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The Constitution Ensures A Fair Trial For Dzhokhar Tsarnaev, But Miranda Has a Public-Safety Exception

By: Roger Pilon – April 22, 2013

The debate over how to interrogate and prosecute the surviving Bostonbomber has raised once again the conflict between security and civil liberties that has bedeviled our efforts to fight terrorism from their inception. There are rules for fighting wars that lean heavily toward security, understandably, and rules for fighting crime that try to balance the public's need for security and the procedural rights of the accused – mindful always that the process that is due may vary by context. But terrorism is insidious not least because it is neither war, in the ordinary sense, nor ordinary crime, certainly. In this war against terrorism we've been working out the rules as we go, and it hasn't been easy.

In the *New York Times* and the *Wall Street Journal* this morning we find contrasting editorials about how to handle the case before us. The immediate question is whether Dzhokhar Tsarnaev should be read his Miranda warning, advising him that he has a right to remain silent, before the FBI's High-Value Interrogation Group begins interrogating him. That warning is not expressly required by the Constitution. It was crafted by the Supreme Court in 1966 in the context of interrogations by state officials that were presumptively unconstitutional under the Fifth Amendment's protection against compelled self-incrimination.

There is, however, a public safety exception to Miranda, allowing suspects to be questioned about imminent threats. Both the *Times* and the *Journal* seem comfortable with that exception – although the *Times* adds that “in 2010, unfortunately, the administration improperly told agents that they could expand that exception for terror suspects even when threats were not imminent.” That brings us to the fundamental question: Just what is the purpose of interrogation in a case like this? For the *Times*, it seems, it's for purposes of prosecution and, fairly narrowly, to “allow investigators to question suspects about *imminent* threats, like bombs or *specific* terror conspiracies.” (emphasis added)

That contrasts sharply with the *Journal's* view. The Miranda issue is a distraction, the *Journal* says. The evidence gathered prior to giving Dzhokhar his warning will not be admissible in court, but that doesn't matter because there's already plenty of evidence to prosecute him. The purpose of *extended* interrogation, which hasn't yet been tested in court, is *security* – “finding out what Dzhokhar knows that might prevent a future attack or break up a terror network.” There's already ample evidence to suggest that there may be wider, international aspects to this bombing. It's not a simple bank robbery or even a domestic bombing case like we had in Oklahoma City. The *Journal* seems to think that

Dzhokhar needs to be labeled an “enemy combatant” in order to be so interrogated. Why? That too is a distraction.

Dzhokhar will get all the process he’s due to defend against the charges that will be brought against him, however difficult that defense may be with all the video and other evidence already before us. The larger question, given what we already know, especially concerning the activities of his older brother, is what more needs to be known to better protect against the kind of terror we saw in Boston last week. The Constitution ensures that the accused will get a fair trial. But it also allows the public to protect itself in ways that violate the rights of no one.