

Legislating a war crime

US Senate moves to ban court review of Guantánamo detentions

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Acting with virtually no debate or warning, the US Senate on Thursday passed, in the form of an amendment to a military budget bill, a far-reaching measure denying so-called “enemy combatants” any right to challenge their detention in US courts.

While this reactionary piece of legislation is aimed in the first instance at the more than 500 men and boys who have been imprisoned without charges, facing torture and abuse, at the Pentagon’s concentration camp in Guantánamo Bay, Cuba, it constitutes a frontal assault on basic democratic rights and the constitutional form of government in the United States itself.

The measure would turn into law the Bush administration’s arrogation to itself of the power to order the arrest and imprisonment of anyone it sees fit on the sole say-so of the president as “commander-in-chief” without formally charging them or even revealing their detention and without any possible review by the courts.

It would dramatically alter the balance of power between the different branches of the US government, undermining the independence of the judiciary and denying the courts the ability to review the actions of the presidency and consider the appeals of those claiming to have been unjustly imprisoned.

Introduced by Senator Lindsey Graham (Republican, South Carolina) and passed by a Senate vote of 49 to 42, the amendment effectively strips the US courts of any jurisdiction over those detained in the so-called war against terror and overturns the extremely limited moves by the courts to review the legality of the Bush administration’s actions.

The legislation would likely end up applying to all non-citizens detained by the government both outside the US and within.

The measure was approved under conditions in which the US government has come under increasing fire internationally over a flood of revelations concerning secret prisons run by the CIA in eastern Europe and elsewhere and the torture of detainees by both the intelligence agency and the US military.

As the Senate voted, prisoners in Guantánamo were continuing a protracted hunger strike to demand that they be granted conditions guaranteed by the Geneva Convention and that they be permitted a hearing in a genuine court.

Graham made it clear that his amendment is designed to ensure that the criminal abuse of these detainees continues. “It is not fair to our troops fighting in the war on terror to be sued in every court

in the land by our enemies based on every possible complaint,” he said.

While an attempt will reportedly be made next week in the Senate to remove the abrogation of habeas corpus from the bill, it is virtually certain that the Graham amendment would win the support of the Republican-controlled House and be signed into law by Bush.

Under international law, the Graham amendment itself constitutes a war crime. It violates the 1907 Hague treaty, which declares it a crime to “declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.”

It likewise violates the Geneva Convention, which protects detainees by prohibiting “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.”

The most fundamental of these guarantees—and one of the cornerstones of democratic rights worldwide—is the right to petition a court for a writ of habeas corpus.

The measure passed the Senate just three days after the US Supreme Court announced that it would rule on the constitutionality of the kangaroo-court-style military tribunals that the Pentagon has set up at Guantánamo to supposedly determine whether detainees can be released.

Not only would the amendment void this case, it would also apply retroactively to other rulings and to appeals filed on behalf of hundreds of detainees in various federal courts. Among the rulings that would be nullified is a June 2004 US Supreme Court finding in the case of *Rasul v. Bush* that foreign citizens accused of terrorism can challenge their detention in the US courts.

It is not a matter of the courts having served as champions of the detainees’ rights. On the contrary, they have for the most part bowed to the administration’s claims that the president is entitled to extraordinary powers because the US is supposedly at war, including the power to hold “enemy combatants” without charges or trial.

The courts have ignored the fact that this so-called “war on terror” has never been declared, has no defined enemy and is presented as a conflict that will continue indefinitely, making the extraordinary powers of the president essentially permanent. As

for “enemy combatant,” this is a term that has never been defined, outside of describing anyone the president wants detained without granting them either the legal rights of someone charged criminally or the rights granted to prisoners of war under the Geneva Convention.

Nonetheless, by legislating the exclusion of the courts from any review of these police-state measures, the Senate’s action represents a significant step toward the institutionalization of dictatorial forms of rule within the US.

The measure also gives the lie to another item tied to the Defense Appropriations Bill, the so-called McCain torture amendment—passed by a vote of 90 to 9—barring “cruel, inhuman, or degrading treatment or punishment” against those detained by the US government.

The Bush administration has threatened to veto the entire military funding bill if the amendment remains, while Vice President Dick Cheney has exerted political pressure on the Senate to specifically exempt the CIA from the proscription of torture so that it can continue the brutal methods it employs at a network of secret prisons scattered around the globe.

The Graham amendment turns this ban on torture into a dead letter, or rather window dressing, for continuing the brutalization of thousands of people held by the US against whom no charges much less evidence has been presented. If they have no right to seek redress in the courts, then the administration is free to do with them as it likes, including torture and extra-judicial executions, without fear of exposure.

The amendment drew sharp fire from both human rights and attorneys’ groups nationwide.

The New York City Bar called the measure “precisely the wrong action at the wrong time.” It noted that the Bush administration “asserting extraordinary wartime powers, has created a whole new structure, based on tenuous legal ground, to indefinitely detain any person anywhere whom the President claims to be an enemy combatant (a term for which there is still no settled definition in law), and argues that he may do so without judicial review.”

The National Institute of Military Justice issued a statement declaring, “The proposed amendment would sanction unreviewable Executive detention that cannot be harmonized with our Nation’s longstanding adherence to the rule of law.”

And the American Civil Liberties Union warned: “By depriving all courts of jurisdiction over nearly all claims by foreign detainees held at Guantánamo Bay, the Graham amendment would eviscerate the protections of the McCain amendment and other anti-torture laws, violate the Constitution by denying the Supreme Court its role as the final authority on whether government actions are constitutional and legal and terminate nearly all court cases brought by military officers on behalf of detainees.”

Once the right of habeas corpus has been abolished for foreign detainees and those whom the president declares “enemy combatants,” what is to stop the Congress from passing a law declaring that no American citizen has the right to challenge his or her imprisonment?

The legal framework is being constructed for the type of state that existed in Latin America in the 1970s, when people “disappeared” to be tortured and executed in the security forces’

clandestine prisons, with no one held accountable and no challenge permitted within the courts.

That such a proposal—repudiating a principle that has been part of democratic legal rights going back to the Magna Carta nearly 800 years ago—could be tacked on as an amendment to a military spending bill speaks volumes about the nature of the US government and America’s ruling elite.

It is a government that operates on the basis of conspiracy and deliberate concealment of its policies from the American people. Within the financial oligarchy that dominates political life and controls both major parties, there is no significant constituency for the defense of bedrock constitutional principles.

In an atmosphere of fear and hysteria whipped up in the aftermath of the September 11, 2001, attacks—events that have yet to be fully explained to the American people—the Bush administration has rammed through sweeping attacks on democratic rights, with the full collaboration of the Democratic Party. These include the Patriot Act, giving police and intelligence agencies unprecedented powers of surveillance, search and seizure.

It has since invoked a “global war on terror” as a pretext for launching an unprovoked and illegal war against Iraq as well as for carrying out a systematic war against the US Constitution.

This drive to demolish centuries’ old rights is part of an international process that has seen in just the past week the imposition of sweeping “anti-terrorism” legislation in both Britain and Australia and the declaration of a state of emergency in France.

Underlying this global process is the unprecedented polarization between a wealthy financial elite and masses of working people, whose basic democratic rights are increasingly seen by the capitalist political establishments in every country as an intolerable obstacle to immensely unpopular policies, including war and the eradication of what remains of generations’ worth of social reforms.

The Graham amendment, in its attempt to enshrine into law the dirty and illegal practices that have been carried out by the Bush administration over the past four years, represents a stark warning that this process is very far advanced and is encountering no serious resistance from any section of the political establishment.

The defense of democratic rights—including the essential right of habeas corpus—is today possible only through the independent political mobilization of the working class.



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