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## Gitmo Detainees and the Courts

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The self-styled "world's greatest deliberative body," the U.S. Senate, voted 84 to 14 on Nov. 15 on an "improved" Sen. Lindsey Graham amendment to the Defense Department authorization bill that prevents prisoners at Guantanamo from filing habeas corpus petitions to our federal courts regarding their conditions of confinement. This includes complaints of abuses and alleged torture from "enhanced" interrogations.

In its present form, this Graham amendment was co-sponsored by Carl Levin, Michigan Democrat, and Jon Kyl, Arizona Republican. Yet, the Supreme Court ruled in *Rasul et al v. Bush* (2004) that Guantanamo detainees do have due process rights to challenge, under habeas corpus, the legality of their imprisonment.

That decision led to lawyers going to Guantanamo Bay, telling us what's going on and then filing habeas corpus petitions in federal district courts in Washington. The Graham-Levin-Kyl amendment cuts off that judicial route except in a very limited form that does not include the actual conditions under which the prisoners are being held.

On Nov. 10, the Senate had passed the original Graham amendment, which went much further to undercut the 2004 Supreme Court ruling. That amendment stripped all federal courts, including the Supreme Court itself, from considering habeas corpus petitions or any other "aspect of the detention" of these detainees, except in the very narrow question of whether the Defense Department's status review boards there were following their own rules. But "enhanced" interrogation techniques would continue. And by now, the world is all well aware of how "enhanced" these techniques can be.

There was a strong backlash to the original Graham amendment from civil-liberties and human-rights organizations, and conservative libertarians. The objectors pointed out that this suspension of habeas corpus -- "the Great Writ" that has roots in the 13th-century Magna Carta -- had been passed after only an hour's debate, and without any previous committee hearings.

Mr. Graham had swiftly persuaded a majority of his colleagues to give habeas corpus much less consideration than a funding bill for highways.

The formerly thoughtful Sen. Joseph Lieberman, Connecticut Democrat, said casually that the sweeping Graham amendment would affect only those "determined to be an enemy combatant in the world war on terrorism." A similarly clueless spokeswoman for Olympia Snowe, Maine Republican, said, "After all, we're talking about enemy combatants." But, as the Supreme Court decided, saying "enemy combatant" is only an accusation before a due-process finding of guilt or innocence.

As if he were conducting an introductory high-school civics class, Washington attorney Thomas Wilner, representing some of the detainees, pointed out the many ways in which the Department of Defense rules for the commissions and tribunals at Guantanamo Bay preclude a fair hearing so that prisoners can try to prove their

innocence. For one example, they cannot see the key evidence against them because it's secret.

On the Nov. 14 "News Hour With Jim Lehrer" on PBS, Mr. Wilner gave Messrs, Graham, Lieberman and Snowe, et al. a constitutional lesson: "The first statute passed by the first Congress of the United States in 1789 was the Habeas Corpus Act, one of the most basic rights in the common law," not to be disposed of in a one-hour debate.

As the disquiet mounted over how Mr. Graham had convinced a majority of his colleagues to brush aside that fundamental right on Nov. 10, a series of amendments and counter-amendments led to the "compromise" Graham-Levin-Kyl legislation on Nov. 15. It included some minimal due-process protections for the prisoners, but retained the crucial refusal of any habeas claims against torture and other abuses. This subverts Sen. John McCain's already passed anti-torture amendments, though he voted for Mr. Graham's amendments anyway. How could he?

Voting against what Mr. Graham had designed, Senate Judiciary Committee Chairman Arlen Specter, Pennsylvania Republican, said on the Senate floor Nov. 15: "These are weighty and momentous considerations that go far beyond the detainees at Guantanamo on an amendment... which on the face takes away jurisdiction of the Supreme Court of the United States. It is untenable and unthinkable and ought to be rejected." Agreeing, the Association of the Bar of the City of New York, often much more penetrating on constitutional issues than any other bar association, wrote to Republican Senate Majority leader Bill Frist on Nov. 17 that this "compromise" amendment "leaves a gaping hole precisely where the Administration's policies are most troublesome, and where the world is most carefully watching the indefinite detention of these whose status as an enemy combatant has not been adequately examined, let alone the treatment of those detainees."

Mr. Graham's crude handiwork now goes to the House, whose Republican leadership, exemplified by House Judiciary Committee Chairman F. James Sensenbrenner Jr., Wisconsin Republican, also regards habeas corpus as a disposable impediment to protecting American values against terrorists. President Bush's Justice Department supported the "compromise" Graham amendment. That's no surprise.