

Dancing the Two-Step Abroad: Finding a Place for Clean Team Evidence in Article III Courts

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Federal agents often employ a two-step interview process for suspects in extraterritorial terrorism investigations. Agents conduct the first interview without Miranda warnings for the purpose of intelligence-gathering. Separate “clean team” agents then give the suspect Miranda warnings prior to the second stage of the interview, which they conduct for law enforcement purposes. Federal courts have yet to decide whether the government can use statements elicited during the second stage of a two-step interview abroad when prosecuting a terrorism suspect, or whether all such evidence should be suppressed. This Note discusses the boundaries of the two-step interrogation practice as an evidentiary issue in Article III courts, using the investigation and prosecution of Mohamed Ibrahim Ahmed as a case study around which to frame the analysis. The Note first explores the contours of current “clean team” practices in extraterritorial investigations. It then analyzes the current state of U.S. law regarding the admissibility of evidence gleaned from two-step interrogations. Finally, this Note situates the two-step practice within existing doctrine and argues courts should admit step-two evidence because the two-step practice in extraterritorial terrorism investigations occupies a particular niche within current Miranda jurisprudence.

I. INTRODUCTION

In 2009, Nigerian officials arrested and detained an Eritrean citizen, Mohamed Ibrahim Ahmed, on suspicion that he was in-

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volved with al-Shabaab, a terrorist group with links to al Qaeda.¹ United States government officers initially interviewed Ahmed for intelligence-gathering purposes.² Several days later, an FBI “clean team”³ interviewed Ahmed for potential prosecution purposes.⁴ The FBI read Ahmed his *Miranda* rights, which he waived, before conducting the interviews.⁵ After legal proceedings began against Ahmed in U.S. District Court for the Southern District of New York, Ahmed moved to suppress the statements he had made during the FBI “clean team” interview. Ahmed’s lawyers argued that employing such a two-step interrogation strategy violated Ahmed’s Fifth Amendment rights.⁶ In June 2012, Ahmed signed a plea agreement before the judge could issue a ruling on the suppression motion.⁷

Law enforcement and national security officials have begun using the two-step interrogation strategy in terrorism investigations abroad to allow for more flexibility.⁸ The strategy is often called a “two-step” interrogation because intelligence and law enforcement officers conduct the interview in two separate segments.⁹ Typically, government officers first interview a newly apprehended suspect to gather information for intelligence purposes. The interviewers do not issue a *Miranda* warning prior to the first interview. Next, officials inform the suspect of his *Miranda* rights and then interview the individual for law enforcement and prosecution purposes. The idea is that federal prosecu-

1. Benjamin Weiser, *Ex-Somali Terrorist Helps a U.S. Prosecution*, N.Y. TIMES, May 13, 2012, at A21.

2. *Id.*

3. For a definition of a “clean team,” see, e.g., Kenneth Roth, *Why the Current Approach to Fighting Terrorism Is Making Us Less Safe*, 41 CREIGHTON L. REV. 579, 587–88 (2008) (“[C]lean teams . . . are brand new interrogators that . . . are reinvestigating these suspects without ever looking at their original interrogation. The idea is they are supposedly not tainted by that coerced interrogation and therefore the evidence that they come up with can be used to prosecute the suspect.”).

4. Weiser, *supra* note 1.

5. *Id.*

6. *Id.*

7. Benjamin Weiser, *Man Offers Guilty Plea, Upending Terror Case*, N.Y. TIMES, June 13, 2012, at A28.

8. Charlie Savage, *U.S. Tests New Approach to Terrorism cases on Somali Suspect*, N.Y. TIMES, July 16, 2011, at A10 (detailing the use of the two-step approach in interrogating a Somali suspect and explaining “the value of allowing the executive branch flexibility between using the military and criminal justice systems”).

9. This Note uses the term “two-step” to refer to this technique, the same term that is used in the briefs on the suppression motion in the *Ahmed* case.

tors will only use material from the second interview for subsequent in-court proceedings against the defendant.¹⁰ Officials are careful to separate the two interviews to the greatest extent possible in order to avoid evidentiary issues related to using content from the second interview in U.S. court.

Currently, no court has specifically decided whether the government can introduce statements elicited from the second stage of such a two-step interview¹¹ abroad in court, or whether all such evidence, pre- and post-*Miranda* warning, should be suppressed. The United States Supreme Court has indicated that it is skeptical of the two-step interrogation practice's validity in the ordinary domestic criminal context, but it has not made a definitive ruling on the practice's absolute validity or invalidity.¹²

In contrast, in the wake of several post-9/11 domestic terrorism attacks, some members of Congress vehemently decried the use of *Miranda* warnings at any time during the interrogations of suspected terrorists.¹³ In one instance, police issued a *Miranda* warning before they interrogated so-called "Christmas Day bomber" Umar Farouk Abdulmutallab. Following this incident, Congressional lawmakers introduced a bill that would limit the

10. See, e.g., Charlie Savage & Eric Schmitt, *U.S. to Prosecute a Somali Suspect in Civilian Court*, N.Y. TIMES, July 5, 2011, at A1 (After the intelligence interviews, "a separate group of law enforcement interrogators came in. They delivered a *Miranda* warning, but he waived his rights to remain silent and have a lawyer present and continued to cooperate, the officials said, meaning that his subsequent statements would likely be admissible in court.").

11. The terms "interview" and "interrogation" will be used interchangeably in this Note to indicate questioning that takes place while in custody. Though FBI training materials seem to make some distinction between the terms, they "do not distinguish between the interview and interrogation phases with respect to preserving the voluntariness of a statement," which is the primary issue with which this Note is concerned. OVERSIGHT AND REVIEW DIVISION OF THE OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI'S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN, AND IRAQ 48 n.36 (2009), available at <http://www.justice.gov/oig/special/s0910.pdf> [hereinafter "OIG FBI Report"].

12. See generally *Missouri v. Seibert*, 542 U.S. 600 (2004) (elucidating a test for determining when suppression of testimonial evidence is appropriate in the two-step context).

13. See, e.g., Adam Serwer, *The Abdulmutallab Rule*, MOTHER JONES (Oct. 14, 2011), <http://www.motherjones.com/politics/2011/10/abdulmutallab-rule-military-detention-terrorist-suspects> ("When Abdulmutallab was first apprehended and interrogated by federal agents, Republicans expressed outrage that he wasn't shunted into indefinite military detention, suggesting that the decision to read Abdulmutallab his *Miranda* rights after he stopped cooperating showed leniency or weakness rather than respect for the law.").

requirement to Mirandize domestic law enforcement suspects when the individuals involved were terrorism suspects.¹⁴

The lack of two-step interrogation jurisprudence is particularly pronounced in the terrorism context. Only a couple of cases involving something that could be called a two-stage interrogation have made it to the Supreme Court, and these two cases both involved domestic law enforcement in the day-to-day criminal context.¹⁵ The interrogation practices used in these domestic criminal cases differ factually from the two-step practice that is used in international terrorism investigations. In the two Supreme Court cases, law enforcement officials from the same office were involved in both steps of the process.¹⁶ In the extraterritorial terrorism context, the first step may consist of CIA officers or other intelligence officials gathering information on terrorist activities for intelligence and national security purposes.¹⁷ The second step, when the suspect is Mirandized, is typically conducted by FBI agents for the purpose of criminal prosecution in the United States.¹⁸ Furthermore, the Supreme Court has not determined whether Fifth Amendment *Miranda* warnings are even required abroad. Because terrorism cases continue to be brought both in Article III courts and in military tribunals, the current state of jurisprudence on *Miranda* exclusionary rules will remain a unique yet crucial consideration during the investigation process abroad.

This Note explores whether there is a place for a deliberate two-step process in extraterritorial terrorism investigations and prosecutions brought in Article III courts. In addressing this

14. See Jordy Yager, *New Bill Would Limit Miranda Rights for Foreigners Arrested as Terror Suspects*, THE HILL (Mar. 17, 2011), <http://thehill.com/homenews/senate/150525-new-bill-would-limit-miranda-rights-for-foreign-terror-suspects> ("Lawmakers criticized the Obama administration for mishandling the case, saying that Abdulmutallab should have been interrogated before being granted any sort of legal rights. By not first questioning him, U.S. officials jeopardized the safety of the country, some lawmakers argued.").

15. See, e.g., *Seibert*, 542 U.S. 600; *Oregon v. Elstad*, 470 U.S. 298 (1985).

16. *Id.*

17. See, e.g., Weiser, *supra* note 1.

18. See, e.g., Craig Whitlock, *Renditions continue under Obama, despite due-process concerns*, WASH. POST (Jan. 1, 2013), http://www.washingtonpost.com/world/national-security/renditions-continue-under-obama-despite-due-process-concerns/2013/01/01/4e593aa0-5102-11e2-984e-f1de82a7c98a_print.html ("The sequence described by the lawyers matches a pattern from other rendition cases in which U.S. intelligence agents have secretly interrogated suspects for months without legal oversight before handing over the prisoners to the FBI for prosecution."); Weiser, *supra* note 1.

question, this Note will discuss the legal implications of the two-step interrogation practice in the extraterritorial terrorism context. Part II first explores current “clean team” practices in extraterritorial investigations by using *Ahmed* as a case study. Part III analyzes the current state of U.S. domestic criminal law with regard to two-step interrogation and the admissibility of step-two evidence. Part IV situates the two-step tactic within domestic criminal doctrine and concludes that courts should admit step-two evidence under current *Miranda* jurisprudence.

Though this Note explores a select portion of the Fifth Amendment implications of extraterritorial interrogations, it does not purport to discuss all of them, and with that in mind I express three caveats. First, none of the following analysis will touch on the question, one level removed, of whether *Miranda* applies fully to non-citizens abroad. This Note assumes that as a baseline matter law enforcement agents need to administer *Miranda* warnings, or their functional equivalent, abroad, in order to render subsequent statements admissible in U.S. domestic courts.¹⁹ Second, the secretive and sensitive nature of terrorism investigations makes it difficult to detail certain aspects of the two-step with any specificity. Given the unique circumstances of each investigation, it is difficult to make any broad generalizations about FBI two-step practices. This Note relies on public information gathered from sources ranging from trial court filings to declassified FBI and OIG documents and reports, and will focus on the *Ahmed* case as a particular example. Finally, much of the current scholarship on voluntariness and *Miranda* exclusionary rules in the context of terrorism investigations discusses the use of torture or enhanced interrogation techniques in the period

19. This assumption is in accord with the decision in *United States v. Bin Laden*, 132 F. Supp. 2d 168, 185–86 (S.D.N.Y. 2001) (holding that U.S. government officials abroad are required to give *Miranda* warnings to suspects prior to interrogation). See also *United States v. Karake*, 443 F. Supp. 2d 8, 13 n.2 (D.D.C. 2006) (government conceding that *Miranda* applies abroad). For arguments that *Miranda* should be limited abroad, see Michael R. Hartman, *A Critique of United States v. Bin Laden in Light of Chavez v. Martinez and the International War on Terror*, 43 COLUM. J. TRANSNAT'L L. 269 (2004) (proposing a *Miranda* exception for overseas interrogations of non-resident aliens); M. Katherine B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law In An Age of Terrorism*, 12 CORNELL J. L. & PUB. POL'Y 319, 351–54 (2003) (proposing a blanket “foreign exception” to *Miranda*); Mark A. Godsey, *Miranda's Final Frontier — The International Arena: A Critical Analysis of United States v. Bin Laden, and a Proposal For a New Miranda Exception Abroad*, 51 DUKE L.J. 1703, 1765 (2002) (suggesting the application of a “good faith” test to determine admissibility).

prior to when the suspect is Mirandized. This Note will not cover instances in which such coercive techniques are used, instead focusing on cases such as Ahmed's, where the suspect is not Mirandized in the first interview simply due to intelligence-gathering reasons.

Given these disclaimers, this Note concludes that though the law disfavors the general two-step tactic in the domestic context, the special circumstances of extraterritorial terrorism investigations allow Article III courts to find a niche in current doctrine that allows "clean team" evidence to be introduced at trial.

II. THE *MIRANDA* TWO-STEP IN EXTRATERRITORIAL TERRORISM INVESTIGATIONS

A. THE DEVELOPMENT OF THE "QUESTION-FIRST" TECHNIQUE POST-*MIRANDA*

To understand the development of the two-step technique in practice, one must first turn to domestic police department policy in the wake of the Supreme Court's decision in *Miranda v. Arizona*.²⁰ The first case in which the Court addressed the deliberate use of two-step interrogation was in *Missouri v. Seibert* in 2004.²¹

By the time the Court decided *Seibert*, police departments were already widely teaching the practice of deliberately withholding *Miranda* warnings in order to elicit an initial confession. Although there is no general study and thus there are no precise statistics on how widespread the practice was, as the Court stated, "it [was] not confined to Rolla, Missouri," where the circumstances of *Seibert* took place.²² The Police Law Institute instructed officers in writing as early as 2001 that:

[O]fficers may conduct a two-stage interrogation At any point during the pre-*Miranda* interrogation, usually after arrestees have confessed, officers may then read the *Miranda* warnings and ask for a waiver. If the arrestees waive

20. 384 U.S. 436 (1966). For an overview of the Supreme Court's jurisprudence leading up to *Miranda*, see *infra* Part III.A.

21. 542 U.S. 600 (2004). For more on the facts of the *Seibert* case, see *infra* Part III.C.

22. *Id.* at 609.

their *Miranda* rights, officers will be able to repeat any *subsequent* incriminating statements later in court.²³

The officer in *Seibert* had received similar training. At a pre-trial suppression hearing, the officer testified that he had made a “conscious decision” to question Seibert first and withhold *Miranda* warnings in accordance with what he had been taught: to “question first, then give the warnings, and then repeat the question until I [got] the answer that [the suspect had] already provided once.”²⁴

Cases brought to court in many states indicate that the practice of eliciting a confession pre-*Miranda* was widespread by the time the Supreme Court heard *Seibert*.²⁵ Law enforcement reasoned that the “question-first technique,” as the court called it, was a useful way to more easily elicit confessions post-*Miranda* that could then be used as evidence in court.²⁶

B. EXTRATERRITORIAL USE OF THE TWO-STEP

The two-step process for international terrorism interrogations differs from the domestic criminal context in several ways.

23. *Id.* at 609–10 (quoting POLICE LAW INSTITUTE, ILLINOIS POLICE LAW MANUAL 83, Jan. 2001–Dec. 2003).

24. *Id.* at 605–06 (internal quotations omitted).

25. See, e.g., *United States v. Orso*, 266 F.3d 1030, 1032–33 (9th Cir. 2001) (en banc); *Pope v. Zenon*, 69 F.3d 1018, 1023–24 (9th Cir. 1995), *overruled by Orso*, 266 F.3d 1030; *Cooper v. Dupnik*, 963 F.2d 1220, 1224–27, 1249 (9th Cir. 1992) (en banc); *United States v. Carter*, 884 F.2d 368, 373 (8th Cir. 1989); *United States v. Esquilin*, 208 F.3d 315, 317 (1st Cir. 2000); *Davis v. United States*, 724 A.2d 1163, 1165–66 (D.C. 1998) (as cited in *Seibert*, U.S. at 611 n.3). For more analysis of cases, see also Elwood Earl Sanders, Jr., *Willful Violations of Miranda: Not A Speculative Possibility but an Established Fact*, 4 FLA. COASTAL L.J. 29, 37–54 (2002) (analyzing cases state-by-state and finding examples of potential *Miranda* violations in Alabama, the District of Columbia, Hawaii, Iowa, Kentucky, Maine, Minnesota, Nevada, New Mexico, Ohio, South Carolina, and Virginia). But see Eric English, *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, 463 (2006) (“The number of agencies advocating and employing this technique is debatable. The *Seibert* plurality concluded that use of the question-first technique is widespread. However . . . its conclusion is at least somewhat uncertain and it is impossible to know exactly how sweeping the effects of *Seibert* will be.”).

26. *Seibert*, 542 U.S. at 613 (“After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble.”).

The most significant difference is that the two-step process is used for the dual purposes of information-gathering and law enforcement in terrorism cases. In contrast, domestic two-step interrogations are usually solely concerned with law enforcement goals.

In the extraterritorial context, once a potential terrorist suspect is in custody abroad, the federal government may use “clean teams” and two-stage interrogations in order to accomplish distinct goals in each stage of the foreign terrorism investigation. Intelligence officials conduct the first stage of the interrogation to ensure that potentially important and time-sensitive intelligence information is obtained from the subject in question.²⁷ The suspect is not Mirandized at this time — for the sake of expediency, and also because it is assumed that statements made during this interview will not be used for prosecution purposes.²⁸ Law enforcement officials then administer *Miranda* warnings to the suspect prior to the second stage of the interrogation. FBI or other law enforcement officials then interview the individual, typically to elicit statements and information that federal prosecutors may use in a potential criminal prosecution in U.S. domestic court.²⁹

The federal government attempts to separate these two stages as much as possible in order to ensure the best likelihood that the Mirandized statements in the second interview will be allowed into court.³⁰ Factors the government takes into account in order

27. See, e.g., Savage & Schmitt, *supra* note 10 (“The officials also said interrogators used only techniques in the Army Field Manual, which complies with the Geneva Conventions. But they did not deliver a *Miranda* warning because they were seeking to gather intelligence, not court evidence. One official called those sessions ‘very, very productive’ but declined to say whether his information contributed to a drone attack in Somalia last month.”).

28. See, e.g., *id.*

29. Gregory S. McNeal, *A Cup of Coffee After the Waterboard: Seemingly Voluntary Post-Abuse Statements*, 59 DEPAUL L. REV. 943, 945 (2010) (“These clean teams were groups of interrogators who used non-abusive techniques to extract inculpatory statements from detainees.”).

30. See, e.g., Roth, *supra* note 3 at 587–88 (2008) (“[C]lean teams . . . are brand new interrogators that . . . are reinvestigating these suspects without ever looking at their original interrogation. The idea is they are supposedly not tainted by that coerced interrogation and therefore the evidence that they come up with can be used to prosecute the suspect.”); Savage, *supra* note 8 (“Mr. Warsame was given a *Miranda* warning — that he had a right to remain silent and to have a lawyer — at the beginning of the second interrogation so that prosecutors would have a better chance of being allowed to use his statements as evidence. The Obama legal team decided to time the Red Cross visit during the break in order to further emphasize that the second set of interrogators comprised differ-

to distinguish the “clean” and “dirty” teams include: different teams of questioners, different locations for the two interviews, length of time between the interviews, different sets of questions, separation of communication between “dirty” and “clean” teams, and how well the Mirandized suspect understands that what was said in first interview should not affect the second.³¹

The FBI initially decided to create these “clean teams” based on the possibility that “clean team” evidence would more likely be admitted by a judge, either in a military tribunal or Article III court.³² Courts have yet to decide whether *Miranda* or similar requirements apply extraterritorially to non-U.S. citizens,³³ however, at the very least, the testimony in question would have to be voluntary and non-coerced.³⁴ Law enforcement must work continually within the bounds of the voluntariness principle, Fifth Amendment due process, and *Miranda* warnings in order to interrogate suspects. In particular for suspects who had been subject to post-9/11 era “advanced interrogation techniques,” prosecutors and the FBI faced a dilemma. If they did not prosecute, either at the military commission or criminal court level, then it

ent officials questioning him for a different purpose. That was intended to be able to make the case later to a judge that any subsequent confession was voluntary.”).

31. See Morris D. Davis, *Historical Perspective on Guantanamo Bay: The Arrival of the High Value Detainees*, 42 CASE W. RES. J. INT’L L. 115, 121 (2009) (“In the sessions I did observe the law enforcement agents, particularly those from the FBI, went to extraordinary lengths to explain to each detainee that his decision to talk or not talk was a purely voluntary choice and there would be no punishment or reward tied to the decision.”); Savage, *supra* note 8; Josh White et al., *U.S. to Try 6 on Capital Charges Over 9/11 Attacks*, WASH. POST (Feb. 12, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/02/11/AR2008021100572_pf.html (“They went in and said that they’d love to talk to them, that they knew what the men had been through, and that none of that stuff was going to be done to them,” said one official familiar with the program who spoke on the condition of anonymity because of its secrecy. “It was made very clear to them that they were in a very different environment, that they were not with the CIA anymore. There was an extensive period of making sure they understood it had to be voluntary on their part.”). For an example of these factors being taken into account in practice, see Government’s Post-Hr’g Mem. in Opp’n to Def.’s Mot. to Suppress at 25–27, *United States v. Ahmed* (S.D.N.Y. filed Jan. 27, 2012) (No. 10 CR 131(PKC)), 2012 WL 1496129 [hereinafter “Government’s Post-Hearing Memorandum”] (detailing that the FBI agents involved in the post-*Miranda* interview were not to know the outcome of the first interview, that there was a break in time between the first and second interviews, that there was an effort to have only officers present at the second interview who were not present at the first, and that the suspect was read *Miranda* rights at the start of each day of interviews).

32. See Davis, *supra* note 31, at 120–21 (describing potential risks and rewards evaluated in the decision to create “clean teams” at Guantanamo Bay).

33. See sources cited *supra* note 19.

34. See 14th Amendment due process precedent, discussed *infra* Part III.A.

was unclear how they would keep the suspects in custody; if they did prosecute, they faced the risk of courts suppressing all of their evidence against the suspect.³⁵ Clean teams became the government's solution.³⁶

Eventually, the idea of the "clean team" started expanding to situations like those of Ahmed and another al-Shabaab operative, Ahmed Abdulkadir Warsame, where the government stated that it took the suspect in question into custody abroad and interviewed him without using enhanced interrogation techniques.³⁷ The United States military apprehended Warsame, a Somali citizen, in 2011. Intelligence officials questioned Warsame aboard a Navy ship for two months before law enforcement officials Mirandized him and interviewed him for prosecution purposes.³⁸ Warsame eventually pled guilty in a closed district court proceeding in New York.³⁹ In fact, officials considered having Warsame testify against Ahmed at trial before Ahmed pled guilty.⁴⁰ Increasingly, the FBI and prosecutors began working with intelligence officials from the initial apprehension of a suspect.⁴¹ Although for these new types of cases, the first stage of the interview may not be "coerced" in that enhanced interrogation techniques are not used, they pose challenges to criminal prosecutions be-

35. "In criminal justice, you either prosecute the suspects or let them go. But if you've treated them in ways that won't allow you to prosecute them you're in this no man's land. What do you do with these people?" Jane Mayer, *Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program*, NEW YORKER, Feb. 14, 2005, at 106, 108 (quoting Jamie Gorelick, former deputy attorney general and 9/11 Commission member).

36. White et. al., *supra* note 31 ("It was the product of a lot of debate at really high levels,' one official familiar with the program said. 'A lot of people were involved in concluding that it may not be the saving grace, but it would put us on the best footing we could possibly be in. You can't erase what happened in the past, but this was the best alternative.'").

37. Savage, *supra* note 8.

38. *Id.*

39. Benjamin Weiser, *Terrorist Has Cooperated With U.S. Since Secret Guilty Plea in 2011, Papers Show*, N.Y. TIMES, Mar. 25, 2013, at A21.

40. *Id.*

41. Government's Post-Hearing Memorandum, *supra* note 31, at 18–19. Even when FBI could not be involved in decision-making from the beginning of the interview process, "[a]ccording to former FBI General Counsel Wainstein, the FBI ultimately decided that its agents could not interview detainees without a 'clean break' from other agencies' use of non-FBI techniques." OIG FBI Report, *supra* note 11, at 74–75.

cause the first stage is un-Mirandized in possible violation of the Fifth Amendment.⁴²

C. CASE STUDY: *UNITED STATES V. AHMED*

The *Ahmed* case provides an example of the dual purpose of the two-step technique in an extraterritorial terrorism investigation. Ahmed, a citizen of Sweden, traveled to Somalia and Nigeria, where he was suspected of participating in a training camp led by the Somali terrorist group al-Shabaab.⁴³ Ahmed was taken into custody by Nigerian officials in November 2009 under suspicion of working with various terrorist groups in Nigeria.⁴⁴ Nigerian officials held numerous interviews with Ahmed while he was in custody and provided him with “cautionary words” about his rights.⁴⁵

In December 2009, the Nigerian officials permitted the U.S. government to conduct an interview with Ahmed.⁴⁶ In prior discussions, the U.S. officials involved had concluded that Ahmed should not be Mirandized during the first interview.⁴⁷ The officials reasoned that the goal of the interview was to ask Ahmed for information for intelligence purposes without having Ahmed

42. In fact, after an initial test case of working with the CIA and Department of Defense on interviewing a detainee in Guantanamo, the FBI made an internal decision to not participate in a non-Mirandized interview if the other interviewers engaged in non-FBI-compliant interview techniques:

FBI personnel who participate in interrogations with non-FBI personnel . . . shall at all times comply with FBI policy for the treatment of persons detained. FBI personnel shall not participate in any treatment or use any interrogation technique that is in violation of these guidelines regardless of whether the co-interrogator is in compliance with his or her own guidelines. If a co-interrogator is complying with the rules of his or her agency, but is not in compliance with FBI rules, FBI personnel may not participate in the interrogation and must remove themselves from the situation.

OIG FBI Report, *supra* note 11, at 51.

43. Weiser, *supra* note 7.

44. *Id.*

45. Def. Mohamed Ibrahim Ahmed's Post-Hr'g Mem. in Supp. of His Mot. to Suppress Post-Arrest Statements at 15–17, *United States v. Ahmed* (S.D.N.Y. filed Feb. 28, 2012) (No. 10 CR 131(PKC)), 2012 WL 1805050 [hereinafter “Defendant's Post-Hearing Memorandum”]; Government's Post-Hearing Memorandum, *supra* note 31, at 7–15.

46. Government's Post-Hearing Memorandum, *supra* note 31, at 17–18; Defendant's Post-Hearing Memorandum, *supra* note 45, at 21.

47. Government's Post-Hearing Memorandum, *supra* note 31, at 18.

feel that the U.S. was seeking charges against him in court.⁴⁸ Furthermore, since the U.S. representatives were unsure whether the December interview would be their only chance to speak with Ahmed, the focus was on gathering information “for actionable purposes that could be used to prevent acts of possible terrorism.”⁴⁹ An FBI special agent was present during all parts of this first interview.⁵⁰

In January 2010, Nigerian officials allowed a second team that included two FBI agents to conduct Mirandized interviews with Ahmed.⁵¹ The FBI special agent who had been present during the first un-Mirandized interview informed the two new agents about the general nature of the first interview, but did not discuss the specific content of the statements that Ahmed had made.⁵² The agent further advised those who had participated in the December interview that the “clean team” agents “were not to be made aware of the outcome of [the first] interview.”⁵³ However, the “clean team” agents were provided with documents containing the transcribed questions and answers from Ahmed’s interviews with Nigerian officials.⁵⁴ A period of five days passed between the first un-Mirandized interview in December and the clean team’s first Mirandized interview in January.⁵⁵ U.S. agents also requested that “the [Mirandized interviews] occur in a separate room, with separate . . . officers that had not previously interviewed [the defendant] and that could potentially be called to testify at some future date.”⁵⁶ During this second round of interviews, Ahmed was read his Miranda rights at the start of each

48. *Id.* at 18–19 (“And so, the purpose of the non-Mirandized interview was to gain his trust, to learn more about his travel, his background, who he may have interacted with and what he may know about imminent plots or plans against the United States.”).

49. *Id.* at 19.

50. *Id.* at 17–23.

51. *Id.* at 26.

52. *Id.* at 25.

53. *Id.* at 25–26. There is some dispute on this point, because one of the agents on the “clean team” had “familiarized himself with the content of Ahmed’s prior statements to Nigerian officials,” and Ahmed’s defense argued this meant he could have assumed the outcome of the prior U.S. interrogation to be the same as the Nigerian one. Defendant’s Post-Hearing Memorandum, *supra* note 45, at 15–19.

54. Government’s Post-Hearing Memorandum, *supra* note 31, at 26.

55. *Id.* at 27.

56. *Id.*

interview and was provided with the standard “Advice of Rights” form.⁵⁷

In February 2010, a grand jury in the Southern District of New York issued a five-count indictment charging Ahmed with crimes related to his support of al-Shabaab.⁵⁸ Before trial, the judge held a suppression hearing on the motion Ahmed’s lawyers filed to suppress all statements Ahmed made while he was in custody, including statements made after officials Mirandized him.⁵⁹ The motion alleged that the deliberate two-step process employed was unconstitutional under the Fifth Amendment as the defendant’s waiver of his Miranda rights was not knowing or voluntary.⁶⁰ Before the judge could issue his order on the suppression motion, Ahmed agreed to a plea bargain, leaving the outcome of the motion and suppression hearing unresolved.⁶¹

III. CURRENT *MIRANDA* LANDSCAPE

*Missouri v. Seibert*⁶² is the most recent Supreme Court case on suppression and two-step interrogations. In contrast to the facts of the *Ahmed* case, in *Seibert* both the first and second steps of the interview in question were staged in such a way as to further a law enforcement goal — encouraging the defendant to confess.⁶³ The Supreme Court held that the confession in the case should be suppressed given the *Miranda* exclusionary rule and the structure of the interview; however, the decision was fractured, leaving open questions as to the voluntariness standard.⁶⁴ The case addressed several critical issues, including how to determine a Fifth Amendment violation in the two-step context as well as whether statements made during conscious two-step interrogations should ever be held admissible in court.

The fractured *Seibert* opinion is representative of a tangled federal jurisprudence on interrogations, confessions, and *Miran-*

57. *Id.* at 31.

58. *Id.* at 3.

59. Weiser, *supra* note 7.

60. Government’s Post-Hearing Memorandum, *supra* note 31, at 3–4.

61. Weiser, *supra* note 7.

62. 542 U.S. 600 (2004).

63. *Id.* at 613 (“After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset . . .”).

64. For a detailed discussion of *Seibert*, see *infra* Part III.C.

da suppression that has been described as incoherent.⁶⁵ The Supreme Court has vacillated between different tests with regards to how to determine the voluntariness of a confession.⁶⁶ Though the current state of the law regarding two-step interrogations remains murky, an intent-based test to determine violation followed by a multifactor examination of possible curative measures is increasingly the accepted standard for a suppression determination.

A. AN OVERVIEW OF VOLUNTARINESS IN CONFESSIONS JURISPRUDENCE

The Fifth Amendment states that “No person . . . shall be compelled in any criminal case to be a witness against himself.”⁶⁷ In 1897, the Supreme Court linked the right against self-incrimination to confessions elicited during custodial interrogation for the first time in *Bram v. United States*.⁶⁸ Basing its opinion upon the Fifth Amendment right against self-incrimination, the Supreme Court in *Bram* held that a confession would not be admissible in court unless it was “free and voluntary.”⁶⁹ The Court determined voluntariness by considering factors such as the circumstances of the confession and the nature of the law enforcement officer’s communications to the suspect.⁷⁰ *Bram* was not only the first case in which the Court linked the Fifth Amendment to confessions jurisprudence, but also the first case that expanded the scope of the suppression of “involuntary” statements.

The next major Fifth Amendment case specifically about custodial interrogation was *Miranda v. Arizona*, almost seventy years after *Bram*.⁷¹ In *Miranda*, the Supreme Court held that custodial interrogations may undermine the Fifth Amendment by exposing a suspect to physical or psychological intimidation or

65. See, e.g., Darmer, *supra* note 19, at 321 (“Moreover, the Court’s broader confessions jurisprudence can perhaps best be described as incoherent.”).

66. See McNeal, *supra* note 29, at 944–45 (“[T]he U.S. law of interrogations generally — and voluntariness specifically — is extremely complicated . . .”).

67. U.S. CONST. amend. V. The privilege against self-incrimination applies to the states through the Fourteenth Amendment. See *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

68. *Bram v. United States*, 168 U.S. 532, 542 (1897).

69. *Id.* at 542.

70. *Id.* at 562–64.

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

coercion.⁷² In order to guard against such potential violations, the Court held that warnings concerning the right to remain silent and the right to counsel should be given prior to a custodial interrogation as a prophylactic device.⁷³ Any statements the suspect provided would be inadmissible at trial unless law enforcement had administered a proper warning of the suspect's Fifth Amendment rights and the suspect had given an intelligent waiver.⁷⁴ The waiver of rights, the Court held, must have been made voluntarily, knowingly and intelligently.⁷⁵

Miranda treated the Fifth Amendment right against self-incrimination as a complement to the 14th Amendment due process line of cases. The 14th Amendment cases had held that a confession must be "voluntary" in order to be admitted in court.⁷⁶ These due process-based cases had concluded that in order to determine admissibility:

[t]he ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne

72. *Id.* at 457 ("It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning.").

73. *Id.* at 444. The *Miranda* Court elucidated four specific notifications that law enforcement should provide to the suspect:

He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479; see also *United States v. Patane*, 542 U.S. 630, 636 (2004) (specifying that the *Miranda* warning is a prophylactic device).

74. *Miranda*, 384 U.S. at 492. This *Miranda* warning requirement was reaffirmed in *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (invalidating a federal statute purporting to serve as a replacement for *Miranda* requirements).

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

76. In fact, Justice Harlan, in a strongly worded dissent, wrote that the existing due process line of cases provided an "adequate tool" to deal with issues of coercion in confessions. *Id.* at 505.

and his capacity for self-determination critically impaired, the use of his confession offends due process.⁷⁷

The Court in *Miranda* built on this idea of coercion or “involuntariness” to define “compulsion” under the Fifth Amendment more broadly than under the Fourteenth Amendment — extending beyond cases of mere physical or psychological coercion.⁷⁸ Crucially, the Court hinted that custodial interrogation would be presumptively involuntary if suspects were not given the requisite warnings.⁷⁹

In more recent decisions, the Court has muddied the water on how far the *Miranda* requirement extends. Though *Miranda v. Arizona* itself seemed to expand the scope of what the Court defined as “involuntary” by suggesting that the custodial interrogation context itself was inherently a coercive situation,⁸⁰ the Court circumscribed the boundaries of *Miranda* in subsequent cases. Testimonial evidence obtained through a direct *Miranda* violation is admissible, the Court later held, for impeachment purposes at trial⁸¹ and when there is a threat to public safety necessitating immediate questioning.⁸² In *New York v. Quarles*, the Court defined a “public safety” exception to *Miranda* that potentially had extremely broad applications. *Quarles* held that *Miranda* is not absolute and that “the failure to provide *Miranda* warnings in and of itself does not render a confession involuntary.”⁸³ The Supreme Court did not, and has not, defined the scope of the public safety exception, and some argue that the exception is very

77. *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

78. *Miranda*, 384 U.S. at 461.

79. *Id.* at 456–58 (“In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. . . . In these cases, we might not find the defendants’ statements to have been involuntary in traditional terms. . . . It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. . . . 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.”).

80. *Id.*

81. *Oregon v. Hass*, 420 U.S. 714, 723–24 (1975); *Harris v. New York*, 401 U.S. 222, 226 (1971).

82. *New York v. Quarles*, 467 U.S. 649, 655 (1984) (holding that un-Mirandized statements given to law enforcement in a situation where the public safety is at stake were later admissible in court).

83. *Id.* at 655 n.5.

broad.⁸⁴ This resulting ambiguity implies that *Quarles* could extend beyond the heat of the moment to circumstances in which more extensive questioning for the purposes of protecting the “public safety” could fall under the exception as well. Finally, and most recently, in *Chavez v. Martinez*, the Court held that failure to provide *Miranda* warnings did not violate the Fifth Amendment because the defendant's statements, though potentially coerced, were not used against him in a criminal case.⁸⁵

B. THE INTRODUCTION OF TWO-STEP INTO THE ATTENUATION
DOCTRINE: *OREGON v. ELSTAD*

The first case the Supreme Court decided concerning a potential Fifth Amendment violation due to a mid-stream *Miranda* warning was *Oregon v. Elstad*.⁸⁶ In *Elstad*, a police officer who had just arrested a teenage burglary suspect told the suspect that he “felt” that the suspect was involved in a burglary.⁸⁷ The suspect then admitted that he had been at the scene.⁸⁸ Approximately one hour later, at the police station, an officer read the defendant his *Miranda* rights.⁸⁹ The defendant then confessed — to the original officer and another officer — that he had committed the burglary.⁹⁰

The *Elstad* Court refused to extend the “fruit of the poisonous tree” doctrine⁹¹ to a mere violation of *Miranda* without proof of a

84. See, e.g., William T. Pizzi, *The Privilege Against Self-Incrimination in a Rescue Situation*, 76 J. CRIM. L. & CRIMINOLOGY 567, 580 (1985).

85. *Chavez v. Martinez*, 538 U.S. 760, 772–73 (2003) (plurality opinion).

86. 470 U.S. 298 (1985).

87. *Id.* at 301.

88. *Id.*

89. *Id.*

90. *Id.* at 314.

91. The fruit of the poisonous tree theory is “[t]he rule that evidence derived from an illegal search, arrest, or interrogation is inadmissible because the evidence (the ‘fruit’) was tainted by the illegality (the ‘poisonous tree’).” A HANDBOOK OF CRIMINAL LAW TERMS 284 (Bryan A. Garner et. al. 2000). This suppression doctrine is mainly a guarantee that the Supreme Court has applied in the Fourth Amendment context. See *Wong Sun v. United States*, 371 U.S. 471 (1963). *Wong Sun* held that not only physical but also verbal evidence is inadmissible if it is acquired through an illegal act by the police or other officials, and that the relevant inquiry is “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” *Id.* at 488 (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

more fundamental Fifth Amendment violation.⁹² The Court held that the defendant's voluntary un-Mirandized statement should be suppressed, but that "the admissibility of any subsequent statement should turn . . . solely on whether it is knowingly and voluntarily made."⁹³ Because the suspect had knowingly and voluntarily confessed, the Court held that any causal connection between the first admission and the interview at the police station was "speculative and attenuated," and that the post-*Miranda* statements were admissible in court.⁹⁴

The Court also rejected the argument that the initial statement, voluntary or not, had the same psychological effect as "let[ting] the cat out of the bag."⁹⁵ The Court held that accepting this paradigm would be overprotective of the defendant's statement. The Court rejected this overprotective holding, reasoning that it would perpetually prevent the police from obtaining an informed confession even if the initial utterance were voluntary (though technically unwarned).⁹⁶

Elstad is a further step in the overall attenuation doctrine that has developed in criminal cases. Most of these Fifth Amendment cases, like *Elstad*, look to voluntariness and compulsion to determine admissibility of evidence. Prior to *Elstad*, there were several cases in which the Court seemingly made an exception to the *Miranda* exclusionary rule. In *Harris v. New York*, for example, the Court held that a statement taken from a defendant during custodial interrogation where no *Miranda* warnings had been given may be used for impeachment purposes at trial.⁹⁷ In *New York v. Quarles*,⁹⁸ the Court elucidated a "public safety" exception to the *Miranda* rule. These exceptions emphasize *Miranda*'s prophylactic and circumscribed nature. The interplay of the-

92. *Elstad*, 470 U.S. at 305–07.

93. *Id.* at 309.

94. *Id.* at 313.

95. *Id.* at 311. The "cat out of the bag" argument reasoned that once a suspect had confessed, the psychological effect of the confession could not be overcome, and thus a subsequent Mirandized confession should always be suppressed.

96. *Id.* ("But endowing the psychological effects of *voluntary* unwarned admissions with constitutional implications would, practically speaking, disable the police from obtaining the suspect's informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in either his warned or unwarned confessions.") (emphasis in original).

97. 401 U.S. 222, 225–26 (1971).

98. 467 U.S. 649 (1984).

se cases indicates that there is no *per se* exclusionary rule against testimonial evidence given after an earlier coerced statement; rather, the “admissibility of the later confession depends upon the same test — is it voluntary.”⁹⁹

C. *MISSOURI v. SEIBERT*: AN ANALYSIS OF CURRENT DOCTRINE

Nineteen years after *Elstad*, the Court faced the issue of a more deliberate and systemic use of mid-stream *Miranda* warnings in *Missouri v. Seibert*.¹⁰⁰ Unlike in *Elstad*, where the *Miranda* omission was not planned in advance, *Seibert* came to the court in a world where two-step interrogations had become a trained tactic listed in police manuals.¹⁰¹ The defendant, Patrice Seibert, burned her trailer down in order to hide her son’s death from cerebral palsy, in the process taking the life of another mentally challenged boy inside the same trailer.¹⁰² Five days after the fire, the police confronted Seibert at the hospital, where an officer intentionally interrogated the defendant without *Mirandizing* her in order to elicit a confession.¹⁰³ Only after Seibert confessed did the same police officer then give Seibert a twenty minute break, after which he read the defendant her *Miranda* rights and ask her to repeat everything.¹⁰⁴ During this post-*Miranda* portion of the interview, the officer continually referenced the statements Seibert had made in the first stage of the interview in his questions.¹⁰⁵ The officer made a “conscious decision” to withhold *Miranda* warnings in order to more easily elicit a repeated confession post-warning, a technique he had been trained to use at police academy.¹⁰⁶ Seibert was later convicted in Missouri state court, and her appeal to suppress her post-warning statements as coerced made its way to the Supreme Court.

In two separate opinions — a four-justice plurality and a concurrence by Justice Kennedy — a majority of the court agreed

99. *Lyons v. State of Oklahoma*, 322 U.S. 596, 603 (1944).

100. 542 U.S. 600 (2004).

101. *Id.* at 609–10.

102. *Id.* at 604.

103. *Id.* at 604–05.

104. *Id.* at 605.

105. *Id.*

106. *Id.* at 605–06, 609–10.

that Seibert's post-*Miranda* statements were inadmissible.¹⁰⁷ Nonetheless, in light of the facts of the case, the plurality opinion and Justice Kennedy's opinion expressed two divergent opinions of what standard to apply for a *Miranda* exclusionary rule. The plurality advocated for an approach that examined the efficacy of the *Miranda* warning in conveying to the suspect that she still had a choice of whether or not to confess.¹⁰⁸ Justice Kennedy, in his concurring opinion, advocated for an intent-based approach that looked first at whether the two-stage interrogation was a deliberate police strategy before looking at mitigating factors to determine whether the violation was cured.¹⁰⁹

The eight justices in the plurality and dissent explicitly rejected Justice Kennedy's intent-based approach, with Justice O'Connor's dissenting opinion declaring that two suspects who went through the exact same interrogation save for the intent of the questioner "would not experience the interrogation any differently."¹¹⁰ Despite the rejection of the intent-based approach, in practice the plurality's efficacy-based approach would only rarely lead to a different result than Justice Kennedy's intent-based approach in evaluating the admissibility of evidence elicited during a deliberate two-stage interrogation. This rapprochement becomes particularly evident in the context of international terrorism interrogations.

Justice Souter, writing for the plurality, affirmed the Missouri Supreme Court and advocated for an objective multi-factor test to determine "whether it would be reasonable to find that [given the circumstances] the warnings could function 'effectively' as *Miranda* requires."¹¹¹ In essence, the Court found that the *Miranda* warning would only have been effective, and thus the confession admissible, if the warning had been delivered in a manner where objectively, a suspect in the circumstances felt that she had a choice of whether or not to remain silent.¹¹² The plurality hinted that the *Miranda* warning would likely be ineffective in a situation where the investigators had employed a deliberate two-stage interrogation strategy that did not "prepar[e] the suspect for suc-

107. *Id.* at 601.

108. *Id.* at 612–16.

109. *Id.* at 622.

110. *Id.* at 625.

111. *Id.* at 611–12.

112. *Id.* at 612.

cessive interrogation, close in time and similar in content.”¹¹³ The plurality listed factors to consider in determining the effectiveness of the warning, including “the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator’s questions treated the second round as continuous with the first.”¹¹⁴

In contrast, Justice Kennedy’s concurrence advocated for a two-part test that would take into account whether the two-stage interrogation “was used in a calculated way to undermine the *Miranda* warning.”¹¹⁵ If so, Kennedy wrote, confessions obtained even after the *Miranda* warning was administered should be excluded “unless curative measures are taken before the postwarning statement is made.”¹¹⁶ The “curative measures” could include a substantial difference in time and circumstance between the first and second stages, or an additional warning that explained the situation fully and clearly to the suspect.¹¹⁷ If the *Miranda* violation were unintentional, however, *Elstad* should continue to be the standard applied.¹¹⁸

When one compares the two approaches, Justice Kennedy seemingly had a stricter view of intentional two-stage interrogation. However, although the plurality disavowed an intent-based approach in favor of an objective analysis based on “a series of relevant facts,” the objective approach and the intent-based approach are more intertwined in interrogation situations than the plurality, or the dissent, may have admitted in their respective opinions.¹¹⁹ The factors the plurality listed were extremely similar to the “curative measures” that Kennedy described in his concurrence.¹²⁰ Furthermore, as the plurality noted, the primary purpose of deliberate two-stage interrogations was to elicit a post-*Miranda* confession more easily by inducing the suspect to give

113. *Id.* at 613.

114. *Id.* at 615.

115. *Id.* at 622.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 615.

120. *Id.* at 622.

one in the pre-warning stage.¹²¹ It would be contrary to the purpose of employing the two-stage tactic to attempt more than a formal recitation of *Miranda*, either taking into account the plurality's factors or Kennedy's "curative measures." According to the plurality's representation of police motives, there would be no incentive for police to separate the two stages in any meaningful way, in which case neither Kennedy nor the plurality would be likely to allow the evidence.

In the wake of the Supreme Court's fractured opinion in *Seibert*, circuit courts across the country were left to determine the appropriate standard to apply to evaluate the suppression of the fruits of two-step interrogations. The Second Circuit, where a large number of terrorism prosecutions are brought,¹²² has since held Justice Kennedy's concurring opinion to be controlling in two-step cases.¹²³ Six other circuits have also heard two-step cases in the wake of *Seibert* and have applied Justice Kennedy's interpretation.¹²⁴ Four of the remaining circuits have so far refrained from definitively adopting either test because both led to the same result in those particular cases.¹²⁵

In *United States v. Capers*, the Second Circuit not only applied Justice Kennedy's approach but also expanded upon the meaning of a "deliberate" violation. After noting that Kennedy had not clearly articulated how to analyze whether a two-step interrogation had been "deliberate," the court "review[ed] the totality of the objective and subjective evidence surrounding the interrogations in order to determine deliberateness, with a recognition that in most instances the inquiry will rely heavily, if not entire-

121. *Id.* at 609–10.

122. See RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE, PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS: 2009 UPDATE AND RECENT DEVELOPMENTS 7 figs. 3–4 (2008), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090723-LS-in-pursuit-justice-09-update.pdf>.

123. See, e.g., *United States v. Williams*, 581 F.3d 35 (2d Cir. 2012); *United States v. Capers*, 627 F.3d 470 (2d Cir. 2010); *United States v. Carter*, 489 F.3d 528 (2d Cir. 2007).

124. See *United States v. Street*, 472 F.3d 1298 (11th Cir. 2006); *United States v. Courtney*, 463 F.3d 333 (5th Cir. 2006); *United States v. Williams*, 435 F.3d 1148 (9th Cir. 2006); *United States v. Kiam*, 432 F.3d 524, 532 (3d Cir. 2006); *United States v. Mashburn*, 406 F.3d 303 (4th Cir. 2005); *United States v. Hernandez-Hernandez*, 384 F.3d 562 (8th Cir. 2004).

125. See *United States v. Jackson*, 608 F.3d 100, 103–04 (1st Cir. 2010); *United States v. Heron*, 564 F.3d 879, 884–86 (7th Cir. 2009); *United States v. Pacheco-Lopez*, 531 F.3d 420, 498 (6th Cir. 2008); *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1153 (10th Cir. 2006).

ly, upon objective evidence.”¹²⁶ Furthermore, the court held that the “only legitimate reason to delay intentionally a *Miranda* warning until after a custodial interrogation has begun is to protect the safety of the arresting officers or the public.”¹²⁷ Though this holding is more specific than Justice Kennedy’s concurrence in *Seibert*, the Second Circuit echoes Kennedy’s opinion nonetheless: “[e]vidence is admissible when the central concerns of *Miranda* are not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction.”¹²⁸ The panel gave specific examples of “important objectives,” including the use of statements for impeachment purposes to further the truth-finding function of the trial,¹²⁹ to protect public safety concerns,¹³⁰ and to obtain physical evidence based on statements made in violation of *Miranda*.¹³¹

IV. TWO-STEP ABROAD: THE INTERPLAY OF DOMESTIC CRIMINAL LAW AND EXTRATERRITORIAL INTERROGATION TECHNIQUES

Despite the increasing acceptance of Justice Kennedy’s intent-based approach to the *Miranda* exclusionary rule for two-step interrogations, no court to date has issued an opinion on the admissibility of two-step evidence in an extraterritorial terrorism case. Though courts appear to disfavor admitting any statements that are the product of a conscious two-step strategy, there is still a niche that allows for admitting post-warning statements made by suspects in the extraterritorial terrorism context.

Given the unique character and circumstances of extraterritorial terrorism interrogations, there is room in the post-*Seibert* world for finding that two-step confessions in these cases are admissible in court. First, the two-step strategy, as employed in the terrorism context, is arguably not “deliberate” as envisioned by the Supreme Court, and thus the suppression issue must only pass the *Elstad* standard. Second, even if a court were to deter-

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

127. *Id.* at 481.

128. *Missouri v. Seibert*, 542 U.S. 600, 618–19 (2004).

129. *Id.* at 619 (citing *Harris v. New York*, 401 U.S. 222 (1971)).

130. *Id.* (citing *New York v. Quarles*, 467 U.S. 649 (1984)).

131. *Id.* (citing *United States v. Patane*, 542 U.S. 630 (2004)).

mine that a two-step terrorism interrogation was deliberate, it may nevertheless find that the curative measures taken to separate two stages of the interrogation serve to cure the *Miranda* omission sufficiently that the second stage statements should be admissible.¹³²

A. THE TWO-STEP IN THE TERRORISM CONTEXT: NOT A
“DELIBERATE” VIOLATION?

The government can make a strong argument that the two-step interview process as used in extraterritorial terrorism interrogations is not “deliberate” within *Seibert*’s meaning because Justice Kennedy did not specifically define the parameters of a “deliberate” violation in his opinion. Under the Second Circuit¹³³ elucidation of the Kennedy standard, to determine whether the two-step was deliberate, a court “should review the totality of the objective and subjective evidence surrounding the interrogations in order to determine deliberateness, with a recognition that in most instances the inquiry will rely heavily, if not entirely, upon objective evidence.”¹³⁴ The Second Circuit added that the “only legitimate reason to delay intentionally a *Miranda* warning until after a custodial interrogation has begun is to protect the safety of the arresting officers or the public.”¹³⁵

Though Justice Kennedy did not explicitly list it as an example of an “important objective” in his *Seibert* opinion, the intelligence-gathering goal of the first stage of a terrorism interview like Ahmed’s may be within the range of a legitimate objective that would at the same time avoid compromising *Miranda*’s central concerns. Even though the potential threat to public safety

132. Although this Note takes the position that Justice Kennedy’s *Seibert* test should control, I argue that the outcome could be the same in these cases even if a court were to apply the plurality’s test. For an opposing interpretation of the relationship between the two *Seibert* opinions, see Lee Ross Crain, *The Legality of Deliberate Miranda Violations: How Two-Step National Security Interrogations Undermine Miranda and Destabilize Fifth Amendment Protections*, 112 Mich. L. Rev. 453 (2013) (arguing that though two-step confessions are admissible under Justice Kennedy’s test, they are not under the plurality’s test, and that courts should apply the plurality’s test).

133. Because most of the terrorism trials to date have been brought in the Second Circuit (specifically, in the Southern District of New York), which is also where *Ahmed* was brought, this Note takes the case law in that circuit as guidance in its analysis.

134. *United States v. Capers*, 627 F.3d 470, 479 (2d Cir. 2010).

135. *Id.* at 481.

was not as imminent in Ahmed's case as in a case like *Quarles*, the purpose of gaining potentially vital intelligence information combined with the clear attempts to ensure that *Miranda*'s Fifth Amendment objectives were preserved may mean that a court could find no "deliberate" *Miranda* violation in a case like *Ahmed*.

1. *Subjective Factors*

In light of the Second Circuit's holding in *Capers*, a general interest in protecting national security could qualify as a legitimate public safety concern within the one exception that that circuit allows. In *Capers*, the Second Circuit found that the interrogating officer's proffered reasons for conducting un-Mirandized questioning "lack[ed] not only legitimacy but also credibility."¹³⁶ In contrast, Special Agent Dent's testimony in *Ahmed* about the rationale for the un-Mirandized interview was credible:

Given our knowledge of [the defendant's] movements and interactions, based on the information that was available at the time, we had every reason to believe, based on his travels to countries of concern, that he was not only interacting with organizations that have been identified by the U.S. Government as foreign terrorist organizations, but members of those organizations who actively target and plan to carry out attacks against the United States. As such, we were very interested in speaking with him to determine what he may know And so, the purpose of the non-Mirandized interview was to gain his trust, to learn more about his travel, his background, who he may have interacted with and what he may know about imminent plots or plans against the United States.¹³⁷

The government reasoned that Ahmed would have been more willing to speak with interrogators if he trusted that what he said would not be used against him in a criminal prosecution. Furthermore, the government fully believed that Ahmed was associated with al-Shabaab and could provide the U.S. with valuable intelligence on the terrorist group. The defense might raise a

136. *Id.*

137. Government's Post-Hearing Memorandum, *supra* note 31, at 18–19.

Miranda objection that being in a custodial interrogation environment in itself is coercive, and thus that the defendant would feel that he had to reveal his information; however, the Supreme Court's *Miranda* jurisprudence has proven *Miranda* protection is not absolute.¹³⁸

Additionally, because the government's national security-related rationale is close in nature to the public safety exception discussed in *Quarles*,¹³⁹ courts are more likely to give deference to the government's interpretation. *Capers* also held that the only reason to intentionally delay a *Miranda* warning was "to protect the safety of the arresting officers or the public,"¹⁴⁰ further buttressing the *Quarles* exception. Although Ahmed's initial interview spanned several days and thus might have covered more than topics immediately related to the public safety, the interviewers' purpose was not to elicit inculpatory statements.¹⁴¹ Furthermore, *Quarles*'s reach has never been fully tested in terms of an absolute time limit. *Quarles* was about possible imminent risk to public safety, but the government can argue it was "reasonably prompted by a concern for the public safety" in investigating whether there was a terrorist threat to the United States.¹⁴²

Finally, *Capers* and the cases from other circuits all examined the employment of two-step tactics in the domestic criminal context, where national security concerns were not implicated. In contrast to domestic criminal cases where rationales for use of the two-step seem to lack "not only legitimacy but also credibility," the national security justification in the terrorism context is more compelling.¹⁴³ Given the facts of a case like Ahmed, a court likely could interpret "deliberate" to mean deliberately trying to obscure the effect of a later *Miranda* warning rather than simply

138. See discussion *supra* Part III.A.

139. *Id.*

140. *Capers*, 627 F.3d at 481.

141. Government's Post-Hearing Memorandum, *supra* note 31, at 18–19.

142. *New York v. Quarles*, 467 U.S. 649, 656 (1984). In fact, the FBI has taken the position that the *Quarles* exception does apply in certain situations where suspects are being interrogated for intelligence-gathering purposes. See FED. BUREAU OF INVESTIGATION, CUSTODIAL INTERROGATION FOR PUBLIC SAFETY AND INTELLIGENCE-GATHERING PURPOSES OF OPERATIONAL TERRORISTS INSIDE THE UNITED STATES (Oct. 21, 2010), available at <http://www.nytimes.com/2011/03/25/us/25miranda-text.html>; DEP'T OF JUSTICE, GUIDANCE FOR CONDUCTING INTERVIEWS WITHOUT PROVIDING *MIRANDA* WARNINGS IN ARRESTS OF TERRORISM SUSPECTS (Oct. 19, 2010), available at <http://www.justice.gov/oip/docs/ag-memo-miranda-rights.pdf>.

143. *Capers*, 627 F.3d at 481.

intentionally withholding a warning.¹⁴⁴ The bar against “deliberate” violations was to prevent interrogators from purposefully undermining *Miranda*’s protections, something the government in *Ahmed* made clear was not the rationale behind the first stage two-step interview. Critics of the use of the two-step domestically argue that the effect of the Supreme Court’s murky *Miranda* jurisprudence has been to encourage law enforcement to use *Miranda* as a tool for interrogators rather than a prophylactic for suspects.¹⁴⁵ However, the unique purpose of intelligence-gathering distances these foreign terrorism interrogations from the issue that domestic *Miranda* interrogations face.

2. Objective Factors

The objective considerations in *Ahmed* also tend to show that the violation was not deliberate because it was not calculated to undermine the effectiveness of the later *Miranda* warning. In fact, the agents who interrogated Ahmed were careful to separate the two stages of the interview process. Not only was there no overlap between the FBI interviewers or the content of the two interviews,¹⁴⁶ but there was also a period of five days between the first un-Mirandized interview in December and the “clean” team’s first Mirandized interview in January.¹⁴⁷ In *United States v. Carter*, another Second Circuit case, the court found no deliberate *Miranda* violation with a much shorter six-hour interval between interviews.¹⁴⁸ Furthermore, Ahmed’s interviewers requested that “the [Mirandized interviews] occur in a separate room, with separate [] officers that had not previously interviewed [the defendant] and that could potentially be called to testify at some future date.”¹⁴⁹ Finally, law enforcement agents were careful to read Ahmed his rights at the start of each day, and made clear that

144. Justice Kennedy’s opinion may support this interpretation, stating that the technique as used in *Seibert* “distorts the meaning of *Miranda* and furthers no legitimate countervailing interest.” *Missouri v. Seibert*, 542 U.S. 600, 621 (2004).

145. See, e.g., Sandra Guerra Thompson, *Evading Miranda: How Seibert and Patane Failed to “Save” Miranda*, 40 VAL. U. L. REV. 645, 670 (2006) (“The cumulative effect of the Court’s jurisprudence has been to free interrogators to obey or disobey *Miranda*’s strictures depending on the balance of advantages and disadvantages.”).

146. Government’s Post-Hearing Memorandum, *supra* note 31, at 25–27.

147. *Id.* at 27.

148. *United States v. Carter*, 489 F.3d 528, 533 (2d Cir. 2007).

149. Government’s Post-Hearing Memorandum, *supra* note 31, at 27.

what Ahmed said to his first set of interviewers could not be held against him.¹⁵⁰

An analysis of *Ahmed*'s subjective and objective factors weighs against finding that the government's *Miranda* withholding was "deliberate" as defined by *Seibert*. It is likely that in cases like *Ahmed* courts will hold that the two-step was not deliberately designed to obscure the legal implications of *Miranda* or to weaken the suspect's belief in his *Miranda* rights. Since the failure to Mirandize was in good faith, the initial omission of *Miranda* warnings in *Ahmed* would not render the post-*Miranda* statements inadmissible.

B. CURATIVE MEASURES CAN OVERCOME THE STEP-ONE STATEMENTS

A further argument against suppressing all two-step statements made in extraterritorial terrorism cases is that even if a court were to hold that the two-stage interrogation was a "deliberate" violation of *Miranda*, the curative measures taken by U.S. officials to separate the two stages are enough to overcome the *Miranda* violation. This is particularly likely in the terrorism context, where the purpose of the two-stage approach and the separation of the "dirty" and "clean" teams is to make sure that necessary intelligence information is gained before a different interrogation can occur for the less time-sensitive purposes of criminal prosecution.

As discussed in Part III.C, the line between Kennedy and the *Seibert* plurality blurs when analyzing Kennedy's "curative measures" and the plurality's "efficacy of the warning." Because a law enforcement official's intent (whether or not to deliberately subvert the efficacy of the *Miranda* warning) bears directly on the strength and efficacy of the warning given in any particular case, the analyses of the plurality and Justice Kennedy are similar at this point. Particularly in the terrorism context, despite the presence of a "deliberate" two-step structure, the interviewers involved will "deliberately" try to separate the two interrogations as much as possible in order to distinguish the second from the first.

150. *Id.* at 31.

The *Ahmed* scenario brings Justice Kennedy even closer to *Seibert*'s plurality in terms of result. The situation would still fall into Kennedy's "deliberate" category, but more deference might be given to the possibility of "curative measures" in this context. What separates the two-stage approach in terrorism cases from standard domestic police procedure is that the deliberate use of the two-step tactic is motivated by different concerns. The investigators' step-one motive in the terrorism context is to extract information for the purposes of national security, but their step-two motive is to obtain evidence for criminal prosecution in Article III courts. Because the aim is different, interrogators in terrorism cases could, and as a policy and practical matter should, be much more disposed to implement curative measures as compared to ordinary law enforcement cases. As opposed to the terrorism context, the domestic two-step tactic in the law enforcement context is mainly used to increase the chances of eliciting a confession from a suspect. Therefore, in the ordinary criminal context it is unlikely that any curative measures would be attempted to separate the two stages. Though the *Seibert* court does express hostility towards overt police tactics that leave suspect without a meaningful choice of whether to self-incriminate, the "intent" behind the two-stage process in terrorism cases is different. Consequently, a court's analysis could also be different in situations where conscientious investigators had put safeguards in place.

In Ahmed's case, for example, the agents and U.S. officials involved were careful to separate the two stages of the interrogation to the extent that a court could reasonably hold that the curative measures taken ensured "that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver."¹⁵¹ Though the circumstances dictated that only a five day break occurred between the un-Mirandized and Mirandized stages of the interview, the agents were careful to ensure that there was no overlap in personnel or location between the two stages and that Ahmed was read his *Miranda* rights and understood the waiver.¹⁵² Unlike in *Seibert* and other domestic cases, the agents involved in

151. *Missouri v. Seibert*, 542 U.S. 600, 622 (2004).

152. Government's Post-Hearing Memorandum, *supra* note 31, at 25–27.

the Mirandized questioning were careful never to reference any earlier interviews that Ahmed had with either U.S. or Nigerian officials.¹⁵³ Furthermore, Kennedy wrote that “an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient.”¹⁵⁴ At the beginning of Ahmed’s Mirandized interviews, agents were careful that Ahmed read and understood each section of the Advice of Rights form, the goal being “to make sure that the defendant understood specifically that the fact that he spoke to others in the past did not mean that he had to speak to the agents at the present interview.”¹⁵⁵ This careful attempt to distinguish the Mirandized interviews from prior interviews for Ahmed would likely satisfy Kennedy’s “curative measures” standard in *Seibert*.

V. CONCLUSION

There is a niche in current *Miranda* jurisprudence for the admission of statements made by defendants in the course of extra-territorial terrorism investigations, despite the calculated nature of two-step interrogation strategy. Because the goals of the two-step are different in the terrorism context than in the ordinary domestic criminal context, courts should be willing to admit evidence not only because it would further important objectives of the justice system, but also because sufficient curative steps are likely to be taken even in the face of the “deliberate” nature of the use or non-use of *Miranda* warnings. Overall, *Missouri v. Seibert* and its multitude of opinions may cause greater confusion to both lower courts and law enforcement than is necessary. Although questions still remain about what degree of attenuation between step one and step two of the interrogation is necessary for a court to admit confessions elicited via a deliberate two-stage interrogation, given the right safeguards, Justice Kennedy’s concurring opinion in *Missouri v. Seibert* is not as hostile to the tactic in the terrorism context as it might seem on its face.

Not only is the *Miranda* issue confusing in terrorism investigations due to murky Supreme Court precedent on confessions, but the problem is also convoluted by its position at the intersec-

153. *Id.* at 34–35.

154. *Seibert*, 542 U.S. at 622.

155. Government’s Post-Hearing Memorandum, *supra* note 31, at 32.

tion of intelligence, national security, and law enforcement. The interplay of international investigations and domestic prosecutions in the extraterritorial two-step context implicates wider policy issues — in particular, the FBI's interview techniques, how and where to prosecute terrorism suspects, and international cooperation in terrorist investigations. The issue of how the Fifth Amendment and *Miranda* may or may not restrict extraterritorial terrorism investigations relates directly to another issue — the choice of law question of how to prosecute terrorism suspects in general. The debate over whether to use Article III domestic courts and the criminal justice system or military tribunals to prosecute terrorists remains contentious.¹⁵⁶ From the Executive's perspective, it is easier to maintain both options and to tailor the particular case to the best option.¹⁵⁷ In contrast, some lawmakers still push for no *Miranda* warning requirement and military tribunals for known terror suspects.¹⁵⁸ In the debate over *Miranda* warnings for terrorism suspects, the Executive Branch's continued commitment to prosecuting terrorists in Article III courts as well as in the military system makes the question of admissibility of two-step evidence pressing as well as relevant.

156. See, e.g., Charlie Savage, *G.O.P. Takes Hard Line in Pushing Military Trials for All Terrorism Suspects*, N.Y. TIMES, Oct. 28, 2011, at A4.

157. Savage, *supra* note 8 (“From the government’s perspective, it’s better to maintain options for custody and prosecution and in each case to select that option that best fits the needs of a particular case,” Mr. Wainstein said.”).

158. *Id.*