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Dzhokhar Tsarnaev and the Miranda Debate

By Jana Nestlerode

It was almost fifty years ago that the United States Supreme Court determined that individuals subjected to custodial interrogation must be informed of their constitutional rights. *Miranda v. Arizona* (1966) was an interesting amalgamation of four cases that had wound their ways to the U.S. Supreme Court's docket. The four cases had several factors in common. In each case, the defendant had been convicted in some part through the use of a confession obtained by the police. In each case, the defendant had been subjected to "incommunicado" interrogation. In each case, the defendant had not been informed of his constitutional rights.

Interestingly, none of the defendants alleged that the police had coerced the confession. The sole contention was that they should have been informed of their rights prior to being questioned. In its lengthy decision, the High Court concluded that custodial interrogation is "inherently coercive". That is, the mere fact of being in custody and being asked potentially incriminating questions creates a level of intimidation (no matter how polite and kind the police may be behaving) that must be counter balanced. The Court concluded that the means by which this "inherent coercion" should be addressed is the required reading of the now-famous Miranda rights.

Thereafter, custodial interrogation of an arrestee required the officer to inform the individual, prior to any questioning of the following constitutional rights: You have the right to remain silent; anything you say can and will be used against you in a court of law; you have the right to have an attorney present prior to and during questioning; if you cannot afford an attorney one will be provide for you free of charge". It was the officer's responsibility to ensure that the defendant understood these rights. So after each recitation, the officer was required to ask "do you understand this?" Assuming the arrestee answered in the affirmative, the officer would ask at the conclusion of the reading of the rights "Understanding all of these rights, are you willing to waive them and speak to me now?" If the arrestee agreed, the interrogation began. If the arrestee refused, or otherwise indicated he wanted to remain silent or consult with an attorney, the questioning ceased.

Most recently, the U.S. Supreme Court modified *Mirandas* to permit officers to begin interrogation even when the arrestee remained silent when asked if he would waive his rights. In *Berghuis, Warden v. Thompkins* (2009), the Court concluded quite ironically that silence by the arrestee could be construed by the police as an effective waiver of his right to remain silent. Now, under current jurisprudence, an arrestee is deemed to have waived his right to remain silent unless he has affirmatively asserted it.

In 1984, the U.S. Supreme Court recognized an "emergency" or "public safety" exception to *Mirandas*. In *New York v. Quarles*, a young woman was raped at gunpoint in her New York City apartment. After he left, she sought help from two uniformed officers. She described her attacker and indicated that she saw him enter a local grocery store. She warned Officer Kraft that

he had a gun. Officer Kraft entered the grocery and saw man she described. He grabbed him and cuffed him and noted that he had no gun on his person. Office Kraft asked him where the gun was, and Quarles indicated a nearby carton. Officer Kraft retrieved the gun from the carton. Later, Quarles moved to suppress his statement to Kraft about the location of the loaded gun arguing that he had been subjected to custodial interrogation without first having been Mirandized. The High Court carved out the "public safety" exception to Mirandas and held that Officer Kraft could temporary forego Mirandas to facilitate the neutralization of a danger to the public safety (a loaded gun in an area accessible to the public). In doing so, the Court indicated that "The narrow exception to the Miranda rule recognized here will to some degree lessen the desirable clarity of that rule. However, the exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it. 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 testimonial evidence from a suspect."

It is this exception on which Attorney General Eric Holder relies in his assertion that he need not Mirandize Boston Marathon bomber Dzhokhar Tsarnaev prior to questioning him. He relies, in part, on a 2010 internal FBI memorandum that provides guidance on the expanded use of the "public safety" exception to Mirandas when interrogating those accused of terrorism. Indeed, it has been asserted before with regard to other suspected terrorists without much fanfare. One can understand Mr. Holder's position. Tsarnaev and his older brother carried out an attack that resulted in the deaths of three people and injured more than one hundred and seventy others. There was increasing evidence that more attacks were being planned. Mr. Holder is charged with protecting the citizens of this country, and wants to know as much as he can about the attack. How did the brothers obtain the information they used to build these bombs? How were they able to obtain the materials? In what quantity and from what source did they obtain the explosives? Were they acting alone or were there others involved? Were more attacks being planned? Are there co-conspirators or confederates still on the loose? What support (financial and otherwise) did the brothers have from dissident groups in Chechnya? All of these are logical, even urgent questions to which reasonable and competent law enforcement officials want answers.

On the other hand, civil rights advocates argue that protection of civil liberties, especially in times of tragedy, should be paramount. They argue that we cannot sacrifice our constitutional principles for short-term goals, or we have lost our republic. What government does to the worst of us, the government will eventually do to the best of us. They make a cogent argument that the "public safety" exception recognized by the U.S. Supreme Court in 1984 was envisioned as a very brief delay before informing the arrestee of his rights. In *New York v. Quarles*, the delay was the short time it took for the arrestee to indicate where he had hidden the gun. Mr. Holder's plan is to delay the recitation of Mirandas for days, weeks, or even months. That is a far cry from the Supreme Court's "temporary" delay approved in *Quarles*.

But does it really matter? The failure to inform an arrestee of his Miranda rights prior to custodial interrogation has only one consequence: the prosecution cannot use any ensuing statements in the criminal trial of the defendant. The charges are not dismissed; the case does not go away; the defendant is not released. Only the unlawfully obtained statements are

"suppressed" (inadmissible in a criminal court). In the criminal case against Dzhokhar, there is an abundance of evidence already in place to convict him of the crimes with which he is charged. For his prosecutors, information obtained as a result of Miranda-less interrogation may be helpful, but is not essential to the prosecution. Such information, however, may be extremely helpful in identifying confederates, in learning of financial sources for terrorism, and in learning of weapons and materiel trafficking that facilitates acts of terrorism. In the end, the information interrogators obtain from Tsarnaev is more relevant to intelligence-gathering and improvement in techniques to avert these terrorist acts, than it is to the successful prosecution of him.

The issue of whether the "public safety" exception to Mirandas should be expanded to permit delaying Mirandas for days, weeks or months (rather than minutes) is an important one, but it is not one that the instant case will resolve.