

DZHOKHAR TSARNAEV: THE BIG ISSUE IS NOT MIRANDA, IT'S PRESENTMENT

Particularly given Lindsey Graham's persistent tweeting yesterday that "the last thing we may want to do is read Boston suspect Miranda Rights," there was a lot of discussion in the moments after Boston Marathon bombing suspect Dzhokhar Tsarnaev was captured last night about whether he would be read his rights.

At first, there were reports he would be. But then DOJ announced he would not be read Miranda immediately; they would invoke the public safety exception to question him.

"The suspect is en route to the hospital for immediate treatment," the official tells TPM's Sahil Kapur. "But we plan to invoke the public safety exception to Miranda in order to question the suspect extensively about other potential explosive devices or accomplices and to gain critical intelligence."

As of about 40 minutes ago, he had still not been read his rights.

Now, thus far, I'm actually not that worked up about Miranda rights (though I may get there soon). As Orin Kerr explains, the public safety exception is a legally recognized law, and Miranda itself only limits what can be admitted as testimony against Dzhokhar in his trial (I'm betting he'll plead guilty in any case). The government appears to have so much evidence against him in any case, any confession he makes will likely not be necessary to convict him.

Mind you, as Charlie Savage reported two years ago, the government has been institutionalizing longer delays before they give Miranda warnings,

most notably with people they (or foreign proxies) interrogate overseas first, followed by a clean team Mirandized interrogation. And as the reference to “gain[ing] critical intelligence” above suggests, the Obama Administration is stretching the intent of pre-Miranda interrogations to include more substantive interrogation (update: Emily Bazelon also made this point).

But here in the US, the delays on Miranda warnings aren't that long. The best—quite similar—example is the 2009 UndieBomber, who was interviewed for about 50 minutes under a public safety exception when he was captured. That entire interrogation was deemed admissible and in fact formed a significant part of the opening arguments in his trial (which didn't get much further than opening arguments before he plead guilty). So the UndieBomber's case is one reason the Administration is confident they could question Dzhokhar without Mirandizing him at first (though the length of time has gotten far longer than used with the UndieBomber).

There's a precedent from the UndieBomber I find more troubling though. The judge in that case also allowed the use of UndieBomber's statements from the hospital after he had been given a fair amount of sedation. While there was a dispute about how much he got and what kind of effect that might have had, conversations he had with a nurse were also used in the opening arguments of the trial. The two issues together – a suspect interviewed without a lawyer after he's been given serious drugs, both of which will be apply to Dzhokhar, as well – is troubling on legal, humanitarian, and practical grounds. The High-Value Interrogation Group had already been brought in last night, which suggests he may well be asked questions while in precarious medical state.

But the big issue, in my opinion, is presentment, whether he is brought before a judge within 48 hours. In addition to stretching Miranda, the government has also been holding

and interrogating suspects for periods – up to two weeks for American citizens and far longer for non-citizens – before they see a judge. Not only does this postpone the time when they will be given a lawyer whether they ask or not (because judges are going to assign one), but it gives the government an uninterrupted period of time to use soft coercion to get testimony and other kinds of cooperation.

In my opinion, two of the most troubling cases like this, both involving naturalized citizens accused of terrorism, are Faisal Shahzad and Manssor Arbabsiar.

Shahzad, the Times Square bomber, was held and questioned, reportedly with the help of the HIG, for two weeks before he first appeared before a judge. Each day during that period, he signed a waiver of his right to appear before a judge. Ultimately, he plead guilty, so no one every questioned whether his confessions were coerced or not.

But there are two details that I think raise questions about whether he freely waived his rights. First, within a day or so of his arrest, Pakistani authorities had detained a friend of his and his father-in-law in Pakistan. The day after that, authorities put Shahzad's father, and possibly his wife and children, under "protective" house arrest. That is, even before he normally would have been permitted to see a judge, his loved ones – possibly even his kids – were in Pakistani custody. Particularly given the way our government used threats to family members with detainees being tortured, this seems like a potential way to coerce a presentment "waiver."

Then there's the reason the government gave for wanting uninterrupted access to Shahzad:

Federal law enforcement agents are vigorously and expeditiously pursuing leads relating to this and other information provided by the defendant, a process which has required the

participation of hundreds of agents in different cities working around the clock since the defendant's arrest. Uninterrupted access to the defendant has been, and continues to be, critical to this process, which requires, among other things, an ability to promptly verify with him the accuracy of information developed in the investigation. [my emphasis]

The government said it wanted to avoid presentment so it could have uninterrupted, around the clock, access to him to verify information with him. Recall the technique used at Gitmo, "Frequent Flier," where detainees would be wakened and moved, as a way to continue to use sleep deprivation without looking like they were doing so. The language of round-the-clock access seems to permit the same kind of sleep deprivation by default.

Like Shahzad, Manssor Arbabsiar (the Scary Iran Plotter) had a period of delay before seeing a lawyer, 12 days. During that period, he provided a confession that would be the cornerstone of most of the charges against him, and would also be about the only admissible evidence directly implicating the Quds Force in Iran. Without that confession, in other words, the government had almost no case, and certainly not one they could make an international incident over.

In that case, too, the government seemed to implicate his brother (who had transferred money to him) during the initial period, which raises questions about whether that helped to get him to cooperate. The government kept Arbabsiar hidden away at a military base, rather than a jail. The government never told Arbabsiar that charges against him had already been filed, so he never knew what those charges were (or what they didn't include, which was a bunch of stuff he confessed to).

But it's in the way the government got Arbabsiar to sign his first waiver I find most troubling.

Arbasiar was detained in Mexico sometime on September 28, 2011 (the government has never publicly revealed what time). He was held there for some time, then flown to JFK, arriving at 8:40 PM on September 29, where he was arrested. He was questioned for three hours in what sounds like a bogus public safety exception form (there was absolutely no reason to believe there was a public safety risk, not least because Arbabsiar's main co-conspirator was a DEA informant). And only then was he first asked to waive Miranda. But the government's discussion of this timing (which was a response to an almost entirely redacted defense motion to throw out this confession) ties that waiver with Arbabsiar smoking a cigarette. It appears – though the facts on this are almost entirely secret – that the government detained a chain smoker at least three and more likely at least 24 hours (and possibly up to 48 hours, given his detention in Mexico), and then used the offer of a cigarette to get him to waive his most basic rights. There also appears to have been food involved (though Arbabsiar had the opportunity, which he didn't use, to eat on the plane to the US), but the use of a cigarette to get someone to waive Miranda seems especially troubling (I realize rewards like cigarettes are central to non-violent interrogation, but apparently tying to basic rights is far more troubling).

Arbabsiar's lawyer had a slew more complaints about his pre-presentment conditions (some also seem to do with food), but we don't get to see those.

Which is part of the point. What the government did by delaying presentment in these two cases was to afford itself a 2 week period of oversight free interrogation. And there are at least hints – hints that, because both men ultimately plead out, we'll never learn more about – that the interrogations used some of the same techniques we're supposed to have left behind.

In only Arbabsiar's case did the government need

the confession elicited using these methods. Like Dzhokhar, Shahzad was caught in the act, with tens or hundreds of witnesses. Nevertheless, the government chose to infringe on the fundamental right to a lawyer, likely guessing it could get the accused to plead guilty and hide all this detail from the public.

Now the government no doubt would claim it needed to do this for intelligence purposes (indeed, the case of the UndieBomber, where they were never able to coerce his cooperation, even though his public defenders appear to have advised him to do so, and therefore had apparently unadmissible evidence against Anwar al-Awlaki may be why they did this), whether that purpose amounted to real intelligence or propaganda they could use internationally. But ultimately, this practice is corroding our legal system (and this approach will surely be adapted for other uses, such as hackers).

There are a lot of reasons why delaying reading Dzhokhar his Miranda rights are wrong, ethically. But I'm not as worried about that as the possibility they'll stash Dzhokhar away for a couple of weeks without a lawyer or any oversight. And in any case, the Administration seems intent on developing both means of curtailing rights.

Update: Josh Gerstein, who was the first to report on the presentment issue with Shahzad, considers that and Miranda and other issues in this worthwhile piece.