



Interrogation of Detainees: Requirements of the Detainee Treatment Act

Michael John Garcia
Legislative Attorney

August 26, 2009

Congressional Research Service

7-5700

www.crs.gov

RL33655

Summary

U.S. treatment of enemy combatants and terrorist suspects captured in Afghanistan, Iraq, and other locations has been a subject of long-standing debate, including whether such treatment complies with U.S. statutes and treaties such as the 1949 Geneva Conventions and the U.N. Convention Against Torture (CAT). In response to this controversy, 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 provisions of the DTA concerning standards for the interrogation and treatment of detainees.

This report discusses the application of the DTA 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 DTA. It also addresses the Executive Order issued by President Barack Obama that generally instructs all U.S. agencies to comply with Army Field Manual requirements when interrogating persons captured in an armed conflict. The report also discusses the recommendations made by the Special Task Force on Interrogation and Transfer established by the Executive Order, and the DTA’s relevance in the event of the prosecution of U.S. personnel for authorized interrogation or detention activities. For 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, Kenneth R. Thomas, and Michael John Garcia.

Several legislative proposals were introduced during the 110th Congress that referenced or modified the DTA’s requirements relating to the treatment and interrogation of detainees, including H.R. 2082, the Intelligence Authorization Act for Fiscal Year 2008, which was vetoed by President Bush on March 8, 2008, and House-passed H.R. 4156, the Orderly and Responsible Iraq Redeployment Appropriations Act, 2008. Both bills would have barred the CIA and other intelligence agencies from employing any interrogation tactic that is not authorized by the Army Field Manual. Similar proposals have been introduced in the 111th Congress. It remains to be seen whether President Obama’s recent Executive Order on detainee treatment will affect congressional interest in passing further legislation affecting U.S. interrogation policy.

Contents

Outline and Analysis of Relevant DTA Provisions	1
Applying U.S. Army Field Manual Standards	1
Prohibition on Cruel, Inhuman, or Degrading Treatment or Punishment.....	2
Protection of U.S. Personnel Engaged in Authorized Interrogations	5
Post-DTA Developments Concerning the Interrogation and Treatment of Detainees.....	6
Updated Army Field Manual	6
Effects of <i>Hamdan v. Rumsfeld</i> and the MCA.....	7
Post-DTA Standards for Treatment of Detainees by Intelligence Agencies during the Bush Administration	9
Executive Order by President Obama Imposing New Interrogation Standards.....	11
Task Force Recommendations	11
Potential Implications of DTA upon Criminal Investigation Concerning Detainee Treatment.....	12
Recent Legislative Developments.....	14

Contacts

Author Contact Information	16
----------------------------------	----

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 DTA also provides legal protections and assistance to U.S. personnel engaged in the authorized interrogation of a terrorist suspect.

Outline and Analysis of Relevant DTA Provisions

The DTA contains three provisions relevant to the interrogation of detainees, which are described in the following sections.

Applying U.S. Army Field Manual Standards

The DTA 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 DTA, the DOD had authorized certain interrogation techniques for possible use in the interrogation of security detainees whom the Bush Administration deemed to be ineligible for prisoner of war status under the Geneva

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 Fiscal Year 2006 (P.L. 109-163), as amended and passed by the House and Senate, was signed into law on January 6, 2006.

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

³ At the time the DTA 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 2-22.3 (FM 34-52), HUMAN INTELLIGENCE COLLECTOR OPERATIONS (2006) (hereinafter “2006 FM”), available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/armyfm2223humanintel.pdf>.

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 DTA 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 DTA 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 DTA 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 DTA 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 DTA 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 DTA, 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 DTA 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

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>.

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.

In interpreting whether treatment falls below this standard, the DTA 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 Fourteenth Amendments.⁹ However, noncitizens who have not entered the United States have historically been recognized as receiving few, if any, constitutional protections.¹⁰ In the 2008 case of *Boumediene v. Bush*, the Supreme Court held that the constitutional writ of *habeas corpus* extends to noncitizen detainees held at Guantanamo, in significant part because Guantanamo, while not technically part of the United States, is nonetheless subject to its complete control.¹¹ The Court’s opinion did not address the extent to which other constitutional protections extend to Guantanamo detainees, and it suggested that noncitizens held by the United States in foreign territories where U.S. control was less absolute than Guantanamo would be afforded even lesser protections.¹²

The DTA 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 DTA 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.¹³

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

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.

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”).

¹¹ *Boumediene v. Bush*, 553 U.S. ___, 128 S.Ct. 2229 (2008).

¹² *See id.* at 2262 (noting that the Court had never before found that the noncitizens detained in another country’s territory have any rights under the U.S. Constitution, but concluding that the case before it “lack[ed] any precise historical parallel”). Notably, the Court did not overrule its decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where it held that the constitutional writ of *habeas* did not extend to enemy aliens held in postwar Germany. Instead, the Court distinguished the two cases, and noted that unlike the petitioners in *Eisentrager*, the Guantanamo detainees denied they were enemy combatants and the government’s control over post-WWII German territory was not nearly as complete as its control over Guantanamo. *Boumediene*, 128 S. Ct. at 2259-2260.

¹³ The DTA 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 noncitizens 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.

debate.¹⁴ The types of acts that fall within “cruel, inhuman, or degrading treatment or punishment” contained in the DTA 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.¹⁵ 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”;¹⁶
- maintaining temperatures and ventilation systems in detention facilities that fail to meet reasonable levels of comfort;¹⁷ and
- prolonged interrogation over an unreasonably extended period of time,¹⁸ including interrogation of a duration that might not seem unreasonable in a vacuum, but becomes such when evaluated in the totality of the circumstances.¹⁹

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*:

¹⁴ 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).

¹⁵ *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).

¹⁶ *Hope v. Pelzer*, 536 U.S. 730 (2002).

¹⁷ *Chandler v. Crosby*, 379 F.3d 1278 (11th Cir. 2004).

¹⁸ *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).

¹⁹ *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).

- 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;²⁰
- solitary or isolated confinement, so long as such confinement is within a cell in acceptable condition and is not of an unreasonable duration;²¹ 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.²²

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.

As discussed later, the Army subsequently released an updated version of the Field Manual to implement requirements of the DTA, including the prohibition upon “cruel, inhuman, or degrading treatment or punishment.”

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 DTA, providing legal protections and assistance to U.S. personnel engaged in authorized interrogations.²³ As modified, the DTA 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 DTA 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 DTA 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 DTA originally permitted 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. The Military Commissions Act of 2006 (MCA, P.L. 109-366) subsequently amended the DTA to require the federal government to provide or employ counsel and pay fees

²⁰ Rhodes v. Chapman, 452 U.S. 337 (1981).

²¹ 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.

²² Shanks v. Litscher, 02-C-0064-C, 2003 U.S. Dist. Lexis 24590 (W.D. Wis. January 29, 2003).

²³ P.L. 109-148, Title X, § 1004; P.L. 109-163, Title XIV, § 1404.

related to any prosecution or civil action against U.S. personnel for authorized detention or interrogation activities.²⁴

Post-DTA Developments Concerning the Interrogation and Treatment of Detainees

In the years following the enactment of the DTA, the standards governing the interrogation and treatment of detainees have been further modified by executive, legislative, and judicial action. Most recently, President Barack Obama has issued an Executive Order which generally requires all U.S. agencies conducting interrogations of persons during armed conflicts to comply with Army Field Manual requirements. The following paragraphs discuss notable developments concerning standards for detainee treatment since the DTA was enacted.

Updated Army Field Manual

On September 6, 2006, the Army released an updated version of the Field Manual that implements the requirements of the DTA. The Manual prohibits cruel, inhuman, and degrading treatment. Notably, 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;
- 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.²⁵

The Field Manual specifically authorizes 19 interrogation techniques, some of which require higher-level authorization to be performed - i.e., “Mutt and Jeff,” a “good cop, bad cop” interrogation tactic where a detainee is made to identify with the friendlier interrogator; “false flag,” where a detainee is made to believe he is being held by another country known to subject prisoners to harsh interrogation; and separation, an interrogation tactic by which detainees are separated so that they cannot coordinate their stories, which is barred from use against “lawful” prisoners of war.²⁶

²⁴ P.L. 109-366, § 8(a) (2006).

²⁵ 2006 FM, *supra* footnote 3, at 5-75.

²⁶ *Id.* at Chapter 8 and Appendix M. 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.

Effects of *Hamdan v. Rumsfeld* and the MCA

In the 2006 case of *Hamdan v. Rumsfeld*,²⁷ 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,²⁸ 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 DTA. One of these proposals, the Military Commissions Act of 2006, was signed into law on October 17, 2006.²⁹

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).³⁰ While the MCA expressly criminalized torture and certain less severe forms of cruel treatment against persons protected by Common Article 3,³¹ it did *not* criminalize all conduct that violates the standards of the DTA (i.e., cruel, inhuman, or degrading treatment of the kind prohibited under the Fifth, Eighth, and Fourteenth Amendments).³² The MCA also retroactively applied the DTA's provision establishing

²⁷ 126 S.Ct. 2749 (2006).

²⁸ 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.

²⁹ 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); 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 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.

³⁰ P.L. 109-366, § 6(b).

³¹ 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.

³² See CRS Report RL33662, *The War Crimes Act: Current Issues*, *supra* footnote 28. 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 DTA standards. Similar legislation has been introduced in 110th (continued...)

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 DTA was enacted).³³

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 DTA or (2) enumerated in the War Crimes Act, as amended by the MCA, as constituting a “grave breach” of Common Article 3.³⁴ 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 DTA standards. Additionally, the DTA 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.³⁵

The MCA also authorized the President, pursuant to an Executive Order published in the *Federal Register*, to interpret the meaning and application of Convention requirements and promulgate administrative regulations implementing this interpretation.³⁶ Although the President is generally permitted to interpret the Geneva Conventions, the act did not permit the President to interpret and apply the Conventions so as to permit “grave breaches.”³⁷ 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.³⁸

(...continued)

Congress. See H.R. 1415 (introduced March 8, 2007); S. 576 (introduced February 13, 2007).

³³ P.L. 109-366, § 8(b). The MCA did not directly amend the DTA’s provision providing an affirmative defense to persons who engaged in authorized interrogations. Accordingly, even though the MCA specifies that the DTA’s affirmative defense provision applies retroactively to certain criminal prosecutions, this specification arguably does not limit the DTA’s application to other criminal or civil actions involving authorized interrogation methods.

³⁴ *Id.*, § 6(a).

³⁵ For example, it is unclear whether the DTA’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.”

³⁶ P.L. 109-366, § 6(a)(3).

³⁷ *Id.*

³⁸ 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. See *Noriega v. Pastrana*, 564 F.3d 1290 (11th Cir. 2009) (MCA precluded petitioner, a designated prisoner of war under the Geneva Conventions, from invoking Conventions in challenge to his proposed extradition to France). 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 MCA 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, Kenneth R. Thomas, and (continued...)

The MCA amended the DTA 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.³⁹

In addition, the act included a provision restating the DTA'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 the President to establish administrative rules and procedures ensuring compliance with this provision.⁴⁰ Accordingly, it would appear that detainees are required in all circumstances to be treated in a manner consistent with DTA standards.

Post-DTA Standards for Treatment of Detainees by Intelligence Agencies during the Bush Administration

As previously mentioned, the MCA authorizes the President, acting pursuant to an Executive Order published in the Federal Register, to interpret the meaning and application of Common Article 3 of the Geneva Convention, and promulgate higher standards and administrative regulations for violations of Geneva Convention obligations, except as they involve "grave breaches" of the Conventions.⁴¹

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.⁴² The Executive Order did not specifically authorize the use of any particular interrogation techniques with respect to detainees, but instead barred any CIA detention and interrogation program from employing certain practices. Specifically, the Order prohibited 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 DTA 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,

(...continued)

Michael John Garcia.

³⁹ P.L. 109-366, § 8(a).

⁴⁰ *Id.*, § 6(c).

⁴¹ P.L. 109-366, § 6(a)(3).

⁴² 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).

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 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.

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 fell 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 or restricted from being used by the military under the most recent version of the Army Field Manual—waterboarding, hooding, sleep deprivation,⁴³ or forced standing for prolonged periods, for example—were not specifically addressed by the Order. Whether or not such conduct was deemed by Bush Administration officials to be barred under the more general restrictive language of the Order is unclear.

On the same day the Executive Order was issued, the Department of Justice Office of Legal Counsel issued a legal opinion which concluded that six "enhanced interrogation techniques," when used with specified conditions and safeguards, could be employed by the CIA against high value detainees belonging to Al Qaeda and affiliated groups without violating the DTA, War Crimes Act, or Common Article 3. These techniques included

- dietary manipulation, with a minimum caloric intake depending on the detainee's body weight and physical activity;
- extended sleep deprivation for up to 96 hours and no more than 180 hours over a 30-day period (including through the use of physical restraints to prevent the detainee from falling asleep);
- a "facial hold" to briefly keep the detainee's head immobile during an interrogation;
- an "attention grasp," in which an individual would be grabbed on each side of a collar opening for a few seconds;
- abdominal slaps; and
- insult or facial slaps.⁴⁴

This memorandum was subsequently withdrawn by the OLC in June 2009, after it concluded that the memorandum no longer reflected its views.⁴⁵

⁴³ See 2006 FM, *supra* footnote 3, at Appendix M (requiring detainees who are subjected to the restricted interrogation technique of separation to receive at least four hours of continuous sleep every 24 hours)

⁴⁴ Department of Justice, Office of Legal Counsel, "Memorandum Regarding Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques That May Be Used by the CIA in the Interrogation of High-level Al Qaeda Detainees," July 20, 2007, available at http://www.washingtonpost.com/wp-srv/nation/documents/2007_0720_OLC_memo_warcrimesact.pdf.

⁴⁵ Department of Justice, Office of Legal Counsel, "Withdrawal of Office of Legal Counsel Opinion," June 11, 2009, available at http://www.washingtonpost.com/wp-srv/nation/documents/2009_0611_OLC_Barron_memo.pdf.

Executive Order by President Obama Imposing New Interrogation Standards

On January 22, 2009, President Barack Obama issued Executive Order 13491, which rescinded President Bush's order of July 20, 2007, and instituted new requirements for interrogation by the CIA and other agencies. The new Order generally bars anyone in U.S. custody or control while in an armed conflict from being subjected to any interrogation technique or treatment other than that authorized under the Army Field Manual.⁴⁶ The Order does not preclude federal law enforcement agencies from continuing to "use authorized, non-coercive techniques of interrogation that are designed to elicit voluntary statements and do not involve the use of force, threats, or promises."⁴⁷

The Executive Order also provides that when conducting interrogations, U.S. government officials, employees, and agents may not rely on any interpretation of the law governing interrogations issued by the Department of Justice between September 11, 2001 and January 20, 2009 (i.e., the final day of the Bush Administration), absent further guidance from the Attorney General. It further establishes a Special Interagency Task Force on Interrogation and Transfer Policies (Task Force), chaired by the Attorney General, which was required

to study and evaluate whether the interrogation practices and techniques in [the] Army Field Manual ... when employed by departments or agencies outside the military, provide an appropriate means of acquiring the intelligence necessary to protect the Nation, and, if warranted, to recommend any additional or different guidance for other departments or agencies....⁴⁸

The Task Force was required to issue a report to the President of its recommendations within 180 days of the Order's issuance, unless the Task Force Chairman (the Attorney General) deemed an extension to be appropriate. In July, the Chairman extended the deadline for the Task Force's final report by two months.⁴⁹

Task Force Recommendations

On August 24, 2009, the Task Force issued recommendations to the President on U.S. interrogation and transfer policies. According to the announcement, the Task Force concluded, based upon the unanimous assessment of its members, that "the practices and techniques identified by the Army Field Manual or currently used by law enforcement provide adequate and effective means of conducting interrogations."⁵⁰ The Task Force concluded that no additional or further guidance on interrogation was necessary for interrogators within the military or non-

⁴⁶ Executive Order No. 13491, "Ensuring Lawful Interrogations," 74 FED. REG. 4893, January 22, 2009.

⁴⁷ *Id.*, § 4.

⁴⁸ *Id.*, § 5. Besides the Attorney General, the Task Force is composed of the Director of National Intelligence and the Secretary of Defense (who serve as co-vice-chairs); the Secretary of State; the Secretary of Homeland Security; the Director of the CIA; the Chairman of the Joint Chiefs of Staff; and other officers or full-time or permanent part-time employees of the United States, as determined by the Attorney General, with the concurrence of the head of the department or agency concerned.

⁴⁹ See Department of Justice, "Detention Policy Task Force Issues Preliminary Report," press release, July 21, 2009, <http://www.usdoj.gov/opa/pr/2009/July/09-ag-705.html>.

⁵⁰ Department of Justice, "Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President," press release, August 24, 2009, <http://www.usdoj.gov/opa/pr/2009/August/09-ag-835.html>.

military agencies. However, the Task Force recommended the establishment of a scientific research program for interrogation, in order to “study the comparative effectiveness of interrogation approaches and techniques, with the goal of identifying the existing techniques that are most effective and developing new lawful techniques to improve intelligence interrogations.”⁵¹

The Task Force also recommended the creation of special interrogation group to coordinate the interrogation of high-level terrorist suspects. The High-Value Detainee Interrogation Group (HIG) will be composed of experienced interrogators and support personnel from law enforcement, the Department of Defense, and the Intelligence Community. The HIG will “coordinate the deployment of mobile teams of experienced interrogators, analysts, subject matter experts and linguists to conduct interrogations of high-value terrorists if the United States obtains the ability to interrogate them.”⁵² The primary goal of HIG interrogations will be to collect intelligence to prevent terrorist attacks and deter threats to national security. Measures will also be taken, where appropriate, to preserve the option of gathering information to be used in criminal investigations and prosecutions. The Task Force also recommended that the HIG develop a set of best practices for conducting interrogations and disseminate these among agencies for training purposes.

Potential Implications of DTA upon Criminal Investigation Concerning Detainee Treatment

On August 24, 2009, Attorney General Eric Holder announced “a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations.”⁵³ According to the Attorney General, this decision was motivated by a still-classified DOJ Office of Professional Responsibility report, which recommended that the DOJ reexamine previous decisions not to pursue criminal charges in several cases relating to the treatment of detainees. The Attorney General also stated that his decision was based upon a review of other information, including a 2004 CIA Inspector General report which concluded that certain interrogation techniques employed by CIA agents and contractors were not authorized.⁵⁴

The preliminary review will be led by Assistant U.S. Attorney John Durham, who will recommend to the Attorney General whether there is sufficient predication for a full-scale criminal investigation. In announcing this review, the Attorney General emphasized “that neither the opening of a preliminary review nor, if evidence warrants it, the commencement of a full investigation, means that charges will necessarily follow.”⁵⁵ The Attorney General also reiterated his prior statements that the DOJ “will not prosecute anyone who acted in good faith and within

⁵¹ *Id.*

⁵² *Id.* The Task Force proposed that the HIG be subject to policy guidance and oversight coordinated by the National Security Council, and be administratively housed within the Federal Bureau of Investigation.

⁵³ Department of Justice, “Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees,” August 24, 2009, <http://www.usdoj.gov/ag/testimony/2009/ag-testimony-090824.html> (*hereinafter* “Holder Statement”).

⁵⁴ *Id.* See also Central Intelligence Agency Inspector General, Special Review of Counterterrorism and Detention Activities (September 2001-October 2003), May 2004, available at <http://graphics8.nytimes.com/packages/images/nytint/docs/c-i-a-reports-on-interrogation-methods/original.pdf>.

⁵⁵ P.L. 109-148, Title X, § 1004; P.L. 109-163, Title XIV, § 1404.

the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees.”⁵⁶

The DTA may have implications for the prosecution of U.S. agents for conduct involving the treatment or interrogation of wartime detainees. The DTA provides that:

In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent’s engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States ... and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that ... [the] agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should 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. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available ... or to provide immunity from prosecution for any criminal offense by the proper authorities.⁵⁷

The statutory defense provided by the DTA appears to apply only to U.S. personnel who were “engaging in specific operational practices” that had been officially authorized. It would not apply to unauthorized conduct. Whether or not conduct was “officially authorized” might be the subject of considerable scrutiny during the criminal prosecution of U.S. personnel, especially if higher-level officials were aware of the defendants’ activities at the time they occurred. The statutory defense provided by the DTA does not appear applicable to higher-level U.S. officials who may have authorized, but did not directly engage in, specific operational practices involving detention or interrogation.

In addition to this statutory defense, a number of other legal defenses could be raised by U.S. personnel should they be prosecuted for interrogation or detention activities, assuming the defendants acted with government sanction and/or had been erroneously informed by responsible authorities that their conduct was legal. Although “mistake of law” defenses are generally rejected, such defenses have been recognized by courts in certain cases where defendants have acted with government sanction or after being erroneously informed by responsible authorities that their conduct was legal. These defenses can be divided into three overlapping categories: (1) defense of entrapment by estoppel, available when a defendant is informed by a government official that certain conduct is legal, and thereafter commits what would otherwise constitute a criminal offense in reasonable reliance of this representation; (2) defense of public authority, available when a defendant reasonably relies on the authority of a government official to authorize otherwise illegal conduct, and the official has actual authority to sanction the defendant to perform such conduct; and (3) defense of apparent public authority, which is recognized by some (but not all) federal circuits, and is similar to the defense of public authority, except that the official only needs “apparent” authority to sanction the defendant’s conduct.⁵⁸

⁵⁶ Holder Statement, *supra* footnote 53.

⁵⁷ P.L. 109-148, Title X, § 1004; P.L. 109-163, Title XIV, § 1404.

⁵⁸ *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1368 n. 18 (11th Cir. 1994). Unlike the other defenses, the defense of entrapment by estoppel stems from the due process notions of fairness, rather than from common law (continued...)

Recent Legislative Developments

In the 110th Congress, several legislative proposals were introduced that were 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 have required 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. More broadly, the Manual restricts the use of a number of other techniques (though not necessarily because they are incompatible with DTA requirements), including, for example, the use of “good cop, bad cop” interrogation tactics or the separation of detainees during interrogation without special approval.⁵⁹

President Bush indicated that he would veto legislation requiring the CIA to use only those interrogation techniques authorized under the Army Field Manual. In a statement released on November 16, 2007, the Bush Administration 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.”⁶⁰ 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.”⁶¹

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. 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 DTA 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, but was subsequently vetoed by President Bush on March 8, 2008.⁶² The

(...continued)

concerning contract, equity, or agency. *United States v. Austin*, 915 F.2d 363, 366 (8th Cir. 1990).

⁵⁹ 2006 FM, *supra* note 3, at 8-65 to 8-71, Appendix M.

⁶⁰ 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>.

⁶¹ *Id.*

⁶² 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

(continued...)

House voted to approve the bill on March 13, 2008, by a vote of 225-188, 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.

Similar proposals have also been introduced in the 111th Congress. It remains to be seen whether President Obama's Executive Order on detainee treatment or the findings of the Special Interagency Task Force on Interrogation and Transfer Policies will affect congressional interest in passing further legislation affecting U.S. interrogation policy. S. 147/H.R. 374, the Lawful Interrogation and Detention Act, and H.R. 2544, the Legal Interrogation Procedures Act, would generally bar any individual in the custody or control either of an intelligence agency or a contractor or subcontractor of an intelligence agency, from being subjected to any treatment or interrogation technique not authorized by the United States Army Field Manual. Similarly, H.R. 893, the American Anti-Torture Act of 2009, would generally prohibit all U.S. agencies from employing any interrogation technique or treatment not authorized by the Army Field Manual, though this requirement would not apply with respect to any person detained under U.S. criminal or immigration laws. S. 147/H.R. 374 would also bar the CIA from permitting a contractor or subcontractor from carrying out an interrogation of an individual. H.R. 591, the Interrogation and Detention Reform Act of 2008 (*sic*), would require the President to establish uniform standards for the interrogation of persons in the custody or under the effective control of the United States, and that U.S. intelligence personnel receive training regarding the federal and international obligations and laws applicable to the humane treatment of detainees. The President would be required to submit a report to Congress concerning implementation of this requirement. S. 1494, the Intelligence Authorization Act for Fiscal Year 2010, would require the Director of National Intelligence to submit a report to the congressional intelligence committees concerning measures taken by the Intelligence Community to comply with applicable legal requirements concerning detention and interrogation activities, including those requirements contained in the DTA.

(...continued)

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 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.

Author Contact Information

Michael John Garcia
Legislative Attorney
mgarcia@crs.loc.gov, 7-3873