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## **Obstacle Course;**

Points of View; Bush and Congress unjustly add barriers to keep detainees away from courts; CHOKING OFF THE WRIT; AVOIDING CRISIS; GONE IN CONFERENCE; IGNORING CONGRESS

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It was disturbing enough when Congress restricted the habeas rights of Guantánamo Bay detainees in December. But now President George W. Bush is trying to apply the legislation retroactively -- against the apparent intent of Congress.

The president's actions may frustrate a Congress that has so far accommodated the administration's national security tactics. At the same time these actions may also cut off meaningful judicial review for Guantánamo inmates.

The end results† The constitutional balance of power tips toward the executive branch, at the expense of the other branches, and possibly innocent people are denied meaningful due process.

### **CHOKING OFF THE WRIT**

On Nov. 8 last year, Sen. Lindsey Graham (R-S.C.) circulated a proposed law to end all pending and future habeas proceedings and "any other action" filed by any alien designated as an enemy combatant. Had it passed, Graham's amendment would have precipitated a first-order constitutional dilemma: Can Congress choke off entirely the Great Writ for one disfavored group†

Forty-odd days later, President Bush signed a much-modified version of the amendment. While purporting to avoid the original's constitutional flaw, this new law pushes federal courts into different constitutional quicksand: Can Congress reduce federal court review of an executive detention decision so much that an Article III court becomes a rubber stamp for the executive†

It is no surprise that Congress can be inattentive to the constitutional briars in the legislative path. The trajectory of Graham's amendment, now called the Graham-Levin amendment after its final sponsors, illustrates how legislative back and forth can end up leaving intact problems that Congress hopes to solve and even create new ones to boot.

When first introducing his amendment, Graham focused on the specter of allegedly frivolous, burdensome suits filed by detainees at the Guantánamo Bay Naval Base in Cuba. On the Senate floor and in a Dec. 6 Washington Post op-ed, Graham argued that the military should not be ensnared in a blizzard of suits about "mail delivery" and "Internet access." According to Graham, the Supreme Court's 2004 decision in *Rasul v. Bush*-- that federal habeas jurisdiction existed over the Guantánamo cases -- was a mistake.

Missing from his presentations, however, was an accurate assessment of the detainees' litigation, which overwhelmingly focuses on the elementary question of whether each prisoner is lawfully detained based on solid facts.

Nor did Graham mention cases such as those of Abu Bakker Qassim and A'del Abdu Al-Hakim. Ethnic Uighurs from northwestern China, both men had been determined not to be enemy combatants by the military. Yet neither has been released from Guantánamo. It is hard to see how an innocent man's claim to be free ranks as frivolous. And Graham passed over repeated

alarms by FBI agents about coercive interrogations that left detainees physical and mental wrecks.

On Nov. 10 a version of Graham's amendment narrowly passed the Senate, 49-42. Limited to Guantánamo alone, this version nonetheless would have cut short pending cases, including one accepted by the U.S. Supreme Court for review, *Hamdan v. Rumsfeld*. It would have replaced ongoing cases with a statutorily limited grant of judicial review: Courts could have looked to see whether the military followed its own skeletal procedures, and nothing else.

## **AVOIDING CRISIS**

In the days after the vote, Sen. Carl Levin (D-Mich.) stepped in and, through intense weekend negotiations, secured critical changes to the amendment. In perhaps the most important change, Levin altered the effective date of the amendment to exclude already-filed habeas petitions.

This has the important consequence of preserving existing judicial review over the *Hamdan* case, a facial challenge to the constitutionality of military commissions at Guantánamo. It would also leave untouched the challenges filed by hundreds of detainees to the legality of their detentions.

By contrast, the amendment created a new, limited channel of review for post-enactment cases, in which only a tightly constrained set of issues could be raised. This new version passed the Senate on Nov. 15 and moved onto conference.

Sen. Levin's changes would have avoided at least one constitutional crisis. Fifty years ago, professor Henry Hart asked himself in the *Harvard Law Review* what would happen if Congress tried to end all federal court jurisdiction over a habeas corpus petition. The answer remained uncertain, Hart concluded, because "Congress so far has never tried to destroy the Constitution."

The Nov. 15 version also barred the military from making detention decisions based on evidence extracted by "undue coercion." Perhaps Levin had in mind the evidence obtained from senior al Qaeda operative Ibn al-Sheikh al-Libi, who had been "rendered" to Egypt for coercive interrogation. Under threat of torture, al-Libi had told his interrogators not what was true but what they wanted to hear: that al Qaeda had cooperated with Saddam Hussein's regime. This false evidence, as Levin discovered, played a pivotal role in the debate about war in Iraq. And James Risen's new book, *State of War*, suggests that much of the intelligence gained by torturing the alleged al Qaeda operations chief, Khalid Sheikh Mohammed, has also proved false.

But the Nov. 15 version nonetheless contained the seeds of another problem: What would happen if Congress, in post-enactment cases, were to constrain review so courts would be, for all practical purposes, rubber stamps for decisions by the executive? At least courts could be assured by Levin's no-coercion rule that they were not hearing what the rack and screw had extracted.

## **GONE IN CONFERENCE**

Many of the useful changes wrought by Levin vanished in conference, however. Troublingly, these revisions not only undid Levin's compromises but also aimed to undermine another provision the executive has long been resisting -- namely, the anti-abuse amendment introduced by Sen. John McCain (R-Ariz.), which would have outlawed cruel, inhuman, and degrading treatment by U.S. agents anywhere in the world. After the conference committee reworked the Graham-Levin amendment, the provision was attached to a defense appropriations bill, passed by both houses, and signed by the president at the end of December.

The conference committee restored statutory language cutting off "any other action" in addition to habeas proceedings. In practical effect this bars suits for injunctive relief and damages based on

violations of the McCain amendment. Now, a lawyer may know that her client at Guantánamo is being water-boarded but have no legal remedy to stop ongoing abuse.

The conference committee also removed Levin's "undue coercion" rule and allowed evidence obtained by coercion to make detention decisions if it is not "practicable" to do otherwise. This places no effective limit on the use of coerced evidence. To the contrary, it creates an incentive to violate the McCain amendment. It also encourages the executive to continue sending suspects to less law-abiding allies, such as Syria and Egypt, for interrogation by torture.

Indeed, in that sliver of statutory language, Congress breached an ethical watershed: For the first time in the republic's history, a law passed by Congress apparently authorizes the use of torture to make decisions about human liberty.

In addition, the committee curtailed even more narrowly the grant of judicial review for new cases. Seemingly, a federal court will have no ability to probe evidence underlying the detention decision that it is reviewing.

But at least one important provision of the earlier bill was preserved. Significantly, Levin's changes to the effective-date provision, which ensured that pending cases would not be cut short, went untouched by the conference.

### **IGNORING CONGRESS**

But the executive branch has not respected Congress' decision to keep Levin's language. In his signing statement, President Bush directly contradicted the Senate's clear intent by saying that the jurisdictional bar would apply to "past, present, and future actions."

Since then, the Justice Department has moved to dismiss all the pending Guantánamo habeas petitions. In so doing, the government would create a fresh round of litigation as the cases return for military hearings and then start over in the federal courts. This would mean more delay before the Supreme Court could settle the matter. Detainee lawyers are poised to fight hard against the president's efforts to thwart the congressional will.

The coming months will see fierce argument over the knotty problems of habeas retroactivity and of whether Congress can cut off pending cases in the lower federal courts and the Supreme Court. Rather than expediting fair disposition of the Guantánamo detainees' petitions, as Sen. Graham had claimed, his initiative will have a perverse multiplier effect on litigation, adding delay and cost while innocent detainees languish.

Even after the federal courts have sorted through the tangled matters of retroactivity and separation of powers, another critical constitutional problem arises from the restriction of jurisdiction only to limited review of military detention decisions. This issue will arise quickly if the federal courts decide that all pending cases are cut off and detainees can get only the limited review specifically described in the Graham-Levin amendment.

This new jurisdictional grant seems so limited that a court will not be able to probe the factual bases of a detention decision as it signs off on that determination. Certainly, this is not the first time Congress has drastically limited judicial review of a detention decision. But it has always done so after a person has received an adversarial hearing before a neutral decision-maker that meets due process norms.

For the first time, Congress may have placed the federal courts in the untenable position of approving detention decisions made without adequate due process to ensure accuracy.

Worse, Congress seems to have cut off the courts' ability to probe whether the evidentiary basis of a detention decision is coerced evidence. This limited review risks making courts complicit in systematic deprivations of human liberty based on evidence gathered by torture.

So it's not just that the Graham-Levin amendment, as enacted, will not achieve the congressional goal of limiting the military's exposure to litigation because retroactivity and separation-of-powers litigation will drag on. It may also force the courts into deciding thorny questions about the meaning of Article III's "judicial power" and the constitutional guarantee of due process.

Indeed, as these constitutional problems crescendo, Congress may well see wisdom in undoing much of the harm to the Constitution that this amendment risks.

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