

Senate to Mull Potential Endgame for Guantanamo

6/5/2015

The Senate is considering an overhaul of Guantanamo policy that would permit medical treatment of detainees in the United States but would otherwise tighten transfer restrictions, to be relaxed once again only after the President submits, and Congress approves, a plan to close Guantanamo. Like the [House-passed version of the FY 2016 National Defense Authorization Act](#) (2016 NDAA, discussed in a previous [Sidebar post](#)), the [version reported favorably by the Senate Armed Services Committee](#) would essentially reinstate the harsher Guantanamo transfer restrictions that applied prior to the 2014 NDAA under which no detainees were transferred except by court order. (See this [CRS report](#) for a description of previously applicable provisions.) The bill would also continue the ban on transferring detainees into the United States, but with a new exception that would, for the first time since that ban began in 2010, permit transfer into the United States for medical treatment. However, the transfer restrictions to foreign countries would revert to the current more permissible standards (described in this [CRS report](#)) following congressional approval of a detailed Department of Defense (DOD) plan to close the Guantanamo detention facility. At that time, detainees could even be transferred into the United States for continued detention or trial. The bill also proposes some new Guantanamo-related [reporting requirements](#).

The [Administration strongly objects](#) to the Guantanamo provisions and has [threatened a veto](#).

Plan for the closure of the Guantanamo detention facility. The Senate bill would require the Secretary of Defense to [submit a comprehensive plan for the disposition of Guantanamo detainees](#), including an assessment of costs and proposed risk management measures, as well as legal implications. (For a somewhat more detailed summary of requirements, see this [CRS report](#).) Until Congress considers and approves the plan by means of a [privileged joint resolution](#), Guantanamo detainees [who are transferred to the United States](#) (presumably for [medical treatment](#)) may not be released within the United States or its territories, and may be transferred or released (presumably to a foreign country) only in accordance with the [provision](#) that applies to the release of Guantanamo detainees to foreign countries.

Transfer of Guantanamo detainees into the United States. The Senate bill would continue the [bar on transferring Guantanamo detainees into the United States](#), except for detainees to be transferred temporarily to DOD facilities for [emergency or critical medical care](#), with such transfers subject to congressional notification and safeguards to ensure the detainee is not released or relieved of any aspect of the status of unprivileged belligerent. The bill would also extend the [prohibition on building or modifying facilities](#) in the United States to house Guantanamo detainees.

Once a plan to close Guantanamo has been approved, however, these [bans would end](#), and detainees could be transferred into the United States for trial or incarceration after the Secretary of Defense makes the [appropriate determinations](#) and notifies the [specified congressional committees](#). Any detainee transferred under this authority would be considered to be [paroled into the United States for immigration purposes](#), and would not be eligible to apply for admission or asylum or to benefit from any other legal right or privilege. He would retain the status of unprivileged enemy belligerent, and would be ineligible to pursue any court action against the United States or its officials—except to challenge his status in a habeas case.

Transfer of Guantanamo detainees to foreign countries. The Senate bill would repeal the [current transfer requirements](#) and [resurrect earlier restrictions](#) on detainee transfers to foreign countries, including the 30-day congressional notification requirement, with some modifications to the certification for detainees who have not been ordered released by a court. As in prior years, the Secretary of Defense could waive some criteria involving actions to be taken by the receiving country to mitigate the threat (but only with the concurrence of the Secretary of State and after consultation with the Director of National Intelligence), by [certifying](#) instead that: (1) alternative actions will be taken to mitigate the threat; (2) it is not possible to certify that the risks have been completely eliminated, but the

alternative actions will substantially mitigate the risks; and (3) the transfer is in the national security interests of the United States. A national security waiver would also be available to certify such detainees for otherwise [prohibited transfer](#) to countries that have experienced a confirmed case of recidivism.

At such time as a Guantanamo closure plan gets the congressional green light, the repealed transfer provisions would kick in once again and would apply equally to the overseas transfer of Guantanamo detainees who are first transferred to the United States. [These provisions](#) permit the transfer, without further certification, of a detainee who has been ordered released by a competent U.S. court or who is assessed by a [Periodic Review Board](#) as no longer posing a threat to the United States. Other detainees may be transferred provided the Secretary of Defense determines that the move is in the U.S. national security interest and that appropriate steps are taken to substantially mitigate the risk of recidivism. The Secretary must consider a number of factors in making such a determination, but need not certify to Congress that identified security goals have been achieved as a prerequisite to making a transfer. Thirty days' advance congressional notification is required, though, whether or not any determination is required, including an explanation of how the U.S. national security interests are served.

Neither set of transfer provisions would provide a ticket to Yemen, however, as detainee transfers there would remain barred under [a separate provision](#) of the bill until December 31, 2016.

For a background of issues related to U.S. wartime detention legislation, see [CRS Report R42143, *Wartime Detention Provisions in Recent Defense Authorization Legislation*](#).