

THE MILITARY COMMISSIONS ACT OF 2006: HOW ITS INABILITY TO CURB ABUSIVE INTERROGATIONS THREATENS THE FUTURE TREATMENT OF DETAINEES AND THE UNITED STATES' REPUTATION

INTRODUCTION

On September 18, 2001, Congress authorized the President “to use all necessary and appropriate force against those . . . he determines planned, authorized, committed, or aided the terrorist attacks.”¹ Thereafter, in *Hamdi v. Rumsfeld*,² the Supreme Court ruled that this authorization provided for detention and interrogation of persons, including citizens of the United States, deemed enemy combatants.³

Assuming that detention of enemy combatants is authorized and necessary in the War on Terror, this Comment explores the inherent difficulties stemming from interrogation of detainees, such as abuse and torture, and argues that interrogations should be restricted. This Comment examines the extent to which the Military Commissions Act (“MCA”),⁴ a response to allegations of abuse and torture, will restrict interrogations. After identifying the MCA’s deficiencies, this Comment offers practical remedies to serve as a roadmap to the government as it strives to strike the appropriate balance between preserving human rights and protecting our nation.

The argument is presented in four parts. Part I briefly explains the military’s interrogation procedures and identifies some troubling issues that have emerged within the realm of interrogation. Part II acquaints readers with the MCA—the most recent legislation offered to restrict abuse and torture stemming from interrogation. Part III recognizes that the MCA has some potential and therefore highlights some of the statute’s advantages. Part IV

¹ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

² 542 U.S. 507 (2004).

³ *Id.* at 518. In *Hamdi*, the government argued against using regular criminal procedures to deal with enemy combatants because of the security interests at stake; the government was concerned that regular criminal procedures would hamper the war effort. *Id.* at 527.

⁴ Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of titles 10, 18, and 28 U.S.C.).

concludes that these advantages are not sufficient to thwart abusive interrogations and that the ultimate failure of the MCA to curb abusive interrogations and torture requires more government action. That Part recommends how the United States can more effectively deal with interrogation and ensure that interrogations are in accordance with domestic and international law.

In conclusion, this Comment agrees that interrogation is necessary in today's world of terror. However, this Comment asserts that this necessity cannot be left unbridled.

I. INTERROGATION: INEVITABLE WITH UNFORTUNATE IMPLICATIONS

A. *What Interrogation Is and Why It Is Necessary*

Interrogation is a form of questioning—a process by which personnel can extract intelligence, particularly from detained combatants.⁵ Interrogation is necessary because detainees may provide insight into future terrorist attacks, information relating to financiers, and the location of terrorist leaders who direct terrorist activities.⁶ This information is significant for combating terrorism and preserving national security.⁷

Inevitably, military and Central Intelligence Agency (CIA) personnel will wish to interrogate detainees⁸ given the covert nature of the current enemy's actions. No longer are United States military forces carrying out conventional warfare where the enemy is known and electronic instruments detect its movement.⁹ Instead, the United States now faces an enemy whose movement occurs beneath radars, whose spirit remains unbroken, and whose fear of death is nonexistent.¹⁰ This unconventional warfare cannot be fought by conventional means.¹¹ Thus, interrogation is appropriate.

⁵ GREGORY E. MAGGS, *TERRORISM AND THE LAW: CASES AND MATERIALS* 312 (2005).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ This assessment is the product of the author's experiences as a member of the United States Army. See also MAGGS, *supra* note 5, at 312.

¹¹ MAGGS, *supra* note 5, at 312.

B. Implications That Stem from Interrogation

Detainees are often unwilling to freely offer information to interrogators,¹² who then feel the need to exert pressure on detainees in order to force admissions.¹³ This pressure can have devastating results; evidence of these results was apparent in 2003 when reports of Iraqi detainee abuse surfaced.¹⁴ When photographic images of abuse began circulating in 2004, the public was justifiably outraged.¹⁵

The cause of abuse was, in part, due to conflicting documents offered by the Bush Administration as authority on the issue of permissible interrogation practices.¹⁶ Ultimately, interrogators were not given clear direction as to which techniques were prohibited.¹⁷ For instance, different interrogation techniques were allowed based upon a detainee's classification.¹⁸ This lack of clarity gave interrogators discretion, and the discretion was abused.¹⁹

The government responded in December 2005 with legislation crafted to provide the requisite direction and clarity,²⁰ the Detainee Treatment Act of 2005 (DTA).²¹ The DTA provided a uniform standard for Department of Defense (DOD) interrogators to use when interrogating detainees held in any DOD facility in the world.²² Additionally, the former U.S. Army Field Manual was rewritten and the new version now enumerates specific techniques permissible for military interrogators.²³

C. The Importance of Focusing on CIA Interrogations

Though the government responded by enacting the DTA and amending the U.S. Army Field Manual, this Comment does not examine the effectiveness of

¹² *Id.*

¹³ *Id.* at 313.

¹⁴ See Arsalan M. Suleman, *Detainee Treatment Act of 2005*, 19 HARV. HUM. RTS. J. 257, 257 (2006).

¹⁵ See *id.* at 257 n.3.

¹⁶ See *id.* at 258.

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.* at 257. Some interrogation techniques were permitted for use on unlawful combatants only. *Id.* at 258. The different standards led to confusion, and interrogation techniques permitted only for use on unlawful combatants were used on those not deemed unlawful combatants. *Id.*

²⁰ Suleman, *supra* note 14, at 258.

²¹ Detainee Treatment Act, Pub. L. No. 109-148, §§ 1001–1006, 119 Stat. 2739–44 (2005).

²² Suleman, *supra* note 14, at 257–58.

²³ DEP'T OF THE ARMY, FM 2-22.3 (FM 34-52): HUMAN INTELLIGENCE COLLECTOR OPERATIONS (2006), available at <http://www.fas.org/irp/doddir/army/fm2-22-3.pdf>.

these documents, because they are not applicable to interrogations conducted by CIA²⁴ personnel.²⁵ In the House debate surrounding passage of the MCA, Representative Jane Harman of California noted the troubling effects of not broadening the terms of the MCA to limit CIA interrogations.²⁶ She stated, “There is a carve-out for the CIA. The bill would permit the CIA to continue a separate program for interrogation that does not comply with the Army Field Manual.”²⁷ She continued, “I remain very skeptical that Congress can assure that any CIA carve-out will be limited and carefully monitored.”²⁸

A letter from numerous religious organizations was submitted by Representative Ike Skelton during the House debate wherein it was noted that “the CIA has used a variety of interrogation techniques which the United States has previously prosecuted as war crimes and routinely denounces as torture when they are used by other governments.”²⁹ *The Washington Post* noted that detainees held at secret CIA centers “are sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles.”³⁰ Sometimes these detainees “are held in awkward, painful positions and deprived of sleep.”³¹

Because the MCA does not apply, CIA interrogators are still prone to a lack of direction and clarity. As a result, the door to abuse of discretion remains open to CIA interrogators. Thus, the focus of this Comment is on CIA interrogators and the impact of the MCA specifically on these interrogators.

²⁴ Human Rights Watch, U.S.: *Bush Justifies CIA Detainee Abuse*, Sept. 6, 2006, <http://hrw.org/english/docs/2006/09/06/usdom14139.htm>.

²⁵ See Suleman, *supra* note 14 (discussing the effectiveness of the DTA). The DTA allowed for the transfer of a detainee from a DOD facility to a non-DOD facility under the control of a department, such as the CIA, that is not constrained by DOD regulations. *Id.* at 260.

²⁶ 123 CONG. REC. H7538 (2006).

²⁷ *Id.* (statement of Rep. Harman).

²⁸ *Id.*

²⁹ *Id.* at H7542–43 (letter from religious organizations).

³⁰ Danna Priest & Barton Gellman, *U.S. Decrees Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1.

³¹ *Id.*

II. THE MILITARY COMMISSIONS ACT DECONSTRUCTED

A. *Introduction to the MCA*

This Part examines the MCA's effectiveness at curbing abuse stemming from CIA interrogations. This Part concludes that certain sections of the MCA render the Act unlikely to achieve the purpose for which it was drafted.

Amidst claims that the United States condoned abusive interrogation techniques in violation of domestic and international law,³² the President signed the Military Commissions Act on October 17, 2006.³³ In general, the MCA authorizes and establishes procedures for military tribunals, which govern prosecution of unlawful enemy combatants.³⁴ However, the MCA also addresses several aspects of interrogation, such as the fundamental rights of detainees,³⁵ the Geneva Conventions (Conventions),³⁶ the War Crimes Act (WCA),³⁷ and possible prosecution of personnel who have used abusive interrogation techniques.³⁸

The MCA has placed the Bush Administration under strict scrutiny. Opponents range from A to Z: the American Civil Liberties Union (ACLU),³⁹

³² Suleman, *supra* note 14, at 258.

³³ Military Commissions Act, 120 Stat. 2600.

³⁴ *Id.* Title 10 of the U.S. Code, as amended, now includes a definition of unlawful enemy combatants:

The term "unlawful enemy combatant" means (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

Id. § 3(a)(1), 120 Stat. at 2601. This language is dangerously broad and could include aliens who are permanent residents of the United States. See Human Rights Watch, *Q and A: Military Commissions Act of 2006*, Oct. 16, 2003, at 6, <http://hrw.org/backgrounder/usa/qna1006/usqna1006web.pdf>. Notably, such persons could include neighbors, coworkers, professors, and scientists. *Id.* at 3. Significantly, the definition of an unlawful enemy combatant found in the MCA is not in accord with that under the laws of war. *Id.*

³⁵ *Id.* at 1.

³⁶ Military Commissions Act §§ 5–6, 120 Stat. at 2631–35.

³⁷ *Id.* § 6(b), 120 Stat. at 2633.

³⁸ *Id.* §§ 6, 8, 120 Stat. at 2633–36.

³⁹ Press Release, American Civil Liberties Union, President Bush Signs Un-American Military Commissions Act, ACLU Says New Law Undermines Due Process and the Rule of Law (Oct. 17, 2006), <http://www.aclu.org/safefree/detention/27091prs20061017.html>. The ACLU vehemently opposed the Act, calling it "one of the worst civil liberties measures ever enacted in American history." *Id.* Anthony D.

Amnesty International,⁴⁰ several Congressmen and legal scholars, and internet discussion forums such as Z Net.⁴¹

Opponents have found section 7 of the MCA most alarming.⁴² That section strips federal courts of jurisdiction to hear writ of habeas corpus petitions by alien unlawful enemy combatants.⁴³ To date, detainees have relied on habeas corpus to show that their detention is not in accord with due process.⁴⁴ This important check no longer exists,⁴⁵ therefore making restraints on interrogations even more crucial. The Supreme Court may strike down the habeas corpus provision at some future time,⁴⁶ but it is currently still valid.

Romero, Executive Director of the ACLU, added that “[n]othing could be further from the American values we all hold in our hearts.” *Id.*

⁴⁰ Amnesty Int’l, *United States: Rubber Stamping Violations in the “War on Terror”: Congress Fails Human Rights*, AI Index AMR 51/155/2006, Sept. 29, 2006, at 1, available at [http://web.amnesty.org/library/pdf/AMR511552006ENGLISH/\\$File/AMR5115506.pdf](http://web.amnesty.org/library/pdf/AMR511552006ENGLISH/$File/AMR5115506.pdf) (noting that “the United States Congress has, in effect, given its stamp of approval to human rights violations”).

⁴¹ See generally Z MAGAZINE ONLINE, <http://www.zmag.org/weluser.htm> (last visited Dec. 5, 2006). Z Net is a discussion forum for Z Magazine subscribers. Z Magazine is an independent magazine dedicated to protecting against racial, gender, and class-based inequality. *Id.* For an article posted on Z Net about the MCA, see Mickey Z., *Boiling Point: Eroding Freedom: From John Adams to George W. Bush*, Z MAGAZINE ONLINE, Oct. 14, 2006, <http://www.zmag.org/content/showarticle.cfm?ItemID=11186>.

⁴² For instance, several groups, along with congressmen and congresswomen, voiced their concerns about section 7 during the legislative debates over the MCA. See, e.g., 123 CONG. REC. H7543 (2006) (letter submitted by several religious organizations) (“Habeas Corpus is necessary to avoid wrongful deprivations of liberty and to ensure that executive detentions are not grounded in torture or other abuse.”); *id.* at H7546 (written testimony of Jonthan Hafetz before the U.S. Senate Committee on the Judiciary) (“[T]he writ provides a check against executive detention without trial, and it is in this context that its protections have always been strongest.”); see also Military Commissions Act § 7, 120 Stat. at 2635.

⁴³ *Id.*

⁴⁴ E.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (detainee petitioned for habeas corpus); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (detainee’s father filed for habeas corpus). For a historical analysis of the writ of habeas corpus, see LOUIS FISHER, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* 37–135 (2003) and GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 12–227 (2004).

⁴⁵ See *Boumediene v. Bush*, 476 F.3d 981, 988, 991 (D.C. Cir. 2007) (holding that the MCA’s habeas corpus stripping provision does not violate the Suspension Clause because the Suspension Clause protected the writ as it was in 1789, and habeas corpus would not have been extended in 1789 to aliens held at an overseas military prison leased from a foreign government), *cert. granted*, 127 S. Ct. 3078 (2007).

⁴⁶ Military Commissions Act § 7(a), 120 Stat. at 2635. Thomas Jefferson wrote to A.H. Rowan in 1798 that “[t]he Habeas Corpus secures every man here, alien or citizen, against everything which is not law, whatever shape it may assume.” Letter from Thomas Jefferson, Vice President of the United States to A.H. Rowan (Sept. 26, 1798), in *THE WRITINGS OF THOMAS JEFFERSON* 61, 61 (Andrew A. Lipscomb ed., Library ed. 1904) (emphasis added). Notably, the Court in *INS v. St. Cyr* stated that the Suspension Clause of the Constitution protects the writ at least as it existed in 1789. See 533 U.S. 289, 300–01 (2001). Case law supports the argument that resident aliens are entitled to the writ of habeas corpus, rendering the provision an unconstitutional stripping of federal courts’ habeas corpus jurisdiction. That question has not yet been decided by the Supreme Court, but the Court has agreed to hear certain cases concerning this habeas corpus stripping provision. See, e.g., *Boumediene*, 127 S. Ct. 3078 (2007) (granting certiorari).

Other sections of the MCA, though not necessarily unconstitutional per se, are equally troubling given their probable inability to curb abuse of detainees. These sections are examined below.

B. Sections Targeted for Criticism

On June 26, 2003, President Bush remarked that “[f]reedom from torture is an inalienable human right.”⁴⁷ The President continued by rebuking those nations who “have long sought to shield their abuses from the eyes of the world by staging elaborate deceptions and denying access to international human rights monitors.”⁴⁸ Sections 6 and 8 of the MCA raise serious doubts about the sincerity of such words.

Section 6 of the MCA grants the President considerable interpretive power; for instance, the President is given authority to interpret the Conventions.⁴⁹ The Conventions are a body of international law containing standards that the United States must adhere to during conflicts.⁵⁰ The Conventions governs interrogation of detainees and prohibits torture and cruel treatment.⁵¹ Section 6 also narrows the scope of the WCA.⁵² The MCA uses vague and circular language to define terms such as torture, and vague language is used to convey what acts constitute breaches of the WCA.⁵³

Section 8 revises⁵⁴ the DTA by backdating the Act to September 11, 2001.⁵⁵ The effect is to grant immunity for all governmental personnel,

⁴⁷ Press Release, President George W. Bush, Statement by the President: United Nations International Day in Support of Victims of Torture (June 26, 2003), <http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html> (speaking in reference to the United Nations’ International Day in Support of Victims of Torture).

⁴⁸ *Id.* President Bush referred specifically to Burma, Cuba, North Korea, Iran, and Zimbabwe. *Id.*

⁴⁹ Military Commissions Act § 6(a)(3)(A), 120 Stat. at 2632.

⁵⁰ MAGGS, *supra* note 5, at 585–86.

⁵¹ *Id.* at 586–88 (discussing and quoting the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135).

⁵² See Military Commissions Act § 6(b)(1), 120 Stat. at 2633. The WCA is defined and discussed further below. See *infra* notes 81–92 and accompanying text.

⁵³ See Military Commissions Act § 6(b)(1), 120 Stat. at 2633.

⁵⁴ *Id.* § 8, 120 Stat. at 2636. Section 1004 of the DTA provides as follows:

In any civil action or criminal prosecution against a[] . . . member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the . . . member of the Armed Forces, or other agent’s engaging in specific operational practices, that involve detention and interrogation . . . that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such . . . member of the Armed Forces, or other 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

including CIA interrogators, who have used abusive interrogation techniques.⁵⁶ The DTA sets forth standards that must be met before an interrogator may obtain immunity from suit.⁵⁷

Given these provisions, the MCA raises serious questions concerning the future treatment of detainees. Troubling reports documenting the use of abusive techniques by CIA interrogators and the absence of previous legislation to restrict CIA interrogators suggest that claims of ineffectiveness should be taken seriously.⁵⁸

C. Section 6: *The Authority Vested in the President*

Section 6—interestingly tucked away in the middle of the MCA—could have devastating effects on detainees under interrogation. The MCA vests the authority to interpret international law in the President.⁵⁹ Specifically, “the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions.”⁶⁰ Thus, the language empowers the President with the authority to determine whether interrogators violate international law.⁶¹ For example, the Conventions state that “[p]risoners of war must at all times be humanely treated.”⁶² Because of the MCA, the President now has the authority to determine what exactly “humanely” means. It follows that the President can determine whether a CIA interrogator committed a grave breach of the Conventions and, therefore, whether the interrogator can be convicted under the WCA.⁶³ The WCA makes a grave breach of Article 3 of the Conventions a felony.⁶⁴ If the President decides a

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.

Detainee Treatment Act, Pub. L. No. 109-148, § 1004, 119 Stat. 2739, 2740.

⁵⁵ Military Commissions Act § 8(b)(3), 120 Stat. at 2636.

⁵⁶ Human Rights Watch, *supra* note 24, at 10.

⁵⁷ Detainee Treatment Act § 1004(a), 119 Stat. at 2740.

⁵⁸ See Greg Miller & John Hendren, *No Need for CIA Abuse Probe, Republican Says*, L.A. TIMES, Mar. 11, 2005, at A11 (noting multiple investigations into CIA personnel abuse of detainees during interrogations).

⁵⁹ Military Commissions Act § 6(a)(3)(A), 120 Stat. at 2632.

⁶⁰ *Id.*

⁶¹ See Stephen Rickard, *Interrogators Beware*, WASH. POST, Oct. 17, 2006, at A21 (discussing the Bush Administration’s failure to clarify the allowed methods of interrogation for the CIA).

⁶² Geneva Convention Relative to the Treatment of Prisoners of War art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁶³ Military Commissions Act § 6(a)(3)(A), 120 Stat. at 2632.

⁶⁴ See *infra* Part II.D (explaining the WCA).

given technique is not a grave breach, CIA interrogators will not be punished under the WCA.⁶⁵ Therefore, the purpose of the MCA—to deter abusive interrogations—could be rendered ineffective depending on the President’s interpretation.⁶⁶

How might the President interpret the Conventions? President George W. Bush has frequently referred to detainees as “terrorists” and “killers,” while Vice President Dick Cheney has referred to terrorists as “evil.”⁶⁷ Given that rhetoric, it is hard to say that the Bush Administration views detainees as individuals deserving of human rights protected by the Conventions, and such rhetoric provides a glimpse into how President Bush may interpret the Conventions.

Differing interpretations concerning abuse are especially problematic. The President may define abuse differently than justices sitting on the International Court of Justice, for instance, or differently than United States judges. In particular, the President’s definition of inhumane and degrading treatment, which is prohibited by the Conventions, may be different from how this phrase is interpreted by judges in foreign countries. This could lead to certain techniques being deemed valid by President Bush, in stark contrast to what, according to our allies, should be prohibited.

*Ireland v. United Kingdom*⁶⁸ illustrates this point. In *Ireland*, the European Court of Human Rights interpreted two of the Conventions’ terms: *inhumane* and *degrading treatment*.⁶⁹ The court considered several interrogation techniques and decided that wall-standing,⁷⁰ hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink, when used in combination, constituted inhumane and degrading treatment.⁷¹ The court

⁶⁵ Human Rights Watch, *supra* note 24, at 9.

⁶⁶ *See id.* at 11–12. Notably, the President is equipped to decide whether to order CIA interrogators to cease use of certain interrogation techniques. *See* Rickard, *supra* note 61, at A11.

⁶⁷ Amnesty Int’l, *Military Commissions Act of 2006—Turning Bad Policy into Bad Law*, AI Index AMR/51/154/2006, Sept. 29, 2006, at 4, available at [http://web.amnesty.org/library/pdf/AMR511542006ENGLISH/\\$File/AMR5115406.pdf](http://web.amnesty.org/library/pdf/AMR511542006ENGLISH/$File/AMR5115406.pdf). [hereinafter Amnesty Int’l, *Bad Policy*].

⁶⁸ 23 Eur. Ct. H.R. (ser. A) (1978).

⁶⁹ *See id.*

⁷⁰ Wall-standing involves a detainee being forced to remain for several hours in a “stress position”; a stress position may include the detainee standing against a wall, with his fingers above his head placed against the wall, his legs spread apart, and his feet back behind his head, forcing the detainee onto his toes, thus placing a substantial part of his body weight placed on his fingers. *Id.* at 41.

⁷¹ *Id.* at 41, 66.

decided that the techniques were inhumane and degrading, even though no actual bodily injury resulted.⁷²

It is impossible to predict how *Ireland* would have turned out had President Bush been the sole arbiter of the validity of the techniques at issue. This query warrants attention because CIA interrogators have reportedly used these techniques.⁷³

Worldwide contrasting definitions and applications of the law governing interrogations are dangerous for several reasons. The result could evoke further widening of the transatlantic gap between the United States and Europe.⁷⁴ Depending on the President's interpretation, the newly acquired authority may furnish fertile ground for seeds that could grow into permanent weeds in the United States' reputable garden of human rights.⁷⁵ The next section examines more specifically how section 6 transforms the WCA.

D. Section 6 and The War Crimes Act: Then and Now

The original purpose of the WCA was to make certain violations of the law of war into felonies if committed by or against a United States citizen.⁷⁶ Enacted in 1996 and later revised, the WCA covers domestic and international armed conflicts.⁷⁷ Interestingly, CIA personnel are among those most vulnerable to prosecution under the WCA.⁷⁸

That vulnerability may explain why section 6 of the MCA narrows the scope of the WCA.⁷⁹ The WCA previously provided for prosecution of those who had committed any violation of Article 3 of the Conventions in addition to grave breaches of the Conventions.⁸⁰ Those who had committed cruel, humiliating, or degrading treatment, as outlined in the Conventions, could be prosecuted as well.⁸¹

⁷² *Id.* at 66.

⁷³ Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABCNEWS.COM, Nov. 18, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1322866&page=1>.

⁷⁴ See PHILLIP H. GORDON & JEREMY SHAPIRO, *ALLIES AT WAR* (2004). The general proposition is that "the United States and Europe are clashing today over the management of world politics." *Id.* at 19.

⁷⁵ See *supra* Part IIC.

⁷⁶ See Human Rights Watch, *supra* note 34, at 9.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 10.

⁸¹ R. Jeffrey Smith, *War Crimes Act Changes Would Reduce Threat of Prosecution*, WASH. POST, Aug. 9, 2006, at A1.

A watchful reader would note that the MCA revises the WCA as it relates to cruel, humiliating, or degrading treatment.⁸² For instance, the narrowing of the WCA makes only *grave* breaches of the Conventions punishable as felonies.⁸³ Grave breaches are enumerated within the statute; humiliating or degrading treatment is not listed as a grave breach.⁸⁴ This change is unsettling primarily because it sends a message to CIA interrogators that the Administration has become more lenient concerning what interrogation methods warrant punishment and deterrence.⁸⁵

Notably, section 6 prohibits courts from using international law to decide whether an interrogation technique is a “grave breach” of the Conventions and is therefore punishable under the WCA.⁸⁶ That provision gained significance with the Supreme Court’s reliance on international law in *Hamdan v. Rumsfeld*⁸⁷ to determine if the judicial procedures at issue were lawful.⁸⁸

Some impacts of section 6 may not be obvious to the deferential reader. For instance, the changes to the WCA will enable the President to further his war paradigm.⁸⁹ This is problematic because President Bush’s war paradigm has, to date, championed war and rejected international human rights laws;⁹⁰ further, within President Bush’s war paradigm, the laws of war, which limit a country’s actions during hostilities, are applied sporadically.⁹¹ This practice is more likely to continue, given that CIA interrogators may be shielded not only from past acts but also from future abusive acts since only grave breaches of the Conventions are considered punishable as felonies.⁹²

In essence, by granting the President the ability to interpret the Conventions, by narrowing the WCA, and by prohibiting courts from using international law as an interpretive device, section 6 will fail to thwart abuse. The discussion below illustrates how section 5 limits the Conventions, thereby further opening the door to abusive interrogations.

⁸² See Human Rights Watch, *supra* note 34, at 10.

⁸³ Amnesty Int’l, *Bad Policy*, *supra* note 67, at 9.

⁸⁴ Human Rights Watch, *supra* note 34, at 10.

⁸⁵ Smith, *supra* note 81, at A1.

⁸⁶ See Military Commissions Act, Pub. L. No. 109-366, § 6(a)(2), 120 Stat. 2600, 2632 (2006).

⁸⁷ 126 S. Ct. 2749 (2006).

⁸⁸ *Id.* at 2796–98; see also *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1344–45 (N.D. Ga. 2002) (specifically looking to international law to define what was and was not a violation of the law of nations).

⁸⁹ See Amnesty Int’l, *Bad Policy*, *supra* note 67, at 9.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Smith, *supra* note 81, at A1.

E. Stripping Detainees of Their Armor: The Geneva Conventions Are No Longer a Sword or a Shield

Section 5 of the MCA states that the Conventions are not a source of rights or a shield for detainees.⁹³ That language negates the importance of the Conventions and could possibly encourage CIA interrogators to ignore the Conventions.⁹⁴ This is problematic given that the Conventions' purpose is to prevent abuse during interrogations.

For instance, if a CIA interrogator commits a breach of the Conventions, the interrogator is apt to believe he will never be convicted for his act. This is true because the government, through section 5, has said that detainees cannot rely on the Conventions as a source of rights.⁹⁵

Nor can the Conventions be used to protect detainees in the same way that the Constitution may be used to protect citizens from, for example, being stripped of their property without just compensation. To illustrate this point further, imagine that there were no Takings Clause.⁹⁶ If that were the case, the government could take one's property without just compensation. A citizen would not have a body of law to rely upon for recourse. If the Takings Clause existed but was not recognized as a source of rights, there would be a toothless taking!

In essence, the MCA severs rights from remedies.⁹⁷ Detainees can no longer raise claims arising under the Conventions.⁹⁸ For instance, a detainee cannot challenge the military commissions (detainee tribunals) by arguing that they are not in accord with Article 3 of the Conventions; Article 3 sets forth certain protective measures that must be followed during trial of a detainee.⁹⁹

⁹³ See Military Commissions Act, Pub. L. No. 109-366, § 5(a), 120 Stat. 2600, 2631 (2006). "No person may invoke the Geneva Conventions . . . as a source of rights in any court of the United States or its States or territories." *Id.*

⁹⁴ See Human Rights Watch, *supra* note 34, at 10.

⁹⁵ Military Commissions Act § 5(a), 120 Stat. at 2631; *see also* Human Rights Watch, *supra* note 34, at 8.

⁹⁶ U.S. CONST. amend. V.

⁹⁷ See Rickard, *supra* note 61. The importance of this severance is further illustrated by the words of Chief Justice Marshall, who declared, "[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES *109).

⁹⁸ Human Rights Watch, *supra* note 34, at 8.

⁹⁹ *Id.*

This severance sends a message that the Conventions may be selectively applied and that it need not be strictly enforced.¹⁰⁰ Therefore, United States interrogators may not adhere to significant prohibitions set forth in the Conventions. There is little deterrence from conducting abusive interrogations because the Conventions state that a detainee should be free from, for example, torture. Yet, the United States government has stated that no detainee may use the Conventions as a sword or shield.¹⁰¹

The analysis may go one step further. The judicial branch historically has served as a check on the executive branch. Yet, certain protections granted within the Conventions are no longer applicable in a court of law.¹⁰² It seems that this necessary and historical check has been removed.¹⁰³ Removing significant checks on power broadens the amount of discretion already given to CIA interrogators.

F. Does the MCA Provide Interrogators with Direction and Clarification?

Aside from the provisions discussed above, the very text of the MCA opens the door to abusive interrogations. The MCA uses vague and circular language; therefore, just like previous documents, it creates confusion. As noted above, confusion has bred abuse.¹⁰⁴ Such language has also provided interrogators with leeway concerning what techniques are permissible.

1. Lack of Direction Provides Too Much Discretion

One example of vagueness within the MCA is the definition of “torture” as “an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person.”¹⁰⁵ Another example is the MCA’s definition for “cruel or inhuman treatment”: “an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse.”¹⁰⁶

¹⁰⁰ Smith, *supra* note 81, at A1.

¹⁰¹ See Military Commissions Act, Pub. L. No. 109-366, § 5(a), 120 Stat. 2600, 2631 (2006).

¹⁰² See *supra* notes 98–101 and accompanying text; see also MAGGS, *supra* note 5, at 586–88 (discussing and quoting the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135).

¹⁰³ Human Rights Watch, *supra* note 34, at 12.

¹⁰⁴ See *supra* note 19 and accompanying text.

¹⁰⁵ Military Commissions Act § 6(d)(1)(B), 120 Stat. 2600, 2633 (2006).

¹⁰⁶ *Id.*

There are further instances of vagueness found in the MCA. Take, for instance, the MCA's definition of "serious physical pain or suffering."¹⁰⁷ The MCA defines "serious physical pain or suffering" as "(i) a substantial risk of death; (ii) extreme physical pain; (iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or (iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty."¹⁰⁸

Especially troubling is that serious physical pain or suffering is defined as injuries that result in a "substantial risk of death."¹⁰⁹ Because the definition is unclear, interrogators must ask: what if there is a serious risk of death? According to the MCA, a serious risk of death, depending on how "substantial" is interpreted, may not constitute torture.¹¹⁰ Notably, this means that some acts falling just shy of torture may not constitute a grave breach of the Conventions, therefore shielding an interrogator from punishment under the WCA.¹¹¹

Moreover, serious bodily injury is defined as "extreme physical pain."¹¹² How will interrogators know what is "extreme" as compared with "serious"? Is extreme not more than serious? It is confusing indeed that extreme physical pain is used to define *serious* bodily injury. Further, "significant loss or impairment of the function of a bodily . . . organ" is used to define serious bodily injury.¹¹³ There are no terms defining a "significant loss." If one loses half of their organ's functioning, is this significant loss or is there significant loss only if more than half of the functioning is impaired?

This vague, circular language renders the MCA confusing, just like the documents previously offered to interrogators.¹¹⁴ This leaves interrogators with little idea of what techniques are permissible.¹¹⁵ This could result, once again, in circulation of photographic depictions of torture, as was the case

¹⁰⁷ *Id.* § 6 (d)(2)(D), 120 Stat. at 2634.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ For additional arguments concerning vagueness within the MCA, see Postings of Aziz Huq to The Huffington Post, *Junking Checks and Balances?*, http://www.huffingtonpost.com/aziz-huq/junking-checks-and-balanc_b_30518.html (Sept. 28, 2006) [hereinafter Postings of Aziz Huq].

¹¹¹ Smith, *supra* note 81.

¹¹² Military Commissions Act, § 6(d)(1)(B), 120 Stat. at 2634.

¹¹³ *Id.*

¹¹⁴ See *supra* Part I.B.

¹¹⁵ See *supra* note 14.

concerning interrogations at Abu Ghraib.¹¹⁶ The MCA's reach and ability to restrain CIA interrogators is limited given this vague, circular language.¹¹⁷

2. *Are Abusive Techniques Permitted?*

Aside from the confusion that vague language may produce, the language could actually permit abusive interrogations. For example, the reference to bodily injury implies that all methods not causing bodily injury would be permitted.¹¹⁸

Delving more deeply into the issue, it becomes apparent that the text could provide a way out for an interrogator if a detainee claimed that he was subjected to torture or cruel or inhuman treatment. A CIA interrogator could claim that the abuse was "incidental to lawful sanctions."¹¹⁹ Alternatively, an interrogator could argue that he did not specifically intend to cause harm.¹²⁰ The statute does not explain how courts should construe words such as "incidental to lawful sanctions" or "specifically intend[.]" required for torture, so the possibility of using loopholes in such language as a defense is expected.

Terms such as "severe" are vague, and officials may claim that a given amount of abuse is only serious and not severe, therefore not resulting in torture. This is especially troubling given that the most frequent types of alleged abuse during interrogations were assaults.¹²¹

Aziz Huq, Associate Counsel to the Liberty and National Security Program at the Brennan Center for Justice, argues that the language concerning serious bodily injury could mean that long-time standing and other enhanced

¹¹⁶ See *supra* note 16 and accompanying text.

¹¹⁷ Postings of Aziz Huq, *supra* note 110.

¹¹⁸ *Id.*

¹¹⁹ See Military Commissions Act, Pub. L. No. 109-366, § 6(b)(1)(B), 120 Stat. 2600, 2633 (2006) (excluding "pain or suffering incidental to lawful sanctions" from the definition of "torture" and "cruel or inhuman treatment").

¹²⁰ See *id.* (defining "torture" and "cruel or inhuman treatment" as requiring that the offender "*intended to inflict*" the pain or suffering) (emphasis added).

¹²¹ HUMAN RIGHTS WATCH, BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND ACCOUNTABILITY PROJECT 8 (2006), available at <http://hrw.org/reports/2006/ct0406/ct0406webwcover.pdf>. Assault was found in at least 220 cases, and use of physical or non-physical humiliation was found in ninety cases. *Id.* Sexual assault or abuse was found in sixty cases, and stress techniques during interrogations were alleged in forty cases. *Id.*

techniques, such as waterboarding,¹²² would be permitted.¹²³ Although techniques, such as long-time standing may not fall within the definition of torture, they do cause physical pain; opening the door to these techniques may invite interrogators into the realm of torture, therefore increasing the risk that abusive interrogation techniques will continue.

Vague language opens the door to abusive interrogations because terms like “torture” may be defined very narrowly. Ultimately, the MCA fails to provide strict prohibitions, and this provides too much room for discretion.

G. The Detainee Treatment Act: Take That and Rewind It Back

The previous sections highlighted the inadequacies of sections 5 and 6 of the MCA. This section will focus on an equally important section: section 8.

Of all the provisions in the MCA, retroactive immunity for all interrogators is perhaps the most detrimental provision to the future condition of detainees. Section 8 makes the DTA retroactive so that the DTA applies to any conduct that occurred between September 11, 2001 and December 30, 2005.¹²⁴ This language is significant, especially within the realm of interrogations. The language provoked Senator Patrick Leahy to remark: “And we wonder why some of our closest allies ask us, what in heaven’s name has happened to the conscience and moral compass of this great nation?”¹²⁵

An obvious problem with this provision is that the government is speaking out of both sides of its mouth. On the one hand, before the enactment of the MCA, some military personnel were convicted of, or pled guilty to, abusing detainees.¹²⁶ Now, military and especially CIA interrogators (because military law set forth in the Uniform Code of Military Justice does not apply to the latter) are given the message that if they reasonably relied upon a document

¹²² Waterboarding is an interrogation technique where the detainee is strapped to a slanted board and is drenched with water. See Rickard, *supra* note 61. This technique is specifically designed to give the effect of being drowned and is used as a mock execution exercise. *Id.*

¹²³ Postings of Aziz Huq, *supra* note 110.

¹²⁴ Military Commissions Act, § 8(b)(3), 120 Stat. at 2636.

¹²⁵ R. Robin McDonald, *Debate over Habeas Rights Roils Senate*, FULTON COUNTY DAILY REP., Oct. 11, 2006, at 1, 9 (quoting Senator Leahy).

¹²⁶ HUMAN RIGHTS WATCH, *supra* note 121, at 6–7. “At least 600 United States personnel are implicated.” *Id.* at 6. Of those, ninety-five percent are military personnel. *Id.* About one-third have faced some kind of disciplinary or criminal sanctions. *Id.* at 7. As of June 1, 2006, Sergeant Santos A. Cardona was the eleventh soldier convicted of crimes related to abuse in 2003 and 2004. Associated Press, *Abu Ghraib Dog Handler Guilty of Abuse*, CBSNEWS.COM, June 1, 2006, <http://www.cbsnews.com/stories/2006/06/01/iraq/main1675743.shtml>.

outlining certain techniques as permissible, they cannot be tried and convicted for abusive acts.¹²⁷ The message is undeniably clear: the machinery of the judiciary is not geared up to deter abusive interrogations.

Section 8 sends a message to CIA interrogators that the government's bark is worse than its bite. That is especially true for interrogators who committed abuse between 2001 and 2005. For instance, if an interrogator states that he reasonably relied on a document defining permissive interrogations¹²⁸ and is not convicted for prior acts of abuse, the same interrogator may believe that future conduct will not be punished. That possibility warrants thought, especially given what is at stake—the United States' reputation and the preservation of human rights.

The need for this exemption undercuts former claims. This ex-post exemption contradicts earlier claims that the torture at Abu Ghraib was conducted by a few corrupt individuals and not by interrogators in general.¹²⁹ Section 8 signals that the Administration will pound incidents of abuse with a velvet-tipped hammer.

III. LIGHT AT THE END OF THE TUNNEL

The previous Part scrutinizes the MCA and its inability to curb detainee abuse. But analysis of the MCA would not be complete without discussion of those portions that discourage abuse. Analysis likewise would not be complete without a discussion of why the MCA was enacted. This Part devotes attention to the specific provisions of the MCA that are likely to play a key role in providing for more acceptable interrogations. This Part also examines why the Administration deemed the MCA necessary in today's world of terror.

A. *The MCA: Not Ineffective in Its Entirety*

The MCA does not relieve the United States of its obligations under Common Article 3 of the Conventions.¹³⁰ Article 3 sets forth certain prohibitions concerning the treatment of detainees such as the prohibition on

¹²⁷ See Detainee Treatment Act, Pub. L. No. 109-148, §§ 1001–1006, 119 Stat. 2739–44 (2005).

¹²⁸ See *infra* Part III.B.2 (discussing the Torture Memo as an example of a document with lenient standards relied upon by interrogators).

¹²⁹ Edward S. Herman, *Torture, Moral Values, and Leadership of the Free World*, 19 Z MAGAZINE 11, Nov. 2006, <http://zmagazine.zmag.org/Nov2006/hermanpr1106.html>.

¹³⁰ Human Rights Watch, *supra* note 34, at 9.

torture, and these prohibitions are reiterated in the MCA.¹³¹ Even though the MCA narrows the scope of the War Crimes Act,¹³² the most egregious interrogation techniques are still illegal.¹³³ For example, Senator Lindsey Graham asserts that the MCA renders waterboarding illegal.¹³⁴

Moreover, the MCA, in certain provisions, applies more stringent standards than those set forth previously. For example, section 6 provides that, as to conduct occurring after enactment of the MCA, the term “serious and non-transitory mental harm (which need not be prolonged),” replaces the term “prolonged mental harm.”¹³⁵ It seems that mental harm that “need not be prolonged” is more likely to result from abusive interrogations. Thus, the MCA recognizes serious and nontransitory mental harm that is temporary.¹³⁶

The MCA also replaces the term “severe” with “serious,”¹³⁷ thus establishing a lower threshold for pain. Interestingly, Webster’s Dictionary defines “severe” by referring to words such as “inflicting pain or distress.”¹³⁸ “Serious” is defined with no reference to pain or discomfort whatsoever.¹³⁹

¹³¹ See Military Commissions Act, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2633–35 (2006). In the case of an armed conflict that is not of an international character—one which occurs in the territory of one of the High Contracting Parties—each party to the conflict is bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall . . . be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited . . . : (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

¹³² See *supra* discussion Part II.D.

¹³³ Military Commissions Act § 6, 120 Stat. at 2632–35.

¹³⁴ *Id.*

¹³⁵ Military Commissions Act § 6(b)(1)(B), 120 Stat. at 2635.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 2081 (1986).

¹³⁹ *Id.* at 2073.

Here, again, the MCA provides for some greater protection than what previously existed.¹⁴⁰

The MCA also sets forth some prohibitions directly related to interrogations.¹⁴¹ The MCA prohibits those techniques that constitute grave breaches of the Conventions.¹⁴² Some of the grave breaches include torture,¹⁴³ cruel or inhuman treatment,¹⁴⁴ and murder.¹⁴⁵ Therefore, the MCA does not condone torture, at least not on its face.

B. The MCA: An Inherent Necessity

It should be noted that the MCA became law, in part, out of stark necessity. In many respects, the MCA is a direct response to *Hamdan v. Rumsfeld*.¹⁴⁶ This is reflected in the MCA as a whole. The MCA provides authorization for procedures, such as trial by military commissions, that the President considers necessary to combat terrorism. So, the broader War on Terror emphasizes why the MCA was necessary. Adjusting the lens to focus on interrogations only, it is easy to see why section 8, in particular, was needed to maintain a force of interrogators.

1. Hamdan v. Rumsfeld: A Red Flag to the Bush Administration

In *Hamdan*, the Court considered not only military detention, the issue in *Hamdi v. Rumsfeld*,¹⁴⁷ but also the justifications for trial by military commissions.¹⁴⁸ The detainee in *Hamdan* was a Yemeni national in custody at Guantánamo Bay, Cuba.¹⁴⁹ The President declared Hamdan eligible for trial by military commission¹⁵⁰ and charged him with one count of conspiracy.¹⁵¹

¹⁴⁰ Note also that the MCA at least attempts to provide some clarification by amending the original version of 18 U.S.C. § 2441 to specifically enumerate acts that violate Common Article 3 of the Geneva Conventions. See Military Commissions Act, § 6(b)(1), 120 Stat. at 2633.

¹⁴¹ See Military Commissions Act § 6, 120 Stat. 2600.

¹⁴² *Id.* § 6(b)(1)(B), 120 Stat. at 2633.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See 126 S. Ct. 2749 (2006).

¹⁴⁷ 542 U.S. 507, 516 (2004).

¹⁴⁸ *Hamdan*, 126 S. Ct. at 2773–74.

¹⁴⁹ *Id.* at 2759.

¹⁵⁰ The President, on November 13, 2001, issued a military order governing the trial of some noncitizens in the War on Terror. *Id.* at 2760. Those falling under the order included any noncitizen that the President determined “‘there is reason to believe’ that he or she (1) ‘is or was’ a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States.” *Id.* (quoting Military Order,

Hamdan was decidedly an enemy combatant according to a Combatant Status Review Tribunal (CSRT).¹⁵²

According to Hamdan, the military commission lacked jurisdiction to try him primarily for two reasons: (1) neither a congressional act nor the common law of war supported his trial for the crime of conspiracy; and (2) the procedures of the commission violated military as well as international law.¹⁵³ Hamdan referred specifically to Common Article 3 of the Conventions that sets forth procedures that must be afforded to persons tried.¹⁵⁴

The government responded to Hamdan's international law contention by stating that the Conventions did not apply, specifically because Article 2 of the Conventions extends full protections only to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties."¹⁵⁵ The Government noted that Hamdan was captured and detained due to the conflict with al Qaeda; al Qaeda is not a high contracting party to the Conventions.¹⁵⁶ The Court, however, was not persuaded.

Instead, the Court pointed out that Article 2 of the Conventions does apply in such circumstances.¹⁵⁷ The Court quoted language from Common Article 3: "[E]ach Party to the conflict shall be bound to apply . . . provisions"¹⁵⁸ The Court made it clear that one such provision prohibited sentencing by a court that does not provide all of the judicial guarantees recognized as essential by civilized peoples.¹⁵⁹ Ultimately, the Court held that "Common Article 3 . . . is applicable . . . and . . . requires that Hamdan be tried by a regularly

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 at 5784 (Nov. 13, 2001)). The order stated that "[a]ny such individual 'shall, when tried, be tried by military commission for any and all offenses triable by military commission.'" *Id.* (quoting Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 at 5784 (Nov. 13, 2001)).

¹⁵¹ *Id.* at 2761.

¹⁵² *Id.* CSRTs are military boards that were established to allow detainees at Guantánamo Bay, Cuba to contest their status. Human Rights Watch, *supra* note 34, at 6. Anyone the CSRT determines to be an unlawful enemy combatant is presumed to be so for purposes of trial by military commission. *Id.*

¹⁵³ *Hamdan*, 126 S. Ct. at 2772 n.20.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 2795.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 2795.

constituted court.”¹⁶⁰ That statement was unequivocal: the Conventions apply to the War on Terror.

As to Hamdan’s military law claim, the Court reasoned that the Uniform Code of Military Justice (UCMJ) required trials governed by the same procedures as courts-martial, except under particular circumstances.¹⁶¹ The President could deviate from the procedures governing courts-martial if those procedures were found by the President to be impracticable.¹⁶²

Even though the President had determined that regular criminal proceedings were impracticable in Hamdan’s case, the Court was not satisfied that the President had deemed proceedings pursuant to courts-martial impracticable.¹⁶³ This is significant primarily because a trial by court-martial affords a detainee many more protections than a trial by military commission.¹⁶⁴

The Court also noted that the UCMJ required that military commissions, when used, be governed by procedures in accord with the American common law of war and also in accord with rules of the law of nations.¹⁶⁵ The Court emphasized particularly upsetting regulations. For instance, the Court expressed concern that Hamdan could be excluded, in contravention of the Conventions, from the commission’s proceedings.¹⁶⁶ The Court held that Article 3 of the Conventions sets forth certain rights entitled to all, and it noted that such rights are flexible; however, the Court emphasized that the rights are requirements.¹⁶⁷

Hamdan impacted the Bush Administration in two significant ways. First, it declared to the Administration that international law, specifically the

¹⁶⁰ *Hamdan*, 126 S. Ct. at 2796.

¹⁶¹ *Id.* at 2790.

¹⁶² *Id.*

¹⁶³ *Id.* at 2791.

¹⁶⁴ Several aspects of a military commission deviate from courts-martial. See Military Commissions Act, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2608–09, 2611–13. For instance, a military commission may exclude the detainee from the proceedings if the detainee becomes disruptive. *Id.* 120 Stat. at 2611–12. A military commission may accept hearsay as evidence under certain circumstances. *Id.* 120 Stat. at 2608–09. And, in a military commission proceeding, the government’s evidence may be withheld from the detainee. See *id.*

¹⁶⁵ *Hamdan*, 126 S. Ct. at 2786.

¹⁶⁶ *Id.* The Court recognized that the Conventions set forth several safeguards to which all detainees are entitled. The Court looked to Article 75 and stated that one such right included the “right to be tried in [one’s] presence.” *Id.* at 2797 (citation omitted).

¹⁶⁷ *Id.* at 2798.

Conventions, did apply to the War on Terror in Afghanistan.¹⁶⁸ Therefore, the Administration would need to confine its operations within the boundaries of domestic and international law. Second, it became clear that the AUMF, the DTA, and the UCMJ provided no authorization for a military commission like that used to try Hamdan.¹⁶⁹ This forced the Administration to return to the drawing board.

The Administration, heeding the words of the concurrence, returned to Congress and sought the requisite authority.¹⁷⁰ The result: the Military Commissions Act.¹⁷¹ The MCA provided the requisite authority for trial by military commissions, and it authorized certain procedures that were previously not allowed because of the Conventions.¹⁷² This legislation is ostensibly valid because, under constitutional law principles, a subsequently passed act trumps a previously signed treaty.¹⁷³

The MCA uses language bearing a striking resemblance to sections of Article 3 pointed out by the Court in *Hamdan*: “A military commission . . . is a regularly constituted court, affording . . . ‘judicial guarantees . . . recognized . . . by civilized peoples’”¹⁷⁴ The MCA declares that the Conventions are met merely by stating that a military commission affords all the guarantees deemed indispensable to civilized peoples, as required by the Conventions.¹⁷⁵ Therefore, this case also sheds light on the importance of President Bush’s newfound authority to interpret the Conventions.

¹⁶⁸ Human Rights Watch, *supra* note 34, at 1.

¹⁶⁹ *Hamdan*, 126 S. Ct. at 2798.

¹⁷⁰ *Id.* at 2799 (Breyer, J., concurring) (“Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”).

¹⁷¹ Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of titles 10, 18, and 28 U.S.C.).

¹⁷² *Id.* § 2, 120 Stat. at 2600.

¹⁷³ U.S. CONST. art. 6, cl. 2; *see also* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 600 (1889) (finding that when a treaty and an act are of the same subject matter, “the last expression of the sovereign will must control”). For an interesting opinion that an interpretation by the Executive of treaties concerning human rights should be refuted by the Court if the interpretation opposes the Constitution or takes away individual rights, see Jeffrey C. Goldman, *Of Treatises and Torture: How the Supreme Court Can Restrain the Executive*, 55 DUKE L.J. 609 (2005).

¹⁷⁴ Military Commissions Act § 3(a)(1), 120 Stat. at 2602.

¹⁷⁵ *See supra* note 164 and accompanying text. This statement is debatable because the procedures allowed by a military commission would be prohibited in any regular criminal proceeding and prohibited even by courts-martial.

2. Hamdan's Implications for the CIA

The decision in *Hamdan* had significant impacts on interrogators, specifically on CIA interrogators. Until the *Hamdan* decision, CIA interrogators were using interrogation techniques that would meet the requirements set forth in what is commonly referred to as the Torture Memo.¹⁷⁶ The Torture Memo was a formal legal opinion from the Office of Legal Counsel.¹⁷⁷ This memo purported to interpret the Convention Against Torture (an international law treaty), as well as criminal provisions enacted by Congress.¹⁷⁸

The Torture Memo provides a very narrow definition of torture: “[O]nly activities resulting in ‘death, organ failure or the permanent impairment of a significant body function’ qualify” as torture.¹⁷⁹ The memo also stated that al Qaeda detainees were not prisoners of war and therefore not entitled to the protection extended to such persons by the Conventions.¹⁸⁰ No doubt, the belief that the Conventions did not apply contributed to the use of some of the abusive techniques. The memo certainly failed to provide comfort to interrogators after *Hamdan*, wherein the Court rejected the government’s position that the Conventions did not apply to the War on Terror.¹⁸¹

The Torture Memo further instructed that an interrogator could raise criminal law defenses, such as necessity and self-defense, if prosecuted for torture.¹⁸² These defenses stemmed from the terrorist attacks of September 11, 2001.¹⁸³ The memo also asserted that the prohibitions against torture could possibly be unconstitutional if made applicable to interrogations conducted on enemy combatants pursuant to the President’s plenary war-making powers.¹⁸⁴

¹⁷⁶ See Memorandum from John Yoo, Deputy Assistant Att’y Gen., to Alberto R. Gonzales, White House Counsel (Aug. 1, 2002), available at <http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html>. This memorandum interpreted the United States’ responsibilities and obligations under international law and therefore provided some insight as to what methods would and would not violate prohibitions against torture. See *id.*

¹⁷⁷ John W. Dean, The Torture Memo by Judge Jay S. Bybee That Haunted Alberto Gonzales’s Confirmation Hearings, Jan. 14, 2005, <http://writ.news.findlaw.com/dean/20050114.html>. This memo was written by Judge Jay S. Bybee and his deputy, John Yoo. *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (quoting the Torture Memo).

¹⁸⁰ Memorandum from John Yoo, *supra* note 176, at 5–6.

¹⁸¹ See 126 S. Ct. 2749, 2798 (2006).

¹⁸² See Dean, *supra* note 177.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

The memo seemed to give interrogators carte blanche, and interrogators must have felt that almost any technique was permitted. That is especially true of CIA interrogators, because DOD directives against abusive techniques—including the Army Field Manual, which provides several clear-cut prohibitions—do not regulate CIA interrogators.¹⁸⁵ Even after the Senate passed the McCain Amendment,¹⁸⁶ which repudiated the Torture Memo, the Administration attempted to carve out an exception¹⁸⁷ for CIA interrogators.¹⁸⁸ Considering the Torture Memo's "anything goes" approach and the subsequent acts of the Administration, it is not surprising that CIA interrogators allegedly used abusive techniques, such as waterboarding, periods of long standing, and dousing naked prisoners with water, just to name a few.¹⁸⁹

When the McCain Amendment was passed, and after failure of the Administration to excuse CIA interrogators, interrogators were understandably confused and, indeed, concerned about the legality of the techniques they had been using.¹⁹⁰ The *Hamdan* decision further frustrated the CIA interrogators' expectations concerning what techniques were permissible. The words of the McCain Amendment and the *Hamdan* decision were inescapably impressed on the interrogators' consciences. CIA interrogators demanded protection for past acts that were apparently in contravention of United States and international laws.¹⁹¹ They needed clear-cut prohibitions as to what did and did not constitute torture. The Administration provided the MCA.

¹⁸⁵ Human Rights Watch, *supra* note 24.

¹⁸⁶ By a 90-9 vote, the United States Senate approved the McCain Amendment. Library of Congress: Thomas, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SP01977>. The Amendment, sponsored by Republican Senators John McCain and Lindsey Graham, prohibited cruel, inhumane, or degrading treatment. See Human Rights Watch, US: License to Abuse Would Put CIA Above the Law, Oct. 26, 2005, <http://hrw.org/english/docs/2005/10/26/usdom11922.htm>. The prohibition applied to any detainee anywhere in the world. *Id.*

¹⁸⁷ For the proposed exception, see Human Rights Watch, *Possible Change to Section 8155 of the Senate Amendment to H.R. 2863, Department of Defense Appropriations Act, 2006*, Oct. 20, 2005, available at http://hrw.org/us/cheney_detainee102505.pdf.

¹⁸⁸ Human Rights Watch, *supra* note 24.

¹⁸⁹ See Rickard, *supra* note 61.

¹⁹⁰ *Id.*

¹⁹¹ See Smith, *supra* note 81.

IV. PROTECTING THE NATION AND THE UNITED STATES' REPUTATION AS A LEADER OF HUMAN RIGHTS

Protecting the nation is vital. But detainees held under our nation's control are entitled to basic human rights including freedom from abuse and torture.¹⁹² Ensuring that detainees are extended such rights is critical to the nation's reputation as a leader of human rights.¹⁹³ Unfortunately, the country's reputation continues to deteriorate. Given the inadequacies of the MCA set forth above, there must be policies and recommendations implemented that achieve the following two purposes: (1) preservation of our nation's security in a world troubled by terrorism; and (2) preservation of our nation's reputation.

Section A introduces readers to Israel's struggle with interrogation of detainees. This section identifies ways in which Israel has restricted interrogations and encourages the United States to implement similar policies. Section B outlines an argument that coercive interrogations should be accepted under certain circumstances. Specifically, this argument concludes—erroneously in my view—that coercive interrogation provides for accurate, reliable intelligence.

Section C looks beyond the realm of interrogation and peeks into the arena of prosecutorial discretion, describing the policies that have been implemented to prevent prosecutors from filing charges based upon bias, prejudice, and the like. The section argues that these policies and procedures could prove effective within the realm of interrogation.

A. *Words of Wisdom from the Experienced: Israel and Its Long Struggle with Interrogation of Detainees*

The United States is not the only country acquainted with terrorists and the difficulties stemming from the interrogation of detainees. It would be wise for the United States to pay close attention to those countries, like Israel, that have for years been faced with the difficulties of preserving human rights while gathering useful intelligence for security purposes.

¹⁹² See U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment); see also *supra* note 131 and accompanying text.

¹⁹³ See Michael Abramowitz, *Bush's Unpopularity in Europe Hangs over Summit*, WASH. POST, June 21, 2006, at A15 (noting that the United States' image has diminished recently in France, Germany, and Spain partially due to allegations of abuse at Guantánamo Bay); see also BBC News, *UK Calls for Guantanamo Closure*, May 10, 2006, http://news.bbc.co.uk/2/hi/uk_news/politics/4759317.stm.

Israel has long struggled with terrorists seeking to advance their political agendas via acts of hostility. Those attacks have forced Israel to answer the same important questions the United States now faces: what interrogation techniques strip detainees of their human rights and should therefore be prohibited; should coercive techniques ever be permitted, such as when a detainee has information about a “ticking bomb”;¹⁹⁴ and what non-abusive techniques provide reliable, useful intelligence?

First, this section tracks Israel’s struggle with the inherent difficulties of interrogation and highlights parallels between Israeli and CIA interrogators. Next, the section examines how the Israeli Supreme Court provided much-needed direction to Israeli interrogators. Then, the benefits of the Court’s direction are emphasized. Finally, Israeli principles are applied to United States interrogations.

1. We Are Not Alone: Israeli Struggles with Interrogation and Allegations of Abuse and Torture

In 1987, Israel created the Commission of Inquiry into the Methods of Investigation of the General Security Service.¹⁹⁵ The Commission suggested that the Israeli General Security Service use moderate physical pressure on detainees when conducting interrogations; such techniques, it was suggested, would not amount to torture.¹⁹⁶ This moderate physical pressure was supposed to be limited to special circumstances.¹⁹⁷

It is important to note that, like the interrogators of the CIA who relied upon the Torture Memo, Israeli interrogators relied on this Commission, an authority presumed to possess knowledge of the relevant law.¹⁹⁸ Israeli interrogators used some of the same techniques as CIA interrogators.

¹⁹⁴ HCJ 5100/94 Pub. Comm. Against Torture in *Isr. v. The State of Israel* [1999] IsrLR 567, 580. A detainee who has information, for example, regarding the location of an imminent attack is sometimes referred to as a “ticking bomb.” *Id.* If a detainee is a ticking bomb, then interrogators must make a difficult decision; interrogators must choose between torturing the detainee, in violation of international and domestic law, to force an admission, or risk human lives. *Id.* at 580–81. For a discussion of whether torture or other coercive techniques should ever be permitted, including situations where a detainee is a ticking bomb, see *infra* Part IV.B.

¹⁹⁵ *Id.* at 573.

¹⁹⁶ *Id.* at 574.

¹⁹⁷ *Id.*

¹⁹⁸ See *supra* Part III.B.2 (discussing the Torture Memo).

Five of the most common techniques included: shaking,¹⁹⁹ forcing detainees to wait in the “Shabach” position,²⁰⁰ forcing detainees to sit in the “frog crouch,”²⁰¹ using excessively tight handcuffs,²⁰² and depriving detainees of sleep.²⁰³ The Israeli interrogators, much like their American counterparts, thought that these interrogation techniques were in compliance with the law.²⁰⁴ Despite the fact that such interrogation techniques would evoke feelings of unrest in most people, the interrogators did not expect that the techniques would run afoul of domestic or international law.²⁰⁵

The Israeli government allowed these techniques, claiming that they were necessary to preserve the security of the population.²⁰⁶ However, despite the government’s argument that the techniques were necessary, the Israeli Supreme Court struck down their legitimacy in 1999.²⁰⁷

The Supreme Court of Israel acknowledged that interrogations should be “exercised in conformity with the basic principles of the democratic regime.”²⁰⁸ The court was sympathetic to the need to prevent acts of violence.²⁰⁹ The majority realized that a balance needed to be struck between the public interest in safety and the need to preserve the dignity and basic liberties of detainees.²¹⁰ Thus, the court reasoned that a reasonable interrogation was “one free of torture, free of cruel, inhumane treatment, and free of any degrading conduct whatsoever.”²¹¹ In addition, any violence aimed

¹⁹⁹ *Public Committee Against Torture in Israel*, [1999] IsrLR at 577. This method involves forceful and repeated shaking of one’s upper body. *Id.* The shaking is severe and causes the neck and head to jerk violently. *Id.* This method may cause brain damage, injury to the spinal cord, and uncontrolled vomiting and urination. *Id.*

²⁰⁰ *Id.* at 578. During this method, a detainee is seated on a small, low chair. *Id.* The chair is tilted slightly. *Id.* The detainee’s hands are tied behind his back with one hand placed between the chair’s seat and back support. *Id.* The other hand is tied against the back support. *Id.* A long hood is placed over the detainee’s head and loud music is played while the detainee is forced to wait for a lengthy period. *Id.*

²⁰¹ *Id.* at 579. In this position, the detainee crouches on the tips of her toes. *Id.* The detainee is expected to remain in this position for up to five minutes. *Id.* The crouches occur often and consecutively. *Id.*

²⁰² *Id.* Interrogators would sometimes use handcuffs or leg cuffs that were unnecessarily tight. The cuffs were also excessively small. *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 581.

²⁰⁵ *Public Committee Against Torture in Israel*, [1999] IsrLR at 581.

²⁰⁶ *Id.* at 581.

²⁰⁷ *Id.* at 607.

²⁰⁸ *Id.* at 590.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 591.

²¹¹ *Public Committee Against Torture in Israel*, [1999] IsrLR at 591.

at one's body or spirit was not considered a reasonable interrogation technique.²¹²

Since shaking was directed at harming one's body, this technique was struck down,²¹³ along with the "Shabach" position,²¹⁴ the "frog crouch,"²¹⁵ and excessively tight handcuffing.²¹⁶ As to routine handcuffing and sleep deprivation, the court stated that these are actions inherent to the interrogation process, and such methods therefore fall within the general power to interrogate.²¹⁷ The court was careful to note that such methods, if used unreasonably, could deviate from the inherent power to investigate and thus constitute torture or cruel, inhuman, and degrading treatment.²¹⁸

2. *Advantages of Clear-Cut Prohibitions in Israel*

Since the Israeli Supreme Court's decision in *Public Committee Against Torture in Israel*, interrogators in Israel have been using techniques in accord with the principles set forth in that opinion.²¹⁹ These techniques include "psychological tricks,"²²⁰ informants²²¹ and electronic surveillance.²²² These techniques do not involve any physical contact.²²³

Significantly, since the court's opinion, claims of detainee abuse have decreased. Before the decision, three quarters of those questioned stated that

²¹² *Id.* at 592.

²¹³ *Id.* at 592.

²¹⁴ *Id.* at 594.

²¹⁵ *Id.* at 593.

²¹⁶ *Id.* at 593–94.

²¹⁷ *Public Committee Against Torture in Israel*, [1999] IsrLR at 593, 597.

²¹⁸ *Id.* at 595, 597. Some of the other acts deemed reasonable included seating a detainee during interrogations in order to facilitate the mind game key to interrogations; preventing contact between the interrogator and the detainee; preventing contact between the detainee and others; reasonably covering the detainee's eyes in order to prevent eye contact between the interrogator and the detainee; and carrying out interrogations at frequent intervals. *Id.* at 594–97.

²¹⁹ Dion Nissenbaum, *Israel's Experience with Harsh Questioning May Provide Guidance*, MCCLATCHY WASH. BUREAU, Oct. 25, 2006, http://www.mcclatchydc.com/staff/dion_nissenbaum/story/14897.html.

²²⁰ This method refers to the use of tricks such as using fake documents to make the detainee feel as if the government has a rap sheet on him. *Id.* Ultimately, this method focuses on carrying out acts that provide the psychological effect of fear. *Id.* There is no physical contact involved. *Id.*

²²¹ Informants are individuals used to seemingly befriend detainees. The goal is to trick the detainee to give information to the informant whom he thinks is a trusted friend. The informants are referred to as birds. *Id.*

²²² *Id.*

²²³ *Id.*

they were subjected to the shabach position during interrogations.²²⁴ After the decision, this number dropped to less than forty percent.²²⁵ Further, the use of shaking dropped substantially: Before the decision, forty-five percent claimed to have been subjected to this technique; after the decision, this number fell to twenty percent.²²⁶

3. *Applying Israeli Principles to the United States*

The United States lacks a Supreme Court decision explicitly banning certain techniques. Given the Israeli statistics above, it seems that a Supreme Court ruling as explicit as the Israeli court's would encourage interrogators to cease the use of abusive techniques and remind them of the valuable essence of a democratic society which adheres to human rights. Unfortunately, that type of opinion is not likely, given the reluctance of the United States Supreme Court to wade in such waters.²²⁷ However, explicit prohibitions could be created via other means.

The MCA instructs the President to issue an executive order.²²⁸ This order shall describe the President's interpretation of the Conventions, and it may also set forth more stringent standards for violations of treaty obligations not deemed grave breaches of the Conventions.²²⁹ Ultimately, the MCA requires the President to publish interpretations of the Conventions, and these interpretations could state exactly what interrogation techniques are permissible.

This is the President's opportunity to put to rest misperceptions about the law and of the validity of interrogation techniques.²³⁰ However, the President is not required to set forth clear-cut prohibitions,²³¹ and given the substance of past documents and the President's attempts to create a safe haven for CIA

²²⁴ This study was conducted by the Treatment and Rehabilitation Center for Victims of Torture. *Id.*

²²⁵ Nissenbaum, *supra* note 219.

²²⁶ *Id.*

²²⁷ *Cf.* PHILIP J. PRYGOSKI, SUM AND SUBSTANCE: QUICK REVIEW OF CONSTITUTIONAL LAW 16 (12th ed. 2007) (noting that the Supreme Court will not settle disputes that involves a political question, including suits concerning the constitutionality of military action in a foreign country).

²²⁸ Military Commissions Act, Pub. L. No. 109-366, 6(a)(3)(B), 120 Stat. 2600, 2632 (2006).

²²⁹ *Id.* § 6(a)(3)(A), 120 Stat. at 2632.

²³⁰ Human Rights Watch, *supra* note 34, at 11–12.

²³¹ Military Commissions Act § 6(a)(3)(A), 120 Stat. at 2632 (authorizing President to set forth “standards”).

interrogators,²³² the President may refuse to provide clear and explicit restrictions.²³³

Pressure should be put on the President to use the order to set forth clear-cut prohibitions. This may seem like a tedious task at first, but it is one that could be based on existing rules. For instance, prohibitions could mirror those found within the new Army Field Manual.²³⁴ The Manual, entitled DOD Human Intelligence Collector Operations, explicitly enumerates acts that, if used in conjunction with intelligence interrogations, are prohibited.²³⁵

The Army Field Manual prohibits the following practices: “[f]orcing the detainee to be naked, perform sexual acts, or pose in a sexual manner”; duct taping one’s eyes or covering the head with a hood or sack; “[a]pplying beatings, electric shock, burns, or other forms of physical pain”; using dogs; causing hypothermia or a heat injury; and conducting mock executions.²³⁶ Waterboarding is also specifically prohibited.²³⁷ Such clear-cut prohibitions from the President are necessary given the vague, circular language used in the MCA.

Aside from setting forth explicit restrictions, the Army Field Manual clearly defines non-abusive interrogation techniques that are permitted when military personnel seek information from a detainee.²³⁸ These defined techniques do not involve physical touching, and they are not geared towards rendering a detainee mentally unstable.²³⁹ Rather, these techniques are designed to exploit a detainee’s character flaws or emotional weaknesses, such as having an inflated ego or possessing already present doubts.²⁴⁰

²³² See sources cited *supra* note 186–88 and accompanying text.

²³³ On July 20, 2007, President Bush signed an executive order concerning the Geneva Conventions Article that failed to apply the entire Military Commissions Act to CIA interrogations. See Exec. Order No. 13,440, 72 Fed. Reg. 40707 (July 20, 2007), available at <http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html> [hereinafter Geneva Conventions Executive Order]. This order also failed to provide clear-cut prohibitions and examples of interrogation techniques such as those set forth in the Army Field Manual. See *infra* note 243. Therefore, unfortunately, this order in and of itself does not clarify what interrogations are appropriate, and it fails to clarify vague terms used within the MCA. See Geneva Conventions Executive Order.

²³⁴ See DEP’T OF THE ARMY, *supra* note 25.

²³⁵ *Id.* at 5–21.

²³⁶ *Id.*

²³⁷ See *id.*

²³⁸ DEP’T OF THE ARMY, *supra* note 23, at 8-2 to 8-19.

²³⁹ See *id.*

²⁴⁰ *Id.*

The prohibitions and clearly defined non-abusive techniques set forth in the Army Field Manual should apply even to CIA interrogators. There is no need for a double standard in the War on Terror; this is one War on Terror and the same international (i.e., the Geneva Conventions) and domestic law (i.e., the Constitution) govern all United States persons. A need for a uniform standard concerning interrogations becomes especially apparent given that statements “in which the degree of coercion is disputed” are sometimes admissible under the MCA.²⁴¹ Rules even provide that evidence, under certain standards, may be admissible in “the absence of a search warrant or other authorization.”²⁴² And it must not be forgotten that an alien unlawful combatant may no longer rely upon a writ of habeas corpus to contest detention.²⁴³ Ultimately, the time for uniformity within the arena of interrogations is now.

In addition, there should be widespread adoption of the non-abusive techniques now used in Israel, and their use should be encouraged.

B. Are Abusive Interrogations Ever Warranted?

At first glance, it may be difficult to understand the need for the United States to implement the Israeli techniques that are far from constituting abuse. Some scholars have argued that coercive interrogations should be permitted under certain circumstances.²⁴⁴ Coercive interrogation involves the use of physical or mental force to gather information from detainees in an effort to preserve the security of others.²⁴⁵ At least one scholar has said that coercive interrogations amounting to torture should be permitted under certain circumstances.²⁴⁶ Such scholars should note the words of Aristotle: “[P]eople under [torture’s] compulsion lie just as often, sometimes persistently refusing to tell the truth, sometimes recklessly making a false charge in order to be let

²⁴¹ U.S. DEP’T OF DEF., MANUAL FOR MILITARY COMMISSIONS, I-1 to I-2 (2007), available at http://www.loc.gov/rr/frd/Military_Law/pdf/manual-mil-commissions.pdf (citing 10 U.S.C. § 948r(c) (2006)).

²⁴² *Id.* at I-2.

²⁴³ See *supra* Part IIA; see also *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

²⁴⁴ See, e.g., Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. 671 (2006); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004) (arguing that coercive interrogations should be prohibited, except in certain instances such as when there is the threat of a catastrophic attack).

²⁴⁵ Posner & Vermeule, *supra* note 244, at 672.

²⁴⁶ *Id.* at 701.

off sooner.”²⁴⁷ Nevertheless, arguments supporting the use of coercive techniques or torture may proceed along the lines of a cost-benefit analysis.²⁴⁸

That argument does not ignore the importance of the United States’ reputation, but it does suggest that allowing coercive interrogations in limited circumstances would have only a marginal effect on the nation’s reputation.²⁴⁹ This stems from an assumption that a slippery slope effect will not cause interrogators to unduly rely upon coercive interrogation techniques; due to this assumption, this possible side effect is not added into the cost-benefit calculus.²⁵⁰

Yet it fails to take into account the conditions under which interrogations take place. For instance, many interrogations are conducted in facilities sitting in the middle of a combat zone, as was the case in Abu Ghraib.²⁵¹ Further, interrogators are often burdened with the weight of extreme stress, given conditions inherent to war, such as sleep deprivation and anxiety.²⁵² Those conditions increase the likelihood that interrogators will cross the line and use coercive interrogations, even when unnecessary. This means that allegations, and perhaps photos of abuse, will likely surface again from the already murky waters surrounding interrogations. Thus, the risk of a permanent scar on the nation’s reputation may be greater than some scholars would recognize. This is especially true given that “[t]he prohibition of torture in international law knows no exceptions.”²⁵³

1. Results of Coercive Interrogations

Arguments that coercive interrogations are warranted in certain circumstances ignore evidence that coercive interrogations do not provide useful, reliable intelligence. That fact should certainly be considered in the cost-benefit analysis, if that is the method relied on to justify the use of coercive interrogations.

²⁴⁷ ARISTOTLE, RHETORIC bk. I, ch. 15 (W. Rhys Roberts trans., 1954), *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE, at 2190 (Jonathan Barnes ed., Princeton Univ. Press 1984).

²⁴⁸ *Id.* at 680.

²⁴⁹ *Id.* at 693. A limited circumstance would include a situation where a detainee is a ticking bomb. *See supra* note 194 and accompanying text.

²⁵⁰ Posner & Vermeule, *supra* note 244, at 688.

²⁵¹ DEP’T OF THE ARMY, INSPECTOR GENERAL: DETAINEE OPERATIONS INSPECTION 34 (2004), *available at* <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/index.html>.

²⁵² *Id.* at iii.

²⁵³ Johan D. van der Vyver, *Torture as a Crime Under International Law*, 67 ALB. L. REV. 427, 453 (2003).

A comprehensive look at interrogations conducted in the past is warranted. There are several instances where coercive interrogations were used and the end result was useless intelligence.²⁵⁴ Long before September 11, 2001, interrogations were conducted on prisoners.²⁵⁵ During the Korean War, thirty-six American airmen were taken into custody and subjected to interrogation.²⁵⁶ The interrogation techniques used on these airmen included solitary confinement of up to thirteen months, awkward positioning, such as painful standing and sitting, and taunting.²⁵⁷ Such techniques would not constitute torture, yet they do fit within the definition of coercive interrogations.²⁵⁸

In the end, all of the Americans confessed; their confessions, however, were entirely false.²⁵⁹ That is alarming because, even though the Americans were not subjected to torture, the coercive interrogations were harsh enough to cause the detainees to admit to crimes they had neither committed nor had any knowledge of.²⁶⁰ One American prisoner stated that “[t]hey don’t have to lay a hand on you to make you the most miserable person in the world.”²⁶¹ Lieutenant General John F. Kimmons, at a Pentagon briefing, expressed his view by stating, “No good intelligence comes from abusive interrogation practices.”²⁶²

Coercive interrogations do not provide interrogators with a way to extract useful intelligence. If coercive interrogations do not provide for reliable intelligence, surely detainees who are being subjected to more extreme forms of abuse and torture will admit to anything to stop the pain and humiliation.

This point is further illustrated by examining those who are detainees. Significantly, those in custody are rarely, if ever, actually deemed terrorists.²⁶³ So, even if coercive interrogations and torture produced reliable intelligence, conducting this type of interrogation on those held would still ultimately be useless.

²⁵⁴ See Joseph Margulies, *The More Subtle Kind of Torment*, WASH. POST, Oct. 2, 2006, at A19.

²⁵⁵ See *id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See Posner & Vermeule, *supra* note 244, at 672.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Margulies, *supra* note 254 (quoting Major William Harris).

²⁶² Human Rights Watch, *supra* note 24.

²⁶³ MARK DENBEAUX & JOSHUA DENBEAUX, *THE GUANTÁNAMO DETAINEES: THE GOVERNMENT’S STORY* 2 (2006), available at http://law.shu.edu/news/Guantánamo_report_final_2_08_06.pdf.

2. *An Inside Look at the “Terrorists” Held Under U.S. Control*

According to a study conducted by Mark and Joshua Denbeaux, fifty-five percent of the Guantánamo Bay detainees had not committed any hostile acts against the United States.²⁶⁴ In fact, only five percent of the detainees were found and taken into custody by United States military personnel.²⁶⁵ Eighty-six percent of the detainees were found, arrested, and turned over to United States custody by Pakistan or the Northern Alliance, both of whom had incentives to turn over any individual: Pakistan and the Northern Alliance received monetary compensation from the United States.²⁶⁶

The study found that there were over 500 detainees deemed enemy combatants at Guantánamo Bay.²⁶⁷ Most had been detained for four years or more, and only about ten had been charged with any crime concerning a violation of the laws of war.²⁶⁸ A considerable portion of the detainees had never participated in combat against the United States on a battlefield.²⁶⁹

More troubling is the definition used to define an “enemy combatant.” The study found that a CSRT defined an enemy combatant quite loosely.²⁷⁰ Further, at a CSRT hearing, the detainee is not allowed an attorney and may not be able to present certain evidence, thereby making it less likely that the detainee will be correctly named an enemy combatant.²⁷¹

Notably, it was not illegal to fight for the Taliban before September 11, 2001; yet, some of the detainees are being held because they fought for the Taliban prior to that date.²⁷²

Scholars suggesting that coercive interrogations and torture should be permitted in certain instances erroneously assume, for the sake of argument, that the benefits of using these techniques outweigh the costs.²⁷³ These

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 4.

²⁶⁸ *Id.*

²⁶⁹ See DENBEAUX & DENBEAUX, *supra* note 263, at 4.

²⁷⁰ See *id.* at 7 (the study found, “[o]nly 8% of the detainees were characterized as al Qaeda fighters [O]f the remaining detainees, 40% have no definitive connection with al Qaeda at all and 18% are have no definitive affiliation with either al Qaeda or the Taliban.”). *Id.* at 2.

²⁷¹ John Chandler, Attorney, Sutherland Asbill & Brennan, LLP, Lecture on Representation of Detainees at Emory University School of Law (Nov. 8, 2006) (notes on file with author).

²⁷² See *id.*

²⁷³ See Posner & Vermeule, *supra* note 244.

scholars wrongfully begin with the premise that such techniques provide for accurate intelligence that could potentially save lives.²⁷⁴ They also fail to consider that many detainees are not likely to possess any information that, if extracted, would prove useful. Ultimately, the costs of using these techniques fail to outweigh any marginal benefits such as the extraction of information that may or may not be accurate.

C. Internal Policies: The Key to More Useful and Less Intrusive Interrogations

Given that abusive interrogations do not provide reliable intelligence,²⁷⁵ there must be policies that will eliminate abusive interrogations. The decision in *Public Committee Against Torture in Israel* provides an analytical framework for understanding the intricacies of interrogation and the public interest at stake.²⁷⁶ However, the United States does not have to look beyond its own borders for answers as to how abuse and torture can be thwarted.

For instance, government prosecutors have significant discretion to decide which cases to prosecute and in which ones to be lenient or to prosecute aggressively.²⁷⁷ This discretion could potentially open the door to abuse and corruption. Given the lenient standards that govern prosecutorial filing decisions, prosecutorial misconduct could erupt, leading prosecutors, influenced by bias or prejudice, to file charges only against certain races or genders.²⁷⁸ At least within the federal realm, Washington, D.C. prosecutors have been fair and just when deciding which cases to file and which to prosecute aggressively.²⁷⁹

There are many parallels between the type of discretion extended to prosecutors and CIA interrogators, so it is important to examine why D.C. prosecutors remain fair and just instead of abusing their discretion. The following section examines the internal regulations used to deter and prevent abuse of discretion by prosecutors, and highlights how these regulations may be used to likewise deter abuse of discretion by interrogators.

²⁷⁴ See *id.* at 692.

²⁷⁵ See *supra* Part IV.B.1.

²⁷⁶ See *supra* Part IV.A.1.

²⁷⁷ See Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1075 (2006).

²⁷⁸ *Id.*

²⁷⁹ See *id.*

1. *The Environmental Mindset: An Outgrowth of Training and Supervision*

There are many reasons D.C. prosecutors do not abuse their discretion. First, prosecutors care about their reputations and they want to be perceived as fair; they want to be team players.²⁸⁰ Further, prosecutors, under the scrutiny of judges, do not want to jeopardize their reputations.²⁸¹ Therefore, oftentimes prosecutors in D.C. do not use prejudice, bias, or the like to make filing decisions, nor do these prosecutors choose to prosecute aggressively defendants who are seen as only marginally culpable.²⁸² Otherwise, this would reflect negatively on their valued reputations.

The desire to maintain a positive reputation stems from the overall mission of the Federal Prosecutor's Office to achieve just results; this mission creates an environment in which it is expected that defendants will be dealt with evenhandedly.²⁸³ Therefore, prosecutors do not want to step beyond the boundaries of this mission and risk losing their standing in the eyes of colleagues.²⁸⁴

This environment is fostered and maintained primarily because of two mechanisms: training and supervision.²⁸⁵ Newly hired prosecutors undergo basic training, and there is also monthly training for senior prosecutors.²⁸⁶ Additionally, training guides and internal regulations set forth in memoranda by the Attorney General are readily available to prosecutors in an online database.²⁸⁷

The second mechanism is supervision. Supervision begins even before a prosecutor is hired.²⁸⁸ Prosecutors in management positions only hire and maintain the employment of prosecutors who will uphold the ideals of the office.²⁸⁹ Hiring practices are stringent. For instance, several interviews are conducted to determine if the prospective prosecutor will uphold the overall mission of the office and deal with all persons justly.²⁹⁰

²⁸⁰ *Id.* at 1080.

²⁸¹ *Id.*

²⁸² Brown & Bunnell, *supra* note 277, at 1080–81.

²⁸³ *Id.* at 1080.

²⁸⁴ *Id.* at 1080–81.

²⁸⁵ *Id.* at 1081–83.

²⁸⁶ *Id.* at 1081.

²⁸⁷ *Id.*

²⁸⁸ Brown & Bunnell, *supra* note 277, at 1081 n.49.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

During the last interview, candidates are asked a few hypothetical questions.²⁹¹ These questions are posed to determine the candidate's skills, but also to determine the candidate's ethical inclination.²⁹² This interview is videotaped and reviewed by several senior prosecutors.²⁹³

There is also hands-on supervision to ensure that prosecutors are following internal guidelines.²⁹⁴ Supervisors also frequently review the individual work of prosecutors.²⁹⁵ Prosecutors who make mistakes are counseled and retrained.²⁹⁶

Ultimately, it is this training and supervision that creates an environment in which prosecutors wish to be looked upon favorably and learn that abuses of discretion will not be tolerated. This same type of environment must be created within the realm of interrogations. Since the MCA opens the door to abusive interrogations,²⁹⁷ the necessary environment could be created by implementation of internal policies whereby interrogators are trained to perfection and supervised closely.²⁹⁸

2. *Implementing Prosecutorial Safeguards*

The CIA could implement an interviewing process that presents hypothetical situations to potential interrogators as a means of determining whether they would cross the line of normal interrogation and use abusive techniques. Also, training should be conducted frequently, as with the prosecutors, and retraining, at the very least, should always occur when an interrogator is found to have used abusive interrogation techniques. Significantly, the importance of training has been recognized as a key reason why current Israeli interrogators are using non-abusive interrogation techniques after the *Public Committee Against Torture in Israel* decision.²⁹⁹

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Brown & Bunnell, *supra* note 277, at 1082.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ See *supra* Part II.F.2.

²⁹⁸ See Brian Knowlton, *U.S. General Links Prisoner Abuse to 'Lack of Discipline,'* INT'L HERALD TRIB., May 12, 2004, at 1 (noting that allegations of abusive interrogations stemmed from a lack of training and supervision).

²⁹⁹ See Posner & Vermeule, *supra* note 244, at 685. Posner and Vermeule point out that Israeli interrogators work according to explicit guidelines and are supervised constantly. See *id.*

At each facility where the CIA conducts interrogations, supervisors should take an active role like that taken by supervisors in the D.C. prosecutorial office.³⁰⁰ Supervisors should examine individuals conducting interrogations and provide feedback where necessary. Lastly, information about internal policies and more general policies should be posted on a secure, password-protected website so any interrogator that is unsure of a given technique can readily access the appropriate regulation.

Ultimately, the activities of the D.C. prosecutors confirm that discretion can be honored and will not be necessarily abused. Implementation of proper training and supervision can create an environment in which interrogators know the appropriate boundaries and feel compelled to remain within them.

CONCLUSION

Many interrogations have produced abuse and torture; few interrogations have produced reliable, accurate intelligence.³⁰¹ As a result, the United States' reputation as leader of human rights has been significantly harmed.³⁰² Detainees, as well as their families, are significantly harmed.³⁰³ This harm even affects the interrogators; military personnel have been brought to trial³⁰⁴ and allegations of abuse and torture have tainted the reputation of all interrogators.

Legislators who enacted the MCA may have intended to lay such harms to rest. However, that law may increase allegations of abuse and torture due to the power it vests within the Administration, its vagueness, and its leniency toward governance of CIA interrogators.

Interrogations must be restrained by some other means. The United States cannot afford to rely upon the MCA itself. The President should have, in his executive order, set forth explicitly what techniques are permissible.³⁰⁵ This

³⁰⁰ See *supra* Part IV.C.1.

³⁰¹ See *supra* Parts I.B & IV.B.1 (discussing allegations of abuse and inaccurate information obtained by coercive interrogations).

³⁰² See Knowlton, *supra* note 298.

³⁰³ See CHRISTIAN PEACEMAKER, IRAQ: REPORT AND RECOMMENDATIONS ON IRAQI DETAINEES (2004), available at http://www.cpt.org/iraq/detainee_report.pdf.

³⁰⁴ See *supra* note 126 and accompanying text.

³⁰⁵ A more specific executive order is unlikely given the President's statements concerning a recent intelligence funding bill that would restrict CIA interrogators, allowing said interrogators to only use interrogation techniques authorized by the 2006 Army Field Manual. Jaime Jansen, *Bush to Veto Intelligence*

would have given CIA interrogators the direction they need to make informed decisions concerning permissible interrogation techniques. Specifically, the President should examine those techniques used in Israel that have proved effective in producing reliable intelligence without sacrificing human rights, and the President should set forth clear-cut prohibitions and permitted techniques, such as those found in manuals governing military interrogators.

It must be remembered that coercive interrogations do not provide for reliable intelligence. Therefore, it is not appropriate to deem such interrogations valid, even in limited situations. Consequently, internal regulations, like those governing prosecutorial discretion, should be implemented in addition to the limited standards set forth in President Bush's current Executive Order.³⁰⁶

These restrictions may make gathering intelligence more difficult. But, as the Supreme Court of Israel explained, "This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back."³⁰⁷

The United States must not forget that while collecting intelligence via interrogation is important for security purposes, it is not acceptable to succumb to the techniques used by the terrorist enemy. The very reason we are fighting terrorism is to preserve rights, such as human dignity, inherent to a democratic society. Interrogation techniques must be adopted that are in accordance with domestic, international, and moral laws, for these are the foundation upon which this country stands.

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Bill Restricting CIA Interrogations Tactics, JURIST, <http://jurist.law.pitt.edu/paperchase/2008/02/bush-to-veto-intelligence-bill.php> (Feb. 15, 2008); *see also supra* note 242.

³⁰⁶ *See supra* note 237 and accompanying text.

³⁰⁷ *Public Committee Against Torture in Israel*, *supra* note 194, at 332.

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