

LINDSEY GRAHAM'S INDEPENDENT REVIEW FOR ALL DETAINEES IN US PRISONS

As I've said before, I think Carl Levin's assurances that habeas corpus will prevent the Executive from holding people without cause under his new detainee provisions (and, frankly, under the status quo) is dangerously naive, because it ignores how badly the DC Circuit has gutted habeas.

That said, maybe this colloquy between Lindsey Graham and Carl Levin might help. (h/t to Lawfare for making transcripts available)

Mr. GRAHAM. If someone is picked up as a suspected enemy combatant under this narrow window, not only does the executive branch get to determine how best to do that—do you agree with me that, in this war, that every person picked up as an enemy combatant—citizen or not—here in the United States goes before a Federal judge, and our government has to prove to an independent judiciary outside the executive branch by a preponderance of the evidence that you are who we say you are and that you have fit in this narrow window? That if you are worried about some abuse of this, we have got a check and balance where the judiciary, under the law that we have created, has an independent review obligation to determine whether the executive branch has abused their power, and that decision can be appealed all the way to the Supreme Court?

Mr. LEVIN. That guarantee is called habeas corpus. It has been in our law. It is untouched by anything in this bill. Quite the opposite; we actually

enhance the procedures here.

[snip]

Mr. GRAHAM. In this case where somebody is worried about being picked up by a rogue executive branch because they went to the wrong political rally, they don't have to worry very long, because our Federal courts have the right and the obligation to make sure the government proves their case that you are a member of al-Qaida and didn't go to a political rally. That has never happened in any other war. That is a check and balance here in this war. And let me tell you why it is necessary.

This is a war without end. There will never be a surrender ceremony signing on the USS Missouri. So what we have done, knowing that an enemy combatant determination could be a de facto life sentence, is we are requiring the courts to look over the military's shoulder to create checks and balances. Quite frankly, I think that is a good accommodation.

[snip]

I want to be able to tell anybody who is interested that no person in an American prison—civilian or military—held as a suspected member of al-Qaida will be held without independent judicial review. We are not allowing the executive branch to make that decision unchecked. For the first time in the history of American warfare, every American combatant held by the executive branch will have their day in Federal court, and the government has to prove by a preponderance of the evidence you are in fact part of the enemy force. [my emphasis]

Not only does Graham insist the standard in

habeas cases must be a “preponderance of the evidence” standard—something the DC Circuit has threatened to chip away at. But the language about courts having an obligation to make sure the government proves its case and courts looking over the shoulder sure implies a stronger review than Janice Rogers Brown understands it.

Furthermore, while Graham speaks explicitly at times about people caught in the US, his aspiration that “no person in an American prison ... will be held without independent judicial review” would surely sound good to the detainees in the American prison at Bagram, particularly taken in conjunction with Section 1036, which seems to suggest they get a review too.

Of course, passing a law stating that habeas corpus must consist of something more than a Circuit Court Judge rubber-stamping the government’s inaccurate intelligence files would be far better. But this language, showing legislative intent that habeas review remain real, is about all we get these days.