



Written by [Jack Kenny](#) on April 11, 2010

## Elena Kagan & the Worldwide "Battlefield"

Elena Kagan, Solicitor General of the United States and former dean of Harvard Law School, is widely believed to be the frontrunner for President Obama's nomination to succeed retiring Justice John Paul Stevens on the U.S. Supreme Court.



She is also known to have a rather expansive view of the power of the executive branch of government in time of war. During her 2009 confirmation hearing for Solicitor General last year, Senator Lindsey Graham (R-S.C.), led the nominee through a series of questions concerning our government's policy of detaining indefinitely, without trial, persons suspected of being "enemy combatants," regardless of whether they have even been near an armed battle or taken any action against the United States. [Sen. Graham posed to Kagan](#) some of the same questions he had previously asked of Attorney General Eric Holder during his confirmation hearing. The questions dealt in part with the definition of a "battlefield" in the "war on terror."

"I asked him this question," Graham said. "Now, when you talk about the physical battlefield, if our intelligence agency should capture someone in the Philippines that is suspected of financing al-Qaida worldwide, would you consider that person part of the battlefield, even though we're in the Philippines, if they were involved in al-Qaida activity?" Holder said, the attorney general said, 'Yes, I would.' Do you agree with that?" Graham asked Kagan.

"I do," she replied.

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And if all the world is a battlefield, then everyone is potentially an enemy combatant in a war that is, as Graham said, "a war without end, that will not end with a ceremony on the U.S.S. Missouri." And nearly any suspect may be brought to justice — or something — under military, rather than criminal law.

"You can't detain someone indefinitely under criminal law, they have to have a trial," conceded Graham, a former Air Force lawyer. "But under military law, if you're part of the enemy force, there is no requirement to let them go back to the war and kill our troops. Does that make sense?"

"I think that makes sense and I believe that's the law," Kagan answered.

"So America," Graham concluded, "needs to get ready for the proposition that some people are going to be detained as enemy combatants, not criminals and there will be a process to determine whether or



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not they should be let go." But the person in the Philippines in Graham's hypothesis is not at war with American troops. He or she is "suspected of financing al-Qaida." To suggest that on such suspicion alone, someone should be imprisoned indefinitely, without trial, for the duration of a "war without end," is to encourage a war on liberty more destructive to our values and our way of life than anything al-Qaida has yet attempted.

Graham and Kagan did agree on the need for a review to determine who should or should not be designated an enemy combatant, and that the process, in Graham's words, "should have an independent judiciary involved in making that decision, beyond the executive branch." But that would still leave many suspects in a legal black hole, imprisoned indefinitely without a chance to defend themselves in a court of law.

It is also a breathtaking assertion of American authority to claim a right to arrest people worldwide and imprison them without trial on the suspicion that they are in some way aiding enemies of the United States. We might wonder what the reaction here might be if Russian officials, for example, were to claim the right to apprehend people in the United States and imprison them on the suspicion they are aiding Chechnyan rebels. Or if Israel were to apprehend and detain indefinitely Americans suspected of contributing financially to Hezbollah or Hamas.

Graham's questions and Kagan's even more troubling answers bring to mind a hearing held in U.S. District Court Washington, D.C. in 2004, when Judge Joyce Hens Green heard arguments from Justice Department lawyers against 60 Guantanamo Bay inmates seeking a review of their status as enemy combatants.

"How long will they be held? As long as Islamic fundamentalists are a threat?" the judge asked.

"I wish I could give you an answer," said Deputy Associate Attorney General Brian Boyle.

"What can the people who are being held be told is the longest they are subject to detention?" the judge wanted to know.

"I'm not sure what can be told to them," Boyle responded.

"What and where is the battlefield the U.S. military is trying to detain the prisoners from returning to?" Green asked. "Africa? London?"

"The conflict with al-Qaida has a global reach," Boyle said. The judge asked again how long the prisoners might be held.

"When will this end?" she asked. "Can hostilities last as long as Muslim fundamentalists vow attacks on the United States?"

"That, Boyle replied, was "a question for the President."

At one point the judge posed the following hypothetical question:

"If a little old lady in Switzerland gave money to a charity for an Afghan orphanage, and the money was passed to al Qaida, could she be held as an enemy combatant?"

"She could," replied Boyle. "Someone's intention is clearly not a factor that would disable detention." It would be up to a military review panel to decide whether to release the lady, Boyle said.

"That's really shocking," Thomas B. Wilner, attorney for 12 Kuwaiti detainees, told reporters after the hearing. "People throughout the world will fear the United States is asserting the power to pick up little



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old ladies and men who made a mistake."

That, of course, was under the Bush administration. But little has changed in that regard since Obama has come to the White House, aside from the fact that Democrats are no longer as vocal in denouncing policies of imprisonment without trials, "extraordinary rendition" of terror suspects, and other policies that aroused their indignation when they were practiced by a Republican regime.

CIA Director Leon Panetta, for example, said last year that the agency would continue to send foreign terrorist suspects to nations other than their homeland for interrogation and would rely on diplomatic assurances that the suspects would not be tortured — the same assurances the Bush administration sought and received, even from nations that routinely practice torture. Concerning the CIA's own interrogation, Panetta said that when approved techniques do not elicit the information sought, he would seek "additional authority."

But while our military and intelligence agencies might find the idea of an all encompassing, worldwide battlefield convenient, other aspects of Elena Kagan's view of the military's role in 21st Century America could be less congenial. As dean of Harvard Law School, she barred military recruiters from campus because of the military's "Don't ask, don't tell policy" concerning homosexuals. Not surprisingly for a potential Obama nominee for the nation's highest court, Kagan is said to be strong in her support of "gay rights" and "abortion rights."

It's should not be surprising that when respect for the right to life and the laws of nature fall into disrepute, other rights — the right to trial, the right to be free from torture and coerced confessions — soon follow.

Newer rights to abortion and perverted sexuality arise to replace them in the "new world order."



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