

Statement on the McCain Anti-Torture Amendment Prohibitions

The McCain Amendment is an important milestone on the road to ending torture and abusive interrogations. The Amendment bans “cruel, inhuman and degrading” treatment, including during interrogations conducted by any U.S. officials, against any detainee, anywhere in the world. It makes the U.S. Army Field Manual on Interrogation binding on all Department of Defense interrogations.

Under any good faith interpretation of the McCain Amendment a wide variety of interrogation techniques are illegal under U.S. law, including seven specific techniques reported to have been used or to be currently in use. Techniques now squarely prohibited include:

- Waterboarding
- Sleep Deprivation
- Stress Positions
- Temperature Manipulation Risking Hypothermia
- Striking Prisoners and Violent Shaking
- Using Dogs to Terrify
- Nakedness and Sexual Humiliation

As they have reportedly been practiced on U.S. detainees, these techniques are illegal under the 5th, 8th and 14th Amendments to the Constitution. They all are prohibited by the U.S. Army Field Manual on Interrogation (FM 34-52). These techniques have been routinely condemned when they have been employed by despotic regimes throughout history, and the Department of State continues to recognize them as forms of torture in its current statements and reports. Many have also been expressly recognized as torture and inherently cruel by the United States Supreme Court, the government of the United Kingdom and a unanimous Israeli Supreme Court.

Since the Nuremberg War Crimes Trials it has been understood that the notion that a person committing war crimes was “just following orders” is no longer an acceptable defense. The perpetrators and those exercising command responsibility may be charged with and convicted of war crimes. The claim of a perpetrator that he was acting in an official capacity cannot constitute a defense or a basis to mitigate punishment. Similarly a defense of superior orders is unlikely to be available in such circumstances.

No reasonable person, given the text of the McCain Amendment, the binding decisions of our Supreme Court, and common sense understandings of decency, can now consider such techniques to be permitted. Any U.S. official or employee who gets legal advice to the contrary should recognize that advice as unreasonable and contrary to law. Any U.S. official or employee who acts upon instructions, orders or purported authorization to engage in this conduct does so at his or her peril and in defiance of the will of Congress and the law. Congress should be vigilant in its oversight role with respect to implementation of the McCain amendment and should insist upon reviewing

all legal opinions produced by the Administration interpreting the McCain Amendment or the ban on torture and cruel, inhuman and degrading treatment.

At the same time we are deeply concerned over reports that Congress is considering authorizing the use of information obtained through torture as evidence in legal proceedings and radically limiting habeas rights for those detained at Guantanamo Bay. The Graham-Levin-Kyl Amendment should be dropped by Congress to make clear and unequivocal a single, unified message on these issues: torture and cruel, inhuman or degrading treatment can never be tolerated in the name of the United States.

Signed,

Center for American Progress

Human Rights First

American Civil Liberties Union

Amnesty International USA

Human Rights Watch

Open Society Policy Center

“Cruel, Inhuman and Degrading”

What the McCain Amendment Bans

*“The obvious cruelty inherent in this practice should have provided ... notice that their alleged conduct violated Hope’s constitutional protection against **cruel and unusual punishment**. Hope was treated in a way **antithetical to human dignity**.... [It was] both degrading and dangerous.”*

-- U.S. Supreme Court, *Hope v. Pelzer* (2002)¹

McCain Amendment Standards

- Makes US Army Field Manual binding authority for all DOD interrogations
- Bans “cruel and unusual” conduct under the 5th, 8th and 14th Amendment in all interrogations conducted by the US anywhere in the world

Seven Techniques Reportedly in Use Clearly Banned by McCain Amendment

This list is not exhaustive. Many techniques are banned by the McCain Amendment (e.g., any form of mock execution). But there are seven techniques that have been widely reported to have been used by U.S. officials that are now clearly banned because they violate both the U.S. Army Field Manual and constitute “cruel and unusual punishment” under the Constitution

Waterboarding

- Water, suffocation used on bound prisoner creating overwhelming fear of death
- Used by the Spanish Inquisition, the Argentine junta and other despots
- “Mental torture” under Army Manual because it is a form of mock execution
- “Torture” under federal torture law because it creates “threat of imminent death”
- Meets Justice Dept. standard of “barbaric” act of “torture” through threat of death

¹ In *Hope v. Pelzer* the Supreme Court prohibited handcuffing a prisoner in a prolonged, painful position in the hot sun.

Sleep Deprivation

- Classic form of torture used by Stalin and other brutal regimes
- Explicitly a form of “Mental Torture” under the U.S. Army Field Manual
- Banned by the UK and by a unanimous Israeli Supreme Court
- Expressly prohibited by the US Supreme Court

Prolonged, Painful Stress Positions

- Can involve forced standing or kneeling for 40 or more hours
- Banned in UK and by unanimous Israeli Supreme Court
- Explicitly called “Physical Torture” by the Army Field Manual
- Bush Justice Dept. said it violated 8th Amend. in its *Hope v. Pelzer* brief
- Supreme Ct. denounced it as “obvious cruelty” antithetical to human dignity

Temperature Manipulation, Hypothermia

- US used ice water and freezing conditions, rectal thermometers to avoid death;
CIA reportedly killed a prisoner using this technique
- Used by Stalin, Syria and North Korea among others
- Clearly capable of causing severe damage and death
- Deliberate and dangerous exposure to heat criticized by Supreme Court

Punching, Striking, Violent Shaking and Beatings

- CIA reportedly using “shaking” technique with blows to face and stomach
- Israeli shaking technique killed prisoner; banned by unanimous Supreme Court
- Constitutes assault and is a criminal offense
- Plainly illegal under the Constitution to beat, strike, shake prisoners

Using Dogs to Terrorize

- Terrorized blindfolded prisoners in Iraq to extent that many urinated on selves
- Banned in directive issued by Pentagon, but that order can be waived by SecDef
- Clearly degrading and traumatizing

Nakedness and Sexual Humiliation

- Used in dictatorships like Syria, Uzbekistan and North Korea
- Clearly intended to degrade and humiliate
- Would never be accepted as legitimate if used on US soldier
- Clearly illegal under the US Constitution