

THE UNDIEBOMBER TRIAL GETS INTERESTING

I used to have a bit of a party trick last year before I moved out of SE Michigan. At some opportune time, I'd surprise folks by telling them the UndieBomber, Umar Farouk Abdulmutallab, was in a prison just 20 miles from where we were in Ann Arbor, one you'd pass on the way down to Ohio.

Every time I did this, people were surprised to learn he was at that prison.

I raise this because of one of four developments (reported by Josh Gerstein) in the Abdulmutallab case that might make the trial something beyond the routine trial in October I had been expecting. These are:

- Abdulmutallab is asking to have the trial moved out of Michigan
- Abdulmutallab is asking to have statements he made while under sedation suppressed
- Abdulmutallab is asking to have statements he made while at the Milan Correctional Facility suppressed
- The government is asking for a protective order to withhold information from Abdulmutallab that appears to include exculpatory information

Now, from the standpoint of the defense, I think

the request for a change of venue is a big mistake (remember Abdulmutallab is defending himself, although he is being assisted by a lawyer who seems to have been very involved in these filings). Given that this is a counterterrorism case, I presume it would only be moved to NY, DC, or VA. I suspect the jury pool would be demographically better for Abdulmutallab in MI than (at least) in VA. And, as my little party trick suggests, even people from among the jury pool who are exposed to counterterrorism issues on a regular basis (because they hear me talk about torture and wiretapping and such things) had pretty much forgotten Abdulmutallab was there just months after the attack. Finally, while I don't know the entire manifest of the plane that Abdulmutallab allegedly attacked, Detroit is a hub, which means a lot of the passengers on the plane presumably connected on to somewhere else.

More importantly, if Judge Nancy Edmunds does consent to Abdulmutallab's request, it will likely reignite the debate about what kind of trials alleged terrorists should have, and where. I assume at least some Republicans would use the event of a venue move to argue Abdulmutallab should be tried in Gitmo.

Particularly given the other filings in the case.

As a reminder, Abdulmutallab was detained in Detroit and taken to University of Michigan hospital for treatment. Throughout this period, Abdulmutallab was talking—under a public safety exception, the government has said. Then, 10 hours later, he was read his Miranda rights, and he stopped talking until such time as—weeks later—his family convinced him to talk.

But according to Abdulmutallab, in addition to the Miranda issue during the early period when he was talking (which I don't expect to get much traction because it seems to fall squarely under a public safety exception), for part of it he was also under sedation, and hospital staff told federal agents he was not fit to be

interrogated.

That hospital staff advised federal agents that the Defendant was in no position to conduct a legal interview because he had just been administered 300 mg of fentanyl. [sic—as Jim points out this seems to be the wrong dose]

That hospital staff were direct and clear when advising federal agents that the Defendant would not be able to conduct a legal interview for four to six hours.

In addition to challenging the admission of these statements (note, I think Abdulmutallab did speak to agents even before this), he is also trying to suppress statements made while at the prison they held him. He claims statements he made there—he seems to claim, all of them, which I find dubious—were made in the course of discussions about a plea agreement.

Defendant ABDULMUTALLAB met with government agents on numerous occasions at the Milan Correctional Facility. The government intended to obtain incriminating statements from Defendant regarding the alleged incident on December 25, 2009. In addition, the government engaged in plea negotiations with the Defendant during the meetings. Before the meetings began, the government agents verbally agreed that they would not use any statements Defendant made, against him. Defendant relied on the government's representation – as officers of the court – and made incriminating statements. See *United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995) (the government can grant the defendant varying degrees of immunity in an informal agreement). Allowing the government to use these statements at trial will violate the government's

agreement with Defendant.

Now, as I said, I find this much more dubious. There were several stages of interrogation at Milan (pronounced "My-lan," btw). And I don't believe all of these would have been in the context of plea negotiations.

Finally, there's the government's motion requesting a protective order,

...precluding discovery of certain classified information and precluding the defendant from inquiring of certain subjects during the cross-examination of government witnesses, because cross-examination of these subjects may result in the disclosure of classified information. The classified information the government seeks to protect is either not exculpatory, is privileged, or otherwise not discoverable.

Now part of this seems to stem from the fact that Abdulmutallab is defending himself (and so would get access to all this material himself—with many of the other alleged terrorists in civilian proceedings, their lawyers get such information, but they are forbidden from disclosing the information to their client). But note that last compound statement: this is information that is either not exculpatory or is privileged or is "otherwise not discoverable."

This filing seems to suggest that some of this information is exculpatory, but is privileged (If it were really "otherwise not discoverable," then why would it be included in this filing?). And they don't even bother to say what kind of privilege. Is this a back-door state secrets declaration? The part of the filing that discusses this information is entirely classified.

And think of what kind of information this might possibly be. Just guessing here, but I think it

might include,

- Details about interrogation methods used with Abdulmutallab
- Details about any pressure they used to convince Abdulmutallab's family to help get him to cooperate (remember Abdulmutallab's father is a prominent Nigerian banker)
- Information about Anwar al-Awlaki, including (potentially) information that shows AQAP didn't consider Abdulmutallab a serious member; note this might include SIGINT
- Information about how the government had information about Abdulmutallab, but didn't act on it

I have no idea which of these they're trying to hide, or even if I've thought of everything. But given how some of these issues—interrogation techniques, pressure on the family—go to behaviors that might otherwise be illegal, but seem to be increasingly used with alleged terrorists tried in civilian courts (both, I believe, were factors in Faisal Shahzad's treatment), I find it interesting that the government refuses to share it with Abdulmutallab.

What I find interesting about all this, taken together, is what it suggests about our treatment of counterterrorism. This should be an open-and-shut case. There are tens of witnesses that saw Abdulmutallab try to blow up a plane, and at least some of his own statements must be

admissible. But because of the way we've treated it, it seems to have introduced issues entirely of the government's own making that will make it harder to try in civilian court. The government seems to be unable or unwilling to cleanly bracket off intelligence gathering. And—if the suggestion they're hiding exonerating evidence under some kind of privilege is right—they continue to be unwilling to give alleged terrorists access to the exonerating information learned in intelligence collection, either.

I don't think this makes the case for military commissions, which after all are mostly an attempt to pretend such actions don't affect the legitimacy of the trial. But they seem to have unnecessarily introduced all the challenges they complain about when they try to justify military commissions.