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Ban Torture Or Protect Torturers?

Jeremy Brecher & Brendan Smith (op-ed)

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Thousands of well-meaning people are mobilizing to pressure Congress to pass legislation banning torture. But the Bush Administration is maneuvering to turn it into legislation that would instead protect the torturers by eliminating a basic legal right. To stop them, torture opponents will need to be not just as innocent as doves but also as cunning as foxes.

When Congress returns to Washington on Monday, a campaign will unfold in support of Senator John McCain's legislation banning torture, which is attached to a defense bill. But McCain's amendment is accompanied by one from Senator Lindsey Graham that bans the appeals that prisoners at Guantánamo have used to take their cases to civilian courts.

In the 2004 case *Rasul v. Bush*, brought on behalf of Guantánamo captives, the Supreme Court established the right of foreigners held by the United States to habeas corpus, the 800-year-old legal procedure grounded in the Magna Carta and enshrined in the U.S. Constitution, which requires government officials to explain to a court why they are holding someone in captivity. Graham's amendment strips courts of the power to hear such cases.

Graham sprang his amendment on the Senate in the closing days of the session with no hearings and little debate. A firestorm of criticism forced Graham to accept a compromise--negotiated with Democratic Senator Carl Levin--that allows captives limited appeals to civilian courts. (Newsweek has reported that Attorney General Alberto Gonzales and White House Counsel Harriet Miers were also in on the negotiations.) But the Graham compromise still strips federal courts of jurisdiction to hear applications for habeas corpus brought by Guantánamo prisoners.

The Senate passed the compromise amendment 84 to 14. Republican Senator Arlen Specter, chair of the Senate Judiciary Committee, described it as "a sophisticated, blatant attempt at court-stripping."

Bill Goodman, legal director for the Center for Constitutional Rights, which brought the first habeas corpus cases for Guantánamo captives, says the Graham amendment "will formalize the lawless policies of the Bush Administration that allow the Department of Defense to hold prisoners indefinitely without any requirement that it show any reason for doing so." That has and will continue to result in "torture of U.S. prisoners."

The Graham amendment bans habeas corpus appeals against conditions of confinement. The consequence, according to Michael Dorf, the Sovern Professor of Law at Columbia University, is that "a prisoner cannot get into federal court by claiming (or presenting evidence) that he is being subject to torture or otherwise degrading treatment."

Deviously, the Graham amendment has been packaged with McCain's anti-torture amendment. But the package will make things worse, not better, for Guantánamo captives unless Graham's amendment banning habeas corpus is removed. As Bill Goodman points out, while the pair of amendments "profess to ban torture," without

the right to judicial oversight, they are "defanged." They are "a right without a remedy and, as such, meaningless."

The Bush Administration is now negotiating with Graham and others to make the legislation even more restrictive. A Justice Department spokesperson says, "We definitely agree with the principle behind the current bill, though there are still some concerns that the language may need to be improved." White House spokesman Trent Duffy says that the White House is positive about the Graham bill and is "working with Senator Graham on technical aspects" of the legislation.

Attorney General Alberto Gonzales has talked with Senator Graham about the bill at least twice. The Justice Department spokesperson says Gonzales was "particularly focused on thwarting some of the 160 habeas lawsuits filed by Gitmo detainees." (Gonzales was the author of the notorious 2002 memo advising the President that the Geneva Conventions did not apply in order to provide "a solid defense to any future prosecution" of U.S. officials under the War Crimes Act. Gonzales's personal role in laying the groundwork for torture is sufficient for professor Marjorie Cohn, now president-elect of the National Lawyers Guild, to have drafted an indictment of Gonzales for violating the War Crimes Act.)

The Bush Administration is apparently divided. Despite the role of the White House in preparing the Graham compromise amendment, Vice President Cheney opposed it. Indeed, Cheney has fought any legislation that would eliminate the government's right to torture, though he seems willing to compromise on language that leaves the CIA, but not the military, free to torture. In the past, President Bush has threatened to veto the entire defense bill if McCain's anti-torture amendment is included.

Both the Graham and McCain amendments are attached to a defense bill that now goes to a Senate-House conference. Graham and Levin plan to demand that the final legislation include both.

The conference committee will undoubtedly be the focus of pressure from those who want to preserve the right of habeas corpus. A statement by Habeas Counsel, the coalition of prestigious attorneys representing Guantánamo captives, says, "To legislate this way is disgraceful. It is also completely unnecessary. This is not an emergency situation. The Graham-Levin amendment should be stripped out in conference. The genuine deliberation required by the gravity of the issue can then begin."

Representative Edward Markey of Massachusetts, a member of the Progressive Caucus and an outspoken opponent of torture and "extraordinary rendition" (a k a government-run kidnapping), describes the task facing cunning progressive foxes:

"If the U.S. wants to demonstrate that we are a nation committed to justice and the rule of law, we should adopt the McCain amendment barring torture and drop the Graham amendment suspending habeas corpus rights for those detained at Guantánamo Bay. If persons held by the US lack the right to challenge their detention or their treatment, the McCain amendment's protections against torture and other forms of cruel or humiliating treatment may turn out to be illusory."

Only nine of the more than 500 Guantánamo captives have even been charged with crimes, and their trials are being prolonged year after year. This is exactly the situation habeas corpus is designed to remedy. And without it, the captives can rot in prison forever and possibly be subject to torture and inhumane treatment that the courts are unable even to learn about.

Graham and the Bush Administration oppose rights for Guantánamo detainees in part on the grounds that they are terrorists who deserve no better. They refuse to face the very real possibility of innocent people caught up in

the system, acknowledged by the military's own commanders at Guantánamo. According to the Wall Street Journal:

"American commanders acknowledge that many prisoners shouldn't have been locked up here in the first place because they weren't dangerous and didn't know anything of value. 'Sometimes, we just didn't get the right folks,' says Brig. Gen. Jay Hood, Guantánamo's current commander."

Graham's original proposal to eliminate habeas corpus for foreign captives was met by extraordinary condemnation. Ten retired military leaders endorsed a letter from Rear Adm. John Hutson calling the restriction on habeas corpus a "momentous" change. "The practical effects of such a bill would be sweeping and negative." Signers included Army Lieut. Gen. Robert Gard, Marine Maj. Gen. Fred Haynes and other senior officers.

Eugene Fidell, president of the National Institute of Military Justice, the organization of military lawyers, said the Graham amendment would sanction "unreviewable executive detention that cannot be harmonized with the nation's longstanding adherence to the rule of law."

The American Bar Association has urged the Senate to reconsider and defeat the original Graham amendment. Michael Greco, president of the association, gave a stirring defense of habeas corpus, which "cannot and should not" be replaced by the "extremely limited review" provided by the Graham amendment, which "would undermine the very principles that distinguish us from our enemies."

Does Congress have the power to tell the Supreme Court what cases it can or cannot hear? In American law, courts have the power to review the constitutionality of legislation passed by Congress, but they tend to defer to the other branches of government, especially where national security issues are involved.

Both Graham's original amendment and his compromise amendment directly conflict with the Supreme Court's decision in *Rasul v. Bush* that Guantánamo captives have the right to habeas corpus. The Supreme Court recently agreed to hear *Hamdan v. Rumsfeld*, a challenge to the constitutionality of the Bush Administration's military tribunals for Guantánamo captives.

No one knows how the Court would respond to an instruction from Congress to reverse its interpretation of the Constitution. Indeed, the conflict over the power of courts to hear prisoners' appeals is plunging the country into an ongoing constitutional crisis in which all three branches of government are involved.

Since treatment of captives held by the United States has included well-documented cases of torture, brutality and even treatment leading to death, the Graham amendment would erect a screen behind which such crimes may be conducted with impunity. Opponents of torture need to make sure they are not inadvertently helping to pass an amendment that would protect torturers.