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Treating Terrorism Solely as a Law Enforcement Matter—Not Miranda—Is the Problem

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In the wake of the failed car bomb attack on Times Square, Attorney General Eric Holder has proposed that Congress expand the public safety exception to Miranda. Superficially, carving out more time for law enforcement personnel to question a terrorist suspect before reading the suspect his Miranda rights seems commonsensical. However, once the purpose of Miranda—as well as other legal options available—is clear, it becomes apparent that Holder's proposal is not only unwise but serves as another example of the Administration's insistence on approaching terrorism, first and foremost, as a law enforcement problem.

Miranda 101. A basic understanding of how and why Miranda warnings are used is essential to understanding why Holder's proposal is unwise and most likely unconstitutional. Miranda is a criminal trial tool, period. It was court-created and is now grounded in the U.S. Constitution by subsequent Supreme Court rulings. Therefore, trying to tweak Miranda by statute would be constitutionally suspect.

When a suspect is taken into custody and subjected to official interrogation, law enforcement officials are required to inform him of his Miranda rights. If law enforcement forget or intentionally choose not to read the suspect his Miranda warnings, then the government usually cannot use those un-Mirandized statements at trial. But if the defendant testifies at trial, the government can *cross-examine* the defendant using those un-Mirandized statements. Behind the government's use of Miranda is an underlying assumption: The case is going to trial, and the government wants to preserve the possibility of using the defendant's statements against him in its case. Thus, Miranda is a trial tool—not a national security tool.

The law allows for a public safety exception to the reading of Miranda warnings. Law enforcement may question detained criminal suspects during emergencies to find out time-sensitive information, such as the location of a kidnapped child. Once the emergency situation is resolved—a short time period, not yet defined by the courts—law enforcement must read the suspect his Miranda warnings. Those un-Mirandized statements, usually incriminating, are generally allowed to be introduced by the government in its case. Question a criminal suspect too long under the public safety exception—i.e., well past the time the emergency has passed—and the court will not allow the whole statement to come in. Again, Miranda and its public safety exception are trial tools; not national security tools.

National Security and Enemy Combatants 101. The stakes are much different in national security investigations. Fortunately, Congress's Authorization for Use of Military Force and subsequent court cases allow the President to designate suspected terrorists as enemy combatants.

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In 2004, the Supreme Court ruled that the President has the authority to hold a U.S. citizen as an enemy combatant. Similarly, a lower federal court held that the President has the authority to designate a suspected terrorist who is an American captured in the U.S. an enemy combatant.

Enemy combatants (or unprivileged enemy belligerents) may be lawfully interrogated for intelligence purposes. There is not, and never has been, a requirement to read enemy combatants Miranda warnings when they are being interrogated for intelligence purposes. They may be interrogated at length for as long as they are enemy combatants.

By designating appropriate terrorist suspects captured in the U.S. as enemy combatants (at first) and interrogating them at length without Miranda or an attorney, the government puts national security first, which happens to be its constitutional duty.

Preserving the Miranda-less interrogation option does not preclude the government, after appropriate interrogation, from then deciding to send the suspect to trial in federal court or a military commission. Once that decision has been made, the government will want to read the terrorist (whose is now a criminal suspect) his Miranda warnings. If he waives his rights and makes a statement, the government has the option of using those statements at trial. If the terrorist invokes his right to remain silent and his right to an attorney, so be it; the government will then need to prove its case using all the other available evidence. And although Miranda warnings are not required in military commissions cases, it has been the practice to Mirandize some military commissions' candidates.

America Is at War; Fight to Win. To date, the Administration has been fortunate: Despite treating the Christmas Day underwear bomber and the Times Square bomber each as mere criminal suspects and giving them Miranda warnings, no American lives have been lost.

Umar Abdulmutallab, the failed underwear bomber, was Mirandized after only 50 minutes and then fell silent. Only after the Obama Administration brought his family to the U.S. weeks later did he begin talking again.

Having apparently learned a little from that episode, the Administration delayed reading the Times Square bomber his Miranda warnings for several hours. Using the public safety exception, law enforcement interrogated the suspect until they were advised by attorneys that the prudent course of action was to read him his Miranda warnings. They did, and fortunately he waived those rights.

Recall that right after the Christmas Day bombing, the Administration insisted that they got all the intelligence they needed from the suspect in the mere 50 minute interrogation—an obvious attempt to create the impression that their law-enforcement-only approach was efficacious and prudent. Yet the Administration clearly did not believe its own political rhetoric because they scrambled to get the would-be bomber's family to the U.S. solely to get him to talk more.

Similarly, the Administration is also finding it useful, and perhaps even essential, to interrogate the Times Square bomber at length after he waived his Miranda warnings. But what if, in both of those cases, the suspect simply invoked his rights, remained silent, and requested an attorney from the beginning? The Administration's gamble—treating the cases solely as conventional law enforcement problems from the beginning—would have resulted in lost intelligence and perhaps lost lives.

Real Problems, Real Solutions. The Administration has rightly preserved the military commissions process and prolonged detention. They have also rejected the left's simplistic mantra of "try them or set them free." That criminal-law-only procedure never has, and hopefully never will be, required during wartime.

Yet the Attorney General's proposal takes America back to the 1990s, when the U.S. approached all terrorist attacks as a law-enforcement-only problem. In making this proposal, Holder reveals that he has not learned what the rest of the country has learned from the 1990s and of the years since 9/11: that this unconventional enemy requires the government to use all lawful tools at its disposal, including holding some terrorists captured in the U.S. as enemy com-

batants. Federal courts are a powerful weapon, but they are not the only weapon.

After 9/11, the White House rightly shifted the focus of counterterrorism operations from investigating attacks to preventing them. By being more concerned about safeguarding the opportunity to prosecute suspects than stopping terrorist plots, Holder is returning to the wrong-headed strategy that characterized this nation's pre-9/11 approach to fighting terrorism. The Attorney General has forgotten that intelligence gathering, at the outset of capture, is more important than preparing for a trial.

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