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“The Senate: Making a Mess of Guantanamo”

The word “Guantanamo” has become an epithet in international legal circles. Our country has imprisoned hundreds of foreign citizens without trial for over three years at our Naval Base in Guantanamo Bay, Cuba, with no end in sight. The Pentagon has brought charges against only a few, whom it proposes to try before military commissions. Legal and human rights groups around the world have denounced these detentions and so-called trials as an American abandonment of the rule of law.

Until last week, only two branches of our government – the executive and judiciary -- had addressed the legal issues raised by Guantanamo. The executive concocted the very procedures that draw so much criticism abroad.

The judiciary, on the other hand, was in the process of resolving the issues in an orderly way. In June 2004 the Supreme Court ruled by 6-3 that our courts have jurisdiction to hear habeas corpus petitions, by which Guantanamo prisoners may challenge the legality and conditions of their detentions. Lower courts have since issued conflicting rulings on whether the prisoners have substantive legal rights. These issues appeared to be headed back to the Supreme Court, which has already agreed to review the legality of military commission trials.

Enter the Senate. For over three years Republican support for the Administration, and Democratic apprehension over being seen as soft on terrorism, have kept the Congress out of the Guantanamo issues.

A first step came this June when the Senate Judiciary Committee, chaired by Senator Arlen Specter of Pennsylvania, held hearings on the Guantanamo detentions. After an August trip to Guantanamo, Senator Specter reports, “I had the expectation of having a hearing and making progress to really come to grips with the complex issues ...”

Then along came South Carolina Republican Senator Lindsey Graham. Last week, with no hearing, no testimony, only four days notice and hardly any debate, he got the Senate to vote by 49-42 to strip Guantanamo prisoners of their right to apply for habeas corpus. The full text of his bill that purports to overturn last year’s Supreme Court decision was not even available until the day of the vote.

Led by Senators Jeff Bingamon of New Mexico and Carl Levin of Michigan, Democrats attempted in the last few days to mitigate the damage. A Bingamon amendment to overturn the Graham amendment failed by a vote of 54-44. A bipartisan compromise negotiated by Senator Levin then passed by 84-14.

As of this writing it is not even clear to the public what the compromise provides. The text of the amendment is not yet posted on the congressional website. Press accounts indicate that it would allow limited judicial review of detentions and military trials, but it is not clear what issues could be reviewed, and under what standards of judicial review. Human rights groups charge that the ancient and fundamental right to habeas corpus has been maimed.

What is clear is that the lawmaking process has been shameful. Senator Graham is a member of the Judiciary Committee. Whatever personal political credit he hopes to gain by sponsoring his floor amendment is more than offset by the dangerous precedent of bypassing committee hearings and deliberations in order to curtail habeas corpus, all in the blink of a blind eye.

The dozens of Guantanamo prisoners who have habeas petitions pending in federal court are represented by many lawyers, including several of the nation's leading law firms, without fee.

In a joint statement on the Senate amendment, these lawyers comment as follows:

“The Senate’s treatment of the habeas issue is a scandal. The Great Writ of Habeas Corpus ... is too fundamental ... to be rewritten on the back of an envelope ... Many are alarmed by these measures on the merits. Many others are alarmed by the precedent they could set ... To legislate this way is disgraceful. It is also completely unnecessary. The Graham-Levin Amendment should be stripped out in conference.”

As the lawyers point out, the Senate amendment will not become law unless it is accepted in a conference committee with the House, which has not yet spoken on the issue. There is still time for the House to redeem the Senate’s folly.

However one views the merits of the Graham-Levin compromise – once we find out exactly what it says -- rewriting basic rights in the dead of night is no way to make law in a democracy. The House should insist on a transparent, deliberative process, one in which responsible opposing views can be heard, and consequences weighed with care.

After all, Congress has waited years to speak on this issue. Surely it can wait a bit longer to do it right.

Doug Cassel’s commentaries are broadcast Wednesdays during the noon hour of the Worldview program on Chicago Public Radio, 91.5 FM. All views expressed are the personal views of the author and not necessarily those of Notre Dame Law School, the Center for Civil and Human Rights or Chicago Public Radio.