

OUR DETENTION AUTHORITY BRANCHES OUT BEYOND AL QAEDA

It was pretty inconsiderate of Charlie Savage to break the news that the US had filed military commission charges against Ali Musa Daqduq the day after Jeh Johnson gave a speech emphasizing how our detention authority is restricted to those associated with al Qaeda.

But, the AUMF, the statutory authorization from 2001, is not open-ended. It does not authorize military force against anyone the Executive labels a “terrorist.” Rather, it encompasses only those groups or people with a link to the terrorist attacks on 9/11, or associated forces.

While Daqduq does, by all accounts, have ties to Hezbollah, there’s no allegation in the charges sheet that he had any ties to al Qaeda.

Now, I don’t dispute that Daqduq could be charged (or could have been, while we were still at war—oh wait, that Iraq AUMF will never be repealed!) for violating the laws of war. What I’m interested in is how the government implicated the various Shia groups with which Daqduq allegedly conspired.

Most of Daqduq’s charges—the murder, attempted murder, intentional bodily injury, and attempted kidnapping of some American soldiers—don’t mention any other people or organizations. Nor do the treachery and spying charges.

The charge of terrorism charges Daqduq alone—he’s a terrorist because he engaged in an act evincing wanton disregard for human life. Which is consistent with the way the Iraq AUMF defines terrorism, but not the way the GWOT one does.

The material support for terrorism charge does

name others, though—the Shia group Asa’ib Ahl al-Haqq, which broke off from the Mahdi army in 2004:

In that Ali Musa Daqduq al-Musawi, an alien unprivileged enemy belligerent subject to trial by military commission, did, between about May 2006 and about January 2007, at various locations in Iraq and Iran, in the context of and associated with hostilities, provide material support and resources to be used in preparation for and in carrying out an act of terrorism against U.S. forces in Iraq, knowing or intending that such material support and resources were to be used for that purpose, to wit: advice, training and planning to Qays al-Khazali, Layth al-Khazali, and other members of Asa’ib Ahl al-Haqq, known and unknown, for the purpose of killing or inflicting great bodily harm upon one or more protected persons in or near Karbala, Iraq, on or about 20 January 2007.

Asa’ib Ahl al-Haqq is neither—and I don’t believe it was—on the State Department’s Foreign Terrorism Organization list nor sanctioned by Treasury. And last month it agreed to enter Iraq’s political process. But MC’s have a slightly different definition of Material Support that would permit charges in this case:

Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24) of this section), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a

military commission under this chapter
may direct. [my emphasis]

But again, charging someone with material support for terrorists, not a designated terrorist group, shows that our military authority extends beyond those groups associated with al Qaeda.

It's only when we get to Charge IX, conspiracy, where the charge sheet starts naming the terrorists we're gearing up for the next war with:

In that Ali Musa Daqduq al-Musawi, an alien unprivileged enemy belligerent subject to trial by military commission, did, between about May 2006 and about January 2007, at various locations in Iraq and Iran, in the context of and associated with hostilities, conspire and agree with Qays al-Khazali, Layth al-Khazali, and other members and associates of Asa'ib Ahl al Haqq (AAH), **Lebanese Hezbollah (LH), and the Iranian Revolutionary Guard-Quds Force (IGRC-QF)**, known and unknown, to commit one more more substantive offenses triable by military commission, ... [my emphasis]

Hezbollah was on State's terrorist list at this point. Quds Force only got listed by Treasury subsequent to this attack.

And the ties to Hezbollah and Quds Force aren't spelled out in great detail—just this bullet point,

Between about May 2006 and about March 2007, traveled to Iran to meet with members of the IRCG-QF Department of Special External Operations for the purpose of discussing how to provide support and training to Iraqi insurgent groups, including the AAH, in conducting kidnapping and sniper and ambush attack operations.

And two more mentioning meetings in Iran (though not Hezbollah or Quds Force).

In other words, Daquq is being charged under the same system as our al Qaeda detainees, without relying on his ties to designated terrorist organizations.

I'm not saying that charging him is not (or wouldn't have been earlier) legally smart. But it is worth noting that all the assurances Johnson gave the other day didn't hold up very long.

Update: Robert Chesney says much the same thing (without noting how it challenges what Johnson said the other day):

Application of the commission system to a non-al Qaeda, non-Taliban defendant – As Charlie's article emphasizes, this would indeed be a distinction from the existing post-9/11 commission cases. But it's perfectly within the scope of the Military Commissions Act in both its 2006 and 2009 incarnations, as both encompassed persons who engaged in hostilities against the United States without combatant privilege, without requiring more narrowly that the person be linked to al Qaeda or the Taliban or more generally that the hostilities relate to the 9/18/01 AUMF (as opposed to, say, the 2002 AUMF for Iraq).

The Substantive Offenses – The lead offenses charged (Charges I, II, and III) are core war crimes: murder in violation of the law of war (with the violation consisting both of perfidy and execution of prisoners), causing serious bodily injury via perfidy, and the act of perfidy itself. The attempted murder charges (Charge VII) are similar, and so too with the attempted hostage-taking charge (Charge VIII). There's just nothing controversial at all about calling these offenses war crimes. The

other charges might spark some debate, however, as they include terrorism (Charge IV), material support to an act of terrorism in the form of providing advice, training, and planning in support of the attack (Charge V), spying in preparation for the attack (Charge VI), and conspiracy (Charge IX). Note that the conspiracy charge is framed in terms of an agreement among members of the insurgent cell involved in the attack, members of Hezbollah, and members of the Iranian Revolutionary Guard-Quds Forces (IRGC-QF).

Though, as I noted above, the charges of terrorism and material support do comply with the allowable charges under the MCA.