

SCOTUS REVIEWS THE “MILITARY AGE MALE” STANDARD ON THURSDAY

One of the most consistent statements of outrage I've seen from people just coming to the horrors of the drone program is the military aged male criterion: the Administration's assumption that all military age males killed in a drone strike must be combatants.

Mr. Obama embraced a disputed method for counting civilian casualties that did little to box him in. It in effect counts all military-age males in a strike zone as combatants, according to several administration officials, unless there is explicit intelligence posthumously proving them innocent.

Justin Elliott even got the Administration to reiterate the claim, albeit anonymously.

I gave the White House a chance to respond, and it declined to comment on the record. But speaking on condition of anonymity, an administration official acknowledged that the administration does not always know the names or identities of everyone in a location marked for a drone strike.

“As a general matter, it [the Times report] is not wrong that if a group of fighting age males are in a home where we know they are constructing explosives or plotting an attack, it's assumed that all of them are in on that effort,” the official said. “We're talking about some of the most remote places in the world, and some of the most paranoid organizations on the planet. If you're there with them, they know you, they

trust you, there's a reason [you're] there." [brackets original]

What no one seems to get, however, is that between them, the Bush and Obama Administrations have been using that standard to detain people for over a decade. Indeed, there are probably over 30 men (I suspect the number is closer to 50) still at Gitmo being held on that standard, most of them for over a decade.

More importantly, SCOTUS will decide whether to uphold that standard on Thursday (or whenever they get around to accepting or denying cert on the 7 Gitmo cases they've been agonizing over for weeks).

The case in question is Uthman Abdul Rahim Mohammed Uthman's habeas petition. Here's how his cert petition describes the issues presented by his case.

Whether the Authorization of Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), authorizes the President to detain, indefinitely and possibly for the rest of his life, an individual who was not shown to have fought for al Qaeda, trained to fight for al Qaeda, or received or executed orders from al Qaeda, and was not claimed to have provided material support to al Qaeda.

The government has always yoked its detention authority closely to its targeted killing authority (see, for example, the reported justification for the Awlaki killing). And here you can replace "detain, indefinitely and possibly for the rest of his life" with "kill with a drone strike" and you've got precisely the authority that Obama (and Bush before him) claims to kill all men in the vicinity of suspected al Qaeda figures, even absent any claim they were al Qaeda fighters.

I wrote about the evidence against Uthman here

(two of the men who gave evidence against him had been tortured), but here are the passages from Judge Henry Kennedy's (yup, the same judge who presided over the Latif suit, with another Yemeni prisoner) opinion granting the habeas petition (before the DC Circuit overturned it).

In sum, the Court gives credence to evidence that Uthman (1) studied at a school at which other men were recruited to fight for Al Qaeda; (2) received money for his trip from an individual who supported jihad; (3) traveled to Afghanistan along a route also taken by Al Qaeda recruits; (4) was seen at two Al Qaeda guesthouses in Afghanistan; and (5) was with Al Qaeda members in the vicinity of Tora Bora after the battle had occurred there.

[snip]

Even taken together, these facts do not convince the Court by a preponderance of the evidence that Uthman received and executed orders from Al Qaeda. Although this information is consistent with the proposition that Uthman was a part of Al Qaeda, it is not proof of the allegation. . . . Associations with Al Qaeda members, or institutions to which Al Qaeda members have connections, are not enough to demonstrate that, more likely than not, Uthman was part of Al Qaeda.

In other words, Uthman's habeas appeal challenges whether being in any of five wrong place at the wrong time—including a school, a travel route, a guest house, and the vicinity of Tora Bora, as well as funded by jihadists—amount to being an al Qaeda militant. Subsequent to Uthman, detainees' habeas petitions were rejected based on fewer of those criteria (for example, in addition to the error-ridden intelligence report against Latif, the main evidence against him is an even more tenuous

travel route than used to jail Uthman). But the Circuit decision in Uthman basically enshrines the claim that being in the wrong place is all the evidence the government needs to detain someone indefinitely.

Since they're rushing to roll out drones in US airspace, you better start worrying about whether your travel patterns mark you for killing or detention.