

SEARCH AND REPLACE: SEXUALLY DANGEROUS PERSON, TERRORIST

Just as a little thought experiment, let's look how some passages from SCOTUS nominee Elena Kagan's successful argument in *U.S. v. Comstock*—in which SCOTUS just voted 7-2 to affirm the federal government's authority to indefinitely detain sex offenders who are mentally ill—appear when we replace the term “sexually dangerous person” with “terrorist.” (See Adam B's post on the decision for a good overview of the decision.)

KAGAN: The Federal Government has mentally ill, ~~sexually dangerous persons~~ [terrorists] in its custody. It knows that those persons, if released, will commit serious ~~sexual~~ [terrorist] offenses;

[snip]

JUSTICE GINSBURG: But the likelihood is that the person will stay in Federal custody?

GENERAL KAGAN: I think that that's fair, that the likelihood is that the person will stay in Federal custody until such time as a court finds that the reasons for that custody have lapsed.

[snip]

CHIEF JUSTICE ROBERTS: Right. I understand your argument to be that this power is necessary and proper, given the fact that the person is in Federal custody for some other reason, ~~criminal conviction~~ [enemy combatant designation].

GENERAL KAGAN: That has been the government's case throughout this litigation, that it is always depended

on the fact of Federal custody, on the fact that this person has entered the ~~criminal justice system~~ [been designated an enemy combatant],

[snip]

CHIEF JUSTICE ROBERTS: Well, why doesn't the Federal Government's authority to have custody because of the ~~criminal justice system~~ [enemy combatant designation] end ~~when the criminal justice system is exhausted~~ if he can't be charged? ~~In other words, when the sentence is done?~~

GENERAL KAGAN: Because the Federal Government has a responsibility to ensure that release of the people it has in its custody is done responsibly, and is done in such a way –

[snip]

GENERAL KAGAN: I think that the power to run a responsible ~~criminal justice~~ [detainee] system extends to the way in which the Federal Government releases these prisoners.

[snip]

JUSTICE SOTOMAYOR: Under your theory –under the theory that you are proposing, then, any dangerous person, whether it's because of mental illness or any other reason, could be held indefinitely under a civil commitment statute. Because what you're saying is that the Federal Government, merely because of their – their time in control of the individual, has an unlimited constitutional power to then civilly commit this dangerous person.

GENERAL KAGAN: I think what would prevent that, Justice Sotomayor, is the Due Process Clause. It is obviously the case that there are other constraints on

governmental action than Article I.

JUSTICE SOTOMAYOR: Well, what constrains the government under the Due Process Clause from invoking a dangerousness merely because someone has a long history.

[snip]

SCALIA: General Kagan, you are relying on the Necessary and Proper Clause, right? You say: But necessary and proper doesn't mean it is necessary and proper for the good of society. It means it is necessary and proper for the execution of another power that the Federal Government is given by the Constitution.

Now why is this necessary for the execution of any Federal power? The Federal ~~criminal~~ [enemy combatant] proceeding has terminated. The individual is released. You could say it's necessary for the good of society, but that's not what the Federal Government is charged with. Why is it necessary to any function that the Federal Government is performing? It has completed its performance of the function of incarcerating this individual until he's served his punishment.

GENERAL KAGAN: The Court has always said, Justice Scalia that the Necessary and Proper Clause, the question is is it necessary and proper to the beneficial exercise of Federal powers. And so this is, that it is necessary and proper to the beneficial or, what I said before, the responsible exercise of the Federal power to operate a ~~criminal-justice~~ [terrorist detainee] system, which includes the responsibility to ensure that those people who have been in custody in that Federal – in that ~~criminal-justice~~ [detainee] system, are

not released irresponsibly.

I've long said that the most likely candidates for indefinite detention as alleged terrorists are those—like Abu Zubaydah and Mohammed al-Qahtani—whose torture has made them mentally unfit for trial. And in fact, one of the five respondents here was never convicted; like I presume Abu Zubaydah and al-Qahtani might well be, he was deemed mentally unfit to stand trial. So it would not take much to see the argument affirmed today used to justify indefinite detention of Gitmo detainees. Heck, Obama's probably already sent the draft legislation to Lindsey Graham for his approval...

Of course, by the time such indefinite detention were reviewed by SCOTUS, Elena Kagan would be one of the Justices asking the questions.