

DOES KAGAN THINK THE 2001 AFGHAN AUMF AUTHORIZED IRAQ?

I'm going to assume that this was just a misstatement on Elena Kagan's part, but it's one that I hope she corrects before her confirmation hearings are done. In response to a question from DiFi, Kagan suggested that SCOTUS' decision in the Hamdi case—which relied on the 2001 Authorization to Use Military Force passed after 9/11—applied to Iraq and Afghanistan.

DiFi: Could you elaborate on the scope of the President's authority to detain individuals under the law of armed conflict?

Kagan: Senator Feinstein, the conversation that Senator Graham and I had—and I believe in that same hearing you asked a similar question—starts with the Hamdi case, where the Supreme Court said that the AUMF—the authorization for the use military force—which is the statute that applies to our conflict with Iraq and Afghanistan, that the AUMF includes detention authority, detention authority, and Hamdi said that the law of war typically grants detention authority in a wartime situation and interpreted the AUMF consistent with that law of war understanding.

Hamdi, of course, doesn't even mention Iraq. And while Bush did conduct detention in Iraq in relation to that separate war, those detention operations fell under different guidelines even according to the radical people running the Bush Administration. More troubling, however, is the possibility that Kagan has internalized the false claims of many on the right that Iraq had anything at all to do with the 2001 AUMF, which authorized action only against those with ties

to 9/11.

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hearings are done.