

United States House of Representatives, Committee on the Judiciary

**Hearing on “Protecting U.S. Citizens’ Constitutional Rights
During the War on Terror”**

May 22, 2013

Statement of Steven A. Engel

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Chairman Goodlatte, Ranking Member Conyers, and the Members of the Committee, thank you for the invitation to testify today on protecting U.S. citizens' constitutional rights during the War on Terror.

For more than ten years now, the United States has been engaged in an armed conflict against Al Qaeda, the Taliban, and associated forces. That conflict, while centered outside our borders, has not been limited to external threats. To the contrary, on September 11th, Al Qaeda proved that it had the military capability to inflict an attack on our homeland as devastating as anything that our Nation had experienced before.

While Al Qaeda clearly demonstrated that it represented a military threat to our country, the group and its associated forces are quite different from prior enemies. Al Qaeda is not a nation state, and its forces neither wear uniforms nor control territory in a conventional sense. Rather, Al Qaeda operates outside of, or in the shadows of, the laws of nation states, by exploiting power vacuums in failed states, making opportunistic alliances where available, and operating covertly within nations. As time has passed, the

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nature of Al Qaeda itself has changed, as the group has shifted, fragmented, and associated with regional groups outside of the Afghanistan and Pakistan region.

The War on Terror, as this armed conflict has been described, is thus a very different kind of conflict from ones we have seen in the past. And the nature of that conflict—with an ill-defined enemy, operating covertly and opportunistically—has itself raised special issues when it comes to defining the laws of war that govern this conflicts. The traditional laws of war are premised upon a conventional armed conflict or, in some cases, civil wars. The established legal framework provides clear answers to who may be detained, how they must be treated, and where they should be prosecuted. None of these questions is self-evident when it comes to the War on Terror.

The War on Terror poses special issues as well when it comes to the rights secured to United States citizens under our Constitution. With the nature of the enemy less defined, and the enemy set on attacking our homeland, the War on Terror requires that the Government work to detect and stop terrorist plots at home. The means by which we seek to stop such threats, and the rights of those, including American citizens, detained on our soil pose special challenges to ensure that we protect the constitutional rights of Americans at the same time as we protect their lives.

Indeed, the topic of today's hearing is hardly theoretical. Just one month ago, we saw that the domestic threat posed by Al Qaeda and its ideological adherents remains very real. On April 15, 2013, two American citizens committed a heinous terrorist attack that claimed the lives of three people and seriously injured another 264. In the manhunt that followed, those same individuals murdered a police officer, critically injured another, and apparently, were planning to commit another terrorist attack, had they not been

stopped. The city of Boston was paralyzed for nearly 48 hours. And the apprehension of the second bomber raised questions about how he should be detained, what rights he had as an American citizen, and whether our Government had done all that it could to ensure that we had obtained the intelligence available to prevent another attack.

These issues make the topic of today's hearing quite timely. In fighting the War on Terror, and in protecting our citizens, the United States must have the flexibility to use all of the tools at its disposal, including both its military and civilian capabilities. We have been successful over the past ten years precisely because we have recognized that the terrorist problem is a problem to be dealt with both by civilian law enforcement and our military/intelligence services. It would be a mistake for us to tie one of our hands behind our back in the face of these threats.

At the same time, when it comes to civil liberties, we must recognize that the choice between civilian and military means is not a choice between whether or not our Government will fight this conflict with the limits of the law. The rights secured by the Constitution are fixed and do not bend with the demands of the time. And the Supreme Court has made clear that the Constitution applies to constrain the actions both of civilian and military personnel.

Let's take the example of the Dzhokhar Tsarnaev, the Boston marathon bomber, who was captured after a citywide manhunt. According to press reports, Tsarnaev was apprehended by law enforcement, and then questioned by the Federal Bureau of Investigation for sixteen hours in his hospital bed based upon the public safety exemption to the *Miranda* warnings. It is unclear from press reports precisely who decided to end the questioning. What is clear, however, is that after those sixteen hours, Mr. Tsarnaev

was read his *Miranda* rights, a lawyer was appointed for him, and he immediately stopped cooperating with the Government.

The Boston Marathon case raises a number of questions when it comes to the detention and interrogation of enemy combatants in the present conflict. First, should Mr. Tsarnaev have been detained by civilian law enforcement at all, or should he have been declared an enemy combatant and transferred to military custody for detention and interrogation? Second, even if Mr. Tsarnaev was properly kept in civilian custody, were law enforcement officials obliged to read him his *Miranda* rights at the end of the sixteen-hour period? Let me try a few answers to those questions.

Military v. Civilian Detention

With respect to Mr. Tsarnaev's detention, the Supreme Court has made clear that a U.S. citizen who takes up arms against this country may be detained in military custody for the duration of wartime hostilities. Whether Mr. Tsarnaev was in fact associated with an enemy force, of course, is a separate question. But in connection with the War on Terror, the Supreme Court has specifically upheld the military detention of a U.S. citizen who fought with the Taliban and was captured in Afghanistan. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). During World War II, the Court went one step further and held that an American citizen arrested within our borders could likewise be transferred to military custody for detention and prosecution. *See Ex parte Quirin*, 317 U.S. 1 (1942). The fact that the enemy combatant could also be prosecuted in the civilian justice system is not a legal reason why he may not be detained by the military.

While the Constitution permits the military detention of a U.S. citizen who takes up arms against the country, the Supreme Court in *Hamdi* made equally clear that the writ

of habeas corpus permits American citizens to test the lawfulness of such detention. Accordingly, the controlling opinion in *Hamdi* held that the Due Process Clause of the Fifth Amendment guaranteed Hamdi the right to receive notice of the factual basis for his classification, a fair opportunity to rebut the government's factual assertions before an impartial federal judge. *Hamdi*, 542 U.S. at 532-33. Thus, even though the Constitution permits the military detention of a citizen enemy combatant, it guarantees that the individual would have meaningful process to challenge that determination.

It should also be emphasized that if an American citizen were captured in the United States as an enemy combatant, the President would be strongly inclined to bring criminal charges against that person and to try him for his crimes in an Article III federal court. Indeed, during the early years following September 11th, when the Nation's fear of the next attack was at its height, the United States detained only two American citizens in military custody (Yaser Hamdi and Jose Padilla), as well as one lawful permanent resident (Ali Al-Marri). Two of those individuals were ultimately transferred into civilian custody and prosecuted before an Article III court. President Obama appears to have taken an even narrower view, apparently ruling out any military detentions for U.S. citizens. Accordingly, as a matter of sound public policy, the occasions for military detention of a U.S. citizen are likely to be exceedingly rare.

In the case of Mr. Tsarnaev, I would caveat the analysis by noting that those of us outside the Government are somewhat hampered because we are limited to the facts, as recounted by the press. Taking that limitation as a given, however, the United States does appear to have acted appropriately in keeping Mr. Tsarnaev in civilian custody, rather than transferring him to military custody. For purposes of military detention, the

question is whether Mr. Tsarnaev in fact was part of, or substantially supporting, Al Qaeda, the Taliban or associated forces, who were engaged in hostilities against the United States. The publicly available facts leave reason to doubt whether the Tsarnaev brothers in fact were working with such an enemy force, as opposed simply to having been inspired by Al Qaeda and its ideological adherents.

It is true that Mr. Tsarnaev's brother went abroad prior to the attacks, and his brother's travel certainly raises a question as to whether the Tsarnaevs had managed to link up with forces associated with Al Qaeda. Yet when it comes to justifying the military detention of an American citizen, the burden must be on the Government, and the questions raised by such travel do not themselves rise to the level of evidence. Again, based on the public reports, the evidence appears to suggest that while the Tsarnaevs were inspired by jihadist ideology, they in fact developed and carried out their terrorist plot on their own, rather than in coordination with, or at the direction of, the enemies of our country.

While Mr. Tsarnaev may appropriately have been treated as a criminal suspect, rather than an enemy combatant, the Boston Marathon case is instructive, because the facts would not have to change much to lead to a different conclusion. If, in fact, Mr. Tsarnaev and his brother had left the United States to join up with Al Qaeda or its allies, and if they had returned to our country for the express purpose of committing a terrorist act of war against the United States, then the President might well have been justified in transferring Mr. Tsarnaev to military detention.

We also would not have to posit too many additional facts before such a determination would appear to be a prudent choice. What if the Tsarnaev brothers were

members of a larger terrorist cell, whose other members remained at large? What if the Government suspected that Mr. Tsarnaev knew of their next plot but needed more time to interrogate him? What if the Government did not want to disclose to Mr. Tsarnaev, or to his confederates, the information that they had relied upon in support of his arrest for fear of tipping off the enemy? Under those circumstances, the President might well determine that it is both lawful and necessary to transfer a terrorist to military custody. Such instances may thankfully rare, but it is equally important that the United States should maintain the flexibility to deal with such extraordinary circumstances as they arise.

Miranda and Terrorist Interrogations

The Boston Marathon case also raises a question as to whether the FBI acted appropriately in questioning Mr. Tsarnaev for sixteen hours and then reading him his *Miranda* rights. Some have contended that the FBI should have not questioned Mr. Tsarnaev at all, without reading him his *Miranda* rights. Others have suggested that the sixteen-hour cutoff was too short, and that terminating the interrogation ran the risk of losing valuable intelligence, including information related to any foreign terrorist groups with whom the Tsarnaevs may have had contact, and the role of any confederates within the United States.

In answering these questions, we need to distinguish between the FBI's ability to question Mr. Tsarnaev and the use to which his answers may be put in a future criminal trial. The *Miranda* rule is not an independent requirement of our Constitution. Rather, it is an evidentiary rule that governs how statements may be used in a criminal trial. Under *Miranda*, the Government may only use custodial statements in a criminal trial, if the *Miranda* warnings were provided in advance of the interrogation. If, however, the FBI

wished to interrogate Mr. Tsarnaev solely for the purpose of obtaining actionable intelligence about future terrorist attacks, then there was no duty to *Mirandize* him.

Based on press reports, the Government appears to believe that it could interrogate Mr. Tsarnaev without providing him with the warnings, and still use his statements at trial, based upon the “public safety” exception to *Miranda*, which the Supreme Court recognized in *New York v. Quarles*, 467 U.S. 649 (1984). In *Quarles*, the police apprehended an armed suspect in a grocery store, but discovered that his gun was no longer in its holster. The police asked the suspect, “where is the gun?” and he told them where he had stashed it. The Supreme Court held that the prosecutors could use Quarles’s statement at all—even though he had not received *Miranda* warnings—the Supreme Court recognized a limited “public safety” exception that would allow the government to use custodial statements at trial, where the police’s questions were “necessary to secure their own safety or the safety of the public,” and were not “designed solely to elicit testimonial evidence from a suspect.” *Id.* at 658.

The custodial interrogation in *Quarles* was fleeting in time, and it was limited to the single question of the location of a loaded gun. Nonetheless, the Department of Justice has argued in recent years that *Quarles* may support the lengthier interrogation of terrorism suspects, where the questions go beyond simply an immediate threat, but are more generally motivated by the law enforcement interest in obtaining actionable intelligence in future terrorist plots. While the Department of Justice’s position is not unreasonable, the argument has not been thoroughly tested in the courts, and it is an open question whether the *Quarles* exception may bear the weight that the Government wishes to place upon it.

Whether the Government is right about *Quarles* or not, it is important to emphasize that the sole issue is not whether the Government may interrogate a terrorism suspect about terrorist networks and future plots, but whether the Government may use those statements at a future trial. Neither *Miranda* nor *Quarles* places any limits upon police questioning when the sole interest is obtaining intelligence information, and the Government does not need to use the statements at issue at the criminal trial.

In the Boston Marathon case, it appears that the Department of Justice did not need much, if any, information for Mr. Tsarnaev's criminal trial. Mr. Tsarnaev was caught on video at the scene of the crime, he had confessed to at least one witness, his apartment apparently contained incriminating evidence, and he may even have left a written confession in the boat where he was apprehended. Thus, the purpose of the FBI's interrogation should have been to determine whether he had additional intelligence to provide as a means of preventing a future attack. In deciding whether the duration of his interrogation was appropriate, the appropriate measure should be whether law enforcement had determined that, in their best judgment, they had obtained the information needed from him, and not rules of criminal procedure designed solely for courtroom evidence. It remains unclear from the public account whether in fact the Department of Justice applied that rule to measure the duration of the interrogation in Mr. Tsarnaev's case. If they did not, there is a risk that valuable intelligence was lost.

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The Constitution gives the federal Government the power to protect American citizens, at the same time as it secures out most important civil liberties. Those rights apply during times of both war and peace. Ensuring that the Government has struck the

appropriate balance is certainly a topic worthy of this Committee's attention. Thank you Chairman Goodlatte and Ranking Member Conyers for the opportunity to appear here today and I look forward to the Committee's questions.