ADDENDUM

After Defining Torture went to print, an important development in the law governing the treatment of detainees occurred. On December 30, 2005, President Bush signed into law H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, Pub. L. No. 109-148. Title X of Division A of the Act is the Detainee Treatment Act of 2005, commonly referred to as the "McCain Amendment." Notwithstanding the popular media's depiction of this legislation, the McCain Amendment does not prohibit torture. Indeed, it does not even use the word torture. While a potentially significant law in its own right, the McCain Amendment does nothing to clarify the definition of torture, leaving the issues central to Defining Torture unaltered.

The McCain Amendment provides that (1) those in the custody of control of the Department of Defense shall be subject only to interrogation techniques or treatment included in the U.S. Army Field Manual, Detainee Treatment Act § 1002(a), and (2) "no individual in the custody or under physical control of the United States Government, shall be subject to cruel, inhuman, or degrading treatment or punishment," id. § 1003(a). The actual impact of these provisions is the subject of some debate.

First, limiting interrogation to techniques permitted in the Army Field Manual may provide better guidance to those responsible for interrogations. However, critics note that the Army Field Manual is not set in stone. Which interrogation methods are permitted and which prohibited is always subject to revision. In fact, the Army recently prepared an amended Field Manual, which includes a new, classified Addendum listing secret interrogation methods.

Second, the prohibition against cruel, inhuman, and degrading treatment largely, if not entirely, recodifies existing law. As discussed in Defining Torture, cruel, inhuman, and degrading treatment was already prohibited. Article 16 of the Convention Against Torture obligates signatories to prohibit such treatment, and in its Reservations to the CAT the United States stated that it deemed such a prohibition coextensive with, and thus its obligations satisfied by, the 5th, 8th, and 14th Amendments to the Constitution. As Senator McCain himself acknowledged, "[t]he second part of this amendment really shouldn't be objectionable to anyone since I'm actually not proposing anything new. The prohibition against cruel, inhumane and degrading treatment has been a longstanding principle in both law and policy in the United States." McCain Statement on Detainee Amendments, October 5, 2005, available at http://mccain.senate.gov. The new legislation defines "cruel, inhuman and degrading treatment" to be no more and no less than treatment or punishment already prohibited by the Constitution. Detainee Treatment Act § 1003(d).

Perhaps the most significant aspect of the McCain Amendment is that it clarifies (or,
some would say, newly provides) that the prohibition applies to conduct by U.S. personnel anywhere in the world. Id. § 1003(b) ("Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.").

Critics have noted a number of weaknesses in the new legislation. First, the McCain Amendment does not employ the word torture, instead utilizing the existing definition of cruel, inhuman and degrading treatment, i.e. conduct that violates the 5th, 8th, and 14th Amendments of the U.S. Constitution. Id. § 1003(d). The precise definition of "torture" and the distinction between it and "cruel, inhuman and degrading treatment" remain utterly enigmatic. Second, the McCain Amendment is immediately followed by limiting language: provisions that set forth defenses and protections for persons accused of cruel, inhuman, or degrading treatment or punishment, id. § 1004, and that leave open the possibility of military tribunals using statements obtained through coercion, id. § 1005(b). Moreover, the McCain Amendment establishes neither criminal or civil penalties, nor an express private right of action, for violations.

In signing the bill, President Bush issued a statement that calls into question whether the Administration considers the legislation binding. According to the President's signing statement the administration will construe the law "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power...." President's Statement on Signing of H.R. 2863, Dec. 30, 2005, available at http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html. Pundits from across the political spectrum have predicted that the Bush Administration is positioning itself to ignore the McCain Amendment, relying on inherent executive authority to justify continued use of cruel, inhuman, and degrading treatment.

Torture continues to be a front-page story. While legislators are beginning to grapple with the issue, to date they have left the root problems untouched. The definition of torture remains central to the multifaceted debate over detention policies, interrogation methods, abuse of power, and the pursuit of universal human rights. The McCain Amendment further highlights the paramount and continuing need for a precise, fair, and universal definition of torture.

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January 2006