



Guantanamo Detention Center: Legislative Activity in the 111th Congress

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Summary

The detention of alleged enemy combatants at the U.S. Naval Station in Guantanamo Bay, Cuba, has been the focus of significant legislative activity during the 111th Congress. The Supplemental Appropriations Act, 2009 (P.L. 111-32), enacted in June 2009, contains several provisions relevant to Guantanamo detainees. Section 319 of the act includes an ongoing reporting requirement. Section 14103 restricts the use of funds for the transfer and release of the detainees in specified circumstances. Although the Supplemental Appropriations Act is the only Guantanamo-related measure enacted to date in the 111th Congress, versions of defense appropriations and authorization bills passed by the House and Senate also contain provisions that would establish reporting requirements, restrict the transfer or release of detainees, or amend military commission procedures. Various other proposals address a range of issues related to detainee treatment, executive and judicial authority, and other matters.

This report analyzes the relevant provisions of the Supplemental Appropriations Act, 2009, and selected legislative proposals that have been introduced in the 111th Congress. For more detailed explorations of the legal issues related to the potential closure of the detention facility and the transfer, release, and treatment of detainees, see CRS Report R40139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia, *et al.*, and CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea, Kenneth R. Thomas, and Michael John Garcia.

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Introduction

In 2001, Congress authorized the President’s use of “all necessary and appropriate force” against those responsible for the 9/11 terrorist attacks.¹ Pursuant to that authority, the United States has captured suspected Al Qaeda and Taliban members and detained them at several locations, including the U.S. Naval Station at Guantanamo Bay, Cuba. Of the nearly 800 alleged enemy combatants whom the United States has detained at Guantanamo throughout the course of post-9/11 military operations, all but 229 detainees have been released or transferred from the base. For the remaining Guantanamo detainees, practical and legal hurdles, including national security concerns and questions regarding detainees’ rights under international law and the U.S. Constitution, have delayed prosecutions and made transfers difficult.²

Highlighting the prominence of the issue, three executive orders signed by President Obama shortly after he took office address the Guantanamo detention facility and Guantanamo detainees. To “promptly” close the detention facility and “in order to effect the appropriate disposition of” Guantanamo detainees, one executive order required the closure of the detention facility as soon as practicable, and no later than January 22, 2010.³ It also ordered an immediate review of each detainee’s status and temporarily halted all proceedings before military commissions.⁴ A second executive order limited the methods for interrogating persons in U.S. custody (as part of any armed conflict) to those listed in the Army Field Manual on Human Intelligence Collector Operations, although it provides an exception for interrogations by the Federal Bureau of Investigation, stating that the FBI may “continu[e] to use authorized, non-coercive techniques of interrogation that are designed to elicit voluntary statements and do not involve the use of force, threats, or promises.”⁵ A third executive order established the Special Task Force on Detainee Disposition, which is tasked with “identif[y]ing lawful options” for the disposition of Guantanamo detainees and others captured by the United States.⁶ Because executive orders can be revoked by subsequent presidential directives, legislation would be necessary to make the

¹ Authorization to Use Military Force, P.L. 107-40 (2001). The authority applies to “nations, organizations, or persons” who “planned, authorized, committed, or aided the terrorist attacks” and to people who harbored the perpetrators of the attacks.

² For more detailed background information and an analysis of legal issues implicated by the potential closure of Guantanamo, see CRS Report R40139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia et al.

³ Executive Order 13492, Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 4897–4900 (Jan. 27, 2009).

⁴ *Id.* Congress enacted the Military Commissions Act of 2006, P.L. 109-366, to authorize the President to convene military commissions to prosecute “alien unlawful enemy combatants.” The act exempted the new military commissions from several requirements, codified in the Uniform Code of Military Justice, that would have otherwise applied. For a detailed analysis of the military commissions created pursuant to the Military Commissions Act, see CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea. More recently, the Secretary of the Department of Defense notified Congress of five proposed modifications to the procedures for the military commissions established under the Military Commissions Act. See White House Press Release, *Statement of President Barack Obama on Military Commissions* (May 15, 2009).

⁵ Executive Order 13491, *Ensuring Lawful Interrogations*, 74 Fed. Reg. 4891–4896 (Jan. 27, 2009); Army Field Manual, § FM 2-22.3, Human Intelligence Collector Operations, issued by the Department of the Army on September 6, 2006.

⁶ Executive Order 13493, *Review of Detention Policy Options*, 74 Fed. Reg. 4901–4902 (Jan. 27, 2009).

President's policies permanent. Likewise, Congress could reverse or adjust the approach of the executive orders in any area in which it has the authority to act.

Key issues implicated by the potential closure of the detention facility include the transfer or release of detainees and procedures for prosecuting detainees or assessing their enemy combatant status. Members have noted that issues related to the disposition of the remaining detainees complicate any legislative actions to fund, mandate, or prohibit closure of the detention facility. For example, when introducing a bill proposing a timeline for closure of the facility, Senator Feinstein noted that "the hard part about closing Guantanamo is not deciding to go do it; it is figuring out what to do with the remaining detainees."⁷ Thus, much of the legislative activity related to Guantanamo has focused on the transfer, release, and treatment of detainees.

Congress enacted the Supplemental Appropriations Act, 2009 (P.L. 111-32), in June 2009. Provisions of the law establish reporting requirements and restrict the transfer and release of Guantanamo detainees, thereby requiring further information regarding the disposition of detainees before appropriated funds may be used to effectuate the closure of the detention facility or the transfer or release of detainees into the United States. In addition, the House and Senate have passed several provisions as part of appropriations or authorization measures that would likewise restrict the use of federal funds for the transfer or release of Guantanamo detainees until reporting requirements have been fulfilled. The measures to restrict detainees' transfer to or release are perhaps prompted by perceived security risks to U.S. citizens that some argue could arise if suspected terrorists were detained or tried in the United States.⁸ Other provisions in appropriations bills would amend the military commissions framework or address the application of *Miranda* warnings to those in U.S. custody. This report discusses relevant provisions of the Supplemental Appropriations Act, 2009, appropriations bills that have been passed by at least one chamber, and selected additional proposals which address issues relevant to Guantanamo detainees.

Supplemental Appropriations Act, 2009

The Supplemental Appropriations Act, 2009 (P.L. 111-32), signed into law in June 2009, contains two affirmative requirements or restrictions related to the Guantanamo detention facility and a number of related provisions restricting the use of appropriated funds. Section 319 of the act creates a general reporting requirement, which requires the President to submit reports on the Guantanamo "prisoner population" to specified Members⁹ of Congress within 60 days of the legislation's enactment and every 90 days thereafter. The reports must provide the following information with respect to each detainee: (1) name and country of origin; (2) a "summary of the

⁷ 155 Cong. Rec. S157 (daily ed. Jan. 7, 2009) (statement of Sen. Feinstein).

⁸ See, e.g., Press release, Rep. J. Randy Forbes, *Members Introduce Bill to Prevent Transfer of Terrorists to Virginia Prisons* (Mar. 2, 2009), available at <http://forbes.house.gov/News/DocumentSingle.aspx?DocumentID=113008>.

⁹ Members to whom the report must be submitted include: "(1) The majority leader and minority leader of the Senate; (2) The Chairman and Ranking Member on the Committee on Armed Services of the Senate; (3) The Chairman and Vice Chairman of the Select Committee on Intelligence of the Senate; (4) The Chairman and Vice Chairman of the Committee on Appropriations of the Senate; (5) The Speaker of the House of Representatives; (6) The minority leader of the House of Representatives; (7) The Chairman and Ranking Member on the Committee on Armed Services of the House of Representatives; (8) The Chairman and Vice Chairman of the Permanent Select Committee on Intelligence of the House of Representatives; and (9) The Chairman and Ranking Member of the Committee on Appropriations of the House of Representatives."

evidence, intelligence, and information used to justify” his detention; and (3) a “current accounting of all the measures taken to transfer” him to his home or another country. In addition, the reports must state the “number of individuals released or transferred from detention ... who are confirmed or suspected of returning to terrorist activities after release or transfer” and provide “an assessment of any efforts by al Qaeda to recruit detainees released from detention.” The initial report (to be completed within 60 days of the legislation’s enactment) must address several additional matters, including: (1) a “description of the process that was previously used for screening the detainees” who have been released and are confirmed or suspected of returning to terrorist activities; (2) “[a]n assessment of the adequacy of that screening process for reducing the risk that detainees previously released or transferred ... would return to terrorist activities after [their] release or transfer”; and (3) “[a]n assessment of lessons learned from previous releases and transfers of individuals who returned to terrorist activities for reducing the risk that detainees released or transferred ... will return to terrorist activities after their release or transfer.”¹⁰

Section 14103 prohibits the ceasing of operations at the Guantanamo detention center until a report on the status of detainees has been submitted to Congress. Specifically, it requires the President, before “the termination of detention operations” at the detention facility, to submit a classified report to Congress which “describ[es] the disposition or legal status of each individual detained at the facility.”¹¹ It does not specify the level of detail that the report would need to include with respect to each detainee, nor does it appear to impose any particular time line governing submission of the report.

As mentioned, § 14103 also contains various provisions which restrict the use of funds for the transfer and release of Guantanamo detainees. First, it bans the use of appropriated funds for the purpose of releasing any individual detained at Guantanamo into the continental United States, Hawaii, or Alaska. Thus, absent further legislation, it would appear that the Executive could not transfer detainees into the United States for the purpose of release. However, the provision does not appear to restrict the use of funds for the release of detainees to the U.S. territories, which could raise questions regarding potential restrictions on detainees’ travel to the United States after release to a U.S. territory.

Second, regarding the transfer of detainees, it conditions the use of funds on a reporting requirement.¹² Specifically, it bars the use of appropriated funds for the purpose of transferring a detainee into the continental United States, Hawaii, or Alaska for continued detention or prosecution, unless the President submits a plan to Congress 45 days prior to the transfer, in classified form, concerning the proposed disposition of the individual to be transferred. In particular, the plan must address: (1) “findings of an analysis regarding any risk to the national security of the United States that is posed by the transfer”; (2) “costs associated with transferring the individual”; (3) “[t]he legal rationale and associated court demands for transfer”; (4) “[a] plan for mitigation of any risk”; and (5) “[a] copy of a notification to the Governor of the State to which the individual will be transferred or to the Mayor of the District of Columbia if the individual will be transferred to the District of Columbia with a certification by the Attorney

¹⁰ P.L. 111-32, 111th Cong. (2009) at § 319.

¹¹ *Id.* at § 14103(f).

¹² The most important difference between the original House and Senate versions of the legislation appears to have arisen in the context of restrictions on the transfer of detainees into the United States. Whereas the Senate version banned the use of funds for that purpose outright, the House version conditioned the use of funds for that purpose on the fulfillment of a reporting requirement. The enacted legislation more closely resembles the House version with respect to restrictions on the transfer of detainees.

General of the United States in classified form at least 14 days prior to such transfer (together with supporting documentation and justification) that the individual poses little or no security risk to the United States.”¹³

Finally, the act creates a similar condition regarding the use of funds for the transfer or release of a detainee to another country. In particular, it limits the availability of funds for the transfer or release of a Guantanamo detainee to a foreign State, unless the President submits a classified report to Congress, at least 15 days prior to the transfer, which contains specified information regarding the proposed transfer. Specifically, the report must provide information regarding: (1) the detainee’s name and the country to which he will be released or transferred; (2) “[a]n assessment of any risk to the national security of the United States or its citizens, including members of the Armed Services of the United States, that is posed by such transfer or release and the actions taken to mitigate such risk”; and (3) “[t]he terms of any agreement with another country for acceptance of such individual, including the amount of any financial assistance related to such agreement.”¹⁴

Pending Legislative Proposals

Legislative proposals introduced both prior to and after the enactment of the Supplemental Appropriations Act, 2009, address a range of issues, including closure of the base, transfer of detainees to the United States, detainee treatment and prosecution, and jurisdictional matters. Some of the first bills introduced during the 111th Congress suggested specific time frames for closure of the Guantanamo detention facility.¹⁵ In introductory remarks regarding one such bill, Representative Harman said that closure was necessary because the detention facility is “so widely viewed as illegitimate, so plainly inconsistent with America’s proud legal traditions, that it has become a stinging symbol of our tarnished standing abroad.”¹⁶ Although it is a position that has been advocated,¹⁷ no bill introduced to date includes an unconditional bar on closure of the detention facility. Instead, bills address a number of concerns implicated by the proposed closure.

The most recent legislative activity has taken place within the context of appropriation and authorization measures. In many cases, differing provisions in versions passed by one chamber would face consideration by the other chamber, or differences between two bills would be subject to resolution by committee.

¹³ *Id.* at § 14103(d).

¹⁴ *Id.* at § 14103(e).

¹⁵ By requiring closure of the base within 180 days of enactment, the Interrogation and Detention Reform Act of 2008, H.R. 591, proposed the shortest time frame. The Terrorist Detainees Procedures Act of 2009, H.R. 1315, provided a target date of December 31, 2009, which is slightly sooner than the date set by the President’s executive order. Two companion bills, S. 147 and H.R. 374, would require closure within one year. The companion bills’ time line corresponds with the one-year timetable set in President Obama’s executive order, although the one-year mark set by the bills would track the date of the legislation’s enactment.¹⁵ All of these bills also provided corresponding options and restrictions governing the transfer and prosecution of detainees.

¹⁶ 155 Cong. Rec. E59 (daily ed. Jan. 9, 2009) (extended remarks of Rep. Harman).

¹⁷ See, e.g., Mitch McConnell, *Don’t Close It*, Wash. Post. (March 15, 2009) at A19.

Provisions in Selected Authorization and Appropriations Bills¹⁸

Various provisions in authorization and appropriations bills passed by the House or Senate are relevant to the Guantanamo detention center. Some of the provisions passed by the House resemble provisions enacted as part of the Supplemental Appropriations Act, 2009, and earlier bills¹⁹ and might be struck as duplicative before the bill is reported in the Senate.²⁰ Other provisions in appropriations bills address issues related to the prosecution of detainees. Perhaps in response to judicial opinions invalidating provisions of the Military Commissions Act²¹ and to concerns regarding detainee abuse,²² some measures would eliminate the military commissions framework for prosecution or provide additional standards governing interrogation and treatment.

National Defense Authorization Act for Fiscal Year 2010 (H.R. 2647)

The House version of the 2010 National Defense Authorization Act, H.R. 2647, contains several relevant provisions, some of which resemble or would reinforce measures already enacted as part of the Supplemental Appropriations Act, 2009.²³ First, § 1023 would require the President to “consult” with the “chief executive” of any U.S. state, territory, or possession prior to transferring or releasing a Guantanamo detainee into that local jurisdiction. The consultation requirement appears to contemplate a somewhat greater degree of involvement by state governors than the Supplemental Appropriations Act, which requires a certification that a governor has been “notified” regarding a transfer. Second, § 1023 would also require the President to submit a plan to the congressional defense committees at least 120 days before transferring or releasing any Guantanamo detainee anywhere within the United States, its territories or possessions. The report would include: (1) “an assessment of the risk that the [detainee] poses to the national security of the United States, its territories, or possessions”; (2) a proposal for the disposition of each detainee; (3) a plan to mitigate any identified risks; and (4) a “summary” of the consultation that took place with the local jurisdiction’s chief executive. Regarding the release of detainees into the United States, it appears that the National Defense Authorization Act would allow the release of detainees as long as the reporting and consultation conditions were fulfilled, whereas the Supplemental Appropriations Act contains an outright ban on the use of appropriated funds to release of detainees into the United States. Finally, § 1058 would require the Department of Defense to “take such actions as are necessary to ensure the videotaping or otherwise electronically recording of each strategic intelligence interrogation” of any person in the Department’s custody.

¹⁸ For more information on appropriations requests and proposals related to Guantanamo, see CRS Report R40531, *FY2009 Spring Supplemental Appropriations for Overseas Contingency Operations*, coordinated by Stephen Daggett and Susan B. Epstein, and CRS Report RL34473, *Defense: FY2009 Authorization and Appropriations*, by Pat Towell, Stephen Daggett, and Amy Belasco.

¹⁹ See, e.g., Guantanamo Bay Detention Facility Safe Closure Act of 2009, S. 291, 111th Cong. (2009); Guantanamo Bay Detention Facility Safe Closure Act of 2009, H.R. 1069, 111th Cong. (2009).

²⁰ For example, provisions passed by the House as part of the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, H.R. 2847, were similar to provisions considered during deliberations leading to the enactment of the Supplemental Appropriations Act, 2009. These were struck from the bill before it was reported in the Senate.

²¹ See *Boumediene v. Bush*, 553 U.S. ___, 128 S.Ct. 2229 (2008) (invalidating the provision in the act that purported to foreclose *habeas corpus* challenges brought by Guantanamo detainees).

²² See, e.g., Senate Armed Services Committee, *Inquiry into the Treatment of Detainees in U.S. Custody*, available with redactions at <http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf>.

²³ National Defense Authorization Act for Fiscal Year 2010, H.R. 2647, 111th Cong. (2009).

National Defense Authorization Act for Fiscal Year 2010 (S. 1390)

Subtitle D of the Senate version of National Defense Authorization Act for Fiscal Year 2010, S. 1390, contains several provisions addressing military commissions and the reading of *Miranda* warnings. Section 1031 would replace the chapter of the U.S. Code, enacted as part of the Military Commissions Act of 2006, which governs military commissions procedures.²⁴ Examples of changes proposed by the measure include a prohibition on the use of evidence elicited by cruel or degrading treatment; a shift to the government of the burden of proof for the reliability of hearsay evidence; an extension of the obligation to disclose exculpatory information to include evidence of mitigating circumstances; and a new requirement that limits military commissions' jurisdiction to offenses which occurred "in the context of and associated with armed conflict."

In addition, § 1033 would restrict the reading of the warnings required in the general law enforcement context by *Miranda v. Arizona*.²⁵ Applying *Miranda*, courts generally do not admit defendants' statements at trial unless law enforcement officers issued the warnings, which typically begin with "You have the right to remain silent," before the statements were made. Section 1033 would prohibit the reading of *Miranda* warnings, absent a court order requiring that such warnings be read, to any "foreign national who is captured or detained as an enemy combatant by the United States."²⁶

Department of Homeland Security Appropriations Act, 2010 (H.R. 2892)

Section 552 of the version of the Department of Homeland Security Appropriations Act, 2010 that was passed by the House, H.R. 2892, contains several national security measures related to Guantanamo detainees.²⁷ First, it requires the Secretary of Homeland Security to "conduct a threat assessment for each [Guantanamo detainee] who is proposed to be transferred to the continental United States, Alaska, Hawaii, the District of Columbia, or the United States Territories." The assessment would examine the likelihood that a detainee might: (1) "instigate an act of terrorism within the continental United States, Alaska, Hawaii, the District of Columbia, or the United States Territories"; or (2) "advocate, coerce, or incite violent extremism, ideologically motivated criminal activity, or acts of terrorism, among inmate populations at incarceration facilities within the continental United States, Alaska, Hawaii, the District of Columbia, or the United States Territories." Second, it requires the Secretary to include former detainees on the "No Fly List,"

²⁴ National Defense Authorization Act for Fiscal Year 2010, S. 1390, 111th Cong. (2009), at § 1031.

²⁵ 384 U.S. 436 (1966).

²⁶ Section 504 of the version of the Intelligence Authorization Act for Fiscal Year 2010, H.R. 2701, which was reported in the House, contains a similar prohibition. Two other bills passed by the House during the 111th Congress also address the application of *Miranda* warnings to people held in U.S. custody. Section 744 of the Financial Services and General Government Appropriations Act, 2010, H.R. 3170, "requests the President, and directs the Attorney General, to transmit to each House of Congress ... copies of any portions of all documents, records, and communications in their possession referring or relating to the notification of rights under [*Miranda*] ... to ... detainees in the custody of the Armed Forces of the United States." In addition, § 1036 of H.R. 2647 would require the Secretary of Defense to submit a report within 90 days of the act's enactment regarding how reading of *Miranda* rights to individuals taken into custody in Afghanistan "may affect: (1) the rules of engagement of the Armed Forces deployed in support of Operation Enduring Freedom; (2) post-capture interrogations and intelligence-gathering activities conducted as part of Operation Enduring Freedom; (3) the overall counterinsurgency strategy and objectives of the United States for Operation Enduring Freedom; (4) United States military operations and objectives in Afghanistan; and (5) potential risks to members of the Armed Forces operating in Afghanistan."

²⁷ Department of Homeland Security Appropriations Act, 2010, H.R. 2892, 111th Cong. (2009).

“unless the President certifies in writing to Congress that the detainee poses no threat to the United States, its citizens, or its allies.”²⁸ Finally, it prohibits the use of funds appropriated under the act to “provide any immigration benefit (including a visa, admission into the United States, parole into the United States, or classification as a refugee or applicant for asylum)” to any former Guantanamo detainee.

Department of Defense Appropriations Act, 2010 (H.R. 3326)

Section 8119 of the Department of Defense Appropriations Act, 2010, H.R. 3326, a bill which was passed by the House, includes reporting requirements and restricts the transfer and release of Guantanamo detainees in a manner very similar to the restrictions in the Supplemental Appropriations Act, 2009.²⁹ Like § 14103 of the enacted Supplemental Appropriations Act, 2009, it contains both an outright restriction on the use of funds for the release of detainees into the United States and reporting requirements to be fulfilled before detainees could be transferred to the United States or another country.³⁰ One potentially important difference between § 8119 and the enacted law is that the § 8119 restrictions would apply to the transfer or release not only to the continental United States and Alaska and Hawaii, but also to “any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI).” Thus, it would restrict transfers to the U.S. territories, whereas the Supplemental Appropriations Act addresses only transfers to the continental U.S. or Alaska and Hawaii.

Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (H.R. 2996)

Like H.R. 3326, § 426 of the House version of the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, H.R. 2996, appears aimed to address gaps regarding transfers to U.S. territories that the Supplemental Appropriations Act, 2009, does not address.³¹ It

²⁸ Two related bills introduced in the House would require that Guantanamo detainees’ names be added to the Transportation Security Administration’s “no-fly list.” A bill to amend title 49, United States Code, to require inclusion on the no fly list certain detainees housed at the Naval Air Station, Guantanamo Bay, Cuba, H.R. 2503, 111th Cong. (2009); Transportation Security Administration Authorization Act, H.R. 2200, 111th Cong. (2009) at § 405(a). One of these bills, H.R. 2200, was passed by the House. It would allow for the removal of individuals’ names from the no-fly list upon a certification by the President that a former detainee no longer posed a “threat to the United States, its citizens, or its allies.”

²⁹ Department of Defense Appropriations Act, 2010, H.R. 3326, 111th Cong. (2009), at § 8119.

³⁰ The reporting requirement upon which transfers to the United States would be conditioned contains elements nearly identical to those that would be included in a report submitted prior to transfer pursuant to § 14103 of the Supplemental Appropriations Act. Namely, § 8119 would require the President to submit a “comprehensive plan regarding the proposed disposition” of each detainee except those whom the President proposes to transfer or release to another country. The plan must include, “at a minimum”: (1) “findings of an analysis regarding any risk to the national security of the United States that is posed by the transfer of the individual”; (2) “costs associated with not transferring the individual”; (3) “[t]he legal rationale and associated court demands for transfer”; (4) a “certification by the President that any risk ... has been mitigated, together with a full description of the plan for such mitigation”; and (5) a “certification by the President that the President has submitted to the Governor and legislature of the State or territory ... a certification in writing at least 30 days prior to such transfer ... that the individual does not pose a security risk to the United States.” One substantive difference appears in the fifth element. Whereas the Supplemental Appropriations Act requires notification of a state’s governor, only, § 8119 requires certification that notification has been given to both the relevant governor and legislature.

³¹ Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, H.R. 2996, 111th Cong. (continued...)

bars the use of appropriated funds for the release of Guantanamo detainees to “any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI),” and it conditions the use of funds for the transfer of detainees to any of those locations on the fulfillment of a reporting requirement. Unlike other bills, it would also restrict transfers to “associated states.” In particular, it would establish a reporting requirement for the transfer or release of detainees to any “freely associated state”—namely Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI), and the Republic of Palau. However, these provisions were struck from the version of the bill that was reported in the Senate.

Department of State, Foreign Operations, and Related Programs Appropriations Act, 2010, H.R. 3081

Finally, the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2010, H.R. 3081, which has been passed by the House and placed on the Senate calendar, contains a five-day notification requirement for transfers to other countries. Specifically, § 7087 restricts the obligation of funds “for any country ... that concludes an agreement with the United States to receive [Guantanamo detainees] by transfer or release ... unless, not later than 5 days after the conclusion of the agreement but prior to implementation of the agreement, the Secretary of State notifies the Committees on Appropriations in writing of the terms of the agreement.”³²

Selected Additional Bills

Because the most recent legislative activity related to Guantanamo detentions has taken place in the context of appropriations and authorization measures, it is likely that many bills introduced earlier in the 111th Congress have informed the debate in that context. For example, as discussed, § 14103 of the Supplemental Appropriations Act, 2009, requires the President to certify that he has notified the governor of any state to which he intends to transfer a Guantanamo detainee prior to transferring a detainee to that state. A bill introduced earlier, the Keep Terrorists Out of America Act, H.R. 2294, first proposed that the President not only notify but also obtain consent from state governors and legislatures before transferring or releasing a Guantanamo detainee.³³ Likewise, before such restrictions were enacted as part of the Supplemental Appropriations Act, 2009, various bills proposed restrictions on the use of federal funds for the purpose of transferring or releasing detainees in the United States.³⁴

(...continued)

(2009).

³² Department of State, Foreign Operations, and Related Programs Appropriations Act, 2010, H.R. 3081, 111th Cong. (2009) at § 7087.

³³ Keep Terrorists Out of America Act, H.R. 2294, 111th Cong. (2009).

³⁴ For example, S. 370 would have prohibited the use of federal funds to transfer detainees or construct detention facilities for them anywhere within the United States. H.R. 1012 would similarly have prohibited the use of Department of Defense funds for such purposes and forbids the Department from coordinating with another department to effect transfers into the United States. In addition, another set of bills – H.R. 148, H.R. 565, H.R. 633, H.R. 701, H.R. 794, H.R. 817, H.R. 829, H.R. 951, H.R. 1073, H.R. 1186, H.R. 1566, and H.R. 2315 – would restrict the use of federal funds for transferring Guantanamo detainees to particular locations within the United States. Such locations include, respectively: Fort Leavenworth, Kansas; the Naval Consolidated Brig in Charleston, South Carolina; brig in Miramar and Camp Pendleton, California; any facility in Oklahoma; the Florence Federal Correctional Complex in Colorado; any facility in Georgia; any facility in North Carolina; any facility in Florida; any facility in Arizona; any facility in (continued...)

Likewise, some proposals introduced outside of the context of appropriations or authorization measures have been affected by the enactment of the Supplemental Appropriations Act, 2009. For example, provisions authorizing the transfer of detainees for the purposes of criminal prosecution would be impacted by the reporting requirements enacted in § 14103 of the Supplemental Appropriations Act.

Other bills contemplate approaches not addressed in the context of the appropriations or authorization bills currently under consideration. In addition, differences among proposals raise questions not addressed by provisions that have passed the House or Senate. For example, a remaining question is whether detainees who are criminally prosecuted but acquitted after judicial proceedings might be subject to continued preventive detention. Bills introduced early in the 111th Congress to require closure of the detention facility differ in their approaches to continued preventive detention—i.e., detention for purposes other than prosecution or punishment. For example, whereas three of the bills that would require closure of the detention facility, S. 147, H.R. 374, and H.R. 1315, would allow further preventive detention “in accordance with the law of the armed conflict,” another such bill, H.R. 591, does not contain a provision expressly authorizing detainees’ transfer to the United States for the purpose of continued preventive detention.³⁵

Bills Providing for Transfer for Criminal Prosecution

Several bills introduced during the 111th Congress to mandate the closure of the detention facility—specifically S. 147, H.R. 374, H.R. 591, and H.R. 1315—would also authorize transfer to a detention facility in the United States for criminal prosecution.³⁶ However, transfer to the United States under H.R. 1315 would apply only after a panel of military judges had reviewed a detainee’s status and determined that he was an unlawful enemy combatant. Under these bills, it is unclear whether detainees might then be released into the United States if acquitted after a criminal trial. Even if the bills contemplate such release, detainees would presumably lack immigration status and be subject to U.S. immigration laws. Sponsors of the measures noted that the Guantanamo detention “experiment” has lasted seven years and resulted in only three convictions. The bills appear to emphasize a priority on transfer for the purpose of initiating criminal prosecutions in a timely manner.³⁷ Appearing to counter other lawmakers’ concerns

(...continued)

Virginia; any military installation or federal detention center in Minnesota; and any facility in Ohio. Explaining the concern prompting one such bill, Representative Forbes of Virginia explained that Guantanamo detainees’ suspected “connections with terrorist organizations ... rais[es] significant security questions about moving these suspects to facilities within Virginia, especially as many of the [Virginia] facilities are within miles of neighborhoods, military bases, and schools.” Press release, Rep. J. Randy Forbes, *Members Introduce Bill to Prevent Transfer of Terrorists to Virginia Prisons* (Mar. 2, 2009), available at <http://forbes.house.gov/News/DocumentSingle.aspx?DocumentID=113008>.

³⁵ In *Hamdi v. Rumsfeld*, the Supreme Court held that pursuant to the 2001 Authorization for Use of Military Force, the President may preventively detain persons properly determined to be “enemy combatants” – a category not fully defined but which includes those captured while fighting U.S. forces in Afghanistan – for the duration of the conflict. 542 U. S. 507 (2004). Under *Hamdi*, it appears that Guantanamo detainees properly determined to be “enemy combatants” may be held in preventive detention by military authorities even if transferred to the United States. It is unclear whether H.R. 591 would purport to reverse that grant of authority as applied to Guantanamo detainees.

³⁶ Interrogation and Detention Reform Act of 2008, H.R. 591, 111th Cong. (2009); Lawful Interrogation and Detention Act, H.R. 374, 111th Cong. (2009); Lawful Interrogation and Detention Act, S. 147, 111th Cong. (2009); Terrorist Detainees Procedures Act of 2009, H.R. 1315, 111th Cong. (2009).

³⁷ 155 Cong. Rec. S157 (daily ed. Jan. 7, 2009) (statement of Sen. Feinstein).

regarding ensuing security risks, Senator Feinstein said that “federal civilian or military justice systems ... have handled terrorists and other dangerous individuals before and are capable of dealing with classified evidence and other unusual factors.”³⁸ These bills also contain options for transferring detainees to international tribunals, transfer to a detainee’s home country or a different country, and release.

Restrictions on the Transfer or Release of Detainees into the United States

Rather than restrict the use of funds as multiple appropriations and authorization measures have done, some bills would restrict the transfer or release of detainees through provisions that restrict detainees’ immigration status, require certifications, or limit judicial authority. For example, H.R. 1238 would make an alien detained at Guantanamo “permanently ineligible” for both “admission to the United States for any purpose” and “parole into the United States or any other physical presence in the United States that is not regarded as an admission.”³⁹ Likewise, S. 1071, the Protecting America’s Communities Act, would amend the Immigration and Nationality Act to prohibit the admission, asylum entry, or parole entry of a Guantanamo detainee into the United States.⁴⁰ It would also require that a Guantanamo detainee be detained for an additional six months after the “removal period” if the Secretary of Homeland Security certifies that: (1) the detainee “cannot be removed due to the refusal of all countries designated by the [detainee] or under this section to receive the [detainee]”; and (2) “the Secretary is making reasonable efforts to find alternative means for removing the [detainee].”⁴¹

Similarly, the Protection from Enemy Combatants Act, S. 108, would forbid the release by a U.S. court of any “covered alien”—defined as any person who “was detained” at Guantanamo—into the United States.⁴² It would also bar the issuance of an immigration visa or the granting of any immigration status that might facilitate a detainee’s entry into the United States or continued presence after release from custody. However, S. 108 contains a waiver provision that would allow the President to remove the restriction where doing so would be “consistent with the national security of the United States.” S. 1081, introduced by Senator Graham, includes measures similar to those in H.R. 1238 and S. 108, but it would apply only to non-U.S. citizens who had been determined by a Combatant Status Review Tribunal to be enemy combatants.⁴³

Interrogation, Treatment, or Prosecution

As discussed *supra*, the Senate version of the National Defense Authorization Act bill, S. 1390, would replace the existing chapter of the U.S. Code that sets forth procedures for the military commissions established pursuant to the Military Commissions Act. Several additional bills introduced during the 111th Congress address the treatment or prosecution of Guantanamo (and other) detainees. Treatment is currently governed by the Detainee Treatment Act of 2005 and

³⁸ *Id.*

³⁹ A bill to prohibit the presence in the United States of any alien formerly detained at the Department of Defense detention facility at Naval Station, Guantanamo Bay, Cuba, H.R. 1238, 111th Cong. (2009).

⁴⁰ Protecting America’s Communities Act, S. 1071, 111th Cong. (2009).

⁴¹ For more information regarding the removal of aliens, see CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, by Michael John Garcia and Ruth Ellen Wasem.

⁴² Protection from Enemy Combatants Act, S. 108, 111th Cong. (2009).

⁴³ A bill to prohibit the release of enemy combatants into the United States, S. 1081, 111th Cong. (2009).

Common Article 3 of the Geneva Conventions.⁴⁴ Pursuant to the Detainee Treatment Act of 2005, all persons in the custody or control of the U.S. military (including Guantanamo detainees) must be treated in accordance with Army Field Manual requirements.⁴⁵ Under Common Article 3, detainees must be treated humanely and protected from “violence to life and person,” “cruel treatment and torture,” and “outrages upon personal dignity, in particular, humiliating and degrading treatment.”⁴⁶ The same requirements would apply if detainees were transferred to the United States. In contrast, prosecution is governed by the Military Commissions Act of 2006, which addresses only detainees held at Guantanamo; inside the United States, it is unclear whether a civilian, military, or an alternative judicial process that is in accordance with constitutional rights afforded to persons located in the United States might be used to prosecute detainees.

Other proposals which address military commissions procedures include H.R. 591, which would institute or prompt the formulation of major reforms for interrogating and prosecuting detainees.⁴⁷ Referring to the “failure of the military commissions system,” it contains provisions that repeal the Military Commissions Act and abolish the military commission system established by the act. Instead, prosecutions would take place in federal civilian courts or in military court proceedings. In addition, it would direct the President to establish a “Center for Excellence in Human Intelligence Collection” and develop “uniform standards for the interrogation of persons in the custody or under the effective control of the United States.” It would also require that interrogations be videotaped. Similarly, the Terrorist Detainees Procedures Act of 2009, H.R. 1315, would repeal the Military Commissions Act.⁴⁸ It would establish new procedures for hearings by combatant status review tribunals. Specifically, panels comprised of three military judges would determine whether a detainee is an unlawful enemy combatant, in a manner similar to hearings that take place pursuant to the Uniform Code of Military Justice to determine whether sufficient evidence exists to warrant a court martial proceeding.

S. 147 and H.R. 374 would require that interrogations of all persons in custody of U.S. intelligence agencies be conducted in accordance with the U.S. Army Field Manual.⁴⁹ The bills would foreclose the possibility, left open in President Obama’s executive order on interrogation, that techniques other than those in the Army Field Manual could eventually be deemed appropriate for use by agencies outside the military.⁵⁰

⁴⁴ The U.S. Supreme Court determined that Common Article 3 applies to Guantanamo detainees in a 2006 case, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁴⁵ Section 1002 of P.L. 109-148 requires the DOD to follow the Army Field Manual for intelligence interrogation. See Department of the Army Field Manual 2-22.3 (FM 34-52), Human Intelligence Collector Operations (2006).

⁴⁶ “Common Article 3” refers to the third article in each of the four Geneva Conventions, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 (6 UST 3114); the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (6 UST 3217); the Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (6 UST 3316); and the Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (6 UST 3516).

⁴⁷ Interrogation and Detention Reform Act of 2008, H.R. 591, 111th Cong. (2009).

⁴⁸ Terrorist Detainees Procedures Act of 2009, H.R. 1315, 111th Cong. (2009).

⁴⁹ Lawful Interrogation and Detention Act, H.R. 374, 111th Cong.; Lawful Interrogation and Detention Act, S. 147, 111th Cong.

⁵⁰ Executive Order, Ensuring Lawful Interrogations, January 22, 2009, available at http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/.

Finally, a few bills would restrict detainees' access to medical facilities or public benefits. Finding that Guantanamo detainees "often receive better medical treatment and food than members of the United States Armed Forces" and "are often treated better than inmates in American prisons," H.R. 1042 prohibits the provision of medical treatment to Guantanamo detainees in any facility where members of the armed forces also receive treatment or in any facility operated by the Department of Veteran's Affairs.⁵¹ Another bill would make those detained at Guantanamo as of the bill's enactment and subsequently transferred to the United States "permanently ineligible" for specified federal, state, or local benefits.⁵² It is possible that such provisions could raise legal concerns regarding U.S. compliance with the Common Article 3 requirement to treat detainees humanely, the equal protection clause, or other legal safeguards.

Executive Authority to Detain Enemy Combatants and Judicial Authority to Hear *Habeas Corpus* Claims

Although the appropriations and authorization bills now under consideration generally do not address broad issues related to executive authority to detain enemy combatants or judicial authority to review *habeas corpus* petitions, several other bills introduced during the 111th Congress address those issues. For example, the Protecting America's Communities Act, S. 1071, would "reaffirm" the President's authority to "detain enemy combatants in connection with the continuing armed conflict with al Qaeda, the Taliban, and associated forces ... regardless of the place of capture."⁵³ Similarly, the Enemy Combatant Detention Review Act of 2009, H.R. 630, "reaffirms that the President is authorized to detain enemy combatants in connection with the continuing armed conflict with al Qaeda, the Taliban, and associated forces, regardless of the place of capture, until the termination of hostilities."⁵⁴ These provisions would perhaps extend the President's authority to preventively detain enemy combatants as part of post-9/11 military operations. In *Hamdi v. Rumsfeld*, the Supreme Court held that the 2001 Authorization to Use Military Force authorized the President to preventively detain enemy combatants captured during hostilities in Afghanistan but did not address whether such authority extends to captures made in other locations.⁵⁵ With the language "regardless of place of capture," S. 1071 and H.R. 630 appear to authorize preventative detentions of any alleged Al Qaeda or Taliban belligerent, even if captured outside military operations in Afghanistan.

H.R. 630 would also amend the federal *habeas corpus* statute.⁵⁶ For example, it would: (1) grant exclusive jurisdiction over *habeas* challenges to the U.S. District Court in the District of Columbia; (2) establish a rebuttable presumption that detainees are enemy combatants for the purpose of *habeas* review; and (3) require that *habeas* proceedings be stayed after charges are brought under the Military Commissions Act and until a detainee has exhausted review procedures established by that act. Because it stays *habeas* review only for detainees against whom charges have been brought, this proposal differs from the broader denial of *habeas* review

⁵¹ To prohibit the provision of medical treatment to enemy combatants detained by the United States at Naval Station, Guantanamo Bay, Cuba, in the same facility as a member of the Armed Forces or Department of Veterans Affairs medical facility, H.R. 1042, 111th Cong. (2009).

⁵² No Welfare for Terrorists Act of 2009, H.R. 2338, 111th Cong. (2009).

⁵³ Protecting America's Communities Act, S. 1071, 111th Cong. (2009).

⁵⁴ Enemy Combatant Detention Review Act of 2009, H.R. 630, 111th Cong. (2009).

⁵⁵ 542 U.S. 507 (2004).

⁵⁶ 28 U.S.C. §2241.

which the Supreme Court struck down as constitutionally invalid in *Boumediene v. Bush*.⁵⁷ It is unclear whether this distinction would be sufficient to withstand judicial scrutiny.

The Terrorist Detainees Procedures Act of 2009, H.R. 1315, would likewise grant exclusive jurisdiction over *habeas* challenges to the U.S. District Court in the District of Columbia and stay pending *habeas* cases.⁵⁸ However, in contrast to H.R. 630, it would stay *habeas* proceedings not to facilitate Military Commissions Act procedures but to await the outcome of status review hearings held by panels of military judges. In addition, the time period in which judges would render decisions in the status review process would be sharply limited—to 120 days from the legislation’s enactment for all detainees.

Conclusion

Legislative proposals introduced during the 111th Congress offer various responses to closing the Guantanamo detention facility, transfer and disposition of detainees, and detainee treatment. Although President Obama has addressed several of these issues in executive orders, legislation may be necessary to make measures taken in an executive order permanent or to effect alternative approaches to the disposition of Guantanamo detainees. The provision enacted as part of the Supplemental Appropriations Act, 2009, arguably signaled Congress’s reticence to facilitate closure of the detention facility before a detailed plan is in place governing the disposition of detainees. As Congress considers additional legislation, its approach to the issue may be shaped by the recommendations of the Special Task Force on Detainee Disposition, established by executive order, which will likely address many issues raised by the legislative proposals.

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⁵⁷ 553 U.S. ___, 128 S.Ct. 2229 (2008) (holding that the constitutional privilege of habeas corpus applies to Guantanamo detainees and that provisions in the Military Commissions Act do not provide an adequate substitute for *habeas* claims). For more information on the *Boumediene* decision, see CRS Report RL34536, *Boumediene v. Bush: Guantanamo Detainees’ Right to Habeas Corpus*, by Michael John Garcia.

⁵⁸ Terrorist Detainees Procedures Act of 2009, H.R. 1315, 111th Cong. (2009).