



Graham, Kagan and the Global "Battlefield"

As a preface to a series of questions about the due process afforded the would-be "Christmas Day bomber" last December 25, Sen. Lindsey Graham, (R- S.C.) asked Supreme Court nominee Elena Kagan where she was that Christmas day. After a moment or two of confusion about what precisely he was asking, the Solicitor General replied: "Like all Jews, I was probably at a Chinese restaurant."



The response drew much laughter, along with praise from Graham, and later other Senators, of the nominee's sense of humor. Still, some watching the spectacle on TV might have been disappointed that Sen. Graham did not ask the obvious follow-up question by inquiring of Ms. Kagan where she spent Chinese New Year's.

Much time was spent on such frivolity and on such praise of the nominee as gushed forth from Democrat Charles Schumer of New York, who looked and sounded less like a United States Senator than a blushing schoolboy with a crush on the teacher.

But there was a good deal of substance in the questions and answers of Graham and Kagan that is worthy of notice and continued attention. Concerning the war on terror and the policy of detaining prisoners designated "enemy combatants," Graham asked if it is not accepted practice to hold such a prisoner for "as long as the holding force deems him to be dangerous."

"Under the traditional law of war, it is permissible to hold an enemy combatant until the end of hostilities," Kagan replied. "And the idea behind that is that the enemy combatant not be enabled to return to the battlefield."

"That's a good summary," Graham agreed. "The problem with this war is, there will *never* be a definable end to hostilities, will there?"

"That is exactly the problem, Senator Graham, and *Hamdi* very briefly discussed this problem. The court in *Hamdi*, suggesting that perhaps if this war was so different from the traditional law of war that there might need to be alternative procedures to put in place. For example, one could imagine a system in which, because of the duration of this war, it was necessary to ensure the enemy combatants continue in dangerousness. That is a question, I think, that has not been answered by the court."

Questions not answered appear to be a specialty among the justices of the Supreme Court, as well as participants in confirmation hearings, so the one cited by Kagan is no surprise. But we might wonder about her imagined system that would require authorities to prove (or "ensure") that one designated an "enemy combatant" would "continue in dangerousness" if released, since there is at present no requirement to ensure that the prisoner is truly a danger when initially imprisoned. The *Hamdi* case



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Kagan cited was about an American citizen arrested by the U.S. military in Afghanistan in the fall of 2001 and accused of fighting for the Taliban against the United States. He was brought to the United States and incarcerated at a military prison in Virginia. A lawyer who intervened on his behalf argued that the government had denied Yaser Hamdi his Fifth Amendment right to due process by holding him indefinitely without access to either an attorney or a trial. A plurality of the Supreme Court justices rejected the government's argument that Hamdi had no right to challenge his status as an enemy combatant.

The exchange also calls to mind the case of Jose Padilla, who was arrested in May of 2002 at Chicago's O'Hare Airport. Padilla, also a U.S. citizen, was accused of conspiring in a plot to detonate a radioactive bomb in one of our major cities. (We were never told which one.) He was held as an enemy combatant for two and a half years without any criminal charge formally lodged against him and without any prospect of a trial. Before his appeal reached the Supreme Court, the government charged him with having attended an al Qaeda training camp, for which he was eventually tried and convicted.

So under a doctrine devised under the Bush administration and continued by Obama, one need not be captured in or near any actual combat to be held as an enemy combatant and denied constitutional rights of due process, whether or not the detainee is an American citizen. And that means to be held "indefinitely," or for the duration of a war that will have no definitive end, as both the Senator and the Supreme Court nominee agreed. Indeed one need not have taken up arms against the United States nor have been in any direct or even intentional contact with al Qaeda or other terrorist organization to qualify. For the executive branch of our government views the whole world as a battlefield.

"The battlefield, you told me during our previous discussions, that the battlefield in this war is the entire world," Graham reminded the nominee. "That is, (if) someone were caught in the Philippines, who was a financier of al Qaeda, and they were captured in the Philippines, they would be subject to enemy combatant determination. Um, because the whole world's the battlefield. Do you still agree with that?"

Kagan replied that when she said that she was acting in her role as Solicitor General, representing the position of the Obama administration. Her role as a judge would be different from that of an advocate, she pointed out.

"When you were an advocate, you had no problem advocating that position?" Graham asked.

"Um, there's certain parts of that I think that we have not addressed in the United States government," Kagan answered. "So the United States government has argued that the battlefield extends beyond Iraq and Afghanistan...."

Graham interrupted at that point to point out that "Attorney General (Eric) Holder said that the battlefield is the hearts, the minds and wherever al Qaeda may reside. Do you believe that is a consistent statement with Obama policy?" Kagan cautiously replied that since she is still the Solicitor General, "I still agree with the Attorney General."

The extension of the battlefield "beyond Iraq and Afghanistan" to "wherever al Qaeda may reside," covers, obviously, a lot of ground. Given the official estimates that the number of al Qaeda still in Afghanistan is no more than 50 to 100, it seems reasonable to assume there may be more al Qaeda presently in the United States than among the strongholds of the Taliban. It is worth recalling also that at his own confirmation hearing early in 2009, then-Attorney General designate Holder, responding to a question from the same Sen. Graham, said that if a "little old lady" in Sweden sent a check to some



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organization designated as a terrorist group by the U.S. government, she would be considered part of the battlefield and, presumably, eligible for arrest by the United States and subject to indefinite detention as an "enemy combatant."

Small world, isn't it? Or about the size of one very large prison.



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