ELENA KAGAN AND LINDSEY GRAHAM ON THE GLOBAL BATTLEFIELD, THE SEQUEL

This exchange is one of the most telling from the entire Kagan hearing today (note; we've edited this exchange for length; here's the full exchange; also, while you're watching, keep an eye on the body language of the bearded man sitting behind Kagan, White House Counsel Bob Bauer).

It's striking, first of all, because Lindsey Graham plays the role of the cross-examiner and his delivery largely overwhelms Kagan. As they go on, Kagan manages to reclaim her ground—on the issue of whether or not the entire world is the battlefield of the war on terror. But even there, the difference in her various answers suggests troubling things about her stance on habeas.

After prompting Kagan to deliver the standard justification for detaining enemy combatants during war and rewarding her with a condescending compliment, Lindsey starts by getting Kagan to agree that the war on terror will never end.

> Lindsey: [Speaking of her rote recitation of the basis for indefinite detention] That's a good summary. The problem with this war is that there will never be a definable end to hostilities, will there?
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> Kagan: [Nodding] That is exactly the problem, Senator.

What a breath-taking exchange! Rather than challenge Lindsey on his slippery definition

(referring to “hostilities” rather than war), rather than challenging him on the premise, Kagan simply nods in agreement. One minority party Senator and the Solicitor General sat in a hearing today and decided between them the state of hostilities under which the Executive Branch has assumed war-like powers to fight terrorism will never end.

The police state will continue forever.

Perhaps sensing the danger, Kagan notes that the Hamdi decision envisions such an indefinite war might require a different approach to detention, perhaps a review to ensure a detainee’s continuing dangerousness. This thrusts Kagan not into the realm of legal review, but the policy disputes between the White House and Lindsey (again, the watchful eye of Bob Bauer here is worth noting).

Our excerpt jumps here (after Lindsey makes his pitch for just such a program).

Lindsey comes back by getting Kagan to personally endorse the stance she embraced in her Solicitor General role, arguing against habeas rights for Bagram detainees.

> Lindsey: You argued against expanding habeas rights to Bagram detainees held in Afghanistan, is that correct?
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> Kagan: I did, Senator Graham.
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> Lindsey: As a matter of fact, you won.
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> Kagan: [pushing back with apparent discomfort] Uh, in the DC Circuit—
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> Lindsey: [interrupting] And you probably won’t be able to hear that case if it comes to the Supreme Court, will you?
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> Kagan: Well, that’s correct, and the reason—
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> Lindsey: [interrupting again] Well, that’s good cause then we can talk openly about it.

> Kagan: [laughing] Uh, if I could just say, the Solicitor General only signs her name to briefs in the Supreme Court, authorizes appeal, but does not sign Appellate briefs, but I determined that I should be the Counsel of Record on that brief because I felt that the United States' interests were so strong in that case based on what the Department of Defense told our office.
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> Lindsey: Right. I want every conservative legal scholar and commentator to know that you did an excellent job in my view of representing the United States in that case.

Lindsey then gets her to reiterate that she signed that brief because of the seriousness of the issues for the government. He interrupts again:

> Lindsey: Well, let me read a quote: "The Federal Courts should not become the vehicle by which the Executive is forced to choose between two intolerable options: submitting to intrusive and harmful discovery, or releasing a dangerous detainee." Do you stand by that statement?
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> Kagan: Senator Graham, can I ask whether that statement comes from that brief?
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> Lindsey: Yes it does.
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> Kagan: No, I uh, that statement is my best understanding of the very significant interests of the United States government in that case, which we tried forcefully to present to the Court and as you said before, the DC Circuit—a very mixed panel of the DC Circuit—upheld our argument.
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> Lindsey: Right. You also said "The Courts of the United States have never entertained habeas lawsuits filed by

> enemy forces detained in war zones. If Courts are ever to take that radical step, they should do so only with explicit blessing by statute." You stand by that?
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> Kagan: Anything that is in that brief I stand by as the appropriate position of the United States government.
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> Lindsey: [while she is speaking] Fair enough.

Throughout this exchange, Lindsey basically had Kagan cornered, not wanting to disavow a document she had signed in unusual circumstances, but seemingly recognizing the risk of adopting these harsh statements as her own. Perhaps because she is on her heels, she doesn't question more of Lindsey's own assumptions (such as that the issue was "expanding" habeas to Bagram detainees rather than determining the bounds of habeas explicitly left open in Boumediene). Not that it matters, given how extreme the sentences from the brief are.

In the bit we've cut, Lindsey goes on to say that conservatives are going to be happy and liberals are going to be unhappy with those statements. He's right.

Later in the exchange, Lindsey tries to do the same with Kagan's statement—to Lindsey—in her Solicitor General hearings regarding the entire world as a battlefield.

> Lindsey: The battlefield, you told me during our previous discussions, that the battlefield in this war is the entire world. That is 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: Well Senator I was speaking there as a legal policy matter representing the position of the Obama Administration. That's obviously a very different role—as the advocate role that I played is also a different role—
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> Lindsey: Let's just stop there. When you were an advocate, you had no problem advocating that position.
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> Kagan: Um, there's certain parts of that I think that we have not addressed in the United States government. So the United States government has argued that the battlefield extends beyond Iraq and Afghanistan—
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> Lindsey: Attorney General 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?
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> Kagan: Senator, when I was here before you asked if I agree with the Attorney General and I said that it would be bad to disagree with the Attorney General, given my position, and I'm still the Solicitor General and I still agree with the Attorney General.

Unlike the sentences Lindsey culled from the Bagram brief, Kagan clearly tries to distance herself from the battlefield statement, effectively claiming these statements were uttered in her role as an advocate for the government's policies (though of course, they were made in her **confirmation** hearings—she wasn't yet Solicitor General). But that then raises the question of why she was so quick to distance herself from the battlefield comment, but not the equally extreme statements on habeas (which, in any case, contradict the battlefield statements; since SCOTUS has already said Gitmo detainees have habeas rights, then detainees on the battlefield—that is, somewhere in the

world—do have habeas rights). Does Kagan believe more strongly in her Bagram habeas stance than in her platitudes about the world as a battlefield?

Later in the hearing (at about 5:50), in one of those set exchanges majority parties use to smooth out nominees' rough edges, Durbin prompts Kagan to say with regard to indefinite detention (this is a near quote) the positions she took as Solicitor General are not necessarily the positions she'll take as a Justice. The positions she has taken are for the US Government as an advocate. Coming from a friendly questioner, Kagan manages to reassert the abstract reason she tried to give under Lindsey's fire for why her thoughts might change as she ascends to the Supreme Court.

But that doesn't, IMO, explain the difference in her approach to answering Lindsey's question, for why she endorsed the sentences from the Bagram brief but caveated the statements about the world as a battlefield.

Now, don't get me wrong. I absolutely think that Lindsey is being a horse's ass here, interrupting Kagan at every turn, and cornering her with her own language. But he's a very effective horse's ass in—at the least—getting her to endorse these views on the record such that any backtracking off them as a Justice could be pitched, with some truth and some spin, as a flip-flop. I'm actually more hopeful that Kagan disagrees with the Obama Administration on some of these issues than I was before. But if we're supposed to be thrilled about Kagan because she'll persuade Kennedy or even the more conservative Justices to her views … I just don't see that.