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The Legality of Deliberate Miranda Violations: How Two-Step National Security Interrogations Undermine Miranda and Destabilize Fifth Amendment Protections

Lee Ross Crain
University of Michigan Law School

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NOTE

THE LEGALITY OF DELIBERATE *MIRANDA* VIOLATIONS: HOW TWO-STEP NATIONAL SECURITY INTERROGATIONS UNDERMINE *MIRANDA* AND DESTABILIZE FIFTH AMENDMENT PROTECTIONS

Lee Ross Crain*

As part of the global “War on Terror,” federal agents intentionally delay issuing Miranda warnings to terrorism suspects during custodial interrogations. They delay the warnings presuming that unwarned suspects will more freely offer vital national security intelligence. After a suspect offers the information he has, agents administer Miranda warnings and attempt to elicit confessions that prosecutors can use at the suspect’s trial. No court has ruled on the constitutionality of this two-step national security interrogation process to determine whether admitting the second, warned confession is allowed under Miranda v. Arizona and its progeny. A fragmented Supreme Court examined two-step interrogations generally in Missouri v. Seibert but offered no clear holding. This Note argues that while confessions derived from two-step national security interrogations are admissible under Justice Kennedy’s Seibert test, courts should instead apply Justice Souter’s Seibert test to limit the use of such interrogations. This Note further contends that permitting two-step national security interrogations contravenes the spirit, if not the letter, of the Fifth Amendment as well as decades of Miranda jurisprudence.

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INTRODUCTION

Before he pled guilty to conspiring to support the al-Shabaab terror organization in June 2012,¹ Mohamed Ibrahim Ahmed moved to suppress incriminating statements he had made to federal agents.² Ahmed made these statements during an interrogation that proceeded in two steps. First, during the interrogation's "dirty" stage, American agents interrogated Ahmed without issuing the warnings required by *Miranda v. Arizona*.³ Second, during the interrogation's "clean" stage, American agents again interrogated Ahmed but this time issued the *Miranda* warnings.⁴ According to the government, agents hoped that their failure to warn during the interrogation's first stage would lead Ahmed to speak more freely about information germane to national security.⁵ According to Ahmed, agents also hoped that issuing warnings before the second stage would allow prosecutors to use Ahmed's

1. Benjamin Weiser, *Man Offers Guilty Plea, Upending Terror Case*, N.Y. TIMES, June 14, 2012, at A28, available at <http://www.nytimes.com/2012/06/14/nyregion/man-who-trained-with-somalis-offers-guilty-plea-ending-pivotal-case.html>.

2. Defendant Mohamed Ibrahim Ahmed's Pretrial Motion to Dismiss the Indictment, Suppress Statements & Strike Surplusage in the Indictment at 25, *United States v. Ahmed*, No. 10 Cr. 131 (PKC), 2011 WL 7782579 (S.D.N.Y. Sept. 8, 2011) [hereinafter Motion to Suppress].

3. Defendant Mohamed Ibrahim Ahmed's Post-Hearing Memorandum in Support of His Motion to Suppress Post-Arrest Statements at 2–3, *Ahmed*, 2012 WL 1805050 (S.D.N.Y. Feb. 28, 2012) [hereinafter Defense Brief]. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966).

4. Defense Brief, *supra* note 3, at 52.

5. Government's Post-Hearing Reply Memorandum in Opposition to Defendant's Motion to Suppress at 29–30, *Ahmed*, 2012 WL 6061229 (S.D.N.Y. Mar. 12, 2012) [hereinafter Government Brief].

second-stage incriminating statements at trial.⁶ In both phases of the interrogation, Ahmed's statements confirmed that he was involved with the al-Shabaab terror organization.⁷

After his indictment, Ahmed moved to suppress these incriminating statements⁸ and challenged the agents' two-step process as a "clever stratagem" and a mere "ruse" to violate his Fifth Amendment right against self-incrimination.⁹ The government opposed the motion, asserting that the post-warning, second-step confessions were admissible under *Missouri v. Seibert*.¹⁰

In *Seibert*, a deeply divided Supreme Court considered the admissibility of confessions elicited during two-step interrogation processes.¹¹ Specifically, an officer in that case testified that he had intentionally undertaken a two-step process for the explicit purpose of vitiating the effectiveness of the defendant's *Miranda* warnings.¹² Although five justices held that Seibert's incriminating statements were inadmissible, they disagreed in three separate opinions as to why.¹³ Consequently, *Seibert* did not issue a clear holding.¹⁴

Seibert's two most influential opinions—Justice Kennedy's solo concurrence and Justice Souter's four-vote plurality¹⁵—analyzed the interrogation procedure in different ways.¹⁶ Justice Kennedy's opinion concluded that a defendant's confession is presumptively inadmissible when elicited through

6. Defense Brief, *supra* note 3, at 2.

7. See Government Brief, *supra* note 5, at 2, 31, 36, 60.

8. Motion to Suppress, *supra* note 2, at 5.

9. Defense Brief, *supra* note 3, at 2–3.

10. See Government Brief, *supra* note 5, at 2 (citing *Missouri v. Seibert*, 542 U.S. 600 (2004) (plurality opinion)).

11. *Missouri v. Seibert*, 542 U.S. 600, 604 (2004) (plurality opinion). Justice Kennedy provided the fifth vote to a splintered Court. *Id.* at 618 (Kennedy, J., concurring in the judgment).

12. See *id.* at 604–06 (plurality opinion).

13. See *id.* at 604, 617 (finding statements inadmissible because the midstream *Miranda* warnings were not objectively effective); *id.* at 617 (Breyer, J., concurring) (supporting an exclusionary rule for *Miranda* violations where courts would exclude the "fruits" of the initial unwarned questioning unless the failure to warn was in good faith); *id.* at 622 (Kennedy, J., concurring in the judgment) (concluding that statements should be excluded if law enforcement officials deliberately deployed the two-step strategy to undermine the effectiveness of the *Miranda* warnings and failed to take curative measures).

14. See *State v. O'Neill*, 936 A.2d 438, 453 (N.J. 2007) ("The *Seibert* opinions have sown confusion in federal and state courts . . ."); Elwood Earl Sanders, Jr., *Breaching the Citadel: Willful Violations of Miranda After Missouri v. Seibert*, 10 APPALACHIAN J.L. 91, 103 (2011) (noting that lower courts have "struggled" to determine *Seibert*'s rule).

15. Although Justice Breyer drafted his own opinion, he adopted the "plurality's opinion in full" under the assumption that the holding was essentially the same as that offered in his own opinion. He also adopted Justice Kennedy's opinion "insofar as it [wa]s consistent with [Justice Breyer's own] approach." *Seibert*, 542 U.S. at 618 (Breyer, J., concurring).

16. Compare *id.* at 617 (plurality opinion), with *id.* at 622 (Kennedy, J., concurring in the judgment).

a two-step interrogation process that police deliberately undertake “in a calculated way to undermine the *Miranda* warning.”¹⁷ This test focused on the purposefulness of the law enforcement agent’s actions as well as the motives underlying this conduct. By contrast, Justice Souter’s test focused on the defendant’s experience during the interrogation.¹⁸ Justice Souter directed courts to admit second, warned confessions only if the *Miranda* warnings functioned “‘effectively’ as *Miranda* requires.”¹⁹ While a majority of the federal circuits have adopted Justice Kennedy’s opinion as *Seibert*’s rule,²⁰ substantial grounds remain to encourage the application of Justice Souter’s approach.²¹

The prosecution and defense in *Ahmed* both sparred within the confines of Justice Kennedy’s *Seibert* concurrence in motions before the Southern District of New York because the Second Circuit had previously found Justice Kennedy’s test binding.²² Accordingly, the *Ahmed* parties largely ignored Justice Souter’s plurality opinion, and Ahmed’s battle for suppression and the government’s *Seibert* defense largely focused on the federal agents’ subjective motive for pursuing the two-step interrogation.²³ The government

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

18. *Id.* at 611–12 (plurality opinion).

19. *Id.*

20. See *United States v. Green*, 388 Fed. App’x 375, 380 (5th Cir. 2010) (unpublished opinion) (“*Seibert* requires the suppression of a post-warning statement only where a deliberate two-step strategy is used and no curative measures are taken” (quoting *United States v. Nunez-Sanchez*, 478 F.3d 663, 668 (5th Cir. 2007) (internal quotation marks omitted))); *United States v. Carter*, 489 F.3d 528, 536 (2d Cir. 2007) (“We now join our sister circuits in holding that *Seibert* lays out an exception to *Elstad* for cases in which a deliberate, two-step strategy was used by law enforcement to obtain the postwarning confession.”); *United States v. Narvaez-Gomez*, 489 F.3d 970, 974 (9th Cir. 2007) (“[I]f the two-step method is not deliberate, the post-warning statements are admissible if voluntarily made”); *United States v. Ollie*, 442 F.3d 1135, 1142 (8th Cir. 2006) (noting that Justice Kennedy’s concurring opinion is of “special significance” (quoting *United States v. Briones*, 390 F.3d 610, 613 (8th Cir. 2004))); *United States v. Kiam*, 432 F.3d 524, 532 (3d Cir. 2006) (“This Court applies the *Seibert* plurality opinion as narrowed by Justice Kennedy.” (citing *United States v. Naranjo*, 426 F.3d 221, 231–32 (3d Cir. 2005))); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005) (“Justice Kennedy’s opinion . . . represents the holding of the *Seibert* Court.”). *But see* *United States v. Johnson*, 680 F.3d 966, 978–79 (7th Cir. 2012) (declining to decide which test to apply since both tests led to the same result in the case at hand), *cert. denied*, 133 S. Ct. 672 (2012); *United States v. Jackson*, 608 F.3d 100, 103–04 (1st Cir. 2010) (same); *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1150–51 (10th Cir. 2006) (same).

21. When no Supreme Court opinion garners a majority, *Marks v. United States* directs lower courts to adopt the “narrowest” opinion as the divided Court’s holding. 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)) (internal quotation marks omitted). It is unclear, however, what makes an opinion “narrowest.” See *infra* Section III.C for an in-depth review of how to apply Justice Souter’s test while remaining consistent with *Marks*.

22. See *Carter*, 489 F.3d at 535–36 (noting that all the circuits that had decided the issue had adopted Justice Kennedy’s approach).

23. The government did not deny that the agents intentionally (rather than accidentally) failed to give Ahmed his *Miranda* warnings. See Government Brief, *supra* note 5, at 28–29.

argued “that the agents’ [sole] intent was to obtain information relevant to the national security of the United States and thus to protect the public.”²⁴ The defense countered that the interrogation served impermissible, “dual” purposes: to gather evidence for national security and to undercut the effectiveness of Ahmed’s *Miranda* warnings.²⁵

It remains unclear whether post-warning confessions are admissible after law enforcement intentionally conducts an unwarned “dirty” interrogation purportedly to elicit vital information for national security. In *Ahmed*, Judge Castel in the Southern District of New York never had a chance to rule on the admissibility of Ahmed’s post-warning statements because Ahmed preemptively pled guilty.²⁶ The guilty plea eliminated an important opportunity to clarify the law in a case presenting a new permutation of two-step interrogations. In these novel circumstances, the government’s proffered motive for undertaking a two-step interrogation was arguably credible enough to pass Justice Kennedy’s intent- and motive-based test.²⁷

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. This is not a mere technical curiosity. The two-step national security interrogation strategy at issue in *Ahmed* is an important tool in the federal government’s “War on Terror.”²⁸

24. *Id.* at 27.

25. Defense Brief, *supra* note 3, at 56–57.

26. Weiser, *supra* note 1 (discussing the fact that Judge Castel had prepared a sixty-page ruling on the motion for suppression, which, due to the guilty plea, would have to be suppressed). Compare this result with *United States v. Abdulmutallab*, where the court admitted incriminating statements that the defendants made in circumstances distinct from those discussed in this Note. No. 10-20005, 2011 WL 4345243, at *6 (E.D. Mich. Sept. 16, 2011). Specifically, the court noted that agents had credible fears of imminent threats to the public safety, which thus justified, under the “public safety” exception established in *New York v. Quarles*, 467 U.S. 649 (1984), withholding *Miranda* warnings. *Id.*

27. *Contra* *United States v. Capers*, 627 F.3d 470, 481 (2d Cir. 2010) (indicating that the government offered a noncredible motive to argue that it did not intend to circumvent *Miranda* through a two-step interrogation process).

28. See Charlie Savage, *Holder Backing Law to Restrict Miranda Rules*, N.Y. TIMES, May 10, 2010, at A1, available at <http://www.nytimes.com/2010/05/10/us/politics/10holder.html?pagewanted=all> (noting that the Obama Administration “had been stretching the traditional limits of how long suspects may be questioned without being warned of their rights” since at least December 2009); Weiser, *supra* note 1 (referring to “the Obama administration’s strategy of interrogating terrorism suspects for both intelligence and law enforcement purposes”); Memorandum, Fed. Bureau of Investigation, Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Inside the United States (Oct. 21, 2010) [hereinafter FBI Memorandum], available at <http://www.nytimes.com/2011/03/25/us/25miranda-text.html> (“After all applicable public safety questions have been exhausted, agents should advise the arrestee of his *Miranda* rights and seek a waiver of those rights before any further interrogation occurs, absent exceptional circumstances described below.”); see also Norman Abrams, *Responses to the Five Questions*, 38 WM. MITCHELL L. REV. 1597, 1601–02 (2012) (describing the two-step interrogation process used in the case of Ahmed Warsame).

Similar interrogation processes have been used in many high-profile antiterrorism cases, including during the questioning of the Detroit “Undergarment Bomber,”²⁹ the “Times Square Bomber,”³⁰ and, it appears, the surviving Boston Marathon bomber.³¹ The admissibility of confessions derived from two-step national security interrogations directly affects what prosecutorial and investigatory tools are available to government officials both at home and abroad. The legality of such interrogation strategies also speaks broadly about longstanding tensions between the competing desires for individual freedom and collective security.

This Note argues that while confessions derived from two-step national security interrogations are admissible under Justice Kennedy’s *Seibert* test, courts should instead apply Justice Souter’s *Seibert* test to limit the use of such interrogations. This Note further contends that permitting two-step national security interrogations contravenes the spirit, if not the letter, of the Fifth Amendment as well as decades of *Miranda* jurisprudence.³² Part I describes *Miranda*’s evolution and explains how to properly apply Justice Kennedy’s *Seibert* test to two-step interrogations. Part II demonstrates that Justice Kennedy’s test would render Ahmed’s particular second-stage confessions admissible, contrary to the spirit and letter of prior *Miranda* jurisprudence. Part III argues that courts should adopt Justice Souter’s plurality test, which would likely disallow the *Ahmed* two-step national security interrogation, as a better means of analyzing the admissibility of confessions elicited during any two-step interrogation. Finally, given that Justice Kennedy’s test currently reigns in most federal circuits, Part IV suggests that courts can apply various evidentiary rules to repair the damage that Justice Kennedy’s test wreaks on *Miranda* and contends that law enforcement officials need not fear giving *Miranda* warnings in the national security context.

I. PROPER APPLICATION OF JUSTICE KENNEDY’S *SEIBERT* TEST

To understand how these two-step interrogations affect *Miranda* and the Self-Incrimination Clause, it is necessary to situate Justice Kennedy’s test in

29. Savage, *supra* note 28.

30. *Id.*

31. See Luke Johnson, *Dzhokhar Tsarnaev Receives Miranda Rights After Delay for Public Safety Exception*, HUFFINGTON POST (Apr. 22, 2013, 7:05 PM) (updated Apr. 23, 2013, 7:43 AM), http://www.huffingtonpost.com/2013/04/22/dzhokhar-tsarnaev-miranda_n_3134745.html. Note that at the time of this Note’s writing, not all facts regarding the surviving Boston Marathon bomber’s interrogation had been made public. Given what is publicly known, however, it appears that agents purposefully withheld *Miranda* warnings during interrogations of the suspect Dzhokhar Tsarnaev. See Cheryl K. Chumley, *Boston Bombing Suspect Dzhokhar Tsarnaev Suffered ‘High-Powered Injury’ at Arrest: Court Documents*, WASHINGTON TIMES (Aug. 20, 2013), <http://www.washingtontimes.com/news/2013/aug/20/dzhokhar-tsarnaev-suffered-high-powered-injury-arr/> (noting that recently unsealed court documents revealed that agents questioned Tsarnaev for two days without *Miranda* warnings, relying on the public safety exception).

32. See generally Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 668–74 (1996), for a discussion of some of *Miranda*’s virtues.

the context of history and current doctrine. Accordingly, Section I.A briefly addresses *Miranda*'s evolution. Section I.B then articulates the proper application of Justice Kennedy's test.

A. *Situating Seibert in the Broader Context of Miranda Jurisprudence*

Miranda established a clear and absolute rule to protect defendants' Fifth Amendment right against self-incrimination.³³ Before *Miranda*, the Court's self-incrimination jurisprudence focused on a case-by-case, subjective "voluntariness" test, which rendered confessions admissible unless "a defendant's will was overborne" by the circumstances surrounding the giving of a confession.³⁴ *Miranda*, by contrast, announced an objective, bright-line rule. Instead of the unclear, ad hoc, and retroactive voluntariness inquiry, *Miranda* requires that officers apprise defendants of their rights before any custodial interrogation.³⁵ Because the environment surrounding a custodial interrogation is "inherently" coercive and "impair[s]" a defendant's "capacity for rational judgment,"³⁶ only when a defendant receives warnings that advise him of his rights can his statements "truly be the product of his free choice."³⁷

The Court's clear mandate nevertheless left open the question of what consequences should follow *Miranda* violations. Although a defendant's un-Mirandized confession was deemed inadmissible, the status of other evidence or confessions garnered as a result of *Miranda* violations was less

33. Cf. Johnathan L. Rogers, Note, *A Jurisprudence of Doubt: Missouri v. Seibert, United States v. Patane, and the Supreme Court's Continued Confusion About the Constitutional Status of Miranda*, 58 OKLA. L. REV. 295, 296–97 (2005) (noting that the pre-*Miranda* test "failed both to provide a clear standard by which to judge the admissibility of confessions and to prevent coercive interrogation practices"). The Fifth Amendment, on which *Miranda* is based, ensures that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. See generally *Miranda v. Arizona*, 384 U.S. 436, 442–43 (1966) (noting that after the 1688 revolution, the English gradually erected "additional barriers for the protection of the people against the exercise of arbitrary power" (quoting *Brown v. Walker*, 161 U.S. 591, 596 (1896)) (internal quotation marks omitted)); *Michigan v. Tucker*, 417 U.S. 433, 440 (1974) ("The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago."); *Ullmann v. United States*, 350 U.S. 422, 427 (1956) (explaining that the Constitution evidences and crystallizes the Founders' "judgment . . . that it [would be] better for an occasional crime to go unpunished than that the prosecution should be free to build upon a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused" (quoting *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954)) (internal quotation marks omitted)); *Twining v. New Jersey*, 211 U.S. 78, 91 (1908) (indicating that by the time of the American Revolution, the protection against self-incrimination "had become embodied in the common law" and was enshrined within five state constitutions or bills of rights), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964).

34. *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

35. *Miranda*, 384 U.S. at 444.

36. *Id.* at 465, 467.

37. *Id.* at 458.

clear.³⁸ The Court faced this question in *Oregon v. Elstad*.³⁹ In *Elstad*, the defendant confessed both before and after officers administered the *Miranda* warnings.⁴⁰ The defendant challenged the admissibility of his second, warned confession.⁴¹ There was no evidence that the officers intended to withhold *Miranda* warnings or to trick the defendant into confessing; the failure to warn seemed to be a good-faith mistake.⁴² Ultimately, the Supreme Court concluded that the defendant's second, warned confession was admissible because it was voluntarily made.⁴³

In *Elstad*, the Supreme Court declined to establish a rule excluding all evidence police discover as a result of failing to give a defendant *Miranda* warnings as required.⁴⁴ Simply put, the Court found that the failure to give *Miranda* warnings does not "taint" a later, post-warning confession and render it inadmissible.⁴⁵ Instead of excluding a post-warning confession automatically, *Elstad* held that courts should admit the second, warned confession if it was voluntarily made.⁴⁶ *Elstad* instructed that courts should look to "the surrounding circumstances [of the interrogation] and the entire course of police conduct with respect to the suspect . . . [to] evaluat[e] the voluntariness of [the suspect's] statements."⁴⁷ Ironically, the effective consequence of a *Miranda* violation under *Elstad* is that courts apply to the second confession the same ad hoc, subjective voluntariness inquiry that *Miranda* originally rejected.

In *Seibert*, the Court faced a different, although related, issue: the effect of an officer's *intentional* failure to issue *Miranda* warnings on subsequent, warned confessions.⁴⁸ Specifically, officers interrogated Patrice Seibert

38. See, e.g., *Tucker*, 417 U.S. at 445–46 (discussing whether an exclusionary rule should be applied to the "fruits" of *Miranda* violations). See *Lyons v. Oklahoma*, 322 U.S. 596 (1944), for an example of how earlier courts dealt with two-step interrogations.

39. 470 U.S. 298 (1985).

40. *Elstad*, 470 U.S. at 300–02.

41. *Id.* at 303.

42. *Id.* at 300–02, 308–09.

43. *Id.* at 318.

44. *Id.* at 307 ("[T]he *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted."). Despite the ruling in *Elstad*, justices on the Supreme Court still disagree about what the appropriate consequences of a *Miranda* violation should be. Compare *United States v. Patane*, 542 U.S. 630, 639 (2004) (plurality opinion) ("[T]he *Miranda* rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecutor's case in chief."), with *Missouri v. Seibert*, 542 U.S. 600, 617 (2004) (Breyer, J., concurring) ("Courts should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith."). See generally *Wong Sun v. United States*, 371 U.S. 471, 485 (1963), for a description of exclusionary rules in the Fourth Amendment context.

45. *Elstad*, 470 U.S. at 307, 318.

46. *Id.* at 318.

47. *Id.*

48. *Seibert*, 542 U.S. at 604 (plurality opinion).

through a two-step process.⁴⁹ First, unlike in *Elstad*, officers intentionally withheld *Miranda* warnings so that Seibert would be more likely to confess.⁵⁰ Only after Seibert admitted that she was guilty of murder did the police issue the *Miranda* warnings.⁵¹ They subsequently re-elicited the murder confession by reminding Seibert that she had already admitted her guilt.⁵² Police testified that they purposefully delayed the *Miranda* warnings to more easily elicit the confession.⁵³ The Supreme Court again rejected an automatic exclusionary rule, even when the police *intentionally* failed to issue *Miranda* warnings. Consequently, Seibert's confession—the “fruits” of the police officers' deliberate *Miranda* violation—was not suppressible *per se*.⁵⁴ Unlike in *Elstad*, however, a splintered majority of the Court found Seibert's second, warned confessions inadmissible based on the facts of the case.⁵⁵

B. Seibert and Justice Kennedy's Opinion

Justice Kennedy focused his analysis on the subjective intent and motivation of law enforcement officers.⁵⁶ His solo opinion concluded that Seibert's confession was presumptively inadmissible because the officers had acted deliberately “in a calculated way to undermine the *Miranda* warning.”⁵⁷ He did not merely ask whether Seibert's second confession was voluntary; evidently he thought that the circumstances of her interrogation were so different from those in *Elstad* that a different rule was required. Under Justice Kennedy's test, if law enforcement officers engaged in a deliberate, two-step interrogation for the impermissible purpose of undermining the effectiveness of the midstream *Miranda* warnings, courts can render a subsequent, warned confession admissible only if law enforcement officers took “curative measures” to ensure that midstream warnings were effective.⁵⁸

49. *Id.* at 604–05.

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

51. *Id.* at 605 (plurality opinion).

52. *Id.*

53. *Id.* at 605–06.

54. *Id.* at 615–17. *Contra id.* at 617 (Breyer, J., concurring) (“Courts should exclude the ‘fruits’ of the initial unwarned questioning unless the failure to warn was in good faith.”).

55. *Id.* at 617 (plurality opinion); *id.* at 618 (Breyer, J., concurring); *id.* at 622 (Kennedy, J., concurring in the judgment).

56. *Id.* at 620–22 (Kennedy, J., concurring in the judgment). Both Justice O'Connor's dissenting opinion and Justice Souter's plurality opinion rejected Justice Kennedy's focus on subjective intent. *See id.* at 623–26 (O'Connor, J., dissenting) (“[T]he plurality correctly declines to focus its analysis on the subjective intent of the interrogating officer. . . . [T]he approach espoused by Justice Kennedy is ill advised.”).

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

58. While Justice Kennedy did not illuminate what exactly constituted a sufficient “curative measure[],” he did state that “a substantial break in time and circumstances” between the two steps or “an additional warning that explains the likely inadmissibility of the prewarning custodial statement” may be sufficiently curative. *Id.*

If law enforcement officers did not engage in such a deliberate process, however, courts have to analyze the defendant's subsequent confessions under *Elstad's* voluntariness inquiry.⁵⁹ Ultimately, Justice Kennedy found that the law enforcement officers involved in *Seibert* conducted the two-step interrogation deliberately for the purpose of vitiating the *Miranda* warnings' effectiveness.⁶⁰ Because law enforcement officers did not use significant curative measures to ensure that the *Miranda* warnings were effective, Justice Kennedy voted to suppress the confession.⁶¹

Justice Kennedy's test presents two subjective inquiries that inform courts whether they should apply the curative measures analysis or the *Elstad* voluntariness inquiry.⁶² First, did the officers actually *intend* to engage in a two-step process?⁶³ Second, was the goal of the interrogation to undermine the effectiveness of the *Miranda* warnings?⁶⁴ These are two different questions, although at times courts conflate them.⁶⁵

59. *Id.* The curative measures analysis is more demanding than *Elstad's* mere voluntariness inquiry, which allows a second, warned confession to be admitted if it is prefaced by a voluntary waiver of rights. See *Oregon v. Elstad*, 470 U.S. 298, 318 (1984). Instead, the curative measures requirement forces affirmative action 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." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment).

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

61. *Id.*

62. *Id.*

63. *Id.* (asking first whether the two-step interrogation is "deliberate").

64. *Id.* at 621; see also Daniel S. Nooter, Note, *Is Missouri v. Seibert Practicable?: Supreme Court Dances the "Two-Step" Around Miranda*, 42 AM. CRIM. L. REV. 1093, 1094 (2005) ("Justice Kennedy . . . focus[es] not on the state of mind of the suspect, but on the motives of the interrogating officer.").

65. For example, *United States v. Naranjo*, 426 F.3d 221, 232 (3d Cir. 2005), glosses over Justice Kennedy's focus on the officers' motive. A deeper analysis of lower court *Seibert* rulings reveals that many courts seem to jettison the motive-based inquiry as moot. See, e.g., *United States v. Courtney*, 463 F.3d 333, 338–39 (5th Cir. 2006) (implying that Justice Kennedy's subjective test may only have an intent-based prong but ultimately resting its holding on the fact that the curative measures were sufficient regardless). Some courts that treat the inquiry as moot do so because they determine that officers did not *intend* to delay or omit *Miranda* warnings. See, e.g., *United States v. Green*, 388 F. App'x 375, 380–81 (5th Cir. 2010) (unpublished opinion); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005). When courts determine that the failure to warn was unintentional (i.e., accidental), they tend to conflate Justice Kennedy's intent- and motive-based tests, perhaps because precision is simply not necessary under such circumstances. See, e.g., *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1152–53 (10th Cir. 2006) (purportedly applying Kennedy's test but focusing on whether the agent "intentionally withheld the *Miranda* warnings during the initial interrogation"); *Naranjo*, 426 F.3d at 232 (purportedly applying Kennedy's test but stating the relevant inquiry as whether "the initial failure to warn . . . was inadvertent"). That a court describes Justice Kennedy's test imprecisely in certain circumstances does not indicate that the test should be applied that way universally.

While Justice Kennedy did not explicitly divide his inquiry in this way, his opinion suggests a two-part intent- and motive-based test.⁶⁶ Justice Kennedy's greatest concern with the technique at issue in *Seibert* was that the omission was not only intentional but also "designed to circumvent" the *Miranda* warnings' effectiveness.⁶⁷ The officers' motive in undertaking this two-step interrogation technique particularly concerned Justice Kennedy:

The *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given. . . . The strategy is based on the assumption that *Miranda* warnings will tend to mean less when recited midinterrogation, after inculpatory statements have already been obtained. This tactic relies on an intentional misrepresentation of the protection that *Miranda* offers. . . .⁶⁸

Justice Kennedy's opinion thus imposed a bifurcated test examining both an interrogator's subjective intent and motive. Whether a court should ultimately analyze a confession under the affirmative demands of the curative measures inquiry or the more lax *Elstad* voluntariness test depended on whether the court found that officers intentionally engaged in a two-step interrogation for the purpose of vitiating the *Miranda* warnings' effectiveness.⁶⁹

II. JUSTICE KENNEDY'S TEST WEAKENS *MIRANDA*

This Part examines *Seibert* in the context of national security interrogations. Section II.A applies Justice Kennedy's test to *Ahmed* and concludes that under this test, Ahmed's second-stage self-incriminating statements would not be suppressed by a trial court. Section II.B finds that permitting these two-step national security interrogations is normatively undesirable and demonstrates how the test weakens self-incrimination protections. Finally, Section II.C contends that the general threat of terrorism is an insufficient excuse to limit a defendant's *Miranda* or Fifth Amendment rights.

66. For the purposes of this Note, "intent" is defined as the deliberateness of an actor's conduct. "Intentional" conduct is conduct that an actor consciously and deliberately undertakes; "unintentional" conduct is that which may be accidental. "Motive" is defined as an actor's goal. "Motive" asks for what purpose an actor undertakes his conduct.

67. See *Seibert*, 542 U.S. at 618 (Kennedy, J., concurring in the judgment) (emphasis added).

68. *Id.* at 620–21.

69. *Id.* at 621–22; see also, e.g., *United States v. Capers*, 627 F.3d 470, 477 (2d Cir. 2010) ("[W]e must address whether the officers employed a 'deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview . . .'" (quoting *Seibert*, 542 U.S. at 621 (Kennedy, J., concurring in the judgment))); *United States v. Crisp*, 371 F. App'x 925, 932 (10th Cir. 2010) (unpublished opinion) ("Justice Kennedy proposed an intent-based test that would apply only when 'the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning.'" (quoting *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment))); *United States v. Briones*, 390 F.3d 610, 614 (8th Cir. 2004) ("Nothing in the record suggests that these law enforcement officers from different agencies used a deliberate strategy of staged interrogations to circumvent Briones' Fifth Amendment rights.").

A. *Application of Justice Kennedy's Test to Ahmed Demonstrates a Defendant's Disadvantages*

The admissibility of post-warning confessions elicited during two-step national security interrogations will often turn on Justice Kennedy's subjective-intent test. To defend against a suppression motion, the government has to demonstrate one of three things. First, it can attempt to show that agents' initial failure to warn was not intentional and that suppression should be denied under *Elstad*.⁷⁰ Proof that the omission was unintentional renders moot the question of motive. Second, the government can attempt to demonstrate that, although the two-step process was intentional, the motive driving the interrogation was permissible and suppression should be denied under *Elstad*.⁷¹ Namely, the federal agents can suggest that in failing to warn, they were not seeking to more easily elicit admissible confessions, as officers did in *Seibert*, but rather they were seeking vital national security information. Third, the government can attempt to prove that, although the two-step process was intentional and had an impermissible motive, agents took sufficient curative steps.⁷² As the government conceded in *Ahmed*, the failure to issue *Miranda* warnings for the purposes of collecting national security information is intentional.⁷³ Therefore, under a proper application of Justice Kennedy's test, the question of the agents' motive and the sufficiency of any curative steps becomes the crux of whether courts should suppress confessions derived from two-step national security interrogations.

Although Ahmed's guilty plea prevented Judge Castel from ruling on Ahmed's suppression motion, the objective evidence presented in that case likely supported the agents' contention that their motive for pursuing a two-step interrogation was permissible. To bolster the agents' claim, the government contended that the questions in each step of the interrogation were fundamentally different. In the "dirty" interrogation, the agents focused on Ahmed's terrorist associates and other information about al-Shabaab generally.⁷⁴ In the "clean" interrogation, the questions focused more on what Ahmed actually *did* with al-Shabaab, especially the financial contributions that he made to the organization.⁷⁵ Those financial contributions, which were "not even discussed" in the first interrogation, were a "key aspect" of Ahmed's charges.⁷⁶

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

71. *See id.* at 621–22 (noting that the subjective-intent test would not apply unless "the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning").

72. *Id.*

73. Government Brief, *supra* note 5, at 38 ("[A]gents have candidly admitted that they intended to use a two-step strategy, and explained the reasons . . .").

74. *Id.* at 31–32.

75. *Id.*

76. *Id.*

The agents also took “significant efforts” to distinguish the two phases of the interrogations.⁷⁷ Namely, they separated the interrogations by several days, used different interrogators, and attempted to find distinct rooms for the interrogations.⁷⁸ These efforts suggest that agents actually sought to bolster the effectiveness of the *Miranda* warnings so that Ahmed could rationally choose whether he wanted to speak during the interrogation’s second phase.

Broader contextual evidence also supported the government’s claims that its motives were permissible. For instance, the very nature of the War on Terror corroborated the agents’ claims that the two-step interrogation’s purpose was to gather national security information and not to weaken the effectiveness of the midstream *Miranda* warnings.⁷⁹ Proof that federal agents believed that their suspect had credible national security information bolstered the agents’ claims that they merely sought to elicit key national security intelligence.⁸⁰ The prosecution and the defense in *Ahmed* also debated about what conclusions the trial court should have drawn from the agents’ testimony. The defense highlighted testimony indicating that the agents sought to “‘gain [the defendant’s] trust’ and ‘create a comfortable environment where [Ahmed] didn’t feel that [they] were there targeting him, seeking charges against him.’”⁸¹ That testimony, said the defense, supported the “more reasonable inference . . . that the planned . . . dirty interrogation of Mr. Ahmed served a dual purpose—to gather intelligence and to prosecute Mr. Ahmed.”⁸² The government noted, again trying to justify its agents’ motives under Justice Kennedy’s test, that the goal of encouraging Ahmed to speak is not “inconsistent” with the purpose of eliciting information for national security.⁸³

Under Justice Kennedy’s subjective-motive inquiry, evidence like that seen in *Ahmed* easily allows the government to evade the *Miranda* warnings requirement. Agents can essentially interrogate at will and still use a defendant’s second, warned confession so long as they intentionally fail to issue *Miranda* warnings solely because they want to more easily elicit information needed for national security purposes. Much of the subjective analysis turns on an agent’s credibility: Can a court believe the agent when he argues that his motives in conducting a two-step interrogation were permissible?⁸⁴

77. *Id.* at 34.

78. *Id.* at 40, 43.

79. The Department of Justice permits two-step interrogation procedures when FBI agents conclude that such interrogations are needed to garner “valuable and timely intelligence.” FBI Memorandum, *supra* note 28. See generally John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765 (2007) (describing how the War on Terror has changed criminal processes).

80. See Government Brief, *supra* note 5, at 28.

81. Defense Brief, *supra* note 3, at 56 (first and second alterations in original) (quoting the transcript of Agent Dent’s testimony).

82. *Id.* at 56–57.

83. Government Brief, *supra* note 5, at 28–29.

84. See, e.g., *United States v. Moore*, 670 F.3d 222, 229 (2d Cir. 2012).

Judges are likely to find agents to be more credible than terrorism suspects.⁸⁵ That credibility, coupled with objective corroborative evidence, demonstrates the government's inherent advantages under Justice Kennedy's test. It is easier for the government to argue about, and thus prove the permissibility of, its agents' subjective motives than it would be for the suspect to do so.

The outcome of the intent-and-motive battle matters because the applicable analyses—the curative measures test and the *Elstad* voluntariness inquiry—differ in the level of protection that each affords to a defendant. Moreover, because the government holds a clear advantage in the subjective-motive battle, courts will frequently find that the *Elstad* inquiry applies, so the government will not often need to demonstrate effective curative measures.⁸⁶ Under Justice Kennedy's formulations, curative measures must be “designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* . . . waiver.”⁸⁷ This is no easy burden to bear.⁸⁸

Notably, the curative measures test does not simply analyze the effectiveness of *Miranda* warnings from a reasonable person's perspective but incorporates the “suspect's situation” as well.⁸⁹ For example, Ahmed argued that the break before his warned interrogations was insufficient compared to the overall length of his captivity: he alleged that he had been interrogated by Nigerian authorities at least eight times over a forty-one-day period before the unwarned interrogation by U.S. agents, that there was less than a five-day break between the unwarned interrogation and the initial warned interrogation, and that he was not conscious of time because he lacked a watch or a calendar.⁹⁰ Likewise, the government did not offer any addendum warning to explain that the first confession was inadmissible at trial.⁹¹ Although agents explained to Ahmed that he “did not need to speak simply because he had spoken to others previously,”⁹² no agent explained the differences between the two interrogations.⁹³

Because the government holds significant advantages in the subjective-inquiry phase, confessions such as Ahmed's will often be admissible because after a defendant receives warnings and gives a waiver, *Elstad* provides him little protection.⁹⁴ Importantly, the fact that a defendant decides to speak

85. Cf. Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1323 (1994).

86. See Sandra Guerra Thompson, *Evading Miranda: How Seibert and Patane Failed to “Save” Miranda*, 40 VAL. U. L. REV. 645, 681 (2006).

87. *Missouri v. Seibert*, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring in the judgment).

88. *But see* Thompson, *supra* note 86, at 681 (arguing that “[i]t will be a simple matter to teach officers” to implement curative measures sufficient to meet Justice Kennedy's test).

89. *Id.*

90. See Defense Brief, *supra* note 3, at 5–6, 62–63.

91. *Id.* at 63; Government Brief, *supra* note 5, at 43.

92. Government Brief, *supra* note 5, at 43.

93. See Defense Brief, *supra* note 3, at 63; Government Brief, *supra* note 5, at 43.

94. See Thompson, *supra* note 86, at 676 (“*Elstad* . . . requires the defendant to bear the burden of proving that the second confession was involuntarily given.”).

(and thus waive his rights) despite receiving his warnings is “highly probative.”⁹⁵ The inquiry in *Ahmed* would have been essentially complete once the government showed that agents read Ahmed his rights and that Ahmed waived those rights and professed to understand them.⁹⁶

B. *The Subjective-Motive Inquiry Allows Agents to More Easily Delay Miranda Warnings*

As a result of advantages that Justice Kennedy’s test vests in the government, officials can more easily elicit damning statements from defendants before those defendants effectively understand their rights. This result contravenes the Founders’ judgment “that it [would be] better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused.”⁹⁷ The Self-Incrimination Clause is a fundamental part of the relationship between the government and its citizens, yet Justice Kennedy’s test undermines its protections.

The advantages Justice Kennedy’s test bestows upon the government, as demonstrated in applying the test to *Ahmed*’s factual circumstances, illustrate the dangers inherent in Justice Kennedy’s focus on the subjective motives of law enforcement in a Fifth Amendment context. As one commentator notes, “Proving an officer’s subjective intent can be nearly impossible if the officer professes not to have acted deliberately in violating *Miranda*.”⁹⁸ The agents in *Ahmed* fiercely contended that their motive was not to vitiate the effectiveness of Ahmed’s *Miranda* warnings during their two-step interrogation.⁹⁹ The circumstances surrounding the War on Terror and the objective facts of the interrogation itself bolstered the agents’ credibility.¹⁰⁰ While there were facts to dispute the agents’ claimed motive, their credibility and the objective evidence would have been difficult to overcome. Subjective credibility battles are also problematic because they incentivize

95. *Oregon v. Elstad*, 470 U.S. 298, 318 (1985).

96. *See id.* (“We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.”); *see also* Defense Brief, *supra* note 3, at 22–23; Government Brief, *supra* note 5, at 58.

97. *Ullmann v. United States*, 350 U.S. 422, 427 (1956) (quoting *Maffie v. United States*, 209 F.2d 225, 227 (1954)) (internal quotation marks omitted).

98. Thompson, *supra* note 86, at 681.

99. *See* Government Brief, *supra* note 5, at 34–35.

100. *See supra* Section II.A.

law enforcement to be dishonest,¹⁰¹ are influenced by court bias in favor of law enforcement,¹⁰² and lead to inconsistent opinions.¹⁰³

In addition to showing us the dangers of applying a subjective, motive-based test, the *Ahmed* interrogation shows how easily law enforcement can ignore *Miranda*'s hard rule and still capture admissible confessions. Before *Seibert*, the Supreme Court's jurisprudence admitted post-*Miranda* violation confessions in two basic contexts: (1) where the public or a police officer faced an imminent threat;¹⁰⁴ or (2) where the failure to warn was unintentional.¹⁰⁵ Justice Kennedy's test instead admits (voluntary) confessions after *Miranda* violations in any circumstance where the officer's motive was not to undermine the effectiveness of the *Miranda* warnings.¹⁰⁶ This test thus denotes a shift in *Miranda* jurisprudence. Formerly, only a small subset of circumstances allowed officers to withhold *Miranda* warnings and still introduce confessions at trial. Now, a much larger set of circumstances permit prosecutors to admit confessions elicited after officers failed to issue *Miranda* warnings. This state of affairs allows law enforcement to ignore too easily *Miranda*'s requirements and admit confessions: Justice Kennedy's test seems to permit an infinite number of reasons to withhold *Miranda* warnings.

Justice Kennedy's shift from pre-*Seibert* jurisprudence might not have been so dire if *Elstad*'s voluntariness analysis could successfully protect defendants from "the compulsion inherent in custodial surroundings."¹⁰⁷ If courts aggressively scrutinized post-midstream warning confessions under *Elstad*, then perhaps the ultimate post-*Seibert* analysis would not leave a defendant significantly less protected than he was before *Seibert*. Still, given the heavy burden on defendants to disprove voluntariness after they receive *Miranda* warnings and waive their rights, Justice Kennedy's opinion leaves defendants more vulnerable to custodial coercion.¹⁰⁸ For law enforcement,

101. See generally Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1346 (1996) (recounting several instances of police dishonesty).

102. See *id.* at 1355 n.70 (noting that 86 percent of police officers surveyed said that it was "unusual but not rare for judges to disbelieve police testimony"); Cloud, *supra* note 85, at 1323 ("When judges must decide whom to believe, it is not surprising that they usually opt to believe law enforcers rather than lawbreakers.").

103. See Joëlle Anne Moreno, *Faith-Based Miranda?: Why the New Missouri v. Seibert Police "Bad Faith" Test Is a Terrible Idea*, 47 ARIZ. L. REV. 395, 397-98 (2005).

104. *New York v. Quarles*, 467 U.S. 649, 657-59 (1984); see also *infra* Section II.C.

105. See *Missouri v. Seibert*, 542 U.S. 600, 615 (2004) (plurality opinion) ("[I]t is fair to read *Elstad* as [based on] . . . a good-faith *Miranda* mistake . . ."). But see Moreno, *supra* note 103, at 411 ("*Elstad* . . . did not turn on a distinction between good and bad faith *Miranda* violations.").

106. *Seibert*, 542 U.S. at 621-22 (Kennedy, J., concurring in the judgment).

107. *Miranda v. Arizona*, 384 U.S. 436, 458 (1966).

108. See Thompson, *supra* note 86, at 646 ("The Court essentially teaches the police how to violate *Miranda* intentionally and then 'cure' the violation so as to render the incriminating statements admissible.").

issuing *Miranda* warnings—the mechanism *Miranda* established to counteract governmental coercion¹⁰⁹—has become less necessary, and thus defendants are faced with a greater threat of compulsion.

From a doctrinal perspective, Justice Kennedy's test is based on a novel and "incoherent" reliance on the subjective motives of law enforcement.¹¹⁰ The Supreme Court has historically eschewed reliance on law enforcement's subjective motives in the Fifth Amendment context. When the Court analyzed a defendant's waiver of rights, for example, it noted pointedly that "the state of mind of the police is *irrelevant* to the question of the intelligence and voluntariness of respondent's election to abandon his rights."¹¹¹ Justice Kennedy's focus on the subjective motives of government officials damages the protections of the Self-Incrimination Clause.¹¹² As Justice O'Connor noted in her *Seibert* dissent, the "heart" of the Fifth Amendment—" [f]reedom from compulsion"—has nothing to do with whether law enforcement intended to coerce a confession.¹¹³ Instead, the "heart" of the Fifth Amendment is "whether a suspect's decision to speak truly was voluntary."¹¹⁴

Justice Kennedy's focus on the motives of law enforcement as opposed to the experience of the defendant is particularly problematic when viewed through the lens of two-step national security interrogations. When law enforcement grills a defendant about his terrorist activity for days, such a defendant might reasonably consider farcical the midstream admonition that he has the "right to remain silent." Especially in the national security context, a defendant may be unfamiliar with American criminal procedure or the English language.¹¹⁵ 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.¹¹⁶ This effect seems contrary to the spirit of the Fifth Amendment's mandate that the government cannot coerce a defendant into serving as "a witness against himself."¹¹⁷

109. See generally Leo, *supra* note 32, at 668–72, for an explanation of why *Miranda* warnings are normatively desirable.

110. *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 306, 315 (2004) [hereinafter *Leading Cases*] ("As a matter of principle, however, this emphasis on an officer's intent is incoherent: whether a confession is coercively obtained cannot depend on what occurs inside a police officer's head.").

111. *Moran v. Burbine*, 475 U.S. 412, 423 (1986) (emphasis added); accord *New York v. Quarles*, 467 U.S. 649, 656–57 (1984) (explaining that courts should not examine the question of imminent harm with respect to "the subjective motivation of the arresting officer" but rather with respect to the objective circumstances surrounding the officer when he made his decision *not* to warn).

112. See *Missouri v. Seibert*, 542 U.S. 600, 624 (2004) (O'Connor, J., dissenting).

113. *Id.*

114. *Id.*

115. See, e.g., Defense Brief, *supra* note 3, at 79.

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

117. U.S. CONST. amend. V.

C. *The General Terrorist Threat Does Not Justify Weakening
Fifth Amendment Protections*

Some suggest that weakening *Miranda*, as Justice Kennedy's test has, is most appropriate in the terrorism context,¹¹⁸ but the Court's treatment of the writ of habeas corpus, which shares a number of profound structural similarities with the right against self-incrimination, suggests that it has already rejected this very argument in a parallel field. Both the writ of habeas corpus and the right against self-incrimination are ancient common law protections.¹¹⁹ They were added to the Constitution with memories of English tyranny and oppression firmly embedded in the minds of the Founders.¹²⁰ The writ of habeas corpus and the right against self-incrimination are "vital instrument[s] for the protection of individual liberty"¹²¹ and are "fundamental to our system of constitutional rule."¹²² Certainly there are differences between the two protections,¹²³ but the fundamental values they represent and their place in history are directly comparable.

In the habeas context, the Supreme Court has noted that while the executive deserves deference to "apprehend and detain those who pose a real danger to our security," the protections enshrined in the Constitution should not bend to the threats presented by modern terrorism.¹²⁴ As the Court has noted, the lessons of our Founders, the choices and judgments they instilled in our Constitution, and "[e]stablished legal doctrine . . . must be consulted for its teaching."¹²⁵ The Self-Incrimination Clause and the constitutional rules that accompany it must not be cast aside when expediency demands. "Security subsists . . . in fidelity to freedom's first principles,"¹²⁶

118. See, e.g., Questioning of Terrorism Suspects Act of 2010, H.R. 5934, 111th Cong. (2010), available at <http://www.govtrack.us/congress/bills/111/hr5934/text> (declaring that the public safety exception to *Miranda* should apply in the terrorism context).

119. See *Boumediene v. Bush*, 553 U.S. 723, 739–42 (2008) (discussing the history of the writ of habeas corpus); *Miranda v. Arizona*, 384 U.S. 436, 442–43 (1966) (discussing the age-old maxim "*nemo tenetur seipsum accusare* [no man is bound to accuse himself]" (quoting *Brown v. Walker*, 161 U.S. 591, 596 (1896)) (internal quotation marks omitted)); *Twining v. New Jersey*, 211 U.S. 78, 91–92 (1908) (discussing the history of the right against self-incrimination), *overruled in part by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

120. See *Boumediene*, 553 U.S. at 742 (noting that the history of the insufficiency of the English common law writ led the Founders to constitutionalize it); *Brown v. Walker*, 161 U.S. 591, 597 (1896) ("So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law . . .").

121. *Boumediene*, 553 U.S. at 743.

122. *Miranda*, 384 U.S. at 468.

123. For example, the writ of habeas corpus can be suspended under certain circumstances but the Self-Incrimination Clause cannot. Compare U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it."), with U.S. CONST. amend. V (providing no exceptions to the enforcement of the right against self-incrimination).

124. *Boumediene*, 553 U.S. at 797.

125. *Id.*

126. *Id.*

and terrorism is not so unique a threat as to warrant the abrogation of our constitutional rights. Our collective security is enhanced, not diminished, when we fulfill our legal and constitutional obligations not only in the context of the writ of habeas corpus but also in that of a defendant's right against self-incrimination.¹²⁷

Both Democratic and Republican officials have suggested that the government's interest in uncovering information relevant to national security justifies limiting a defendant's *Miranda* and Self-Incrimination Clause rights in the terrorism context more than other contexts.¹²⁸ Still, government officials have not focused public debate about terrorism interrogations on *Seibert*, despite the permission Justice Kennedy's test grants to police officers to withhold *Miranda* warnings for "proper" (including, presumably, national security) motives. Instead, the public debate has focused largely on *New York v. Quarles*¹²⁹ and the Supreme Court's narrow construction of the "public safety" exception to *Miranda*.¹³⁰ The public safety exception that officials often seek to broaden permits officers to question an unwarned suspect and introduce incriminating statements he makes at trial when the public faces an imminent threat upon which the answers to those questions depend.¹³¹ Recently, during the debate surrounding the interrogations of Boston Marathon bomber Dzhokhar Tsarnaev, officials in the Obama Administration supported extending the public safety exception generally to terrorism cases.¹³²

This effort to broaden the public safety exception is misplaced. The global terrorist threat to national security does not justify weakening *Miranda*'s protections either through Justice Kennedy's *Seibert* test or through the *Quarles* public safety mechanism. Arguments to the contrary misread the Court's *Miranda* jurisprudence and undervalue the Self-Incrimination Clause.

While Justice Kennedy's test seems to permit two-step national security interrogations,¹³³ the narrower public safety exception to *Miranda* cannot be

127. See *id.* ("[T]he exercise of [executive] powers is vindicated, not eroded, when confirmed by the Judicial Branch.")

128. See, e.g., Savage, *supra* note 28; Kasie Hunt, *Republicans Rip Eric Holder on Miranda Rights for Underwear Bomber*, POLITICO (Jan. 27, 2010, 11:14 AM), <http://www.politico.com/news/stories/0110/32073.html>.

129. 467 U.S. 649 (1984).

130. Democratic Congressman Adam Schiff of California, for example, proposed a bill in the House of Representatives that sought to extend *Miranda*'s public safety exception to terrorism cases generally and permit prosecutors to admit unwarned confessions at trial. Questioning of Terrorism Suspects Act of 2010, H.R. 5934, 111th Cong. (2010), available at <http://www.govtrack.us/congress/bills/111/hr5934/text>.

131. *Quarles*, 467 U.S. at 659.

132. Charlie Savage, *Debate over Delaying of Miranda Warning*, N.Y. TIMES (Apr. 20, 2013), <http://www.nytimes.com/2013/04/21/us/a-debate-over-delaying-suspects-miranda-rights.html>.

133. See *supra* Section II.A and *infra* Part IV for ways to limit the damage of Justice Kennedy's test.

expanded under current doctrine to permit general, unwarned terrorism interrogations.¹³⁴ Moreover, expanding *Quarles* would have profound effects on domestic criminal procedure.¹³⁵ When it established the public safety exception in *New York v. Quarles*, the Supreme Court focused on the “kaleidoscopic” circumstances of highly pressurized situations where public safety is directly threatened.¹³⁶ The Court acknowledged that when human lives are immediately in danger, an officer’s duty is to protect those lives even at the expense of a defendant’s *Miranda* rights.¹³⁷ In *Quarles*, a loaded gun was missing somewhere in a supermarket, thus presenting a concrete, immediate threat to officers and citizens in the area.¹³⁸ The potential cost of affording *Miranda* warnings was clear and substantial: lives depended on the officer locating the gun, and issuing the *Miranda* warnings could have prolonged the danger. In such situations, the Court noted, we as a society cannot demand that officers rise above their “instincts” to protect the public, even at the expense of a defendant’s rights.¹³⁹ In times of imminent danger where

134. One federal district court would beg to differ with my contention: the court in *United States v. Abdulmutallab* concluded that *Quarles* permits unwarned questioning of terrorism suspects without the clear justification of an imminent threat. See *United States v. Abdulmutallab*, No. 10-20005, 2011 WL 4345243 (E.D. Mich. Sept. 16, 2011). The court relied on *United States v. Khalil*, 214 F.3d 111 (2d Cir. 2000), to argue broadly that “[t]he federal courts have extended the logic of *Quarles* to the questioning of terrorism suspects.” *Abdulmutallab*, 2011 WL 4345243, at *5. The court in *Khalil*, however, did not simply expand *Quarles* to cover terrorism interrogations; it instead applied the public safety exception because officers discovered *live* pipe bombs and the officers’ questions related to the stability of those bombs. *Khalil*, 214 F.3d at 121. The court in *Khalil* correctly admitted the defendant’s unwarned, incriminating statements under the safety exception due to an imminent threat to public safety: officers “were concerned that the bomb would explode before they could disarm it.” *Id.* at 115. By contrast, the *Abdulmutallab* court found that the public safety exception permitted unwarned questioning motivated by officers’ concerns of general, undefined terrorism threats. See *Abdulmutallab*, 2011 WL 4345243, at *5–6. Certainly unwarned questions are appropriate when they reflect concerns that terrorist attacks are imminent, but courts should not permit unwarned interrogations under the public safety exception without the justification of credible, imminent threats to public safety. Fortunately it appears that few courts have applied *Quarles* this broadly in the terrorism context. Nonetheless, the *Abdulmutallab* court’s decision has been damaging. *Abdulmutallab* has fanned the flames of misunderstanding about the appropriate use of *Quarles*’s public safety exception. See Savage, *supra* note 132 (“[The *Abdulmutallab*] ruling was seen by the administration as confirmation that its new policy was constitutional . . .”).

135. If gathering information about terrorist activity justified an exception to *Miranda*’s firm requirement of advising defendants of their rights, what would stop courts from applying the public safety exception in the domestic organized crime, gang, or narcotics conspiracy contexts? Any defendant involved in planned criminal activity can provide information that might hypothetically save lives, yet the mere possibility of acquiring life-saving information does not justify systematically undermining a defendant’s right against self-incrimination. The law need not conform to officers’ natural instincts in the two-step national security interrogation context because typically the circumstances presented are not so “exigen[t]” as to justify “spontaneity rather than adherence to a police manual.” *Quarles*, 467 U.S. at 656, 659 n.8.

136. *Id.* at 655–57.

137. *Id.* at 657.

138. *Id.*

139. *Id.* at 659.

“exigency require[s] immediate action by the officers,”¹⁴⁰ the law must bend to an officer’s unavoidable (and perhaps laudable) instincts.

Unlike Justice Kennedy’s test, the *Quarles* public safety exception to the *Miranda* warnings requirement does not apply in many circumstances where the government seeks national security information from a terror suspect.¹⁴¹ With two-step national security interrogations, neither the public nor the interrogating officials face imminent, credible threats to safety. In the case of the Boston Marathon bombing, for instance, once authorities determined that any imminent threats had subsided,¹⁴² it was inappropriate to suggest that the public safety exception applied to Dzhokhar Tsarnaev.¹⁴³ *Quarles* provides “a narrow exception to the *Miranda* rule”: it imposes a fierce imminence requirement that simply cannot justify ignoring *Miranda* in most two-step national security interrogation contexts.¹⁴⁴ By contrast, under Justice Kennedy’s *Seibert* test, officials could have conducted a two-step national security interrogation after the Boston Marathon bombing as long as they were not motivated to vitiate Tsarnaev’s *Miranda* rights.¹⁴⁵

III. JUSTICE SOUTER’S *SEIBERT* TEST IS SUPERIOR TO JUSTICE KENNEDY’S

While Justice Kennedy’s *Seibert* test unnecessarily restricts a defendant’s right against self-incrimination, Justice Souter’s test would revive the self-incrimination protections of the *Miranda* warnings and limit the use of two-step national security interrogations. Section III.A articulates why Justice Souter’s test is more consistent with previous Fifth Amendment jurisprudence and appropriately ignores Justice Kennedy’s focus on the subjective intent of law enforcement. Section III.B argues that, under Justice Souter’s test, the warned confession derived from Ahmed’s two-step national security interrogation would be inadmissible. Finally, Section III.C explains how courts may eschew Justice Kennedy’s test and instead apply that of Justice Souter.

140. *Id.* at 659 n.8.

141. See, e.g., Government Brief, *supra* note 5, at 27. Note that my argument here does not encompass the rare “ticking time bomb” scenario. If officers or agents know that a terrorism suspect has information about a credible, imminent threat to public safety, *Quarles* would clearly allow the admissibility of incriminating statements made during unwarned questioning about that specific threat.

142. See Donovan Slack, *Boston Police: Tsarnaev ‘in No Condition to Be Interrogated’*, POLITICO (Apr. 21, 2013, 9:18 AM), <http://www.politico.com/blogs/politico-live/2013/04/boston-police-tsarnaev-in-no-condition-to-be-interrogated-162205.html?hp=l3>.

143. My contention here assumes that no other bombs or accomplices remained at large; if other bombs remained undiscovered, clearly the threat to public safety would warrant limited, unwarned questioning for the purposes of finding those bombs.

144. *Quarles*, 467 U.S. at 657–58.

145. See *supra* Section II.A for further explanation as to how Justice Kennedy’s *Seibert* test likely functions in the national security context.

A. *Justice Souter's Test Is More Consistent with Miranda Jurisprudence*

Justice Souter's plurality test is a stronger means of analyzing the effect of two-step interrogations on a defendant's right against self-incrimination because it is more consistent with the spirit and letter of the *Miranda* decision. The plurality's opinion asked one question to determine the admissibility of a post-midstream warning confession: "[W]ould [it] be reasonable to find that in [two-step interrogations] the [*Miranda*] warnings could function 'effectively' as *Miranda* requires"?¹⁴⁶ As Justice Souter noted, the point of a two-step interrogation is "to get a confession the suspect would not make if he understood his rights at the outset."¹⁴⁷ The strongest protection against such deception is ensuring that the midstream warnings were effective as required. This test is consistent with that of *Miranda* on its face¹⁴⁸ and in its application. *Miranda* held that the inherently coercive atmosphere of interrogation environments requires law enforcement to effectively apprise defendants of their rights to render a confession uncoerced.¹⁴⁹ The basic thrust of *Miranda* thus comports with Justice Souter's inquiry: if law enforcement fails to administer effective warnings, the confession is inadmissible.¹⁵⁰

Justice Souter's opinion also presents a stronger doctrinal solution to two-step interrogations by reaffirming the constitutional status of *Miranda* warnings. The Court in *Dickerson v. United States* held that *Miranda* was a "constitutional" rule by invalidating a congressional statute that attempted to overrule *Miranda*.¹⁵¹ Although some justices continue to dispute *Miranda*'s constitutional status,¹⁵² this holding represented the culmination of decades of debate and clarified that the *Miranda* warning is a direct requirement of the Fifth Amendment itself rather than mere judicial prophylaxis.¹⁵³

146. *Missouri v. Seibert*, 542 U.S. 600, 611–12 (2004) (plurality opinion) ("[Courts should ask if] the warnings [could] effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture[.] Could they reasonably convey that he could choose to stop talking even if he had talked earlier?").

147. *Id.* at 613.

148. *See* *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966).

149. *Cf. id.* at 465 ("The entire thrust of police interrogation . . . in all the cases today[] was to put the defendant in such an emotional state as to impair his capacity for rational judgment."); *id.* at 458 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.").

150. *Id.* at 467–68, 476; *see also Seibert*, 542 U.S. at 611–12 (plurality opinion).

151. *Dickerson*, 530 U.S. 428, 431–32 (2000).

152. *See, e.g.,* *United States v. Patane*, 542 U.S. 630, 636–37 (2004) (plurality opinion) ("[T]he *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause. . . . [P]olice do not violate the Constitution . . . by mere failures to warn.").

153. *See* Yale Kamisar, *Foreword: From Miranda to § 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879, 883–88 (2001) ("[A]t the time the *Miranda* opinion was handed down almost everyone . . . understood that it was a constitutional decision—an interpretation of the Fifth Amendment privilege against self-incrimination. . . . In the 1970s, however, a new majority of

Dickerson's constitutionalization of *Miranda* implicitly eroded a key part of the *Elstad* Court's rationale and invited the *Seibert* Court to establish a new standard for two-step interrogations.¹⁵⁴ *Elstad* rested much of its analysis on the argument that *Miranda* was merely prophylactic and not constitutionally mandated.¹⁵⁵ Consequently, *Elstad* held that the failure to issue effective *Miranda* warnings did not automatically result in a confession's suppression.¹⁵⁶ The *Seibert* plurality recognized this and "subtly overturned" *Elstad*: now, only objectively "effective" warnings, consistent with *Miranda*, can extinguish the taint of earlier failures to warn.¹⁵⁷ Even if a post-warning confession is voluntary, Justice Souter's test does not admit the confession unless the *Miranda* warnings were "effective."¹⁵⁸ The plurality's approach thus reaffirms the import of *Miranda* and the appropriate post-*Dickerson* constitutional status of the *Miranda* warnings.¹⁵⁹

The plurality opinion is also more consistent with *Miranda* in its focus on the experience of the defendant and its emphasis on objective review.¹⁶⁰ One of *Miranda*'s strengths was precisely its rejection of the pre-*Miranda* subjective-voluntariness inquiry to determine whether confessions are coerced.¹⁶¹ *Miranda* established the objective, bright-line rule that if a defendant is not warned, a confession must be suppressed.¹⁶² Still, *Miranda*, like Justice Souter's *Seibert* opinion, did not completely eliminate subjective inquiries: waivers had to be made "voluntarily, knowingly and intelligently."¹⁶³

the Supreme Court . . . began kicking dirt at *Miranda*. . . . [But *Dickerson*] dismissed the way some majorities of the Court . . . had talked about *Miranda* in the past.").

154. *Leading Cases*, *supra* note 110, at 310, 312 ("In holding, essentially, that unwarned confessions are deemed coerced for constitutional purposes, *Dickerson* eviscerated the reasoning that undergirded *Elstad*.").

155. *Oregon v. Elstad*, 470 U.S. 298, 306–07 (1985).

156. *Id.* at 306–07, 309.

157. *Leading Cases*, *supra* note 110, at 313 ("*Seibert* subtly overturned *Elstad*'s presumption that a voluntary prewarning confession produces a voluntary postwarning confession."); *see also* *Missouri v. Seibert*, 542 U.S. 600, 611–12 (2004) (plurality opinion).

158. *See Seibert*, 542 U.S. at 611–12 (plurality opinion).

159. *But cf.* *United States v. Patane*, 542 U.S. 630, 636–37 (2004) (plurality opinion) (contending that the *Miranda* rule is mere prophylaxis); Kit Kinports, *The Supreme Court's Love-Hate Relationship with Miranda*, 101 J. CRIM. L. & CRIMINOLOGY 375, 376 (2011) (arguing that in recent years, even post-*Dickerson*, "the Supreme Court's . . . attitude towards its landmark ruling in *Miranda v. Arizona* seems to be one of studied ambivalence" (footnote omitted)).

160. *See Seibert*, 542 U.S. at 616–17 (plurality opinion). Justice Kennedy's test, to the contrary, offered an inquiry based on the difficult-to-prove subjective intent of law enforcement. *See id.* at 622 (Kennedy, J., concurring in the judgment).

161. *See supra* note 34 and accompanying text.

162. *See Miranda v. Arizona*, 384 U.S. 436, 468, 476 (1966).

163. *Id.* at 444; *see also id.* at 467 (noting that the defendant must be "adequately and effectively apprised of his rights," which may require a subjective inquiry if law enforcement deviates from *Miranda*'s prescribed warnings).

Instead of eliminating subjective inquiries, *Miranda* limited ad hoc, inconsistent reviews and ordered that law enforcement give warnings before interrogations.¹⁶⁴ The *Seibert* inquiry, true to *Miranda*, rectified the subjective weakness of *Elstad* by “shift[ing] the focus to whether the *Miranda* warnings were *effective*,” as opposed to whether the confession was subjectively voluntary.¹⁶⁵

While subjectivity is inherent in all the tests proposed (even *Miranda* incorporates subjective components), Justice Souter’s plurality test most effectively limits the dangers inherent in subjective analysis. One criticism of Justice Souter’s test is that it might be mere camouflage for the purely subjective “voluntariness” inquiry.¹⁶⁶ Even when the warnings are effective, courts must determine whether a waiver of rights is “made voluntarily, knowingly and intelligently.”¹⁶⁷ Nonetheless, the disadvantage of the plurality’s opinion—the fact that it still falls back on subjective, case-by-case voluntariness inquiries for waivers—is more pronounced in Justice Kennedy’s test. Justice Kennedy’s test both begins with a subjective inquiry into the officers’ intent and motive and often ends with *Elstad*’s similarly problematic subjective-voluntariness inquiry.¹⁶⁸

Although it is *Seibert*’s best offering, Justice Souter’s test is not perfect. Unlike *Miranda*, the test is vague and leaves law enforcement without clear guidance.¹⁶⁹ Justice Souter also provides no guidance to courts about how to weigh the differing effectiveness factors¹⁷⁰ and thus promotes the risk that courts will apply the test inconsistently. This vagueness represents a special problem in the context of serious terrorism threats and national security investigations where decisions need to be made quickly and have significant, life-or-death implications. Still, despite its infirmities, Justice Souter’s test focuses on the issues that are most relevant to the Fifth Amendment: whether the defendant was sufficiently aware of his rights to be able to make

164. See *id.* at 444.

165. United States v. Carter, 489 F.3d 528, 534–35 (2d Cir. 2007); see also United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1137 (11th Cir. 2006) (“In answering that question, *Elstad* relied on a presumption that a defendant’s waiver is voluntary in the absence of circumstances showing otherwise. In contrast, the *Seibert* plurality looked more to whether the *Miranda* warnings given to a reasonable person in the suspect’s shoes could function effectively as *Miranda* requires, and required a multifactor test to determine their effectiveness.” (citation omitted)).

166. See Rogers, *supra* note 33, at 313; see also Eric English, Note, *You Have the Right to Remain Silent. Now Please Repeat Your Confession: Missouri v. Seibert and the Court’s Attempt to Put an End to the Question-First Technique*, 33 PEPP. L. REV. 423, 447–48 (2006).

167. *Miranda*, 384 U.S. at 444.

168. See *Missouri v. Seibert*, 542 U.S. 600, 620–22 (2004) (Kennedy, J., concurring in the judgment).

169. English, *supra* note 166, at 447–48. Compare *Seibert*, 542 U.S. at 611 (plurality opinion) (posing several questions to consider but declining to provide a clear definition of what constitutes an “effective” warning), with *Miranda*, 384 U.S. at 444 (clearly establishing when statements will be admissible in court and outlining procedural safeguards).

170. See *infra* Section III.B for a discussion of the application of Justice Souter’s factors.

a “voluntar[y], knowing[,] and intelligent[]” choice to self-incriminate.¹⁷¹ For those reasons, and because the test is more consistent with prior Fifth Amendment and *Miranda* jurisprudence, Justice Souter’s test remains *Seibert*’s best offering.

B. *Under Justice Souter’s Test, a Court Would Suppress Ahmed’s Confession*

While Justice Kennedy’s test would focus on the subjective intentions of the FBI agents who interrogated Ahmed, Justice Souter’s test would focus instead on Ahmed’s experience and the objective effectiveness of Ahmed’s *Miranda* warnings.¹⁷² Justice Souter offered five factors to analyze the interrogation procedure and the effectiveness of midstream warnings. He used the factors to contrast the good-faith, accidental failure to warn in *Elstad*—where the warnings were objectively effective—with the intentional failure to warn in *Seibert*—where the warnings were *not* objectively effective.¹⁷³ While few courts have applied the plurality’s test in full, those that have done so followed Justice Souter’s lead by using the plurality’s factors to distinguish the case under review from *Elstad* and *Seibert* to determine the effectiveness of the *Miranda* warnings.¹⁷⁴

A court using Justice Souter’s approach would likely have suppressed Ahmed’s second-stage, self-incriminating statements. Applying Justice Souter’s factors to the *Ahmed* facts indicates that the case looks more like *Seibert* than *Elstad*, suggesting that Ahmed’s midstream warnings were likely ineffective. Still, even though the government would likely be unable to introduce Ahmed’s confessions, suppression would not overly hamper its interest in acquiring valuable intelligence. Government officials could still interrogate Ahmed without offering *Miranda* warnings to acquire valuable national security information. Prosecutors would then have to use evidence besides Ahmed’s own incriminating statements to prosecute him.¹⁷⁵ This result would arguably make prosecutions more difficult, but the Self-Incrimination Clause was never intended to facilitate easy convictions.¹⁷⁶

Justice Souter’s first three factors focus on the questions interrogators ask and the responses a defendant supplies. Courts must look to the “completeness and detail of the questions and answers in the first round of interrogation” and the “overlapping content of the two statements.”¹⁷⁷ They must

171. *Miranda*, 384 U.S. at 444.

172. See *Seibert*, 542 U.S. at 611–12 (plurality opinion).

173. See *id.* at 615; Stewart J. Weiss, *Missouri v. Seibert: Two-Stepping Towards the Apocalypse*, 95 J. CRIM. L. & CRIMINOLOGY 945, 968 (2005).

174. See, e.g., *United States v. Aguilar*, 384 F.3d 520, 525 (8th Cir. 2004) (“The facts before us are closer to those in *Seibert* than those in *Elstad*.”).

175. See *United States v. Patane*, 542 U.S. 630, 636–37 (2004) (plurality opinion).

176. See *New York v. Quarles*, 467 U.S. 649, 657 (1984) (“[W]hen the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost.”); *Twining v. New Jersey*, 211 U.S. 78, 91 (1908), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964).

177. *Seibert*, 542 U.S. at 615 (plurality opinion).

also examine “the degree to which the interrogator’s questions treated the second round as continuous with the first.”¹⁷⁸ These factors in *Ahmed* strongly cut against admissibility. During the first interrogation, agents questioned Ahmed in detail.¹⁷⁹ They sought to ensure that he was comfortable speaking freely and openly about what he knew about the terrorist group al-Shabaab.¹⁸⁰ The government wanted to gather the maximum amount of information possible.¹⁸¹ Likewise, statements made during the first and second interrogations concerned the same content. In both phases of the interrogation, the defendant discussed his knowledge of al-Shabaab and his participation in the group’s activities.¹⁸² While the two topics are distinguishable, even the government admitted that the first “dirty” interrogation “inevitably elicited incriminating statements from the defendant.”¹⁸³

The final two factors in Justice Souter’s test focus on the interrogation atmosphere and again cut against admissibility when applied to *Ahmed*. First, how did “the timing and setting of the first and the second” interrogations compare?¹⁸⁴ Second, was there “continuity of police personnel”?¹⁸⁵ In *Ahmed*, the first and second interrogations were separated by five days,¹⁸⁶ but this break seems insufficient compared to the full length of Ahmed’s detention.¹⁸⁷ Also, although FBI agents “requested distinct personnel and a separate room for the un-*Mirandized* and *Mirandized* interviews,”¹⁸⁸ ultimately agents interrogated Ahmed in nearly identical rooms, in a single building, and with the same Nigerian security officials present.¹⁸⁹ Consistent with *Miranda* jurisprudence, the government’s *desire* to make the interrogation phases more distinct lacks significance under Justice Souter’s test.¹⁹⁰ Instead, the fact that the two interrogations occurred in similar settings with overlapping personnel supports suppression. If the room and at least some personnel were similar, “a reasonable person in the suspect’s shoes,”¹⁹¹ especially in

178. *Id.* Note that I analyze the factors here in a different order from that employed by Justice Souter. The order should not significantly affect the ultimate outcome or analysis.

179. See Government Brief, *supra* note 5, at 30.

180. *Id.*

181. *Id.* at 29.

182. See *id.* at 31.

183. *Id.* at 32.

184. *Missouri v. Seibert*, 542 U.S. 600, 615 (2004) (plurality opinion).

185. *Id.*

186. Government Brief, *supra* note 5, at 43.

187. According to Ahmed, he was held “incommunicado” for forty-one days prior to the unwarned interrogation, had no calendar or watch, and spent a total of over 100 days in custody. Defense Brief, *supra* note 3, at 5, 63.

188. Government Brief, *supra* note 5, at 40 (emphasis added).

189. Defense Brief, *supra* note 3, at 61–62; Government Brief, *supra* note 5, at 39 (noting that the interrogations occurred in the “same general location”).

190. See *Seibert*, 542 U.S. at 613–14 (plurality opinion). *But cf. id.* at 622 (Kennedy, J., concurring in the judgment) (suggesting that efforts to “distinguish the two contexts” could serve as sufficient curative measures).

191. *Id.* at 617 (plurality opinion).

the context of a foreign terrorism interrogation, could conclude that there was no effective difference between the first and second interrogations. Consequently, under Justice Souter's test, the midstream *Miranda* warnings were likely ineffective, and Ahmed's second-stage, unwarned confessions would be suppressed.¹⁹²

C. *Marks Does Not Bar the Use of Justice Souter's Test*

While the majority of courts have concluded that Justice Kennedy's test is *Seibert's* holding, courts can nonetheless use Justice Souter's plurality opinion consistent with the Supreme Court's *Marks v. United States* rule.¹⁹³ In *Marks*, the Supreme Court concluded that if the Court is divided, the opinion that rules on the "narrowest grounds" may be viewed as the Court's holding.¹⁹⁴ The *Marks* "narrowest grounds" test can be vague, and lower courts must interpret which opinion in a divided Court is "narrowest."

In the federal courts and among various commentators, there is growing consensus that Justice Kennedy's test is *Seibert's* narrowest opinion and thus its holding under *Marks*.¹⁹⁵ Courts offer two basic rationales to support the conclusion that Justice Kennedy's opinion is narrowest. First, courts consider the test to be narrower than that of the plurality because it would apply to fewer factual circumstances.¹⁹⁶ While the plurality's opinion would apply anytime law enforcement officials delayed administering *Miranda* warnings, Justice Kennedy's test would only apply in a narrow subset of cases where officers used "the two-step interrogation technique . . . in a calculated way to undermine the *Miranda* warning."¹⁹⁷ Second, courts consider Justice Kennedy's opinion to be narrowest because it merely carves out an exception to

192. In the context of Justice Kennedy's opinion, these facts would cut in favor of admitting the second confession: although the interrogation conditions were similar, if the agents had indeed requested different rooms or personnel, such a request suggests that they did not intend to conduct a deliberate two-step interrogation designed to circumvent *Miranda* by confusing the defendant. *See id.* at 622 (Kennedy, J., concurring in the judgment).

193. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

194. *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)) (internal quotation marks omitted).

195. *See, e.g., United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006) ("[W]e find *Seibert's* holding in Justice Kennedy's opinion concurring in the judgment."); *United States v. Briones*, 390 F.3d 610, 613 (8th Cir. 2004) ("Because Justice Kennedy relied on grounds narrower than those of the plurality, his opinion is of special significance."); English, *supra* note 166, at 463. *But see United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) ("Determining the proper application of the *Marks* rule to *Seibert* is not easy, because arguably Justice Kennedy's proposed holding in his concurrence was rejected by a majority of the Court.").

196. *See, e.g., United States v. Mashburn*, 406 F.3d 303, 308 (4th Cir. 2005); *see also Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment) ("I would apply a narrower test applicable only in the infrequent case, such as we have here . . .").

197. *Seibert*, 542 U.S. at 621–22 (Kennedy, J., concurring in the judgment); *see also Mashburn*, 406 F.3d at 308 ("Unlike the plurality opinion which announced a multi-factor test that would apply to both intentional and unintentional two-stage interrogations, Justice Kennedy's concurring opinion set forth 'a narrower test applicable only in . . . infrequent case[s]

*Elstad*¹⁹⁸: his test allows *Elstad* to survive in all circumstances except for the “infrequent case[s]” his opinion targets.¹⁹⁹ By contrast, the plurality arguably effectively overrules *Elstad*.²⁰⁰

However, an opinion cannot be “narrowest” if it offers rationales completely independent from those of other, broader opinions. The *Marks* test is simply not “workable” if a Supreme Court justice’s opinion does not “embody a position implicitly approved by at least five Justices who support the judgment.”²⁰¹ For *Marks* to apply, the “narrower” opinion must “represent a common denominator of the Court’s reasoning.”²⁰²

This logic demonstrates that courts should question the narrowness of Justice Kennedy’s opinion.²⁰³ The opinion is in some sense “narrower” in that it applies in a smaller number of factual circumstances than the plurality’s test, which might apply to all *Miranda* violations.²⁰⁴ Yet, what makes an opinion “meaningfully” narrower is not the amount of times it will be applied but the breadth of its logic.²⁰⁵ We should ask, therefore, whether Justice Kennedy’s opinion serves as a “logical subset of other, broader opinions”; if not, *Marks* does not apply.²⁰⁶ If the *Marks* rule does not mandate that lower courts use Justice Kennedy’s opinion, *Seibert* has no precedential holding and lower courts can apply their own analyses to two-step interrogations.²⁰⁷

. . . .” (citation omitted) (quoting *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment))).

198. See, e.g., *United States v. Carter*, 489 F.3d 528, 535 (2d Cir. 2007).

199. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment); see also *id.* at 625–26 (O’Connor, J., dissenting) (suggesting that Justice Kennedy’s test essentially “recognize[s] an exception to *Elstad* for intentional violations”).

200. See *id.* at 622 (O’Connor, J., dissenting) (“The plurality devours *Oregon v. Elstad*”). But see *United States v. Heron*, 564 F.3d 879, 885 (7th Cir. 2009) (“In the case of *Seibert*, the only thing we know for sure is that at least seven members of the Court . . . accepted some kind of exception to *Elstad*”); *Carter*, 489 F.3d at 535–36 (2d Cir. 2007) (“[A]ll of our sister circuits that have decided the issue have concluded that *Seibert*, rather than overruling *Elstad*, carved out an exception to *Elstad* We now join our sister circuits”). In stark contrast to *Elstad*, Justice Souter’s plurality opinion focuses not on whether the second confession is voluntary but rather on whether the midstream *Miranda* warnings were objectively effective. See *Seibert*, 542 U.S. at 612 (plurality opinion).

201. *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc).

202. *Id.* (emphasis added).

203. See, e.g., *Heron*, 564 F.3d at 885.

204. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment); see also *id.* at 622 (O’Connor, J., dissenting) (“The plurality devours *Oregon v. Elstad*”).

205. *King*, 950 F.2d at 781.

206. *Id.*

207. See *Heron*, 564 F.3d at 885 (“Counting Justice Breyer in the Kennedy camp, we are left with only two Justices who support the intent-based test. This is obviously not the ‘common denominator’ that *Marks* was talking about.”); *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (“Determining the proper application of the *Marks* rule to *Seibert* is not easy, because arguably Justice Kennedy’s proposed holding in his concurrence was rejected by a majority of the Court.”); *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (“When it is not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land

In *Seibert*, Justice Kennedy's opinion might not be the substantively or logically "narrower" opinion, even if he intended courts to apply it less frequently. The main logical thrust of his opinion is that confessions given when officers intentionally withhold *Miranda* warnings for the purposes of vitiating the effectiveness of those warnings must be analyzed differently from other confessions.²⁰⁸ Eight justices categorically rejected this logic. Both the dissent and the plurality eschewed analysis based on the subjective intent of law enforcement and focused instead (to varying degrees) on the experience of the defendant.²⁰⁹ In the case of *Ahmed*, Justice Kennedy would examine the interrogating FBI agents' subjective intent, whereas the other eight justices on the Court would focus on Ahmed's objective or subjective experience.

While no federal circuit court has yet explicitly held that Justice Kennedy's test need not be applied under *Marks*, several have suggested this as a possibility in dicta.²¹⁰ For example, although the Seventh Circuit in *United States v. Heron* declined to decide which *Seibert* test governs, it reasoned that it was "risky to assume that the Court has announced *any* particular rule of law" given the fragmented and logically distinct nature of the *Seibert* opinions.²¹¹

The Supreme Court recently offered dicta that might give lower courts further latitude to apply Justice Souter's test. In *Bobby v. Dixon*, officers intentionally failed to issue *Miranda* warnings for the admitted purpose of rendering ineffective Archie Dixon's right to remain silent.²¹² Dixon did not confess during an unwarned interrogation, but later that day, after officers gave him *Miranda* warnings in a separate interrogation, he confessed to murder.²¹³ The Supreme Court reversed the Sixth Circuit's decision that the confession should have been suppressed.²¹⁴ Although the Sixth Circuit ruled based on Justice Kennedy's *Seibert* test, the Supreme Court concluded that

because no one standard commands the support of a majority of the Supreme Court."); *King*, 950 F.2d at 782.

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

209. *See id.* at 613 (plurality opinion); *id.* at 628 (O'Connor, J., dissenting).

210. *See, e.g., Heron*, 564 F.3d at 884–85 ("[W]e conclude that the *Marks* rule is not applicable to *Seibert*. Although Justice Kennedy provided the crucial fifth vote for the majority, we find it a strain at best to view his concurrence taken as a whole as the narrowest ground on which a majority of the Court could agree."); *Carrizales-Toledo*, 454 F.3d at 1151 ("Determining the proper application of the *Marks* rule to *Seibert* is not easy, because arguably Justice Kennedy's proposed holding in his concurrence was rejected by a majority of the Court."); *State v. Farris*, 849 N.E.2d 985, 994 (Ohio 2006) (applying the plurality test as the *Seibert* rule and rejecting Kennedy's subjective-intent test).

211. *Heron*, 564 F.3d at 885 (emphasis added).

212. 132 S. Ct. 26, 28 (2011) (per curiam). Note that this case did not include two-step interrogations in the national security context. *Bobby*, 123 S. Ct. at 27–29.

213. *Id.* at 28.

214. *Id.* at 32.

Seibert was inapplicable because Dixon did not confess during the earlier, unwarned phase of the interrogation.²¹⁵

In a short per curiam opinion, the Court largely ignored the deliberateness of law enforcement's question-first, warn-later tactic.²¹⁶ Instead, the Court focused on whether the "unwarned and warned interrogations blended into one 'continuum'" and whether the suspect's previous "unwarned interrogation . . . undermine[d] the effectiveness of the Miranda warnings he received before confessing."²¹⁷ The Court concluded that because the suspect had not confessed during the first unwarned interrogation, "the sort of 'two-step interrogation technique' condemned in *Seibert*" did not impair the "effectiveness" of the midstream warnings.²¹⁸ The Supreme Court almost completely eschewed the Sixth Circuit's focus on the deliberateness of the *Miranda* violation. Instead, the Court's opinion focused on whether the warnings were effective.²¹⁹ While this case is distinguishable from *Ahmed* and other *Seibert*-style interrogations because Dixon did not confess during the unwarned interrogation, its analysis is revealing. The opinion suggests that less than a decade after *Seibert*, the Court may be more open to adopting the plurality's approach.²²⁰

IV. REPAIRING JUSTICE KENNEDY'S TEST: REVIVING THE SELF-INCRIMINATION CLAUSE

Justice Souter's test best serves the spirit and letter of the Fifth Amendment, but courts more widely apply Justice Kennedy's test. As we have seen through the lens of two-step national security interrogations, Justice Kennedy's focus on the subjective motives of law enforcement is a novel shift in Fifth Amendment jurisprudence that weakens protections against involuntary self-incrimination. This Part therefore suggests mechanisms to remedy Justice Kennedy's test and mitigate some of its damage.

A. Evidentiary Standards That Honor the Fifth Amendment

Justice Kennedy gave no guidance on how to apply his test, and thus courts are free to impose evidentiary rules that limit the disadvantages the test bestows on defendants.²²¹ Specifically, Justice Kennedy did not address

215. *Id.* at 31.

216. *Id.* at 31–32.

217. *Id.* (emphasis added) (quoting *Missouri v. Seibert*, 542 U.S. 600, 612 (2004) (plurality opinion)).

218. *Id.* at 32.

219. *Id.*

220. *See id.* at 31 (noting that Justice Kennedy did *himself* say that his opinion was narrower but conspicuously declining to endorse the opinion as *Seibert*'s narrowest opinion and rule).

221. *See* *United States v. Capers*, 627 F.3d 470, 477 (2d Cir. 2010) ("Justice Kennedy had no reason to explore how a court should determine when a two-step interrogation strategy had been executed deliberately."); *accord* *United States v. Williams*, 435 F.3d 1148, 1158 (9th Cir. 2006).

how courts should weigh the testimony of law enforcement if agents deny that they sought to undermine the effectiveness of *Miranda* warnings. We likewise do not know which party has the burden of proving or disproving intent and motive. Both of these open questions provide opportunities to rectify some of the dangers of the test. Evidentiary burdens can limit the advantages Justice Kennedy's test gives to the government and thus constrain the government's prosecutorial power. In the case of national security interrogations, evidentiary burdens will help the courts to more effectively scrutinize an agent's claim that his failure to warn was motivated solely by a desire to capture vital national intelligence. Moreover, since these are open questions, courts can answer them in a manner that aligns with the spirit of the Self-Incrimination Clause while still staying consistent with the letter of Justice Kennedy's allegedly governing opinion.

1. Scrutiny of Official Testimony

Courts should heavily scrutinize, and thus more easily discredit, the testimony of a federal agent that proffers a novel or "illegitimate" motive for undertaking two-step interrogations.²²² Heavily scrutinizing official testimony would predetermine what motives are more believable. Still, such scrutiny would not end the inquiry because even officials proffering a less believable or legitimate motive could offer objective evidence to support that motive. Nonetheless, with this rule, courts can more effectively and concretely analyze testimony relating to an official's subjective intent. Courts can also use this rule to offer clearer guidance about what types of two-step interrogations are more or less acceptable.

A "legitimate" motive could be a motive that the Supreme Court accepted prior to *Seibert*. For instance, courts could more easily believe a law enforcement official who claims that his motive in undertaking a two-step interrogation was not to vitiate the effectiveness of the *Miranda* warnings but rather to respond to an imminent threat to public safety. This motive would be consistent with the public safety exception outlined in *New York v. Quarles* and would thus stand as more "legitimate" and credible. Consequently, a government official proffering this rationale for his conduct could more easily demonstrate that his motive in undertaking a two-step interrogation was not to render the *Miranda* warnings ineffective.²²³ In the context of national security interrogations, the motive of eliciting information for

222. While the Second Circuit has not clearly defined "legitimate" versus "illegitimate," it has adopted a rule that more closely scrutinizes official testimony when officials present "illegitimate" reasons for delaying *Miranda* warnings. *United States v. Moore*, 670 F.3d 222, 229 (2d Cir. 2012); *see also Williams*, 435 F.3d at 1159 ("Once a law enforcement officer has detained a suspect *and subjects him to interrogation*—as was the case in *Seibert* and is the case here—there is rarely, if ever, a legitimate reason to delay giving a *Miranda* warning until after the suspect has confessed.").

223. *See Williams*, 435 F.3d at 1158–59.

national security purposes is novel and would be less credible if the interrogation did not respond to an imminent threat. Consequently, in this context, federal agents would have to buttress their testimony with substantial objective and contextual evidence.

Applying heavy scrutiny to *new* reasons to justify failures to issue *Miranda* warnings merely weighs the evidence that law enforcement presents to the court. It does not change Justice Kennedy's test because new reasons to warn can still pass muster. This rule would merely make it harder for the government to pass Justice Kennedy's test and thus mitigate the inherent advantages that Justice Kennedy's test awards to the government. Defendants such as Ahmed would thus recapture some of the protections that Justice Kennedy's test diminished.

2. Burden of Proof

After a criminal defendant alleges that the government violated his Fifth Amendment rights, a court should allocate the burden of proof to the government to disprove that its agents intentionally engaged in a two-step interrogation for the purpose of rendering the *Miranda* warnings ineffective.²²⁴ While courts sometimes reject forcing a party to disprove a negative,²²⁵ the particular disadvantages and the import of this inquiry demand that the government bear this burden. Often, the question of intent and motive will decide whether a defendant's confession should be suppressed.²²⁶ The stakes of this oft-decisive question thus demand some efforts to equalize the field.²²⁷

Unless the government is forced to bear the burden of proof, a court will often lack the opportunity to examine probative evidence. The evidence that demonstrates law enforcement's subjective intent and motive is typically "in the hands of the government."²²⁸ The law must incentivize the government to disseminate that evidence both to the court and to the defendant. All that a defendant alone can speak to are the facts related to his particular experience, and those facts will not often present viable arguments about an agent's subjective intent.²²⁹

Because the Second Circuit allocates the burden of proof in this way, we can see this rule's advantages in *Ahmed*. There, the government was *forced* to

224. Several circuits, including the Second and the Eighth, have allocated the burden of proof here to the government for many of the reasons enumerated in this Section. *See, e.g., Capers*, 627 F.3d at 479; *United States v. Ollie*, 442 F.3d 1135, 1142–43 (8th Cir. 2006).

225. *Ollie*, 442 F.3d at 1143.

226. *Capers*, 627 F.3d at 479.

227. *See id.*

228. *Id.*

229. In *Ahmed*, for example, the defendant would not have known about the probative, "significant efforts" law enforcement had taken to ensure that his two interrogations were distinct experiences. *See* Government Brief, *supra* note 5, at 34. Although those efforts may have failed to produce different interrogation experiences from Ahmed's perspective, they do provide illuminating evidence of the agents' subjective intent.

reveal evidence about its agents' intent, evidence that Ahmed could never have had access to otherwise.²³⁰ Especially in the national security context, where interrogations may be classified and highly secretive, it is important to impose a burden on the government to expose evidence of what actually occurred during an interrogation.

Unlike a defendant who challenges the admissibility of his confession under *Miranda*, a defendant who challenges a confession based on Justice Kennedy's *Seibert* test often lacks relevant information. Under *Miranda*, to demonstrate that a confession was presumptively coerced, all a defendant needed to do was prove that law enforcement failed to advise him of his rights.²³¹ *Miranda* thus asked a simple question: Was a defendant warned? The defendant in *Miranda* possessed all the evidence to answer this question. He knew whether he was warned and could offer his own evidence on the subject. By contrast, under Justice Kennedy's test, nearly all the relevant information lies with the government. The defendant may simply have no knowledge of important facts that would allow him to demonstrate law enforcement's bad intent. Forcing the government to prove that officials did *not* seek to vitiate the effectiveness of the *Miranda* warnings can rectify this information imbalance.

3. A Mixed-Motive Presumption

Allocating the burden of proof to the government may not be sufficient. This Note suggests that it may be easier for the government to demonstrate that agents have not intentionally engaged in a two-step interrogation for the purpose of undermining the *Miranda* warnings' effectiveness when the government demonstrates a credible alternative motive.²³² The analysis of *Ahmed* in Part II shows that the credible alternative motive—seeking information relevant to national security—combined with probative objective evidence might allow the government to easily pass Justice Kennedy's test. This possibility puts a defendant at a disadvantage and allows law enforcement, in effect, to disregard the *Miranda* warnings and the warnings' ability to protect a defendant's right against self-incrimination.

Applying a presumption that law enforcement undertakes intentional, two-step interrogations with mixed motives counters this disadvantage. For this Note's purposes, a "mixed-motive," two-step interrogation occurs when the government undertakes an intentional, two-step interrogation *both* for the purpose of rendering the *Miranda* warnings ineffective and for some other valid motive. In *Ahmed*, for instance, the defense argued that the government's actions and testimony demonstrated that the interrogation was conducted for dual purposes: first, eliciting information deemed vital for national security, and second, undermining the effectiveness of the *Miranda*

230. See Government Brief, *supra* note 5, at 27–29 (discussing the content of agents' testimony).

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

232. See *supra* Section II.B.

warnings.²³³ If courts were to apply a mixed-motive presumption, they would presuppose that evidence of a permitted motive (e.g., national security-based motives) does not prove lack of a prohibited motive. The government would have to present more than a credible, alternative motive to successfully oppose a defendant's motion to suppress.

This is perhaps a difficult presumption to overcome, but it would not overly hamper interrogation effectiveness. If law enforcement officials determine that a two-step process is needed, they can undertake the process and apply robust curative measures.²³⁴ Such curative measures might include, as Justice Kennedy suggested, a detailed, midstream addendum warning explaining the differences between the two phases of the interrogation and the effects those distinctions have on the defendant's rights. An addendum warning could be crafted in lay terms to mitigate confusion.²³⁵ The government could also ensure that significant time passes between the "dirty" and "clean" phases of a two-step interrogation commensurate with the overall context of a defendant's ongoing detention.²³⁶ Such robust curative measures would not only allow the government to pass Justice Kennedy's secondary curative measures inquiry but also might provide significant objective evidence to disprove the mixed-motive presumption.

This mixed-motive presumption would not eliminate two-step interrogations, but it would limit the disadvantages Justice Kennedy's test imposes on defendants. Effectively, with this presumption, the subjective inquiry would no longer be completely dispositive because of the difficulty of overcoming the government's burden of proof. Instead, the effectiveness of the curative measures would become more important. If a court applied Justice Kennedy's subjective inquiry using a mixed-motive presumption, the test would become very similar to that of the plurality. The ultimate admissibility of a defendant's confession would be based on whether curative measures objectively ensured the effectiveness of the *Miranda* warnings.²³⁷ Like that of Justice Souter, such an inquiry is more consistent with *Miranda* and the Fifth Amendment.

B. Law Enforcement Need Not Fear the *Miranda* Warnings

Officials should not shy away from issuing *Miranda* warnings because the outcomes of interrogations may not change when officials warn a defendant of his rights. At least one empirical study suggests that many or most

233. Defense Brief, *supra* note 3, at 52–54.

234. See *Missouri v. Seibert*, 542 U.S. 600, 621–22 (2004) (Kennedy, J., concurring in the judgment).

235. Cf. Thompson, *supra* note 86, at 680 (suggesting that "highly technical and legalistic" addendum warnings would be ineffective).

236. The longer a defendant has been detained or interrogated, as in Ahmed's case, the longer the amount of time that separates distinct phases of the interrogation should be.

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

defendants waive their rights.²³⁸ Based on that data, *Miranda* warnings do not seem to strongly affect the ultimate outcome of an interrogation. Still, the fact that defendants often waive their rights does not minimize the import of *Miranda* warnings. The Fifth Amendment does not mandate that defendants *must* remain silent during interrogations but rather that their choice to speak should be their own.²³⁹ *Miranda* warnings allow defendants to make that choice, although it often seems that defendants choose to speak.²⁴⁰

Particularly in the national security context, the warnings may not ultimately affect how much information a defendant will provide. One commentator argues that terrorism suspects, unencumbered by the silencing “omerta”²⁴¹ culture of domestic criminal organizations, are highly likely to speak to American officials.²⁴² A terrorist group’s goal typically includes “broadcasting its message.”²⁴³ Given the “nihilistic and unhinged” nature of modern terrorist organizations, it seems likely that a captured terrorist would *want* to express the “justness and legitimacy” of his “cause” directly to his “enemy.”²⁴⁴ *Miranda* warnings thus might not thwart the collection of vital intelligence.

Moreover, just prosecutions should not rest entirely on self-incriminating statements, especially those offered during confusing and possibly coercive two-step interrogations. If a prosecutor *needs* confessions to prosecute a suspect of some sort of serious terrorism-based crime, perhaps there is insufficient evidence for a court to convict. Even voluntary confessions can be unreliable,²⁴⁵ and officials seeking to do justice should be wary of resting cases solely on interrogations procured via suspect, two-step procedures.

238. Leo, *supra* note 32, at 654 (noting that in his empirical study about the effects of the *Miranda* warnings, 78.29 percent of people waived their *Miranda* rights after receiving warnings).

239. U.S. CONST. amend. V.

240. Leo, *supra* note 32, at 654.

241. See generally *United States v. Pungitore*, 910 F.2d 1084, 1149 n.96 (3d Cir. 1990) (defining “omerta” as a “[criminal] enterprise’s code of silence”); see also *United States v. Carrozza*, 4 F.3d 70, 89 (1st Cir. 1993) (noting that the defendant took “the oath of ‘omerta’ to protect the secrets of the Patriarca Family of La Cosa Nostra to his grave”).

242. Wadie E. Said, *The Message and Means of the Modern Terrorism Prosecution*, 21 *TRANSNAT’L L. & CONTEMP. PROBS.* 175, 179–80 (2012).

243. *Id.* at 180.

244. *Id.* at 180–81. Three examples prove illustrative: the 1998 U.S. Embassy bomber, the Detroit Christmas Day “underwear bomber,” and the Times Square bomber each waived their rights. *Id.* The embassy bomber in particular expressed “a strong desire to speak with representatives of his enemy.” *Id.* at 181.

245. See Major Peter Kageleiry, Jr., *Psychological Police Interrogation Methods: Pseudoscience in the Interrogation Room Obscures Justice in the Courtroom*, 193 *MIL. L. REV.* 1, 43 (2007) (arguing that even legally voluntary confessions can be “psychologically involuntary”).

CONCLUSION

Two-step national security interrogations demonstrate the dangers inherent in the Supreme Court's recent *Miranda* jurisprudence. While the confessions Ahmed made during his two-step national security interrogation would likely be admissible under Justice Kennedy's test, they would be inadmissible under Justice Souter's plurality test. Justice Kennedy's test affords substantial advantages to the government at the expense of a defendant's right against self-incrimination. Consequently, under Justice Kennedy's test, law enforcement can more easily use the coercive pressures of interrogation environments to elicit incriminating statements.

The right against self-incrimination is "of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions."²⁴⁶ Like the Constitution itself, it cannot be jettisoned when convenience demands. Law enforcement has effective interrogation options that also limit the danger that confessions will be coerced. Those options should reign supreme. Unless law enforcement provides greater protections for defendants, courts should not allow prosecutors to admit confessions derived from two-step national security interrogations. Individual rights should not be so liberally sacrificed on the altar of the collective good.

246. *Twining v. New Jersey*, 211 U.S. 78, 91 (1908), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964).