counts as a suspected terrorist? Do suspects have any opportunity to contest the decision? The specific answers to these questions matter. Posing them to courts deciding on suppression motions will be critical to amassing political will for increased transparency in counterterrorism

trial; and (in noncapital cases) the requirement of a unanimous jury verdict. *See* ELSEA, *supra*, at 17, 20, 26.

211. *DOJ Oversight Hearing*, *supra* note 208, at 45 (statement of Sen. Specter).

212. THOMAS FINGAR, REDUCING UNCERTAINTY: INTELLIGENCE ANALYSIS AND NATIONAL SECURITY 7, 22 (2011). Fingar contrasts the need for "clandestine" collection with the needs in areas in which relying on publicly available information is sufficient to meet intelligence community needs. *See id.* at 22-23.

213. *See, e.g.*, Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 653-54 (1996) (describing an empirical study in which 78% of subjects waived their *Miranda* rights).

214. *See supra* text accompanying notes 95-96 (describing the outcome of the initial, unwarned interrogation of a U.S. citizen detained in Iraq on suspicion of fighting with ISIS).

investigations. But in the meantime, *Seibert* provides a rough framework for considering the legality of two-step interrogations, such that courts are unlikely to go out of their way to outlaw intelligence-oriented interrogation strategies that do not violate *Seibert*'s explicit strictures.

It remains to examine whether Justice Kennedy's intent-based framework is the inevitable solution. As between the two possible approaches for evaluating the constitutionality of two-step interrogations, Justice Kennedy's standard is more lenient. Whereas the plurality approach requires a detailed examination of potentially coercive circumstances any time *Miranda* warnings follow a period of unwarned questioning,[215] Justice Kennedy's approach renders warned confessions inadmissible only if the first-stage interrogators deliberately sought to circumvent *Miranda*'s protections *and* the circumstances of the interrogation do not correct for the coercion created by the officers' bad intent.[216]

It might seem, then, that the most obvious way to ensure interrogators will not abuse their ability to conduct unwarned interrogations for intelligence purposes is to apply the plurality approach and scrutinize every two-step interrogation, regardless of the interrogators' subjective intent. This remedy would indeed go the furthest toward addressing concerns that Justice Kennedy's approach does not adequately vindicate defendants' Fifth Amendment rights, and that his approach would pose similar risks were it to be adopted in the counterterrorism context.[217] These concerns are well founded: Encouraging courts to closely scrutinize the circumstances of *every* unwarned interrogation that precedes a warned confession—not just those undertaken with ulterior motives—would be a step toward better safeguarding defendants' rights.

To be sure, the plurality approach is a far cry from requiring *Miranda* warnings at the outset of every interrogation; it still permits government officials to treat suspects both as intelligence assets and criminal defendants, provided they use the proper means to separate unwarned from warned questioning. The plurality approach thus puts more pressure on interrogators to set up procedures and take appropriate precautions to ensure that officers do not inadvertently coerce a warned confession.

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215. *See* Missouri v. Seibert, 542 U.S. 600, 611-12 (2004) (plurality opinion).

216. *See id.* at 621-22 (Kennedy, J., concurring in the judgment).

217. For an exposition of this sort of concern, see, for example, Crain, *supra* note 14, at 467 (contending that Justice Kennedy's test allows officers to "more easily elicit damning statements from defendants before those defendants effectively understand their rights"); and *id.* at 469 ("Yet, under Justice Kennedy's test, federal agents can reduce the effectiveness of a defendant's *Miranda* warnings as long as they subjectively did not intend to.").

Still, Justice Kennedy's approach must be taken seriously as a method for evaluating interrogations in the counterterrorism context. The most pressing reason to take it seriously is that the majority of courts already do. It is telling that since *Seibert* was decided, Justice Kennedy's standard has emerged as the dominant approach to evaluating two-step interrogations in the criminal justice context.[218] Indeed, even before *Seibert* was decided, at least one court had read *Elstad* to mean that the omission of *Miranda* warnings did not require the exclusion of subsequent warned confessions, as long as the procedures employed did not amount to "end run[s]" around *Miranda*'s protections.[219]

The additional flexibility Justice Kennedy's approach offers, moreover, may be attractive to judges and policymakers concerned about hampering the high-pressure national security decisions made by officers on the ground.[220] And as long as that view holds sway, courts can and should learn how to work within this framework to police potential abuses.

B. Toward a More Discerning Analysis of Interrogators' Subjective Intent

The first two decisions applying *Seibert* to counterterrorism interrogations provide lessons about what courts evaluating two-step interrogations in that context might be missing. The remainder of this Part seeks to fill those information gaps and equip courts to engage in more robust analyses of interrogators' subjective intent in undertaking unwarned questioning. First, it suggests courts should look for evidence of a deliberate intent to circumvent *Miranda* not only at the point of the initial decision not to notify a suspect of his rights, but also throughout the unwarned phase of an interrogation. Second, courts should be more skeptical of asserted pure intelligence-gathering motivations where the first-stage interrogators are closely tied to law enforcement. And finally, courts should be wary of assertions that unwarned questioning was undertaken for intelligence purposes in cases where there was no preexisting information indicating the suspect was of intelligence value.

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218. *See supra* text accompanying notes 76-77.

219. *See, e.g.*, United States v. Gale, 952 F.2d 1412, 1418 (D.C. Cir. 1992) (holding a warned confession admissible because the initial, unwarned questioning after the defendant's arrest—amounting to "one improper question"—was not undertaken as a "deliberate 'end run' around *Miranda*").

220. The Supreme Court, for example, has cited concerns about hampering law enforcement decisionmaking in its Fourth Amendment jurisprudence. *See, e.g.*, Kentucky v. King, 563 U.S. 452, 466 (2011) ("[T]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." (quoting Graham v. Connor, 490 U.S. 386, 396-97 (1989))).

1. Looking for deliberate circumvention throughout the unwarned interrogation

The first refinement relates to the risk that impermissible intent might arise after the unwarned interrogation has begun. Courts should consider not only whether the interrogating officers' initial decision not to warn a suspect was undertaken to circumvent *Miranda*, but whether the officers *at any point* sought to maintain the unwarned nature of the interrogation to set up a later confession to the law enforcement team. Doing so would limit interrogators' ability to prolong an unwarned interrogation—begun with the intent to collect intelligence—based on ulterior motives.

The *Khweis* case provides an object lesson in the importance of considering interrogators' motivations throughout the unwarned phase.[221] There, the court determined that the FBI attaché's decision to interrogate Khweis without *Miranda* warnings in an effort to collect intelligence was "highly probative of whether *Miranda* was intentionally undermined."[222] In reality, that "split-second decision" was all but dispositive.[223] In denying Khweis's motion to suppress, the court minimized the significance of evidence indicating that at some point, the first phase of the interrogation was indeed aimed at preparing Khweis for a confession to the "clean team."[224]

Both reasons the court provided for discrediting the attaché's emails wither upon scrutiny. First, the court reasoned that the attaché did not send the messages to the second-stage interrogators, and he never shared the results of his interrogations with them, suggesting a lack of a "coordinated effort" to avoid *Miranda*.[225] This may be true, but it is ultimately orthogonal to the core inquiry of Justice Kennedy's approach. Communication between each interrogation team can indicate a broader conspiracy to circumvent *Miranda*; it may also influence a number of the plurality's factors for determining whether midstream *Miranda* warnings are effective. But *Seibert* does not require the presence of more than one interrogator to support a finding that there was subjective intent to circumvent *Miranda*.[226] To be sure, the same officer

221. *See supra* notes 141-44 and accompanying text.

222. United States v. Khweis, No. 1:16-cr-143, 2017 WL 2385355, at *14 (E.D. Va. June 1, 2017).

223. *See id.* at *14-15.

224. *See id.* at *14 (concluding that the attaché's emails bragging about setting Khweis up for a confession "do not disturb" the conclusion that he lacked intent to circumvent *Miranda*).

225. *See id.*

226. Indeed, it turns on whether "*an* interrogator uses this deliberate, two-step strategy." *See* Missouri v. Seibert, 542 U.S. 600, 621 (Kennedy, J., concurring in the judgment) (emphasis added).

conducted both the unwarned and warned phases of Seibert's interrogation;[227] in that sense, the single officer could be said to have engaged in a "coordinated effort" to obtain her confession. But nothing in *Seibert* suggests that the motivations of the officer who seeks an unwarned confession to make it easier for *another* officer to elicit a subsequent confession are less corrupt than the motivations of an officer who does so to make it easier to get that second confession himself.

The *Khweis* court's second justification—the attaché's testimony that the messages were "his assessments of Defendant's present truthfulness rather than statements of intent about the purpose of the un-Mirandized interviews"[228]—also falls flat. Perhaps the attaché *was* assessing Khweis's veracity when he called him "a textbook case of getting a guy from a complete lie to a confession."[229] But his assertion that "the intel guys job" is to "obliterate all his lies and get him comfortable with the truth"[230] arguably speaks directly to the attaché's ideas about the purpose of his interrogation. Statements like this one undermine the government's assertion that it conducted Khweis's unwarned interrogation purely for intelligence purposes.

Although it is certainly possible that this particular attaché was a bad apple, the court's ruling implicitly condoning his conduct remains the first to speak on the issue of *Seibert*'s application to counterterrorism interrogations. Faced with the real chance that interrogators' motivations will evolve over the course of an interrogation, courts should not take lightly evidence revealing an interrogator's desire to ensure a future admissible confession, even if that evidence arises after the interrogation has begun. And such an inquiry need not burden interrogators with the responsibility to end an unwarned interrogation at the very moment they cease to believe in its intelligence value. Courts could simply ask whether there is any affirmative evidence of bad faith arising later on in the interview, such as the emails in *Khweis*.[231] Obvious though it may seem, this extra scrutiny on the part of courts is a critical way to give teeth to Justice Kennedy's approach in *Seibert*.

2. Setting standards for intelligence personnel

The second modification to the analysis of intelligence-gathering motivation relates to the identity of the officers conducting the interrogation: Courts

227. *See id.* at 604-05 (plurality opinion); *supra* notes 43-50 and accompanying text.

228. *Khweis*, 2017 WL 2385355, at *15 (emphasis omitted).

229. *Id.* at *3 (quoting Government Exhibit 58, *supra* note 141).

230. *Id.* at *4 (quoting Government Exhibit 59, *supra* note 143).

231. A more aggressive version of this inquiry would examine the credibility of the intelligence motivation at the outset of each interrogation session.

should be more skeptical of an asserted intelligence-gathering motive where the personnel conducting the unwarned interrogation are closely linked to law enforcement.

For two reasons, distance from law enforcement can be probative of interrogators' subjective intent to circumvent *Miranda*. The first is the potential for institutional overlap between the intelligence interrogators and those who will later question the individual to obtain statements for use in a criminal prosecution. FBI agents conducting intelligence interrogations are more likely to have some personal or psychological affinity for the personnel conducting the second, clean team phase—typically also FBI agents.[232] Law enforcement personnel thus are arguably more at risk than others of subconsciously (or even overtly) trying to improve the likelihood that their fellow officers will be able to get an admissible confession. By contrast, the motivation to help downstream law enforcement officers is likely to be a weaker factor for intelligence officers, who typically come from external organizations.

The unique role of intelligence officers also suggests a lower risk that they will deliberately seek to undermine *Miranda*. Some commentators have gone so far as to argue that they embody almost the Platonic ideal of neutrality.[233] But more important than any general impartiality intelligence officers may possess is their overarching goal: to "reduce uncertainty about the aspirations, intentions, capabilities, and actions of adversaries, political rivals, and,

232. For a thorough discussion of the way culture shapes police conduct (and misconduct), see Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 493-514 (2004). Armacost delineates two types of affinity among law enforcement officers: occupational culture and organizational culture. *See id.* at 494. Occupational culture "is created by the kind of work that law enforcement officers do and is held in common with other officers no matter what police department they are in." *Id.* This job-based connection is what may prompt law enforcement officers, regardless of the organization they work for, to consciously or subconsciously steer an unwarned "intelligence" interrogation toward an eventual warned confession. Organizational culture, as Armacost uses the term, is "agency-specific." *See id.* at 494 & n.242. This institution-based loyalty increases the risk that, for example, FBI agents conducting such "intelligence" interviews will be motivated to ease the job of their fellow FBI agents who will later seek to obtain evidence for prosecution during a warned interrogation. For additional discussion of the culture of solidarity among law enforcement officers and its potential sinister consequences, see JOHN P. CRANK, UNDERSTANDING POLICE CULTURE 237-53 (2d ed. 2004).

233. *See, e.g.*, FINGAR, *supra* note 212, at 25 ("Intelligence is not supposed to—and in my experience very seldom does—advocate specific courses of action. Its primary purpose is to provide information and insight that will enhance understanding of the core issue, how it relates to other matters, and possible consequences of alternative courses of action."). Fingar is a former intelligence supervisor, *see id.* at 7, and he speaks largely in terms of the process of intelligence analysis, *see id.* at 11-15. It seems unlikely that interrogators—collectors of intelligence, rather than analysts—are trained to be as constitutively neutral.

sometimes, partners and allies."[234] Intelligence officers are not out to investigate or prosecute crimes—they have no authority to do so. By contrast, FBI intelligence interrogators bring with them the baggage of the Bureau's law enforcement role,[235] and law enforcement's explicit goals of preventing and prosecuting criminal conduct.[236] The result of these two dynamics is the potential for bias and a higher risk of a motivation (at least in part) to set a suspected terrorist up to confess after he is read his rights.

The *Khweis* and *Abu Khatallah* rulings did not single out the issue of personnel dynamics, but the progressions of the respective interrogations in the two cases highlight the difference that personnel can make. Abu Khatallah was interrogated by the High-Value Detainee Interrogation Group (HIG),[237] a highly trained interagency task force. The group has a unique history and purpose that make it particularly well suited for conducting intelligence interrogations. It was established at the recommendation of a 2009 investigation into the government's interrogation and rendition activities, and was designed to "improve the . . . Government's ability to interrogate the most dangerous terrorists."[238] The HIG is focused on intelligence gathering, not prosecution; its operational mission is to "collect human intelligence . . . in the counterterrorism context."[239]

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234. *Id.* at 6.

235. The tension between the FBI's role as a law enforcement agency and its newfound counterterrorism mission has roots in surveillance practices. For years, officials resisted getting rid of the so-called "FISA wall," a metaphorical divider reflecting the "premise that a powerful intelligence tool like [the Foreign Intelligence Surveillance Act (FISA)] should not be used for the primary purpose of supporting criminal prosecution, even if that prosecution targeted terrorists," and that "law enforcement and intelligence were largely separate enterprises and law enforcement was correspondingly limited as a counterterrorism tool." 2 KRIS & WILSON, *supra* note 79, at 5-6; *see also* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1885c (2017)). "Proponents of the wall recognized that FISA could be used to gather information needed to neutralize terrorists through intelligence, diplomatic, or military action; but they treated law enforcement efforts to neutralize terrorists as a separate undertaking." 2 KRIS & WILSON, *supra* note 79, at 6.

236. *Cf.* Davis, *supra* note 85, at 119 ("Law enforcement's retrospective focus—what has the person already done in the past?—with its well-defined and rigid rules is often at cross purposes with the intelligence community's prospective focus—what is the person planning to do in the future?—and its vaguely defined, situation-driven practices.").

237. *See* Hsu, *supra* note 199.

238. HIGH-VALUE DETAINEE INTERROGATION GRP., INTERROGATION BEST PRACTICES 1 (2016), https://perma.cc/2ZKR-AKMD.

239. Christian A. Meissner et al., *Developing an Evidence-Based Perspective on Interrogation: A Review of the U.S. Government's High-Value Detainee Interrogation Group Research Program*, 23 PSYCHOL. PUB. POL'Y & L. 438, 440 (2017).

In addition to its explicitly intelligence-oriented mission, the HIG is comprised of personnel drawn largely from outside of law enforcement. The group formally sits within the FBI and its chief is an FBI official, but it includes intelligence professionals from the CIA and the Department of Defense, and is subject to oversight by the National Security Council, the Department of Justice, and Congress.[240] Thus, HIG teams will inevitably contain individuals from organizations that have no criminal jurisdiction or prosecutorial mandate.[241]

In some ways, the HIG is perfectly adapted to two-step counterterrorism investigations. When the HIG was introduced, it was seen as a move away from the abusive interrogation tactics used in the immediate aftermath of September 11.[242] Indeed, then-FBI Director Robert Mueller told the Senate Judiciary Committee that FBI agents overseeing the HIG would never turn detainees over to the CIA for rendition.[243] Rather, use of the HIG presented a way to continue interrogating highly dangerous terrorists for intelligence purposes while also preserving the option to prosecute them in civilian courts.[244]

In stark contrast stand the circumstances behind Khweis's interrogation. The man who made the decision not to Mirandize Khweis, and who led his intelligence interrogation over the course of a month, was not an intelligence

240. *See High-Value Detainee Interrogation Group*, FBI, https://perma.cc/6SW5-AYCV (archived Oct. 29, 2018).

241. The HIG also has an extensive research program: It runs an unclassified program through which it solicits independent "research on interviewing and interrogation" with the goal of "develop[ing] a robust, evidence-based perspective on effective methods of interrogation that are both legally and ethically sound." Meissner et al., *supra* note 239, at 440. The National Defense Authorization Act for Fiscal Year 2016 instructed the HIG to produce a report on interrogation best practices gleaned from that research, *see* Pub. L. No. 114-92, § 1045(a)(6)(B), 129 Stat. 726, 978 (2015) (codified at 42 U.S.C. § 2000dd-2(a)(6)(B) (2017)), which it first did in 2016, *see* HIGH-VALUE DETAINEE INTERROGATION GRP., *supra* note 238. The group's website says its interrogation teams "do not engage in any unlawful interrogation practices." *High-Value Detainee Interrogation Group*, *supra* note 240.

242. *See* Marisa Taylor, *FBI Chief Vows to Protect Terror Detainees from Rendition*, MCCLATCHY DC BUREAU (updated Sept. 16, 2009, 7:19 PM), https://perma.cc/W974-2KAM ("When the administration announced the new group in August, officials said that it would better protect suspects from rendition.").

243. *See id.*

244. *See* Carrie Johnson, *Has Elite Interrogation Group Lived Up to Expectations?*, NPR (Oct. 16, 2013, 4:11 AM ET), https://perma.cc/LS5P-T3LC; *see also* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President (Aug. 24, 2009), https://perma.cc/56D9-SLGN ("Advance planning and interagency coordination prior to interrogations would also allow the United States, where appropriate, to preserve the option of gathering information to be used in potential criminal investigations and prosecutions.").

officer. He was the FBI's legal attaché to Iraq.[245] FBI attachés work in U.S. diplomatic facilities around the world, and are tasked with "work[ing] with the *law enforcement and security* agencies in their host country to coordinate investigations of interest to both countries."[246] The FBI's official position is that these officers "do not conduct foreign intelligence gathering or counterintelligence investigations."[247] By their very job description, these attachés serve a law enforcement function, albeit a uniquely specialized one. In Khweis's case, the attaché's statements understandably reflect some desire to make the subsequent criminal investigation easier for his FBI colleagues.[248]

This concern that law enforcement officers conducting interrogations for intelligence purposes will be motivated to ease the work of their fellow law enforcement officers downstream does not just apply in Iraq; suspected terrorists apprehended in the United States are more likely to first encounter law enforcement than they are to be abducted and interrogated by an interagency team.[249] In that context, conducting the intelligence portion of a two-step interrogation with an organization that mimics the institutional isolation, structure, and training of the HIG can help guarantee that the unwarned phase of the interrogation is truly about gathering intelligence, not about circumventing *Miranda*.[250]

Courts can be flexible in how they correct for this risk of an underlying motivation to circumvent *Miranda*. Although the specific mechanisms of reconciling these concerns with evidentiary rules lie beyond the scope of this Note, at least one commentator has suggested, for example, applying a presumption that officers conducting two-step counterterrorism interrogations operate with mixed motives.[251] Perhaps such a presumption could be

245. *See* United States v. Khweis, No. 1:16-cr-143, 2017 WL 2385355, at *1-2 (E.D. Va. June 1, 2017).

246. *See International Operations*, FBI, https://perma.cc/B8TV-88XK (archived Oct. 29, 2018) (emphasis added).

247. *Id.*

248. *See Khweis*, 2017 WL 2385355, at *3-4.

249. Although the HIG was eventually deployed to question Dzokhar Tsarnaev, *see* Johnson, *supra* note 244; *supra* text accompanying note 110, his capture was the result of a manhunt staffed by over 1,000 state and federal law enforcement officers, *see* Mark Arsenault, *Second Marathon Bombing Suspect Captured*, BOS. GLOBE (Apr. 20, 2013), https://perma.cc/KS9Y-QA98. The tactics the HIG employs, however, may increasingly reflect the fact that it has begun training some local law enforcement on interrogation best practices. *See* T.J. Raphael, *How Science and Counterterrorism Are Reinventing US Police Interrogations*, PRI: TAKEAWAY (May 27, 2016, 8:15 AM EDT), https://perma.cc/M37A-457R ("Though the HIG program was initially rolled out for US military investigators, police departments in Dallas, Philadelphia, and Los Angeles have begun employing these new tactics.").

250. *See* Raphael, *supra* note 249.

251. *See* Crain, *supra* note 14, at 485-86.

applied as a default rule, at least where FBI agents or local law enforcement lead the intelligence portion of a two-step interrogation. But regardless of exactly how underlying motives factor in, courts evaluating two-step interrogations should be aware of the dynamics at work, and carefully scrutinize the conduct of interrogators who are at risk, by virtue of their institutional role, of harboring an intent to circumvent *Miranda*.

3. Screening for prior knowledge of intelligence value

A final way to render Justice Kennedy's intent-based test more rigorous is to ask whether any preexisting information about the subject lends credence to the decision to interrogate for intelligence purposes. Courts should be more skeptical of the motivations of interrogators questioning individuals about whom no prior intelligence is available.[252] For low-level operatives like Khweis,[253] or those, like Dzokhar Tsarnaev, arrested in the wake of a surprise attack, there may be little or no intelligence about a subject's background prior to his arrest. The very impetus for his interrogation may be a specific incident (an attack, or a capture in a war zone), making it difficult to separate intelligence questioning from questioning that would tend to elicit inculpatory statements about the incident itself.

Moreover, for individuals arrested in the wake of a specific incident, the impulse to prosecute the specific crime is present from the beginning. By contrast, with well-known terrorist suspects, an advance plan to interrogate for intelligence purposes can take shape apart from the evidence-gathering impulse of law enforcement, and there, the odds are greater that interrogators will have well-formed ideas for topics of questioning that are unrelated to the incident for which the suspect will be prosecuted. These ideas in turn reflect a more genuine intent to collect intelligence rather than to secure admissible information for later prosecution.

Abu Khatallah was not questioned in the immediate aftermath of an attack or attempted attack. As evidenced by the nearly year-long effort to plan his capture,[254] extensive intelligence almost certainly had been developed about Abu Khatallah before he was ever arrested. Though observers cannot know for sure what the HIG asked Abu Khatallah about, the court's ruling mentions that

252. To be sure, unwarned questioning of such individuals may be permissible under the *Quarles* public safety exception to *Miranda*. *See* New York v. Quarles, 467 U.S. 649, 655-56 (1984); *see also supra* Part II.B. But prolonged questioning, beyond that required to dismiss concerns about imminent threats, is unlikely to be conceptually separable from the questioning for the very attack for which suspects are likely to be prosecuted.

253. *See Khweis*, 2017 WL 2385355, at *1, *12 n.10 (describing Khweis's capture a mere three months after he traveled to Syria, ostensibly to fight with ISIS).

254. *See* United States v. Abu Khatallah, 275 F. Supp. 3d 32, 40 (D.D.C. 2017).

the aim of the intelligence interviews was to discover any information about Abu Khatallah's "travel, background, his association with terrorists, and his knowledge about any imminent terrorist plots against the United States."[255] Abu Khatallah was officially named as a Specially Designated Global Terrorist by the State Department in January 2014.[256] In addition to his alleged role in the Benghazi attacks, he was known to have had a role in the uprising against Libya's former leader Muammar Qaddafi, and he had formed an armed rebel group.[257] His fighters were suspected to have assassinated a Qaddafi government defector.[258] By the time Abu Khatallah was captured, his group had reportedly joined forces with Ansar al-Sharia, a State Department-designated terrorist organization; although he denied in an interview with an American journalist that he was one of Ansar al-Sharia's senior leaders, he admitted that they "ha[d] a friendly relationship" and that he "kn[e]w many important figures in the movement."[259]

This preexisting intelligence convincingly establishes that the information Abu Khatallah may have been able to share with an intelligence team would have been of high value. If pressed, his intelligence interrogators likely could have pointed to specific pieces of information they hoped to ask Abu Khatallah about, completely distinct from his role in the Benghazi attacks, to bolster their asserted intent to collect intelligence. For example, interrogators may have been concerned about the activities of Ansar al-Sharia.[260] They might have asked him about any acquaintances who had traveled to Iraq from Libya to fight with other terrorist groups.[261] Or they may have wanted to find out what Abu Khatallah knew about the overall landscape of extremist activity in Benghazi.[262] All of these potential lines of inquiry are separable from Abu

255. *Id.* at 63 (quoting Government's Opposition to Defendant's Motion to Suppress Statements, *supra* note 183, at 34).

256. *See* Press Release, U.S. Dep't of State, Terrorist Designations of Three Ansar al-Shari'a Organizations and Leaders (Jan. 10, 2014), https://perma.cc/7AJZ-9C75.

257. *See* Mary Fitzgerald, *A Conversation with Abu Khattala*, NEW YORKER (June 17, 2014), https://perma.cc/35ZS-DHHS.

258. *See id.* ("His group's fighters were accused of killing General Abdul Fattah Younes, a former [Libyan] Interior Minister who had defected to the rebels but was viewed with suspicion by Islamists.").

259. *Id.*

260. *See id.* ("Beginning in early 2012, several fighters from Abu Ubaidah bin Jarrah's ranks joined a militant group called Ansar al-Sharia, which now comprises an armed core of several hundred men with affiliated preaching outfits and charitable organizations.").

261. *See id.* ("Many young men from [Abu Khatallah's Benghazi neighborhood] have headed overseas in the name of jihad, whether to fight Soviet troops in Afghanistan in the [1980s] or Americans in Iraq over the past decade.").

262. *See* David D. Kirkpatrick, *Brazen Figure May Hold Key to Mysteries*, N.Y. TIMES (June 17, 2014), https://perma.cc/UY7U-LZDZ ("Abu Khattala is a local, small-time Islamist militant. He has no known connections to international terrorist groups, say American

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Khatallah's alleged role in the 2012 attacks. The strength of this preexisting intelligence lends credence to the asserted intelligence motivation of Abu Khatallah's interrogators. It also provides a potential point of distinction for future cases in which there is less daylight between the information needed to prosecute a terrorism suspect and the intelligence potentially obtained by interrogating him.

C. Completing the Analysis: Curative Steps

Even if the analysis outlined in the previous Subpart reveals a subjective intent to circumvent *Miranda*, Justice Kennedy's *Seibert* test permits a court to admit the fruits of the warned phase of the interrogation so long as sufficient "curative steps" were undertaken to dispel the coercion inherent in a deliberately unwarned interrogation. At this point, it may seem that carefully scrutinizing interrogators' intent is an exercise in futility: If a deliberate attempt to elicit a confession can be overcome by, for example, changing a suspected terrorist's surroundings or taking an extended break, what is the point of discerning a latent bad intention?

The answer is twofold. First, at the "curative steps" stage, the gap between the substance of Justice Kennedy's approach and that of the plurality nearly vanishes. The very circumstances that Justice Kennedy would consider curative steps mirror those that the plurality suggests looking to when evaluating whether midstream *Miranda* warnings are likely to be effective. These curative steps, Justice Kennedy explained, "should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver."[263] By lowering the bar for what might reveal a subjective intent to circumvent *Miranda*, courts can kick more interrogation cases into this phase of the analysis than they otherwise would if they simply took an asserted intelligence justification at face value.

This closer scrutiny of officers' intent can create powerful incentives. If interrogators know—by virtue of their institutional roles, their mid-interrogation statements, or something else—that they are more likely to be found to have harbored an impermissible intent to circumvent *Miranda*, they are likely to devote more attention to curative steps. And this attention, in turn, should result in either more invocations of *Miranda*, or at least better-informed waivers. The remainder of this Note draws on the *Khweis* and *Abu*

officials briefed on the criminal investigation and intelligence reporting, and other Benghazi Islamists and militia leaders who have known him for many years.").

263. Missouri v. Seibert, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring in the judgment); *cf. id.* at 611-12 (plurality opinion) (focusing on "whether it would be reasonable to find that in these circumstances the warnings could function 'effectively'").

Khatallah decisions to suggest how those curative steps might look in the context of a two-step counterterrorism interrogation.

Justice Kennedy's concurrence in *Seibert* was unclear about exactly what tactics would be sufficient to dispel the coercion associated with a two-step interrogation deliberately employed to circumvent *Miranda*. He suggested that perhaps a "substantial break in time and circumstances" between the two phases might suffice, and added that "an additional warning that explains the likely inadmissibility of the prewarning custodial statement" may "[a]lternatively" be enough.[264] The only arguably curative step taken in Seibert's case was a twenty-minute cigarette break, but the two 2017 rulings—particularly the facts of Abu Khatallah's interrogation—provide insight into more meaningful tactics the government may employ.

The significance of a midstream shift in interrogation circumstances is in the eye of the beholder—when it comes to motions to suppress, the judge. Justice Kennedy suggested that such a break is critical because it "allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn."[265] Both courts in the 2017 rulings found important that the pause between the phases of the interrogation was longer than the twenty minutes afforded to Seibert. In *Abu Khatallah*, two days separated the warned, intelligence phase from the unwarned, law enforcement phase.[266] In addition to the break in time, Abu Khatallah was given additional privileges, his routine was changed, and decor was added to the location of the questioning to create a visual separation.[267] In *Khweis*, ten days separated the intelligence phase and the law enforcement phase.[268] Cutting against this lengthy break, however, is the fact that the settings of both phases were very similar; Khweis was simply taken from his cell to a different room in the Kurdish detention facility.[269]

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264. *Id.* at 622 (Kennedy, J., concurring in the judgment).

265. *See id.*

266. *See* United States v. Abu Khatallah, 275 F. Supp. 3d 32, 65 (D.D.C. 2017).

267. *See id.*

268. *See* United States v. Khweis, No. 1:16-cr-143, 2017 WL 2385355, at *2-4 (E.D. Va. June 1, 2017).

269. *See id.* The exact details of each room are not mentioned in the suppression ruling, but there is no indication that Kurdish officials made an attempt to soften the setting. Interestingly, Khweis argued that the prolonged break between the two phases of his interrogation *exacerbated*, rather than alleviated, the coercive effect of his detention. *See* Defendant's Motion to Suppress, *supra* note 144, at 13 ("For ten days Mr. Khweis received no visits from U.S. Officials. He waited, despondent in this silence. He wondered if this was no longer a wait, but was now actually his fate—his fate as another nameless prisoner, lost [in] a filthy cell in the middle east . . . ."). The court rejected this argument, and it has not received traction elsewhere.

These two decisions suggest that judges may be more concerned that officers allow a significant pause between the two phases of a two-step interrogation than that they vary the circumstances significantly. Perhaps one way to bolster the protection against the coercive impact of a deliberate circumvention of *Miranda* would be to use the circumstances of Abu Khatallah's interrogation as a floor: Where the setting and routine of the second phase is very similar to the first, courts should hesitate to find the two-step interrogation valid.

Justice Kennedy's other suggested curative step is at least facially more objective. Justice Kennedy, like the plurality, touted the potential utility of a statement telling the accused that what he has already told his interrogators cannot be used against him in court.[270] Such intervening explanatory statements from interrogators can dispel the understandable confusion that arises when an individual is told that anything he says can and will be used against him (implicitly including what he has already said). And fortunately, it should be easier for courts to tell whether such a statement has been issued—a simple yes-or-no inquiry into the record—than it would be for them to evaluate the relative significance of various changes in the circumstances of an interrogation.

The court in *Abu Khatallah* recognized the importance of the clarifying statement the FBI interviewers read at the outset of their questioning, distinguishing it from the "continuum" created during the interrogation in *Seibert*.[271] Although the court did not dwell on it, that clarifying statement included critical information: "Anything you stated in the past to other officials from the U.S. Government was not the subject of the criminal procedures levied against you in the United States, and *probably* will not be used against you in U.S. courts."[272] Curiously, however, the court did not mention that the government's ambiguous guarantee might well have been too vague to adequately advise Abu Khatallah that he did, in fact, have the right to remain silent.

With respect to this factor more than any other, the two 2017 decisions tell dramatically different stories. Ultimately, the court in *Khweis* did not need to consider whether such a curative statement was issued because it ended its inquiry after finding no subjective intent on the FBI attaché's part to circumvent *Miranda*. But it does not appear that Khweis received a sufficient explanatory statement along with his *Miranda* warnings; the form advising him of his rights "did not contain any language discussing the inadmissibility

270. *See Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment).

271. *See Abu Khatallah*, 275 F. Supp. 3d at 65.

272. *Id.* at 46 (emphasis added) (quoting Government Exhibit 220B, *supra* note 170).

of Mr. Khweis' prior statements."[273] Indeed, he was told near the end of the intelligence phase of the questioning that in order to increase his odds of being extradited to the United States and escaping the Iraqi legal system, his "story had to be consistently truthful."[274] Where, as in *Khweis*, *Miranda* warnings are given in the middle of a two-step interrogation and there is no explicit reference to the admissibility of prior incriminating statements, courts should view the warned portion of an interrogation as less distinct from—and thus more infected with the coercive influences of—the previous, unwarned interrogation.

Conclusion

At first glance, two-step counterterrorism interrogations are eerily similar to the end around used by police officers to obtain Patrice Seibert's signed confession. Just as it was in *Seibert*, the entire interrogation process is geared—at least in part—toward obtaining information that will later be usable in court. And as in *Seibert*, officers intentionally withhold *Miranda* warnings for some period of time. But unlike the officers in *Seibert*, government interrogators who conduct unwarned questioning of suspected terrorists ostensibly have a reason to do so that is unrelated to the prospect of future prosecution: gathering critical intelligence about terrorist operations.

To those who view national security interests as paramount, this motivation will always be sufficient to warrant admission of a warned confession obtained after prolonged unwarned questioning. But courts evaluating the constitutionality of such interrogations need not—and should not—accept that justification at face value. This Note encourages them to take a more nuanced view of interrogators' subjective intent, in an effort to better uncover hidden incentives to circumvent *Miranda* and obtain an admissible confession. Ulterior motives may in fact be absent in most cases; hopefully, the overzealous FBI attaché who interrogated Mohamed Khweis was an aberration among interrogators. But arming courts with more information about what may be going on behind the scenes in two-step interrogations is critical to enabling them to evaluate the validity of the government's purported motivations, and to preventing the most egregious abuses of this counterterrorism tool.

273. Defendant's Motion to Suppress, *supra* note 144, at 47 (emphasis omitted).

274. *See Khweis*, 2017 WL 2385355, at *3.