



Guantanamo Detention Center: Legislative Activity in the 111th Congress

Anna C. Henning
Legislative Attorney

December 30, 2009

Congressional Research Service

7-5700

www.crs.gov

R40754

Summary

The detention of alleged enemy combatants at the U.S. Naval Station in Guantanamo Bay, Cuba, together with recent proposals to transfer some such individuals to the United States for prosecution or continued detention, has been a subject of considerable interest for Congress. Several authorization and appropriations measures enacted during the 111th Congress, and various pending bills, address the disposition and treatment of Guantanamo detainees.

Recently legislative activity has focused on the possible transfer of Guantanamo detainees to the United States. The Supplemental Appropriations Act, 2009 (P.L. 111-32), and five FY2010 measures place general restrictions on the use of federal funds to release or transfer a Guantanamo detainee into the United States. The relevant FY2010 measures include: the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84), the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88), the Consolidated Appropriations Act, 2010 (P.L. 111-117), and the Department of Defense Appropriations Act, 2010 (P.L. 111-118). Each of the enacted laws provides an exception which permits transfers when effected 45 days after specified reporting requirements have been fulfilled. However, in most of the measures, the 45-day exceptions apply only to transfers for the purpose of prosecution or detention during legal proceedings.

The public laws and pending proposals address additional issues related to the treatment and disposition of Guantanamo detainees. For example, Title XVIII of P.L. 111-84 establishes new procedures for military commissions. Section 552 of P.L. 111-83 requires that former Guantanamo detainees be included on the “No Fly List” in most circumstances and restricts their access to immigration benefits.

This report analyzes relevant provisions in enacted legislation and selected pending bills. 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.

Contents

Introduction	1
Background	1
Enacted Laws.....	3
Restrictions on Transfer and Release	3
Restrictions on the Use of Funds to Release Detainees into the United States.....	3
15-Day Reporting Requirements for Release in or Transfer to Other Countries	4
45-Day Reporting Requirements for Transfers to the United States.....	4
General Reporting Requirements.....	6
Time Frames and Concurrent Application.....	7
Submission of Reports to Congress	7
Other Relevant Provisions.....	8
Selected Pending Proposals	10
Detainee Treatment	11
Executive and Judicial Authorities.....	11
Conclusion.....	13

Contacts

Author Contact Information	13
----------------------------------	----

Introduction

Recent announcements regarding the proposed transfer of individuals currently detained at the U.S. Naval Station at Guantanamo Bay, Cuba, have renewed attention to legislation addressing the issue. In November 2009, the U.S. Department of Justice announced that five Guantanamo detainees will be transferred to New York for prosecution.¹ In December 2009, the President issued a memorandum directing the transfer of detainees “who have been or will be designated for relocation” to the Thomson Correctional Center, a maximum-security facility in Illinois, as “expeditiously as possible.”² Several enacted measures contain provisions which directly restrict or place reporting obligations on such transfers.

This report surveys those provisions, together with others enacted or pending in the 111th Congress, that are relevant to Guantanamo detainees. 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.

Background

In 2001, Congress authorized the President’s use of “all necessary and appropriate force” against those responsible for the 9/11 terrorist attacks.³ Pursuant to that authority, the United States has captured suspected al Qaeda and Taliban members and detained them at several locations, including Guantanamo. 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 215 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 or made transfers difficult.⁴ In some cases, challenges have arisen because transfer to a detainee’s country of origin might raise national security or human rights concerns but other countries have been unreceptive to accepting detainees. Such was the scenario with detainees who are ethnic Uighurs, a Turkic Muslim minority group from China, who were cleared for release but for whom concerns regarding human rights abuses prevented transfer to their home country.⁵

¹ U.S. Department of Justice, *Attorney General Announces Forum Decisions for Guantanamo Detainees* (Nov. 13, 2009), <http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html>.

² Presidential Memorandum, *Closure of Detention Facilities at the Guantanamo Bay Naval Base* (Dec. 15, 2009), <http://www.whitehouse.gov/the-press-office/presidential-memorandum-closure-detention-facilities-guantanamo-bay-naval-base>.

³ 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.

⁴ 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.

⁵ Emphasizing likely human rights abuses the Uighur detainees would likely suffer if returned to their native China, a U.S. district court judge ordered them released into the United States, but the order was stayed and reversed by the U.S. (continued...)

Highlighting the prominence of the issue, three executive orders signed by President Obama shortly after he took office address the Guantanamo detention facility or affect 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, 2010.⁶ It also ordered an immediate review of each detainee’s status and temporarily halted all proceedings before military commissions.⁷ Two additional executive orders addressed overall wartime detention policy. One 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.”⁸ A third executive order established the Special Task Force on Detainee Disposition, tasked with “identif[y]ing] lawful options” for the disposition of Guantanamo detainees and others captured by the United States.⁹ Because executive orders can be revoked by subsequent presidential directives, legislation would be necessary to make the President’s policies permanent. Likewise, Congress may 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 them or assessing their enemy belligerency 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.”¹⁰ Thus, much of the legislative activity related to Guantanamo has focused on the transfer, release, and treatment of detainees.

(...continued)

Court of Appeals for the District of Columbia Circuit. *See Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *cert. granted*, 78 U.S.L.W. 3237 (2009). The Pacific nation of Palau has accepted some but not all of the Uighur detainees.

⁶ 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).

⁷ *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. In May 2009, 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). The Military Commissions Act of 2009, Title XVIII of P.L. 111-84 (discussed *infra*) enacts further revisions.

⁸ 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.

⁹ Executive Order 13493, *Review of Detention Policy Options*, 74 Fed. Reg. 4901-4902 (Jan. 27, 2009).

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

Enacted Laws

To date in the 111th Congress, relevant provisions have been enacted as part of the 2009 Supplemental Appropriations Act (P.L. 111-32), the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), the 2010 National Defense Authorization Act (P.L. 111-84), the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88), the Consolidated Appropriations Act, 2010 (P.L. 111-117), and the Department of Defense Appropriations Act, 2010 (P.L. 111-118). The 2009 Supplemental Act was the first relevant act; although subsequent provisions differ slightly, provisions restricting the transfer and release of detainees developed during conference committee deliberations for the 2009 Supplemental¹¹ are reflected in subsequent measures. The National Defense Authorization Act and the Homeland Security Appropriations Act each contain relevant provisions in addition to those restricting detainees' transfer or release. Subsequent FY2010 measures include provisions restricting the transfer and release of detainees which mirror those in the Homeland Security Appropriations measure.

Restrictions on Transfer and Release

All of the relevant measures enacted to date in the 111th Congress prohibit or place conditions on the use of federal funds to release or transfer Guantanamo detainees into the United States. Such measures may be 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.¹²

Restrictions on the Use of Funds to Release Detainees into the United States

All of the measures strictly ban the release of Guantanamo detainees into the United States (and specified territories). The 2009 Supplemental Act banned the use of funds appropriated under that or previous acts to release any Guantanamo detainee into the continental United States, Hawaii, or Alaska.¹³ Section 1041 of the National Defense Authorization Act prohibits the Department of Defense from using funds authorized to be appropriated to it by that act or otherwise available to the department to release a Guantanamo detainee into the United States or its territories during the period beginning October 1, 2009, and ending December 31, 2010.¹⁴ The remaining FY2010 measures similarly prohibit the use of federal funds—particularly those appropriated during the 2010 fiscal year—to transfer a Guantanamo detainee into the United States or specified territories.¹⁵

¹¹ See H.Rept. 111-151.

¹² 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>.

¹³ P.L. 111-32, § 14103(a).

¹⁴ P.L. 111-84, § 1041(a).

¹⁵ P.L. 111-83, § 552(a); P.L. 111-88, § 428(a); P.L. 111-117, § 532(a); P.L. 111-118, § 9011(a). The acts specifically enumerate the territories of Guam, American Samoa, the United States Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands. For an explanation regarding the funds to which the restrictions apply, see *infra* note 32 and accompanying text.

15-Day Reporting Requirements for Release in or Transfer to Other Countries

The measures enacted during the 111th Congress permit the use of funds to effect the transfer or release of a Guantanamo detainee to a foreign State. However, such actions are subject to reporting requirements. The 2010 Homeland Security Appropriations, Interior Appropriations, Consolidated Appropriations, and the Defense Appropriations Acts contain identical provisions which restrict the use of appropriated funds to transfer or release a Guantanamo detainee to another country or any “freely associated state.”¹⁶ The restrictions apply unless the President, 15 days prior to such transfer or release, submits the following information in classified form: (1) the name of the detainee and the country or freely associated state to which he will be transferred; (2) an assessment of the risk to national security or U.S. citizens posed by the transfer or release; and (3) the terms of any agreement with the country or freely associated state that has agreed to accept the detainee.¹⁷ The 2009 Supplemental Appropriations Act contains a provision that is similar except that it does not specifically state its application to freely associated states.¹⁸

45-Day Reporting Requirements for Transfers to the United States

Each of the enacted laws permits the use of funds to transfer detainees to the United States if the President fulfills a reporting requirement 45 days prior to effecting the transfer.¹⁹ Although the National Defense Authorization Act appears to authorize transfers for any purpose, the other acts limit the purposes for which transfers may be made to prosecution or detention during legal proceedings.²⁰

While the 45-day reporting requirements in the most recently enacted measures are nearly identical, section 14103 of the 2009 Supplemental Appropriations Act (P.L. 111-32) and section 1041 of the 2010 National Defense Authorization Act (P.L. 111-84) are unique. Section 14103 of P.L. 111-32 requires information, in classified form, which addresses: (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

¹⁶ The acts include the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau within their definition of “freely associated states.”

¹⁷ P.L. 111-83, § 552(e); P.L. 111-88, § 428(e); P.L. 111-117, § 532(e); P.L. 111-118, § 9011(e).

¹⁸ P.L. 111-32, § 14103(e).

¹⁹ The text of the relevant provisions makes clear that the use of funds is restricted “until 45 days *after*” (emphasis added) the report has been submitted to Congress. *See* P.L. 111-32, § 14103(c); P.L. 111-83, § 552(c); P.L. 111-84, § 1041(b); P.L. 111-88, § 428(c); P.L. 111-117, § 532(c); P.L. 111-118, § 9011(c). When making the announcement regarding the five detainees to be transferred to New York for prosecution, the Attorney General acknowledged that the requirements would need to be fulfilled before the detainees could be transferred to New York. *See* U.S. Department of Justice, *Attorney General Announces Forum Decisions for Guantanamo Detainees* (Nov. 13, 2009), <http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html> (noting that the “detainees will not be transferred to the United States for prosecution until all legal requirements are satisfied, including those in recent legislation requiring a 45 day notice and report to the Congress”).

²⁰ P.L. 111-32, § 14103(c); P.L. 111-83, § 552(c); P.L. 111-88, § 428(c); P.L. 111-117, § 532(c); P.L. 111-118, § 9011(c). Because the phrase “legal proceedings” is not defined in the acts or discussed in any detail in the legislative history, it is unclear what it encompasses. P.L. 111-32 was the first measure in which the phrase “for the purposes of prosecuting such individual, or detaining such individual during legal proceedings” appears. The conference report for that act states that the agreed-upon language “prohibits current detainees from being transferred to the U.S., except to be prosecuted,” H.Rept. 111-151 at 141, which suggests a narrow meaning of the phrase. An alternative argument might be that the phrase “legal proceedings” arguably extends to non-prosecution proceedings such as resolution of petitions for *habeas corpus* relief.

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 ... with a certification by the Attorney 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.”²¹

Section 1041 of the 2010 National Defense Authorization Act requires a plan that includes: (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; (4) the proposed transfer location; (5) information regarding costs associated with the transfer; (6) a “summary” of a “consultation” required to take place with the local jurisdiction’s chief executive; and (7) “a certification by the Attorney General that under the plan the individual poses little or no security risk to the United States, its territories, or possessions.” The sixth component refers to a corresponding consultation requirement, which requires that the President “consult with the chief executive” of the jurisdiction that is a proposed location of transfer.²² It 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.

In all of the other measures, the components of the 45-day reports are identical and include some information required by the 2009 Supplemental and the FY2010 Defense Authorization Acts. The components include: (1) “[a] determination of the risk that the individual might instigate an act of terrorism within the continental United States, Alaska, Hawaii, the District of Columbia, or the United States territories if the individual were so transferred”; (2) “[a] determination of the risk that the individual might advocate, coerce, or incite violent extremism, ideologically motivated criminal activity, or acts of terrorism, among inmate populations at incarceration facilities ...”; (3) “costs associated with transferring the individual in question” (4) “[t]he legal rationale and associated court demands for transfer; (5) “[a] plan for mitigation of any risks described [in the first, second, or seventh components]”; (6) “[a] copy of a notification to the Governor of the State to which the individual will be transferred ... with a certification by the Attorney 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”; and (7) “an 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 and the actions taken to mitigate such risk.”²³

The geographic application of the 2009 Supplemental Act and the FY2010 Defense Authorization Acts also differ from the other relevant FY2010 measures. The 2009 Supplemental Act appears to restrict transfers into the United States, only.²⁴ The Defense Authorization Act restriction includes all U.S. “territories or possessions.”²⁵ In contrast, each of the other acts enumerates specific territories to which the restriction applies, namely Guam, American Samoa, the United States

²¹ P.L. 111-32, § 14103(d).

²² P.L. 111-84, § 1041(d).

²³ P.L. 111-83, § 552(d); P.L. 111-88, § 428(d); P.L. 111-117, § 532(d); P.L. 111-118, § 9011(d).

²⁴ P.L. 111-32, § 14103(b) (restricting transfers to the continental United States, Alaska, Hawaii, and the District of Columbia).

²⁵ P.L. 111-84, § 1041(b).

Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.²⁶ They do not expressly name other U.S. territories or possessions.²⁷

General Reporting Requirements

Several of the enacted laws establish general reporting requirements which direct the Executive to report on the status of Guantanamo detainees. Section 319 of the Supplemental Appropriations Act, 2009 (P.L. 111-32), requires the President to submit reports on the Guantanamo “prisoner population” to specified Members²⁸ 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 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 (which was to be completed within 60 days of the legislation’s enactment) was required to 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.”²⁹

In addition, both section 14103 of the 2009 Supplemental Act and section 532 of the 2010 Consolidated Appropriations Act establish reporting requirements which must be satisfied before the Executive may cease operations at the Guantanamo detention center. Specifically, they require 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.”³⁰ They do not specify the level of detail that the report must include with respect to each detainee, nor do they appear to require any particular length of time between the submission of the report and closure of the facility.

²⁶ P.L. 111-83, § 552(c); P.L. 111-88, § 428(c); P.L. 111-117, § 532(c); P.L. 111-118, § 9011(c).

²⁷ U.S. possessions not enumerated in the act include, for example, Baker Island and other island possessions.

²⁸ 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.

²⁹ P.L. 111-32, § 319.

³⁰ *Id.* at § 14103(f); P.L. 111-117, § 532(h).

Time Frames and Concurrent Application

For funds appropriated during FY2010, several of the reporting requirements are likely to apply concurrently. It is likely that the acts will be interpreted so as to avoid a conclusion that a later-enacted provision implicitly repeals an earlier provision.³¹ Thus, to the extent that differing reporting requirements apply to the same committee, they would presumably be read as having a cumulative effect. In other words, it is likely that the Executive will submit one or more reports to the committee(s) of jurisdiction which fulfill all applicable requirements.

The restrictions vary in scope and applicable time frames. Restrictions in P.L. 111-32, the Supplemental Appropriations Act, 2009, applied only to funds appropriated by that or any prior act; although a later measure temporarily extended their application through October 31, 2009, they do not appear to apply to later appropriated funds.³² The restriction in P.L. 111-84, the 2010 Defense Authorization Act, applies through December 31, 2010, but only to the use of funds appropriated to the Department of Defense. In contrast, such restrictions in the 2010 Homeland Security, Interior Department, Consolidated Appropriations, and Defense Appropriations Acts (P.L. 111-83, P.L. 111-88, P.L. 111-117, and P.L. 111-118) appear to apply to all federal funds, but only during the 2010 fiscal year (October 1, 2009-September 30, 2010).³³

Submission of Reports to Congress

After the 2009 Supplemental Appropriations Act was enacted, the President assigned respective reporting functions required by that act to the Attorney General, Director of National Intelligence, and Secretary of State.³⁴ Likewise, on November 30, 2009, the President assigned reporting functions required by the three FY2010 acts to the Secretary of State, Secretary of Defense, and the Attorney General.³⁵ According to press accounts, the designated officials have not yet submitted a 45-day report to Congress.³⁶

³¹ Whenever possible, courts interpret two potentially conflicting provisions so as to give effect to both provisions, rather than interpret one as impliedly repealing the other. This rule is especially compelling here, where the potentially conflicting statutes were enacted during the same session or, in the case of the Homeland Security and Defense Authorization bills, on the same day. *See Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Pullen v. Morgenthau*, 73 F.2d 281 (2d Cir. 1934). For more information regarding statutory interpretation principles, see CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig and Yule Kim.

³² *See* P.L. 111-32, § 14103 (referring throughout to “funds made available in *this or any prior Act*”) (emphasis added); Legislative Branch Appropriations Act, 2010, P.L. 111-68, § 115 (extending the section 14103 provisions).

³³ In appropriations acts, the phrase “or any other act” is typically interpreted as applying to any appropriation for the same fiscal year as the act in question. *See Williams v. United States*, 240 F.3d 1019, 1063 (Fed. Cir. 2001) (“[T]he words ‘or by any other Act’ ... are not words of futurity; they merely refer to any other appropriations act for the same fiscal year.”) (citations omitted). The relevant provisions in P.L. 111-83, P.L. 111-84, P.L. 111-117, and P.L. 111-118 restrict the use of funds appropriated by those “or any other act[s].” Thus, the restrictions appear to apply to any funds appropriated for FY2010, but they would not apply to funds appropriated in future fiscal years.

³⁴ Presidential Memorandum, *Assignment of Reporting Functions Under the Supplemental Appropriations Act, 2009*, 74 Fed. Reg. 35765 (Jul. 21, 2009).

³⁵ Presidential Memorandum, Assignment of Functions Under the National Defense Authorization Act for Fiscal Year 2010; the Department of Homeland Security Appropriations Act, 2010; and the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (Nov. 30, 2009), <http://www.whitehouse.gov/the-press-office/presidential-memorandum-assignment-functions-under-national-defense>.

³⁶ *See, e.g.*, Richard Esposito, *AG Eric Holder in NYC for Terror Trial Summit* (Dec. 9, 2009), <http://abcnews.go.com/Blotter/york-grand-jury-hears-evidence-911-terror-trial/story?id=9291998> (“Congressional sources said notification has not yet happened.”).

The Defense Authorization Act, P.L. 111-84, requires the submission of the 45-day reports to the congressional defense committees in particular.³⁷ The other acts require their submission “to Congress” or “to the Congress,” without specifying individual Members or committees.³⁸ Those general phrases have been interpreted to refer to the committees of jurisdiction. Thus, reports submitted to the clerk of the House and Senate would likely be given to committees deemed to have jurisdiction over the underlying legislation or subject matter.³⁹

Other Relevant Provisions

Provisions other than those restricting detainees’ transfer or release have significant implications for persons held at Guantanamo. First, Title XVIII of the National Defense Authorization Act (P.L. 111-84), the Military Commissions Act of 2009, establishes new procedures governing military commissions.⁴⁰ Examples of changes enacted in the measure include a prohibition on the use of evidence elicited by cruel or degrading treatment, without regard to when the statement was made; 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; a new requirement that limits military commissions’ jurisdiction to offenses which occurred “in the context of and associated with armed conflict”; and a detailed set of procedures regarding the use of classified evidence. Although proposals had been introduced earlier in the 111th Congress that would have abolished military commissions altogether,⁴¹ Congress has instead opted to pass legislation which preserves the military commission system while amending the statutory framework.

Section 1040 of the same act restricts the reading of the warnings required in the domestic criminal law enforcement context by the Supreme Court decision in *Miranda v. Arizona*.⁴² Applying *Miranda*,⁴³ courts generally do not admit defendants’ statements at trial unless law enforcement officers first advise them, with the warnings beginning with “You have the right to

³⁷ P.L. 111-84, § 1041(c).

³⁸ P.L. 111-32, § 14103(d); P.L. 111-83, § 552(d); P.L. 111-88, § 428(d); P.L. 111-117, § 532(d); P.L. 111-118, § 9011(d).

³⁹ For more information regarding the jurisdiction of congressional committees, see CRS Report 98-175, *House Committee Jurisdiction and Referral: Rules and Practice*, by Judy Schneider. See also Rules of the House of Representatives, Rule X; Rules of the Senate, Rule XXV.

⁴⁰ One likely motivation for the new procedures is judicial opinions invalidating provisions of the Military Commissions Act of 2006. 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). For more information regarding the military commissions, see CRS Report R40752, *The Military Commissions Act of 2006 (MCA): Background and Proposed Amendments*, by Jennifer K. Elsea.

⁴¹ For example, the Interrogation and Detention Reform Act of 2008, H.R. 591, referring to the “failure of the military commissions system,” would abolish the military commission system. Instead, prosecutions would take place in federal civilian courts or in military court proceedings.

⁴² The section would also require the Secretary of Defense to submit a report within 90 days of the act’s enactment. The report would assess how the 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.”

⁴³ 384 U.S. 436 (1966).

remain silent,” of their Fifth Amendment right against self-incrimination.⁴⁴ Section 1040 prohibits 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.”⁴⁵ Thus, it applies to all foreign nationals detained as enemy belligerents (presumably including prisoners of war), rather than just foreign nationals detained at Guantanamo.⁴⁶ However, the section does not prohibit warnings made by the Department of Justice.

Finally, section 1080 requires, among other things, that the Department of Defense “ensure that each strategic intelligence interrogation of any person who is in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility is videotaped or otherwise electronically recorded.”

The Homeland Security Appropriations Act includes two additional provisions affecting the treatment of Guantanamo detainees. Section 553, which appears to apply beyond the end of the 2010 fiscal year, requires that former detainees be included on the “No Fly List,” “unless the President certifies in writing to Congress that the detainee poses no threat to the United States, its citizens, or its allies.”⁴⁷ A second provision prohibits the use of funds appropriated under that act to “provide any immigration benefit” to any former Guantanamo detainee, including a visa, admission into the United States, parole into the United States, or classification as a refugee or applicant for asylum.⁴⁸ The prohibition is similar to proposals introduced earlier during the 111th Congress; however, the other proposals would apply permanently, whereas the prohibition in the Homeland Security Appropriations Act appears to apply only to funds appropriated by that act.⁴⁹

⁴⁴ Fifth Amendment protections concerning the right against self-incrimination and due process serve as dual bases for exclusion of evidence perceived to be coercive. U.S. Const. amend. V (“No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law”). Interrogations are generally presumed to be coercive unless *Miranda* warnings have been given or an exception to the *Miranda* requirement applies.

⁴⁵ Section 504 of the version of the Intelligence Authorization Act for Fiscal Year 2010, H.R. 2701, reported in the House, contains a similar prohibition. In addition, § 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.”

⁴⁶ It is unclear how, if at all, this provision will affect the warning requirement in Article 31 of the Uniform Code of Military Justice, 10 U.S.C. § 831, which prohibits military personnel from interrogating an accused or suspected person, arguably including a person captured during hostilities, without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense ... ”. A narrow reading of section 1040 might not encompass the Article 31 warnings because they technically differ from the warnings required by *Miranda*.

⁴⁷ P.L. 111-83, § 553(a). The provision amends 49 U.S.C. § 44903(j)(2)(C). Two bills previously introduced in the House would have similarly required that Guantanamo detainees’ names be added to the Transportation Security Administration’s “No Fly List.” See 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).

⁴⁸ P.L. 111-83, § 552(f).

⁴⁹ 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.” 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. 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]”; (continued...)

Selected Pending Proposals

As mentioned, numerous legislative proposals introduced during the 111th Congress address the disposition or treatment of Guantanamo detainees. Some bills introduced shortly after the issuance of the three relevant January 2009 executive orders suggest specific time frames for closure of the Guantanamo detention facility.⁵⁰ 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.”⁵¹ However, as shown, recent legislative activity related to Guantanamo detentions has favored restrictions on the use of appropriated funds to effectuate Guantanamo detainees’ transfer or release, possibly signaling an approach by Congress to delay closure at least until more information has been received.

Many of the early bills are reflected in the enacted public laws. For example, enacted provisions mirror bills which were introduced to prohibit the transfer of detainees, replace the military commissions framework, or restrict Guantanamo detainees’ access to immigration benefits.⁵² Some additional proposals introduced during the 111th Congress raise issues not addressed in the enacted or pending authorization and appropriations measures. Such proposals might become relevant as closure of the Guantanamo detention facility appears more imminent or as Congress reviews the United States’ overall wartime detention policies.

(...continued)

and (2) “the Secretary is making reasonable efforts to find alternative means for removing the [detainee].” 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. Protection from Enemy Combatants Act, S. 108, 111th Cong. (2009). 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. A bill to prohibit the release of enemy combatants into the United States, S. 1081, 111th Cong. (2009).

⁵⁰ 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. All of these bills also provided corresponding options and restrictions governing the transfer and prosecution of detainees.

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

⁵² For example, 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, H.R. 2315, and H.R. 4120 propose prohibitions on the use of federal funds for transferring Guantanamo detainees to particular locations within the United States. Like the 2010 Defense Authorization Act (P.L. 111-84), H.R. 1315, the Terrorist Detainees Procedures Act of 2009, would have repealed the Military Commissions Act of 2006. It would also have established new procedures for hearings by combatant status review tribunals. And similar to the approach in the 2010 homeland security appropriations act (P.L. 111-83), H.R. 1238 would have made 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.”

Detainee Treatment

Several pending bills address the treatment of persons detained at the Guantanamo detention facility or elsewhere. Companion bills (S. 147 and H.R. 374), both entitled the Lawful Interrogation and Detention Act, propose that interrogations of all persons in custody of U.S. intelligence agencies be conducted in accordance with the U.S. Army Field Manual.⁵³ Such legislation 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.⁵⁴

A few bills would restrict detainees' access to public benefits or medical facilities. H.R. 2338 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.⁵⁵ Another bill, 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.⁵⁶ To the extent that H.R. 1042 would result in withholding medical care, it is possible that it would raise legal concerns regarding U.S. compliance with international treaty obligations.⁵⁷

Executive and Judicial Authorities

Several other pending bills address broad issues related to judicial authority to review *habeas corpus* petitions or to executive authority to detain enemy belligerents or prosecute detainees. For example, S. 2795, a bill introduced by Senator Vitter, would prohibit funds from being made

⁵³ Lawful Interrogation and Detention Act, H.R. 374, 111th Cong; Lawful Interrogation and Detention Act, S. 147, 111th Cong.

⁵⁴ Executive Order, Ensuring Lawful Interrogations, January 22, 2009, available at http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/.

⁵⁵ No Welfare for Terrorists Act of 2009, H.R. 2338, 111th Cong. (2009). The provision would presumably apply even if a court determined a detainee to have been wrongfully held.

⁵⁶ 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).

⁵⁷ Treatment of wartime detainees in the conflict with al Qaeda and the Taliban is primarily governed by the Detainee Treatment Act of 2005 and Common Article 3 of the Geneva Conventions. 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. 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). 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." "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). The U.S. Supreme Court determined that, at a minimum, Common Article 3 applies to persons captured in the conflict with al Qaeda. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

available to the U.S. Department of Justice for the prosecution of any Guantanamo detainee in a criminal court in the United States.⁵⁸

Conversely, several proposals would reaffirm or extend executive authority. 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."⁵⁹ 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."⁶⁰ These provisions would perhaps extend the President's authority to preventively detain enemy belligerents 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.⁶¹ 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.⁶² 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 which the Supreme Court struck down as constitutionally invalid in *Boumediene v. Bush*.⁶³ 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.⁶⁴ 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.

⁵⁸ Stopping Criminal Trials for Guantanamo Terrorists Act of 2009, S. 2795, 111th Cong. (2009).

⁵⁹ Protecting America's Communities Act, S. 1071, 111th Cong. (2009).

⁶⁰ Enemy Combatant Detention Review Act of 2009, H.R. 630, 111th Cong. (2009).

⁶¹ 542 U.S. 507 (2004).

⁶² 28 U.S.C. §2241.

⁶³ 553 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.

⁶⁴ Terrorist Detainees Procedures Act of 2009, H.R. 1315, 111th Cong. (2009).

Finally, several House resolutions would possibly facilitate greater congressional oversight. Namely, H.Res. 920, H.Res. 922, and H.Res. 923 would require or request the transmittal to the House of Representatives of relevant documents or information in the possession of the Attorney General, Secretary of Homeland Security, and the President, respectively. In each case, the request or direction includes a 14-day timeline for transmittal. Each of the resolutions has been favorably reported by the respective committee of jurisdiction.

Conclusion

Some bills introduced during the time frame of President Obama's executive orders indicated initial support for closure of the detention facility. In contrast, restrictions on the use of federal funds in authorization and appropriations measures enacted to date in the 111th Congress arguably signal Congress's present reluctance to facilitate closure of the detention facility, at least in the absence of significant congressional oversight. In particular, restrictions on the use of appropriated funds in multiple public laws appear to indicate opposition to the release and transfer of detainees into the United States. However, exceptions to the restrictions suggest congressional approval for transfers, particularly for the purpose of prosecution, which follow the presentation to Congress of risk assessments and other information.

Other changes effected by legislation enacted in the 111th Congress, such as new military commissions procedures, are likely to significantly impact the treatment and disposition of Guantanamo detainees. These and pending proposals are also likely to inform future legislative debates regarding the treatment and rights of detainees at Guantanamo and elsewhere.

Author Contact Information

Anna C. Henning
Legislative Attorney
ahenning@crs.loc.gov, 7-4067