



# Analysis of Selected Legislative Proposals Addressing Guantanamo Detainees

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## Summary

Several bills introduced during the 111<sup>th</sup> Congress address the detention of suspected enemy belligerents held at the U.S. Naval Station in Guantanamo Bay, Cuba. This report identifies selected legislative proposals and analyzes pertinent legal implications. For detailed explorations of the legal issues raised by proposals addressing closure of the Guantanamo detention facility and interrogation techniques, see CRS Report R40139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia, *et. al.* and CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea, Kenneth R. Thomas, and Michael John Garcia.

On January 22, 2009, President Obama issued three executive orders affecting Guantanamo detainees. Some legislative proposals would effectuate or make permanent the policies contained in the executive orders. Other bills offer alternative approaches to the disposition of the detainees. The proposals pursue dramatically different goals, ranging from mandating closure of the Guantanamo detention facility to precluding closure through various requirements and restrictions, and offering various approaches to detainee treatment, interrogation methods, and jurisdictional concerns. To date, most bills have been referred to committees and no further legislative action has been taken.

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## Introduction

In 2001, Congress authorized the President's use of "all necessary and appropriate force" against those responsible for the 9/11 terrorist attacks.<sup>1</sup> Pursuant to that authority, the United States has captured suspected al Qaeda and Taliban members and detained them at several locations, including the U.S. Naval Station at Guantanamo Bay, Cuba. Of the nearly 800 alleged enemy combatants whom the United States has detained at Guantanamo throughout the course of post-9/11 military operations, all but approximately 240 have been released or transferred from the base. For the remaining Guantanamo detainees, practical and legal hurdles, including national security concerns and questions regarding detainees' rights under international law and the U.S. Constitution, have delayed prosecutions and made transfers difficult.<sup>2</sup>

Highlighting the prominence of the issue, President Obama's first executive orders, signed on January 22, 2009, address the Guantanamo detention facility and Guantanamo detainees. To "promptly" close the detention facility and "in order to effect the appropriate disposition of" Guantanamo detainees, one executive order requires closure of the detention facility as soon as practicable, and no later than January 22, 2010.<sup>3</sup> It also halts (at least temporarily) all proceedings before military commissions.<sup>4</sup> A second executive order limits methods for interrogating persons in U.S. custody to those listed in the Army Field Manual on Human Intelligence Collector Operations, although it provides an exception for interrogations by the Federal Bureau of Investigation, stating that the FBI may "continu[e] to use authorized, non-coercive techniques of interrogation that are designed to elicit voluntary statements and do not involve the use of force, threats, or promises."<sup>5</sup> A third executive order establishes the Special Task Force on Detainee Disposition, which is tasked with "identif[ying] lawful options" for the disposition of Guantanamo detainees and others captured by the United States.<sup>6</sup>

Because executive orders can be revoked by subsequent presidential directives, legislation would be necessary to make the President's policies permanent. Likewise, Congress could reverse or adjust the approach taken by the President in any area in which it has the authority to act. Some

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

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

<sup>3</sup> Executive Order, *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, January 22, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/Closure\\_Of\\_Guantanamo\\_Detention\\_Facilities/](http://www.whitehouse.gov/the_press_office/Closure_Of_Guantanamo_Detention_Facilities/).

<sup>4</sup> *Id.* Military commissions were part of the system created by the Military Commissions Act of 2006, P.L. 109-366, to prosecute and try Guantanamo detainees. Although the Supreme Court has struck down the provisions in the Military Commissions Act that preclude Guantanamo detainees from pursuing *habeas corpus* challenges to their continued detention, see *Boumediene v. Bush*, 553 U.S. \_\_\_, 128 S.Ct. 2229 (2008), the act's basic framework remains. For more information, see CRS Report R40139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia et al.

<sup>5</sup> Executive Order, *Ensuring Lawful Interrogations*, January 22, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/EnsuringLawfulInterrogations/](http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/); Army Field Manual, section FM 2-22.3, Human Intelligence Collector Operations, issued by the Department of the Army on September 6, 2006.

<sup>6</sup> Executive Order, *Review of Detention Policy Options*, January 22, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/ReviewofDetentionPolicyOptions/](http://www.whitehouse.gov/the_press_office/ReviewofDetentionPolicyOptions/).

bills introduced both before and after the President signed the executive orders would effectuate goals contained in the executive orders, whereas others offer alternative solutions or are perhaps intended to be emblematic of key controversies surrounding closure of the detention facility.

This report discusses the approaches that selected legislative proposals take regarding Guantanamo detainees. Several bills discussed in this report would affect detainees held in places other than Guantanamo. This broad scope seems appropriate to address issues for which the practical and legal analyses are not specific to Guantanamo; for example, proposals addressing interrogation techniques might appropriately apply to all persons held in U.S. custody. However, the detentions at Guantanamo have arguably assumed unique significance in international relations and public perception. In addition, existing statutes such as the Military Commissions Act address Guantanamo detainees in particular. For those reasons, some bills propose repeals of existing statutes or other actions that are specific to Guantanamo detainees.

## Legislative Proposals in the 111<sup>th</sup> Congress

Legislative proposals introduced during the 111<sup>th</sup> Congress offer dramatically different approaches to the disposition and treatment of Guantanamo detainees.<sup>7</sup> They address a range of issues, including closure of the base, transfer of detainees to the United States, detainee treatment and prosecution, and jurisdictional matters.

### Bills Requiring or Delaying Closure

Some bills would, if enacted, direct the President to close the Guantanamo detention facility within a given time frame. By requiring closure of the base within 180 days of enactment, the Interrogation and Detention Reform Act of 2008, H.R. 591, gives the shortest timeframe.<sup>8</sup> The Terrorist Detainees Procedures Act of 2009, H.R. 1315, provides a target date slightly sooner than the date set by the President's executive order.<sup>9</sup> By directing the President to ensure that no detainee is held at Guantanamo after December 31, 2009, it would effectively halt detentions at Guantanamo "as soon as practicable" or by that date. Two companion bills, S. 147 and H.R. 374, require closure within one year.<sup>10</sup> The companion bills' timeline corresponds with the one-year timetable set in President Obama's executive order, although the one-year mark set by the bills would track the date of the legislation's enactment.<sup>11</sup> In introductory remarks on H.R. 374, Representative Harman explained that closure was necessary because the detention facility is "so widely viewed as illegitimate, so plainly inconsistent with America's proud legal traditions, that it has become a stinging symbol of our tarnished standing abroad."<sup>12</sup>

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<sup>7</sup> Although some proposals would affect people detained at other locations, this report is limited to a discussion of provisions that address Guantanamo.

<sup>8</sup> Interrogation and Detention Reform Act of 2008, H.R. 591, 111<sup>th</sup> Cong. (2009).

<sup>9</sup> Terrorist Detainees Procedures Act of 2009, H.R. 1315, 111<sup>th</sup> Cong. (2009).

<sup>10</sup> Lawful Interrogation and Detention Act, H.R. 374, 111<sup>th</sup> Cong. (2009); Lawful Interrogation and Detention Act, S. 147, 111<sup>th</sup> Cong. (2009).

<sup>11</sup> When introducing S. 147 on the Senate floor, Senator Feinstein explained that the legislation is "fully consistent with the policies and intentions of President-elect Obama." 155 Cong. Rec. S132 (daily ed. Jan. 6, 2009) (statement of Sen. Feinstein).

<sup>12</sup> 155 Cong. Rec. E59 (daily ed. Jan. 9, 2009) (extended remarks of Rep. Harman).

When introducing S. 147, Senator Feinstein noted that “the hard part about closing Guantanamo is not deciding to go do it; it is figuring out what to do with the remaining detainees.”<sup>13</sup> To address such concerns, all of these bills proffer corresponding options and restrictions, discussed *infra*, governing the transfer and prosecution of detainees.

Although it is a position that has been advocated,<sup>14</sup> no bill strictly prohibits closure of the Guantanamo detention facility. However, S. 291 and H.R. 1069 require the President to notify, present study findings, and offer a relocation plan to the congressional committees responsible for defense at least 90 days prior to closing it.<sup>15</sup> The study would assess “the legal ramifications and the security, infrastructure, and other support requirements associated with closing the detention facility and transferring persons to a new detention facility.” The relocation plan would provide for relocating detainees in a manner consistent with the results of the study.

As discussed *infra*, proposals have also been introduced to restrict detainees’ transfer into the United States. These proposals might have the effect of precluding an imminent closure of the Guantanamo detention facility because legal and practical barriers could prevent transfers to locations outside the United States. For example, Article 3 of the U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and its implementing legislation prohibit the transfer of persons to countries where there are substantial grounds for believing that they would be subjected to torture.<sup>16</sup>

## **Bills Restricting Transfer to or Release in the United States**

Prompted by perceived security risks to U.S. citizens that some argue could arise if suspected terrorists were detained or tried in the United States,<sup>17</sup> several legislative proposals would inhibit detainees’ transfer to or release in the United States. Perhaps anticipating separation of powers concerns that might arise if Congress directly forbade the President from transferring detainees to the United States,<sup>18</sup> most proposals restrict relocation indirectly by prohibiting the use of federal funds, requiring state approval, forbidding extension of immigration status, or by restricting judicial authority.

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<sup>13</sup> 155 Cong. Rec. S157 (daily ed. Jan. 7, 2009) (statement of Sen. Feinstein).

<sup>14</sup> See, e.g., Mitch McConnell, *Don’t Close It*, Wash. Post. (March 15, 2009) at A19.

<sup>15</sup> Guantanamo Bay Detention Facility Safe Closure Act of 2009, S. 291, 111<sup>th</sup> Cong. (2009); Guantanamo Bay Detention Facility Safe Closure Act of 2009, H.R. 1069, 111<sup>th</sup> Cong. (2009). Relevant committees would include the Senate Committee on Armed Services, the Senate Committee on Appropriations, the House Committee on Armed Services, and the House Committee on Appropriations.

<sup>16</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984). CAT Article 3 requirements were implemented by the United States pursuant to the Foreign Affairs Reform and Restructuring Act of 1998, P.L. 105-277 [hereinafter “FARRA”].

<sup>17</sup> See, e.g., Press release, Rep. J. Randy Forbes, *Members Introduce Bill to Prevent Transfer of Terrorists to Virginia Prisons* (Mar. 2, 2009), available at <http://forbes.house.gov/News/DocumentSingle.aspx?DocumentID=113008>.

<sup>18</sup> Although the war powers and foreign affairs powers are shared between the political branches, traditional notions dictate that Congress should not interfere with the President’s direction of wartime campaigns, *See Hamdan v. Rumsfeld*, 548 U.S. 557, 591-92 (2006) (citing *Ex Parte Milligan*, 71 U.S. 2, 139-40 (1866)). However, Congress has occasionally purported to limit executive authority in the conduct of wars. See, e.g., War Powers Resolution, 50 U.S.C. §§ 1541-1548. The boundaries between executive and congressional war and foreign affairs powers are unclear, as is the scope of activities which fall under those powers in the modern war on terror.

One set of bills – H.R. 148, H.R. 565, H.R. 633, H.R. 701, H.R. 794, H.R. 817, H.R. 829, H.R. 951, H.R. 1073, H.R. 1186, H.R. 1566, and H.R. 2315 – would restrict the use of federal funds for transferring Guantanamo detainees to particular locations within the United States. Such locations include, respectively: Fort Leavenworth, Kansas; the Naval Consolidated Brig in Charleston, South Carolina; brig in Miramar and Camp Pendleton, California; any facility in Oklahoma; the Florence Federal Correctional Complex in Colorado; any facility in Georgia; any facility in North Carolina; any facility in Florida; any facility in Arizona; any facility in Virginia; any military installation or federal detention center in Minnesota; and any facility in Ohio.<sup>19</sup> Some would also restrict the use of federal funds to construct new detention facilities or house detainees in those locations. Explaining the concern prompting one such bill, Representative Forbes of Virginia explained that Guantanamo detainees’ suspected “connections with terrorist organizations ... rais[es] significant security questions about moving these suspects to facilities within Virginia, especially as many of the [Virginia] facilities are within miles of neighborhoods, military bases, and schools.”<sup>20</sup>

S. 370 and H.R. 1012 are broader in scope. S. 370 prohibits the use of federal funds to transfer detainees or construct detention facilities for them anywhere within the United States.<sup>21</sup> H.R. 1012 prohibits the use of Department of Defense funds for such purposes and forbids the Department from coordinating with another department to effect transfers into the United States.<sup>22</sup>

Rather than restrict the use of funds, some bills would restrict entry through provisions that restrict detainees’ immigration status, require certifications, or limit judicial authority. H.R. 1238

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<sup>19</sup> A bill to prohibit the use of funds to transfer enemy combatants detained by the United States at Naval Station, Guantanamo Bay, Cuba, to the United States Disciplinary Barracks, Fort Leavenworth, Kansas, H.R. 148, 111<sup>th</sup> Cong. (2009); A bill to prohibit the use of funds to transfer individuals detained by the United States at Naval Station, Guantanamo Bay, Cuba, to Naval Consolidated Brig, Charleston, South Carolina, H.R. 565, 111<sup>th</sup> Cong. (2009); A bill to prohibit the use of funds to transfer enemy combatants detained by the United States at Naval Station, Guantanamo Bay, Cuba, to the Naval Consolidated Brig, Miramar, California, or the Camp Pendleton Base Brig, Camp Pendleton, California, or to construct facilities for such enemy combatants at such locations, H.R. 633, 111<sup>th</sup> Cong. (2009); A bill to prohibit the use of funds to transfer enemy combatants detained by the United States at Naval Station, Guantanamo Bay, Cuba, to any facility in Oklahoma, or to construct any facility for such enemy combatants in Oklahoma, H.R. 701, 111<sup>th</sup> Cong. (2009); A bill to prohibit the use of funds to transfer enemy combatants detained by the United States at Naval Station, Guantanamo Bay, Cuba, to the Florence Federal Correctional Complex in Colorado, or to construct facilities for such enemy combatants at such location, H.R. 794, 111<sup>th</sup> Cong. (2009); A bill to prohibit the use of funds to transfer individuals detained at Naval Station, Guantanamo Bay, Cuba, to facilities in Georgia or to house such individuals at such facilities, H.R. 817, 111<sup>th</sup> Cong. (2009); A bill to prohibit the use of funds to transfer individuals detained at Naval Station, Guantanamo Bay, Cuba, to facilities in North Carolina or to house such individuals at such facilities, H.R. 829, 111<sup>th</sup> Cong. (2009); A bill to prohibit the use of funds to transfer enemy combatants detained at Naval Station, Guantanamo Bay, Cuba, to facilities in Arizona or to build, modify, or enhance any facility in Arizona to house such enemy combatants, H.R. 951, 111<sup>th</sup> Cong. (2009); A bill to prohibit the use of funds to transfer individuals detained at Naval Station, Guantanamo Bay, Cuba, to facilities in Florida or to house such individuals at such facilities, H.R. 1073, 111<sup>th</sup> Cong. (2009); A bill to prohibit the use of funds to transfer individuals detained at Naval Station, Guantanamo Bay, Cuba, to facilities in Virginia or to house such individuals at such facilities, H.R. 1186, 111<sup>th</sup> Cong. (2009); A bill to prohibit the use of funds to transfer individuals detained at Naval Station, Guantanamo Bay, Cuba, to facilities in Minnesota or to house such individuals at such facilities, H.R. 1566, 111<sup>th</sup> Cong. (2009); A bill to prohibit the use of funds to transfer enemy combatants detained at Naval Station, Guantanamo Bay, Cuba, to facilities in Ohio or to construct facilities in Ohio for such enemy combatants, H.R. 2315, 111<sup>th</sup> Cong. (2009).

<sup>20</sup> Press release, Rep. J. Randy Forbes, *Members Introduce Bill to Prevent Transfer of Terrorists to Virginia Prisons* (Mar. 2, 2009), available at <http://forbes.house.gov/News/DocumentSingle.aspx?DocumentID=113008>.

<sup>21</sup> A bill to prohibit the use of funds to transfer detainees of the United States at Naval Station, Guantanamo Bay, Cuba, to any facility in the United States or to construct any facility for such detainees in the United States, and for other purposes, S. 370, 111<sup>th</sup> Cong. (2009).

<sup>22</sup> Guantanamo Bay Detention Facility Safe Closure Act of 2009, H.R. 1012, 111<sup>th</sup> Cong. (2009).

makes an alien detained at Guantanamo “permanently ineligible” for both “admission to the United States for any purpose” and “parole into the United States or any other physical presence in the United States that is not regarded as an admission.”<sup>23</sup> Similarly, the Protection from Enemy Combatants Act, S. 108, would forbid the release by a U.S. court of any “covered alien” – defined as any person who “was detained” at Guantanamo – into the United States.<sup>24</sup> It would also bar the issuance of an immigration visa or the granting of any immigration status that might facilitate a detainee’s entry into the United States or continued presence after release from custody. However, S. 108 contains a waiver provision that would allow the President to remove the restriction where doing so would be “consistent with the national security of the United States.”

The Keep Terrorists Out of America Act, H.R. 2294, would require the President, at least 60 days before transferring any Guantanamo detainee into the United States, to: (1) certify to the Governor and legislature of the state to which the detainee would be transferred that the detainee does not pose a security risk to the United States; (2) obtain consent from the relevant state’s Governor and legislature for the detainee’s transfer or release; and (3) submit specified information and certifications to Congress, including a certification that the detainee’s transfer or release will “not result in the release of individuals covered under this section into the United States.”<sup>25</sup> Because this measure would restrict the President’s authority in the realm of national security, albeit by requiring pre-approval from states rather than by a direct prohibition by Congress, it may prompt separation of powers concerns.<sup>26</sup>

## **Bills Permitting Detainee Transfer to the United States**

Several proposals contemplate the transfer, in specific circumstances, of Guantanamo detainees into the United States. Specifically, the bills requiring closure of the detention facility – S. 147, H.R. 374, H.R. 591, and H.R. 1315 – would also authorize transfer to a detention facility in the United States for criminal prosecution.<sup>27</sup> With sponsors noting that the Guantanamo detention “experiment” has lasted seven years and resulted in only three convictions,<sup>28</sup> the bills appear to emphasize a priority on transfer for the purpose of initiating criminal prosecutions in a timely manner. Appearing to counter other lawmakers’ concerns regarding ensuing security risks, Senator Feinstein noted that “federal civilian or military justice systems ... have handled terrorists and other dangerous individuals before and are capable of dealing with classified evidence and other unusual factors.”<sup>29</sup> All of the bills also contain options for transferring detainees to international tribunals, transfer to a detainee’s home country or a different country, and release.

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<sup>23</sup> A bill to prohibit the presence in the United States of any alien formerly detained at the Department of Defense detention facility at Naval Station, Guantanamo Bay, Cuba, H.R. 1238, 111<sup>th</sup> Cong. (2009).

<sup>24</sup> Protection from Enemy Combatants Act, S. 108, 111<sup>th</sup> Cong. (2009).

<sup>25</sup> Keep Terrorists Out of America Act, H.R. 2294, 111<sup>th</sup> Cong. (2009).

<sup>26</sup> See *supra* note 18.

<sup>27</sup> Interrogation and Detention Reform Act of 2008, H.R. 591, 111<sup>th</sup> Cong. (2009); Lawful Interrogation and Detention Act, H.R. 374, 111<sup>th</sup> Cong. (2009); Lawful Interrogation and Detention Act, S. 147, 111<sup>th</sup> Cong. (2009); Terrorist Detainees Procedures Act of 2009, H.R. 1315, 111<sup>th</sup> Cong. (2009). However, transfer to the United States under H.R. 1315 would apply only after a panel of military judges had reviewed a detainee’s status and determined that he was an unlawful enemy combatant. For all bills, it is unclear whether detainees might then be released into the United States if acquitted after a criminal trial. Even if the bills contemplate such release, detainees would presumably lack immigration status and be subject to U.S. immigration laws.

<sup>28</sup> 155 Cong. Rec. S157 (daily ed. Jan. 7, 2009) (statement of Sen. Feinstein).

<sup>29</sup> *Id.*

The bills differ in their approaches to continued preventative detention – i.e., detention for purposes other than prosecution or punishment. S. 147, H.R. 374, and H.R. 1315 would allow further preventative detention “in accordance with the law of the armed conflict.” In contrast, H.R. 591 does not contain a provision expressly authorizing detainees’ transfer to the United States for the purpose of continued preventative detention.<sup>30</sup>

H.R. 1315 also differs from the other bills in that it expressly creates a preliminary step, whereby a panel of three military judges would first conduct a “status review” to determine whether a detainee is an unlawful enemy combatant. The outcome of the status review would trigger the various options: whereas detainees found to be unlawful enemy combatants would be transferred for criminal prosecution or continued detention, detainees found not to be unlawful enemy combatants would be transferred to their home countries or other countries, or released.

## **Bills Relating to Interrogation, Treatment, or Prosecution**

Several legislative proposals address the treatment or prosecution of Guantanamo (and other) detainees. Treatment is currently governed by the Detainee Treatment Act of 2005 and Common Article 3 of the Geneva Conventions.<sup>31</sup> Pursuant to the Detainee Treatment Act of 2005, all persons in the custody or control of the U.S. military (including Guantanamo detainees) must be treated in accordance with Army Field Manual requirements.<sup>32</sup> Under Common Article 3, detainees must be treated humanely and protected from “violence to life and person,” “cruel treatment and torture,” and “outrages upon personal dignity, in particular, humiliating and degrading treatment.”<sup>33</sup> The same requirements would apply if detainees were transferred to the United States. In contrast, prosecution is governed by the Military Commissions Act of 2006, which addresses only detainees held at Guantanamo; inside the United States, it is unclear whether a civilian, military, or an alternative judicial process that is in accordance with constitutional rights afforded to persons located in the United States will be used to prosecute detainees.

Perhaps in response to judicial opinions invalidating provisions of the Military Commissions Act<sup>34</sup> and to concerns regarding detainee abuse,<sup>35</sup> legislation has been introduced which would

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<sup>30</sup> In *Hamdi v. Rumsfeld*, the Supreme Court held that pursuant to the 2001 Authorization for Use of Military Force, the President may preventatively detain persons properly determined to be “enemy combatants” – a category not fully defined but which includes those captured while fighting U.S. forces in Afghanistan – for the duration of the conflict. 542 U. S. 507 (2004). Under *Hamdi*, it appears that Guantanamo detainees properly determined to be “enemy combatants” may be held in preventative detention by military authorities even if transferred to the United States. It is unclear whether H.R. 591 would purport to reverse that grant of authority as applied to Guantanamo detainees.

<sup>31</sup> The U.S. Supreme Court determined that Common Article 3 applies to Guantanamo detainees in a 2006 case, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>32</sup> Section 1002 of P.L. 109-148 requires the DOD to follow the Army Field Manual for intelligence interrogation. See Department of the Army Field Manual 2-22.3 (FM 34-52), Human Intelligence Collector Operations (2006).

<sup>33</sup> “Common Article 3” refers to the third article in each of the four Geneva Conventions, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 (6 UST 3114); the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (6 UST 3217); the Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (6 UST 3316); and the Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (6 UST 3516).

<sup>34</sup> See *Boumediene v. Bush*, 553 U.S. \_\_\_, 128 S.Ct. 2229 (2008) (invalidating the provision in the act that purported to foreclose *habeas corpus* challenges brought by Guantanamo detainees).

<sup>35</sup> See, e.g., Senate Armed Services Committee, *Inquiry into the Treatment of Detainees in U.S. Custody*, available with (continued...)

eliminate the military commissions framework for prosecution or provide additional standards governing interrogation and treatment. H.R. 591 would institute or prompt the formulation of major reforms for interrogating and prosecuting detainees.<sup>36</sup> Referring to the “failure of the military commissions system,” it contains provisions that repeal the Military Commissions Act and abolish the military commission system established by the act. Instead, prosecutions would take place in federal civilian courts or in courts-martial proceedings. In addition, it would direct the President to establish a “Center for Excellence in Human Intelligence Collection” and develop “uniform standards for the interrogation of persons in the custody or under the effective control of the United States.” It would also require that interrogations be videotaped. Similarly, H.R. 1315 would repeal the Military Commissions Act.<sup>37</sup> In place of military commissions, it proposes status review hearings, whereby a panel of three military judges would determine whether a detainee is an unlawful enemy combatant.

S. 147 and H.R. 374 require that interrogations of all persons in custody of U.S. intelligence agencies be conducted in accordance with the U.S. Army Field Manual.<sup>38</sup> The bills would foreclose the possibility, left open in President Obama’s executive order on interrogation, that techniques other than those in the Army Field Manual could eventually be deemed appropriate for use by agencies outside the military.<sup>39</sup>

Other bills would restrict detainees’ access to medical facilities or public benefits. Finding that Guantanamo detainees “often receive better medical treatment and food than members of the United States Armed Forces” and “are often treated better than inmates in American prisons,” H.R. 1042 prohibits the provision of medical treatment to Guantanamo detainees in any facility where members of the armed forces also receive treatment or in any facility operated by the Department of Veteran’s Affairs.<sup>40</sup> Another bill, H.R. 2338, would make those detained at Guantanamo as of the bill’s enactment and subsequently transferred to the United States “permanently ineligible” for specified federal, state, or local benefits.<sup>41</sup> It is possible that such provisions could raise legal concerns regarding U.S. compliance with the Common Article 3 requirement to treat detainees humanely, the equal protection clause, or other legal safeguards.

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(...continued)

redactions at <http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf>.

<sup>36</sup> Interrogation and Detention Reform Act of 2008, H.R. 591, 111<sup>th</sup> Cong. (2009).

<sup>37</sup> Terrorist Detainees Procedures Act of 2009, H.R. 1315, 111<sup>th</sup> Cong. (2009).

<sup>38</sup> Lawful Interrogation and Detention Act, H.R. 374, 111<sup>th</sup> Cong; Lawful Interrogation and Detention Act, S. 147, 111<sup>th</sup> Cong.

<sup>39</sup> Executive Order, Ensuring Lawful Interrogations, January 22, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/EnsuringLawfulInterrogations/](http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/).

<sup>40</sup> To prohibit the provision of medical treatment to enemy combatants detained by the United States at Naval Station, Guantanamo Bay, Cuba, in the same facility as a member of the Armed Forces or Department of Veterans Affairs medical facility, H.R. 1042, 111<sup>th</sup> Cong. (2009).

<sup>41</sup> No Welfare for Terrorists Act of 2009, H.R. 2338, 111<sup>th</sup> Cong. (2009).

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

The Enemy Combatant Detention Review Act of 2009, H.R. 630, “reaffirms that the President is authorized to detain enemy combatants in connection with the continuing armed conflict with al Qaeda, the Taliban, and associated forces, regardless of the place of capture, until the termination of hostilities.”<sup>42</sup> This provision would reaffirm, and perhaps extend, the President’s authority to preventatively detain enemy combatants as part of post-9/11 military operations. In *Hamdi v. Rumsfeld*, the Supreme Court held that the 2001 Authorization to Use Military Force authorized the President to preventatively detain enemy combatants captured during hostilities in Afghanistan but did not address whether such authority extends to captures made in other locations.<sup>43</sup> With the language “regardless of place of capture,” H.R. 630 appears to authorize preventative detentions of any alleged al Qaeda or Taliban belligerent, even if captured outside military operations in Afghanistan.

H.R. 630 would also amend the federal *habeas corpus* statute.<sup>44</sup> For example, it would: (1) grant exclusive jurisdiction over *habeas* challenges to the U.S. District Court in the District of Columbia; (2) establish a rebuttable presumption that detainees are enemy combatants for the purpose of *habeas* review; and (3) require that *habeas* proceedings be stayed after charges are brought under the Military Commissions Act and until a detainee has exhausted review procedures established by that act. Because it stays *habeas* review only for detainees against whom charges have been brought, this proposal differs from the broader denial of *habeas* review which the Supreme Court struck down as constitutionally invalid in *Boumediene v. Bush*.<sup>45</sup> It is unclear whether this distinction would be sufficient to withstand judicial scrutiny.

The Terrorist Detainees Procedures Act of 2009, H.R. 1315, would likewise grant exclusive jurisdiction over *habeas* challenges to the U.S. District Court in the District of Columbia and stay pending *habeas* cases.<sup>46</sup> However, in contrast to H.R. 630, it would stay *habeas* proceedings not to facilitate Military Commissions Act procedures but to await the outcome of status review hearings held by panels of military judges. In addition, the time period in which judges would render decisions in the status review process would be sharply limited – to 120 days from the legislation’s enactment for all detainees.

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<sup>42</sup> Enemy Combatant Detention Review Act of 2009, H.R. 630, 111<sup>th</sup> Cong. (2009).

<sup>43</sup> 542 U.S. 507 (2004).

<sup>44</sup> 28 U.S.C. §2241.

<sup>45</sup> 553 U.S. \_\_\_, 128 S.Ct. 2229 (2008) (holding that the constitutional privilege of habeas corpus applies to Guantanamo detainees and that provisions in the Military Commissions Act do not provide an adequate substitute for *habeas* claims). For more information on the *Boumediene* decision, see CRS Report RL34536, *Boumediene v. Bush: Guantanamo Detainees' Right to Habeas Corpus*, by Michael John Garcia.

<sup>46</sup> Terrorist Detainees Procedures Act of 2009, H.R. 1315, 111<sup>th</sup> Cong. (2009).

## **Conclusion**

Legislative proposals introduced during the 111<sup>th</sup> Congress offer various responses to closing the Guantanamo detention facility, transfer and disposition of detainees, and detainee treatment. Although President Obama has addressed several of these issues in executive orders, legislation may be necessary to make measures taken in an executive order permanent or to effect alternative approaches to the disposition of Guantanamo detainees. To date, none of the legislative proposals have been reported from committee. Congress's approach to the issue may be shaped by the recommendations of the Special Task Force on Detainee Disposition, established by executive order, which will likely address many issues raised by the legislative proposals.

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