

CRS Report for Congress

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, Title X), and the National Defense Authorization Act for FY2006 (P.L. 109-163, Title XIV). 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 the Military Commissions Act of 2006 (MCA) (P.L. 109-366), which contains provisions that reference or amend the McCain Amendment, along with the Executive Order signed by President Bush that references MCA and McCain Amendment standards when describing guidelines for the treatment of detainees by the Central Intelligence Agency (CIA). For a discussion of the provisions in the DTA that limit judicial review of challenges to U.S. detention policy, see CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Kenneth R. Thomas.

Finally, this report briefly describes legislation introduced in the 110th Congress that references interrogation standards or requirements initially established by the McCain Amendment. Discussed legislation includes H.R. 2082, the Intelligence Authorization Act for Fiscal Year 2008, which was vetoed by President Bush on March 8, 2008, and H.R. 4156, the Orderly and Responsible Iraq Redeployment Appropriations Act, 2008, which was passed by the House on November 14, 2007, but has not been considered by the Senate due to the failure to invoke cloture on the bill. Both bills proposed to bar the CIA and other intelligence agencies from employing any interrogation tactic that is not authorized by the Army Field Manual, effectively prohibiting these agencies from employing certain harsh interrogation techniques, including waterboarding, regardless of whether those techniques had otherwise been deemed legally permissible. The White House has indicated that the President shall veto any legislation requiring the CIA to use only those interrogation techniques authorized under the Army Field Manual.

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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 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 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 The Field Manual establishes procedures for the treatment and questioning of persons by military personnel.³ Prior to the enactment of the McCain Amendment, DOD had authorized certain interrogation techniques for possible use in the interrogation of security detainees whom the Administration had deemed to be ineligible for prisoner of war status under the Geneva Conventions — namely, Taliban fighters designated as “unlawful combatants” and members of Al Qaeda. These techniques were more aggressive than those authorized by the Army Field Manual, and were prohibited from being used against lawful prisoners of war.⁴

Though the McCain Amendment generally requires the interrogation of persons in DOD custody to be consistent with Field Manual requirements, an exception 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 McCain Amendment does not prevent DOD from subsequently amending the Field Manual. As discussed later, an updated version of the Army Field Manual

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>] (*hereinafter* “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) (*hereinafter* “2006 FM”), *available at* [<http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/armyfm2223humanintel.pdf>].

⁴ In December 2002, the Department of Defense approved several new techniques for possible use in the interrogation of suspected Al Qaeda and Taliban fighters, who were deemed ineligible for lawful prisoner of war status under the 1949 Geneva Conventions. These techniques were more aggressive than those authorized for use against lawful prisoners of war, and included, among other things, (1) hooding and other sensory deprivation; (2) the use of stress positions, including forced standing for a maximum of four hours; (3) stripping detainees of their clothes; (4) removing religious objects belonging to detainees; and (5) using dogs to intimidate detainees. Memorandum from William Haynes II, General Counsel of the Department of Defense, *Re: Counter-Resistance Techniques*, November 22, 2002, *available at* [<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>]. In early 2003, authorization to employ most of these additional techniques was rescinded following internal military criticism, though some interrogation techniques, including sensory deprivation and environmental manipulation, remained permissible upon high-level approval. FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS at 7, Appendix D (August 2004), *available at* [<http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>].

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 physical location, from being subjected to “cruel, inhuman, or degrading treatment or punishment.”⁵ 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.⁶ 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.”⁷

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).⁸ 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

⁵ P.L. 109-148, Title X, § 1003; P.L. 109-163, Title XIV, § 1402.

⁶ See CRS Report RL32890, *Renditions: Constraints Imposed by Laws on Torture*, by Michael John Garcia.

⁷ P.L. 109-148, Title X, § 1003; P.L. 109-163, Title XIV, § 1402.

⁸ 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) (*hereinafter* “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.

Fourteenth Amendments.⁹ However, noncitizens arguably only receive constitutional protections after they have entered the United States.¹⁰

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.¹¹

The scope of the Fifth, Eighth, and Fourteenth Amendment prohibitions upon harsh treatment or punishment is subject to evolving case law interpretation and

⁹ 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.”).

¹⁰ 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”); *In re Iraq and Afghanistan Detainees Litigation*, 479 F.Supp.2d 85 (D.D.C.,2007) (finding that aliens detained in Afghanistan and Iraq did not have Fifth Amendment right to be protected from torture allegedly inflicted by U.S. military personnel). *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). 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 courts. In June 2007, the Supreme Court granted certiorari to hear the consolidated cases of *Boumediene v. Bush* and *Al Odah v. United States*, which concern the availability of habeas and constitutional protections to persons detained in Guantanamo. See *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), cert. granted by 127 S.Ct. 3078 (2007); *Al Odah v. United States*, 476 F. 3d 981 (D.C. Cir. 2007), cert. granted by 127 S.Ct. 3067 (2007). For further discussion, see CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Kenneth R. Thomas.

¹¹ 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.

constant legal and scholarly debate.¹² 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.¹³ Accordingly, a U.S. court might employ a different 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”;¹⁴
- maintaining temperatures and ventilation systems in detention facilities that fail to meet reasonable levels of comfort;¹⁵ and
- prolonged interrogation over an unreasonably extended period of time,¹⁶ including interrogation of a duration that might not seem

¹² 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).

¹³ *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 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).

¹⁴ *Hope v. Pelzer*, 536 U.S. 730 (2002).

¹⁵ *Chandler v. Crosby*, 379 F.3d 1278 (11th Cir. 2004).

¹⁶ *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).

unreasonable in a vacuum, but becomes such when evaluated in the totality of the circumstances.¹⁷

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 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;¹⁸
- solitary or isolated confinement, so long as such confinement is within a cell in acceptable condition and is not of an unreasonable duration;¹⁹ and
- in detention situations, the use of constant lighting in prisoner cells when the detainees’ inconvenience and discomfort is outweighed by the need to protect safety and welfare of the other detainees and staff.²⁰

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 are expressly prohibited from being used in conjunction with intelligence interrogations:

- 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;

¹⁷ 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).

¹⁸ *Rhodes v. Chapman*, 452 U.S. 337 (1981).

¹⁹ *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.

²⁰ *Shanks v. Litscher*, 02-C-0064-C, 2003 U.S. Dist. Lexis 24590 (W.D. Wis. January 29, 2003).

- 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.²¹

In addition, the Manual restricts the use of other interrogation techniques, but these restrictions may be due to other legal obligations besides those imposed by the McCain Amendment.²²

In October 2007, the *New York Times* reported that in early 2005, the Department of Justice issued a legal opinion, which remains classified, authorizing the use of certain harsh interrogation techniques against terrorist suspects, including head-slapping, simulated drowning (waterboarding), and exposure to frigid temperatures.²³ Later that year, as Congress considered enactment of the McCain Amendment, the DOJ reportedly issued another classified opinion declaring that these techniques would not be barred under the McCain Amendment, at least when employed against terrorist suspects with crucial information regarding a future terrorist attack.²⁴ According to the *New York Times*, the memorandums “remain in effect, and their legal conclusions have been confirmed by several more recent memorandums” that are not publicly available.²⁵ The opinions have been the subject of controversy, with some Members of Congress disputing their legal conclusions and claiming that they had been unaware of the opinions’ existence at the time the McCain Amendment was considered.²⁶

²¹ 2006 FM, *supra* note 3, at 5-75.

²² 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.* at Appendix M.

²³ Scott Shane, et al., *Secret U.S. Endorsement Of Severe Interrogations*, NY TIMES, October 4, 2007, at A1.

²⁴ *Id.*

²⁵ *Id.*

²⁶ David Johnson and Scott Shane, *Debate Erupts On Techniques Used by C.I.A.*, NY TIMES, October 5, 2007, at A1. The McCain Amendment does not describe the type of interrogation techniques that were believed to constitute “cruel, inhuman, or degrading treatment.” During Senate consideration of the legislation, Senator Richard Durbin, a co-sponsor of the McCain Amendment, suggested that waterboarding, exposure to frigid temperatures, and sleep deprivation were “examples of conduct that is clearly prohibited by the McCain
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For its part, the White House has claimed that appropriate congressional committees or Members were informed about interrogation techniques that had been approved by the Administration.²⁷ According to CIA director Michael Hayden, the CIA has waterboarded three high-level Al Qaeda suspects but has not used the technique since 2003.²⁸ Gen. Hayden further stated in congressional testimony that waterboarding is not a part of the current CIA interrogation program, and that “it is not certain that the technique would be considered to be lawful under current statute.”²⁹

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 legal protections and assistance to U.S. personnel engaged in authorized interrogations.³⁰ 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 originally permitted the U.S. government to employ legal counsel for and pay the court costs of U.S. personnel in any legal

²⁶ (...continued)

[A]mendment.” 151 CONG.REC. S14274 (December 21, 2005).

²⁷ See Sheryl Gay Stolberg, *Bush Says Interrogation Methods Aren't Torture*, NY TIMES, October 6, 2007, at A1 (quoting President Bush as stating that approved interrogation techniques were “fully disclosed” to appropriate Members); White House Office of the Press Secretary, Press Briefing by White House Press Secretary Dana Perino, October 5, 2007, available at [<http://www.whitehouse.gov/news/releases/2007/10/20071005-4.html>] (claiming that appropriate congressional committees were “fully briefed” regarding approved interrogation methods).

²⁸ *Hearing on Annual Threat Assessment Before the Senate Select Committee on Intelligence*, CQ Transcriptions, February 5, 2008 (response by CIA director General Michael Hayden to question posed by Senator Bond).

²⁹ *Hearing on Annual World Wide Threat Assessment Before the House Permanent Select Committee on Intelligence*, February 7, 2008 (statement by CIA director General Michael Hayden during questioning).

³⁰ P.L. 109-148, Title X, § 1004; P.L. 109-163, Title XIV, § 1404.

actions brought against them in foreign judicial tribunals and administrative agencies on account of such persons' participation in authorized interrogations. The Military Commissions Act of 2006 (MCA, P.L. 109-366) subsequently amended 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.³¹

Effects of *Hamdan v. Rumsfeld* and the MCA

In the 2006 case of *Hamdan v. Rumsfeld*,³² 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. Among other things, Common Article 3 prohibits protected persons from being subjected to violence, outrages upon personal dignity, torture, and cruel or degrading treatment. As a result of the Court's ruling in *Hamdan*, questions arose regarding permissible interrogation tactics that could 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,³³ which made it a criminal offense to commit *any* violation of Common Article 3. Several bills introduced in response to the *Hamdan* decision contained provisions that referenced the McCain Amendment. One of these proposals, the Military Commissions Act of 2006, was signed into law on October 17, 2006.³⁴

³¹ P.L. 109-366, § 8(a) (2006).

³² 126 S.Ct. 2749 (2006).

³³ 18 U.S.C. § 2441. For background on the War Crimes Act and the amendments made to it by the MCA, see CRS Report RL33662, *The War Crimes Act: Current Issues*, by Michael John Garcia.

³⁴ On September 6, 2006, the Bush Administration submitted draft legislation to Congress authorizing military commissions to try detainees, amending the War Crimes Act, and specifying conduct complying with Common Article 3. White House Press Release, *Fact Sheet: The Administration's Legislation to Create Military Commissions* (September 6, 2006), available at [<http://www.whitehouse.gov/news/releases/2006/09/20060906-6.html>]; Draft Legislation, Military Commissions Act of 2006, available at [<http://www.law.georgetown.edu/faculty/nkk/documents/MilitaryCommissions.pdf>]. In response, several legislative proposals were thereafter introduced concerning these matters, including S. 3901, the Military Commissions Act of 2006, introduced by Senator John Warner; S. 3861, the Bringing Terrorists to Justice Act of 2006 and S. 3886, the Terrorist Tracking, Identification, and Prosecution Act of 2006, both introduced by Senator Bill Frist; and H.R. 6054, the Military Commissions Act of 2006, introduced by Representative Duncan Hunter. S. 3861, S. 3886, and H.R. 6054 were largely identical to the draft legislation proposed by the Bush Administration, while S. 3901 somewhat differed. Soon thereafter, three other bills were introduced: S. 3929 and S. 3930, which were both entitled the Military Commissions Act of 2006 and were introduced by Senator Mitch McConnell; and H.R. 6166, also entitled the Military Commissions Act of 2006, which was introduced by Representative Duncan Hunter. Reportedly, S. 3929/S. 3930 and H.R. 6166 reflected an agreement reached by the Bush Administration and certain lawmakers to resolve differences

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With respect to criminal conduct, the MCA amended 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 was previously the case).³⁵ While the MCA expressly criminalized torture and certain less severe forms of cruel treatment against persons protected by Common Article 3,³⁶ it did *not* criminalize all conduct that violates the standards of the McCain Amendment (i.e., cruel, inhuman, or degrading treatment of the kind prohibited under the Fifth, Eighth, and Fourteenth Amendments).³⁷ The MCA also retroactively applied the McCain Amendment's provision establishing a defense for U.S. personnel relating to the authorized 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 (i.e., the date that the McCain Amendment was enacted).³⁸

The MCA also included provisions concerning authorized conduct under Common Article 3 more generally. Under U.S. treaty obligations, U.S. personnel cannot commit *any* violation of Common Article 3, even though the MCA amended the War Crimes Act so that U.S. personnel would only be subject to criminal penalty for *severe* violations of Common Article 3. The MCA provided that it is generally a violation of Common Article 3 to engage in conduct (1) inconsistent with the McCain Amendment or (2) enumerated in the War Crimes Act, as amended by the

³⁴ (...continued)

in the approach taken by S. 3901 and that taken by S. 3861, S. 3886, and H.R. 6054. Kate Zernike & Sheryl Gay Stolberg, *Differences Settled in Deal Over Detainee Treatment*, NY TIMES, September 23, 2006, at A9. H.R. 6166 was passed by the House on September 27, 2006, while S. 3930 was passed by the Senate on September 28, 2006, and by the House on September 29, 2006. Although the provisions of S. 3929/S. 3930 and H.R. 6166 were largely similar, there were initially some differences between the bills. However, S. 3930 was subsequently amended so that it contained the same provisions as House-passed H.R. 6166, and this amended version of S. 3930 was thereafter passed by the House and Senate and enacted as P.L. 109-366.

³⁵ P.L. 109-366, § 6(b).

³⁶ 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.

³⁷ See CRS Report RL33662, *supra* note 33, at 6-8. One proposal considered by the 109th Congress, S. 3901, would have amended the War Crimes Act to expressly criminalize treatment of persons protected under Common Article 3 that violated McCain Amendment standards. Similar legislation has been introduced in 110th Congress. See H.R. 1415 (introduced March 8, 2007); S 576 (introduced February 13, 2007).

³⁸ P.L. 109-366, § 8(b). The MCA did not directly amend the McCain Amendment's provision providing an affirmative defense to persons who engaged in authorized interrogations. Accordingly, even though the MCA specifies that the McCain Amendment's affirmative defense provision applies retroactively to certain criminal prosecutions, this specification arguably does not limit the Amendment's application to other criminal or civil actions involving authorized interrogation methods.

MCA, as constituting a “grave breach” of Common Article 3.³⁹ It should be noted that most, if not all, activities specified by the War Crimes Act, as amended, as “grave breaches” of Common Article 3 (e.g., rape, murder, torture, cruel treatment) are probably already impermissible under McCain Amendment standards. Additionally, the McCain Amendment arguably imposes less stringent requirements concerning the treatment of detainees than the plain text of Common Article 3, and may permit U.S. personnel to engage in more aggressive means of interrogation than Common Article 3 might otherwise allow.⁴⁰

The MCA also authorized the President, pursuant to an Executive Order published in the *Federal Register*, to more restrictively interpret the meaning and application of Convention requirements and promulgate administrative regulations implementing this interpretation.⁴¹ Although the President is generally permitted to interpret the Geneva Conventions so as to enlarge the scope of conduct deemed not to violate them, the act did not permit the President to interpret and apply the Conventions so as to permit “grave breaches.”⁴² Presidential interpretations of the Conventions are deemed authoritative (if published and concerning non-grave breaches) as a matter of U.S. law to the same degree as other administrative regulations, though judicial review of such interpretations might be more limited.⁴³

The MCA amended 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.⁴⁴

In addition, the act included a provision restating the McCain Amendment’s prohibition on cruel, inhuman, and degrading treatment or punishment of persons under the detention, custody, or control of the U.S. Government. It further required

³⁹ *Id.*, § 6(a).

⁴⁰ For example, it is unclear whether the McCain Amendment’s prohibition upon “cruel, inhuman, and degrading treatment” is coextensive with Common Article 3’s restrictions on “violence against the person” and “outrages upon personal dignity.”

⁴¹ P.L. 109-366, § 6(a)(3).

⁴² *Id.*

⁴³ The MCA prohibits the Geneva Conventions from being invoked in habeas or civil proceedings to which the United States or a current or former agent of the United States is a party. This bar could be interpreted in a fashion that would prevent any judicial challenge to the interpretation and application of the Conventions except in criminal proceedings. Persons might still be able to indirectly challenge the application of the Conventions in some non-criminal cases, to the extent that Convention provisions are incorporated into another source of law that may be invoked in a judicial proceeding. The Military Commission Act also revoked U.S. courts’ jurisdiction to hear habeas corpus petitions by aliens in U.S. custody as enemy combatants. *Id.*, § 7. The constitutionality of the MCA’s provisions limiting habeas jurisdiction and prohibiting the Geneva Conventions from being invoked as a source of rights in judicial proceedings has been subject to legal challenge. For background and development of recent litigation, see generally CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Kenneth R. Thomas.

⁴⁴ P.L. 109-366, § 8(a).

the President to establish administrative rules and procedures ensuring compliance with this provision.⁴⁵ Accordingly, it would appear that detainees are required in all circumstances to be treated in a manner consistent with McCain Amendment standards, even if the President interprets the Geneva Conventions as not requiring such treatment.

Post-MCA Developments Regarding the Treatment of Detainees

As previously mentioned, the MCA authorizes the President, acting pursuant to an Executive Order published in the Federal Register, to more restrictively interpret the meaning and application of Common Article 3 of the Geneva Convention, and promulgate administrative regulations implementing this interpretation,⁴⁶ so long as these rules do not authorize conduct subject to criminal penalty under the War Crimes Act.

On July 20, 2007, President Bush signed an Executive Order interpreting Common Article 3, as applied to the detention and interrogation of certain alien detainees by the CIA, when those aliens (1) are determined to be members or supporters of Al Qaeda, the Taliban, or associated organizations; and (2) likely possess information that could assist in detecting or deterring a terrorist attack against the United States and its allies, or could provide help in locating senior leadership within Al Qaeda or the Taliban.⁴⁷ The Executive Order does not specifically authorize the use of any particular interrogation techniques with respect to detainees, but instead bars any CIA detention and interrogation program from employing certain practices. Specifically, the Order prohibits the use of

- torture, as defined under the Federal Torture Statute (18 U.S.C. § 2340);
- cruel, inhuman, and degrading treatment, as defined under the McCain Amendment and the MCA;
- any activities subject to criminal penalties under the War Crimes Act (e.g., murder, rape, mutilation);
- other acts of violence serious enough to be considered comparable to the kind expressly prohibited under the War Crimes Act;
- willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose

⁴⁵ *Id.*, § 6(c).

⁴⁶ P.L. 109-366, § 6(a)(3).

⁴⁷ Executive Order 13340, *Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*, 72 FED. REG. 40707 (July 20, 2007). The Executive Order may also be viewed at [<http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html>].

- sexually, threatening the individual with sexual mutilation, or using the individual as a human shield; or
- acts intended to denigrate the religion, religious practices, or religious objects of the individual.

The scope of activity prohibited by the Order is not immediately apparent. Although some types of conduct barred by the Order are easily recognizable (e.g., murder, rape, the performance of sexual acts), it is not readily apparent as to what interrogation techniques would fall under the Order's prohibition against acts deemed to be "cruel, inhuman, and degrading" or "beyond the bounds of human decency." Certain interrogation techniques that have been the subject of controversy and are expressly prohibited from being used by the military under the most recent version of the Army Field Manual — waterboarding, hooding, sleep deprivation, or forced standing for prolonged periods, for example — are not specifically addressed by the Order. Whether or not such conduct is deemed by the Executive to be barred under the more general restrictive language of the Order remains unclear.

In a public address on September 7, 2007, CIA director General Michael Hayden stated that "no one ever claimed that the Army Field Manual exhausted all the lawful tools that America could have to protect itself," and suggested that additional interrogation techniques may be employed by the CIA than are permitted to be used by DOD personnel.⁴⁸ Nonetheless, as discussed previously, the CIA has apparently stopped using some interrogation techniques, including waterboarding, which are expressly prohibited under Army Field Manual standards.⁴⁹

Recent Legislative Developments

In the 110th Congress, several pieces of legislation have been introduced that are intended to limit the use of certain interrogation techniques against security detainees by members of the intelligence community. One measure proposed in several pieces of legislation would require the CIA to use only those interrogation techniques that are authorized by under the Army Field Manual. As previously discussed, the Field Manual expressly bars several interrogation techniques, including waterboarding, which are deemed to be inconsistent with the McCain Amendment's prohibition on cruel, inhuman, and degrading treatment. More broadly, the Manual restricts the use of a number of other techniques (though not necessarily because they are incompatible with McCain Amendment requirements), including, for example, the use of "good cop, bad cop" interrogation tactics or the separation of detainees during interrogation without special approval.⁵⁰

The White House has indicated that the President would veto legislation requiring the CIA to use only those interrogation techniques authorized under the

⁴⁸ Transcript of Remarks by Central Intelligence Agency Director General Michael V. Hayden at the Council on Foreign Relations, September 7, 2007, *available at* [<https://www.cia.gov/news-information/speeches-testimony/general-haydens-remarks-at-the-council-on-foreign-relations.html>] (rush transcript).

⁴⁹ *Supra* at 8.

⁵⁰ *See supra* note 23; 2006 FM, *supra* note 3, at 8-65 to 8-71, Appendix M.

Army Field Manual. In a statement released on November 16, 2007, the White House claimed that such legislation would “jeopardize the safety of the American people by undermining the CIA’s enhanced interrogation program, which has helped the United States capture senior al Qaeda leaders and disrupt multiple attacks against the homeland.”⁵¹ The White House also alleged that legislation requiring all security detainees to be treated in accordance with Field Manual provisions would not be “consistent with the President’s obligation to take all lawful measures to protect the citizens of the United States from future attacks.”⁵²

H.R. 2082, the Intelligence Authorization Act for Fiscal Year 2008, as reported out of conference on December 6, 2007, would generally have barred any person, in the custody or effective control of either an element of the intelligence community or a contractor or subcontractor of the intelligence community, from being subjected to any treatment or interrogation tactic not authorized by the Army Field Manual. This prohibition would have effectively barred the CIA and others from employing certain controversial interrogation techniques, such as waterboarding or sleep deprivation, that are barred by the Army Field Manual, regardless of whether the intelligence community had previously deemed such techniques as legally permissible. H.R. 2082 would not have prohibited the Army Field Manual from being revised in the future, meaning that the scope of prohibited conduct could potentially be modified. H.R. 2082 also contained a provision requiring the Director of National Intelligence to report to appropriate committees concerning detention or interrogation methods approved or discontinued following enactment of the McCain Amendment and MCA, along with the legal basis behind the decision to approve or rescind authorization of such techniques. The version of H.R. 2082 reported out of conference was passed by the House on December 13, 2007, and the Senate on February 13, 2008. The bill was subsequently vetoed by President Bush on March 8, 2008.⁵³ The House voted to approve the bill on March 13, 2008, by a vote of 225-

⁵¹ Executive Office of the President, *Statement of Administration Policy: H.R. 4156 — Making Emergency Supplemental Appropriations for the Department of Defense for the Fiscal Year Ending September 30, 2008, and for other purposes*, November 16, 2007, available at [<http://www.whitehouse.gov/omb/legislative/sap/110-1/hr4156sap-h.pdf>].

⁵² *Id.*

⁵³ In a radio address delivered on March 8, 2008, President Bush explained his reason for vetoing H.R. 2082, claiming that it would have

take[n] away one of the most valuable tools in the war on terror — the CIA program to detain and question key terrorist leaders and operatives. This program has produced critical intelligence that has helped us prevent a number of attacks. The program helped us stop a plot to strike a U.S. Marine camp in Djibouti, a planned attack on the U.S. consulate in Karachi, a plot to hijack a passenger plane and fly it into Library Tower in Los Angeles, and a plot to crash passenger planes into Heathrow Airport or buildings in downtown London. And it has helped us understand al Qaida’s structure and financing and communications and logistics. Were it not for this program, our intelligence community believes that al Qaida and its allies would have succeeded in launching another attack against the American homeland.

Limiting the CIA’s interrogation methods to those in the Army Field Manual

(continued...)

188, but failed to muster the two-thirds majority necessary to override the President's veto.

H.R. 4156, the Orderly and Responsible Iraq Redeployment Appropriations Act, 2008, which was passed by the House on November 14, 2007, would have generally barred all federal agencies, including the CIA, from using any treatment or interrogation tactic that is not authorized or listed by the Army Field Manual. Agencies would still be permitted to use non-Field Manual standards with respect to any individual being held pursuant to U.S. criminal or immigration laws. On November 16, 2007, the Senate failed to invoke cloture on a motion to proceed with consideration of H.R. 4156. H.R. 4114, introduced by Representative Nadler on November 8, 2007; S. 1943, introduced by Senator Kennedy on August 2, 2007; and S. 1876, introduced by Senator Biden on July 5, 2007, would impose similar requirements as H.R. 4156. However, S. 1943 would also independently bar the use of the eight techniques described in the 2006 Field Manual as constituting "cruel, inhuman, or degrading treatment."⁵⁴

S. 576, introduced by Senator Dodd on February 13, 2007, and a companion bill, H.R. 1415, introduced by Representative Nadler on March 8, 2007, would modify MCA and War Crimes Act provisions concerning the interrogation of detainees. Among other things, both bills would amend the War Crimes Act to criminalize treatment of protected persons which violated McCain Amendment standards, or which denied such persons the right to be tried for war crimes before a regularly constituted court. The two bills would also amend the MCA by requiring the President to notify Geneva Convention parties that the United States expects U.S. persons detained in a conflict not of an international character to be treated in a manner consistent with U.S. interpretation and application of Common Article 3.

H.R. 5460, introduced by Representative Eshoo, would amend the McCain Amendment to expressly list waterboarding as an impermissible form of cruel, inhuman, or degrading treatment. H.R. 5460 would also amend the definition of "torture" under Federal Torture Statute (18 U.S.C. § 2340) to expressly describe waterboarding as a form of torture subject to criminal penalty.

⁵³ (...continued)

would be dangerous because the manual is publicly available and easily accessible on the Internet. Shortly after 9/11, we learned that key al Qaida operatives had been trained to resist the methods outlined in the manual. And this is why we created alternative procedures to question the most dangerous al Qaida operatives, particularly those who might have knowledge of attacks planned on our homeland. The best source of information about terrorist attacks is the terrorists themselves. If we were to shut down this program and restrict the CIA to methods in the Field Manual, we could lose vital information from senior al Qaida terrorists, and that could cost American lives.

White House Office of the Press Secretary, Transcript of President's Radio Address, March 8, 2008, available at [<http://www.whitehouse.gov/news/releases/2008/03/20080308.html>].

⁵⁴ See *supra* at 6-7.