The Political Foundations of *Miranda v. Arizona* and the *Quarles* Public Safety Exception

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I. TO MIRANDIZE, OR NOT TO MIRANDIZE: THE CASE OF THE BOSTON BOMBER

Tragedy struck the Atlantic coast when on April 15, 2013, at 2:49 pm EDT, two bombs exploded at the Boston Marathon finish line, killing three people and injuring 282 others. A massive manhunt ensued and large parts of the City of Boston were shut down to facilitate the search for Dzhokhar and Tamerlan Tsarnaev, two brothers who were suspected of carrying through a terrorist plot.[1] On April 19, 2013, Americans were glued to their televisions, watching as authorities cornered Dzhokhar Tsarnaev in an abandoned boat outside of Boston in Watertown, MA.[2] After Tsarnaev was taken into custody, the question immediately turned to whether or not he should be read his Miranda rights as presumably required by the landmark decision in *Miranda v. Arizona*.[3] At the press conference announcing the capture of Tsarnaev, the U.S. Attorney for Massachusetts, Carmen Ortiz, announced that the government could cite *New York v. Quarles*[4] and the Public Safety Exception to the *Miranda* requirement in cases of terrorism.[5]

From past experience, the Obama Administration was profoundly aware of the political consequences of informing terrorism suspects of their constitutional rights. On Christmas Day in 2009, Umar Farouk Abdulmutallab was accused of boarding a plane from Amsterdam to the United States with the intent of detonating explosives that were hidden in his undergarments. The suspect was immediately taken to the hospital where FBI agents began interrogating him for just under an hour.[6] After Abdulmutallab made it clear to authorities that he no longer wanted to talk to them, FBI officials informed the suspect of his rights after

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[1] Timeline of Boston Marathon Events, BOSTON HERALD, http://www.boston.com/news/local/massachusetts/2015/01/05/timeline-boston-marathon-bombing-events/qiYJmANm6DYxqsusVq66yK/story.html(last visited Jan. 14, 2015).

[2] *Id.*

[3] *Id.*; Mark Sherman, *Dzhokhar Tsarnaev Miranda Rights Timing Sparks Legal Questions*, HUFFINGTON POST (April 25, 2013 10:04 PM), http://www.huffingtonpost.com/2013/04/25/dzhokhar-tsarnaev-miranda_n_3159287.html; *see* Miranda v. Arizona, 384 U.S. 436 (1966).

[4] New York v. Quarles, 467 U.S. 649 (1984).

[5] *Boston News Conference on Bombing Suspect* (C-SPAN television broadcast Apr.13, 2013), *available at* http://www.c-span.org/video/?312281-1/boston-news-conference-bombing-suspect.

[6] Richard A. Serrano & David G. Savage, *Officials OKd Miranda Warning for Accused Airline Plotter*, L.A. TIMES (Feb. 1, 2010), http://articles.latimes.com/2010/feb/01/nation/la-na-terror-miranda1-2010feb01.

deliberating with officials from the State Department, Justice Department, FBI, and the CIA.[7] Republicans were immediately critical about the decision to inform the suspect of his rights, especially the Obama Administration's policy that allowed terrorism suspects to be processed through the civilian criminal justice system. In a letter to Attorney General Eric Holder, Senator Mitch McConnell (R-KY) wrote:

> It appears that the decision not to thoroughly interrogate Abdulmutallab was made by you or other senior officials in the Department of Justice . . . We remain deeply troubled that this paramount requirement of national security was ignored – or worse yet, not recognized – due to the administration's preoccupation with reading the Christmas Day bomber his Miranda rights.[8]

In response to these criticisms, the Justice Department formulated a policy for handling these sensitive interrogation situations.

The Department of Justice announced its legal policy of invoking the *Quarles* Public Safety Exception in the event that public safety becomes a concern. The FBI memo instructed agents to treat terrorism suspects in the following way:

> If applicable, agents should ask any and all questions that are reasonably prompted by an immediate concern for the safety of the public or the arresting agents without advising the arrestee of his *Miranda* rights.
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> 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.[9]

Immediately after U.S. Attorney Carmen Ortiz explained to the media the Justice Department policy of invoking the Public Safety Exception in response to the Boston Bombing incident, there was a scrum by analysts to find out what the Public Safety Exception entailed.[10]

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[7] *Id.*

[8] *See* 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.

[9] Memorandum from the Acting Deputy Att'y Gen. (OCT. 19, 2010) (on file with the Dept. of Justice), *available at* http://www.justice.gov/oip/docs/dag-memo-ciot.pdf).

[10] Bill Chappell, *Miranda Rights And Tsarnaev: Ex-U.S. Attorney General Weighs In*, NPR (Apr. 21, 2013 12:07 PM), http://www.npr.org/blogs/thetwo-way/2013/04/

Some analysts were immediately critical of the decision to invoke the Public Safety Exception in response to the capture of Tsarnaev. Emily Bazelon wrote for *Slate* that:

> There is one specific circumstance in which it makes sense to hold off on Miranda [sic]. It's exactly what the name of the exception suggests. The police can interrogate a suspect without offering him the benefit of Miranda [sic] if he could have information that's of urgent concern for public safety . . . The problem is that Attorney General Eric Holder has stretched the law beyond that scenario. And that should trouble anyone who worries about the police railroading suspects, which can end in false confessions.[11]

Bazelon's response represents just one perspective from the widespread public debate that erupted after the Obama Administration declared its legal policy with respect to the legal rights of potential terror suspects. This is a debate that continues to this day and has important legal consequences for the rights of criminal suspects.

Invoking the Public Safety Exception to interrogate terrorism suspects without informing them of their *Miranda* rights raises important questions in a political system where the judiciary oversees the power of authorities to gather information from the accused. In this Article, we review the development of the *Miranda* Rule prior to its adoption by the United States Supreme Court by placing it in the context of the Congressional debate over the evidentiary rule announced in *Mallory v. United States*.[12] It is important to understand the political and legal context surrounding the *Miranda* warning because doing so may help us reach normative conclusions about whether terror suspects, such as Tsarnaev, should be informed of their rights prior to interrogation.

Using a neo-institutionalist perspective,[13] we show that the *Mi-*

21/178254784/miranda-rights-and-tsarnaev-ashcroft-says-u-s-move-is-the-right-one.

[11] Emily Bazelon, *Why Should I Care That No One's Reading Dzhokhar Tsarnaev His Miranda Rights?*, SLATE (Apr. 19, 2013, 11:29 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/04/dzhokhar_tsarnaev_and_miranda_rights_the_public_safety_exception_and_terrorism.html.

[12] *See* Mallory v. United States, 354 U.S. 449 (1957), *modified by statute*, 18 U.S.C. § 3501 (2013), *as recognized in* Corley v. United States, 556 U.S. 303 (2009).

[13] *See* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 1–12 (Cornell W. Clayton & Howard Gillman eds., 1999); J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM (2004); MAKING POLICY, MAKING LAW: AN INTERBRANCH

randa Rule was developed after a number of critical institutional interactions that occurred between the various branches of American government as the nation debated the problem of crime and processing criminal suspects in the custody of law enforcement officers. It is not our intention here to argue that the debates occurring in Congress prior to *Miranda* were causal explanations of the ruling. Instead, we argue that these institutional interactions and, thus, political supports preceding and arguably shaping the *Miranda* decision were absent when the Burger Court formulated the *Quarles* Public Safety Exception. Prior to the Court's announcement in *Miranda* (1966), and after the ruling in *Mallory* (1957), Congress struggled for a decade to reach consensus on how to inform criminal suspects of their rights when in the custody of federal officials or authorities in the District of Columbia. During this time, a small group of senators successfully obstructed the legislative progress that was made toward achieving consensus on the question of the rights of criminal suspects. When legislative obstructions proved insurmountable, the U.S. Supreme Court was instrumental in breaking through the political stalemate by handing down the *Miranda* ruling.

By any measure, the ruling handed down by the U.S. Supreme Court in *Miranda v. Arizona* was an unpopular one, with conservatives later proposing legislation to overturn the decision.[14] How is judicial review justified when the Supreme Court hands down such seemingly unpopular decisions like the one in *Miranda*? As a number of scholars have demonstrated in other legal conflicts, legislatures are prone to a variety of obstructions that discourage legislative policy development and when the Supreme Court intervenes, a close examination often uncovers an infrastructure of political support for its rulings.[15] Rather than acting in a counter-majoritarian manner, the Court can legitimize the preferences of popular majorities by helping political coalitions overcome legislative obstructionists, especially those using the supermajority mechanisms of institutions like the U.S. Senate to keep legislation from passing.[16] *Miranda v. Arizona* has similar political foundations because

PERSPECTIVE 3–12 (Mark C. Miller & Jeb Barnes eds., 2004).

[14] Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda*?*, 85 CORNELL L. REV. 883, 894-901 (1999).

[15] *See* Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005); *see also* SUPREME COURT DECISION-MAKING, *supra* note 13, at 28–42.

[16] *Id.*

it occurred after Congress engaged in a robust political debate that bore no fruit due to the successful actions of legislative obstructionists who supported maintaining the legal status quo that was in place after the Court handed down *Mallory v. United States*.

The ruling in *Miranda* was a judicially-created compromise that reconciled the desire of Northern Democrats to maintain the practice of U.S. Commissioners informing suspects of their rights with the desire of Republicans and Southern Democrats to provide greater flexibility to law enforcement officers who would inform criminal suspects of their rights.[17] However, the requirement that these procedures be followed at the state-level proved too much for the coalition of Southern Democratic senators like Sam Ervin (D-NC) and John McClellan (D-AR) who were strong advocates for states' rights and also members of the Senate Judiciary Committee.[18] This probably explains why there was a significant backlash among Republicans and Southern Democrats even though *Miranda* warnings were nearly identical to the federal statutory language that was widely supported by this coalition in Congress. Congress responded in 1968 with the Omnibus Crime Control and Safe Streets Act, a statute that included a provision overriding *Miranda* by instituting the pre-*Miranda* voluntariness test,[19] although the main thrust of the statute was to provide law enforcement assistance to the states through block grants rather than to censure the Court. If the provision invalidating *Miranda* was not included in the legislation, then the statute was bound to fail because it needed support from the Southern Democrats who considered overriding *Miranda* among the highest of their priorities. In fact, it was such a parochial provision that future presidents, including

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[17] Our observation is consistent with others who observed that:

> *Miranda* was something of a compromise. The Court did not forbid all interrogations without counsel, as some had invited it to do and as others had feared it might hold in the wake of *Escobedo*. Interrogations still could continue, but within set procedures that would protect Fifth Amendment rights. Nor did the Court prohibit police officers from questioning people who possess relevant information, but are not suspects of any crime. By limiting its application to custodial interrogations, the Justices narrowed *Miranda*'s bite to situations in which suspects legitimately need Fifth Amendment protections because custodial questioning aims to elicit incriminating information.

Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 121 (1998).

[18] Kamisar, *supra* note 14, at 894-901.

[19] "[A] confession, in order to be admissible, must be free and voluntary: that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight." WILLIAM OLDNALL RUSSELL, 3 A TREATISE ON CRIMES AND MISDEMEANORS 478 (London, Stevens and Sons, Ltd. 1896).

Nixon, ignored it and instructed federal officers to continue using *Miranda* as a matter of federal policy for treating criminal suspects.[20] This extensive background demonstrates that prior to and following the *Miranda* decision, there was robust political debate and ongoing institutional dialogues between Congress, the Court, and the executive branch that shaped policy of how we treat criminal suspects and how much flexibility is granted to law enforcement officers.

Through our examination of the Congressional Record, however, we found almost no debate in Congress or in the executive branch about emphasizing public safety through an exception to the exclusionary rule that was articulated in *Miranda*. Therefore, we argue that the Public Safety Exception announced in *Quarles* did not receive the same amount of full-throated and robust congressional debate that occurred prior to the *Miranda* ruling and that, while the rule announced in *Miranda* helped overcome a legislative obstruction and bore the qualities of a doctrine possessing political foundations, the *Quarles* exception is a prominent example of judicial policymaking that deserves greater congressional attention and debate, especially as applied to terrorism suspects.

We begin our analysis by describing the historical development of Supreme Court decisions leading up to the *Miranda* decision. In doing so, we pay particular attention to the Court's decision in *Mallory v. United States*,[21] a case that is one of the first to explore the admissibility of confessions in the District of Columbia. We also show how Congress debated the procedural safeguards meant to protect those held in custody by law enforcement officers in the District of Columbia in the immediate aftermath of *Mallory v. United States*, and how that debate shaped the decision that was handed down in *Miranda*. We continue by outlining Congress's decision to send law enforcement assistance to the states through block grants in the Omnibus Crime Control and Safe Streets Act of 1968.[22] This response included a provision weakening the *Miranda* Rule, but this was ignored by future presidents and struck down by the

[20] Michael Edmund O'Neill, *Undoing* Miranda, 2000 BYU. L. REV. 185, 236 (2000).

[21] *See Mallory*, 354 U.S. at 449. Another important case that preceded *Mallory* was McNabb v. United States, 318 U.S. 332 (1943), *modified by statute*, 18 U.S.C. § 3501, *as recognized in* Corley v. United States, 556 U.S. 303, 318 (2009). *McNabb* involved confessions received by federal law enforcement officials while holding criminal suspects in custody. For the purposes of this project, we focus on *Mallory* to demonstrate the legislative response immediately leading up to *Miranda*.

[22] 18 U.S.C. § 2510 (2013).

Rehnquist Court in *Dickerson v. United States*. We conclude our analysis by describing how the *Quarles* Public Safety Exception has been applied by the lower courts and what this exception means in light of our "democratic experience" with *Miranda* warnings.

II. THE *MALLORY* RULE AND THE CONGRESSIONAL DEBATE TO INFORM SUSPECTS OF THEIR RIGHTS

In the 1930s and the 1940s, the U.S. Supreme Court began examining police practices that produced involuntary confessions.[23] In one case, the Court reviewed involuntary confessions documented in *Brown v. Mississippi*,[24] where a Mississippi state deputy admitted to whipping and hanging a criminal suspect from a tree in order to extract a confession. Other suspects were brought into the station house and whipped until police were satisfied that they had extracted the confessions of guilt needed to successfully prosecute the crimes. In light of these facts, the Supreme Court refused to endorse the state's tolerance for the zeal with which officers were pursuing confessions from suspects. In reversing the decision by the Mississippi Supreme Court, Chief Justice Charles Evans Hughes declared:

> The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination . . . without supplying corrective process. The State may not deny to the accused the aid of counsel. Nor may a State, through the action of its officers, contrive a conviction through the pretense of a trial.[25]

Nearly twenty years later, the U.S. Supreme Court made another authoritative statement on the voluntariness of confessions when it handed down *Mallory v. United States*,[26] a unanimous Warren Court decision, written by Justice Frankfurter, that articulated a federal judicial response to the voluntariness of confessions, but drew an immediate and negative reaction from some members of Congress.

Mallory began on April 7, 1954, when police were called to a Washington, D.C. apartment complex in response to an alleged sexual

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[23] *See* DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 1067 (8th ed. 2011).

[24] Brown v. Mississippi, 297 U.S. 278 (1936).

[25] *Id.* at 285–86 (citations omitted).

[26] *Mallory*, 354 U.S. 449.

assault in a basement laundry room.[27] The victim was doing laundry and sought assistance from the building janitor, who lived in the apartment complex.[28] When the victim sought assistance, she was greeted at the door by the petitioner, Andrew Mallory, the janitor's nineteen-year-old half-brother, who helped the victim.[29] Mallory returned to his apartment, but shortly thereafter, a masked man fitting Mallory's description attacked the woman in the laundry room basement.[30] When police arrived at the crime scene, Andrew Mallory was no longer at the apartment complex, but when he was found the next afternoon, he was questioned by authorities at police headquarters and confessed to the crime after submitting to a lie detector test.[31] The confession came at about 9:30 pm, was repeated several times, and was dictated to a typist between 11:30 pm and 12:30 am.[32] In all, Andrew Mallory was held at the police station for a total of approximately eight hours. Although there were attempts by police investigators to call the home of a U.S. Commissioner immediately after Mallory's first confession, Mallory was not informed of his rights by a magistrate until the next morning.[33]

When Mallory was taken into custody, District of Columbia authorities were required to follow the "frequently ignored"[34] Rule 5(a) of the Federal Rules of Criminal Procedure, which requires that "officer[s] making an arrest . . . shall take the arrested person *without unnecessary delay* before the nearest available commissioner."[35] When the defendant is brought before a commissioner, then that commissioner is required to inform the defendant of "the complaint against him, of his right to retain counsel, and of his right to have a preliminary examination."[36] Furthermore, the commissioner is required to explain to the defendant that statements are not mandatory and that any statements can be used against the defendant.[37] Finally, the commissioner is also expected to

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[27] *Id.* at 450.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 451.
[33] *Id.*
[34] Comment, *Prearraignment Interrogation and the* McNabb-Mallory *Miasma: A Proposed Amendment to the Federal Rules of Criminal Procedure*, 68 YALE L.J. 1003, 1005 (1959) [hereinafter *Prearraignment Interrogation*].
[35] *Mallory*, 354 U.S. at 451–52 (quoting FED. R. CRIM. P. 5(a)) (emphasis added).
[36] *Id.* at 453–54 (citing FED. R. CRIM. P. 5(b)).
[37] *Id.* at 454.

allow the defendant a reasonable amount of time to consult with an attorney.[38] The Federal Rules of Criminal Procedure—applicable here—were developed by Article III judges and codified by Congress, so when the U.S. Supreme Court unanimously ruled in favor of Mallory, finding that he was not taken before a magistrate without delay,[39] the Court was ruling on a provision with which it had intimate experience. In the words of the Court, "The requirement of Rule 5(a) is part of the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement."[40] Since this rule was developed by Congress, it only applied in the District of Columbia and when suspects were in federal custody, but it is nevertheless important here because the Court's authoritative decisions on conflicts occurring over federal law and in the District of Columbia sometimes foreshadow how it will address these issues at the state-level.[41]

In hearing Mallory's appeal, the Court became concerned that Mallory did not fully understand his rights.[42] The Court wrote, "When this inquiry of a nineteen-year-old lad of limited intelligence produced no confession, the police asked him to submit to a 'lie detector' test."[43] Particularly troublesome to the Justices was that Mallory was not told about his right to counsel, his right to remain silent, and that the prosecution could use the statements Mallory made against him. In conclusion, Justice Frankfurter wrote for the Court that, "We cannot sanction this extended delay, resulting in confession, without subordinating the general rule of prompt arraignment to the discretion of arresting officers in finding exceptional circumstances for its disregard."[44]

Almost immediately after the decision in *Mallory*, members of Congress were quick to point out that interpreting the requirement that suspects be brought before U.S. Commissioners "without unnecessary delay" invited confusion among lower federal judges. One of Congress's first moves was to create a special subcommittee of the House Judiciary Committee to study the Supreme Court decisions that were

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38 *Id.*

39 *Id.*

40 *Id.* at 453.

41 *Compare* District of Columbia v. Heller, 554 U.S. 570 (2008) *with* McDonald v. Chicago, 561 U.S. 742 (2010); Bolling v. Sharpe, 347 U.S. 497 (1954) *with* Brown v. Board of Education, 347 U.S. 483 (1954).

42 *See Mallory*, 354 U.S. at 454–56.

43 *Id.* at 455.

44 *Id.* at 455–56.

handed down after the Court's 1956 term.[45] These hearings produced countless anecdotes about the effect of the *Mallory* Rule and the impending "complete breakdown in law enforcement" as a consequence of "thousands of guilty persons that will be freed."[46] Members of Congress frequently used the *Mallory* Rule as evidence that Chief Justice Warren and the Supreme Court were allowing dangerous criminals to go free. In the months following his release, Andrew Mallory became wanted for the investigation of crimes that were committed in Philadelphia, which prompted members of Congress to use the *Mallory* case as a cautionary tale for protecting society from unscrupulous criminals. A *Washington Evening Star* editorial warned residents of the dangers lurking in the shadows of the nation's capital:

> Now the police are hunting again for Mallory. He is wanted for housebreaking and assaulting the daughter of a woman who had befriended him. And this within 6 months after his release from jail. The real point, it seems to us, is that the law, as it has been interpreted by the courts, is too heavily weighted on the side of the criminal. The public, or society . . . is entitled to some consideration, too . . . [O]ne thing is certain – [Mallory] ought not to be roaming the streets of this city. And as long as he and others like him are on the loose it would be well to keep the doors locked.[47]

Congress, especially the Republicans and Southern Democrats who adopted positions in support of greater flexibility for law enforcement officers, and who were becoming increasingly agitated by the Court's criminal procedure rulings, immediately began investigating ways to statutorily override the Supreme Court decision by revising Rule 5(a) of the Federal Rules of Criminal Procedure.

III. THE CONGRESSIONAL RESPONSE TO *MALLORY V. UNITED STATES*: INFORMING CRIMINAL SUSPECTS OF THEIR RIGHTS

Republicans and Southern Democrats responded to *Mallory* by considering legislation to revise Rule 5(a) so that it would apply the voluntariness standard to confessions. Representative Kenneth Keating (R-NY), who spearheaded the effort to revise the *Mallory* Rule, declared

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[45] WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS 178 (1962).

[46] *See id.*

[47] 104 CONG. REC. 199 (1958) (statement of Sen. Thurmond).

the need for greater clarity by announcing:

> The confusion among lawyers, the public, and the police as a result of this ruling on Federal arraignment procedures, should be cleared up without delay . . . Further delay invites peril for all our citizens. The time to take the shackles off the police is upon us. Legislation to revise the Mallory [sic] decision is absolutely necessary in order to protect our citizens from criminal elements in our society. I hope the committee and then Congress as a whole will enact ameliorative legislation without further delay.[48]

The fact that perceived criminals like Mallory were going free not only signaled to some members of Congress that law enforcement agencies needed more flexibility, but that something needed to be done to curb the Supreme Court. There were members of Congress who wasted no time tying the rulings of the Court to other notoriously unpopular elements of society. Representative Bill Cramer (R-FL), a prominent Southern Republican, declared:

> Many serious questions have arisen in recent years . . . [including] whether the Supreme Court was placing an unwarranted and unbalanced emphasis on the rights of the individual under our Constitution as compared to the collective rights of society or all of the people of the country to protection, specifically against criminals, Communists, and others who do violence to the public welfare and good.[49]

When one member of Congress asked Representative Cramer whether it was appropriate for Congress to respond to the Court's ruling, Cramer replied:

> I think it is the duty and the responsibility of Congress within its constitutional authority to review the decisions of the Supreme Court and its interpretations of the laws as passed by the Congress; also to make certain that the Supreme Court does not usurp the law-enactment authority and power of Congress, and that it is its duty to do so and its responsibility. That is why I

[48] 104 CONG. REC. 633–34 (1958) (statement of Rep. Keating).
[49] 104 CONG. REC. 944–54 (1958) (statement of Rep. Kramer).

> think the formation of this committee is timely under our constitutional powers and it should go forward with this work.[50]

Representative Cramer's statement proved to be the beginning of a decades-long Congressional response to the Supreme Court's ruling in *Mallory*, a response that a small number of passionate supporters of individual rights would creatively circumvent.

While Republicans and Southern Democrats supported legislation to override the *Mallory* ruling, it was evident that others wanted to preserve or strengthen the Court's ruling. One of those members was Senator Wayne Morse (D-OR), a former law professor at the University of Oregon and a staunch libertarian on criminal procedure issues who led the fight against reversing the Supreme Court's *Mallory* decision.[51] In response to the coalition of Republicans and Southern Democrats who wanted *Mallory* overturned, Senator Morse responded:

> I wish to pay my respects to the United States Supreme Court, and thank God for it, because in these days, when hysteria so frequently stalks our country, it has become too common a practice to engage in attacks upon the United States Supreme Court and individual Justices because they live up to the sanctity of their robes and carry out their constitutional duty of rendering decisions in accordance with the Constitution as they interpret that Constitution on the basis of their legal research.[52]

Senator Morse endorsed a different perspective for how to treat criminal suspects after taking them into custody. This proposal included a clear announcement to the suspect of his or her right to counsel and a warning against self-incrimination. He described his views of this relationship in the following way:

> "Interrogate or arrest him; but you are required, when you detain him, to notify him of his rights. You are required to notify him that he is entitled to the benefits of counsel. You are required to notify him that anything he says can be used against him, and he is not under any obligation to say anything."
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> The last point is quite important. Let me say by way of generality, subject to all the limitations of a generality, that confessions

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50 *Id.*

51 *See* MASON DRUKMAN, WAYNE MORSE: A POLITICAL BIOGRAPHY (1997).

52 104 CONG. REC. 2549 (1958) (statement of Sen. Morse).

> forced out of an arrested person are usually the technique of a lazy police department and a slovenly district attorney.[53]

Nevertheless, conservatives in Congress maintained that law enforcement officers would be burdened by these requirements.

These claims, however, were met with skepticism by the coalition led by Morse. The Morse coalition advocated professionalizing law enforcement officers so that when police agencies enforced the law, the officers would do so while faithfully obeying the Constitutional rights of criminal suspects. Representative Emanuel Celler (D-NY) put it this way:

> We hear this afternoon that the police have been unable to do their duty. The police can do their duty. In the District of Columbia the police have not always been most inefficient. Their methods are outmoded. There is no school for the police. There is no school to indicate the new police methods. Maybe we do not appropriate enough money for that.[54]

These early debates over the *Mallory* Rule demonstrate that immediately following the Court's ruling, Republicans and Southern Democrats found common ground in supporting the legislative changes to the *Mallory* Rule to produce greater flexibility for federal law enforcement officers, including those in the District of Columbia. On the other hand, Democrats, especially those in the northern states, concluded that valuing the efficiency of law enforcement agencies should not outweigh the pursuit of values like individual liberty and the due process rights of criminal suspects in the custody of law enforcement officers.

These debates culminated in the drafting of legislation, the most prominent called the Willis-Keating Bill,[55] to redefine the Supreme Court's interpretation of Rule 5(a). Rep. Edwin Willis (D-LA) included the following two provisions in H.R. 11477:

> (a) Evidence, including statements and confessions, otherwise admissible, shall not be inadmissible solely because of delay in taking an arrested person before a commissioner or other officer

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53 *Id.* at 2552.

54 104 CONG. REC. 12698 (1959) (statement of Rep. Celler).

55 H.R. 11477, 85th Cong. (2d Sess. 1958).

> empowered to commit persons charged with offenses against the laws of the United States.
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> (b) No statement, including a confession, made by an arrested person during an interrogation by a law-enforcement officer shall be admissible unless prior to such interrogation the arrested person had been advised that he is not required to make a statement and that any statement may be used against him.

This bill received significant acclaim from Republicans, Southern Democrats, and even moderates. During discussion of the bill in the Senate Judiciary Committee, Senator Joseph C. O'Mahoney (D-WY) proposed an amendment to change Part A of the bill to replace "delay" with "*reasonable* delay."[56] With little opposition, the amendment passed, although some of the senators wondered how the amendment differed from the present interpretation of the *Mallory* Rule.[57] When the bill reached the full floor of the Senate it passed 65-12 in the same form as the bill reported out of the Judiciary Committee.[58] In the meantime, the U.S. House overwhelmingly passed a bill that did not include the word "reasonable" before "delay."[59] When both bills were assigned to a conference committee, the House and the Senate negotiators were at odds with one another because the House negotiators desired a bill weakening the *Mallory* Rule while the Senate negotiators were split.[60] After two days of negotiations, the conferees agreed to an amendment that recognized the following principles:

> [T]hat "reasonable delay" in arraignment would not of itself invalidate a confession obtained during such delay . . . that no confession or statement would be admissible unless prior to interrogation the suspect had been advised of his right to silence and warned that anything he said might be used in evidence . . . "that such delay is to be considered as an element in determining the voluntary or involuntary nature of such statements or confessions."[61]

Not all senators, however, were satisfied with the resulting bill.

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56 *Prearraignment Interrogation*, *supra* note 34, at 1029.
57 *Murphy*, *supra* note 45, at 195.
58 *Id.* at 207.
59 *Id.* at 219.
60 *Id.* at 219–220.
61 *Id.* at 220.

Some senators did not want a bill that returned "voluntariness" as a standard for judging the admissibility of confessions. Senator Morse was committed to "talk[ing] this [bill] to death," while Senator John Carroll (D-CO) focused on invoking a Senate rule that "forbade a conference to add new material to a bill."[62] Since this amendment was not agreed to in either the original House or Senate bills, the conference bill fell under this rule. If anyone invoked the Senate rule, the rule required the bill to be sent back to conference committee, but since this was all happening on the last day of the session before an election year, the likelihood of the bill making it to the Senate floor if the point of order was successful was low.[63] With Congress on the verge of adjournment, Senator Carroll successfully raised a point of order that was sustained by Vice President Nixon and the bill was defeated.[64] What is remarkable about the saga that ensued over the initial congressional response to the *Mallory* Rule was the ability of two senators to effectively obstruct the passage of legislation that was desired by a majority of lawmakers. As a consequence, it was another year before Congress started over to alter the *Mallory* Rule with H.R. 4957.

The various perspectives of those supporting and opposing H.R. 4957 provide insight as to how lawmakers viewed the constitutional safeguards of those in custody at this later point in time. Lawmakers who strongly supported permissive rules for the admission of evidence drafted legislative language informing suspects of the right to remain silent and the consequences of speaking to law enforcement officers. The author of the bill,[65] Rep. Willis, described it in the following way:

> This provision is deliberately intended as a protection of the rights of the accused. It goes beyond the common practice in interrogating and taking the statement of an accused . . . Under the specific provisions of this proposal the arrested person would have to be advised that he is not required to make a statement and that any statement made by him may be used against him prior to the interrogation. In short, this bill is intended to balance the rights of society and at the same time protect the rights of an accused.[66]

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62 *Id.*

63 *Id.*

64 *Prearraignment Interrogation*, *supra* note 34, at 1030.

66 105 CONG. REC. 12865 (1959) (statement of Rep. Willis).

Later, Rep. Willis was asked by Rep. Celler, an opponent of the bill, why there were no requirements to inform suspects that they also have the right to counsel. Rep. Willis responded:

> We did not do that for the simple reason that there is no requirement at that point. The right of counsel begins at time of arraignment . . . The right to counsel comes at the time of arraignment or at least preliminary hearing and that is the reason why it is not in the bill.[67]

Despite the confidence of some members of Congress that H.R. 4957 sufficiently protected the rights of the accused, opponents criticized it for not including limits on the length of time suspects could be held in custody by authorities for questioning.

Supporters of the bill, on the other hand, maintained that the proper standard for judging the admissibility of confessions was not the passage of time, but the voluntariness of the confession. They also adopted a new strategy that required law enforcement officers to inform the accused of their rights upon their arrest. One supporter of this approach was Representative William McCulloch (R-OH), who explained the purpose of the bill from the perspective of those who supported it:

> The purpose of H.R. 4957 is to return the law to its commonly accepted interpretation prior to the Supreme Court's decision. H.R. 4957 will simply clarify [*Mallory*] by providing that the 'evidence, including statements and confessions, shall not be inadmissible solely because of delay in taking an arrested person before a commissioner.' . . . The officer obtaining the confession is required to tell the accused that he does not have to make a statement and that, if he does, the statement may be used against him.[68]

Another supporter of the bill was Rep. Cramer who explained in greater detail the purpose of the bill. In explaining the legislation, Rep. Cramer said that the purpose of explaining these rights to those in the custody of law enforcement officers "is to provide adequate safeguards for the arrested individual. The burden of proof is upon the Government

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[67] *See id.*

[68] 105 CONG. REC. 12869 (1959) (statement of Rep. McCullough).

to prove that these requirements have been met."[69] Opponents of the bill, however, remained opposed to the idea of giving law enforcement officers, rather than judges, responsibility for informing suspects of their rights.

One member of Congress who came out forcefully against the obligations of law enforcement officers to deliver these warnings was Representative Alfred Santangelo (D-NY). He warned:

> The second subsection . . . is shortsighted. It requires a law enforcement officer . . . to tell an arrested person that he is not required to make a statement. The net effect of section B is to require the police officer, as soon as he apprehends a person and places him under arrest, to advise, declare, and state to the person in words or in substance, 'Mr. Mallory or Mr. Jones, you are not allowed to talk, and if you do make any statement, whatever you might say will be used against you.' How many confessions do you think you will get under those circumstances?[70]

This concern was shared by a number of other members of Congress. One was Representative Robert Kastenmeier (D-WI) who explained:

> [E]ven the proponents are forced to suggest in section [B] of the bill that the arresting officer must advise the defendant that he is not required to make a statement and that any statement made by him may be used against him. Therefore this bill presumes a delay of an undetermined period of time and insists that the police officer inform the defendant of one of his rights . . . He does not tell the defendant that he is entitled to counsel, does not inform him of the charge with which he is confronted.[71]

In addition to the opposition from members of Congress who believed that suspects were not being informed of all of their rights, the experience under the *Mallory* Rule was not producing the dire criminal problems that were predicted immediately after the rule was announced by the Court. The *Washington Post* wrote an editorial expressing opposition to H.R. 4957:

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[69] 105 CONG. REC. 12861–12889 (1959) (statement of Rep. Cramer).
[70] 105 CONG. REC. 12875 (1959) (statement of Rep. Santangelo).
[71] 105 CONG. REC. 12877 (1959) (statement of Rep. Kastenmeier).

> Policemen and prosecutors have learned to live with the Mallory rule. Their effectiveness in convicting the guilty has not been impaired; and the dire predictions that a horde of criminals would be loosed on the streets of the capital have not been realized. The Willis-Keating bill passed by the House and pending in the Senate would operate however, to open the door to serious police trespasses on individual rights; and it would take away from the courts their one effective sanction against such trespasses.[72]

In the end, H.R. 4957 did not receive the necessary support to replace the *Mallory* Rule. It was not until the mid-1960s that significant progress was made in overcoming the legislative obstructionism that became so prevalent during the post-*Mallory* debates.

As the 1960s progressed, it became clear that Congress would not pass legislation to establish uniform procedures for the interrogation of criminal suspects because liberals wanted criminal suspects brought immediately before a magistrate to be informed of their rights, while conservatives wanted law enforcement officers to do so. The most progress occurred when the Justice Department weighed in on treatment of suspects who were in the custody of law enforcement officials. By 1964, the Justice Department supported informing those in custody of their right to remain silent and their right to consult an attorney. At a hearing before the Senate Committee on the District of Columbia, Deputy Attorney General Ramsey Clark described the Justice Department's position on the *Mallory* Rule and how it formulated policy with respect to interrogating criminal suspects. After noting the importance of striking the delicate balance between the individual rights of suspects and the need to give flexibility to law enforcement, Clark testified:

> Under this [Justice Department] plan, after an arrest based upon probable cause and prior to the filing of a charge, a suspect may be questioned concerning his knowledge of a crime. As a prerequisite to questioning he must be clearly advised that he need not answer any question, that any statement given may be used against him, that he may consult counsel, a relative, or a friend, and that if he is charged and cannot afford a lawyer the court will appoint one for him.
>
> . . . .

[72] 105 CONG. REC. 15993–94 (1959) (statement of Sen. Keating).

> [DC Metropolitan Police] Chief Layton and his staff have participated in the formulation of this procedure and fully concur in it. The U.S. attorney [sic] believes that it will best serve his needs for the present. It will be improved by detailed police regulations based on experience, and can take into account the work of the American Law Institute and the American Bar Association as it becomes available.[73]

In addition to the policy positions formulated at the Justice Department, the department's U.S. Attorneys also weighed in on the issue. In a letter written to the Chief of Police for the District of Columbia Metropolitan Police Department, U.S. Attorney David Acheson explained that a consensus was emerging in the federal district and circuit courts about the treatment of criminal suspects once taken into custody. The U.S. Attorney described the type of announcement that should be adopted by Congress:

> Proposed Warning . . . You have been placed under arrest. You are not required to say anything to us at any time or to answer any questions. Anything you say may be used as evidence in court . . . . You have a right to call a lawyer, relative, or friend. He may be present here and you have a right to talk to him . . . If you cannot afford a lawyer, one may be appointed for you when you first go to court.[74]

Although the Executive Branch made significant progress articulating a new legal policy for criminal suspects in custody of law enforcement officials, Senator Morse nevertheless maintained that it did not protect individual rights. He spoke for a small group of senators who were primarily concerned with giving responsibility to individual law enforcement officers to explain to criminal suspects their rights. When the Justice Department supported specifying the rights of the accused under the *Mallory* Rule, Sen. Morse criticized the proposed policy by announcing:

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[73] *Hearing Before the S. Comm. on D.C. on Measures Relating to Crime and Crim. Proc. in D.C.*, 89th Cong. (1964) (statement of Deputy Att'y Gen. of the United States Ramsey Clark); *see also* 111 CONG. REC. 17159 (1965).

[74] *Hearings on H.R. 5688 and S. 1526 Before the S. Committee on the D.C.*, 89th Cong. 498 (1965) (statement of Deputy Att'y Gen. of the United States Ramsey Clark); *see also* 111 CONG. REC. 17,159-60 (1965).

> This is the Justice Department [sic] excuse and weak rationalization for scuttling the Mallory rule, in effect:
>
> > 1. A plain warning to the defendant, immediately in advance of the questioning, that he is not required to make any statement at any time and that any statement made by him may be used against him—
>
> What kind of protection is that, really? He has that right in any case; but that does not stop a brutal police department from browbeating him.
>
> . . . .
>
> Continuing with the reading of the recommendations:
>
> > 2. The arrested persons being afforded a reasonable opportunity to notify a relative or friend and consult with counsel of his own choosing.
>
> What a weak statement that is.
>
> Time and time again the police will take advantage of the frightened, the timid, and the ignorant. If it is all right to have a lawyer there, if it is all right to have a friend or a member of the family there, what is wrong with just taking the arrested person before a committing magistrate? The court said that should be done.[75]

Besides opposition from the liberal wing of Congress, news outlets also became concerned about allowing police officers to inform suspects of their rights. *The Washington Post* published an editorial supporting the view of the Morse coalition by announcing:

> Being advised of one's rights by a policeman is not at all the same thing as being advised of one's rights by a judge. And the insertion of the phrase "when reasonably possible" in connection with the interrogation of a defendant makes the promised protection meaningless. This kind of corner cutting neither curbs crime nor enhances respect for the law.[76]

It was not until 1966 that the congressional stalemate over the admissibility of confessions was resolved when another formal institutional player weighed in on the issue—the U.S. Supreme Court.

In 1966, the Warren Court drastically changed the nature of American interrogation law in its landmark decision, *Miranda v. Arizo-*

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[75] 110 CONG. REC. 7,438–63 (1964) (statement of Sen. Morse).

[76] *See* 110 CONG. REC. 7456 (1964) (statement of Sen. Morse).

na.[77] The Court began by outlining and describing abusive police practices, including widespread use of the "third degree."[78] Further, and perhaps more importantly, the Court stressed that the "modern practice of in-custody interrogation is psychologically rather than physically oriented."[79] This was of particular concern because custodial interrogations take place in privacy, allowing law enforcement officers to exploit certain factors or sensitive areas of the suspect's personality.[80] Therefore, "[e]ven without employing brutality, the 'third degree' or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[81]

With all of this in mind, the *Miranda* Court found that "without proper safeguards the process of [custodial interrogation] contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[82] Accordingly, the Court formulated specific safeguards for any custodial interrogation:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. 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

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[77] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[78] *Id*. at 445–47. The Court discussed the "famous Wickersham Report to Congress by a Presidential Commission . . . and a series of cases decided by [the] Court after these studies, [to show that] the police resorted to physical brutality—beatings, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions." *See id.* at 445 n.5 (citing IV NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931)). The Court continued that these practices remained "sufficiently widespread to be the object of concern" and saw no assurance that the practices would cease in the future. *Id.* at 447.

[79] *Id*. at 447.

[80] *See id*. (discussing interrogation techniques).

[81] *Id*. at 455 n.24. The Court also noted that modern interrogation practices increased the risk of a false or otherwise unreliable confession.

[82] *Id*. at 467.

> 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.[83]

The Court's authoritative decision set into motion another series of interactions between the Courts, Congress, and the Executive Branch over the proper balance to be struck when processing criminal suspects through the criminal justice system.

IV. THE CONGRESSIONAL BACKLASH IN THE WAKE OF THE *MIRANDA* DECISION

Congress's response to *Miranda v. Arizona* was forceful. Blaming *Miranda* and the Supreme Court for the increase of crime in the United States became a popular pastime among legislators. It became commonplace for legislators to propose legislation to overturn the landmark ruling. Some members of Congress began using omnibus crime bills as a vehicle to overturn the *Miranda* decision. By devoting a section of these bills to overturning *Miranda*, some members of Congress who disagreed with overturning *Miranda* were guaranteed to vote for it because they agreed with another part of the bill, especially sections that devoted block grants to cash-poor law enforcement agencies.

Still, not all senators were so easily persuaded to support one of the first crime bills drafted in the wake of the *Miranda* decision, and neither was the Johnson Administration, which vetoed those measures. Senator Robert Kennedy (D-NY), for instance, opposed the measure, stating:

> I have carefully studied the omnibus crime bill [H.R. 5688] . . . I regret that I cannot support this bill as it is presently drafted because of the provisions . . . that deal with the arrest, the detention, and interrogation of criminal suspects. In my judgment, these provisions are unclear in their scope and subject to police abuse. The threat they pose to the civil liberties of this city's citizenry cannot be taken lightly.[84]

The head of the Justice Department, Attorney General Ramsey Clark, agreed with Kennedy because Clark believed that the bill "con-

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[83] *Id.* at 478–79.

[84] 112 CONG. REC. 27,291–92 (1966) (statement of Sen. Kennedy).

tained some very repressive and . . . several unconstitutional features."[85]

Crime bills were not the only response to the Supreme Court's decisions. In addition to the Omnibus Crime Control Bill, Senator Sam Ervin (D-NC) proposed a constitutional amendment to overturn *Miranda*.[86] Although he gathered little support, Sen. Ervin nevertheless proposed stripping the Supreme Court of jurisdiction in cases involving voluntary confessions. This bill, S. 1194, which later became part of the proposed Omnibus Crime Control Bill of 1968, stated:

> Neither the Supreme Court nor any inferior court ordained and established by the Congress under article [sic] III of the Constitution of the United States shall have jurisdiction to review or to reverse, vacate, modify, or disturb in any way, a ruling of any trial court of any State in any criminal prosecution admitting in evidence as voluntarily made any admission or confession of an accused if such ruling has been affirmed or otherwise upheld by the highest court of the Sate having appellate jurisdiction of the cause.[87]

However, there was little agreement about the constitutionality of stripping the Supreme Court of jurisdiction to hear these cases. When Congress debated altering the Court's jurisdiction in the Omnibus Crime Control and Safe Streets Act in 1968, Senator John McClellan (D-AR) argued that there was historical precedent for altering the Court's jurisdiction dating back to the Civil War and that was "clearly enunciated in *Ex Parte McCardle*."[88] In response, Senator Strom Thurmond (R-SC) also supported stripping the Court of jurisdiction and argued that Congress wielded the institutional power to alter the Court's jurisdiction in the area of voluntary confessions because "Article III, Section 2 sets up the authority for Congress to limit the jurisdiction of the Court in any field Congress wishes."[89] Senator Sam Ervin agreed, saying, "The good and wise men who drafted the Constitution could not have used plainer words than those; and those words state in unmistakable language that Congress has the constitutional power to define the appellate jurisdiction

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[85] ALEXANDER WOHL, FATHER, SON, AND CONSTITUTION: HOW JUSTICE TOM CLARK AND ATTORNEY GENERAL RAMSEY CLARK SHAPED AMERICAN DEMOCRACY 323 (2013).

[86] Kamisar, *supra* note 14, at 889.

[87] S. 1194, 90th Cong. (1968); *see also* 113 CONG. REC. 5578 (1967).

[88] 114 CONG. REC. 11,200–232 (1968) (statement of Sen. McClellan) (citing *Ex parte* McCardle, 74 U.S. 506 (1868)).

[89] *See* 114 CONG. REC. 11,610–619 (1968) (statement of Sen. Thurmond).

of the Supreme Court."[90] These proposals eventually became part of the Omnibus Crime Control and Safe Streets Act, which was designed to deal with the issue of crime through greater law enforcement assistance to the states.

Meanwhile, the Johnson Administration wanted to see the Omnibus Crime Bill passed quickly with a presidential election less than one year away. One *New York Times* article reported:

> A majority of the Senate is reported to favor the President's bill and the White House is said to be anxious that it pass soon so that the money can reach local police departments before next summer, partly because crime and civil disorder are expected to be a prime issue in the Presidential campaign.[91]

While most everyone agreed that law enforcement assistance was needed in the states, not everyone agreed that altering the Court's jurisdiction would withstand constitutional scrutiny. The Attorney General prepared a statement about the constitutionality of the section that altered the Court's jurisdiction to determine whether confessions could be admitted into evidence:

> The Department of Justice considers this legislation of doubtful constitutional validity . . . I must say that I find [Section 3502] the most repugnant section of the whole bill. Section 3502 of title II abolishes the jurisdiction of the Supreme Court and other Federal courts to review a State court determination admitting a confession in evidence as voluntarily made.[92]

While a number of congressmen supported altering the court's jurisdiction, several others members disagreed. Senator Joseph Tydings (D-MD) was one of those members of Congress, who argued:

> [T]he arbitrary carving of the appellate jurisdiction of the Supreme Court, with the clear motive of overruling specific court decisions such as Marbury against Madison and Martin against Hunter's Lessee; the blatant attempt to amend the Constitution by a simple legislative enactment—all of these provisions are

[90] 114 CONG. REC. 12,458 (1968) (statement of Sen. Ervin).

[91] 113 CONG. REC. 34,010 (1967).

[92] 114 CONG. REC. 11,596 (1968) (statement of Att'y Gen.); *see also* S. REP. NO. 90–1097 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112.

> fundamentally inconsistent with the roots of our tradition of respect for individual liberty, and reliance on an independent judiciary to protect our liberties.[93]

Republicans were not altogether of one mind about the proper way of responding to the Court's ruling in *Miranda*, either.

One Republican who disagreed with altering the court's jurisdiction to preclude review of voluntary confessions was Senator Hiram Fong (R-HI), who argued:

> The Supreme Court is the only tribunal provided by the Constitution to resolve inconsistent or conflicting interpretations of Federal law by State and Federal courts, and to maintain the supremacy of Federal law against conflicting State law. To deny the power of ultimate resolution by the Supreme Court in any area is to nullify the principal instrument for implementing the Supremacy Clause in our constitutional system.[94]

Senator Stephen Young (D-OH) also doubted the constitutionality of the bill and was concerned that the U.S. Supreme Court was under attack by Congress. He declared:

> I could not in good conscience vote for this bill unless such proposals and provisions are eliminated altogether. They present a grave threat to the basic principles on which our Nation was founded—to our basic concept of separation of powers, to Federal supremacy, to judicial independence, in short, to our most cherished ideas of justice and the rule of law.[95]

The legal community also stepped up the pressure by becoming more involved in opposing legislation that altered the court's jurisdiction. The New York City Bar Association's Committee on Civil Rights and Federal Legislation adopted a statement to that end:

> We deplore this proposal as exceedingly unwise and, beyond that, we believe that it raises grave constitutional issues. We most strongly urge that the Senate reject Title II. Our opposition is based on our conclusions that: as a matter of technique, the

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93 114 CONG. REC. 11,891 (1968) (statement of Sen. Tydings).

94 114 CONG. REC. 12,293 (1968) (statement of Sen. Hiram Fong).

95 114 CONG. REC. 12,925 (1968) (statement of Sen. Young).

> legislation represents a blatant assault on the federal judiciary constituting a misuse of whatever power Congress may possess over its jurisdiction.[96]

The opposition to stripping the Court's jurisdiction was enough to defeat the proposal, but it left the Omnibus Crime Control and Safe Streets Act largely intact, including Section 3501 that "replaced" the *Miranda* ruling with the pre-*Miranda* voluntariness standard.

While Congress responded to *Miranda* by successfully passing legislation to overturn it, Nixon continued to use the *Miranda* ruling to his electoral advantage. He understood that a strategic response to *Miranda* entailed consideration of the southern states' growing discontent over the Warren Court's liberal rulings in the area of criminal procedure.[97] This may explain the Nixon Administration's refusal to recognize the pre-*Miranda* voluntariness test articulated in the Omnibus Crime Control and Safe Streets Act of 1968, and instead to recognize *Miranda* as a legitimate law enforcement policy. Nevertheless, Nixon recognized an electoral opportunity to reach out to southern states by appointing "strict constructionists" who were wholly different than the pro-defendant Justices who sided with Chief Justice Warren in *Miranda*.[98]

In pursuit of this strategy, Nixon successfully appointed William Rehnquist and Chief Justice Warren Burger, both of whom were instrumental in shaping the *Miranda* doctrine and signaled greater respect for the law enforcement community over the criminally accused.[99] Burger became Chief Justice in 1969, three years after *Miranda*.[100] Nixon believed Burger would be a reliable "law-and-order" justice, rather than sympathetic to the plight of criminal suspects,[101] and his past record was

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[96] 114 CONG. REC. 14,163 (1968).

[97] *See* KEVIN M. MCMAHON, NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES (2011).

[98] Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 87 WASH. L. REV. 965, 975–76 (2012) [hereinafter Kamisar, *Rise, Decline, and Fall*] (citing RICHARD M. NIXON, TOWARD FREEDOM FROM FEAR (1968), *available at* http://legacy.library.ucsf.edu/tid/xfe16b00/pdf;jsessionid=B3108BC30B410939156F8DCF38F2F114.tobacco).

[99] *See* Russell W. Galloway, Jr., *The Burger Court (1969-1986)*, 27 SANTA CLARA L. REV. 31 (1987).

[100] *Warren E. Burger, 1969–1986*, THE SUPREME COURT HISTORICAL SOCIETY, http://supremecourthistory.org/timeline_burger.html (last visited Jan. 5, 2015).

[101] *See* Kamisar, *Rise, Decline, and Fall*, *supra* note 98, at 976 (citing SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 244 (2010)). Prior to becoming Chief Justice, Judge Burger was the principle antagonist of the liberal judges on

enough to ease the concerns of conservatives who worried that he would be another Earl Warren clone. A *Washington Post* article written by John MacKenzie described why Nixon considered Burger to be a good choice for Chief Justice. He wrote:

> Burger is a veteran of combat over the use of incriminating statements obtained illegally from suspects in police custody. He labored in the court of appeals to limit the impact of the Supreme Court's 1957 decision Mallory v. United States, a forerunner of Miranda. Over a dissenters' protest that the result was 'monstrous,' Burger held that illegally obtained statements, which could not be used the prosecutor's basic case, may be used to discredit the testimony of a defendant who takes the stand. In the course of a brief opinion, Burger cast doubt on the court's policy, dating back 50 years and more, of excluding evidence that authorities have obtained illegally.[102]

President Nixon nominated William Rehnquist for similar reasons, whose legal background revealed a deep skepticism about the Supreme Court's decisions on police interrogations and confessions. For example, while Rehnquist headed the Office of Legal Counsel, he sent an internal memo maintaining that "there is reason to believe" the *Miranda* decision favored criminals and advocated the creation of a national presidential commission "to determine whether the overriding public interest in law enforcement requires a constitutional amendment."[103]

President Nixon's belief that Justices Burger and Rehnquist would alleviate the effects of *Miranda* proved true in some way. Chief Justice Burger dealt the first major blow to *Miranda* in *Harris v. New York*.[104] In *Harris*, the Court held that the "shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense,"

his own court. President Nixon believed this trend would continue if Judge Burger became Chief Justice. *See id.* at 976–78.

[102] *See* John P. MacKenzie, *Precedent-Upsetting Ruling Give Court a Nixon Stamp*, WASH. POST, Mar. 1, 1971, at A2; *see also* 117 CONG. REC. 7833 (1971).

[103] Yale Kamisar, *Miranda's Reprieve: How Rehnquist Spared the Landmark Confession Case, but Weakened Its Impact*, 92 A.B.A. J. 48, 50 (2006) (quoting Memorandum from William H. Rehnquist, Assistant Att'y Gen., Office of Legal Counsel, to John W. Dean III, Assoc. Deputy Att'y Gen. (Apr. 1, 1969)). According to now-author John W. Dean III, the memorandum was marked "administratively confidential" and the Department of Justice "kept it locked up for many years." *See* JOHN W. DEAN, THE REHNQUIST CHOICE 12–13 (2001).

[104] Harris v. New York, 401 U.S. 222 (1971).

and that law enforcement could impeach a criminal defendant with un-Mirandized statements in cases where the defendant took the stand in his own defense.[105] Justice Rehnquist scored another victory for law enforcement in *Michigan v. Tucker* by allowing the testimony of a witness whose identity was revealed through unwarned statements given by a suspect into evidence.[106] Together, Chief Justices Burger and Rehnquist were harsh critics of *Miranda*, and Rehnquist stated that the Court "repeatedly referred to the *Miranda* warnings as 'prophylactic,' and 'not themselves rights protected by the Constitution.'"[107] In fact, Justice Rehnquist penned the majority opinion that devised the Public Safety Exception, but a number of other important cases created the momentum needed for carving out these exceptions to the rule.[108]

V. THE CONTOURS OF THE *MIRANDA* DOCTRINE

The *Miranda* decision spawned an extensive array of Supreme Court jurisprudence defining its requirements and limitations. First, police are not required to repeat the warnings prescribed by *Miranda* verbatim. Rather, *Miranda* has been satisfied in case law so long as the words chosen by law enforcement "reasonably convey" to a suspect his or her rights.[109] Police are not required to apprise a suspect of the specific subject matter to be discussed; rather, they need only convey a suspect's constitutional rights.[110] Nonetheless, police must ensure that the warnings given are reasonably effective – the Court has excluded confessions where *Miranda* warnings were given "mid-stream" or as part of a deliberate, "two-step" process to avoid giving meaningful *Miranda* warnings.[111]

Second, the warnings are only required where a suspect is both "in custody" and subject to "custodial interrogation." These phrases have spawned complex legal doctrines of their own. In determining whether an individual is in custody, courts must consider the totality of the circumstances to determine how a hypothetical, reasonable person

[105] *Id*. at 226.
[106] Michigan v. Tucker, 417 U.S. 433 (1974).
[107] Dickerson v. United States, 530 U.S. 428, 437–38 (2000) (citations omitted).
[108] *See* New York v. Quarles, 467 U.S. 649, 656 (1984). For a more in-depth analysis of the effect that Chief Justices Burger and Rehnquist had on the *Miranda* doctrine, see Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99 (1977); *see also* DEAN, *supra* note 103.
[109] Duckworth v. Eagan, 492 U.S.195 (1989).
[110] Colorado v. Spring, 479 U.S. 564 (1987).
[111] Missouri v. Seibert, 542 U.S. 600 (2004).

would perceive his or her own circumstances—if a reasonable person would not feel free to leave, then that person is in custody for *Miranda* purposes.[112] Whether a suspect has been "interrogated" for the purposes of *Miranda* requires an analysis from the perspective of the police, and asks whether direct questioning or its functional equivalent was "reasonably likely to elicit an incriminating response."[113] Chiefly, interrogation for the purposes of *Miranda* requires that questioning come from the police, meaning questions posed by a third-party need not be preceded by warnings.[114] This rule usually applies even if the police are nearby or listening to the conversation.[115] Additionally, a criminal suspect's *Miranda* rights cannot be invoked in anticipation of being in custody or subject to custodial interrogation. Instead, both elements—"custody" and "subject to interrogation"—must be satisfied before an invocation of *Miranda* rights is considered valid.[116]

Third, invocation of one's *Miranda* rights is no simple task. Invocation of the right to silence requires an affirmative, unambiguous statement indicating an intent to remain silent.[117] Even so, successful invocation of the right to silence provides short-lived protection: so long as police "scrupulously honor" the suspect's invocation of the right to silence, *Miranda* does not forbid a subsequent attempt to interrogate the suspect later that day.[118] Invocation of the right to counsel similarly requires an unambiguous statement, and successful invocation requires the

[112] *See* Stansbury v. California, 511 U.S. 318 (1994). *But see* Berkemer v. McCarty, 468 U.S. 420 (1984) (holding that a routine traffic stop does not, in fact, automatically result in "custody" for the purposes of *Miranda*, because such an occurrence does not give rise to the inherently compelling pressures contemplated by *Miranda*).

[113] Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

[114] *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 164–65 (1986).

[115] *See* Arizona v. Mauro, 481 U.S. 520 (1987).

[116] *See* McNeil v. Wisconsin, 501 U.S. 171 (1991); *see also* Bobby v. Dixon, 132 S. Ct. 26 (2011).

[117] Berghuis v. Thompkins, 560 U.S. 370 (2010).

[118] Michigan v. Mosley, 423 U.S. 96, 104–05 (1975) (holding that second interrogation attempt about a different crime two hours after invocation of the right to silence did not offend *Miranda* because suspect's invocation or right to silence was "fully respected"). The *Mosley* Court involved a second interrogation about a different crime, and the Court has not decided whether the police may attempt a second interrogation regarding the same crime. However, most lower courts have held that *Mosley*'s permissive "re-interrogation" rule applies to interrogations regarding the same crime. *See, e.g.*, Weeks v. Angelone, 176 F.3d 249 (4th Cir. 1999) (noting that "the mere fact that a second interrogation involves the same crime as the first interrogation does not necessarily render a confession derived from the second interrogation unconstitutionally invalid under *Mosley*.").

police to refrain from "re-interrogation" until the suspect has a lawyer present or until the suspect reinitiates the interrogation on his own.[119] Further, ambiguous statements need not be followed by a clarifying question from the police. Therefore, the interrogation may proceed until a suspect clearly indicates a desire for counsel.[120] Comparatively, however, an expressed intent to remain silent provides considerably more protection than invocation of the right to counsel because police may not attempt re-interrogation on any matter, even if the suspect has had a chance to consult with counsel.[121] This protection continues unless the suspect reinitiates the police interrogation,[122] or there has been a significant "break in custody."[123] A "break in custody" sufficient to allow re-interrogation occurs where a suspect has been released from *Miranda* custody for at least two weeks.[124] Where a suspect is already incarcerated pursuant to a prior conviction, a break in custody can occur if the suspect is permitted to return to "his normal life," meaning his cell or the general prison population.[125]

The *Miranda* doctrine's exclusionary rule is a particularly weak exclusionary rule in comparison to other constitutional protections. Where a confession is taken pursuant to an improper interrogation, the confession can be used to impeach the defendant's credibility should he elect to take the stand in his own defense.[126] Further, and perhaps more importantly, any physical evidence or witnesses derivatively discovered from the illegal interrogation are admissible in the prosecution's case-in-chief.[127] This is in contrast to, for example, violations of the Fourth Amendment's prohibition on unreasonable search and seizure, which require law enforcement to show that the evidence is not "tainted" by an earlier violation in order for the evidence to be admissible.[128] Thus, *Mi-*

[119] Edwards v. Arizona, 451 U.S. 477 (1981).
[120] Davis v. United States, 512 U.S. 452 (1994).
[121] Minnick v. Mississippi, 498 U.S. 146 (1990).
[122] *See Edwards*, 451 U.S. 477.
[123] Maryland v. Shatzer, 559 U.S. 98 (2010).
[124] *Id*. at 110–11 (reasoning that two weeks is enough time to alleviate the coercive effects of a custodial interrogation, and enough time to "seek advice from an attorney, family members, and friends").
[125] *Id*. at 114.
[126] Harris v. New York, 401 U.S. 222 (1971).
[127] United States v. Patane, 542 U.S. 630 (2004).
[128] *See, e.g.*, Brown v. Illinois, 422 U.S. 590, 601–02 (1975) (holding that the prosecution bears the burden of proving that the "causal chain" between an illegal arrest and subsequent statements has been broken).

randa's exclusionary rule is weaker because the prosecution is not required to make this affirmative showing.

The Supreme Court has carved out several exceptions to *Miranda*, meaning the warnings do not apply even if a suspect is in custody and questioned by police. For example, *Miranda* warnings are not required before the police ask "routine booking questions," meaning questions reasonably necessary to secure the biographical data needed to complete booking or pretrial services.[129] Warnings are also not required where the police use a secret agent to interrogate a criminal suspect. *Miranda* contemplated pressures emanating from the police toward the suspect, pressures that are not implicated when the suspect is unaware of police involvement.[130] Finally, and most relevantly, the Supreme Court, per Justice Rehnquist, created an exception to *Miranda* for questions "reasonably prompted by a concern for public safety" in *New York v. Quarles*.[131]

VI. CREATION AND APPLICATION OF THE PUBLIC SAFETY EXCEPTION.

The Public Safety Exception categorically exempts certain questioning from *Miranda*'s warning requirements. Therefore, responses to questions asked pursuant to the Public Safety Exception are admissible in the prosecution's case-in-chief because *Miranda*'s exclusionary rules do not apply. However, statements that are coerced within the meaning of the Fifth or Fourteenth Amendment Due Process Clause are not admissible for any purpose, regardless of whether the Public Safety Exception applies.[132]

A. Creation of the Public Safety Exception: *New York v. Quarles*.

The Public Safety Exception to *Miranda* was created in 1984, when the United States Supreme Court held that Benjamin Quarles' unwarned statements taken after an incident in a New York City supermarket were admissible at his trial.[133] In *Quarles*, the police pursued a sus-

[129] Pennsylvania v. Muniz, 496 U.S. 582 (1990).
[130] Illinois v. Perkins, 496 U.S. 292 (1990).
[131] New York v. Quarles, 467 U.S. 649, 656 (1984).
[132] *See, e.g.*, State v. Leone, 581 A.2d 394, 397–98 (Me. 1990) (upholding suppression of statements taken after officers slammed the suspect's head into the ground and threatened to kill him with a service revolver, but admitting other statements taken in response to questions reasonably prompted by a concern for public safety after finding they were voluntarily given).
[133] *See generally Quarles*, 467 U.S. 649.

pect when a rape victim, who had just been attacked, provided the police with a detailed description of her attacker, his location, and his possession of a gun.[134] After cornering Quarles in a supermarket minutes later, an officer noticed Quarles's empty holster and asked him about the location of the gun.[135] In response, Quarles told the officer, "the gun is over there."[136]

A technical reading of *Miranda* would warrant application of a "presumption of coercion," followed by exclusion of the statements concerning the location of the gun. Therefore, strict adherence to *Miranda* would have compelled the Court to conclude that Quarles should have received warnings. He was in the custody of the police after being "cornered," and asking about the location of a gun used during the commission of a violent crime was clearly "reasonably likely to elicit an incriminating response."[137] In fact, this was the conclusion reached by a majority of judges on New York's highest court. The New York Court of Appeals, accordingly, held that Quarles' response occurred while in custody and "before he had been given the preinterrogation warnings to which he was constitutionally entitled."[138] Further, without expressly recognizing or rejecting a public safety exception to *Miranda*, the New York high court found that "there is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety or that the police interrogation was prompted by any such concern."[139] Accordingly, the New York Court of Appeals held that the lower courts properly suppressed Quarles's statement about the location of the gun.[140]

In dissent, Chief Judge of the New York Court of Appeals Sol Wachtler argued that Quarles's statements could be admitted without violating *Miranda*. Chief Judge Wachtler believed that under the circumstances before the court, strict adherence to *Miranda* "would only unnecessarily enhance the potential for death or serious injury."[141] Further, careful analysis of *Miranda* and *Innis*[142] revealed that the Court was primarily concerned with law enforcement conduct that "reveals an un-

[134] *Id*. at 651–52.
[135] *Id*. at 652.
[136] *Id.*
[137] *See* Rhode Island v. Innis, 446 U.S. 291, 301 (1980); *see also* Stansbury v. California, 511 U.S. 318 (1994).
[138] People v. Quarles, 58 N.Y.2d 664, 666 (1982).
[139] *Id*.
[140] *Id*.
[141] *Id*. at 671 (Wachtler, J., dissenting).
[142] *See Innis*, 446 U.S. 291.

mistakably deliberate attempt to elicit some incriminating response from the detainee as opposed to official conduct designed to achieve an articulable and legitimate noninvestigatory purpose."[143] In Judge Wachtler's view, attempts to protect both officers and the public constituted such a purpose, and failing to carve out a public safety exception to *Miranda* was "contrary to reason and binding precedent."[144]

The United States Supreme Court agreed with Judge Wachtler's dissenting opinion. In writing for the majority, Justice Rehnquist found Quarles's response —"the gun is over there"—admissible, citing "overriding considerations of public safety."[145] The Court found that under these circumstances *Miranda* would place police in the "untenable position" of choosing between protecting the public and securing statements that would be admissible in court.[146] The Court resolved these conflicting objectives in favor of law enforcement, finding "that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[147]

The majority sympathized with police officers forced to make quick decisions in attempts to gain control of volatile situations. Justice Rehnquist explained the "importance of a workable rule to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the circumstances they confront."[148] The Public Safety Exception, according to the Court, would lessen the necessity of the on-the-scene balancing process described above, and would "not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it."[149]

The Court alluded to this confidence in law enforcement by placing great faith in the ability of police officers to determine when the exception applies: "We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit tes-

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[143] *Quarles*, 58 N.Y.2d at 668–69 (Watchler, J., dissenting).
[144] *Id*. at 671 (Watchler, J., dissenting).
[145] New York v. Quarles, 467 U.S. 649, 651 (1984).
[146] *Id*. at 657.
[147] *Id*.
[148] *Id*. at 658 (quoting Dunaway v. New York, 442 U.S. 200, 213–14 (1979)).
[149] *Id*.

timonial evidence from a suspect."[150] In sum, the *Quarles* Court held that *Miranda* does not require warnings in "a situation in which police officers ask questions reasonably prompted by a concern for public safety," regardless of the motivation of individual officers.[151]

In dissent, Justice Marshall argued that "the policies underlying the Fifth Amendment's privilege against self-incrimination are not diminished simply because testimony is compelled to protect the public's safety."[152] Because he considered Quarles's statement "compelled," the Fifth Amendment posed an "absolute prohibition" that could not be eluded by the majority "in such an ad hoc manner, [otherwise] the Bill of Rights would be a most unreliable protector of individual liberties."[153]

In applying the specific facts pertaining to the pursuit and arrest of Benjamin Quarles, the majority found that the police "were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket."[154] The officer's questioning of the suspect regarding the location of the gun, therefore, was objectively reasonable because it "obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it."[155] Therefore, the Court's newly minted exception to *Miranda* applied, and Quarles's statements were improperly suppressed.

B. Reconciling *Quarles* with *Dickerson*.

In 2000, the Supreme Court had an opportunity to overturn the *Miranda* ruling once and for all. In *Dickerson v. United States*, the Court, per Chief Justice Rehnquist, held that 18 U.S.C. § 3501, the part of the Omnibus Crime Bill in 1968 that articulated the voluntariness standard, was unconstitutional because "*Miranda* announced a constitutional rule that Congress may not supersede legislatively."[156] The most surprising component of *Dickerson* was its author, since Justice Rehnquist had been one of *Miranda*'s harshest critics since its establishment in 1966. The Court declined to overturn *Miranda* because the

[150] *Id*. at 658–59.
[151] *Id.* at 657.
[152] *Id*. at 688 (Marshall, J., dissenting).
[153] *Id*. (Marshall, J., dissenting).
[154] *Id*.
[155] *Id*.
[156] Dickerson v. United States, 530 U.S. 428, 444 (2000).

decision "has become embedded in routine police practice to the point where the warnings have become embedded in our national culture [and] . . . wide acceptance in the legal culture . . . is adequate reason not to overrule it."[157] Finally, principles of *stare decisis* "weigh heavily against overruling" *Miranda*.[158]

The Court addressed *Quarles* directly, finding that the Public Safety Exception was merely an illustration of the principle that "no constitutional rule is immutable."[159] Chief Justice Rehnquist also noted that in some cases the *Miranda* doctrine had been expanded, rather than eroded.[160] According to the Court, *Miranda* had announced a general rule that was subject to expansion and retraction based on the "various circumstances in which counsel will seek to apply it, and the sort of modification represented by [cases like *Quarles*] are as much a normal part of constitutional law as the original decision."[161]

Finally, the *Dickerson* Court noted that although *Miranda* itself invited alternative legislative action to protect the Fifth Amendment privilege against self-incrimination, Congress must adopt measures "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it."[162] Therefore, supplanting *Miranda*'s warnings with the pre-*Miranda* "voluntariness" test—which is what §3501 purported to do—was impermissible and in violation of *Miranda*'s "constitutionally based" rule.[163]

VII. LOWER COURT APPLICATION OF THE *QUARLES* PUBLIC SAFETY EXCEPTION

The *Quarles* decision is the only instance in which the United States Supreme Court has directly applied the Public Safety Exception.

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[157] *Id*. at 443.
[158] *Id*.
[159] *Id*. at 441.
[160] *Id*. (citing Arizona v. Roberson, 486 U.S. 675 (1988); Doyle v. Ohio, 426 U.S. 610 (1976)).
[161] *Id.* at 441.
[162] *Id.* at 440 (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).
[163] *Id*. The "voluntariness" test provided by section 3501 clearly fell below the floor provided by *Miranda*. *See* Berghuis v. Thompkins, 560 U.S. 370 (2010). However, some law professors argue that *Miranda* never lived up to the protections envisioned by the Warren Court. *See, e.g.*, Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519 (2008) (arguing that modern application of the *Miranda* doctrine fails to provide the protections envisioned by the Warren Court, and that a more stringent due process voluntariness test should replace the *Miranda* decision).

Accordingly, lower federal and state courts have been free to decide whether *Quarles* should be limited to its own facts or applied more broadly. While most courts have chosen the latter—electing to apply Public Safety Exception in a variety of situations—the Public Safety Exception is most often applied to factual situations similar to *Quarles* itself.[164] Although only a small number of courts have decided Public Safety Exception issues involving explosives, such as those used in the Boston Marathon bombing, most have found that explosives present special circumstances that warrant even broader application of the Public Safety Exception.[165]

A. General Trends in Application of the Public Safety Exception[166]

This Part of our Article primarily focuses on the manner in which federal courts apply the Public Safety Exception, because the FBI will conduct most terrorist interrogations.[167] However, some state court opinions are incorporated to demonstrate the variety of rationales employed by American courts since *Quarles*.

In the majority of cases—approximately 83%—where a court

[164] *See infra* Part VII.A.

[165] *See infra* Part VII.B.

[166] Our research methodology is borrowed from Joanna Wright, author of a law review note about the Public Safety Exception. *See* Joanna Wright, *Mirandizing Terrorists? An Empirical Analysis of the Public Safety Exception*, 111 COLUM. L. REV. 1296 (2011).

Ms. Wright aggregated data about the Public Safety Exception by analyzing every court decision in which courts applied the Public Safety Exception from 1984 (when *Quarles* was decided) to October 4, 2011. Her research focused on opinions that "provide[d] a clear, definite statement on the court's [Public Safety Exception] approach. . . . [and omitted] cases lacking clear statements regarding the appropriate application of the Public Safety Exception." *Id*. at 1313. As of October 2011, according to Ms. Wright's research, in 267 out of 322 (or 83% of) cases involving application of the Public Safety Exception, a firearm was the threat to public safety. *Id*. at 1320.

We attempted to mirror Ms. Wright's research methodology, which involved a straightforward WestlawNext search of all federal and state cases using the search terms ["Public Safety Exception" and suppress! and Quarles], while filtering out decisions after October 4, 2011 (the cut-off date for Ms. Wright's Note). *Id*. at 1311 n.75. This modified search yielded 73 decisions, 54 of them from federal courts. Of these 54 decisions, approximately 36 provided the "clear, definite statement" concerning the court's approach employed by Ms. Wright. Unless otherwise specified, references to percentages represent a combination of my research with Ms. Wright's, in order to provide a more comprehensive overview of *Quarles*' application from 1984 to 2013.

[167] *See* Anne E. Kornblut, *New Unit to Question Key Terror Suspects*, WASH. POST, Aug. 24, 2009, at A1 (reporting that FBI's newly created "High Value Detainee Interrogation Group" is charged with interrogated key suspected terrorists).

elects to apply the Public Safety Exception, the threat to public safety is a missing or discarded firearm.[168] Often the police are pursuing a known suspect or searching for an individual based upon some description of the suspect only hours after a crime has been committed.[169] Law enforcement typically bases its belief that a firearm was used or discarded on several forms of evidence, including whether the victim or witness reported the use of a firearm, the officers observed the suspect dispose of a firearm or other object during the pursuit, the suspect had firearm paraphernalia on his or her person, or the suspect had a history of violent criminal activity.[170] Upon successful apprehension or detention of the suspect, questions falling under the Public Safety Exception have three broad goals: learning the location of the discarded firearm, whether the firearm is loaded, and whether the suspect has any other weapons on his person or in a location where a third-party could access and use the weapon.[171]

Courts have split on the importance of a firearm in deciding whether to apply the Public Safety Exception. In *United States v. Williams*, the Sixth Circuit held that where a firearm is involved, officers must "have reason to believe (1) that the defendant might have (or recently have had) a weapon; *and* (2) that someone other than police might gain access to that weapon and inflict harm."[172] However, other courts have found that the Public Safety Exception applies beyond the immediate moments after an arrest, on the grounds that the threat of a missing or discarded firearm "does not dissipate over time."[173] However, other courts have found that even where a firearm was involved in the commission of the crime, the Public Safety Exception will not apply if law enforcement has gained control over the suspect or situation in general.[174]

Courts have admitted evidence pursuant to the Public Safety Exception in a broad range of circumstances where there is a threat to officer safety or health. In *United States v. Talley*, the Sixth Circuit held

[168] *See* Wright, *supra* note 166, at 1320. Our research similarly indicates that since October 4, 2011, 79% of federal courts that have applied the Public Safety Exception identified a firearm as the threat to public safety. In incorporating our research with Ms. Wright's, a firearm is the threat to public safety approximately 83% of the time.

[169] *Id*. at 1323.

[170] *See id*.

[171] *Id*. at 1324.

[172] United States v. Williams, 483 F.3d 425, 428 (6th Cir. 2007) (emphasis added).

[173] *See, e.g.*, Allen v. Roe, 305 F.3d 1046, 1051 (9th Cir. 2002).

[174] *See, e.g.*, United States v. Williams, 681 F.3d 35 (2d Cir. 2012).

that Public Safety Exception questioning is permissible when "officers have a reasonable belief based on articulable facts that they are in danger."[175] Other circuits have found that the Public Safety Exception applies where an officer's future health is at issue, thus broadening the Public Safety Exception to circumstances beyond immediate injury caused by a weapon. For example, in *United States v. Carrillo*, the Ninth Circuit held that the defendant's response to an officer's unwarned inquiry into whether the defendant had any sharp needles or objects on his person was admissible under the Public Safety Exception.[176] The court reasoned that even though a weapon was not directly involved, the officer acted objectively reasonably because he had been scratched during previous searches and suffered from headaches and skin irritations.[177]

Several federal courts have found that, where a suspect requests counsel, the Public Safety Exception is still applicable if officers reasonably believe there is a threat to public safety. The central justification for this rule is that the danger to the public is the same whether or not a suspect has requested an attorney.[178] However, the Public Safety Exception is not an exception to the Fifth Amendment itself, just to *Miranda*'s "prophylactic" rule, meaning officers may not use violent or coercive tactics to elicit a confession from a suspect.[179]

In sum, the vast majority of Public Safety Exception cases involve fact patterns similar to *Quarles* itself. It is unclear whether this is a product of the judiciary's desire to stay faithful to the policy announced in *Quarles* by limiting application of the Public Safety Exception to cases with similar facts, or because law enforcement has simply chosen to limit invocation of the Public Safety Exception to cases where a firearm is involved for fear that the judiciary will limit its application to cases with facts similar to *Quarles*. However, as we demonstrate later in this Article, in cases involving a bomb or other explosive, courts have

[175] United States v. Talley, 275 F.3d 560, 563 (6th Cir. 2001).

[176] United States v. Carrillo, 16 F.3d 1046 (9th Cir. 1994); *see also* Thomas v. State, 737 A.2d 622 (Md. App. 1999) (holding that an officer's request that the suspect undergo a blood test after being bitten by the suspect fell within the Public Safety Exception, because officer had an objectively reasonable fear that he might have contracted AIDS from the bite, and was entitled to information concerning whether he should undergo prompt medical treatment to avoid infecting others).

[177] *Carillo*, 16 F.3d 1046.

[178] *See* United States v. Mobley, 40 F.3d 688 (4th Cir. 1994); *see also* United States v. DeSantis, 870 F.2d 536 (9th Cir. 1989).

[179] *See* Mincey v. Arizona, 437 U.S. 385 (1978).

been more willing to apply the Public Safety Exception because those types of weapons are less stable and potentially involve greater loss of life.

B. How Do Federal Courts Analyze the Public Safety Exception in the Context of "Terrorist Scenarios"?

American courts have only decided two cases involving circumstances similar to the interrogation of the surviving Boston Marathon bombing suspect. However, the Public Safety Exception has been invoked in two high-profile attempted terrorism scenarios under circumstances similar to the Boston Marathon Bombing. On Christmas Day in 2009, Umar Farouk Abdulmutallab (the "Christmas Day Bomber") was apprehended after an unsuccessful attempt to detonate a bomb on a flight from Amsterdam to London.[180] After an hour of interrogation by the FBI and without being read his *Miranda* rights, Abdulmutallab confessed and made numerous other incriminating statements.[181] Similarly, in 2010, Faisal Shahzad (the so-called "Times Square Bomber") gave an un-Mirandized confession and provided the FBI with valuable intelligence and evidence.[182]

Although both of these cases are highly relevant because of their similarity to the interrogation of the Boston Bombing suspect, only Abdulmutallab moved to suppress statements given to law enforcement after the attempted bombing on the grounds that the Public Safety Exception was inapplicable.[183] The Eastern District of Michigan denied Abdulmutallab's motion, reasoning that the unwarned questions posed by law enforcement were made

> in an attempt to discover whether [Abdulmutallab] had information about others who could be on planes or about to board planes with explosive devices similar to the one [he] used because, based upon his training, experience, and knowledge ofearlier al-Qaeda attacks, this was not a solo incident and the poten-

[180] Elisa Labott et al., *Al Qaeda Link Investigated as Clues Emerge in Foiled Terror Attack*, CNN (Dec. 29, 2009), http://www.cnn.com/2009/CRIME/12/28/airline.terror.attempt/index.html.

[181] *See* Wright, *supra* note 166.

[182] Michael Wilson, *Shahzad Gets Life Term for Times Square Bombing Attempt*, N.Y. TIMES, Oct. 5, 2010, at A25, *available at* http://www.nytimes.com/2010/10/06/nyregion/06shahzad.html.

[183] *See* United States v. Abdulmutallab, No. 10–20005, 2011 WL 4345243 (E.D. Mich. Sept. 16, 2011).

> tial for a multi-prong attack existed even if [he] was unaware of any specific additional planned attack.[184]

Thus, the court concluded that law enforcement's questions "sought to identify any other attackers or other potentially imminent attacks—information that could be used in conjunction with other U.S. government information to identify and disrupt such imminent attacks before they could occur," and held that the circumstances of the questioning fell within the Public Safety Exception.[185]

Abdulmutallab appealed, but the Sixth Circuit never issued an opinion on his *Quarles* argument because it found that he waived his right to an appeal by pleading guilty.[186] However, several of the U.S. Courts of Appeals have issued opinions in cases involving bombs or potential explosions. While none of these cases involved a high-profile terrorist attack, they provide valuable insight into how a federal appellate court might analyze an unwarned interrogation similar to that of Dzhokhar Tsarneav.[187]

In *United States v. Hodge*, the Sixth Circuit explained that where a bomb is involved, the potential threat to the safety of law enforcement and the general public increases dramatically.[188] In *Hodge*, officers received a reliable tip that a suspect was cooking methamphetamine at his residence and had a pipe bomb.[189] After obtaining a warrant to search the residence, law enforcement entered the home and an officer, without

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[184] *Id.* at *5. Specifically, Abdulmutallab was asked:

> where he traveled, when he had traveled, how, and with whom; the details of the explosive device; the details regarding the bomb-maker, including where Defendant had received the bomb; his intentions in attacking Flight 253; who else might be planning an attack; whether he associated with, lived with, or attended the same mosque with others who had a similar mind-set as Defendant about jihad, martyrdom, support for al-Qaeda, and a desire to attack the United States by using a similar explosive device on a plane, and what these individuals looked like.

Id.

[185] *Id.* at *6.

[186] United States v. Abdulmutallab, 739 F.3d 891, 904 (6th Cir. 2014).

[187] Although the prosecution stated that it does not intend to use Mr. Tsarnaev's statements in its case-in-chief at trial or sentencing, Tsarnaev moved to suppress all potential uses of the statement because the government "expressly declined to disavow reliance on *Quarles*" and the Public Safety Exception. *See* Motion to Suppress Statements at 11 n.9, United States v. Tsarnaev, 951 F. Supp. 2d 209 (D. Mass. 2014) (No. 13-cr-10200-GAO).

[188] United States v. Hodge, 714 F.3d 380 (6th Cir. 2013).

[189] *Id*. at 382.

giving *Miranda* warnings, asked the suspect whether there was "anything in the house that could get anyone there hurt, any active meth labs, meth waste, bombs, anything like [that] at all."[190] A couple of minutes later, officers overheard the suspect "blurt out that there was a bomb inside."[191] After the suspect gave the officers the location of the bomb, officers asked several more questions about the "construction, appearance, and method of detonation out of a concern for the safety of the officers in the house[,]" to which the suspect provided answers.[192]

The Sixth Circuit held that the lower court properly admitted the suspect's statements under *Quarles*.[193] The court relied on earlier opinions by the Second Circuit[194] and Eleventh Circuit[195] in reaching the conclusion that where officers reasonably believe that a bomb is on the premises, *Miranda* warnings are not required before asking questions about the bomb.[196] Importantly, the court found that the test articulated in *Williams*—which required that officers using the Public Safety Exception reasonably believe a third-party could gain access to the weapon and use it to harm others—did not apply where a bomb was the potential threat to public safety.[197] The court reasoned "in a case involving a *bomb*, the presence of third parties who can access the bomb is usually not a compelling consideration. Bombs are potentially unstable and may cause damage if ignored or improperly handled by the police."[198]

Similarly, in *United States v. Khalil*, the Second Circuit held that whether the police had successfully detained the suspect and gained control over the premises was not dispositive as to whether the Public Safety Exception applied.[199] In *Khalil*, law enforcement acted on a tip from defendant Abu Mezer's roommate that Mezer "had bombs in the apartment and planned to detonate them soon."[200] Mezer's roommate gave police a key to the apartment and a diagram of the apartment indicating where the bombs were kept.[201] Upon detaining the suspects, the police

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190 *Id.* at 383 (alteration in original).
191 *Id*.
192 *Id*.
193 *Id*. at 385–86.
194 *See* United States v. Khalil, 214 F.3d 111 (2d Cir. 2000).
195 *See* United States v. Spoerke, 568 F.3d 1236 (11th Cir. 2009).
196 *See Hodge*, 714 F.3d at 386–87.
197 *Id*. at 386; *see also* United States v. Williams, 483 F.3d 425, 428 (6th Cir. 2007).
198 *Hodge*, 714 F.3d at 386.
199 *See generally Khalil*, 214 F.3d 111.
200 *Id.* at 115.
201 *Id.*

asked them about the construction of the bombs and whether or not one of the suspects "planned to kill himself" by detonating them.[202] The court found that these questions fell within the Public Safety Exception because of their "potential for shedding light on the bomb's stability."[203] Further, in *United States v. Spoerke*, the Eleventh Circuit applied the Public Safety Exception notwithstanding that the officer had successfully detained the suspect and removed pipe bombs from his vehicle.[204] Thus, the Public Safety Exception was applied even though there was no possibility that a third party would intercept the bombs.[205]

However, in *State v. Kane*, the Hawaii Supreme Court found that the presence of a bomb was insufficient for application of the Public Safety Exception. The court held that *Quarles* was inapposite where a police officer had learned the nature and location of the defendant's bomb.[206] Hawaii's high court reasoned that upon learning this information about the bomb, the officer's next step was to call the bomb squad, meaning additional questions "cannot be said to have been designed solely for the purpose of addressing the danger posed by the explosive."[207]

Together, these three decisions by the United States Courts of Appeals show a willingness to apply the Public Safety Exception where the threat to public safety is an explosion or bomb, although *Kane* shows that the presence of a bomb is not always dispositive. However, as the Eastern District of Michigan reasoned in *Abdulmutallab*, law enforcement's reasonable belief that another bomb may be in play may lead courts to consider the threat to public safety especially imminent.

However, where the sole justification for invoking the Public Safety Exception is that the suspect is a "known member" of a dangerous terrorist group, at least one district court has been unwilling to apply the Public Safety Exception.[208] In *United States v. Colon Osorio*, officers initiated a traffic stop with the suspect that quickly escalated into a scuffle.[209] After detaining the suspect, the police observed a handgun on

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[202] *Id*.
[203] *Id.*
[204] *See* United States v. Spoerke, 568 F.3d 1236, 1249 (11th Cir. 2009).
[205] *Id.*
[206] State v. Kane, 951 P.2d 934, 942 (Haw. 1998)
[207] *Id.*
[208] *See* United States v. Colon Osorio, 877 F. Supp. 771 (D.P.R. 1994).
[209] *Id*. at 776.

the pavement and asked the suspect if it was his.[210] The court held that the Public Safety Exception did not apply because the police had the situation under control, and that the Public Safety Exception analysis should not change solely because the defendant was a convicted felon and a "known member of . . . a clandestine Puerto Rican terrorist group" that had claimed responsibility for terrorist acts.[211]

Finally, courts have been willing to apply the Public Safety Exception to cases involving questioning about accomplices.[212] In *Fleming v. Collins*, the Fourth Circuit held that learning the identification of a suspect's fleeing accomplice fell within the Public Safety Exception, especially because a dangerous crime had been committed hours earlier.[213] Similarly, in *United States v. Dodge*, a federal district court held that where the location of a bomb was unknown, officers were permitted to question a suspect about the location of a potential accomplice who could detonate the bomb.[214]

In sum, courts have analyzed the Public Safety Exception quite differently where a bomb—as opposed to a firearm—poses a threat to officers or the general public. While none of these cases discussed above involve situations where a bomb had already been detonated, as was the case of the Boston Marathon, they could provide valuable insight into how courts assess Tsarneav's unwarned statements. Although a suspect's status as a known terrorist is not dispositive, courts have not considered whether a known terrorist's possession of a bomb automatically gives rise to the application of the Public Safety Exception. If any of Dzhokhar Tsarneav's un-Mirandized statements are admitted at his trial, and he argues on appeal that the Public Safety Exception is inapplicable, it is entirely possible that a court would analyze his interrogation under a police-friendly framework similar to the framework in *Hodge*. However, a court may find that officers had sufficient control over the situation, and that Tsarneav's status as a suspected terrorist is not dispositive, as in *Colon-Osario*.[215]

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[210] *Id.*

[211] *Id*.

[212] *See* Fleming v. Collins, 954 F.2d 1109 (5th Cir. 1992).

[213] *See id*. at 1114.

[214] United States v. Dodge, 852 F. Supp. 139 (D. Conn. 1994), *aff'd*, 61 F.3d 142 (2d Cir. 1994); *see also* United States v. Khalil, 214 F.3d 111 (2d Cir. 2000).

[215] *See Colon Osorio*, 877 F. Supp. 771.

VIII. CONCLUSION

The *Miranda* rule was not created from whole cloth, but rather was a rule that was handed down after a robust debate over legislative proposals to respond to the U.S. Supreme Court's unanimous ruling in *Mallory v. United States*. *Miranda* represents a clear example of the U.S. Supreme Court acting as an American political institution whose decisions cannot be interpreted without consideration of the broader political environment in which it is embedded. In this Article, we demonstrated how the Court acted as a majoritarian institution and helped Congress overcome severe legislative obstructions in the United States Senate. While Republicans and Southern Democrats supported a limited recitation of rights to the criminally accused by police officers, a small number of passionate Northern Democrats supported a broader recitation of these rights by U.S. Magistrate Judges. The Warren Court's response was a classic political compromise where both liberals and conservatives could claim a victory. Namely, Northern Democrats could claim victory by the Court's ruling that required a broad recitation of rights applicable to criminal suspects at the federal *and* state level. Republicans and Southern Democrats, on the other hand, could claim victory by virtue of the fact that giving local law enforcement officers authority to explain these rights to criminal suspects would give them the flexibility to avoid having suspects appear before U.S. Magistrates prior to questioning.

Despite the victory that Republicans and Southern Democrats could claim in the wake of this victory, the ruling nevertheless proved unpopular and Congress responded by threatening to strip the Court's jurisdiction, a response that proved too extreme for a number of lawmakers and was quickly shelved. Instead, Congress succeeded in "overturning" the *Miranda* ruling in the Omnibus Crime Control and Safe Streets Act of 1968. As Keith Whittington has shown in other examples of legislation,[216] bills like the Omnibus Crime Control and Safe Streets Act often include constitutionally questionable sections—oftentimes invalidated by the U.S. Supreme Court—that are designed to bring together a majority of legislators to ensure safe passage. Indeed, there was widespread political support to see passage of this bill to ensure that financial assistance would be given to local law enforcement agencies to assist in the professionalization of local police forces. The assistance through block grants, however, was not enough for a small coalition of Southern Democrats who were agitating to see the *Miranda* ruling over-

[216] Whittington, *supra* note 15.

turned and were willing to hold the legislation hostage until a section of it altered the rule. Despite their victory in returning to the pre-*Miranda* voluntariness standard, even the Nixon Administration and subsequent presidents chose to ignore Section 3501's voluntariness standard as a matter of law enforcement policy and was even overturned by the conservative Rehnquist Court in *Dickerson v. United States*.

What differentiates the rulings by the Burger and Rehnquist Courts in *Quarles* from the Warren Court's rulings in *Miranda* is that the *Quarles* ruling was not announced following a robust political debate like the one that occurred prior to the *Miranda* ruling. This is especially true for the recent application of the *Quarles* Public Safety Exception to high profile cases that involve allegations of terrorist activity. Because there was very little debate about the *Quarles* Public Safety Exception in Congress before and after it was handed down by the Burger Court, it can be argued that the executive branch policy of invoking *Quarles* lacks the political foundations that support the *Miranda* ruling. If the creation of the *Quarles* Public Safety Exception lacks political foundation and support, and is merely a judicially-created rule that was not vetted after years of congressional debate, then we argue that Congress should intervene and undertake a robust political debate about altering the *Miranda* ruling and applying the *Quarles* Public Safety Exception in the way that the executive branch currently does. Although Congress has debated the efficacy of *Miranda* rights for terror suspects, the Public Safety Exception has not enjoyed the sustained, widespread, and robust debate that occurred before and after the *Miranda* ruling. To ignore a major exception to this policy, in such an important area of law enforcement, jeopardizes a political compromise that was shaped through a decade of institutional dialogues among Congress, the Executive Branch, and the Supreme Court that produced *Miranda v. Arizona*.