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Overview and Analysis of Senate Amendment Concerning Interrogation of Detainees

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Summary

On October 5, 2005, the Senate adopted a floor amendment (S.Amdt. 1977), proposed by Senator John McCain with 11 co-sponsors, that would (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.” The amendment modified the Defense Department FY2006 Appropriations bill (H.R. 2863), which had passed the House on June 20, 2005, without a comparable provision. The defense appropriations bill is currently before a conference committee.¹

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The adoption of S.Amdt. 1977 by the Senate comes amidst controversy over interrogation and detention techniques employed by the United States against enemy

¹ This report was prepared under the general supervision of Michael Garcia, legislative attorney.

² S.Amdt. 1977 to H.R. 2863 (Oct. 5, 2005)

³ Charles Babington and Shailagh Murray, “Senate Supports Interrogation Limits,” *Washington Post*, Oct. 6, 2005, p. A1.

combatants and terrorist suspects being detained in Iraq, Afghanistan, and other locations. Senate adoption of S.Amdt. 1977 followed several earlier attempts for floor votes on similar proposals.⁴

Summary and Analysis of Senate Amendment 1977

S.Amdt. 1977 contains two provisions, described in the following sections.

Applying U.S. Army Field Manual Standards. The first provision of S.Amdt. 1977 provides that no person in the custody or effective control of the DOD or under detention 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. An exception to this general requirement is made for individuals being held pursuant to U.S. criminal or immigration laws. S.Amdt. 1977 does not require non-DOD agencies, such as nonmilitary intelligence and law enforcement agencies, to employ manual guidelines with respect to interrogations they conduct.

The United States Army Field Manual addresses intelligence interrogation under FM 34-52, detailing certain procedures for the treatment and questioning of persons by military personnel.⁵ FM 34-52 also contains a section regarding the applicability of the 1949 Geneva Conventions. According to the manual, these Conventions, including the 1949 Geneva Convention on the Treatment of Prisoners of War, are to be “strictly observed and enforced by the United States Forces without regard to whether they are legally binding upon this country and its specific relations with any other specific country.”⁶ In applying these standards, the manual requires soldiers to adhere to the

⁴ During floor debate of the National Defense Authorization Act for FY2006 (S. 1042) on July 25, 2005, Senator John McCain (AZ) offered S.Amdt. 1556 and S.Amdt. 1557 to attach at the end of subtitle G of title X of the bill. Under S.Amdt. 1556, the U.S. government would be prohibited from using “cruel, inhuman, or degrading treatment or punishment” against individuals in its custody or under its control. This provision also originally included a presidential waiver clause, which was later removed by Senator McCain on July 27, 2005, for being “inconsistent with the overall intent” of the amendment.

S.Amdt. 1557 applied to the permissible interrogation techniques of DOD. Here, the United States Army Field Manual would act as the sole guide in the field to define restricted and allowable interrogation procedures. During debate of the amendment, Senator John Warner (VA), a cosponsor, offered S.Amdt. 1566, which reflected the same language of Senator McCain’s amendment, but listed the Secretary of Defense as the source for defining what interrogation techniques could be used.

While both S.Amdt. 1556 and S.Amdt. 1557 were considered and debated on the Senate floor, ultimately no action was taken regarding their passage. The National Defense Authorization Act for FY2006’s status is currently in question as it is unclear if the two houses will act to pass it this year.

⁵ Department of the Army Field Manual 34-52, Intelligence Interrogation (1992), available at [<http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/FM34-52IntelInterrogation.pdf>]

⁶ Id.

Geneva Convention's prohibition against "cruel treatment and torture" and "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment."⁷

Were S.Amdt. 1977 to become law, it would not prevent DOD from subsequently amending the manual. Indeed, the manual is undergoing review and revisions with a new version to be published in the near future.⁸ The manual has both an unclassified and classified section. Until the new version is released, it is unknown how much of the interrogation section will be available for public reference.

Prohibition on Cruel, Inhuman, or Degrading Treatment or Punishment.

The second provision of S.Amdt. 1977 prohibits persons in the custody or under the control of the U.S. government, regardless of their nationality or physical location, from being subjected to "cruel, inhuman, or degrading treatment or punishment." 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 S.Amdt. 1977, this provision covers not only DOD activities, but also intelligence and law enforcement activities occurring both inside and outside the United States. It does not appear that this provision would prevent U.S. agencies from transferring persons to other states where those persons would face "cruel, inhuman, or degrading treatment or punishment," so long as such persons were no longer in custody or under control of the United States, though such transfers might otherwise be limited by applicable treaty and statute provisions.⁹ S.Amdt. 1977 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."

In interpreting whether treatment falls below this standard, the 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).¹⁰ 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

⁷ Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, entered into force Oct. 21, 1950. For additional background, see CRS Report RL32567, *Lawfulness of Interrogation Techniques under the Geneva Conventions*, by Jennifer K. Elsea.

⁸ Sen. John McCain during debate of the Department of Defense Appropriations Act for FY-2006, CONG. REC. S11063 (daily ed., Oct. 5, 2005). ("This amendment would establish the Army Field Manual as the standard for interrogation of all detainees held in DOD custody. The manual has been developed by the executive branch for its own uses, and a new edition, written to take into account the needs of the war on terror and with a new classified annex, is due to be issued soon.")

⁹ See CRS Report RL32890, *Renditions: Constraints Imposed by Laws on Torture*, by Michael John Garcia.

¹⁰ 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.

prohibited under the Fifth, Eighth, and/or Fourteenth Amendments.¹¹ However, noncitizens arguably only receive constitutional protections after they have effected entry into the United States.¹² Still, S.Amdt. 1977 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 S.Amdt. 1977 is intended to ensure that persons under U.S. custody or control abroad cannot be subjected to treatment that would be deemed unconstitutional if it occurred in U.S. territory.

The scope of Fifth, Eighth, and Fourteenth Amendment prohibitions upon harsh treatment or punishment is subject to evolving case law interpretation and constant legal and scholarly debate.¹³ The types of acts that fall within “cruel, inhuman, or degrading treatment or punishment” contained in S.Amdt. 1977 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. For example, a U.S. court might employ a different standard for determining whether interrogation techniques employed against a criminal suspect are “cruel” treatment prohibited under the Constitution than it would for employing those same techniques upon an enemy combatant in a war zone.

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

¹¹ 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.”).

¹² See, e.g., *Verdugo-Urquidez v. United States*, 494 U.S. 259, 270-71 (1990) (“aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country”). But see *Rasul v. Bush*, 124 S.Ct. 2686, n.15 (2004) (noting in dicta that petitioners’ allegations that they had been held in Executive detention for more than two years “in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing — unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States’”) (*citing* federal habeas statute 28 U.S.C. § 2241(c)(3), under which petitioners challenged their detention).

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

- 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 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/or Fourteenth Amendments includes, *inter alia*:

- The double-celling of those in custody, at least so long as it does not lead to deprivations of essentials, an unreasonable increase in violence, or create other conditions intolerable for confinement.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
- In detention situations, the use of constant lighting in prisoner cells is allowed as the detainees’ inconvenience and discomfort is outweighed by the need to protect safety and welfare of the other detainees and staff.²⁰

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

¹⁷ E.g. *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). The Court stated that, “General considerations fall far short in themselves of proving cruel and unusual punishment, for there is no evidence that double celling under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment.” Here, the condition of the cells was modern and well-equipped. This contributed to the Court’s decision for allowing it in this situation, but also showed that the decision does not preclude all other situations of double celling from being cruel and unusual.

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. Jan. 29, 2003).

Again, it might not be 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.