# Detainee Provisions in the National Defense Authorization Bills

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# Summary

The House and Senate bills competing to become the National Defense Authorization Act for FY2012 contain a subtitle addressing issues related to detainees at the U.S. Naval Station at Guantanamo Bay, Cuba, and more broadly, hostilities against Al Qaeda and other entities. At the heart of both bills' detainee provisions appears to be an effort to confirm or, as some observers view it, expand the detention authority that Congress implicitly granted the President via the Authorization for Use of Military Force (AUMF, P.L. 107-40) in the aftermath of the terrorist attacks of September 11, 2001.

H.R. 1540, as passed by the House of Representatives on May 26, 2011, contains provisions that would reaffirm the conflict and define its scope; impose specific restrictions on the transfer of any non-citizen wartime detainee into the United States; place stringent conditions on the transfer or release of any Guantanamo detainee to a foreign country; and require that any foreign national who has engaged in an offense related to a terrorist attack be tried by military commission if jurisdiction exists.

In June, the Senate Armed Services Committee reported its initial version of the bill, S. 1253, which included many provisions similar to the House bill, but also included a provision requiring the military detention of certain terrorist suspects. Consideration of the bill was delayed after the the White House and the chairs of other Senate committees objected to some of the provisions. The Senate Armed Services Committee reported a second version of the authorization bill, addressing some, but not all of the concerns. The new bill, S. 1867, would authorize the detention of certain categories of persons and require the military detention of a subset of them; regulate status determinations for persons held pursuant to the AUMF, regardless of location; regulate periodic review proceedings concerning the continued detention of Guantanamo detainees; and continue current funding restrictions that relate to Guantanamo detainee transfers to foreign countries. Unlike the House bill, the Senate bill would not bar the transfer of detainees into the United States for trial or perhaps for other purposes. On December 1, 2011, the Senate passed S. 1867. During floor debate, significant attention centered on the extent to which the bill and existing law permit the military detention of U.S. citizens believed to be enemy belligerents. A single amendment was made to the detainee provisions to clarify that the bill's affirmation of detention authority under the AUMF was not intended to affect any existing authorities relating to the detention of U.S. citizens or lawful resident aliens, or any other persons captured or arrested in the United States. The Senate subsequently passed H.R. 1540, with the Senate bill's language inserted in place of the original provisions. Differences between the House- and Senate-passed versions of the bill will be considered in conference.

The White House has been critical of aspects of each bill, and has threatened to veto any legislation "that challenges or constrains the President's critical authorities to collect intelligence, incapacitate dangerous terrorists, and protect the Nation." In particular, the Administration has expressed strong opposition to any provision which mandates the military detention of certain categories of persons, limits executive discretion as to the appropriate forum to prosecute terrorist suspects, or constrains its ability to transfer detainees from U.S. custody.

This report offers a brief background of the salient issues raised by H.R. 1540 and S. 1867 regarding detention matters, provides a section-by-section analysis of the relevant subdivision of each bill, and compares the bills' approaches with respect to the major issues they address.

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# Introduction

Both House and Senate bills competing to become the National Defense Authorization Act for FY2012 contain a subtitle addressing issues related to detainees at the U.S. Naval Station at Guantanamo Bay, Cuba ("Guantanamo"), and more broadly, hostilities against Al Qaeda and other entities. H.R. 1540, which passed the House of Representatives May 26, 2011, addresses "counterterrorism" matters in subtitle D of Title X. A companion bill in the Senate, S. 1253, was reported out of the Armed Services Committee June 22, 2011, and addresses "detainee matters" in subtitle D of Title X. A second companion bill, S. 1867, was reported out of the Armed Services Committee on November 15, 2011, in an effort to resolve disputes over the detainee provisions that had kept S. 1253 from reaching the floor. On December 1, 2011, the Senate passed S. 1867, as amended. The Senate subsequently passed H.R. 1540, with the Senate bill's provisions inserted in place of the original language. Differences between the House- and Senate-passed versions of the bill will be considered in conference.

The White House has been critical of aspects of each bill, and has threatened to veto any legislation "that challenges or constrains the President's critical authorities to collect intelligence, incapacitate dangerous terrorists, and protect the Nation."[1] In particular, the Administration has expressed strong opposition to any provision which mandates the military detention of certain categories of persons, limits executive discretion as to the appropriate forum to prosecute terrorist suspects, or constrains its ability to transfer detainees from U.S. custody.

This report offers a brief background of the salient issues, provides a section-by-section analysis of the relevant subdivisions of the House- and Senate-passed bills, and compares the bills' approach with respect to the major issues they address.

# Background

At the heart of both houses' detainee provisions appears to be an effort to confirm or, as some observers view it, expand the detention authority Congress implicitly granted the President in the aftermath of the terrorist attacks of September 11, 2001. In enacting the Authorization for Use of Military Force (P.L. 107-40) ("AUMF"), Congress authorized the President

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Many persons captured during subsequent U.S operations in Afghanistan and elsewhere have been placed in preventive detention to stop them from participating in hostilities or terrorist

[1] *See* Exec. Office of the Pres., Statement of Administration Policy on H.R. 1540 (May 24, 2011) (hereinafter "White House Statement on H.R. 1540"), *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1540r_20110524.pdf; Exec. Office of the Pres., Statement of Administration Policy on S. 1867 (Nov. 17, 2011) (hereinafter "White House Statement on S. 1867"), *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf.

activities. A few have been tried by military commission for crimes associated with those hostilities,[2] while many others have been tried for terrorism-related crimes in civilian court.

In 2004 case of *Hamdi v. Rumsfeld*, a majority of the Supreme Court recognized that, as a necessary incident to the AUMF, the President may detain enemy combatants captured while fighting U.S. forces in Afghanistan (including U.S. citizens), and potentially hold such persons for the duration of hostilities.[3] The *Hamdi* decision left to lower courts the task of defining the scope of detention authority conferred by the AUMF, including whether the authorization permits the detention of members or supporters of Al Qaeda, the Taliban, or other groups who are apprehended away from the Afghan zone of combat.

Most subsequent judicial activity concerning U.S. detention policy has occurred in the D.C. Circuit, where courts have considered numerous habeas petitions by Guantanamo detainees challenging the legality of their detention. Rulings by the U.S. Court of Appeals for the D.C. Circuit have generally been favorable to the legal position advanced by the government regarding the scope of its detention authority under the AUMF.[4] It remains to be seen whether any of these rulings will be reviewed by the Supreme Court and, if such review occurs, whether the Court will endorse or reject the circuit court's understanding of the AUMF and the scope of detention authority it confers.

Thus far, Congress has not enacted any legislation to directly assist the courts in defining the scope of detention authority granted by the AUMF. The D.C. Circuit has, however, looked to post-AUMF legislation concerning the jurisdiction of military commissions for guidance as to the categories of persons who may be subject to military detention. In 2010, the circuit court concluded that the government had authority under the AUMF to detain militarily persons subject to the jurisdiction of military commissions established pursuant to the Military Commissions Acts of 2006 and 2009 ("MCA"); namely, those who are "part of forces associated with Al Qaeda or the Taliban," along with "those who purposefully and materially support such forces in hostilities against U.S. Coalition partners."[5]

Most of the persons detained under the authority of the AUMF are combatants picked up during military operations in Afghanistan or arrested elsewhere abroad. Many of these individuals were transported to the U.S. Naval Station at Guantanamo Bay, Cuba for detention in military custody, although a few "high value" Guantanamo detainees were initially held at other locations by the CIA for interrogation. A U.S.-operated facility in Parwan, Afghanistan, holds an even larger number of detainees, most of whom were captured in Afghanistan.[6] Neither of these two

[2] To date there have been six convictions by military commissions, four of which were procured by plea agreement. For more information about military commissions, see CRS Report R40932, *Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court*, by Jennifer K. Elsea.

[3] Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (O'Connor, J., plurality opinion); *id*. at 588-589 (Thomas, J., dissenting).For more information about relevant court decisions, see CRS Report R41156, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, by Jennifer K. Elsea and Michael John Garcia.

[4] *See* CRS Report R41156, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, by Jennifer K. Elsea and Michael John Garcia.

[5] Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010) (quoting the Military Commissions Act of 2006, P.L. 109-366, §3, and the Military Commissions Act of 2009, P.L. 111-84, Div A, §1802), *cert. denied*, 131 S. Ct. 1814 (2011).

[6] The Parwan detention facility took over detention operations previously conducted at the Bagram Theater Internment Facility. *See* Lisa Daniel, *Task Force Ensures Fair Detainee Treatment, Commander Says*, American Forces Press Service, Aug. 6 2010, *available at* http://www.defense.gov/News/NewsArticle.aspx?ID=103004. The detention center, which reportedly holds about 900 detainees on any given day, is slated to be turned over to Afghan authority by (continued...)

detention facilities, however, appears to be considered a viable option for future captures that take place outside of Afghanistan; the current practice in such cases seems to be ad hoc.[7]

In almost all instances, persons arrested in the United States who have been suspected of terrorist activity on behalf of Al Qaeda or affiliated groups have not been placed in military detention pursuant to the AUMF, but instead have been prosecuted in federal court for criminal activity. There were two instances in which the Bush Administration transferred persons arrested in the United States into military custody and designated them as "enemy combatants"—one a U.S. citizen initially arrested by law enforcement authorities upon his return from Afghanistan, where he had allegedly been part of Taliban forces, and the other a legal permanent resident alien who had never been to the Afghanistan zone of combat, but was alleged to have been an Al Qaeda "sleeper agent" who was planning to engage in terrorist activities on behalf of the organization within the United States. However, in both cases, the detainees were ultimately transferred back to the custody of civil authorities and tried in federal court when it appeared that the Supreme Court would hear their habeas petitions, leaving the legal validity of their prior military detention uncertain.[8]

Over the years, there has been considerable controversy over the appropriate mechanism for dealing with suspected belligerents and terrorists who come into U.S. custody. Some have argued that all suspected terrorists (or at least those believed to be affiliated with Al Qaeda) should be held in military custody and be tried for any crimes they have committed before a military commission. Others have argued that such persons should be transferred to civilian law enforcement authorities and be tried for any criminal offenses before an Article III court. Still others argue that neither a military nor traditional law enforcement model should serve as the exclusive method for handling suspected terrorists and belligerents who come into U.S. custody. They urge that such decisions are best left to executive discretion for a decision based on the distinct facts of each case.

Disagreement over the appropriate model to employ has become a regular occurrence in high-profile cases involving suspected terrorists. In part as a response to the Obama Administration's plans to transfer certain Guantanamo detainees, including Khalid Sheik Mohammed, into the United States to face charges in an Article III court for their alleged role in the 9/11 attacks, Congress passed funding restrictions that effectively barred the transfer of any Guantanamo detainee into the United States for the 2011 fiscal year, even for purposes of criminal prosecution.[9] The Consolidated and Further Continuing Appropriations Act, 2012 ("2012

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January, 2012. *Id*. Fewer than 50 of the detainees at the time of the news article were said to be non-Afghans, 75% of whom were from Pakistan.

[7] U.S. Congress, Senate Committee on Armed Services, *Hearing to Consider the Nomination of Vice Admiral William H. McRaven, USN*, 112th Cong., 2nd sess., June 28, 2011, p. 43 [hereinafter "McRaven Testimony"], *transcript available at* http://armed-services.senate.gov/Transcripts/2011/06%20June/11-59%20-%206-28-11.pdf. Admiral McRaven indicated that captures outside a theater of operations like Iraq or Afghanistan are treated on a case-by-case basis.

[8] al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (per curiam), *cert. granted by* 129 S.Ct. 680 (2008), *vacated and remanded for dismissal on mootness grounds by* al-Marri v. Spagone, 129 S.Ct. 1545 (2009); Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005). *See also* CRS Report R41156, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, by Jennifer K. Elsea and Michael John Garcia (discussing *al-Marri* and *Padilla* litigation).

[9] Ike Skelton National Defense Authorization Act for FY2011 (2011 NDAA), P.L. 111-383, §1032 (applying to military funds); Department of Defense and Full-Year Continuing Appropriations Act, 2011 (2011 CAA), P.L. 112-10, §1112. (applying to any funds appropriated by the 2011 CAA or any prior act). For further background, see CRS (continued...)

Minibus," P.L. 112-55) extends this prohibition through the entirety of FY2012.[10] Additionally, several other legislative measures limiting executive discretion as to the transfer of Guantanamo detainees were set to expire at the end of the 2011 fiscal year, but were extended beyond FY2011 via a series of continuing resolutions.[11] The blanket restriction on transfers into the United States effectively makes trial by military commission the only viable option for prosecuting Guantanamo detainees for the foreseeable future, as no civilian court operates at Guantanamo.

Considerable attention has also been drawn to other instances when terrorist suspects have been apprehended by U.S. military or civilian law enforcement authorities. On July 5, 2011, Somali national Ahmed Abdulkadir Warsame was brought to the United States to face terrorism-related charges in a civilian court, after having reportedly been detained on a U.S. naval vessel for two months for interrogation by military and intelligence personnel.[12] Some have argued that Warsame should have remained in military custody abroad, while others argue that he should have been transferred to civilian custody immediately. Controversy also arose regarding the arrest by U.S. civil authorities of Umar Farouk Abdulmutallab and Faisal Shahzad,[13] who some argued should have been detained and interrogated by military authorities and tried by military commission. The Administration incurred additional criticism for bringing civilian charges against two Iraqi refugees arrested in the United States on suspicion of having participated in insurgent activities in Iraq against U.S. military forces,[14] although the war in Iraq has generally been treated as separate from hostilities authorized by the AUMF, at least insofar as detainee operations are concerned.

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Report R40754, *Guantanamo Detention Center: Legislative Activity in the 111th Congress*, by Michael John Garcia.

[10] The Consolidated and Further Continuing Appropriations Act, 2012 ("2012 Minibus"),P.L. 112-55, §532 (providing that "[n]one of the funds appropriated or otherwise made available in this or any other Act may be used to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions" any detainee held at Guantanamo). In appropriations legislation, 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) (Plager, J., dissenting) ("[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).

[11] P.L. 112-33 (extending funding through Oct. 4, 2011, generally subject to the terms and conditions of FY2011 appropriations enactments); P.L. 112-36 (extending funding through Nov. 18, 2011); P.L. 112-55, Div. D (extending funding for certain agencies through Dec. 16, 2011).The Consolidated and Further Continuing Appropriations Act, 2012. These continuing resolutions extended funding for many federal agencies, subject to the terms and conditions contained in the 2011 CAA, beyond the 2011 fiscal year. Besides expressly barring the transfer and release of Guantanamo detainees into the United States, the 2011 CAA also contained provisions which generally extended funding for federal agencies subject to the terms and conditions of FY2010 appropriations enactments. P.L. 112-10, §1112, Div. B. Accordingly, to the extent that provisions of FY2010 enactments relating to Guantanamo detainees were incorporated into the 2011 CAA, they were also extended beyond FY2011 via continuing resolution. Most of these restrictions overlap with others that are currently in effect, but two 2010 appropriations enactments also had provisions barring detainees' access to immigration visas and benefits. Department of Homeland Security Appropriations Act, 2010, P.L. 111-83, §552(f); Continuing Appropriations Act, 2010, P.L. 111-117, §532(f).

[12] Peter Finn and Karen DeYoung, *In Detention Case, a Blend of Two Systems*, WASH. POST, Jul. 6, 2011, at A02, *available at* http://www.washingtonpost.com/national/national-security/in-somali-terror-suspects-case-administration-blends-military-civilian-systems/2011/07/06/gIQAQ4AJ1H_story.html.

[13] Umar Farouk Abdulmutallab is a Nigerian national accused of trying to destroy an airliner traveling from Amsterdam to Detroit on Christmas Day 2009. He was apprehended and interrogated by civilian law enforcement before being charged in an Article III court. Faisal Shahzad, a naturalized U.S. citizen originally from Pakistan, was arrested by civilian law enforcement and convicted in federal court for his attempt to detonate a bomb in New York's Time Square in 2010.

[14] *See* Jeremy Pelofsky, *US Lawmaker Wants Accused Iraqis sent to Guantanamo*, REUTERS NEWS, June 14, 2011.

It appears likely that the 2012 NDAA will contain provisions addressing the disposition of persons apprehended by U.S. authorities in the conflict with Al Qaeda. H.R. 1540, as passed by the House of Representatives on May 26, 2011, contains provisions that would reaffirm the conflict and define its scope; impose specific restrictions on the transfer of any non-citizen wartime detainee into the United States; establish stringent conditions upon the transfer or release of any Guantanamo detainee to a foreign country; and require that any foreign national who has engaged in an offense related to a terrorist attack be tried by military commission if jurisdiction exists.

Shortly before H.R. 1540 was approved by the House, the White House issued a statement regarding its provisions. While supportive of most aspects of the bill, the White House was highly critical of those provisions concerning detainee matters. It threatened to veto any version of the bill that contains provisions that the Administration views as challenging critical executive branch authority.[15]

S. 1253, as reported out of the Senate Armed Services Committee on June 22, 2011, would have authorized the detention of certain categories of persons and require the military detention of a subset of them; regulated status determinations for persons held pursuant to the AUMF, regardless of location; regulated periodic review proceedings concerning the continued detention of Guantanamo detainees; and made permanent the current funding restrictions that relate to Guantanamo detainee transfers to foreign countries. After the White House and the chairs of the Senate Judiciary and Intelligence Committees objected to some of these provisions, Senate Majority Leader Reid delayed consideration of the bill pending a resolution of the detainee issues.[16] The Senate Armed Services Committee reported a new version of the bill, S. 1867, on November 15, 2011, with revised detainee provisions. The Department of Defense has also objected to the revised detainee provisions, and the White House reiterated its threat to veto any final bill that challenges or constrains the President's critical authorities with respect to handling terrorist suspects.[17] On December 1, 2011, the Senate passed S. 1867, with an amendment to clarify that a provision which affirmed the authority to detain persons captured in the conflict with Al Qaeda did not modify any existing authorities relating to the power to detain U.S. citizens or lawful resident aliens, or any other persons captured or arrested in the United States. The Senate thereafter amended H.R. 1540 to replace the original language with the provisions of S. 1867. Differences between the House- and Senate-passed versions of the bill will be considered in conference.

The following sections address the current status of U.S. policies and legal authorities with respect to detainee matters that are addressed in the House or Senate versions of the FY2012

[15] *See* White House Statement on H.R. 1540, *supra*,footnote 1 (objecting in particular to Section 1039 [barring transfer of detainees to the United States] as a "dangerous and unprecedented challenge to critical Executive branch authority to determine when and where to prosecute detainees, based on the facts and the circumstances of each case and our national security interests"). At the time these objections were made public, the bill did not yet contain the provision requiring military commission trials for certain offenders.

[16] *See* Letter from Senator Harry Reid to Senator Carl Levin and Senator John McCain (Oct. 4, 2011), *available at* http://www.politico.com/static/PPM169_111004_levin_mccain.html. The chairs of the Senate Judiciary Committee and the Senate Select Committee on Intelligence asked for hearings on the detainees provisions, and later described concerns about the provisions in a letter. *See* Letter to Senator Harry Reid from Senator Dianne Feinstein, et al., (Oct. 21, 2011) (hereinafter "Feinstein Letter"), *available at* http://www.feinstein.senate.gov/public/index.cfm?a=Files.Serve&File_id=f0f3bb47-a38b-47da-a619-abf609510a5d.

[17] *See* White House Statement on S. 1867, *supra*,footnote 1.

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NDAA. The first section addresses the scope of detention authority under the AUMF as the Administration views it and as it has developed in court cases. The following section provides an overview of current practice regarding initial status determinations and periodic reviews of detainee cases. The background ends with a discussion of recidivism concerns underlying current restrictions on transferring detainees from Guantanamo.

## Scope of Detention Authority Conferred by the AUMF

Although the AUMF constitutes the primary legal basis supporting the detention of persons captured in the conflict with Al Qaeda and affiliated entities, the scope of the detention authority it confers is not made plain by its terms, and accordingly can be subject to differing interpretations. The Obama Administration framed its detention authority under the AUMF in a March 13, 2009, court brief as follows:

> The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.[18]

While membership in Al Qaeda or the Taliban seems to fall clearly within the parameters of the AUMF, the inclusion of "associated forces," a category of indeterminate breadth, could raise questions as to whether the detention authority claimed by the executive exceeds the AUMF's mandate. The "substantial support" prong of the executive's description of its detention authority may raise similar questions. The Supreme Court in *Hamdi* interpreted the detention authority conferred by the AUMF with reference to law of war principles, and there is some dispute as to when and whether persons may be subject to indefinite detention under the law of war solely on account of providing support to a belligerent force.[19] In its 2009 brief, the government declined to clarify these aspects of its detention authority:

> It is neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of "substantial support," or the precise characteristics of "associated forces," that are or would be sufficient to bring persons and organizations within the foregoing framework.[20]

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[18] *See* In re Guantanamo Bay Detainee Litigation, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, No. 08-0442, filed March 13, 2009 (D.D.C.)(hereinafter "Government Brief"). This government brief is posted on the Department of Justice website at http://www.justice.gov/opa/documents/memo-re-det-auth.pdf.

[19] *Compare* Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. 2009) (finding that detention on account of providing substantial or direct support to a belligerent, without more, is inconsistent with the laws of war), *abrogated by* Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010) *with* Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 A.J.I.L. 48 (2009) (discussing instances where the laws of war permit the detention of persons who have not directly participated in hostilities, including persons posing a security threat on account of their "indirect participation in hostilities," albeit as civilians rather than combatants). *See also* Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 TEX. INT'L L.J. 1 (2007) (suggesting that the justification for detaining persons for providing "support" to Al Qaeda or the Taliban is influenced by principles of U.S. criminal law).

[20] Government Brief, *supra* footnote 18, at 2. The government also claimed that the contours of the definition of "associated forces" would require further development through their "application to concrete facts in individual cases." (continued...)

The Obama Administration's definition of its scope of detention authority is similar to the Bush Administration's definition describing who could be treated as an "enemy combatant," differing only in that it requires "substantial support," rather than "support."[21] Recent court decisions have not shed much light on the "substantial support" prong of the test to determine detention eligibility, with all cases thus far adjudicated by the Court of Appeals of the D.C. Circuit relying on proof that a detainee was functionally part of Al Qaeda, the Taliban, or an associated force.[22]

The executive branch has included "associated forces" as part of its description of the scope of its detention authority since at least 2004, after a majority of the Supreme Court held in *Hamdi* that the AUMF authorized the detention of enemy combatants for the duration of hostilities.[23] The Court left to lower courts the task of defining the full parameters of the detention authority conferred by the AUMF, and it did not mention "associated forces" in its opinion.[24] In its 2009 brief, the government explained that

> [The AUMF does not] limit the "organizations" it covers to just al-Qaida or the Taliban. In Afghanistan, many different private armed groups trained and fought alongside al-Qaida and the Taliban. In order "to prevent any future acts of international terrorism against the United States," AUMF, § 2(a), the United States has authority to detain individuals who, in analogous circumstances in a traditional international armed conflict between the armed forces of opposing governments, would be detainable under principles of co-belligerency.[25]

This statement is consistent with the position earlier taken by the Bush Administration with respect to the detention of a group of Chinese Uighur dissidents who had been captured in

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(...continued)

*Id.*

[21] *See* Parhat v. Gates, 532 F.3d 834, 838 (D.C. Cir. 2008) (quoting definition used in the order establishing Combatant Status Review Tribunals: "an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.")

[22] *See* CRS Report R41156, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, by Jennifer K. Elsea and Michael John Garcia.

[23] Hamdi v. Rumsfeld, 542 U.S. 507 (2004). A plurality of the Supreme Court stated:

> The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. 115 Stat. 224. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

*Id.* at 518 (O'Connor, J., plurality opinion).

[24] The plurality cited with apparent approval the declaration of a government official in explaining why the petitioner, who had surrendered to the Northern Alliance in Afghanistan, was considered to be an "enemy combatant":

> [B]ecause al Qaeda and the Taliban "were and are hostile forces engaged in armed conflict with the armed forces of the United States," "individuals associated with" those groups "were and continue to be enemy combatants."

*Id.* at 514 (O'Connor, J., plurality opinion).

[25] *See* Government Brief, *supra* footnote 18, at 7. One D.C. district judge expressly adopted the "co-belligerency" test for defining which organizations may be deemed "associated forces" under the AUMF, see Hamilily v. Obama, 616 F. Supp. 2d 63, 74-75 (D.D.C. 2009), but it does not appear that the D.C. Circuit has adopted that view.

Afghanistan and transferred to Guantanamo as members of an "associated force." In *Parhat v. Gates*,[26] the D.C. Circuit rejected the government's contention that one petitioner's alleged affiliation with the East Turkistan Islamic Movement (ETIM) made him an "enemy combatant." The court accepted the government's test for membership in an "associated force" (which was not disputed by petitioner):

> (1) the petitioner was part of or supporting "forces"; (2) those forces were associated with al Qaida or the Taliban; and (3) those forces are engaged in hostilities against the United States or its coalition partners.[27]

The court did not find that the government's evidence supported the second and third prongs, so it found it unnecessary to reach the first. The government had defined "associated force" to be one that "becomes so closely associated with al Qaida or the Taliban that it is effectively 'part of the same organization,'" in which case it argued ETIM is covered by the AUMF because that force "thereby becomes the same 'organization[ ]' that perpetrated the September 11 attacks." If the definition asserted by the government in *Parhat* is adopted, then the term would seem to require a close operational nexus in the current armed conflict. On the other hand, as the court noted, "[t]his argument suggests that, even under the government's own definition, the evidence must establish a connection between ETIM and al Qaida or the Taliban that is considerably closer than the relationship suggested by the usual meaning of the word 'associated.'"[28] The court did not find that the evidence adduced established that ETIM is sufficiently connected to Al Qaeda to be an "associated force," as the government had defined the concept, but the decision might have come out differently if the court had adopted a plain-language interpretation of "associated force."

In its 2009 brief, the government indicated that the contours of the definition of "associated forces," would require further development through their "application to concrete facts in individual cases."[29] In habeas cases so far, the term "associated forces" appears to have been interpreted only to cover armed groups assisting the Taliban or Al Qaeda in Afghanistan. For instance, membership in "Zubayda's militia," which reportedly assisted Osama bin Laden's escape from Tora Bora, has been found to be an "associated force" within the meaning of the AUMF.[30] In another case, the habeas court determined that Hezb–i–Islami Gulbuddin ("HIG") is an "associated force" for AUMF purposes because there was sufficient evidence to show that it supported continued attacks against coalition and Afghan forces at the time petitioner was captured.[31] The D.C. Circuit also affirmed the detention of a person engaged as a cook for the 55th Arab Military Brigade, an armed force consisting of mostly foreign fighters that defended the Taliban from coalition efforts to oust it from power.[32] However, the Administration has suggested

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[26] 532 F.3d 834 (D.C. Cir. 2008) (court challenge under now defunct Detainee Treatment Act judicial review process).

[27] *Id*. at 843 (citations omitted).

[28] *Id.* at 844. The court noted the following exchange that had taken place at an oral hearing:

> Judge Sentelle: So you are dependent on the proposition that ETIM is properly defined as being part of al Qaida, not that it aided or abetted, or aided or harbored al Qaida, but that it's part of [?]
>
> Mr. Katsas: Correct ... in order to fit them in the AUMF.

*Id*. & note 4.

[29] *Id*.

[30] *See* Barhoumi v. Obama, 609 F.3d 416 (D.C. Cir. 2010).

[31] Khan v. Obama, 646 F. Supp. 2d 6 (D.D.C. 2009).

[32] Al-Bihani v. Obama, 590 F.3d 866, *en banc rehearing denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. (continued...)

that other groups outside of Afghanistan may be considered "associated forces" such that the AUMF authorizes the use of force against their members.[33]

An issue of continuing uncertainty regarding the scope of detention authority conferred by the AUMF concerns its application to persons captured outside of Afghanistan, and in particular those who are U.S. citizens or otherwise have significant ties to the United States. While the Supreme Court in *Hamdi* recognized that the AUMF permitted the detention of a U.S. citizen captured while fighting U.S. coalition forces in Afghanistan, it did not address whether (or the extent to which) persons captured outside of Afghanistan could be properly detained under the AUMF. The U.S. Court of Appeals for the D.C. Circuit has apparently taken the view that the AUMF authorizes the detention of any person who is functionally part of Al Qaeda, though this view has been espoused in cases involving non-U.S. citizens who have been captured outside the United States.[34] In separate rulings, the U.S. Court of Appeals for the Fourth Circuit upheld the military detention of a U.S. citizen and a resident alien captured in the United States who were designated as enemy combatants by the executive branch.[35] In each case, the detainee was transferred to civilian law enforcement custody for criminal prosecution before the Supreme Court could consider the merits of the case. Accordingly, the circumstances in which a U.S. citizen or other person captured or arrested in the United States may be detained under the authority conferred by the AUMF remains unsettled.[36]

## Status Determinations for Unprivileged Enemy Belligerents

In response to Supreme Court decisions in 2004 related to "enemy combatants," the Pentagon established Combatant Status Review Tribunals (CSRTs) to determine whether detainees brought to Guantanamo are subject to detention on account of enemy belligerency status. CSRTs are an administrative and non-adversarial process based on the procedures the Army uses to determine POW status during traditional wars.[37] Guantanamo detainees who were determined not to be (or

(...continued)

1814 (2011).

[33] *See* Harold Hongju Koh, Legal Adviser, U.S. Department of State, The Obama Administration and International Law, Address at the Annual Meeting of the American Society of International Law, Washington, D.C. (March 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

[34] *See* Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. 2010) (recognizing that government might be able to lawfully detain an Algerian citizen arrested by Bosnian authorities in 2001 and subsequently transferred to U.S. custody for detention at Guantanamo, but remanding to lower court to assess sufficiency of government's evidence that petitioner was a member of Al Qaeda); Salahi v. Obama, 625 F.3d 745 (D.C. Cir. 2010) (in assessing whether person captured in Mauritania was lawfully detained under the AUMF, "the relevant inquiry is whether [the petitioner] was 'part of' al-Qaida when captured").

[35] Padilla v. Hanft, 423 F.3d 386, 390-391 (4th Cir. 2005)(holding that U.S. citizen captured in the United States could be detained pursuant to the AUMF because he had been, prior to returning to the country, "'armed and present in a combat zone' in Afghanistan as part of Taliban forces during the conflict there with the United States"); al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008), *vacated by* al-Marri v. Spagone, 129 S.Ct. 1545 (2009).

[36] For analysis of historical practice relating to the wartime detention of U.S. citizens, see CRS Report RL31724, *Detention of American Citizens as Enemy Combatants*, by Jennifer K. Elsea.

[37] *See* Department of Defense (DOD) Fact Sheet, "Combatant Status Review Tribunals," *available at* http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf. CSRT proceedings are modeled on the procedures of Army Regulation (AR) 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997), which establishes administrative procedures to determine the status of detainees under the Geneva Conventions and prescribes their treatment in accordance with international law. It does not include a category for "unlawful" or "enemy" combatants, who would presumably be covered by the other categories.

no longer to be) enemy combatants were eligible for transfer to their country of citizenship or were otherwise dealt with "consistent with domestic and international obligations and U.S. foreign policy."[38] CSRTs confirmed the status of 539 enemy combatants between July 30, 2004, and February 10, 2009.[39] Although the CSRT process has been largely defunct since 2007 due to the fact that so few detainees have been brought to Guantanamo since that time,[40] presumably any new detainees that might be transported to Guantanamo detention facility would go before a CSRT. The CSRT process has only been employed with respect to persons held at Guantanamo. Non-citizen detainees held by the United States in Afghanistan have been subject to a different status review process which provides detainees with fewer procedural rights.[41] Moreover, whereas the Supreme Court has held that the constitutional writ of habeas extends to non-citizens held at Guantanamo,[42] enabling Guantanamo detainees to challenge the legality of their detention in federal court, existing lower court jurisprudence has not recognized that a similar privilege extends to non-citizen detainees held by the United States in Afghanistan.[43]

Shortly after taking office, President Obama issued a series of executive orders creating a number of task forces to study issues related to the Guantanamo detention facility and U.S. detention policy generally. While these groups prepared their studies, most proceedings related to military commission and administrative review boards at Guantanamo, including the CSRTs, were held in abeyance pending the anticipated recommendations. The Obama Administration also announced in 2009 that it was implementing a new review system to determine or review the status of detainees held at the Bagram Theater Internment Facility in Afghanistan,[44] which continues to

[38] *See* DOD Press Release, "Combatant Status Review Tribunal Order Issued" (June 7, 2004), *available at* http://www.defense.gov/releases/release.aspx?releaseid=7530; Memorandum from the Deputy Secretary of Defense to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, July 7, 2004 (hereinafter "CSRT Order"), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf; Memorandum from Deputy Secretary of Defense, Implementation of Combatant Status Review Tribunals Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, July 14, 2006 (hereinafter "CSRT Implementing Directive"), *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf.

[39] *See* Department of Defense, Combatant Status Review Tribunal Summary, Feb. 10, 2009 [hereinafter "CSRT Summary"], *available at* http://www.defense.gov/news/csrtsummary.pdf. Nearly all CSRT proceedings were held in 2004, another two dozen were held in 2005, none took place in 2006, fourteen were held in 2007 (likely the fourteen "high-value" detainees, including Khalid Sheik Mohammed and others previously detained by the CIA), with numbers dropping off significantly after that time. For more information about the CSRT rules and procedures, see CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Michael John Garcia.

[40] *See* Guantanamo Review Task Force, Final Report 1, Jan. 22, 2010, *available at* http://www.justice.gov/ag/guantanamo-review-final-report.pdf (reporting statistics related to arrivals at Guantanamo). CSRTs continue to be held in the event that "new evidence" is received that may affect a detainee's initial status determination, but these were temporarily suspended in 2009 along with the suspension of the Annual Administrative Review process. *See* CSRT Summary, *supra* footnote 39.

[41] *See generally*, Maqaleh v. Gates, 604 F. Supp. 2d 205, 226-228 (D.D.C. 2009)(comparing CSRT process with that employed at Bagram prior to 2009), *vacated on other grounds and remanded by* 605 F.3d 84 (D.C. Cir. 2010) ; Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, ARMY LAW., Jun. 2010, at 9 (discussing evolution of the detainee review process used by the United States in Afghanistan); Letter from Phillip Carter, Dep. Asst. Sec. Defense for Detainee Policy, to Sen. Carl Levin, Chairman of Sen. Armed Serv. Comm., July 14, 2009, *available at* http://www.scotusblog.com/wp/wp-content/uploads/2009/09/US-Bagram-brief-9-14-09.pdf (discussing 2009 modifications to the status review process employed with respect to persons held by the United States at Bagram).

[42] Boumediene v. Bush, 553 U.S. 723 (2008).

[43] *See* Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (holding that, at least as a general matter, the constitutional writ of habeas does not extend to non-citizens detained in the Afghan theater of war).

[44] Karen DeYoung and Peter Finn, "New Review System Will Give Afghan Prisoners More Rights," *Washington Post*, (continued...)

apply at the new detention facility in Parwan.[45] It is unclear what process has been used to determine the status of persons captured in connection with the hostilities who were not transported to any of those facilities.[46]

On March 7, 2011, President Obama issued Executive Order 13567, establishing a process for the periodic review of the continued detention of persons currently held at Guantanamo who have either been (1) designated for preventive detention under the laws of war or (2) referred for criminal prosecution, but have not been convicted of a crime and do not have formal charges pending against them.[47] The executive order establishes a Periodic Review Board (PRB) to assess whether the continued detention of a covered individual is warranted in order "to protect against a significant threat to the security of the United States." In instances where a person's continued detention is not deemed warranted, the Secretaries of State and Defense are designated responsibility "for ensuring that vigorous efforts are undertaken to identify a suitable transfer location for any such detainee, outside of the United States, consistent with the national security and foreign policy interests of the United States" and relevant legal requirements. An initial review of each individual covered by the order, which involves a hearing before the PRB in which the detainee and his representative may challenge the government's basis for his continued detention and introduce evidence on his own behalf, must occur within a year of the order's issuance. Those persons deemed to be subject to continued detention will have their cases reviewed periodically thereafter. The order also specifies that the process it establishes is discretionary; does not create any additional basis for detention authority or modify the scope of authority granted under existing law; and is not intended to affect federal courts' jurisdiction to determine the legality of a person's continued detention.

## "Recidivism" and Restrictions on Transfer

Concerns that detainees released from Guantanamo to their home country or resettled elsewhere have subsequently engaged in terrorist activity have spurred Congress to place limits on detainee transfers, generally requiring a certification that adequate measures are put in place in the destination country to prevent transferees from "returning to the battlefield."[48] Statistics regarding the post-release activities of Guantanamo detainees have been somewhat elusive, however, with much of the information remaining classified. It does not appear to be disputed that some

(...continued)

September 13, 2009. The new system reportedly gave the detainees certain rights that were unavailable to detainees subject to the "Unlawful Enemy Combatant Review Board" established in 2007, including a limited right to call witnesses and examine government information, and a right to have the assistance of a personal military representative.

[45] *See* Daniel, *supra* footnote 6.

[46] Admiral McRaven, discussing this issue at his confirmation hearing for command of SOCOM, noted that Guantanamo is "off the table" as a prospective destination for persons newly captured in hostilities against Al Qaeda, and that sovereignty issues make it unlikely that persons captured outside Afghanistan will be transferred to Parwan for detention. *See* McRaven Testimony, *supra* footnote 7. Admiral McRaven indicated that captures outside a theater of operations like Iraq or Afghanistan are treated on a case-by-case basis, with detainees sometimes kept on board a naval vessel until a decision is made, *id*. at 37, but did not indicate what if any process is used to determine the detainee's status as subject to detention under the AUMF in the first place.

[47] Exec. Order No. 13,567, "Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to Authorization to Use Military Force," 76 Fed. Reg. 13,277 (March 10, 2011) [hereinafter "Executive Order on Periodic Review"].

[48] For an overview of restrictions, see CRS Report R40754, *Guantanamo Detention Center: Legislative Activity in the 111th Congress*, by Michael John Garcia.

detainees have engaged in terrorist activities of some kind after their release from Guantanamo, but the significance of such activity has been subject to debate. The policy implications of the reported activities have also been the subject of controversy, with some arguing that virtually none of the remaining prisoners should be transferred and others arguing that long-term detention without trial of such persons is fundamentally unfair.

In 2007, the Pentagon issued a news release estimating that 30 former detainees had since their release engaged in militant activities or "anti-U.S. propaganda" (apparently including public criticism of U.S. detention policies).[49] This number and others released by DOD officials were challenged by researchers at Seton Hall University School of Law Center for Policy and Research who, in connection with advocacy on behalf of some Guantanamo detainees pursuing habeas cases, identified what they viewed as discrepancies in DOD data as well as a lack of identifying information that would enable independent verification of the numbers.[50] Moreover, they took issue with the Pentagon's assertion that the former detainees' activities could be classified as "recidivism" or "reengagement," inasmuch as data released by the Pentagon from CSRT hearings did not establish in each case that the detainee had engaged in terrorist or insurgent activity in the first place, and suggested that post-release terrorist conduct could potentially be explained by radicalization during internment. The study did note that available data confirmed some cases of individuals who engaged in deadly activities such as suicide bombings after leaving Guantanamo.

In 2008, the Defense Intelligence Agency (DIA) reported that 36 ex-Guantanamo detainees were confirmed or suspected of having returned to terrorism.[51] In 2009, the Pentagon reported that one in seven, or 74 of the 534 prisoners transferred from Guantanamo were believed to have subsequently engaged in terrorism or militant activity.[52]

The Intelligence Authorization Act for FY2010 (P.L. 111-259), which was enacted in October 2010, required the Director of National Intelligence (DNI) to make publicly available an unclassified summary of intelligence relating to recidivism rates of current or former Guantanamo detainees, as well as an assessment of the likelihood that such detainees may engage in terrorism or communicate with terrorist organizations. The report was released in December 2010, and stated that of the 598 detainees transferred out of Guantanamo, the "Intelligence Community assesses that 81 (13.5 percent) are confirmed and 69 (11.5 percent) are suspected of reengaging in

[49] Department of Defense, "Former Guantanamo Detainees Who Have Returned to the Fight", news release, July 12, 2007.

[50] *See* Mark Denbeaux et al., *The Meaning of "Battlefield"*(2007) *available at* http://law.shu.edu/publications/guantanamoReports/meaning_of_battlefield_final_121007.pdf; *see also* Mark Denbeaux et al., Released Guantánamo Detainees and the Department of Defense: Propaganda by the Numbers? (2009), *available at* http://law.shu.edu/publications/guantanamoReports/propaganda_numbers_11509.pdf.

[51] Department of Defense, Fact Sheet: Former GTMO Detainee Terrorism Trends (June 13, 2008), *available at* http://www.defense.gov/news/d20080613Returntothefightfactsheet.pdf. The factsheet described "confirmed" as being demonstrated by a "preponderance of evidence," such as "fingerprints, DNA, conclusive photographic match, or reliable, verified, or well-corroborated intelligence reporting." It described "suspected" as "[s]ignificant reporting indicates a former Defense Department detainee is involved in terrorist activities, and analysis indicates the detainee most likely is associated with a specific former detainee *or* unverified or single-source, but plausible, reporting indicates a specific former detainee is involved in terrorist activities." (Emphasis in original). The document does not indicate how many of the total number fell into each category.

[52] Elisabeth Bumiller, *Later Terror Link Cited for 1 in 7 Freed Detainees*, NY TIMES, May 20, 2009, *available at* http://www.nytimes.com/2009/05/21/us/politics/21gitmo.html. The report noted that 27 of the former prisoners were confirmed as having engaged in terrorism, while the remaining 47 were merely suspected of doing so. *Id.* (editor's note).

terrorist or insurgent activities after transfer."[53] Of the 150 confirmed or suspected recidivist detainees, the report stated that 13 are dead, 54 are in custody, and 83 remain at large. The summary also indicated that, of 66 detainees transferred from Guantanamo since the implementation of Executive Order 13492,[54] 2 are confirmed and 3 are suspected of participating in terrorist or insurgent activities.[55] The report does not include detainees solely on the basis of anti-U.S. statements or writings,[56] but the accuracy or significance of the numbers has nevertheless been challenged. The New America Foundation analyzed publicly available Pentagon reports and other documents and estimated that the actual figure of released detainees who went on to pose a threat to the United States or its interests is closer to 6%.[57] Because the intelligence data forming the basis for the DNI's report remains classified, it is not possible to explain the discrepancy between the report's estimate of detainee recidivism numbers and those estimates deriving from publicly available sources. At any rate, there seems to be broad agreement that the number of detainees who engage in activities related to terrorism after their release has grown.

# H.R. 1540: Summary and Analysis of Detainee Provisions of House-Passed Bill

The following sections summarize subtitle D of title X of H.R. 1540, as passed by the House of Representatives on May 26, 2011.

## Definitions

Section 1031 provides that, for purposes of subtitle D, the term "individual detained at Guantanamo" refers to any individual detained at Guantanamo on or after March 7, 2011, who is not a citizen of the United States or a member of the U.S. Armed Forces and is "in the custody or under the effective control of the Department of Defense." The provision does not expressly limit the term to those detained under the authority of the AUMF, presumably to ensure that the term covers detainees held at Guantanamo who, despite having been found by a federal court or administrative board not to be enemy belligerents who may be detained pursuant to the AUMF, remain at Guantanamo until such time as their transfer or release to a foreign country may be effectuated. It is unclear who might fall under the "effective control" of the Department of

[53] Office of the Director of National Intelligence, Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba (December 2010) [hereinafter "DNI Recidivism Summary"], *available at* http://www.dni.gov/electronic_reading_room/120710_Summary_of_the_Reengagement_of_Detainees_Formerly_Held_at_Guantanamo_Bay_Cuba.pdf.

[54] Exec. Order No. 13,492, Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 4,897 (Jan. 22, 2009).

[55] DNI Recidivism Summary, *supra* footnote 53.

[56] *Id.* The assessment defines "terrorist" or "insurgent" activities for its purposes as including "planning terrorist operations, conducting a terrorist or insurgent attack against Coalition or host-nation forces or civilians, conducting a suicide bombing, financing terrorist operations, recruiting others for terrorist operations, arranging for movement of individuals involved in terrorist operations, etc." but not communications on issues not related to terrorist operations or "writing anti-U.S. books or articles, or making anti-U.S. propaganda statements." *Id*.

[57] *See* Peter Bergen, Katherine Tiedemann, and Andrew Lebovich, *How Many Gitmo Alumni Take Up Arms?*, FOREIGN POLICY online, Jan. 11, 2011, *available at* http://www.foreignpolicy.com/articles/2011/01/11/how_many_gitmo_alumni_take_up_arms.

Defense (DOD) yet not be in its custody for purposes of the bill. That term may be intended to cover situations other than immediate physical custody, as might occur if a detainee held at Guantanamo is technically placed in the custody of another agency while remaining under DOD supervision.

The term "individual detained at Guantanamo" is defined broadly enough to cover foreign nationals who are brought to Guantanamo for purposes unrelated to hostilities, including, for example, any foreign refugees who are interdicted at sea and brought to the Migrant Operations Center at the Naval Station. There is no indication that the provisions of H.R. 1540 that relate to Guantanamo detainees were intended to cover foreign refugees,[58] so it is possible that executive authorities will not interpret the term literally to cover such persons.

## Military Commissions Act Revision

Section 1033 amends the Military Commissions Act of 2009 (MCA) to expressly permit guilty pleas in capital cases brought before military commissions. As currently written, the MCA clearly permits the death penalty only in cases where all military commission members present vote to convict and concur in the sentence of death. This requirement has been interpreted by many as precluding the imposition of the death penalty in cases where the accused has pled guilty, as there would have been no vote by commission members as to the defendant's guilt.

Section 1033 amends the MCA expressly to permit the death penalty in cases where the accused has pled guilty, so long as military commission panel members vote unanimously to approve the sentence.[59] Section 1033 also amends the MCA to address pre-trial agreements, specifically permitting such agreements to allow for a reduction in the maximum sentence, but not to permit a sentence of death to be imposed by a military judge alone.[60]

## Affirmation of Armed Conflict; Detention Authority

Section 1034 seeks to clarify the existence of the armed conflict with Al Qaeda and other entities, identify parties to the conflict, and affirm that the AUMF grants the President the authority to detain captured belligerents for the duration of hostilities. Specifically, Section 1034 "affirms" that the United States is "engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces and that those entities continue to pose a threat to the United States and its citizens, both domestically and abroad." It further affirms that the President is authorized to use all necessary force during the armed conflict pursuant to the AUMF.[61] Subparagraph (3) states that

[58] Certain provisions of H.R. 1540 applicable to "individuals detained at Guantanamo," including those providing for the periodic review of an individual's continued detention (§1036) and limiting executive discretion to transfer such persons to foreign countries (§1040), exclude from their requirements those individuals who have been ordered released by a federal court. This exception might not be applicable to every foreign refugee who is interdicted at sea and brought to Guantanamo.

[59] H.R. 1540, §1033 (House-passed version) (amending 10 U.S.C. §949m(b)).

[60] *Id.* (amending 10 U.S.C. §949i).

[61] The AUMF authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." P.L. 107-40, Sept. 18, 2001, 115 Stat. 224, codified at 50 U.S.C. §1540 note.

The House of Representatives and Senate Explained

# Congressional Procedure

## A Practical Guide to the Legislative Process in the U.S. Congress

Richard A. Arenberg

Foreword by Alan S. Frumin

TheCapitol.Net

> (3) The current armed conflict includes nations, organizations, and persons who—
>
> (A) are part of, or are substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners; or
>
> (B) have engaged in hostilities or have directly supported hostilities in aid of a nation, organization, or person described in subparagraph (A)[.]

Section 1034 further affirms that the President's authority under the AUMF includes the authority to detain belligerents, including persons described above, until the termination of hostilities.

This section appears to be the most controversial provision in H.R. 1540. Supporters of the provision contend that it merely confirms the armed conflict as it has evolved since the enactment of the 2001 AUMF[62] and places Congress's imprimatur on the executive branch interpretation of the authority the AUMF conferred by adopting the same phrase the government has put forth in habeas litigation (and which the U.S. Court of Appeals for the D.C. Circuit has largely accepted).[63] Opponents of the provision view the inclusion of "associated forces" without reference to the AUMF requirement for a certain nexus to the 9/11 terrorist attacks[64] as authorizing an expansion of the armed conflict to cover any new terrorist group that can be characterized as associated with Al Qaeda.[65]

Proponents argue that concerns about the breadth of the proposed language are misplaced, noting that the AUMF was never expressly limited in terms of geography or time, and that it left the President considerable discretion to determine the parties against whom to use force. Others view the apparent removal of the AUMF's limits on identifying parties to the armed conflict as significant. Moreover, they note that Section 1034 appears to go beyond the executive branch's characterization of the conflict by identifying as belligerent parties not only Al Qaeda, the Taliban, and associated forces who are directly engaged in or substantially supporting hostilities against the United States (§1034, subparagraph 3(A)), but also "any nations, organizations, and persons who have engaged in hostilities or have directly supported hostilities in aid of" those entities (§1034, subparagraph 3(B)). On the one hand, the requirement that those entities described in subparagraph 3(B) engage in or support hostilities seems to require a nexus to armed hostilities, rather than mere support to an entity described in subparagraph 3(A). On the other hand, the use of the past tense to describe the requisite conduct (i.e., entities that "have engaged in" or "have directly supported" hostilities by Al Qaeda, the Taliban, or associated forces) could be read to suggest that entities could be deemed belligerents even if their support for Al Qaeda,

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[62] *See Reauthorize the War on Terrorism*, WASH. POST, May 18, 2011, at A16, *available at* http://www.washingtonpost.com/opinions/reauthorize-the-war-on-terrorism/2011/05/12/AFyov35G_story.html.

[63] *See*, *e.g.* Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010) (agreeing the AUMF includes authority to detain persons "who were part of or substantially supported Taliban or al Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported hostilities in aid of such enemy armed forces").

[64] *See* P.L. 107-10 (authorizing force "against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons....").

[65] *See, e.g.*, *A Conflict Without End*, NY TIMES, May 17, 2011, at 26 (opinion page), *available at* http://www.nytimes.com/2011/05/17/opinion/17tue1.html?_r=2&partner=rssnyt&emc=rss; Coalition Memo to the House Committee on Armed Services Regarding a Proposed New Declaration of War, *available at* http://www.aclu.org/files/assets/Coalition_Memo_to_the_House_Committee_on_Armed_Services_Regarding_a_Proposed_Declaration_of_War.pdf.

the Taliban, or associated groups occurred prior to September 11, 2001, and involved hostilities with no effect on the United States. While the purpose of describing the enemy parties to the armed conflict in paragraph (3) is only expressly tied to the President's authority to detain persons for the duration of hostilities in paragraph (4), because it describes persons or entities as "belligerents" who are included in an armed conflict, it could be construed to apply to targeting decisions or other operations as well.

The legislative history of H.R. 1540 suggests that Section 1034 is not intended to authorize a significant expansion of the ongoing conflict with Al Qaeda and affiliated organizations, but instead to reaffirm the current interpretation of the AUMF advanced by the executive in habeas litigation involving wartime detainees. The House Armed Services Committee report accompanying H.R. 1540 describes the intent behind Section 1034 as follows:

> The committee notes that as the United States nears the tenth anniversary of the attacks on September 11, 2001, the terrorist threat has evolved as a result of intense military and diplomatic pressure from the United States and its coalition partners. However, Al Qaeda, the Taliban, and associated forces still pose a grave threat to U.S. national security. The Authorization for Use of Military Force necessarily includes the authority to address the continuing and evolving threat posed by these groups.
>
> The committee supports the Executive Branch's interpretation of the Authorization for Use of Military Force, as it was described in a March 13, 2009, filing before the U.S. District Court for the District of Columbia. While this affirmation is not intended to limit or alter the President's existing authority pursuant to the Authorization for Use of Military Force, the Executive Branch's March 13, 2009, interpretation remains consistent with the scope of the authorities provided by Congress.[66]

If the courts continue to construe the term "associated forces" as they have in the past, to mean armed organizations fighting alongside the Taliban or Al Qaeda against the United States or coalition forces, then it does not appear the language in H.R. 1540 Section 1034 paragraphs (1) and (2) would permit the expansion of the authority to use force beyond that already permitted under the AUMF. However, as the D.C. Circuit noted in *Parhat*, the word "associated" is not confined to such a meaning. Congress's express codification of the language without further definition could be interpreted to supersede the AUMF as it has been interpreted, in which case courts might prefer to apply a plain-text interpretation of "associated" rather than the definition currently advanced by the government in habeas cases.

The language in paragraph (3) likewise echoes the language that has been employed by Combatant Status Review Tribunals at Guantanamo, which permit the detention of

> an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

However, where these words describe captured *individuals* who are subject to detention, the language in paragraph (3) applies also to *nations* and *organizations* who are deemed to be part of

[66] H.Rept. 112-78. The government brief it mentions was likely the brief filed in *In re Guantanamo Bay Detainee Litigation*, *supra* footnote 18.

the conflict. The differing contexts may result in an altogether different interpretation for the scope of the conflict.

The White House has stated that it "strongly objects to section 1034,"[67] arguing that "in purporting to affirm the conflict, [section 1034] would effectively recharacterize its scope and would risk creating confusion regarding applicable standards."[68]

## Periodic Review of Detention of Persons at Guantanamo

Section 1036 requires the Secretary of Defense to establish a review process for Guantanamo detainees to determine whether continued military detention is necessary to protect the national security of the United States. The periodic review process contemplated by Section 1036 is in many ways similar to the process established earlier this year pursuant to Executive Order 13567,[69] but there are notable differences as well. Among other things, the review process contemplated by Section 1036 requires that the initial review panel consist of military officers rather than senior officials from multiple agencies; imposes more detailed and stringent criteria for assessing whether an individual's continued detention is no longer warranted; and limits the assistance private counsel may provide to detainees.[70]

Pursuant to Section 1036, the Secretary of Defense is required to submit a report to Congress within 180 days regarding the establishment of a process to periodically review whether the continued detention of individuals detained at Guantanamo is warranted. The process is to include a full review every three years of each detainee and a more limited review of each detainee's files not less than once a year. The review process *does not* apply to those individuals held at Guantanamo who are undergoing trial by military commission or are serving a sentence imposed by a military commission, or detainees who have been ordered released by a federal court.

A full review may not take place sooner than 21 days after an individual's arrival at Guantanamo. The review is to be conducted by a panel made up of military officers with expertise in operations, intelligence, and counterterrorism matters as well as the appropriate security clearances. The subject detainee is entitled to be assisted by a "military personal representative" with the appropriate security clearance, who is to appear before the panel to advocate on the detainee's behalf. The detainee is permitted to present to the panel a written or oral statement, introduce evidence, respond to questions, and call "reasonably available" witnesses who are willing to provide relevant information as to whether the individual poses a continuing threat to the United States or its allies. Prior to the hearing, the detainee is to be provided with an unclassified summary of information the panel will consider, including mitigating information. The detainee's personal representative is to be provided with a copy of the government's submission prior to the hearing, except that the panel may order a sufficient substitute or summary of classified information, if deemed necessary to protect national security. Outside parties, including the detainee's private counsel if he hires any, may, if authorized in writing by the detainee, provide a written submission to the military panel.

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[67] White House Statement on H.R. 1540, *supra*,footnote 1, at 2.

[68] *Id.*

[69] Executive Order on Periodic Review, *supra* footnote 47.

[70] For further discussion of the periodic review process established by Executive Order 13567, see CRS Report R40139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia et al.

The limited annual file review is intended to consider any significant new information regarding the threat posed by the individual, including mitigating information, which would lead to the commencement of a full review by a military panel if warranted. In either type of review, submitting officials are required to provide relevant information that has been presented for discovery purposes during any military commission case.

In assessing whether a Guantanamo detainee's continued internment is warranted, the military panel is charged with making its recommendation based on the totality of circumstances, and taking into consideration the following factors:

- the likelihood the individual will resume terrorist activity if transferred or released;
- the likelihood the individual will reestablish ties with an organization engaged in hostilities against the United States or its allies if transferred or released;
- the behavior of the individual while in military custody;
- any information reviewed by the officials preparing the government's submission to the panel that tends to mitigate the threat posed by the individual; and
- whether information known to the individual could be of significant intelligence value to the national security of the United States.

Section 1036 further requires the establishment of an interagency review board, composed of senior officials of the Department of State, the Department of Defense, the Department of Justice, the Department of Homeland Security, the Joint Chiefs of Staff, and the Office of the Director of National Intelligence. The interagency review board is to be responsible for reviewing the military panel's full review for clear error. It can reject the recommendation if it disagrees with it by majority vote. In the event that a military panel recommends a particular detainee should no longer be detained, the interagency review panel is to identify a suitable country (other than the United States) where the detainee may safely be transferred, considering a number of factors based on the country's status as a supporter of terrorism, its ability to maintain effective control over any detention facility where the individual may be housed, its ability to prosecute the individual or otherwise prevent him from engaging in terrorist activities, and whether it has made assurances regarding the humane treatment of the individual. The criteria used by the interagency review board is largely identical to that governing Guantanamo transfer decisions established under Section 1040 of the bill, discussed *infra*.

A rejected recommendation may be returned to the military panel for a reevaluation, or the board may forward its recommendation to the Secretary of Defense for approval. Whatever the ultimate decision, the detainee does not have a right to seek redress or enforcement in any U.S. court.

In a written statement regarding H.R. 1540, the White House identified Section 1036 as one of several provisions within the bill which, at least when taken together with other detainee provisions, could raise the possibility of a presidential veto. It asserted that the periodic review process established by Section 1036

> undermines the system of periodic review established by the President's ... Executive Order by substituting a rigid system of review that could limit the advice and expertise of critical intelligence and law enforcement professionals, undermining the Executive branch's ability to ensure that these decisions are informed by all available information and protect the full

> spectrum of our national security interests. It also unnecessarily interferes with DOD's ability to manage detention operations.[71]

## Transfer or Release of Wartime Detainees into the United States

Section 1039 generally limits the transfer or release into the United States of non-citizen detainees held abroad in U.S. military custody.[72] The provision bars the use of funds authorized to the military for FY2012 from being used to transfer or release any individual held at Guantanamo into the United States. It further prohibits such funds from being used to transfer or release into the United States any non-citizen detainee held abroad by the Department of Defense pursuant to the AUMF.

In response to the Obama Administration's stated plan to close the Guantanamo detention facility, Congress enacted several funding measures intended to limit executive discretion to transfer or release Guantanamo detainees into the United States. Initially, these measures barred detainees from being released into the United States, but still preserved executive discretion to transfer detainees into the country for purposes of criminal prosecution.[73] However, more recent funding limitations, including those contained in the 2012 Minibus (P.L. 112-55), prohibit the transfer of Guantanamo detainees into the United States for any purpose, including criminal prosecution.[74] These restrictions appear to have been motivated in part by the Administration's plans to transfer Khalid Sheik Mohammed and several other Guantanamo detainees to the United States to stand trial in an Article III court. As no civilian court operates at Guantanamo, the 2012 Minibus and earlier restrictions appear to have effectively made military commissions the only viable forum for the criminal prosecution of Guantanamo detainees, at least until the end of FY2012.

The funding restrictions established by Section 1039 of House-passed H.R. 1540, which apply for the duration of FY2012, cover a broader category of detainees than the restrictions contained in the 2012 Minibus. Like the funding restrictions currently in effect, Section 1039 applies to all non-citizen detainees held at Guantanamo. But unlike current restrictions, Section 1039 would also restrict the transfer or release into the United States of any non-citizen detainees held by military authorities pursuant to the AUMF at foreign locations other than Guantanamo.

The restrictions imposed by H.R. 1540 only prevent the DOD from transferring or releasing a wartime detainee into the United States, but would not appear to limit detainees from being brought into the country by another government agency. In contrast, the restriction contained in the 2012 Minibus applies to all federal agencies. The express restrictions on detainee transfers to the United States found in Section 1039 of House-passed H.R. 1540, like those found in current law, would expire at the end of FY2012. However, other provisions of H.R. 1540 which apply beyond FY2012, including the provision imposing a permanent bar on the prosecution of enemy belligerents for terrorist offenses in Article III courts (§1046, discussed *infra*), may eliminate the primary incentive for transferring wartime detainees into the country even beyond FY2012.

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[71] White House Statement on H.R. 1540, supra,footnote 1, at 2-3.

[72] The restriction also generally precludes the transfer or release of detainees to U.S. territories or possessions.

[73] For further discussion of these limitations, see CRS Report R40754, *Guantanamo Detention Center: Legislative Activity in the 111th Congress*, by Michael John Garcia.

[74] 2012 Minibus, P.L. 112-55, §532. *See also* 2011 NDAA, P.L. 111-383, §1032 (expired at the end of FY2011); 2011 CAA, P.L. 112-10, §1112 (extended beyond FY2011 and through Dec. 16, 2011, via Division D of the 2012 Minibus).

The White House has expressed strong objection to Section 1039.[75] While stating its opposition to the release of detainees into the United States, the Obama Administration claims that the measure unduly interferes with executive discretion to prosecute detainees in an Article III court located in the United States. According to a White House statement, Section 1039

> is a dangerous and unprecedented challenge to critical Executive branch authority to determine when and where to prosecute detainees, based on the facts and the circumstances of each case and our national security interests. It unnecessarily constrains our Nation's counterterrorism efforts and would undermine our national security, particularly where our Federal courts are the best—or even the only—option for incapacitating dangerous terrorists.[76]

While not directly limiting the transfer or release of detainees into the United States, Section 1037 of H.R. 1540 prohibits the use of any funds made available to the Department of Defense for FY2012 to construct or modify any facility in the United States, its territories, or possessions to house an individual detained at Guantanamo for "detention or imprisonment in the custody or under the control of the Department of Defense." Substantially similar restrictions are contained in the 2012 Minibus.[77]

## Transfer or Release of Guantanamo Detainees to Foreign Countries

Section 1040 limits funds made available to the DOD for the 2012 fiscal year from being used to transfer or release of Guantanamo detainees to foreign countries or entities, except when certain criteria are met. These limitations do not apply in cases where a Guantanamo detainee is transferred or released to effectuate a court order (i.e., when a habeas court finds that a detainee is not subject to detention under the AUMF and orders the government to effectuate his release from custody). The restrictions established by Section 1040 largely mirror those contained in the Ike Skelton National Defense Authorization Act for FY2011 (2011 NDAA, P.L. 111-383) and the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (2011 CAA, P.L. 112-10), most of which were set to expire at the end of the 2011 fiscal year,[78] and appear motivated by congressional concern over possible recidivism by detainees released from U.S. custody.[79]

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[75] Upon signing the 2011 NDAA and CAA into law, which each imposed blanket restrictions on the transfer or release of Guantanamo detainees into the United States, President Obama issued statements expressing his disapproval of the restrictions they imposed upon executive discretion to bring detainees into the country for trial before an Article III court. White House Office of the Press Secretary, Statement by the President on H.R. 6523, January 7, 2011, *available at* http://www.whitehouse.gov/the-press-office/2011/01/07/statement-president-hr-6523; White House Office of the Press Secretary, Statement by the President on H.R. 1473, April 15, 2011, *available at* http://www.whitehouse.gov/the-press-office/2011/04/15/statement-president-hr-1473.

[76] White House Statement on H.R. 1540, *supra*,footnote 1, at 2.

[77] 2012 Minibus, P.L. 112-55, §533. *See also* 2011 NDAA, P.L. 111-383, §1034 (expired at the end of FY2011); 2011 CAA, P.L. 112-10, §1114 (extended beyond FY2011 and through Dec. 16, 2011, via Division D of the 2012 Minibus).

[78] Most of the applicable restrictions on detainee transfers contained in the 2011 NDAA and CAA concern funds made available for FY2011 (which ended on September 30, 2011). However, the 2011 NDAA's prohibition on the transfer of detainees to any country where there has been a confirmed case of recidivism by a previously transferred detainee expires in January 2012. 2011 NDAA, P.L. 111-383, §1333(c) (specifying that prohibition lasts for a one-year period beginning on the date of enactment). The restrictions contained in the 2011 CAA have been extended via continuing resolution beyond the 2011 fiscal year. 2012 Minibus, P.L. 112-55, Div. D (generally extended funding for federal agencies pursuant to the terms and conditions of the 2011 CAA through Dec. 16, 2011).

[79] The DNI reported in December 2010 that 13.5% of released Guantanamo detainees are "confirmed" and 11.5% "are suspected" of "reengaging in terrorist or insurgent activities after transfer." *See* DNI Recidivism Summary, *supra* footnote 53.

Supporters of these funding restrictions argue that they significantly reduce the chance that a detainee will reengage in terrorist activity if released from U.S. custody, while critics argue that they are overly stringent and hamper the executive's ability to transfer even low-risk detainees from U.S. custody. In any event, no Guantanamo detainee has been transferred or released from U.S. custody since the 2011 NDAA and CAA went into effect, though the degree to which these restrictions are responsible for the lack of subsequent detainee transfers is unclear.

Under the requirements of Section 1039, in order for a transfer to occur, the Secretary of Defense must first certify to Congress that the destination country or entity

- is not a designated state sponsor of terrorism or terrorist organization;
- maintains effective control over each detention facility where a transferred detainee may be housed;
- is not facing a threat likely to substantially affect its ability to control a transferred detainee;
- has agreed to take effective steps to ensure that the transferred person does not pose a future threat to the United States, its citizens, or its allies;
- has agreed to take such steps as the Secretary deems necessary to prevent the detainee from engaging in terrorism;
- has agreed to share relevant information with the United States related to the transferred detainee that may affect the security of the United States, its citizens, or its allies; and
- has agreed to allow appropriate agencies of the United States to have access to the individual, if requested.

These requirements are substantively identical to those that the interagency review board established pursuant to Section 1036 are required to consider when determining whether a Guantanamo detainee's continued detention is warranted. Moreover, the certification requirements virtually mirror those contained in the 2011 NDAA and CAA,[80] except that Section 1040 establishes an additional requirement that the receiving foreign entity agree to permit U.S. authorities to have access to the transferred individual.

Like the 2011 NDAA and CAA, Section 1040 also generally prohibits funds from being used to transfer a Guantanamo detainee to the custody or control of a foreign government or entity if there is a confirmed case that a former Guantanamo detainee who was transferred to that government or entity subsequently engaged in terrorist activity.

The White House has expressed disapproval of the restrictions on detainee transfers established by Section 1040. It claims that the provision's certification requirements unduly interfere with the executive's ability "to make important foreign policy and national security determinations regarding whether and under what circumstances such transfers should occur. The Administration must have the ability to act swiftly and to have broad flexibility in conducting its negotiations with foreign countries."[81]

[80] 2011 NDAA, P.L. 111-383, §1033; 2011 CAA, P.L. 112-10, §1013.

[81] White House Statement on H.R. 1540, *supra*,footnote 1, at 2.

## Other Guantanamo-Related Provisions

Section 1035 requires the Secretary of Defense to submit a detailed "national security protocol" pertaining to the communications of each "individual detained at Guantanamo" (defined in Section 1031, discussed *supra*) within 90 days of enactment. The protocol is required to describe an array of limitations or privileges applicable to each detainee regarding access to military or civilian legal representation, communications with counsel or any other person, receipt of information, possession of contraband and the like, as well as applicable enforcement measures. The provision specifically requires a description of monitoring procedures for legal materials or communications for the protection of national security while also preserving the detainee's privilege to protect such materials and communications in connection with a military commission trial or habeas proceeding.

Section 1038 prohibits DOD funds made available in FY2012 from being used to permit family members of Guantanamo detainees to visit them there.

Section 1043 prohibits Guantanamo detainees who are "repatriated" to the Federated States of Micronesia, the Republic of Palau, or the Republic of the Marshall Islands from being afforded the rights and benefits set forth in the Compact of Free Association. The Compact provides certain rights and benefits to citizens of these countries which may, among other things, facilitate their travel to the United States. It should be noted that repatriation is commonly understood to refer to the return of a person back to his or her home country. Accordingly, this provision would not appear to apply to any former Guantanamo detainee who was resettled in one of the countries listed above (i.e., the Chinese ethnic Uighur detainees who were resettled in Palau), though such persons may be effectively barred from travelling to the United States under existing laws.[82] However, Section 1043 would apply to any citizen of Micronesia, Palau, or the Marshall Islands who was detained at Guantanamo and thereafter returned to his country of origin.

## Terrorism Trials

Section 1042 requires consultation among the Attorney General, Deputy Attorney General, or Assistant Attorney General for the Criminal Division, and the Director of National Intelligence and the Secretary of Defense prior to the initiation of any prosecution of a non-citizen for an offense for which the defendant could be tried by military commission. The consultation is to involve a discussion of whether the prosecution should take place in a U.S. district court or before a military commission, and whether the individual should be transferred into military custody for purposes of intelligence interviews. This is not a provision that has appeared in previous defense authorization bills. The White House has expressed opposition to this provision. It claims that robust interagency coordination already exists between federal agencies in terrorism-related

[82] The Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83) and Consolidated Appropriations Act, 2010 (P.L. 111-117) appeared to generally bar the funds they appropriated from being used to grant an "immigration benefit," including a visa to enter the United States, to a person who has been detained at Guantanamo. These funding restrictions were extended for the duration of FY2011 pursuant to the terms of the 2011 CAA. *See* P.L. 112-10, Div. B. Accordingly, to the extent that these provisions incorporated into the 2011 CAA, they also appear to have been extended through Dec. 16, 2011, via the continuing resolution portion of the 2012 Minibus. P.L. 112-55, Div. D (extending funding for certain agencies through Dec. 16, 2011, subject to the terms and conditions of the 2011 CAA). *See also* 8 U.S.C. §1182 (grounds for exclusion of aliens seeking entry into the United States); 49 U.S.C. §44903(j) (placing former Guantanamo detainees on the No Fly List, unless the President certifies to Congress that the detainee poses no threat to the United States, its citizens, or its allies).

prosecutions, and asserts that Section 1042 "would undermine, rather than enhance, this coordination by requiring institutions to assume unfamiliar roles and could cause delays in taking into custody individuals who pose imminent threats to the nation's safety."[83]

Section 1046 provides that any foreign national who has engaged in certain terrorism-related conduct must be tried only by military commission for such offense. The provision applies to any foreign national who

> (1) engages or has engaged in conduct constituting an offense relating to a terrorist attack against persons or property in the United States or against any United States Government property or personnel outside the United States; and
>
> (2) is subject to trial for that offense by a military commission under chapter 47A of title 10, United States Code[.]

The provision does not define its terms. While the provision applies to "an offense relating to" either a terrorist attack within the United States or against U.S. government property or personnel abroad, it is not clear whether the provision would apply to prospective attacks that are never consummated. What qualifies as a "terrorist attack," as opposed to another act of violence, is not clarified. Applying the language to a case such as that of Umar Farouk Abdulmutallab, the Nigerian suspect accused of trying to destroy an airliner traveling from Amsterdam to Detroit on Christmas Day 2009, may be instructive. Assuming that the provision applies to failed attacks, an attempt to destroy an aircraft, for example, might be covered if the attack can be said to have taken place within the United States. If the "attack" takes place in international airspace or the airspace of another country, it would apparently be necessary to demonstrate that U.S. government property or personnel were on board.

Assuming that these criteria were met, it would then need to be established that the "offense" related to the "attack" is also one that can be tried by military commission pursuant to the MCA, and that the accused is subject to the jurisdiction of such a military commission. The attempted use of an explosive device to bring down a civilian aircraft seems amenable to prosecution under a number of criminal prohibitions over which military commissions have jurisdiction.[84] In order for jurisdiction to exist, however, it must also be demonstrated the offense was "committed in the context of and associated with hostilities."[85] "Hostilities," in turn, is defined by the MCA to mean "any conflict subject to the laws of war."[86] Accordingly, it appears that at least some connection between the accused and the forces opposing the United States in an armed conflict would have to be established for Section 1042 to apply.[87]

In order for a military commission to exercise jurisdiction over an accused, it must be established that he is not a citizen of the United States and is an unprivileged enemy belligerent, which is

[83] White House Statement on H.R. 1540, *supra*,footnote 1, at 3.

[84] *See* 10 U.S.C. §950t (listing crimes triable by a military commission, including murder of protected persons, attacking civilians or civilian objects, attacking protected property, hazarding an aircraft, or terrorism).

[85] 10 U.S.C. §950p(c).

[86] 10 U.S.C. §948a(9).

[87] Military commissions established pursuant to the MCA are not statutorily limited in their application solely to the conflict authorized under the AUMF. It is possible that commissions could be employed to try unprivileged enemy belligerents in other armed conflicts.

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defined to exclude a person who qualifies for prisoner of war status under the Third Geneva Convention[88] in an international armed conflict, but to cover any other person who

> (A) has engaged in hostilities against the United States or its coalition partners;
>
> (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or
>
> (C) was part of al Qaeda at the time of the alleged offense....[89]

If the offense is deemed to be sufficiently associated with hostilities, it seems that the accused would by definition qualify as an unprivileged enemy belligerent.[90] The bill does not explain how any of these criteria are to be determined. Military commissions have jurisdiction to make their own jurisdictional determinations,[91] but an Article III court exercising habeas jurisdiction could also determine whether an accused qualifies for treatment under the provision.

How the bill might affect the more typical material support case or other cases involving terrorism charges is difficult to predict. The provision appears to apply to all foreign nationals who have engaged in relevant conduct, although presumably it can only plausibly be read to cover those foreign nationals in U.S. custody. The provision could complicate efforts to extradite terrorism suspects from abroad, or to try those who have already been extradited. As noted above, the provision might be construed as limited to cases where an actual qualifying terrorist attack is carried out, in which case it would not apply to foreign nationals arrested in sting operations. The provision does not appear to require that any agency of the government take any action with respect to foreign nationals in custody to determine whether they are subject to the provision, unless Section 1042, discussed *supra*, is read to serve that purpose, but such a determination may be subject to habeas challenge, at least in the case of foreign nationals in the United States. On the other hand, the bill does not outright preclude trials in Article III courts for the individuals it

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[88] The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, art.4 (6 U.S.T. 3317). The eight categories of persons entitled to protected status are

> 1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> 2. Members of other militias and other volunteer corps that belong to a Party to the conflict that: are commanded by a person responsible for his subordinates, have a "fixed distinctive sign" identifying them as combatants, carry arms openly, and conduct themselves in accordance with the laws and customs of war.
>
> 3. Members of regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power.
>
> 4. Properly authorized persons who accompany the armed forces without actually being members thereof, including, war correspondents, supply contractors and the like.
>
> 5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict.
>
> 6. Inhabitants of a non-occupied territory who spontaneously resist invading forces, provided they carry arms openly and respect the laws and customs of war.
>
> 7. Certain interned members and former members of the armed forces of an occupied country.
>
> 8. Certain detainees in the hands of neutral or non-belligerent.

[89] 10 U.S.C. §948a (6) & (7); §948d.

[90] Whether or under what circumstances the activities of a terrorist organization might be considered to implicate international humanitarian law ("law of war") is subject to continuing debate, particularly outside the United States, but is beyond the scope of this report.

[91] 10 U.S.C. §948d.

describes, nor does it require a military commission trial; it merely states that the individuals shall only be tried for certain offenses in military commissions. If "offense" is understood by reference to the statute defining its elements, the operation of the provision may be avoidable simply by framing the offense as one under a terrorism-related provision of title 18, *U.S. Code* rather than one that is subject to the jurisdiction of a military commission. This reading is supported by Section 1042, which appears to contemplate broader discretion among the executive branch officials over prosecutorial decisions than Section 1046 appears to permit. In the event a federal criminal offense is charged, however, a defendant could challenge the Article III court's jurisdiction based on the language of the provision. If the court were to agree and there is some impediment to trial before a military commission,[92] for example, in a situation where the defendant has been extradited from a foreign country that has not given its permission for a trial by a military court, a criminal trial may not be possible.

Executive branch officials have expressed criticism of this provision, asserting that it improperly constrains executive discretion as to the appropriate forum in which to prosecute detainees.[93]

## General Counterterrorism Matters

Section 1032 extends for two years the authority to make rewards up to $5 million to individuals who provide information or non-lethal assistance to the U.S. government or an ally in connection with a military operation outside the United States against international terrorism or to assist with force protection.[94] The original authority expired on September 30, 2011. The provision also moves the related annual reporting requirement to February rather than December.

Section 1041 requires the Secretary of Defense to provide to the congressional defense committees quarterly briefings outlining global Department of Defense counterterrorism operations, expressly including "an overview of authorities and legal issues including limitations."

Section 1044 provides a sense of the Congress approving DOD anti-terrorism efforts and pledging congressional support for future efforts.

Section 1045 addresses the perceived need for improved interagency strategic planning for measures to deny safe havens to Al Qaeda and affiliated groups and to strengthen "at-risk states." It requires the President to issue planning guidance identifying and analyzing geographic areas of concern and to provide a set of goals for each area and a description of various agency roles as well as gaps in U.S. capabilities that may have to be filled through coordination with other entities. In addition to reviewing and updating the guidance as necessary, the President is required

[92] We read "foreign national … subject to trial for that offense by military commission" to mean that subject matter jurisdiction exists for military commission trial, but not to incorporate other matters particular to an individual case.

[93] When the White House issued an initial statement regarding H.R. 1540, the bill had not yet been amended to add Section 1046. Following the passage of H.R. 1540 by the House, Administration officials expressed opposition to Section 1046 on the grounds that it inappropriately restricted executive discretion to choose the forum in which to prosecute detainees. Frank Oliveri, "Pentagon's Top Lawyer Outlines Opposition to Detainee Provisions in Policy Bills," *CQ Today Online*, October 18, 2011, at http://www.cq.com/doc/news-3965331?wr=RDlYTlRja3lSajdkR0x4VTRoeDBEdw (quoting DOD general counsel Jeh C. Johnson, when discussing H.R. 1540, as stating that "[d]ecisions about the most appropriate forum in which to prosecute a terrorist should be left, case by case, to prosecutors and national security professionals").

[94] 10 U.S.C. §127b.

to submit to Congress copies of each guidance document within 15 days after it is completed or updated. The provision also requires agencies involved in carrying out the guidance to enter into a memorandum of understanding covering a list of criteria.

# S. 1867: Summary and Analysis of Detainee Provisions of Senate-Passed Bill

The Senate bill S. 1867 covers "Detainee Matters" in subtitle D of Title X. The provisions are similar to the detainee provisions in S. 1253, as reported out of the Armed Services Committee in June, but some language was revised to address Administration concerns. S. 1867 was passed by the Senate, as amended, on December 1, 2011. A single amendment was made to the detainee provisions of the bill as had been reported out of committee, which clarified that the bill's affirmation of the legal authority to detain persons captured in the conflict with Al Qaeda did not modify any existing authorities relating to the power to detain U.S. citizens or lawful resident aliens, or any other persons captured or arrested in the United States. The Senate subsequently passed H.R. 1540, with its original provisions stripped and replaced with the language of Senate-passed S. 1867.

## Detention Authority

Section 1031 affirms that the AUMF includes authority for the U.S. Armed Forces to detain "covered persons" as unprivileged enemy belligerents pending disposition under the law of war. Combining the express language of the AUMF with the language the Obama Administration has employed to describe its detention authority in habeas litigation involving Guantanamo detainees.[95] The bill defines "covered persons" in Section 1031(b):

> (b) Covered Persons- A covered person under this section is any person as follows:
>
> (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
>
> (2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.

The earlier version of Section 1031 contained in S. 1253 had included similar language defining "covered persons," but rather than "affirming" detention authority under the AUMF, it directly authorized the Armed Forces to detain covered persons "captured in the course of hostilities authorized by the [AUMF] as unprivileged enemy belligerents," and permitted their detention until "the end of hostilities against the nations, organizations, and persons subject to the [AUMF]." The White House reportedly objected to the language "captured in the course of hostilities" because it could be read to limit detentions to those captured during military operations and not persons who are arrested under other circumstances.[96]

[95] *See supra*, discussion in "Scope of Detention Authority Conferred by the AUMF."

[96] *See* Charlie Savage, *Levin and McCain Strike Deal Over Detainee Handling*, THE CAUCUS (BLOG) NY TIMES (Nov. (continued...)

Section 1031 of Senate-passed S. 1867 states that dispositions under the law of war "may include" several options:

- detention without trial until the end of hostilities authorized by the 2001 AUMF;
- trial by military commission;
- transfer for trial by another court or tribunal with jurisdiction; or
- transfer to the custody or control of a foreign country or foreign entity.

The provision uses the language "may include" with respect to the above options, which could be read as permission to add other options or negate any of the listed options.

Section 1031 does not expressly clarify whether U.S. citizens or lawful resident aliens may be determined to be "covered persons." The corresponding provision of S. 1253 would have provided that such persons could be detained on the basis of conduct occurring within the United States only to the extent permitted by the Constitution.[97] S. 1867 provides that nothing in Section 1031 "is intended to limit or expand the authority of the President or the scope of the Authorization for the Use of Military Force." While S. 1253 seemed to endorse the detention of U.S. citizens and resident aliens (to the extent such detention is constitutionally permissible), the revised provision of S. 1867, as reported out of committee seemed tacitly to leave the application of the AUMF to U.S. persons, in particular those arrested in the United States, in its currently unsettled position. By removing the reference to "captured during the course of hostilities" and disavowing any intent to modify the detention authority exercised under the AUMF, the committee-modified version appeared to be aimed at reinforcing the executive branch's view of its detention authority.[98]

(...continued)

15, 2011, 3:19 PM), http://thecaucus.blogs.nytimes.com/2011/11/15/levin-and-mccain-strike-deal-over-detainee-handling/.

[97] There is continuing uncertainty regarding when and whether U.S. persons may be deemed enemy belligerents on account of domestic conduct. In *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), the U.S. Court of Appeals for the Fourth Circuit sitting *en banc* considered whether the AUMF and the law of war permit the detention of a resident alien alleged to have engaged in activities within the United States in support of Al Qaeda, but who had not been part of the conflict in Afghanistan. Four of the nine judges would have held that even if the allegations were true, al-Marri did not constitute an "enemy combatant" and that the government could continue to hold him only if it charged him with a crime, commenced deportation proceedings, or obtained a material witness warrant in connection with grand jury proceedings (as a majority of an earlier three-judge appellate panel had found). A plurality of the fractured court, however, found that the AUMF and the law of war give the President the power to detain persons who enter the United States as "sleeper agents" on behalf of Al Qaeda for the purpose of committing hostile and war-like acts such as those carried out on 9/11. The Supreme Court agreed to hear an appeal of the circuit ruling, but prior to considering the merits of the case, the government brought charges in civilian court against al-Marri for providing material support to Al Qaeda. The government immediately requested that the Supreme Court dismiss al-Marri's pending case and authorize his transfer from military to civilian custody for criminal trial. The Supreme Court granted the government's application, vacated the Fourth Circuit's judgment, and remanded the case back to the appellate court with instructions to dismiss the case as moot. al-Marri v. Spagone, 129 S.Ct. 1545 (2009).

[98] When presenting S. 1867 to the Senate floor, Senator Carl Levin, the chairman of the Armed Services Committee, stated that the language of Section 1031 was

> written by administration officials for the purpose of codifying existing authority. The description of persons covered is identical to the position taken by the administration and upheld in the courts. The provision specifically provides that nothing in the provision either limits or expands the authority of the President or the scope of the AUMF.

157 Cong Rec S 7785 (Nov. 18, 2011) (statement of Sen. Carl Levin).

The potential application of Section 1031 to U.S. citizens and other persons within the United States was the subject of significant floor debate. An amendment that would have expressly barred U.S. citizens from long-term military detention on account of enemy belligerent status was considered and rejected.[99] Ultimately, an amendment was adopted that added the following proviso to Section 1031:

> Nothing in this section shall be construed to affect existing law or authority relating to the detention of United States citizens or lawful resident aliens of the United States or any other persons who are captured or arrested in the United States.

This language is intended to make clear that Section 1031 neither expands nor limits the executive's existing authority to detain U.S. citizens and resident aliens, as well as other persons captured in the United States. Such detentions have been rare and subject to substantial controversy, without achieving definitive resolution in the courts. While the Supreme Court in *Hamdi* recognized that persons captured while fighting U.S. forces in Afghanistan could be militarily detained in the conflict with Al Qaeda potentially for the duration of hostilities, regardless of their citizenship, the circumstances in which persons captured in other locations may be subject to preventive military detention has not been definitively adjudicated.[100] Section 1031 does not attempt to clarify the circumstances in which a U.S. citizen, resident alien, or person captured with the United States may be held as an enemy belligerent in the conflict with Al Qaeda. As discussed *supra*, the circumstances in which a U.S. citizen or other person captured or arrested in the United States may be detained under the AUMF have not been definitively adjudicated.[101]

In restating the definitional standard the Administration uses to characterize its detention authority, Section 1031 does not attempt to provide additional clarification for terms such as "substantial support," "associated forces," or "hostilities." For that reason, it may be subject to an evolving interpretation that effectively permits a broadening of the scope of the conflict. The revised provision in S. 1867, however, does require the Secretary of Defense to brief Congress on how the provision applies, including with respect to "organizations, entities, and individuals considered to be 'covered persons' under section 1031(b)." This language may be read to require an ongoing accounting of which entities are considered to be "associated forces" or a description of what constitutes "substantial support."

The Administration has not voiced specific objections with respect to any of the language in revised Section 1031, although it believes codification of existing authorities is "unnecessary and poses some risk."[102] It cautions that

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[99] S.Amdt. 1126 (seeking to bar the long-term military detention of U.S. citizens) (not agreed to by a vote of 45-55).

[100] In separate rulings, the U.S. Court of Appeals for the Fourth Circuit upheld the military detention of a U.S. citizen and a resident alien captured in the United States and designated as enemy combatants by the executive branch. Padilla v. Hanft, 423 F.3d 386, 390-391 (4th Cir. 2005)(holding that U.S. citizen captured in the United States could be detained pursuant to the AUMF because he had been, prior to returning to the country, "'armed and present in a combat zone' in Afghanistan as part of Taliban forces during the conflict there with the United States"); al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008), *vacated by* al-Marri v. Spagone, 129 S.Ct. 1545 (2009). In each case, the detainee was transferred to civilian law enforcement custody for criminal prosecution before the Supreme Court could consider the merits of the case.

[101] *See "*Scope of Detention Authority Conferred by the AUMF*"*.

[102] *See* White House Statement on S. 1867, supra,footnote 1, at 1-2.

> Congress must be careful not to open a whole new series of legal questions that will distract from our efforts to protect the country. While the current language minimizes many of those risks, future legislative action must ensure that the codification in statute of express military detention authority does not carry unintended consequences that could compromise our ability to protect the American people.[103]

## Mandatory Military Detention

The provision that appears to have evoked the most controversy, Section 1032, generally requires at least temporary military custody for certain Al Qaeda members and members of "associated forces" who are taken into the custody or brought under the control of the United States as of 60 days from the date of enactment. This provision does not apply to all persons who are permitted to be detained as "covered persons" under Section 1031, but only those captured during the course of hostilities who meet certain criteria. It expressly excludes U.S. citizens from its purview, although it applies to U.S. resident aliens (albeit with the caveat that if detention is based on conduct taking place within the United States, such detention is mandated only "to the extent permitted by the Constitution of the United States").

The mandatory detention requirement applies to covered persons captured in the course of hostilities authorized by the AUMF, defining "covered persons" for its purposes as a person subject to detention under Section 1031 who is determined

> (A) to be a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction al al-Qaeda; and
>
> (B) to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.

Persons described above are required to be detained by military authorities pending "disposition under the law of war," as defined in Section 1031, except that additional requirements must first be met before the detainee can be transferred to another country. Accordingly, such persons may (1) be held in military detention until hostilities under the AUMF are terminated; (2) be tried before a military commission; (3) be transferred from military custody for trial by another court having jurisdiction; or (4) be transferred to the custody of a foreign government or entity, provided the transfer requirements established in Section 1033 of the bill,[104] discussed *infra*, are satisfied.

Section 1032 of S. 1867 differs from S. 1253 by applying to members of "associated forces" rather than "affiliated entities," adopting the language that has generally been used to define

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[103] *Id*.

[104] Section 1032 provides that persons subject to mandatory detention may be transferred to foreign countries only so long as such transfers are "consistent with the requirements of section 1033" of the bill, which bars the transfer of Guantanamo detainees to foreign countries unless certain certification requirements are met. Arguably, the interplay between these two provisions could be read to mean that no person subject to the mandatory detention requirement of Section 1032 may be transferred a foreign country unless the Secretary of Defense certifies that the transfer complies with the criteria described under Section 1033, regardless of the current location of the person's detention. On the other hand, it is possible that the certification requirement is only intended to apply to those persons who are subject to mandatory detention under Section 1032 who are also currently being held at Guantanamo. *See also infra* text accompanying footnote 106 (noting potential implications for the capture of suspected Al Qaeda members during U.S. operations in Iraq or Afghanistan).

detention authority in court.[105] The provision further specifies that covered forces are ones that "act in coordination with or pursuant to the direction of al-Qaeda." The omission of any express reference to the Taliban in Section 1032 seems to indicate that it need not be treated as a force associated with Al Qaeda unless its actions are sufficiently coordinated or directed by Al Qaeda. A question might arise if an associated force acts largely independently but coordinates some activity with Al Qaeda. Would all of its members be subject to mandatory detention, or only those involved in units which coordinate their activities with Al Qaeda? Perhaps this determination can be made with reference to the specific attack the individual is determined to have attempted, planned, or engaged in. Under this reading, hypothetically, captured Taliban insurgents suspected of involvement in efforts to dislodge local government officials could be turned over to the Afghan government without undergoing the certification process in Section 1033 (so long as no Al Qaeda cooperation is suspected), while a Taliban member of a unit engaged with Al Qaeda in planning an attack would be subject to mandatory detention and restrictions on transfer. In any event, Section 1032 would not apply to a "lone wolf" terrorist with no ties to Al Qaeda or any associated force.

What conduct constitutes an "attack ... against the United States coalition partners" is not further clarified. It could be read to cover only the kinds of attacks carried out in a military theater of operations against armed forces, where the law of war is generally understood to permit the military detention of such persons. This reading may be bolstered by the limitation of the provision to persons who are "captured during the course of hostilities." On the other hand, the term "attack" might be interpreted to apply more broadly to cover terrorist acts directed against civilian targets elsewhere, although the application of the law of war to such circumstances is much less certain. It is unclear whether an effort to bring down a civilian airliner, for example, necessarily constitutes an "attack against the United States." The reference to the possibility that lawful resident aliens may be detained based on conduct taking place in the United States supports the broader reading of "attack." Because the mandatory detention requirement is related to hostilities authorized by the AUMF, it would not seem to apply to insurgents who carry out attacks against U.S. or coalition targets in Iraq (though it might be argued that the provision would apply to any perpetrators believed to be members of Al Qaeda or an associated force).[106]

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[105] "Affiliated entity" does not appear to have a set definition. The recently released 2011 National Strategy for Counterterrorism ("2011 Strategy"), http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf distinguishes between "affiliates," which are defined as "groups that have aligned with" Al Qaeda, and "adherents," which are "individuals who have formed collaborative relationships with, act on behalf of, or are otherwise inspired to take action in furtherance of the goals of al-Qa'ida—the organization and the ideology—including by engaging in violence regardless of whether such violence is targeted at the United States, its citizens, or its interests." 2011 Strategy at 3. The 2011 Strategy also distinguishes "affiliates" from "associated forces":

> Affiliates is not a legal term of art. Although it includes Associated Forces, it additionally includes groups and individuals against whom the United States is not authorized to use force based on the authorities granted by the [AUMF]. The use of Affiliates in this strategy is intended to reflect a broader category of entities against whom the United States must bring various elements of national power, as appropriate and consistent with the law, to counter the threat they pose. Associated Forces is a legal term of art that refers to cobelligerents of al-Qa'ida or the Taliban against whom the President is authorized to use force (including the authority to detain) based on the [AUMF]

*Id*. at note 1.

[106] Under present practice, such persons would likely be detained and turned over to the Iraqi government for prosecution. Depending upon how the requirements of Section 1032 are interpreted, it could arguably impede the transfer to Iraq authorities of any insurgent believed to be part of Al Qaeda, potentially hampering U.S.-Iraq relations. *See supra* footnote 104 (discussing interplay between Section 1032 and Section 1033 of the Senate bill). The application of the provision in Afghanistan may have similar implications as the United States seeks to turn over detention operations to the Afghan government. *See* Daniel, *supra* footnote 6 (describing detention procedures in (continued...)

S. 1867 includes a new requirement for the President to submit to Congress, within 60 days of enactment, a report describing the procedures for implementing the provision. The submission is to include procedures for designating who is authorized to determine who is a covered person for the purpose of the provision and the process by which such determinations are to be made. Other procedures to be described include those for preventing the interruption of ongoing surveillance or intelligence gathering with regard to persons not already in the custody or control of the United States; those for precluding implementation of the determination process until after any ongoing interrogation session is completed and for precluding the interruption of an interrogation session; precluding application of the provision in the case of an individual who remains in the custody of a third country, where U.S. government officials are permitted access to the individual; and providing for an exercise of waiver authority to accomplish the transfer of a covered person from a third country, if necessary.

It is not clear how these procedures will interact with those contemplated under Section 1036 (discussed more fully *infra*), which requires DOD to submit to Congress procedures for status determinations for persons detained pursuant to the AUMF for purposes of Section 1031. If the procedures required by Section 1036 are meant to determine whether a person is detainable under the AUMF as an initial matter (as opposed to determining the appropriate disposition under the law of war), then it would seem necessary for that determination to take place prior to the procedures for determining whether a person's detention is *required* under Section 1032. The bill does not appear to preclude the implementation of more than one process for making the determination that someone qualifies as a covered person subject to mandatory military detention, perhaps depending on whether the person is initially in military custody or the custody of law enforcement officials. Nor does it seem to preclude the use of a single procedure to determine whether a person is covered by Section 1032 *and* the appropriate disposition under the law of war, which could obviate the necessity for transferring a person to military custody. Whatever process is adopted to make any of these determinations would likely implicate constitutional due process requirements, at least if the detainee is located within the United States, and would likely be subject to challenge by means of habeas corpus.[107] Section 1032 does not prevent Article III trials of covered persons, although any time spent in military custody could complicate the prosecution of a covered defendant.[108]

The Obama Administration is opposed to this provision, even as the language has been revised from S. 1253.[109] Secretary of Defense Leon Panetta has expressed doubt that the provision offers

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Afghanistan).

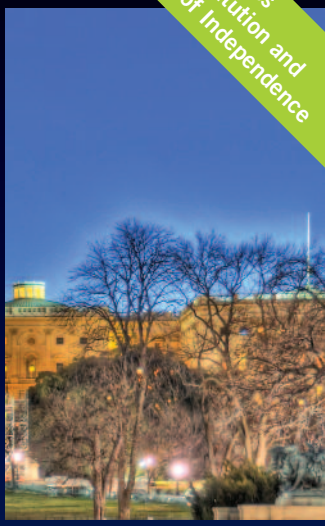
[107] The ability of a detainee to bring a habeas petition under Section 1036 may depend upon his location. *Compare* Boumediene v. Bush, 553 U.S. 723 (2008) (constitutional writ of habeas extends to non-citizen detainees held at Guantanamo) *with* Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (writ of habeas does not presently extend to non-citizen detainees held by the United States in Afghanistan).

[108] There has been one case of an individual who was transferred from Guantanamo to the United States for prosecution on terrorism charges. Ahmed Khalfan Ghailani was indicted in 1998 and charged with conspiracy in connection with the bombing of the United States Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. He was arrested in Pakistan in 2004 and turned over to U.S. custody to be held and interrogated by Central Intelligence Agency (CIA) officials. In 2006, he was transferred to DOD custody and held as an enemy combatant at Guantanamo. He was transferred to the Southern District of New York for trial in 2009, and was subsequently convicted and sentenced to life imprisonment, despite his efforts to quash the prosecution on numerous grounds related to his detention. For more information, see CRS Report R41156, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, by Jennifer K. Elsea and Michael John Garcia.

[109] *See* Letter from the Secretary of Defense to Senator Carl Levin (Nov.15, 2011) (hereinafter "DOD Letter"), (continued...)

By Bradford Fitch

Includes U.S. Constitution and Declaration of Independence



# Citizen's Handbook

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any advantage to DOD or to U.S. national security interests, predicting instead that it would restrain the executive branch's option to make effective use of all available counterterrorism tools. Moreover, Secretary Panetta objects to the provision's failure to clearly limit its scope to persons captured abroad; complains that the qualification to "associated force" (limiting mandatory detention to members of such groups that coordinate with or act under the direction of Al Qaeda) unnecessarily complicates the Department's ability to interpret and implement the restriction; and views as inappropriate the possible extension of the transfer certification requirements of Section 1033 to those covered by Section 1032 who are not currently detained at Guantanamo.[110]

The White House strongly objects to Section 1032, calling it an "unnecessary, untested, and legally controversial restriction of the President's authority to defend the Nation from terrorist threats" that would "tie the hands of our intelligence and law enforcement professionals."[111] The Administration expresses doubt that the committee revisions to the provision, in particular the procedural requirements to be designed to prevent the interruption of interrogations and other enhancements, will correct the fundamental problems it perceives:

> Rather than fix the fundamental defects of section 1032 or remove it entirely, as the Administration and the chairs of several congressional committees with jurisdiction over these matters have advocated, the revised text merely directs the President to develop procedures to ensure the myriad problems that would result from such a requirement do not come to fruition. Requiring the President to devise such procedures concedes the substantial risks created by mandating military custody, without providing an adequate solution. As a result, it is likely that implementing such procedures would inject significant confusion into counterterrorism operations.[112]

## Transfer or Release of Guantanamo Detainees to Foreign Countries

Section 1033 continues for the fiscal year the restriction upon the use of military funds to transfer or release Guantanamo detainees to foreign countries or entities, except when certain criteria are met. These restrictions are largely similar to those contained in the 2011 NDAA and CAA, which were initially set to expire at the end of the 2011 fiscal year,[113] as well as those found in H.R. 1540, which would only apply to funds authorized for FY2012.

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*available* at http://www.politico.com/static/PPM229_111115_dodletter.html.

[110] *Id*. The new version of the bill, according to the letter, makes the intent of the language appending the certification requirement to the transfer option more apparent. This language does not appear to have changed from the earlier provision found in S. 1253. In either version, the reference to Section 1033 requirements in Section 1032 but not in 1031 is subject to two different interpretations, *see supra* footnote 104, although the Secretary's interpretation seems most plausible. The alternative reading would seem to indicate that those detained at Guantanamo who are covered persons under Section 1031 but not subject to mandatory detention under Section 1032 are not subject to Section 1033 certification; while detainees who are subject to Section 1032 mandatory detention and perhaps other detained aliens who are not or no longer considered unprivileged enemy belligerents would be subject to the transfer restrictions. This reading seems implausible given the similar certification requirements in previous statutes, which have generally applied to all Guantanamo detainees.

[111] *See* White House Statement on S. 1867, *supra*,footnote 1, at 2.

[112] *Id*.

[113] Certain restrictions in the 2011 NDAA are set to expire in January 2012. *See supra*, text accompanying footnote 78. The funding conditions contained in the CAA have been temporarily extended past the 2011 fiscal year through a series of continuing resolutions. *See, e.g.,* 2012 Minibus, P.L. 112-55 (Div. B) (extending funding for some federal agencies, (continued...)

Section 1033 would generally prohibit the expenditure of DOD funds for any detainee transfer from Guantanamo to a foreign country unless Congress has received, not later than 30 days prior to the transfer, a certification by the Secretary of Defense, with the concurrence of the Secretary of State and in consultation with the Director of National Intelligence, that the destination country or entity

- is not a designated state sponsor of terrorism or a designated foreign terrorist organization;
- maintains control over any detention facility where the individual is to be housed;
- is not facing a substantial threat to its ability to exercise control over the individual;
- has taken or agreed to take effective measures to avert any threat the individual may pose to the United States, its citizens, or its allies;
- has taken or agreed to take such actions as the Secretary of Defense determines are necessary to prevent the person from engaging in terrorism;
- has agreed to share with the United States any information related to the individual or his associates, and any information relevant to the security of the United States, its citizens, or its allies.

These certification requirements largely mirror those found in the 2011 NDAA and CAA (though the interagency consultation requirements occurring prior to certification are different). Unlike H.R. 1540, the Senate bill would not also require the Secretary of Defense to certify that the receiving foreign entity agreed to permit U.S. authorities to have access to the transferred individual. The certification is not necessary in the case of detainees who are being transferred pursuant to either a pretrial agreement entered in a military commission case prior to the date of enactment or a court order.

Section 1033 also generally prohibits transfers from Guantanamo to any foreign country or entity if there is a confirmed case of a detainee previously transferred to that place or entity who has subsequently engaged in any terrorist activity. The prohibition does not apply in the case of detainees who are being transferred pursuant to either a pretrial agreement in a military commission case, if entered prior to the enactment, or a court order.

Both the certification requirement and the bar related to recidivism may be waived if the Secretary of Defense determines, with the concurrence of the Secretary of State and in consultation with the Director of National Intelligence, that alternative actions will be taken to address the underlying purpose of the measures, or that, in the event that agreements or actions on the part of the receiving state or entity cannot be certified as eliminating all relevant risks, that alternative actions will substantially mitigate the risk.[114] In the case of a waiver of the provision

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subject to the terms and conditions of the 2011 CAA, through Dec. 16, 2011).

[114] While the funding restrictions on detainee transfers contained in the 2011 NDAA and CAA afforded the Secretary of Defense limited waiver authority, they did not permit the waiver of certification requirements. Moreover, though the Senate bill permits the Secretary to waive the prohibition on the transfer of detainees where there is a confirmed case of recidivism, it establishes more stringent requirements for the exercise of this authority than the 2011 NDAA or CAA. *See* 2011 NDAA, P.L. 111-383, §1033; 2011 CAA, P.L. 112-10, §1113.

barring transfers anywhere recidivism has occurred, the Secretary may issue a waiver if alternative actions will be taken to mitigate the risk of recidivism. Any transfer pursuant to a waiver must be determined to be in the national security interests of the United States. Not later than 30 days prior to the transfer, copies of the determination and the waiver must be submitted to the congressional defense committees, together with a statement of the basis for regarding the transfer as serving national security interests; an explanation why it is not possible to certify that all risks have been eliminated (if applicable); and a summary of the alternative actions contemplated.

Like the House-passed version of the 2012 NDAA, the Senate bill's transfer restrictions generally apply to any "individual detained at Guantanamo" other than a U.S. citizen or servicemember (or detainees transferred pursuant to a court order or a military commission pretrial agreement). This term appears broad enough in scope to cover foreign refugees brought to the Migrant Operations Center at Guantanamo after being interdicted at sea while attempting to reach U.S. shores. Whether Section 1033 would be interpreted so broadly as to cover such persons remains to be seen. The "requirements" of the section also apply to persons subject to mandatory detention under Section 1032, but not to all "covered persons" within the meaning of Section 1031 (who are not detained at Guantanamo).[115]

As previously discussed, the White House has expressed strong disapproval of the transfer restriction provisions contained in the House-passed version of the 2012 NDAA. The Department of Defense likewise disapproves of the Senate provision, although the Secretary expressed gratitude that the provision was not made permanent (as in S. 1253).[116]

## Transfer of Guantanamo Detainees Into the United States

Section 1034 imposes a prohibition on the use of DOD funds to construct or modify any facility in the United States or its territories or possessions to house any individual detained at Guantanamo Bay, as defined in the previous section, for the purposes of detention or imprisonment in the custody or under the control of the Department of Defense unless authorized by Congress. Similar restrictions were contained in the 2011 NDAA and CAA, and are also found in the 2012 Minibus.[117] The funding limitation contained in Section 1034 is also similar to one found in H.R. 1540, including its limitation to the 2012 fiscal year (S. 1253 would have made the restriction permanent). As had been the case with similar restrictions enacted for prior fiscal years, the White House objects to the restrictions contained in Section 1034.[118]

Unlike most recent appropriations and defense authorization enactments (as well as the House-passed version of the 2012 NDAA), the Senate bill does not contain a provision prohibiting the transfer or release of Guantanamo detainees into the United States. The bill permits the transfer of Guantanamo detainees into the custody of civilian law enforcement for purposes of criminal prosecution.[119] Moreover, the bill does not bar executive authorities from releasing into the

[115] *See supra* section describing §1032 ("Mandatory Military Detention").

[116] *See* DOD Letter, *supra* footnote 109.

[117] 2011 NDAA, P.L. 111-383, §1034(a)-(b); 2011 CAA, P.L. 112-10, §1114; 2012 Minibus, P.L. 112-55, §533.

[118] White House Statement on S. 1867, supra footnote 1, at 2 (describing Section 1034 as "an unwise intrusion on the military's ability to transfer its detainees as operational needs dictate").

[119] The bill permits the transfer of persons subject to Sections 1031 or 1032 to a civilian court for prosecution as one of the permissible dispositions under the law of war. *See also* S.Rept. 112-26 (accompanying S. 1253), at 177 ("The (continued...)

United States those Guantanamo detainees who have been cleared of enemy belligerency status by administrative authorities or a reviewing court.[120] Thus, the only bar to detainee transfers to the United States in the Senate bill appears to be transfers from Guantanamo for continued military detention, at least where facilities would need to be built or modified.

## Review of Detention of Persons at Guantanamo

Section 1035 addresses Executive Order 13567, pertaining to detention reviews at Guantanamo. Unlike H.R. 1540, the Senate bill does not seek to replace the periodic review process established by the order, but instead seeks to clarify aspects of the process. Section 1035 requires the Secretary of Defense, within 180 days of enactment, to submit to the congressional defense and intelligence committees a report setting forth procedures to be employed by review panels established pursuant to Executive Order 13567. The provision requires that these new review procedures

- clarify that the purpose of the periodic review is not to review the legality of any particular detention, but to determine whether a detainee poses a continuing threat to U.S. security;
- clarify that the Secretary of Defense, after considering the results and recommendations of a reviewing panel, is responsible for any final decision to release or transfer a detainee and is not bound by the recommendations; and
- ensure that appropriate consideration is given to a list of factors, including the likelihood the detainee will resume terrorist activity or rejoin a group engaged in hostilities against the United States; the likelihood of family, tribal, or government rehabilitation or support for the detainee; the likelihood the detainee may be subject to trial by military commission; and any law enforcement interest in the detainee.

The Administration objects to this provision because it shifts to the Defense Department the responsibility for what had been a collaborative, interagency review process.[121]

## Status Determination of Wartime Detainees

Section 1036 requires the Secretary of Defense, within 90 days of enactment, to submit a report to congressional defense and intelligence committees explaining the procedures for determining the status of persons detained under the AUMF for purposes of Section 1031 of the Senate bill. It is not clear whether the status determination "for purposes of section 1031" means determination of

(...continued)

committee understands that this prohibition does not apply to Department of Justice funds that might be needed in connection with a transfer for the purpose of a criminal trial.").

[120] Section 1032 of the Senate bill, which requires the mandatory military detention of members of Al Qaeda and affiliated entities pending disposition under the law of war, would probably not apply to most, if not all, Guantanamo detainees determined not to be involved in hostilities against the United States under the detention standard employed by the D.C. Circuit and executive authorities.

[121] White House Statement on S. 1867, supra footnote 1, at 2.

whether a detained individual is a "covered person" subject to Section 1031, or whether it is meant to refer to the disposition of such a person under the law of war, or to both.[122]

In the case of any unprivileged enemy belligerent who will be held in long-term detention, clause (b) of the provision requires the procedures to provide the following elements:

> (1) A military judge shall preside at proceedings for the determination of status of an unprivileged enemy belligerent.
>
> (2) An unprivileged enemy belligerent may, at the election of the belligerent, be represented by military counsel at proceedings for the determination of status of the belligerent.

The requirements of this provision apply without regard to the location where the detainee is held. It would appear to afford detainees held by the United States in Afghanistan greater privileges during status determination hearings than they currently possess (at least in circumstances where the United States intends to place them in "long-term detention," in which case the requirements of Section 1036(b) are triggered).[123] It is not clear what effect this provision would have upon detainees currently held at Guantanamo, who were designated as "enemy combatants" subject to military detention using a status review process that did not fully comply with the requirements of Section 1036(b).[124] Further, it is unclear how the requirements of Section 1036 would affect habeas challenges by Guantanamo detainees. It is possible, for example, that a habeas judge would stay a case while a Guantanamo detainee sought to have a new status determination using the process established under Section 1036. The implications that Section 1036 would have upon persons held at Guantanamo may depend upon whether the provision is interpreted to apply to all detainees in U.S. custody who are designated for long-term detention under the AUMF (possibly as a supplement to the periodic review process described under Section 1035), or only to persons who are subject to detention after the Senate bill's enactment.

The provision does not explain, in the case of new captures, how it is to be determined prior to the status hearing whether a detainee is one who will be held in long-term detention and whose hearing is thus subject to special requirements, but "long-term detention" could be interpreted with reference to law of war principles to refer to enemy belligerents held for the duration of hostilities to prevent their return to combat, a permissible "disposition under the law of war" under Sections 1031 and 1032 of the bill.[125] This reading, however, suggests that the disposition determination is to be made prior to a status determination, which seems counterintuitive, or that a second status determination is required for those designated for long-term detention. Captured unprivileged enemy belligerents destined for trial by military commission or Article III court, or to be transferred to a foreign country or entity would not be entitled to be represented by military counsel or to have a military judge preside at their status determination proceedings. Another

[122] The language of Section 1036 largely mirrors that originally found in S. 1253. The revised language omits reference to "unprivileged enemy belligerent" to modify "status" in the heading, but this alteration does not appear to affect the meaning of the provision itself. The original version applied to persons captured in the course of hostilities authorized by the AUMF rather than those detained pursuant to it, which seemed to broaden the category of persons subject to it and possibly would have made it less likely to be interpreted as an initial status determination only for those newly captured.

[123] *See supra* citations contained in footnote 41.

[124] *See supra* section headed "Status Determinations for Unprivileged Enemy Belligerents."

[125] Unlike the corresponding provision in S. 1253, Section 1031 of S. 1867 does not use "long-term" to modify "detention under the law of war."

possibility is that there is an assumption that more than one status determination will be held with respect to persons subject to long-term detention in order to change their disposition, that is, it may be decided to transfer them to another country or to prosecute them, in which case the decision need not involve a military judge or a right to counsel.

Alternatively, the status review process required under Section 1036 could be interpreted to apply only to those detainees who have already been determined to be subject to "long-term detention." Under this reading, detainees who have not been designated by military authorities for long-term detention might have their status determined under the existing administrative review processes employed by the military, which would not be subject to the congressional notification requirement.

The White House has expressed disapproval of this provision, claiming that it establishes "onerous requirements [and] conflicts with procedures for detainee reviews in the field that have been developed based on many years of experience by military officers and the Department of Defense."[126]

## Military Commissions Act Revision

Section 1037 amends the MCA to permit plea agreements in capital cases. It is substantially similar to Section 1033 of House-passed H.R. 1540, except that it does not amend the MCA to insert references to capital cases into the existing Section 949i of title 10, *U.S. Code*.

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[126] White House Statement on S. 1867, supra footnote 1, at 3.

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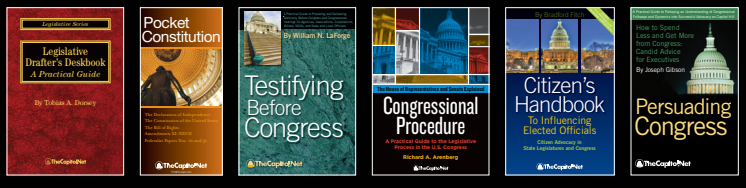
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