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Interrogation of Detainees: Overview of the McCain Amendment

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Summary

Controversy has arisen regarding U.S. treatment of enemy combatants and terrorist suspects detained in Iraq, Afghanistan, and other locations, and whether such treatment complies with U.S. statutes and treaties such as the U.N. Convention Against Torture and Other Forms of Cruel and Inhuman or Degrading Treatment or Punishment (CAT) and the 1949 Geneva Conventions. Congress approved additional guidelines concerning the treatment of detainees via the Detainee Treatment Act (DTA), which was enacted pursuant to both the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (P.L. 109-148), and the National Defense Authorization Act for FY2006 (P.L. 109-163). Among other things, the DTA contains provisions that (1) require Department of Defense (DOD) personnel to employ United States Army Field Manual guidelines while interrogating detainees, and (2) prohibit the “cruel, inhuman and degrading treatment or punishment of persons under the detention, custody, or control of the United States Government.” These provisions of the DTA, which were first introduced by Senator John McCain, have popularly been referred to as the “McCain amendment.” This report discusses the McCain amendment, as modified and subsequently enacted into law.

This report also discusses the application of the McCain amendment by the DOD in the updated 2006 version of the Army Field Manual, particularly in light of the Supreme Court’s ruling in *Hamdan v. Rumsfeld*. In addition, the report discusses recent legislation relating to Al Qaeda detainees that references the McCain amendment. For a discussion of the provisions in the DTA that limit judicial review of challenges to U.S. detention policy, see CRS Report RL33180, *Guantanamo Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Kenneth Thomas.

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Interrogation of Detainees: Overview of the McCain Amendment

Amidst controversy regarding U.S. treatment of enemy combatants and terrorist suspects detained in Iraq, Afghanistan, and other locations, Congress approved additional guidelines concerning the treatment of persons in U.S. custody and control via the Detainee Treatment Act (DTA), which was enacted pursuant to both the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (P.L. 109-148), and the National Defense Authorization Act for FY2006 (P.L. 109-163). Among other things, the DTA contains provisions that (1) require Department of Defense (DOD) personnel to employ United States Army Field Manual guidelines while interrogating detainees, and (2) prohibit the “cruel, inhuman and degrading treatment or punishment of persons under the detention, custody, or control of the United States Government.” These provisions, added to the defense appropriations and authorization bills via amendments introduced by Senator John McCain, have popularly been referred to as the “McCain amendment.”¹ As subsequently modified, the McCain amendment also provides certain legal protections and assistance to U.S. personnel engaged in the authorized interrogation of a terrorist suspect.

Summary and Analysis of the McCain Amendment

The McCain amendment, as modified and enacted into law, contains three provisions, which are described in the following sections.

¹ On October 5, 2005, the Senate adopted a floor amendment (S.Amdt. 1977) proposed by Senator McCain to the House-passed defense appropriations bill, restricting the types of interrogation techniques employed by U.S. personnel. On November 4, 2005, Senator McCain proposed an identically worded amendment (S.Amdt. 2425) to S. 1042, the National Defense Authorization Act for FY2006, which also was adopted by the Senate. The Senate subsequently substituted the language of S. 1042, as amended, for the House-passed version of H.R. 1815, and then passed the amended bill by unanimous consent. The conference committees appointed to resolve differences between the House- and Senate-passed versions of the defense appropriations and authorization bills retained the McCain amendment in the conference report and added identical provisions providing certain legal protections and assistance to U.S. personnel subjected to legal action on account of their involvement in the authorized interrogation of a terrorist suspect. The Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (P.L. 109-148), as amended and passed by the House and Senate, was signed into law on December 30, 2005. The National Defense Authorization Act for FY2006 (P.L. 109-163), as amended and passed by the House and Senate, was signed into law on January 6, 2006.

Applying U.S. Army Field Manual Standards. The first provision of the McCain amendment provides that no person in the custody or effective control of the DOD or detained in a DOD facility shall be subject to any interrogation treatment or technique that is not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.² An exception to this general requirement is made for individuals being held pursuant to U.S. criminal or immigration laws. The McCain amendment does not require non-DOD agencies, such as non-military intelligence and law enforcement agencies, to employ Field Manual guidelines with respect to interrogations they conduct.

The United States Army Field Manual addresses intelligence interrogation under FM 34-52, detailing certain procedures for the treatment and questioning of persons by military personnel.³ At the time the McCain amendment was enacted, FM 34-52 also contained a section regarding the applicability of the 1949 Geneva Conventions. According to the Manual, these Conventions, including the 1949 Geneva Convention on the Treatment of Prisoners of War, were to be “strictly observed and enforced by the United States Forces without regard to whether they are legally binding upon this country and its specific relations with any other specific country.”⁴ In applying these standards, the Field Manual required soldiers to adhere to the Geneva Convention’s prohibition against “cruel treatment and torture” and “[o]utrages upon personal dignity, in particular, humiliating and degrading treatment.”⁵

The McCain amendment does not prevent DOD from subsequently amending the Field Manual. As discussed later, an updated version of the Army Field Manual was released on September 6, 2006. The 2006 Manual contains general requirements that are similar to those in the earlier version of the Manual, requiring all detainees to be treated in a manner consistent with the Geneva Conventions, and prohibiting the use of torture or cruel, inhuman, and degrading treatment in any circumstance. It further provides that the only authorized interrogation techniques or approaches are those included in the Manual.

Prohibition on Cruel, Inhuman, or Degrading Treatment or Punishment. The second provision of the McCain amendment prohibits persons in the custody or control of the U.S. government, regardless of their nationality or

² P.L. 109-148, Title X, § 1002 (2005); P.L. 109-163, Title XIV, § 1402 (2006).

³ At the time the McCain amendment was enacted, the Field Manual provisions concerning interrogation had last been revised in 1992. Department of the Army Field Manual 34-52, Intelligence Interrogation (1992), available at [<http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/FM34-52IntelInterrogation.pdf>] [hereafter “1992 FM”]. An updated and revised Field Manual was released on September 6, 2006. Department of the Army Field Manual 34-52, Human Intelligence Collector Operations (2006), available at [<http://f11.findlaw.com/news.findlaw.com/hdocs/docs/dod/armyfm2223humanintel.pdf>] [hereafter “2006 FM”].

⁴ 1992 FM, *supra* note 3.

⁵ Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, entered into force Oct. 21, 1950. For additional background, see CRS Report RL32567, *Lawfulness of Interrogation Techniques under the Geneva Conventions*, by Jennifer K. Elsea.

physical location, from being subjected to “cruel, inhuman, or degrading treatment or punishment.”⁶ The amendment specifies that this restriction is without geographical limitation as to where and when the government must abide by it. Unlike the first section of the McCain amendment, this provision covers not only DOD activities, but also intelligence and law enforcement activities occurring both inside and outside the United States. This provision does not appear to prohibit U.S. agencies from transferring persons to other countries where those persons would face “cruel, inhuman, or degrading treatment or punishment,” so long as such persons were no longer in U.S. custody or control. However, such transfers might nonetheless be limited by applicable treaties and statutes.⁷ The McCain amendment also provides that this provision may “not be superseded, except by a provision of law enacted after the date of the enactment of this act which specifically repeals, modifies, or supersedes the provisions of this section.”⁸

In interpreting whether treatment falls below this standard, the McCain amendment defines “cruel, unusual, and inhuman treatment or punishment” to cover those acts prohibited under the Fifth, Eighth, and Fourteenth Amendments to the Constitution, as stated in U.S. reservations to the U.N. Convention Against Torture and Other Forms of Cruel and Inhuman or Degrading Treatment or Punishment (CAT).⁹ The Constitution applies to U.S. citizens abroad, thereby protecting them from the extraterritorial infliction by U.S. state or federal officials of cruel, inhuman, or degrading treatment or punishment that is prohibited under the Fifth, Eighth, and/or Fourteenth Amendments.¹⁰ However, noncitizens arguably only receive constitutional protections after they have entered the United States.¹¹

⁶ P.L. 109-148, Title X, § 1003; P.L. 109-163, Title XIV, § 1402.

⁷ See CRS Report RL32890, *Renditions: Constraints Imposed by Laws on Torture*, by Michael John Garcia.

⁸ P.L. 109-148, Title X, § 1003; P.L. 109-163, Title XIV, § 1402.

⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) [*hereafter* “CAT”]. Ratified by the U.S. in 1994, CAT prohibits parties from engaging in torture, and also requires them to take measures to end “cruel, unusual, and inhuman treatment or punishment” within territories under their respective jurisdiction. *Id.* at arts. 1-3, 16.

¹⁰ See, e.g., *Reid v. Covert*, 354 U.S. 1, 6 (1957) (“When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.”).

¹¹ See, e.g., *Verdugo-Urquidez v. United States*, 494 U.S. 259, 270-71 (1990) (“aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country”). *But see* *Rasul v. Bush*, 124 S.Ct. 2686, n.15 (2004) (noting in dicta that petitioners’ allegations that they had been held in Executive detention for more than two years “in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing — unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States’”) (citing federal habeas statute 28 U.S.C. § 2241(c)(3), under which petitioners challenged their detention).

(continued...)

The McCain amendment prohibits persons under U.S. custody or control from being subjected to “cruel, inhuman, or degrading treatment or punishment” of any kind prohibited by the Fifth, Eighth, and Fourteenth Amendments, *regardless of their geographic location or nationality*. Accordingly, it appears that the McCain amendment is intended to ensure that persons in U.S. custody or control abroad cannot be subjected to treatment that would be deemed unconstitutional if it occurred in the United States.¹²

The scope of the Fifth, Eighth, and Fourteenth Amendment prohibitions upon harsh treatment or punishment is subject to evolving case law interpretation and constant legal and scholarly debate.¹³ The types of acts that fall within “cruel, inhuman, or degrading treatment or punishment” contained in the McCain amendment may change over time and may not always be clear. Heightening this uncertainty is the possible difficulty of comparing situations that might arise in the context of hostilities and “the war on terror” with interrogation, detention, and incarceration within the U.S. criminal justice system. Courts have recognized that circumstances often determine whether conduct “shocks the conscience” and violates a person’s due process rights.¹⁴ Accordingly, a U.S. court might employ a different

¹¹ (...continued)

Whether the *Rasul* ruling meant only that federal habeas jurisdiction extended to Guantanamo, or more broadly found that non-citizens detained at Guantanamo possessed constitutional rights, has been subject to conflicting rulings by district courts. *Compare* *Khalid v. Bush*, 355 F. Supp.2d 311 (D.D.C. 2005) (holding that while federal habeas statute covers Guantanamo detainees, non-citizens detained there do not receive constitutional protections) *with* *In re Guantanamo Detainees*, 355 F. Supp.2d 443 (D.D.C. 2005) (reading *Rasul* to mean that persons detained at Guantanamo are owed constitutional protections). For further information, see CRS Report RS22173, *Detainees at Guantánamo Bay*, by Jennifer Elsea.

¹² The McCain amendment also appears aimed at resolving controversy concerning U.S. implementation of CAT Article 16, which obligates CAT parties to prevent cruel, inhuman, or degrading treatment or punishment within territories under their jurisdiction. When the U.S. ratified CAT, it did so with the reservation that the “cruel, inhuman, or degrading treatment or punishment” prohibited by CAT covered only those types of actions prohibited by the U.S. Constitution. There is some legal dispute as to whether CAT Article 16, as read in light of U.S. reservations, applies to non-citizens held outside the United States. For further background, see CRS Report RL32438, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, by Michael John Garcia.

¹³ The Eighth Amendment’s prohibition on “cruel and unusual punishment” concerns the imposition of a criminal punishment. *Ingraham v. Wright*, 430 U.S. 651 (1977). The constitutional restraint of persons in other areas, such as pre-trial interrogation, is found in the Due Process Clauses of the Fifth Amendment (concerning obligations owed by the U.S. federal government) and Fourteenth Amendment (concerning duties owed by U.S. state governments). These due process rights protect persons from executive abuses which “shock the conscience.” *See, e.g., Rochin v. California*, 342 U.S. 165 (1952).

¹⁴ *E.g., County of Sacramento v. Lewis*, 523 U.S. 833, 850-851 (1998) (noting that conduct that shocks in one circumstance might not be considered so egregious in another); *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3rd Cir.1999) (“The exact degree of wrongfulness necessary to reach the ‘conscience-shocking’ level depends upon the circumstances of a
(continued...)”).

standard to determine whether interrogation techniques employed against a criminal suspect are unconstitutionally harsh than it would use to assess whether those same techniques were unconstitutional if employed against an enemy combatant in a war zone.

Nevertheless, types of treatment in a criminal law context that have been deemed prohibited under the Fifth, Eighth, and Fourteenth Amendments may be instructive to a reviewing court. A sampling might include, *inter alia*:

- handcuffing an individual to a hitching post in a standing position for an extended period of time that “surpasses the need to quell a threat or restore order”;¹⁵
- maintaining temperatures and ventilation systems in detention facilities that fail to meet reasonable levels of comfort;¹⁶ and
- prolonged interrogation over an unreasonably extended period of time,¹⁷ including interrogation of a duration that might not seem unreasonable in a vacuum, but becomes such when evaluated in the totality of the circumstances.¹⁸

Again, whether such conduct would also be considered “cruel, inhuman, or degrading punishment or treatment prohibited by the Fifth, Eighth, and Fourteenth Amendment” when employed in other circumstances (e.g., against terrorist suspects or enemy combatants abroad), or whether different constitutional standards could govern such conduct, remains unclear.

Conduct that has not been deemed to violate the Fifth, Eighth, and/or Fourteenth Amendments includes, *inter alia*:

- The double-celling of those in custody, at least so long as it does not lead to deprivations of essentials, an unreasonable increase in violence, or create other conditions intolerable for confinement.¹⁹

¹⁴ (...continued particular case”). Nevertheless, there may be some actions which are constitutionally prohibited no matter what the circumstance. *See Lewis*, 523 U.S. at 856 (1998) (Kennedy, J., concurring).

¹⁵ *Hope v. Pelzer*, 536 U.S. 730 (2002).

¹⁶ *Chandler v. Crosby*, 379 F.3d 1278 (11th Cir. 2004).

¹⁷ *Haynes v. Washington*, 373 U.S. 503 (1963). *See also Greenwald v. Wisconsin*, 390 U.S. 519 (1968); *Davis v. North Carolina*, 384 U.S. 737 (1966) (holding that confession of escaped convict held incommunicado for 16 days was involuntary, even though he was interrogated only an hour each day he was held).

¹⁸ *See Leyra v. Denno*, 347 U.S. 556 (1954); *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Ashdown v. Utah*, 357 U.S. 426 (1958).

¹⁹ *Rhodes v. Chapman*, 452 U.S. 337 (1981).

- Solitary or isolated confinement, so long as such confinement is within a cell in acceptable condition and is not of an unreasonable duration.²⁰
- In detention situations, the use of constant lighting in prisoner cells is allowed as the detainees' inconvenience and discomfort is outweighed by the need to protect safety and welfare of the other detainees and staff.²¹

Again, it is not clear that these and similar treatments may never be deemed constitutionally impermissible outside the criminal context, including when such treatments are used upon enemy combatants or terrorist suspects who have not been charged with a criminal offense.

On September 6, 2006, the Army released an updated version of the Field Manual that implements the requirements of the McCain amendment. The Manual prohibits cruel, inhuman, and degrading treatment. Eight techniques, used in conjunction with intelligence interrogations, are expressly prohibited:

- Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner;
- Placing hoods or sacks over the head of a detainee; using duct tape over the eyes;
- Applying beatings, electric shock, burns, or other forms of physical pain;
- Waterboarding;
- Using military working dogs;
- Inducing hypothermia or heat injury;
- Conducting mock executions; and
- Depriving the detainee of necessary food, water, or medical care.²²

In addition, the Manual restricts the use of certain other interrogation techniques, but these restrictions may be due to other legal obligations besides those imposed by the McCain amendment.²³

²⁰ *Hutto v. Finney*, 437 U.S. 678 (1978). The Court indicated that factors involved in the determination of constitutionality under the Eighth Amendment's "cruel and unusual" prohibition include the physical conditions of the cell and the length of time of confinement.

²¹ *Shanks v. Litscher*, 02-C-0064-C, 2003 U.S. Dist. Lexis 24590 (W.D. Wis. Jan. 29, 2003).

²² 2006 FM, *supra* note 3, at 5-75.

²³ The Manual provides that three interrogation techniques may only be used with higher-level approval: (1) "Mutt and Jeff", a good-cop, bad-cop interrogation tactic where a detainee is made to identify with the more friendly interrogator; (2) "false flag," where a detainee is made to believe he is being held by another country known to subject prisoners to harsh interrogation; and (3) separation, by which detainees are separated so that they cannot coordinate their stories. Separation may not be used against "lawful combatants," as this tactic is prohibited under the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, but is permitted in some circumstances against unlawful combatants. *Id.*

(continued...)

Protection of U.S. Personnel Engaged in Authorized Interrogations.

The conference committees established to resolve differences between the House- and Senate-passed versions of the defense appropriations and authorization bills inserted an additional provision into the McCain amendment, providing certain legal protections and assistance to U.S. personnel engaged in authorized interrogations.²⁴ As modified, the McCain amendment provides a legal defense to U.S. personnel in any civil or criminal action brought against them on account of their participation in the authorized interrogation of suspected foreign terrorists. The amendment specifies that a legal defense exists to civil action or criminal prosecution when the U.S. agent “did not know that the [interrogation] practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.” A good faith reliance on the advice of counsel is specified to be “an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.” The McCain amendment further states that the specification of a “good-faith” defense neither extinguishes any other defenses available to U.S. personnel nor accords such personnel with immunity from criminal prosecution.

In addition, the McCain amendment permits the U.S. government to employ legal counsel for and pay the court costs of U.S. personnel in any legal actions brought against them in foreign judicial tribunals and administrative agencies on account of such persons’ participation in authorized interrogations.

Recent Legislative Developments

In the 2006 case of *Hamdan v. Rumsfeld*,²⁵ the Supreme Court rejected the Bush Administration’s long-standing position that Common Article 3 of the 1949 Geneva Conventions was inapplicable to the present armed conflict with Al Qaeda. Common Article 3 prohibits protected persons from being subjected to violence, outrages upon personal dignity, torture, and cruel, humiliating, or degrading treatment. As a result of the Court’s ruling in *Hamdan*, questions have arisen regarding permissible interrogation tactics that may be used against Al Qaeda suspects, and whether U.S. personnel could face criminal liability for the harsh interrogation of such persons under the War Crimes Act,²⁶ which makes it a criminal offense to commit *any* violation of Common Article 3. Several bills introduced in response to the *Hamdan* decision contain provisions that reference the McCain amendment, including S. 3901, the Military Commissions Act of 2006, proposed by Senator John Warner and voted out of the Senate Armed Service Committee on September 14, 2006; S. 3861, the Bringing Terrorists to Justice Act of 2006 and S. 3886, the Terrorist Tracking, Identification, and Protection Act of 2006, both introduced by Senator Bill Frist; and

²³ (...continued)
at Appendix M.

²⁴ P.L. 109-148, Title X, § 1004; P.L. 109-163, Title XIV, § 1404.

²⁵ 126 S.Ct. 2749 (2006).

²⁶ For background on the War Crimes Act and proposed legislation to amend its scope, see CRS Report RS22504, *The War Crimes Act: Current Issues*, by Michael John Garcia.

H.R. 6054, the Military Commissions Act of 2006, introduced by Representative Duncan Hunter.

All four bills would amend the War Crimes Act provisions concerning Common Article 3, so that only *specified* violations would be punishable (as opposed to *any* Common Article 3 violation, as is the case under current law). While the bills' proposed modifications are largely similar, there are a few notable differences between S. 3901 and the other three bills. Whereas S. 3861, S. 3886, and H.R. 6054 would criminalize cruel or inhuman treatment rising to the level of *torture*, S. 3901 would criminalize any conduct that violated the standards of the McCain amendment (i.e., cruel, inhuman, or degrading treatment of the kind prohibited under the Fifth, Eighth, and Fourteenth Amendments). This latter category of conduct is likely broader in scope, as there are many activities that, while unconstitutionally cruel, inhuman, or degrading, nevertheless are probably not severe enough to rise to the level of torture.²⁷ Unlike the other three bills, S. 3901 would retroactively apply the McCain amendment's provision establishing a defense for U.S. personnel relating to the sanctioned treatment of detainees, so that defense could be employed by U.S. personnel charged with a War Crimes Act offense based on conduct that occurred between September 11, 2001 and December 30, 2005.

Another difference between S. 3901 and the other bills concerns the U.S. understanding of its obligations under Common Article 3 more generally. Under U.S. treaty obligations, U.S. personnel cannot commit *any* violation of Common Article 3, even though, as all four bills propose, such personnel would only be subject to criminal prosecution under the War Crimes Act for *severe* violations of Common Article 3. S. 3861, S. 3886, and H.R. 6054 would specify that U.S. obligations under Common Article 3 (except as they relate to the taking of hostages and the passing of unlawful sentences) are fully met through adherence to the McCain Amendment provision prohibiting unconstitutionally cruel, inhuman, or degrading treatment. This is arguably a less stringent requirement than that imposed by the plain text of Common Article 3, and would possibly permit U.S. personnel to engage in more aggressive means of interrogation than Common Article 3 otherwise permits. S. 3901 does not include a similar provision.

All four bills would also amend the McCain amendment to require the Federal Government to provide or employ counsel and pay fees related to any prosecution or civil action against U.S. personnel for authorized detention or interrogation activities.

²⁷ For purposes of international law, "torture" is considered a particularly severe form of cruel or inhumane treatment. See CRS Report RL32438, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, by Michael John Garcia, at 2, 17-18.