

THE USE OF FALSE PASSPORTS DOES NOT MAKE SOMEONE AN AL QAEDA MEMBER

Happy Fourth of July.

This week, the DC Circuit Court had to tell the government that using false passports does not make someone an al Qaeda member.

At issue is the appeal of Belkacem Bensayah, an Algerian who had been living in Bosnia alleged to have arranged travel for five others (the rest of the detainees set free after the Boumediene decision gave them habeas rights) to go to Afghanistan to fight the Americans. In the past, the government has claimed the phone number of a “senior al Qaeda member”—reported to be Abu Zubaydah—was found in his possession (PDF 19); in addition, a senior al Qaeda member (presumably also a reference to Abu Zubaydah) “reported he has known the detainee since 1993 when the detainee went to Afghanistan from the war in Tajikistan.”

But the evidence presented in his factual return consists of the following:

- An intelligence report, labeled, “INFORMATION REPORT, NOT FINALLY EVALUATED INTELLIGENCE,” which the District Court determined could not be relied upon by itself because of “uncertainty about the source of the document and how the information therein was gathered”

- Claims that Bensayah had ties to Abu Zubaydah—though the Appeals ruling notes that the government provided no evidence of any contact between the two
- Proof that Bensayah had traveled on false passports in the past (Bensayah said he did so to avoid being sent back to Algeria where he feared prosecution)
- Questions about his whereabouts in the 1990s, none of which alleges a tie to al Qaeda

The Appeals Court bounced this case back to the District Court to see if the government could come up with any more evidence.

So at one level, this is another of the many cases where the government has detained someone for years based on what Courts say is a too-tenuous connection to al Qaeda.

But this case is all the more interesting because of the way it relates to questions I raised the other day about Kagan's comments about indefinite detention. As Charlie Savage reported in detail in March, once the Obama Administration backed off Bush's justification for detaining alleged terrorists under Article II, it set off a debate within the Administration over whether they could detain people who had just supported—but were not a part of—al Qaeda. Harold Koh said they could not, Jeh Johnson said they could, and David Barron, acting head of OLC, basically just punted. They were basically hoping to get away with holding people for simply supporting al Qaeda as long as they could.

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.

In September 2009, national-security officials from across the government packed into the Office of Legal Counsel's conference room on the fifth floor of the Justice Department, lining the walls, to watch Mr. Koh and Mr. Johnson debate around a long table. It

was up to Mr. Barron, who sat at the head of the table, to decide who was right.

But he did not. Instead, days later, he circulated a preliminary draft memorandum stating that while the Office of Legal Counsel had found no precedents justifying the detention of mere supporters of Al Qaeda who were picked up far away from enemy forces, it was not prepared to state any definitive conclusion.

So with no consensus, the legal team decided on a tactical approach. For as long as possible they would try to avoid that hard question. They changed the subject by instead asking courts to agree that people like Mr. Bensayah, looked at from another angle, had performed functions that made them effectively part of the terrorist organization – and so were clearly detainable.

Insert your favorite quip about what might have been if Dawn Johnsen had gotten confirmed...

Now, as Savage points out in his article on the DC Circuit's ruling, this case was sent back to the District Court because the evidence was so crummy, not because of the Obama Administration's stance on "support" versus "part of."

Still, Judge Ginsburg's opinion suggested that the appeals court ruling turned less on the recategorization of Mr. Bensayah's alleged ties to Al Qaeda than on skepticism about the basic credibility of the evidence the government presented against him.

But there are interesting other implications of this. First, one of the problems with the evidence against Bensayah is the problem with

the government's evidence against Abu Zubaydah. The Circuit's opinion notes that the government has withdrawn much of the evidence originally presented to the District Court which it used to determine that Abu Zubaydah was closely linked to al Qaeda.

The district court found the government "has put forth more than sufficient credible evidence that [redacted, presumably Abu Zubaydah] was a senior al Qaeda operative and facilitator." Since the district court's decision, however, the Government has eschewed reliance upon much of that evidence; it now maintains the other evidence upon which the district court relied is sufficient to link to [redacted, presumably Abu Zubaydah] Qaeda.

The DC District ruled in favor of Bensayah regardless of whether Abu Zubaydah is really an al Qaeda member or not; it found that the ties between Bensayah and AZ were too weak to tie Bensayah to al Qaeda in any case.

But we seem to be getting awfully close to the point where Judges are not going to permit the government to play this "six degrees of Osama bin Laden" anymore—at least with respect to indefinite detention. But at the same time, SCOTUS recently blew open the definition of material support for terrorism in the civilian courts, such that Bensayah (and certainly Abu Zubaydah) might well qualify. I'm just guessing, but I suspect if the government really wants to hold Bensayah, they may well be forced to charge and convict him in a civilian court to do so.