

# GLENN GREENWALD

ON SECURITY AND LIBERTY



## What rights should Dzhokhar Tsarnaev get and why does it matter?

The Obama DOJ says it intends to question the Boston bombing suspect "extensively" without first Mirandizing him



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This still frame from video shows Boston marathon bombing suspect Dzhokhar Tsarnaev visible through an ambulance after he was captured in Watertown, Massachusetts. Photograph: Robert Ray/AP

**(updated below [Sun.]**

Shortly before Dzhokhar Tsarnaev, an American citizen, was apprehended last night, GOP Sen. Lindsey Graham advocated on Twitter that the Boston Marathon bombing suspect be denied what most Americans think of as basic rights. "If captured," Graham wrote, I hope [the] Administration will at least consider holding the Boston suspect as [an] enemy combatant for intelligence gathering purposes." Arguing that "if the Boston suspect has ties to overseas terror organizations he could be treasure trove of information", Graham concluded: "The last thing we may want to do is read Boston suspect Miranda Rights telling him to 'remain silent.'"

Once Tsarnaev was arrested, President Obama strongly suggested that he would eventually be tried in court, which presumably means he will at some point have a lawyer (something that Graham, along with John McCain and Liz Cheney, last night opposed). But the Obama DOJ also announced that they intended to question him "extensively" - their word - before reading him his Miranda rights, as Graham advocated in the second and third tweets quoted above. And the DOJ said they intend to question him not just about matters relating to immediate threats to the public safety - are there other bombs set to go off? is there an accomplice on the loose preparing to kill? - but also, again in their words, "to gain critical intelligence".

Graham's tweets quickly created a firestorm of outrage among various Democrats, progressives, liberals and the like. They insisted that such actions would be radical and menacing, a serious threat to core Constitutional protections. I certainly shared those sentiments: the general concept that long-standing rights should be eroded in the name of Terrorism is indeed odious, and the specific attempt to abridge core constitutional liberties on US soil under that banner is self-evidently dangerous.

But while I shared the reaction of these Democrats to Graham's decrees, it nonetheless really baffled me, as I quickly noted. This was true for several reasons.

First, the Obama administration has *already* rolled back Miranda rights for terrorism suspects captured on US soil. It did so two years ago with almost no controversy or even notice, including from many of those who so vocally condemned Graham's Miranda tweets yesterday. In May, 2010, the New York Times' Charlie Savage - under the headline "Holder Backs a Miranda Limit for Terror Suspects" - reported that "the Obama administration said Sunday it would seek a law allowing investigators to interrogate terrorism suspects without informing them of their rights." Instead of going to Congress, the Obama DOJ, in March 2011, simply adopted their own rules that vested themselves with this power, as reported back then by Salon's Justin Elliott ("Obama rolls back Miranda rights"), the Wall Street Journal ("Rights Are Curtailed for Terror Suspects"), the New York Times ("Delayed Miranda Warning Ordered for Terror

Suspects"), and myself ("Miranda is Obama's latest victim").

In a great analysis last night denouncing the DOJ's decision to delay reading Tsarnaev his rights, Slate's Emily Bazelon details exactly what roll-back of Miranda was achieved by Obama. Specifically, the Obama DOJ exploited and radically expanded the very narrow "public safety" exception to Miranda, which was first created in 1984 by the more conservative Supreme Court justices in *New York v. Quarles*, over the vehement dissent of its liberal members (Brennan, Marshall and Stevens, along with O'Connor). The Quarles court held that where police officers took a very brief period to ask focused questions necessary to stop an imminent threat to public safety without first Mirandizing the suspect, the answers under those circumstances would be admissible (in Quarles, the police apprehended a rape suspect and simply asked where his gun was before reading him his rights, and the court held that the defendant's pre-Miranda answer - "over there" - was admissible).

The Court's liberals, led by Justice Thurgood Marshall, warned that this exception would dilute Miranda and ensure abuse. This exception, wrote Marshall, "condemns the American judiciary to a new era of post hoc inquiry into the propriety of custodial interrogations" and "endorse[s] the introduction of coerced self-incriminating statements in criminal prosecutions". Moreover, he wrote, the "public-safety exception destroys forever the clarity of Miranda for both law enforcement officers and members of the judiciary" and said the court's decision "cannot mask what a serious loss the administration of justice has incurred".

As Marshall noted, the police have always had the power to question a suspect about imminent threats without Mirandizing him; indeed, they are free to question suspects about anything without first reading them their Miranda rights. But pre-Miranda statements were not admissible, could not be used to prosecute the person. This new 1984 "public safety" exception to that long-standing rule, Marshall said, guts the Fifth Amendment's guarantee that one will not be compelled to incriminate oneself. As he put it: "were constitutional adjudication always conducted in such an ad hoc manner, the Bill of Rights would be a most unreliable protector of individual liberties."

As controversial as this exception was from the start (and as hated as it was among traditional, actual liberals), it was at least narrowly confined. But the Obama DOJ in 2011 wildly expanded this exception for terrorism suspects. The Obama DOJ's Memorandum (issued in secret, of course, but then leaked) cited what it called "the magnitude and complexity of the threat often posed by terrorist organizations" in order to claim "a significantly more extensive public safety interrogation without Miranda warnings than would be permissible in an ordinary criminal case". It expressly went

beyond the "public safety" exception established by the Supreme Court to arrogate unto itself the power to question suspects about other matters without reading them their rights (emphasis added):

"There may be exceptional cases in which, *although all relevant public safety questions have been asked, agents nonetheless conclude that continued unwarned interrogation is necessary* to collect valuable and timely intelligence not related to any immediate threat, and that the government's interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation."

*That* is what Graham advocated regarding Miranda: that Tsarnaev be interrogated about intelligence matters without Mirandizing him, and that's exactly what Obama DOJ policy - two years ago - already approved. Worse, as Bazelon noted: "Who gets to make this determination? The FBI, in consultation with DoJ, if possible. In other words, the police and the prosecutors, with no one to check their power." At the time, the ACLU made clear how menacing was the Obama DOJ's attempted roll-back of Miranda rights for terror suspects.

Although we do not yet know how long the Boston bombing suspect will be questioned pre-Miranda or what will be asked, Bazelon - citing the Obama DOJ's 2011 policy as well as last night's announcement - writes:

"And so the FBI will surely ask 19-year-old Tsarnaev anything it sees fit. Not just what law enforcement needs to know to prevent a terrorist threat and keep the public safe but anything else it deemed related to 'valuable and timely intelligence'. Couldn't that be just about anything about Tsarnaev's life, or his family, given that his alleged accomplice was his older brother (killed in a shootout with police)? There won't be a public uproar. Whatever the FBI learns will be secret: We won't know how far the interrogation went. And besides, no one is crying over the rights of the young man who is accused of killing innocent people. . . ."

So Democrats reacted with horror and outrage to Graham's suggestion that "the last thing we may want to do is read Boston suspect Miranda Rights telling him to 'remain silent.'" But that's already Obama DOJ policy, enacted with little controversy. And last night's announcement makes clear that the Obama DOJ intends, as Bazelon says, to question him about a wide range of topics *far beyond matters of imminent threats to public safety* without first Mirandizing him.

But there's another reason why I found Democratic outrage over Graham's statements to be confounding. The theory on which Graham's arguments are based is one that the Obama administration has vigorously embraced with the full-throated endorsement of most of its supporters: namely, that the US is "at war", and that anyone who takes up arms against the country or tries to kill Americans is not entitled to basic rights - even if they're American citizens. As Graham told the Washington Post, his view that Tsarnaev is not entitled to these rights is grounded in his belief that the US is fighting a global war and those who fight in it against the US are "enemy combatants".

It is bizarre indeed to watch Democrats act as though Graham's theories are exotic or repellent. This is, after all, the same faction that insists that Obama has the power to target even US citizens for execution without charges, lawyers, or any due process, on the ground that anyone the president *accuses* of Terrorism forfeits those rights. The only way one can believe this is by embracing the same theory that Lindsey Graham is espousing: namely, that accused Terrorists are enemy combatants, not criminals, and thus entitled to no due process and other guarantees in the Bill of Rights. Once you adopt this "entire-globe-is-a-battlefield" war paradigm - as supporters of Obama's assassination powers must do and have explicitly done - then it's impossible to scorn Graham's views about what should be done with Tsarnaev. Indeed, one is necessarily endorsing the theory in which Graham's beliefs are grounded.

It's certainly possible to object to Graham's arguments on *pragmatic* grounds, by advocating that Tsarnaev should be eventually Mirandized and tried in a federal court because it will be more beneficial to the government if that is done. But for anyone who supports the general Obama "war on terror" approach or specifically his claimed power to target even US citizens for execution without charges, it's impossible to object to Graham's arguments on principled or theoretical grounds. Once you endorse the "whole-globe-is-a-battlefield" theory, then there's no principled way to exclude US soil. If (as supporters of Obama's terrorism policies must argue), the "battlefield" is anywhere an accused terrorist is found and they can be detained or killed without charges, then that necessarily includes terrorists on US soil (or, as Graham put it, using one of the creepiest slogans imaginable: "*the homeland is the battlefield*").

Recall, in fact, that the Democratic-led Senate enacted the 2011 NDAA, which was then signed into law by President Obama, that codified the power of indefinite detention even of US citizens on US soil accused of terrorism (that's what led a federal court to enjoin the law on the grounds of unconstitutionality). It is true that Obama said that, as a matter of policy, he would not exercise these powers against US citizens on US soil, but that's simply a pragmatic choice that can be changed at any time. The theory of the

NDAA is the same theory as Graham yesterday invoked, which in turn is the same theory animating the Obama "war on terror": the US is "at war" with The Terrorists, and anyone who takes up arms against the US and tries to kill Americans are "combatants" who can be denied basic rights. Watching Democrats mock Graham, while supporting Obama's policies based on the same theory, is truly surreal.

Finally, consider how radically Obama's "war on terror" has altered political opinion. As noted, even the narrow "public safety" exception to Miranda was the work of mostly right-wing Supreme Court justices who long hated Miranda. For that reason, it was loathed by liberals, including Thurgood Marshall, who viewed it as a stealth attempt to destroy Miranda. Yet now, the Obama administration has radically expanded even that once-controversial exception by claiming the power to question suspects without Miranda warnings far beyond what even those conservative justices recognized (as the Obama DOJ put it: "There may be exceptional cases in which, although all relevant public safety questions have been asked, agents nonetheless conclude that continued unwarned interrogation is necessary").

Now, the cheers for this erosion of Miranda are led not by right-wing Supreme Court justices such as William Rehnquist (who wrote the opinion in Quarles), but by MSNBC pundits like former Obama campaign media aide Joy Reid, who - immediately upon the DOJ's announcement - instantly became a newly minted Miranda expert in order to loudly defend the DOJ's actions. MSNBC's featured "terrorism expert" Roger Cressey - who, unbeknownst to MSNBC viewers, is actually an executive with the intelligence contractor Booz Allen - also praised the DOJ's decision not to Mirandize the accused bomber (if you want instant, reflexive support for the US government's police and military powers, MSNBC is the place to turn these days).

Leave aside how misleading and misinformed this defense is: the DOJ's policy, as documented, is to go well beyond that 1984 "public safety" exception and the DOJ clearly intends to do so here. It's just so telling how this doctrine, in the age of Obama, has been transformed from hated right-wing assault on Miranda rights to something liberals now celebrate and defend even in its warped and expanded version as embraced by the Obama DOJ. Just 30 years ago, Quarles was viewed as William Rehnquist's pernicious first blow against Miranda; now, it's heralded by MSNBC Democrats as good, just and necessary for our safety, even in its new extremist rendition. That's the process by which long-standing liberal views of basic civil liberties, as well core Constitutional guarantees, continue to be diluted under President Obama in the name of terrorism. Just compare the scathing denunciation of this Miranda exception by Marshall, Brennan and Stevens to the MSNBC cheers for it in its enlarged form.

Needless to say, Tsarnaev is probably the single most hated figure in America now. As a result, as Bazelon noted, not many people will care what is done to him, just like few people care what happens to the accused terrorists at Guantanamo, or Bagram, or in Yemen and Pakistan. But that's always how rights are abridged: by targeting the most marginalized group or most hated individual in the first instance, based on the expectation that nobody will object because of how marginalized or hated they are. Once those rights violations are acquiesced to in the first instance, then they become institutionalized forever, and there is no basis for objecting once they are applied to others, as they inevitably will be (in the case of the War on Terror powers: as they already are being applied to others). As Bazelon concludes:

"No one is crying over the rights of the young man who is accused of killing innocent people, helping his brother set off bombs that were loaded to maim, and terrorizing Boston Thursday night and Friday. But the next time you read about an abusive interrogation, or a wrongful conviction that resulted from a false confession, think about why we have Miranda in the first place. It's to stop law enforcement authorities from committing abuses. Because when they can make their own rules, sometime, somewhere, they inevitably will."

Leave aside the fact that Dzhokhar Tsarnaev has been convicted of nothing and is thus entitled to a presumption of innocence. The reason to care what happens to him is because how he is treated creates precedent for what the US government is empowered to do, including to US citizens on US soil. When you cheer for the erosion of his rights, you're cheering for the erosion of your own.

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## The Jose Padilla precedent

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It is true, as noted, that Obama's statement that Tsarnaev will eventually be tried in a court constitutes a rejection of the Graham/McCain/Cheney argument that he be held as an "enemy combatant" more or less indefinitely. It's strange to give credit to a political leader for being willing to charge someone with a crime and allow them a lawyer before imprisoning them, but in our political climate, that's how low the bar is set, because that outcome is far from certain. So those who say that Obama is not replicating Graham's entire advocated course of action are, at least to that extent, correct, provided that Tsarnaev is eventually charged and ends up in a civilian court.

But given how Graham's statements were treated like some sort of shocking aberration, it is worth noting that the US government previously did exactly what he advocated. In

2002, US citizen Jose Padilla was arrested on terrorism charges on US soil (at Chicago's O'Hare International Airport), and shortly before he was to be tried, the Bush administration declared him to be an "enemy combatant", transferred him to a military brig, and then imprisoned him (and tortured him) for the next 3 1/2 years without charges, a lawyer, or any contact with the outside world. That was the incident that most propelled me to start political writing, but it barely registered as a political controversy.

So as extremist as Graham's tweets may have seemed to some, it was already done in the US with little backlash. That demonstrates how easily and insidiously extremist rights assaults become normalized if they are not vehemently resisted in the first instance, regardless of one's views of the individual target.

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## CAIR speech

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For those in New York: I'll be giving the keynote speech this evening to the now-incredibly well-timed annual event of CAIR in New York, entitled "Upholding our Constitution", beginning at 6:00 pm. I believe (though I'm not certain) that there are a couple of tickets still available; information is here.

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## UPDATE [Sun.]

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That the Boston Marathon bombing was "an act of terrorism" is now unchallengeable conventional wisdom. Without my adopting it all: Ali Abunimah has an excellent analysis examining whether the evidence exists to make this claim and what is revealed by the embrace of this conclusion.

Similarly, Alan Dershowitz was on BBC radio yesterday and, citing the lack of clarity about motive, said (at the 3:15 mark): "It's not even clear under the federal terrorist statutes that it qualifies as an act of terrorism."

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