

1 are each amended by inserting after the item relating to
2 chapter 667 the following new item:

"669. Maritime Safety of Forces 7921".

3 **Subtitle D—Detainee Matters**

4 **SEC. 1031. AFFIRMATION OF AUTHORITY OF THE ARMED**
5 **FORCES OF THE UNITED STATES TO DETAIN**
6 **COVERED PERSONS PURSUANT TO THE AU-**
7 **THORIZATION FOR USE OF MILITARY FORCE.**

8 (a) **IN GENERAL.**—Congress affirms that the author-
9 ity of the President to use all necessary and appropriate
10 force pursuant to the Authorization for Use of Military
11 Force (Public Law 107–40) includes the authority for the
12 Armed Forces of the United States to detain covered per-
13 sons (as defined in subsection (b)) pending disposition
14 under the law of war.

15 (b) **COVERED PERSONS.**—A covered person under
16 this section is any person as follows:

17 (1) A person who planned, authorized, com-
18 mitted, or aided the terrorist attacks that occurred
19 on September 11, 2001, or harbored those respon-
20 sible for those attacks.

21 (2) A person who was a part of or substantially
22 supported al-Qaeda, the Taliban, or associated forces
23 that are engaged in hostilities against the United
24 States or its coalition partners, including any person
25 who has committed a belligerent act or has directly

1 supported such hostilities in aid of such enemy
2 forces.

3 (c) DISPOSITION UNDER LAW OF WAR.—The dis-
4 position of a person under the law of war as described
5 in subsection (a) may include the following:

6 (1) Detention under the law of war without
7 trial until the end of the hostilities authorized by the
8 Authorization for Use of Military Force.

9 (2) Trial under chapter 47A of title 10, United
10 States Code (as amended by the Military Commis-
11 sions Act of 2009 (title XVIII of Public Law 111-
12 84)).

13 (3) Transfer for trial by an alternative court or
14 competent tribunal having lawful jurisdiction.

15 (4) Transfer to the custody or control of the
16 person's country of origin, any other foreign coun-
17 try, or any other foreign entity.

18 (d) CONSTRUCTION.—Nothing in this section is in-
19 tended to limit or expand the authority of the President
20 or the scope of the Authorization for Use of Military
21 Force.

22 (e) REQUIREMENT FOR BRIEFINGS OF CONGRESS.—
23 The Secretary of Defense shall regularly brief Congress
24 regarding the application of the authority described in this
25 section, including the organizations, entities, and individ-

1 uals considered to be "covered persons" for purposes of
2 subsection (b)(2).

3 **SEC. 1032. REQUIREMENT FOR MILITARY CUSTODY.**

4 (a) **CUSTODY PENDING DISPOSITION UNDER LAW OF**
5 **WAR.—**

6 (1) **IN GENERAL.—**Except as provided in para-
7 graph (4), the Armed Forces of the United States
8 shall hold a person described in paragraph (2) who
9 is captured in the course of hostilities authorized by
10 the Authorization for Use of Military Force (Public
11 Law 107-40) in military custody pending disposition
12 under the law of war.

13 (2) **COVERED PERSONS.—**The requirement in
14 paragraph (1) shall apply to any person whose de-
15 tention is authorized under section 1031 who is de-
16 termined—

17 (A) to be a member of, or part of, al-
18 Qaeda or an associated force that acts in co-
19 ordination with or pursuant to the direction of
20 al-Qaeda; and

21 (B) to have participated in the course of
22 planning or carrying out an attack or attempted
23 attack against the United States or its coalition
24 partners.

1 (3) DISPOSITION UNDER LAW OF WAR.—For
2 purposes of this subsection, the disposition of a per-
3 son under the law of war has the meaning given in
4 section 1031(c), except that no transfer otherwise
5 described in paragraph (4) of that section shall be
6 made unless consistent with the requirements of sec-
7 tion 1033.

8 (4) WAIVER FOR NATIONAL SECURITY.—The
9 Secretary of Defense may, in consultation with the
10 Secretary of State and the Director of National In-
11 telligence, waive the requirement of paragraph (1) if
12 the Secretary submits to Congress a certification in
13 writing that such a waiver is in the national security
14 interests of the United States.

15 (b) APPLICABILITY TO UNITED STATES CITIZENS
16 AND LAWFUL RESIDENT ALIENS.—

17 (1) UNITED STATES CITIZENS.—The require-
18 ment to detain a person in military custody under
19 this section does not extend to citizens of the United
20 States.

21 (2) LAWFUL RESIDENT ALIENS.—The require-
22 ment to detain a person in military custody under
23 this section does not extend to a lawful resident
24 alien of the United States on the basis of conduct
25 taking place within the United States, except to the

1 extent permitted by the Constitution of the United
2 States.

3 (c) IMPLEMENTATION PROCEDURES.—

4 (1) IN GENERAL.—Not later than 60 days after
5 the date of the enactment of this Act, the President
6 shall issue, and submit to Congress, procedures for
7 implementing this section.

8 (2) ELEMENTS.—The procedures for imple-
9 menting this section shall include, but not be limited
10 to, procedures as follows:

11 (A) Procedures designating the persons au-
12 thorized to make determinations under sub-
13 section (a)(2) and the process by which such
14 determinations are to be made.

15 (B) Procedures providing that the require-
16 ment for military custody under subsection
17 (a)(1) does not require the interruption of ongo-
18 ing surveillance or intelligence gathering with
19 regard to persons not already in the custody or
20 control of the United States.

21 (C) Procedures providing that a determina-
22 tion under subsection (a)(2) is not required to
23 be implemented until after the conclusion of an
24 interrogation session which is ongoing at the
25 time the determination is made and does not

1 require the interruption of any such ongoing
2 session.

3 (D) Procedures providing that the require-
4 ment for military custody under subsection
5 (a)(1) does not apply when intelligence, law en-
6 forcement, or other government officials of the
7 United States are granted access to an indi-
8 vidual who remains in the custody of a third
9 country.

10 (E) Procedures providing that a certifi-
11 cation of national security interests under sub-
12 section (a)(4) may be granted for the purpose
13 of transferring a covered person from a third
14 country if such a transfer is in the interest of
15 the United States and could not otherwise be
16 accomplished.

17 (d) **EFFECTIVE DATE.**—This section shall take effect
18 on the date that is 60 days after the date of the enactment
19 of this Act, and shall apply with respect to persons de-
20 scribed in subsection (a)(2) who are taken into the custody
21 or brought under the control of the United States on or
22 after that effective date.

1 **SEC. 1033. REQUIREMENTS FOR CERTIFICATIONS RELAT-**
2 **ING TO THE TRANSFER OF DETAINEES AT**
3 **UNITED STATES NAVAL STATION, GUANTA-**
4 **NAMO BAY, CUBA, TO FOREIGN COUNTRIES**
5 **AND OTHER FOREIGN ENTITIES.**

6 (a) **CERTIFICATION REQUIRED PRIOR TO TRANS-**
7 **FER.—**

8 (1) **IN GENERAL.—**Except as provided in para-
9 graph (2) and subsection (d), the Secretary of De-
10 fense may not use any amounts authorized to be ap-
11 propriated or otherwise available to the Department
12 of Defense for fiscal year 2012 to transfer any indi-
13 vidual detained at Guantanamo to the custody or
14 control of the individual's country of origin, any
15 other foreign country, or any other foreign entity
16 unless the Secretary submits to Congress the certifi-
17 cation described in subsection (b) not later than 30
18 days before the transfer of the individual.

19 (2) **EXCEPTION.—**Paragraph (1) shall not
20 apply to any action taken by the Secretary to trans-
21 fer any individual detained at Guantanamo to effec-
22 tuate—

23 (A) an order affecting the disposition of
24 the individual that is issued by a court or com-
25 petent tribunal of the United States having law-

1 ful jurisdiction (which the Secretary shall notify
2 Congress of promptly after issuance); or

3 (B) a pre-trial agreement entered in a mili-
4 tary commission case prior to the date of the
5 enactment of this Act.

6 (b) CERTIFICATION.—A certification described in this
7 subsection is a written certification made by the Secretary
8 of Defense, with the concurrence of the Secretary of State
9 and in consultation with the Director of National Intel-
10 ligence, that the government of the foreign country or the
11 recognized leadership of the foreign entity to which the
12 individual detained at Guantanamo is to be transferred—

13 (1) is not a designated state sponsor of ter-
14 rorism or a designated foreign terrorist organization;

15 (2) maintains control over each detention facil-
16 ity in which the individual is to be detained if the
17 individual is to be housed in a detention facility;

18 (3) is not, as of the date of the certification,
19 facing a threat that is likely to substantially affect
20 its ability to exercise control over the individual;

21 (4) has taken or agreed to take effective actions
22 to ensure that the individual cannot take action to
23 threaten the United States, its citizens, or its allies
24 in the future;

1 (5) has taken or agreed to take such actions as
2 the Secretary of Defense determines are necessary to
3 ensure that the individual cannot engage or re-
4 engage in any terrorist activity; and

5 (6) has agreed to share with the United States
6 any information that—

7 (A) is related to the individual or any asso-
8 ciates of the individual; and

9 (B) could affect the security of the United
10 States, its citizens, or its allies.

11 (c) PROHIBITION IN CASES OF PRIOR CONFIRMED
12 RECIDIVISM.—

13 (1) PROHIBITION.—Except as provided in para-
14 graph (2) and subsection (d), the Secretary of De-
15 fense may not use any amounts authorized to be ap-
16 propriated or otherwise made available to the De-
17 partment of Defense to transfer any individual de-
18 tained at Guantanamo to the custody or control of
19 the individual's country of origin, any other foreign
20 country, or any other foreign entity if there is a con-
21 firmed case of any individual who was detained at
22 United States Naval Station, Guantanamo Bay,
23 Cuba, at any time after September 11, 2001, who
24 was transferred to such foreign country or entity
25 and subsequently engaged in any terrorist activity.

1 (2) EXCEPTION.—Paragraph (1) shall not
2 apply to any action taken by the Secretary to trans-
3 fer any individual detained at Guantanamo to effec-
4 tuate—

5 (A) an order affecting the disposition of
6 the individual that is issued by a court or com-
7 petent tribunal of the United States having law-
8 ful jurisdiction (which the Secretary shall notify
9 Congress of promptly after issuance); or

10 (B) a pre-trial agreement entered in a mili-
11 tary commission case prior to the date of the
12 enactment of this Act.

13 (d) NATIONAL SECURITY WAIVER.—

14 (1) IN GENERAL.—The Secretary of Defense
15 may waive the applicability to a detainee transfer of
16 a certification requirement specified in paragraph
17 (4) or (5) of subsection (b) or the prohibition in sub-
18 section (c) if the Secretary, with the concurrence of
19 the Secretary of State and in consultation with the
20 Director of National Intelligence, determines that—

21 (A) alternative actions will be taken to ad-
22 dress the underlying purpose of the requirement
23 or requirements to be waived;

24 (B) in the case of a waiver of paragraph
25 (4) or (5) of subsection (b), it is not possible

1 to certify that the risks addressed in the para-
2 graph to be waived have been completely elimi-
3 nated, but the actions to be taken under sub-
4 paragraph (A) will substantially mitigate such
5 risks with regard to the individual to be trans-
6 ferred;

7 (C) in the case of a waiver of subsection
8 (c), the Secretary has considered any confirmed
9 case in which an individual who was transferred
10 to the country subsequently engaged in terrorist
11 activity, and the actions to be taken under sub-
12 paragraph (A) will substantially mitigate the
13 risk of recidivism with regard to the individual
14 to be transferred; and

15 (D) the transfer is in the national security
16 interests of the United States.

17 (2) REPORTS.—Whenever the Secretary makes
18 a determination under paragraph (1), the Secretary
19 shall submit to the appropriate committees of Con-
20 gress, not later than 30 days before the transfer of
21 the individual concerned, the following:

22 (A) A copy of the determination and the
23 waiver concerned.

24 (B) A statement of the basis for the deter-
25 mination, including—

1 (i) an explanation why the transfer is
2 in the national security interests of the
3 United States; and

4 (ii) in the case of a waiver of para-
5 graph (4) or (5) of subsection (b), an ex-
6 planation why it is not possible to certify
7 that the risks addressed in the paragraph
8 to be waived have been completely elimi-
9 nated.

10 (C) A summary of the alternative actions
11 to be taken to address the underlying purpose
12 of, and to mitigate the risks addressed in, the
13 paragraph or subsection to be waived.

14 (e) DEFINITIONS.—In this section:

15 (1) The term “appropriate committees of Con-
16 gress” means—

17 (A) the Committee on Armed Services, the
18 Committee on Appropriations, and the Select
19 Committee on Intelligence of the Senate; and

20 (B) the Committee on Armed Services, the
21 Committee on Appropriations, and the Perma-
22 nent Select Committee on Intelligence of the
23 House of Representatives.

24 (2) The term “individual detained at Guanta-
25 namo” means any individual located at United

1 States Naval Station, Guantanamo Bay, Cuba, as of
2 October 1, 2009, who—

3 (A) is not a citizen of the United States or
4 a member of the Armed Forces of the United
5 States; and

6 (B) is—

7 (i) in the custody or under the control
8 of the Department of Defense; or

9 (ii) otherwise under detention at
10 United States Naval Station, Guantanamo
11 Bay, Cuba.

12 (3) The term “foreign terrorist organization”
13 means any organization so designated by the Sec-
14 retary of State under section 219 of the Immigra-
15 tion and Nationality Act (8 U.S.C. 1189).

16 (f) REPEAL OF SUPERSEDED AUTHORITY.—Section
17 1033 of the Ike Skelton National Defense Authorization
18 Act for Fiscal Year 2011 (Public Law 111–383; 124 Stat.
19 4351) is repealed.

1 **SEC. 1034. PROHIBITION ON USE OF FUNDS TO CONSTRUCT**
2 **OR MODIFY FACILITIES IN THE UNITED**
3 **STATES TO HOUSE DETAINEES TRANS-**
4 **FERRED FROM UNITED STATES NAVAL STA-**
5 **TION, GUANTANAMO BAY, CUBA.**

6 (a) **IN GENERAL.**—No amounts authorized to be ap-
7 propriated or otherwise made available to the Department
8 of Defense for fiscal year 2012 may be used to construct
9 or modify any facility in the United States, its territories,
10 or possessions to house any individual detained at Guanta-
11 namo for the purposes of detention or imprisonment in
12 the custody or under the control of the Department of De-
13 fense unless authorized by Congress.

14 (b) **EXCEPTION.**—The prohibition in subsection (a)
15 shall not apply to any modification of facilities at United
16 States Naval Station, Guantanamo Bay, Cuba.

17 (c) **INDIVIDUAL DETAINED AT GUANTANAMO DE-**
18 **FINED.**—In this section, the term “individual detained at
19 Guantanamo” has the meaning given that term in section
20 1033(e)(2).

21 (d) **REPEAL OF SUPERSEDED AUTHORITY.**—Section
22 1034 of the Ike Skelton National Defense Authorization
23 Act for Fiscal Year 2011 (Public Law 111–383; 124 Stat.
24 4353) is amended by striking subsections (a), (b), and (c).

1 **SEC. 1035. PROCEDURES FOR PERIODIC DETENTION RE-**
2 **VIEW OF INDIVIDUALS DETAINED AT UNITED**
3 **STATES NAVAL STATION, GUANTANAMO BAY,**
4 **CUBA.**

5 (a) **PROCEDURES REQUIRED.**—Not later than 180
6 days after the date of the enactment of this Act, the Sec-
7 retary of Defense shall submit to the appropriate commit-
8 tees of Congress a report setting forth procedures for im-
9 plementing the periodic review process required by Execu-
10 tive Order No. 13567 for individuals detained at United
11 States Naval Station, Guantanamo Bay, Cuba, pursuant
12 to the Authorization for Use of Military Force (Public
13 Law 107–40).

14 (b) **COVERED MATTERS.**—The procedures submitted
15 under subsection (a) shall, at a minimum—

16 (1) clarify that the purpose of the periodic re-
17 view process is not to determine the legality of any
18 detainee’s law of war detention, but to make discre-
19 tionary determinations whether or not a detainee
20 represents a continuing threat to the security of the
21 United States;

22 (2) clarify that the Secretary of Defense is re-
23 sponsible for any final decision to release or transfer
24 an individual detained in military custody at United
25 States Naval Station, Guantanamo Bay, Cuba, pur-
26 suant to the Executive Order referred to in sub-

1 section (a), and that in making such a final decision,
2 the Secretary shall consider the recommendation of
3 a periodic review board or review committee estab-
4 lished pursuant to such Executive Order, but shall
5 not be bound by any such recommendation; and

6 (3) ensure that appropriate consideration is
7 given to factors addressing the need for continued
8 detention of the detainee, including—

9 (A) the likelihood the detainee will resume
10 terrorist activity if transferred or released;

11 (B) the likelihood the detainee will reestab-
12 lish ties with al-Qaeda, the Taliban, or associ-
13 ated forces that are engaged in hostilities
14 against the United States or its coalition part-
15 ners if transferred or released;

16 (C) the likelihood of family, tribal, or gov-
17 ernment rehabilitation or support for the de-
18 tainee if transferred or released;

19 (D) the likelihood the detainee may be sub-
20 ject to trial by military commission; and

21 (E) any law enforcement interest in the de-
22 tainee.

23 (c) APPROPRIATE COMMITTEES OF CONGRESS DE-
24 FINED.—In this section, the term “appropriate commit-
25 tees of Congress” means—

1 (1) the Committee on Armed Services and the
2 Select Committee on Intelligence of the Senate; and

3 (2) the Committee on Armed Services and the
4 Permanent Select Committee on Intelligence of the
5 House of Representatives.

6 **SEC. 1036. PROCEDURES FOR STATUS DETERMINATIONS.**

7 (a) **IN GENERAL.**—Not later than 90 days after the
8 date of the enactment of this Act, the Secretary of Defense
9 shall submit to the appropriate committees of Congress
10 a report setting forth the procedures for determining the
11 status of persons detained pursuant to the Authorization
12 for Use of Military Force (Public Law 107–40) for pur-
13 poses of section 1031.

14 (b) **ELEMENTS OF PROCEDURES.**—The procedures
15 required by this section shall provide for the following in
16 the case of any unprivileged enemy belligerent who will
17 be held in long-term detention under the law of war pursu-
18 ant to the Authorization for Use of Military Force:

19 (1) A military judge shall preside at pro-
20 ceedings for the determination of status of an
21 unprivileged enemy belligerent.

22 (2) An unprivileged enemy belligerent may, at
23 the election of the belligerent, be represented by
24 military counsel at proceedings for the determination
25 of status of the belligerent.

1 (c) REPORT ON MODIFICATION OF PROCEDURES.—
2 The Secretary of Defense shall submit to the appropriate
3 committees of Congress a report on any modification of
4 the procedures submitted under this section. The report
5 on any such modification shall be so submitted not later
6 than 60 days before the date on which such modification
7 goes into effect.

8 (d) APPROPRIATE COMMITTEES OF CONGRESS DE-
9 FINED.—In this section, the term “appropriate commit-
10 tees of Congress” means—

11 (1) the Committee on Armed Services and the
12 Select Committee on Intelligence of the Senate; and

13 (2) the Committee on Armed Services and the
14 Permanent Select Committee on Intelligence of the
15 House of Representatives.

16 **SEC. 1037. CLARIFICATION OF RIGHT TO PLEAD GUILTY IN**
17 **TRIAL OF CAPITAL OFFENSE BY MILITARY**
18 **COMMISSION.**

19 (a) CLARIFICATION OF RIGHT.—Section 949m(b)(2)
20 of title 10, United States Code, is amended—

21 (1) in subparagraph (C), by inserting before the
22 semicolon the following: “, or a guilty plea was ac-
23 cepted and not withdrawn prior to announcement of
24 the sentence in accordance with section 949i(b) of
25 this title”; and

1 (2) in subparagraph (D), by inserting “on the
2 sentence” after “vote was taken”.

3 (b) PRE-TRIAL AGREEMENTS.—Section 949i of such
4 title is amended by adding at the end the following new
5 subsection:

6 “(c) PRE-TRIAL AGREEMENTS.—(1) A plea of guilty
7 made by the accused that is accepted by a military judge
8 under subsection (b) and not withdrawn prior to an-
9 nouncement of the sentence may form the basis for an
10 agreement reducing the maximum sentence approved by
11 the convening authority, including the reduction of a sen-
12 tence of death to a lesser punishment, or that the case
13 will be referred to a military commission under this chap-
14 ter without seeking the penalty of death. Such an agree-
15 ment may provide for terms and conditions in addition to
16 a guilty plea by the accused in order to be effective.

17 “(2) A plea agreement under this subsection may not
18 provide for a sentence of death imposed by a military
19 judge alone. A sentence of death may only be imposed by
20 the unanimous vote of all members of a military commis-
21 sion concurring in the sentence of death as provided in
22 section 949m(b)(2)(D) of this title.”.