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Miranda's Reprieve: How Rehnquist Spared the Landmark Confession Case, but Weakened Its Impact

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JUNE MARKS THE 40TH ANNIVERsary of one of the most praised, most maligned—and probably one of the most misunderstood—U.S. Supreme Court cases in American history, *Miranda v. Arizona*.

The opinion by Chief Justice Earl Warren conditions police questioning of people in custody on the giving of warnings about the right to remain silent, the right to counsel and the waiver of those rights. 384 U.S. 436. This ruling represents a compromise of sorts between the former elusive, ambiguous and subjective voluntariness/totality-of-the-circumstances test and extreme proposals that would have eliminated police interrogation altogether.

But William H. Rehnquist didn't see *Miranda* that way. Indeed, even before he was appointed to the Supreme Court, Rehnquist viewed the landmark confession case as a big mistake.

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On April 1, 1969, when he had been assistant attorney general in charge of the Office of Legal Counsel for fewer than 90 days, Rehnquist sent a memorandum to John Dean (of Watergate fame), who was then the associate deputy attorney general. The memorandum charged that "there is reason to believe" the Warren court had tilted the scales of justice too far in favor of criminal suspects. Rehnquist recommended that the president appoint a national commission "to determine whether the overriding public interest in law enforcement requires a constitutional amendment."

Although he complained about a number of recent cases, Rehnquist directed his heaviest fire at *Miranda*.

At one point, he maintained: "The court is now committed to the proposition that relevant, competent, uncoerced statements of the defendant will not be admissible unless an elaborate set of warnings be given, which is very likely to have the effect of preventing a defendant from making any statement at all."

At another point, Rehnquist complained, as have other critics of *Miranda*, that by "believing that the poor, disadvantaged criminal defendant should be made just as aware of incriminating himself as the rich, well-rounded criminal defendant," the court "has undoubtedly put an additional hurdle in the way of convicting the guilty."

(Although the U.S. Senate confirmed Rehnquist twice, once as associate justice, then as chief justice, it never knew about Rehnquist's memo. Because it was marked "administratively confidential," it was not released until very recently. John Dean mentioned it briefly in his 2001 book, *The Rehnquist Choice*. After months of hard work, Thomas Davies, a professor at the University of Tennessee College of Law and a well-known legal historian, obtained a copy of the Rehnquist memorandum from the National Archives and provided me with a copy.)

Nothing came of the memorandum: Attorney General John Mitchell was not sure the Nixon administration could control the kind of national commission contemplated by Rehnquist. However, Mitchell certainly became well aware of Rehnquist. (Three years later, he supported him strongly for the Supreme Court.)

EATING AWAY AT SECTION 3501

CONGRESS, TOO, WAS UPSET BY *MIRANDA*. A year before Rehnquist had written his anti-*Miranda* memo, Congress had enacted legislation purporting to overrule *Miranda* and reinstate the voluntariness/totality-of-the-circumstances rule as the sole test for the admissibility of confessions in federal prosecutions.

Most commentators thought the statute (commonly known as section 3501 because of its designation under Title 18 of the U.S. Code) was unconstitutional. However, that was not the opinion of Mitchell, who approved a memo that made the best case up to that point for the constitutionality of section 3501. It was sent to all U.S. attorneys in June 1969, only two months after Rehnquist had sent Dean his anti-*Miranda* memo. It is unclear who wrote this Department of Justice memo. However, given his position in the DOJ and his earlier memo sharply criticizing *Miranda*, Rehnquist seems an obvious choice.

The DOJ memorandum emphasized (as Justice Rehnquist was to do five years later in *Michigan v. Tucker*) that the *Miranda* court itself had recognized the Constitution does not require adherence to any particular solution to protect suspects during interrogation. *Michigan v. Tucker*, 417 U.S. 433 (1974), allowed the testimony of a witness whose identity had been discovered as a result of questioning the defendant without giving him a complete set of warnings.

Another Rehnquist opinion that built on *Tucker* was *New York v. Quarles*, 467 U.S. 649 (1984). It recognized a public safety exception to the need for *Miranda* warnings in a prosecution of a defendant who answered a question by police officers who had chased him into a supermarket. The court held admissible both the suspect's statement that "the gun is over there" and the gun found as a result of the statement.

Still another case that relied heavily on *Tucker* was *Oregon v. Elstad*, 470 U.S. 298 (1985), an opinion by Justice Sandra Day O'Connor. In *Elstad*, the fact that the police had obtained a statement from the defendant when they questioned him without giving the required *Miranda* warnings did not bar the admissibility of a later statement obtained at another place when,

this time, the police did comply with *Miranda*.

The *Elstad* case seemed to say—as had Rehnquist's earlier opinions—that a violation of *Miranda* is not a violation of a constitutional right, but only of a procedural safeguard designed to implement a constitutional right. Therefore, evidence derived from a *Miranda* violation would not be entitled to exclusion under the "fruit of the poisonous tree" doctrine, which bars the fruits of unreasonable searches or other "real" constitutional violations.

Tucker and its progeny led critics of *Miranda* to hope that someday the court would overrule *Miranda* or uphold the constitutionality of section 3501, the federal statute that purported to abolish *Miranda*. As it turned out, the court did neither.

Instead, Chief Justice Rehnquist performed a remarkable turnaround. In *Dickerson v. United States*, 530 U.S. 428 (2000), he wrote the majority opinion striking down the anti-*Miranda* statute because "Congress may not legislatively supersede our decisions interpreting and applying the Constitution."

Rehnquist conceded there was some language in some of the court's opinions supporting the view that the protections announced in *Miranda* are not constitutionally required—referring to what he himself had said about *Miranda* in the *Tucker* and *Quarles* cases—and then quickly moved on.

MIRANDA AS A COMPROMISE

WHY, AFTER WRITING THE OPINION in *Tucker*, did Rehnquist come to the rescue of *Miranda* in the year 2000? Many explanations have been offered.

For one thing, the chief justice may have decided to vote with the majority so he could assign the opinion to himself rather than let it go to someone like Justice John Paul Stevens, probably the strongest champion of *Miranda* on the court. (When the chief justice is in dissent, the senior justice in the majority, who would have been Stevens, assigns the opinion of the court.)

Many of those who subscribe to this view doubt that Rehnquist would have voted in favor of *Miranda* if, not counting himself, the vote would have been 4-4, rather than the actual vote, 6-2.

There are, however, other possible reasons for the chief justice's action in *Dickerson*.

Rehnquist might have regarded *Dickerson* as an occasion for the court to maintain its power against Congress. Some have called section 3501 an angry, disrespectful attempt to overrule a decision Congress intensely disliked.

Indeed, in a 2001 article they wrote for *The Supreme Court Review*, law professors Michael Dorf of Columbia University and Barry Friedman of New York University called the statute "a slap at the court" and wrote that "if any court was likely to slap back, it was this one."

Rehnquist might well have agreed that section 3501 was a slap at the court. Or perhaps he was concerned that the police would view the abolition of *Miranda* as a signal that they could return to the "old days" of police interrogation.

Rehnquist might have decided the best outcome would be a compromise, one that reaffirmed *Miranda*'s constitutional status (thereby invalidating the statute that purported to abolish it) but preserved all the qualifications and exceptions the case had acquired since the Warren court had disbanded in the late 1960s.

Civil libertarians had hoped all the exceptions to *Miranda* based on the assumption it was not really a constitutional decision would no longer be good law after *Dickerson* was decided. But the Supreme Court has now made it clear that what it reaffirmed in *Dickerson* was not the *Miranda* doctrine as it burst onto the scene in 1966, but rather *Miranda* with all its post-Warren court exceptions frozen in time.

Shortly after *Dickerson* had revived *Miranda*'s constitutional status, *United States v. Patane* reached the Supreme Court. Without complying with *Miranda*, a detective had questioned Samuel Francis Patane about a pistol he was supposed to own. Patane told the detective where he had put the pistol, and the detective soon found it.

Relying heavily on pre-*Dickerson* cases, the Supreme Court barred the use of the statement itself but allowed the pistol to be used in evidence. *United States v. Patane*, 542 U.S. 630 (2004).

A majority of the court (including Rehnquist) seemed to attach no significance whatever to the fact that only a few years earlier, Rehnquist, speaking for the court, had told us that *Miranda* had "announced a constitutional rule." If so, why wasn't the *Miranda* rule entitled to the fruits doctrine no less than the search-and-seizure exclusionary rule?

In *Missouri v. Seibert*, 542 U.S. 600 (2004), a companion case to *Patane*, a 5-4 majority did exclude a so-called second confession, one obtained after the police had intentionally used a two-stage interrogation technique designed to undermine the *Miranda* warnings. But the case grew out of an extraordinary set of circumstances.

For example, the police interrogator admitted that, as he had been trained to do, he had deliberately failed to give any *Miranda* warnings at the first questioning session. The officer also conceded that the statement ultimately obtained and admitted into evidence had been "largely a repeat" of the statement the police had elicited prior to giving any warnings. *Patane* is the general rule; *Seibert* is the striking exception.

The *Miranda* court made a valiant effort to get police interrogators to stop using methods that were in effect designed to compel suspects to incriminate themselves. The police had been doing this by implying they had a right to an answer, and the suspect had better cooperate if he knew what was good for him. How can we expect to take away the police's incentive to engage in these tactics if we exclude only the incriminating statements police obtain when they fail to give the now-familiar warnings, but permit the use of everything else these statements bring to light?

Dickerson spared *Miranda* the death penalty. But four years later, when *Patane* was decided, *Miranda* took a bullet to the body. ■

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