

Graham Amendment Invokes Constitutional Crisis

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--James Madison, Federalist Paper No. 47

Political Views,

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By Marjorie Cohn

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In blatant defiance of the Constitution's guarantees of Habeas Corpus and separation of powers, the Senate on Thursday approved the Graham Amendment to the Department of Defense Authorization Act by a vote of 49 to 42. Five Democrats joined all but 4 Republican Senators in giving the President unfettered power to hold prisoners at Guantánamo Bay, Cuba, for the rest of their lives, with no criminal charges, and no right to challenge their confinement by Habeas Corpus.

Last year, the Supreme Court held in *Rasul v. Bush* that the Guantánamo detainees are entitled to file habeas petitions in US courts to contest their detentions. The high court determined that non-US citizens held at Guantánamo, "no less than American citizens, are entitled to invoke the federal courts' authority" to hear their petitions under 28 USC § 2241, the US Habeas Corpus statute.

The Supreme Court stated firmly in *Rasul*, "Consistent with the historic purpose of the writ, this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace."

The Graham Amendment is crafted to render *Rasul* a nullity by cutting off the rights of Guantánamo prisoners to have their habeas petitions considered by the federal courts. The Amendment limits federal court review to the narrow issue of the validity of decisions rendered by Combatant Status Review Tribunals. These kangaroo courts were set up to determine whether the Guantánamo prisoners are "enemy combatants." They are not independent judicial tribunals, but rather administrative proceedings stacked with military officials who can use secret or even fabricated evidence. The prisoner is not entitled to be represented by an attorney.

Only a handful of prisoners at Guantánamo have been charged with crimes. Their cases will be heard in military commissions that George W. Bush established to impose long sentences and even execute detainees with virtually no judicial oversight. Without habeas access to federal courts, Bush and Donald Rumsfeld will ostensibly serve as prosecutor, judge and executioner in the military commissions. This flies in the face of the constitutional doctrine of separation of powers. Three days before the Graham Amendment was passed, the Supreme Court announced it would review the legality of those military commissions in *Hamdan v. Rumsfeld*.

Even though the majority of prisoners detained at Guantánamo admittedly pose no threat to the United States, they continue to languish in virtual isolation under torturous conditions. Two hundred of them, who have decided death is preferable to life, are trying to starve themselves in a hunger strike.

Last month, the Senate passed the McCain Amendment, which makes it unlawful for any "individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location [to be] subject to cruel, inhuman, or degrading treatment or punishment." Bush and Cheney have fought this measure tooth-and-nail because it would interfere with their ability to torture prisoners with impunity. The Graham Amendment will undermine the ability of tortured prisoners to enforce the McCain Amendment in federal courts.

By foreclosing judicial review of sentences imposed by the military commissions, the Graham Amendment also violates Common Article 3 of the Geneva Conventions, a ratified treaty and therefore part of US law under the Supremacy Clause of the Constitution. That article prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as

indispensable by civilized peoples." Unlawful combatants are protected by Common Article 3.

Violations of Common Article 3 constitute war crimes under the federal War Crimes Act. Violators can receive life in prison, or even the death penalty if the victim dies.

Sen. Lindsey Graham's pernicious Amendment was proposed and passed with no debate about its far-ranging implications and without any hearings. The senators who voted for it bought into Bush's "war on terror" mantra, ignoring the basic constitutional principles that inform our system of government.

These senators will have the opportunity to rectify this grave threat to the Constitution. As early as today, Senator Jeff Bingaman (D-NM) will attempt to strike from the Amendment the language barring Guantánamo prisoners from habeas relief. Senator John McCain may support a compromise. He said, "Based on ongoing discussions, it is entirely possible that the current version of the amendment will be modified to address concerns about lawful treatment and the scope of independent appeals."

More than 100 legal scholars, including this writer, have signed a letter urging senators to adopt an amendment of the kind proposed by Senator Bingaman. The Center for Constitutional Rights concurs: "Habeas Corpus is a fundamental right that our entire legal tradition is founded on. Unfettered Executive power jeopardizes our free and democratic society. Creating 'no law zones' of unreviewable Executive power at Guantánamo undermines the moral standing of the United State in the eyes of the world and endangers the lives of US soldiers abroad."

The Graham Amendment has also drawn opposition from Judge John Gibbons, who argued *Rasul v. Bush* before the Supreme Court; John Hutson, Dean of Franklin Pierce Law Center and former Judge Advocate General of the US Navy; and the National Institute for Military Justice. NIMJ President Eugene R. Fidell wrote, "We disable ourselves from objecting to flagrant lawlessness elsewhere when we shut the doors to our courts, which are the jewel in the crown of our democracy."

Habeas Corpus, known as The Great Writ, is the final bastion of liberty for those unjustly held. The last time this country suspended Habeas Corpus was for the internment of tens of thousands of Japanese-Americans during World War II. That travesty is now universally recognized as a shameful chapter in our nation's history. To suspend The Great Writ once again, while allegations of systematic torture continue to emerge from US prisons, will threaten our Constitution and render "quaint" our democracy.

The Democrats who voted in favor of the Graham Amendment were Joseph Lieberman (Conn.), Kent Conrad (N.D.), Ben Nelson (Neb), Mary L. Landrieu (La), and Ron Wyden (Or).

Marjorie Cohn, a contributing editor to MWC News Magazine & t r u t h o u t, is a professor at Thomas Jefferson School of Law, president-elect of the National Lawyers Guild, and the US representative to the executive committee of the American Association of Jurists.

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