The Threat to Miranda

For nearly nine years, the threat of international terrorism has fueled a government jackhammer, cutting away at long-established protections of civil liberties. It has been used to justify warrantless wiretapping, an expansion of the state secrets privilege in federal lawsuits, the use of torture, and the indefinite detention of people labeled enemy combatants. None of these actions were necessary to fight terrorism, and neither is a dubious Obama administration proposal to loosen the Miranda rules when questioning terror suspects and to delay presenting suspects to a judge.

A change to a fundamental constitutional protection like Miranda should not be tossed out on a Sunday talk show with few details and a gauzy justification. If Attorney General Eric Holder really wants to change the rules, he owes the public a much better explanation.

At the most basic level, it is not even clear that the warning requirement can be changed, except from the bench. The Miranda warning was the creation of the Supreme Court as a way of enforcing the Fifth Amendment. Since 1966, it has reduced coerced confessions and reminded suspects that they have legal rights.

The Rehnquist court warned against meddling with the rule in a 2000 decision forbidding Congress to overrule the warnings to suspects, which over the decades became an ingrained law enforcement practice.

In 1984, the court itself added a “public safety” exception to Miranda. If there is an overriding threat to public safety and officers need information from a suspect to deal with it, the court said, the officers can get that information before administering the Miranda warnings and still use it in court. We disagreed with that decision, but in the years since, the exception has
become a useful tool to deal with imminent threats.

The question now is whether the exception needs to be enlarged to deal with the threat of terrorism. Clearly an unexploded bomb or a terror conspiracy would constitute a safety threat under the existing rule. But must investigators “Mirandize” a suspect before asking about his financing sources, his experience at overseas training camps, his methods of communication? In a world that is differently dangerous than it was in 1984, these seem to fit logically under the existing exception, without requiring a fundamental change to the rule.

Miranda does not seem to be an impediment to good antiterror police work, as Mr. Holder himself noted on Thursday before the House Judiciary Committee. Investigators questioned Faisal Shahzad, the suspect in the Times Square bombing attempt, for three or four hours before giving him a Miranda warning, receiving useful information both before and after the warning. He readily waived his right to a quick hearing before a judge.

Investigators also questioned the suspect in the attempted airliner bombing last Christmas for 50 minutes before his rights were read. After both incidents, there were alarmist and unproven outcries from some politicians that Miranda was a hurdle to the cases.

We hope the Obama administration is not simply reacting to shortsighted pressure. To allay those concerns, it must quickly explain precisely what changes it wants to make, what time limits would be set on any new exceptions, and why the existing rules are inadequate.