

KOH V. JOHNSON: MATERIAL SUPPORT IN FAR AWAY “BATTLEFIELDS”

I don't know about you. But I'm sort of bored with the Holder v. Rahm fight over torture and Gitmo. My hope is they'll start a military commission trial, it'll get delayed and challenged, and Holder will be able to demonstrate in terms even Rahm understands that civilian trials are not just a question of politics—they are also clearly more efficacious.

Ah well.

Lucky for us, there's a new debate to watch, this one between State Department Legal Advisor Harold Koh and DOD General Counsel Jeh Johnson, over whether Presidential wartime powers are limited to those actually in al Qaeda, or include those more loosely affiliated with the organization. As Charlie Savage describes, both have written secret memos advocating a position on the issue.

But behind closed doors, the debate flared again that summer, when the Obama administration confronted the case of Belkacem Bensayah, an Algerian man who had been arrested in Bosnia – far from the active combat zone – and was being held without trial by the United States at Guantánamo. Mr. Bensayah was accused of facilitating the travel of people who wanted to go to Afghanistan to join Al Qaeda. A judge found that such “direct support” was enough to hold him as a wartime prisoner, and the Justice Department asked an appeals court to uphold that ruling.

The arguments over the case forced onto the table discussion of lingering discontent at the State Department over

one aspect of the Obama position on detention. There was broad agreement that the law of armed conflict allowed the United States to detain as wartime prisoners anyone who was actually a part of Al Qaeda, as well as nonmembers who took positions alongside the enemy force and helped it. But some criticized the notion that the United States could also consider mere supporters, arrested far away, to be just as detainable without trial as enemy fighters.

That view was amplified after Harold Koh, a former human-rights official and Yale Law School dean who had been a leading critic of the Bush administration's detainee policies, became the State Department's top lawyer in late June. Mr. Koh produced a lengthy, secret memo contending that there was no support in the laws of war for the United States' position in the Bensayah case.

Mr. Koh found himself in immediate conflict with the Pentagon's top lawyer, Jeh C. Johnson, a former Air Force general counsel and trial lawyer who had been an adviser to Mr. Obama during the presidential campaign. Mr. Johnson produced his own secret memorandum arguing for a more flexible interpretation of who could be detained under the laws of war — now or in the future.

Part of me actually wonders whether the debate stems at least partly from Johnson's greater familiarity with whom we're already keeping—which includes a bunch of people whose “material support for terrorism” is really quite tenuous. That doesn't justify holding them, but this may be a question about whom we have already held for 9 years.

Still, the ramifications of holding those who

materially supported al Qaeda are pretty ominous, given the fairly expansive notion this country has used to claim material support.

And meanwhile, David Barron—Dawn Johnsen's stand-in—basically punted on this question, seemingly hoping that some judge who is not a radical Bush appointee will make the decision for him.