DOJ'S NEW MIRANDA POLICY BETRAYS CONSTITUTION & POWER OF JUDICIARY

The proclivity of the Obama Administration to simply do as it pleases, whether it violates the Constitution, established authority or the separation of powers doctrine is beyond striking. Last week at this time they were ignoring the Constitutional right of Congress, the Article I branch, to be the determinative branch on the decision to take the country to war. Today Mr. Obama's Department of Justice has stretched its ever extending arm out to seize, and diminish, the power and authority of the judicial branch and the US Constitution.

Specifically, the DOJ has decided to arrogate upon itself the power to modify the Constitutionally based Miranda rights firmly established by the Article III Branch, the Supreme Court. From Evan Perez at the Wall Street Journal:

> New rules allow investigators to hold domestic-terror suspects longer than others without giving them a Miranda warning, significantly expanding exceptions to the instructions that have governed the handling of criminal suspects for more than four decades.
>
> The move is one of the Obama administration's most significant revisions to rules governing the investigation of terror suspects in the U.S. And it potentially opens a new political tussle over national security policy, as the administration marks another step back from pre-election criticism of unorthodox counterterror methods.
>
> The Supreme Court's 1966 Miranda ruling

> obligates law-enforcement officials to advise suspects of their rights to remain silent and to have an attorney present for questioning. A 1984 decision amended that by allowing the questioning of suspects for a limited time before issuing the warning in cases where public safety was at issue.
>
> That exception was seen as a limited device to be used only in cases of an imminent safety threat, but the new rules give interrogators more latitude and flexibility to define what counts as an appropriate circumstance to waive Miranda rights.
>
> A Federal Bureau of Investigation memorandum reviewed by The Wall Street Journal says the policy applies to "exceptional cases" where investigators "conclude that continued unwarned interrogation is necessary to collect valuable and timely intelligence not related to any immediate threat." Such action would need prior approval from FBI supervisors and Justice Department lawyers, according to the memo, which was issued in December but not made public.

This type of move has been afoot for almost a year, with Eric Holder proposing it in a string of Sunday morning talk shows on May 9, 2010 and, subsequently, based on Holder's request for Congressional action to limit Miranda in claimed terrorism cases, Representative Adam Smith proposed such legislation on July 31, 2010. Despite the howling of the usual suspects such as Lindsay Graham, Joe Lieberman, etc. the thought of such legislation died in the face of bi-partisan opposition from a wide range of legislators who actually understood Constitutional separation of powers and judicial authority. They knew the proposed legislation flew in the face of both concepts. And they were quite correct.

It was bad enough for the Obama Administration, headed by the supposed and so called "Constitutional scholar" Barack Obama, to propose inappropriate and unconstitutional legislation to restrict criminal suspects' Constitution based Miranda rights, but it is an egregious step beyond to simply arrogate to themselves the unitary and unilateral power to do it by DOJ memorandum fiat.

It is not as if this is some kind of unexplored area with no legal precedent; there is clear precedent on the nature of Miranda rights. In *Dickerson v. United States* 530 U.S. 428 (2000), the Supreme Court left no mistake as to the nature of Miranda:

> But Congress may not legislatively supersede our decisions interpreting and applying the Constitution. See, e.g., City of Boerne v. Flores, 521 U.S. 507, 517–521 (1997). This case therefore turns on whether the Miranda Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction.
>
> ….
>
> In sum, we conclude that Miranda announced a constitutional rule that Congress may not supersede legislatively.

Furthermore, the "public safety exception" the administration disingenuously bases their new Miranda policy on, is limited and does not support their expansive power grab. The public safety exception, first announced by the Court in *Quarles v. New York,* applies only where there is an imminent and immediate "great danger to public safety" and the officer who questions the suspect reasonably believes the information sought is necessary to protect the immediate public safety and the questions are limited to only those necessary to obtain the information

to mitigate such threat. That is NOT what the Obama/Holder DOJ is contemplating or restricting their policy to and, thus, their policy is simply unconstitutional and inappropriate.

Let us not forget, this attempt by the administration is not aimed at terrorists and enemy combatants on foreign soil, it is aimed squarely at individuals arrested on domestic soil under the regular Article III criminal system. The law is quite established that the reading of the Miranda warning does not confer rights upon the arrestee, the rights are inherent and flow from the Constitution.

I am sure others can, and will, disagree (see for instance the bleatings of John Yoo), the principle is really quite simple: Miranda is a Constitutional based rule, and confirmed by Supreme Court precedent, and it cannot be amended or overruled by act of Congress. And it sure as heck cannot be overruled or amended by administrative fiat via a FBI memorandum.