

# ISSUE BRIEF

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## Boston Bombing Case: Options and Restrictions

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Now that one of the Boston bombers, Dzhokhar Tsarnaev, has been apprehended, naturally the discussion has turned to the most prudent way to deal with him given that there are so many unanswered questions about him and any possible ties to the continuing threat of terrorism.

Should Tsarnaev be tried by a military commission? Should he be designated as an enemy combatant? Should the government invoke the “public safety exception” ostensibly allowing interrogation without giving him his Miranda warnings?

Each of these and related questions require a review of the legal and policy options available to the government.

**Military Commissions Are Not an Option.** Dzhokhar is a United States citizen. Under the Military Commissions Act of 2009, the only persons subject to the jurisdiction of military commissions are “alien unprivileged enemy belligerents.”

The term *alien* means an individual who is not a citizen of the United States.

An “unprivileged enemy belligerent” is a person who has:

- Engaged in hostilities against the United States or its coalition partners,
- Has purposefully and materially supported hostilities against the United States or its coalition partners, or
- Was part of al-Qaeda at the time of the alleged offense.

Thus, even if he would technically qualify as an unprivileged enemy belligerent—and there is no evidence in the public eye to date that he does—since he is a U.S. citizen, he may not be tried under the Military Commissions Act of 2009.

That means that if he is to be tried for his crimes, he can be tried only by the federal government and/or Massachusetts state court.

**Interrogation Before Miranda Warnings Is Lawful and Appropriate.** Government officials (usually law enforcement) are required to give a suspect his Miranda warnings if that person is (1) in custody and (2) subject to official (i.e., government) questioning. This rule stems from the United States Supreme Court case in *Miranda v. Arizona* (1966).

That said, over the years, the courts have recognized various exceptions to the Miranda requirements, including the “public safety” exception. The Supreme Court carved out this exception in *New York v. Quarles* (1984).

The exception provides the government a short period of time to question a custodial suspect without reading him his Miranda warnings. Federal circuit courts have held that the exception applies even after the subject invokes his right to counsel.

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Thus, the government has the legal authority to invoke (and apparently has invoked) the public safety exception to question Tsarnaev. Any statements provided by the suspect to law enforcement can be used by intelligence officials and may even be used at trial against the suspect, depending on a variety of factors.

**Is Tsarnaev an Enemy Combatant?** That is somewhat unclear, but the federal government probably has significantly more facts at this time than outside commentators do to make that determination.

Some lawmakers have called on the Administration to classify Tsarnaev an enemy combatant, ostensibly so that he can be detained under the law of armed conflict (law of war) without charge and interrogated at length. If he were detained as an enemy combatant, they argue, the government would have more time to exploit any intelligence they obtain from him.

The Administration announced today that it will not hold Tsarnaev as an enemy combatant, which might mean that it believes it is not possible to conclude otherwise.

The legal basis for holding a person as an enemy combatant since 9/11 stems mainly from two sources: (1) the September 18, 2001, Authorization for Use of Military Force, and (2) the rulings from the federal courts in the habeas litigation from Guantanamo detainees.

The question of whether he is an enemy combatant is a factual one. To be eligible to be declared an enemy combatant, the suspect would have to be part of or substantially supporting al-Qaeda, the Taliban, or associated forces. If not, he cannot be an enemy combatant.

Even if he were part of, or has substantially supported al-Qaeda, the Taliban, or associated forces, the fact remains that he is an American citizen. The President, as the commander in chief, always has

the policy option of not designating a person as an enemy combatant even if the suspect fits the criteria.

In this case, it is critically important to separate Dzhokhar from his older, deceased brother. His older brother went to Russia for six months in 2012; Dzhokhar did not. One must not casually attribute the actions and travels of the deceased brother to the younger brother.

Finally, even if the Administration designated Dzhokhar an enemy combatant and held him while the investigation developed, there is no evidence that it would make the criminal case against him any better. To the contrary, it might make the federal prosecution more difficult.

**The Way Forward.** At some point in the near future, the government's ability to question the suspect using the public safety exception will expire. If officials want to obtain a statement from him for use at trial, they will need to read him his Miranda rights.

If the suspect waives his Miranda rights, they may question him and may use anything he says as a result of that questioning in the government's case. Given the amount of physical and other evidence in this case, the government may not even need to introduce statements from the suspect at trial.

On the other hand, if the suspect invokes his right to silence or asks for an attorney pursuant to Miranda, all questioning must stop. Assuming he is kept in the federal criminal courts, the accused will be indicted and arraigned, and the case will move forward toward trial absent a guilty plea.

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