

EVEN THE CRUSADES WEREN'T "FOREVER"

I'm going to assume John Cole was asking sincerely when he posted this request.

Can someone explain this reaction from Emptywheel:

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?

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.

Maybe I am misinterpreting these remarks, and you have to watch the video, but didn't Kagan just say it is a bad thing that we are currently engaged in never-ending hostilities? Don't we agree that is a bad thing? Isn't Kagan right? What should she have said?

The question of whether the GWOT will have a "definable end" that justifies indefinite detention means two things in practical terms. First, how long will a state of war exist that justifies our holding of 48 Gitmo detainees who can't otherwise be prosecuted. And second, how long will a state of war exist that justifies holding people at Bagram, including bringing them to Afghanistan after being captured in other locations, for indefinite detention.

48 Gitmo detainees

So how long will we have a legal claim—both within US and international law—to justify holding the 48 detainees at Gitmo that we currently can't charge but deem too dangerous to release?

As I pointed out in this post, the Gitmo Review Task Force Report provided the following reasons why we can't charge these men:

- At least some of these detainees can't be charged because evidence against them is tainted (this probably includes people like Mohammed al-Qahtani and Abu Zubaydah).
- For others, we only have evidence they were members

of al-Qaeda, and not that they engaged in any actual terrorism against the United States, even including actions taken after October 2001 which might be legally considered self-defense but which in some cases (such as with Omar Khadr) we've chosen to label as terrorism. If these people had engaged in the same activities for which we've got evidence after October 2001—and especially after December 2004—we might be able to charge them, but they haven't.

- For a number of these men, we had evidence that we could have used to charge them with material support for terrorism but held them so long without charges that the statute of limitations has expired.
- For some of these men, we purportedly could have charged them with material support, but did not because of “sentencing considerations,” which I take to mean we believed that the 15 year maximum sentence was too short, and so have not charged them (note, the Obama

administration has not gone to Congress and asked for a change to this sentence).

Given that we can't try these men, we are instead justifying holding them under the law of war. As Kagan explained,

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

And, as she made explicit elsewhere in this exchange and repeatedly during her hearings, our ability to invoke the law of war depends on our ability to invoke the AUMF passed after 9/11, which states,

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. [my emphasis]

We can only legally use this justification against people who either by themselves aided 9/11, or were members of an organization or nation that aided 9/11.

Now, we're already pushing this, as the government's lousy 14-36 record on habeas cases makes plain. For example, the Gitmo Task Force claimed the ability to hold people who simply have a "history of associations with extremist activity" without requiring that they have actually either membership in al Qaeda or direct

participation in 9/11.

But to envision that the hostilities authorized by the AUMF will not end, you have to envision both that the al Qaeda and affiliates that existed at the time of 9/11 will exist indefinitely, and/or that we will remain at war against the Taliban forever. In some cases, this is obviously not going to be the case. Hamid Karzai is already talking about bringing Gulbuddin Hekmatyar into government. If he does so, will we still have justification to hold the members of Hezb-e-Islami Gulbuddin who are among the 48? Discussions about a deal with the Taliban are less optimistic, but if we really do withdraw in 2011, will we still have the basis to hold the Taliban members who are among the 48? If we kill or capture Osama bin Laden and Ayman al-Zawahiri, will we still claim holding someone who served as OBL's guard in 2001 is too dangerous to release?

But even the al Qaeda and affiliates described in the AUMF seem to have a definite endpoint. After OBL and Zawahiri are gone and we've managed to kill our 217th "al Qaeda Number 3" will we still be able to say that the al Qaeda that hit us on 9/11 still exists? At some point, judges are going to consider the al Qaeda copycat groups that pop up in various locales to be too tenuously connected to the al Qaeda of 9/11 to be meaningfully the same group anymore.

Bagram detainees

Which brings us to the Bagram detainees, who are significant for two reasons: because the government is considering what happens to these detainees when we leave Afghanistan and because in the Bagram suit discussed here, the government is testing the limits of what constitutes a "battlefield" on which we can capture people and hold them and where we can do so.

As I've already noted, the Administration is already contemplating what it will do its Bagram prison when it withdraws (assuming that ever

happens). If and when the US ever does withdraw from Afghanistan (and we'll have to when we go broke if not before), then it will at least lose the excuse the DC Circuit has endorsed thus far, that Bagram is on an active battlefield and therefore the US can't give detainees there a meaningful legal review. And once they do get a meaningful legal review, you're likely going to be back in the position our legal basis for holding most of the people will no longer be valid (particularly since we moved the more senior people al Qaeda to Gitmo, so more of the Afghan detainees have Taliban connections).

Or you're going to be in a position where, in the interim and possibly already, the US is using Bagram the way we used to use Gitmo—as our storehouse for everyone we've captured in the larger war on terror. Even the DC Circuit envisions a problem if someone proves the US has captured him and brought him to Bagram precisely because it was in an active theater of war and therefore would not be granted habeas rights.

We do not ignore the arguments of the detainees that the United States chose the place of detention and might be able “to evade judicial review of Executive detention decisions by transferring detainees into active conflict zones, thereby granting the Executive the power to switch the Constitution on or off at will.” Brief of Appellees at 34 (quotation marks and citation omitted). However, that is not what happened here. Indeed, without dismissing the legitimacy or sincerity of appellees' concerns, we doubt that this fact goes to either the second or third of the Supreme Court's enumerated factors. We need make no determination on the importance of this possibility, given that it remains only a possibility; its resolution can await a case in which the claim is a reality rather than a speculation.

If we're holding people at Bagram who are not tied either to the Taliban or to the al Qaeda and affiliates that existed in 2001 and supported the attack, then they are going to become a legal problem either when they manage to sue for habeas or when we leave Afghanistan.

And to fight to do so would also amount to a fight to hold people whom we choose not to charge with material support for terrorism (for which SCOTUS, partly through the work of Kagan, has recently endorsed a troublingly broad definition). The biggest reasons to do that, it seems to me, are that we either don't have evidence that the person in question was actually supporting terrorism—in which case we may be holding people by mistake—or we want to hold them longer than Congress has said material support for terrorism merits doing.

But both of these—bringing people to Bagram or some other location to hold indefinitely, or holding people either because we can't or don't want to charge them with material support for terrorism—entail a certain view about counterterrorism.

The endless war on terror is—right now—an illegal war

Which brings me to the reason why I have such problems with this and why I find this exchange so breathtaking. Our efforts to protect the country from terrorism—even if you limit it to Islamic extremist terror—may well be a nebulous and long-lived (but hopefully not endless) effort. But our legally-authorized war against the Taliban and members of the al Qaeda and affiliates who existed and supported 9/11 is not. Under international law and—to a lesser extent—US law, the President (Democratic or Republican) can only use war powers to fight these targets so long as they fall within that description. To envision an endless war against terror—or even a war without a “definable end to hostilities”—is to envision either the use of powers limited to specific targets to fight a much more amorphous target or the passage (which

I imagine our belligerent Congress would do with glee) of another AUMF.

Yet already, the Obama Administration is—according to John Bellinger—applying the 9/11 AUMF to entities not included in the statute.

Former Bush officials, still smarting from accusations that their administration overextended the president's authority to conduct lethal activities around the world at will, have asked similar questions. "While they seem to be expanding their operations both in terms of extraterritoriality and aggressiveness, they are contracting the legal authority upon which those expanding actions are based," said John B. Bellinger III, a senior legal adviser in both of Bush's administrations.

The Obama administration has rejected the constitutional executive authority claimed by Bush and has based its lethal operations on the authority Congress gave the president in 2001 to use "all necessary and appropriate force against those nations, organizations, or persons" he determines "planned, authorized, committed, or aided" the Sept. 11 attacks.

Many of those currently being targeted, Bellinger said, "particularly in places outside Afghanistan," had nothing to do with the 2001 attacks.

Once you've accepted that the basis for these expanded powers rests in the 2001 AUMF rather than Article II (and to her credit, Kagan explicitly endorsed the AUMF basis for those powers repeatedly in her hearings), then you can't willy-nilly apply it to Islamic terrorist organizations that had no tie to 9/11. If you could, then you'd not only be violating international and (to a lesser degree) US law,

but you'd also be on a slippery slope in which you had embraced the view that the President had those powers against terrorists writ large. One day the US would be holding some Hizbullah terrorist as a favor to Israel, and the next it'd be collecting FARC members threatening oil companies. Further, once you asserted the President could indefinitely detain Islamic extremists who had no tie to 9/11, you'd quickly get where Lindsey wants to go, to the indefinite detention of US persons. And once you're at indefinite detention of US persons, some wingnut is going to argue that tree-hugging terrorists or anarchists or Quakers can be detained too.

Mind you, that's farther than I believe Lindsey and—especially—Kagan want to go. But that's why we have a legal system, so we don't set off on a slippery slope that erodes the protections afforded by the law. The urge to hold people under the law of war, whether or not it applies, is an urge (and this is definitely where Lindsey is) to establish special treatment for terrorists outside the protections of our legal system. And then the only thing preventing a police state from breaking out is trust in the good faith of the President who secretly defines whom he believes is a terrorist.

What was Kagan thinking?

Which gets me to why I was so shocked by this and what I think Kagan could have said. I can think of three possible interpretations of Kagan's quick agreement that there will never be an end to these hostilities:

- She just agreed to shut Lindsey up.
- She agreed that the 2001 AUMF can apply generally to the war on terror.
- She agrees with Lindsey's view that all Islamic extremist terrorism should

be treated under the law of war.

The first is a possibility—I'm certainly in favor of strategies to shut Lindsey up. That wouldn't endear me to Kagan as a nominee, mind you, but it's the most charitable interpretation of this.

But Kagan's response—the elaboration that John finds so comforting—suggests she does buy the underlying assumption that the AUMF will apply even after our war against the initial targets in that war is over. Now, her apparent unwillingness to endorse the “world is a battlefield” viewpoint as her own belief may reflect some doubt on this point. But it seems to me the correct legal response to Lindsey's comment was that first the AUMF (and therefore our right to hold people indefinitely) only lasts so long as we're fighting those targets defined in the AUMF. “Hostilities” against Islamic terrorists alone do not authorize such powers. Hostilities are not a legal war. So while we have to think about the things Kagan talked about—some kind of interim review until the time as we kill OBL, for example, we also have to think about what happens to these people—some of them admittedly dangerous—after such time as that legal war ends. And we probably need to talk about what the legal status of our efforts to protect the country against terrorist attacks will be then, too.

I don't, FWIW, believe that Kagan believes uncritically in treating all Islamic extremist terrorism under the law of war. Her caution about people captured in the US suggests she considers it a live legal question (though none of us know how she'll decide if and when such a case gets to SCOTUS). But that's why I would have preferred a little more caution in this exchange, in the larger question of precisely what the AUMF says. SCOTUS has stuck closely to those limits in its rulings on counter-terrorism, and though Lindsey may not have liked it if Kagan had responded by pointing that out,

it would have been, IMO, a much preferable response than her easy agreement.