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Elena Kagan: Justice Stevens Redux?

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As the Senate considers President Obama's appointment of Solicitor General Elena Kagan to the Supreme Court, it should reflect on the Court's increasing role in shaping national security. Specifically, Senators should consider President Obama's authority as commander-in-chief to use military commissions, Predator drone strikes, prolonged detention, and other robust yet necessary wartime counterterrorism policies he has continued from the Bush Administration.

Assuming that Senators want to reserve to the office of the President those powers specifically enumerated in the Constitution, preserve those specific policy tools to assist the United States' war against al-Qaeda, and deny foreign terrorists held in Afghanistan access to U.S. federal courts, they should question Kagan to ascertain whether her jurisprudence—at least as it applies to terrorism cases—will mirror Justice John Paul Stevens's brand of judicial activism. Given that President Obama has stated that he plans to replace Justice Stevens with a person of "similar qualities," such an inquiry is not only reasonable but absolutely essential.

No Deference to the Commander-in-Chief. Unlike all other justices currently on the Court, Justice Stevens served on active duty as an officer in the U.S. Navy during World War II. Given his honorable service to the country during war, it seems logical to expect that Stevens's work as a Supreme Court Justice would manifest itself by, among other things, great deference to the commander-in-chief during wartime.

It is also tempting to assume that Stevens's wartime decisions would tend to put national security on equal footing with, or superior to, the rights of America's enemies. Yet two of Stevens's key wartime opinions—*Rasul v. Bush* and *Hamdan v. Rumsfeld*—evince no such deference. To some, his decisions not only fail to strike a balance between national security and liberty but lean toward the rights of the enemy at the expense of U.S. national security.

In *Rasul*, Stevens's opinion flung open the doors of U.S. courts to foreign terrorists at war with the U.S. and held at Guantanamo Bay for acts committed in foreign countries. This was a radical decision in which Stevens rejected hundreds of years of practice, along with a perfectly on-point case from 1950. That case, *Johnson v. Eisentrager*, involved 21 Germans who were captured in China at the end of World War II. These Germans were convicted of war crimes in China by a military tribunal and imprisoned in Germany. Their jailors in Germany, however, were American and, as a result, these German prisoners sought to challenge their convictions in American courts just like any common criminal in the U.S. In an opinion written by Justice Jackson, who had previously acted as the chief prosecutor in the Nuremberg trials, the Supreme Court rejected their suit stating:

> We are cited to no instance where a court, in this or any other country where the writ is

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> known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.

To hold otherwise, said the Court, would be to "plac[e] the litigation weapon in unrestrained enemy hands"—that is, allowing them to wage war through America's legal process. It would also put the enemy "in a more protected position than our own soldiers," who are subject only to military discipline. Stevens effectively reversed *Eisentrager*, turning his back on the Constitution, laws passed by Congress, and common sense. Overseas terrorists, held Stevens, could demand U.S. courts for their release. Maybe even foreign soldiers held in a conventional war, too—nothing in *Rasul* rules out such a possibility.

Four years later, Justice Stevens joined the 5–4 majority in another wartime detention decision, *Boumediene v. Bush*, which found a constitutionally guaranteed right of *habeas corpus* for terrorists held outside of the U.S. but under the exclusive custody and control of the U.S. The decision, authored by Justice Kennedy, ostensibly dealt with detainees at Guantanamo but was written in such a broad manner with respect to geography that some are now using the holding to argue that alien enemy terrorists captured and held abroad in a U.S. detention facility in Afghanistan have a U.S. constitutional right to *habeas*.

Stevens's other foreign terrorist majority opinion was in the case of *Hamdan v. Rumsfeld*. To even get to the case, Stevens had to sweep aside a 2005 congressional act barring the Supreme Court from even hearing terrorists' challenges to their detention. He proceeded to strike down the system of military commissions for terrorists set up in the wake of 9/11, claiming that the President needed express authorization from Congress to establish military commissions. Never in the history of the U.S. has the commander-in-chief needed to ask permission from Congress to establish war crimes trials. Sure, the commissions were established out of "military necessity," but why should the Court not have a chance to say what the military really needs to fight terrorists?

Stevens's *Hamdan* opinion dismissed the strong authority that Congress gave the President to fight al-Qaeda, as well as the President's constitutional power as commander-in-chief of U.S. forces. Nothing in the Constitution even hints that the Supreme Court has that kind of power, probably because the Court has no competence in this area and such authority would put the country at risk.

Where Does Kagan Stand? President Obama has stated a desire to replace John Paul Stevens with a person of "similar qualities," who has a "keen understanding of how the law affects the daily lives of the American people." Yet Senators should be on guard against any nominee whose wartime jurisprudence is "similar" to that displayed by Justice Stevens in *Hamdan*, *Boumediene*, or *Rasul*.

Therefore, in considering Kagan's nomination to the Supreme Court, the Senate would be wise to ask her the kinds of questions necessary to determine two critical questions: whether she has a keen understanding of the deference courts should give the commander-in-chief during wartime, and whether she will uphold a proper, limited role of the Court—one that will put the security of the country at least on par with the rights of the enemy.

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