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Senate-White House compromise sanctions CIA torture of detainees

By Joe Kay and Barry Grey
23 September 2006

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The Bush administration and Republican senators agreed Wednesday night on legislation that sanctions secret CIA prisons and permits abusive interrogation methods that violate the Geneva Conventions and other international and domestic anti-torture statutes.

The bill also gives congressional approval for military commissions that strip Guantánamo detainees of basic due process rights, while denying them the elementary right to seek redress from arbitrary imprisonment through the filing of habeas corpus suits in US courts.

With this agreement, the US Congress is preparing to give its official imprimatur to the use of barbaric methods historically associated with military and fascist dictatorships, as well as the repudiation of democratic principles that go back to the Magna Carta of 1215.

The Bush administration is determined to obtain passage of the measure before Congress adjourns next week in advance of the November midterm elections. In the absence of any significant opposition from the Democratic Party, the agreement reached between the White House and a trio of Republican senators who opposed the administration's initial draft represents another milestone in the disintegration of American democracy. It demonstrates yet again the absence of any serious commitment to democratic rights within any section of the political establishment or either of the two major parties.

Both sides in the tussle over the terms of the bill hailed the agreement.

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Arizona Senator John McCain, one of the original opponents of the Bush-backed proposal, declared that the agreement “gives the president the tools that he needs to continue to fight the war on terror,” while “the integrity and spirit of the Geneva Conventions have been preserved.” CIA Director Michael Hayden said that if the compromise becomes law, “Congress will have given us the clarity and the support that we need to move forward with a detention and interrogation program.”

From the beginning, the objections of the Republican senators who opposed the administration’s version—McCain, John Warner of Virginia and Lindsey Graham of South Carolina—were not based on a principled defense of international law or democratic rights. The main concern of the senators, and significant elements within the military establishment for whom they spoke, was to authorize the CIA program of detention and abuse without explicitly repudiating—or as Bush put it, “clarifying”—the Geneva Conventions.

The senators succeeded in shifting the administration’s position in this regard, but the changes they obtained were almost entirely cosmetic. The substance of the administration’s bill remains essentially intact.

“We proposed a more direct approach to bringing clarification,” Dan Bartlett, counselor to the president, said on Thursday. “This one is more of the scenic route, but it gets us there.”

In a fairly blunt assessment of the agreement, the *Washington Post* editorialized Friday, under the headline “The Abuse Can Continue:”

“In effect, the agreement means that US violations of international human rights law can continue as long as Mr. Bush is president, with Congress’ tacit assent... Mr. Bush wanted Congress to formally approve these practices and to declare them consistent with the Geneva Conventions. It will not. But it will not stop him either, if the legislation is passed in the form agreed on yesterday. Mr. Bush will go down in history for his embrace of torture and bear responsibility for the enormous damage that has caused.”

Gutting the Geneva Conventions and the War Crimes Act

The administration had wanted a section that would redefine US obligations under Common Article 3 of the Geneva Conventions. This was in response to a Supreme Court ruling in June that declared Bush’s military commissions unconstitutional and stated that all prisoners in US custody had to be held in accordance with Common Article 3, which prohibits “outrages upon personal dignity, in particular, humiliating and degrading treatment.” The

administration's original bill would have said, in effect, that the US interprets Common Article 3 to allow for the various torture methods used by the CIA.

The new version does not include this language. Instead, it circumvents Common Article 3 of the Geneva Conventions by amending the US law, called the War Crimes Act, which enforces the provisions of the Geneva Conventions and other international treaties.

The War Crimes Act currently defines as a war crime any violation of Common Article 3. But the new legislation will amend the War Crimes Act to allow for virtually any technique short of the infliction of extreme physical pain leading to death or permanent debilitating injury. In particular, the act will decriminalize methods that inflict pain which is not "extreme," allow the impairment of bodily members or organs which is not "protracted," and sanction methods that lead to cuts, abrasions or bruises.

In addition, the compromise measure states: "The president has the authority for the United States to interpret the meaning and application of the Geneva Conventions." This gives the president the power to authorize the techniques used by the CIA and declare that they are not war crimes.

As Caroline Frederickson, director of the American Civil Liberties Union's Washington office noted, "The proposal would make the core protections of Common Article 3 of the Geneva Conventions irrelevant and unenforceable. It deliberately provides a 'get-out-of-jail-free card' to the administration's top torture officials..."

The compromise also states that "no foreign or international sources of law shall supply a basis for a rule or decision in the courts of the United States in interpreting the prohibitions enumerated" in the War Crimes Act—thus placing the US outside the authority of any international body that might determine that the US interpretation is a violation of the Geneva Conventions.

A central aim of these sections—which are retroactive to 1997—is to provide immunity to US officials, from Bush on down, who have ordered torture and will continue to do so in the future. The Geneva Conventions require signatories to prosecute those who order violations to be carried out, as well as those who commit them.

Francis Boyle, professor of international law and human rights at the University of Illinois, told the *World Socialist Web Site* that whatever language the bill might contain, it cannot override international law. "Any member of the United States Congress who votes for this act will be

authorizing war crimes in violation of the Geneva Conventions of 1949, the Hague regulations of 1907, and the US War Crimes Act of 1996,” he said. “They will therefore become war criminals themselves.”

Boyle noted that the Nuremberg trials of Nazi leaders rejected the argument that domestic law can be used as an excuse for violating international criminal law. “To find a piece of legislation as bad as this one,” he added, “you would have to go back to the laws passed under Nazi Germany.”

Evidence obtained through torture

Along with the authorization of torture, the compromise bill would allow evidence obtained through coercion to be introduced in the military commissions that the legislation establishes. While the bill nominally bans evidence obtained by torture, this is purely a formality since torture is defined so narrowly.

Thus, prisoners deemed to be “enemy combatants” can be tortured and “evidence” thus obtained can be used in kangaroo military courts to convict and execute them, or prosecute other “enemy combatants.”

The compromise measure states explicitly that the Geneva Conventions will not create any enforceable rights for the individuals under US control. It also states that no court will be allowed to hear a habeas corpus or other lawsuit that is brought by any “enemy combatant” under US custody. This provision would apply retroactively to 2001, and would therefore throw out the hundreds of cases brought by Guantánamo Bay detainees that are currently in the courts.

The measure codifies the category of “enemy combatant”—a category that the Bush administration has used to justify the holding of prisoners indefinitely and without charge.

The denial of due process rights guaranteed by the Constitution is one of the most significant aspects of the compromise, since it creates a class of prisoners who have no legal rights. Professor Boyle noted that this is one of the principal foundations of a totalitarian state. He quoted Hannah Arendt’s comment in her book, *The Origins of Totalitarianism*, that “The first essential step on the road to total domination is to kill the juridical person in man.”

Finally, the bill establishes various procedures for the military commissions. The administration conceded some points on the question of secret evidence. The administration’s version would have allowed such evidence with

virtually no constraints. The compromise allows for classified information to be withheld, but states that “to the extent practicable” the judge must provide an unclassified, summarized version of that which is withheld. This provision remains in dispute, however, with Republicans in the House of Representatives pushing for language that would give freer reign for secret evidence.

The agreement also allows the use of hearsay evidence beyond what is admissible in normal military courts-martial hearings.

The secret evidence compromise was modified under the pressure of the Republican senators, particularly Lindsey Graham, who argued that the administration’s version would have great difficulty getting past the Supreme Court. The Court ruled in June that aspects of the military commissions established by Bush were unconstitutional, including the use of secret evidence.

The largely cosmetic changes to Bush’s torture bill contained in the compromise measure will do nothing to repair the shattered moral and political credibility of the United States around the world. The flouting of international law and evisceration of constitutional guarantees flows organically from the nature of the imperialist policy of the US government, a policy that is supported by the entire political establishment. A policy of war and aggression is inextricably bound up with the use of brutal methods and the destruction of democratic rights.

It can be stated with certainty that the Democrats will provide whatever votes are necessary to get this legislation passed, provided that the Republican agreement holds. Throughout the debate, the Democrats have played an utterly cowardly and complicit role, sitting on the sidelines while the disagreements between the Republicans were worked out.

The Democratic Party leadership has made clear that it will not oppose any of the measures implemented by the administration under the pretext of the “war on terror” and “national security.” Democratic Senate Minority Leader Harry Reid signaled his support for the compromise measure worked out between the White House and the Senate Republicans, saying, “Five years after September 11, it is time to make the tough and smart decisions to give the American people the real security they deserve.”

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