Panel II:

Congressional Update on Developments in National Security Law

Moderator:
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Detainee Provisions in the National Defense Authorization Bills

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Summary

Both House and Senate bills competing to become the National Defense Authorization Act of 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. S. 1253, as reported out of the Senate Armed Services Committee, 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 make permanent the current funding restrictions that relate to Guantanamo detainee transfers to foreign countries. The Senate bill, however, would permit the transfer of detainees into the United States for trial or perhaps for other purposes.

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, it was highly critical of those provisions concerning detainee matters. The Administration voiced strong opposition to the House provision reaffirming the existence of the armed conflict with Al Qaeda and arguably redefining its scope. It threatened to veto any version of the bill that contains provisions that the Administration views as challenging critical executive branch authority, including restrictions on detainee transfers and measures affecting review procedures. Although the Administration has not issued a similarly detailed statement regarding S. 1253, it seems likely that many of the Senate bill’s detainee provisions will evoke similar objections.

This report offers a brief background of the salient issues raised by the bills regarding detention matters, provides a section-by-section analysis of the relevant subdivision of each bill, and compares the bills’ approach with respect to the major issues they address.
Contents

Introduction .................................................................................................................................................. 1
Background .................................................................................................................................................. 1
  Scope of Detention Authority Conferred by the AUMF ................................................................. 4
  Status Determinations for Unprivileged Enemy Belligerent ..................................................... 7
  "Recidivism" and Restrictions on Transfer ....................................................................................... 9
H.R. 1540: Summary and Analysis of Detainee Provisions ................................................................. 11
  Definitions .................................................................................................................................................. 11
  Military Commissions Act Revision .............................................................................................. 12
  Affirmation of Armed Conflict; Detention Authority ................................................................. 12
  Periodic Review of Detention of Persons at Guantanamo ......................................................... 15
  Transfer or Release of Wartime Detainees into the United States .................................................. 17
  Transfer or Release of Guantanamo Detainees to Foreign Countries ........................................... 18
  Other Guantanamo-Related Provisions ........................................................................................ 20
  Terrorism Trials .................................................................................................................................... 21
  General Counterterrorism Matters ............................................................................................... 23
S. 1253: Summary and Analysis of Detainee Provisions ................................................................... 24
  Detention Authority .......................................................................................................................... 24
  Mandatory Military Detention ......................................................................................................... 25
  Transfer or Release of Guantanamo Detainees to Foreign Countries ........................................... 28
  Transfer of Guantanamo Detainees Into the United States ....................................................... 29
  Periodic Review of Detention of Persons at Guantanamo ........................................................... 30
  Status Determination of Wartime Detainees ............................................................................... 30
  Military Commissions Act Revision .............................................................................................. 32

Contacts

Author Contact Information .................................................................................................................. 32
Introduction

Both House and Senate bills competing to become the National Defense Authorization Act of 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. The 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. This report offers a brief background of the salient issues, provides a section-by-section analysis of the relevant subdivision of each bill, and compares the bills' approach with respect to the major issues they address.

Background

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 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 activities. A few have been tried by military commission for crimes associated with those hostilities,1 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, and potentially hold such persons for the duration of hostilities.2 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.

1 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.

Circuit have generally been favorable to the legal position advanced by the government regarding the scope of its detention authority under the AUMF. 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 miliarily 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." 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. Neither of these two 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.

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." 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.

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5 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/NewsNewsArticle.aspx?ID=105094. The detention center, which reportedly holds about 900 detainees on any given day, is slated to be turned over to Afghan authority by 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.
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 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 bar the transfer of any Guantanamo detainee into the United States for the 2011 fiscal year, even for purposes of criminal prosecution. This restriction 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. 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, 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, although the war in Iraq has generally been treated as separate from hostilities authorized by the AUMP, at least insofar as detainee operations are concerned.

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10 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.

Detainee Provisions in the National Defense Authorization Bills

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. S. 1253, as reported out of the Senate Armed Services Committee, 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 make permanent the current funding restrictions that relate to Guantanamo detainee transfers to foreign countries.

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, it 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.12 Although the Administration has not issued a similarly detailed statement regarding S. 1253, it seems likely that many of the Senate bill’s detainee provisions will evoke similar objections.

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 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 the 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-Qa’ida forces or associated forces that are engaged in hostilities against the United States or its

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12 See Exeq. Office of the Pres., Statement of Administration Policy on H.R. 1540 (May 24, 2011), available at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saplx1540c_20110524.pdf (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.
coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.\textsuperscript{13}

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 \textit{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.\textsuperscript{14} 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.\textsuperscript{15}

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.”\textsuperscript{16} 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.\textsuperscript{17}

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 \textit{Hamdi} that the AUMF authorized the detention of enemy combatants for the duration of hostilities.\textsuperscript{18} The


\textsuperscript{14} Compare Hamill 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, \textit{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, \textit{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).

\textsuperscript{15} Government Brief, supra footnote 13, 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.” Id.

\textsuperscript{16} See Pathet v. Gates, 532 F.3d 834, 838 (D.C. Cir. 2008) (quoting order establishing Combatant Status Review Tribunals definition: “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.”)


\textsuperscript{18} 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. (continued...)
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. 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.

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 Afghanistan and transferred to Guantanamo as members of an “associated force.” In Parhat v. Gates, 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.

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,

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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).

19 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”: “Because 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).

20 See Government Brief, supra footnote 13, 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 Hamillity 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.


22 Id. at 843 (citations omitted).
"[t]his argument suggests that, even under the government’s own definition, the evidence must establish a connection between ETIM and al Qaeda or the Taliban that is considerably closer than the relationship suggested by the usual meaning of the word ‘associated.’" 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." 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. 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. 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. However, the Administration has suggested that other groups outside of Afghanistan may be considered "associated forces" such that the AUMF authorizes the use of force against their members.

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. Guantanamo detainees who were determined not to be (or

23 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 Qaeda, not that it aided or abetted, or aided or harbored al Qaeda, but that it’s part of [?]

Mr. Katsas: Correct ... in order to fit them in the AUMF.

Id. & note 4.

24 Id.


29 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." CSRIs confirmed the status of 539 enemy combatants between July 30, 2004 and February 10, 2009. Although the CSRIs process has been largely defunct since 2007 due to the fact that so few detainees have been brought to Guantanamo since that time, presumably any new detainees that might be transported to Guantanamo detention facility would go before a CSR. The CSR 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. Moreover, whereas the Supreme Court has held that the constitutional writ of habeas extends to non-citizens held at Guantanamo, 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.

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 CSRIs, 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, which continues to

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31 See Department of Defense, Combatant Status Review Tribunal Summary, Feb. 10, 2009 [hereinafter "CSRT Summary"], available online 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 Sheikh 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.

32 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). CSRIs 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 note 31.


35 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).


Congressional Research Service 8 293
apply at the new detention facility in Parwan. 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.

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 preventative 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. 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.” 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

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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.

37 See Daniel, supra footnote 5.

38 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 5. 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.


40 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). 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. 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. 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.

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

43 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.
44 Elisabeth Bumiller, Later Terror Link Cited for 1 in 7 Freed Detainees, NY TIMES, May 26, 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." 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, two are confirmed and three are suspected of participating in terrorist or insurgent activities. The report does not include detainees solely on the basis of anti-U.S. statements or writings, 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 percent. 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.


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

Sec. 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

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47 DNI Recidivism Summary, supra footnote 45.

48 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.

effectuated. It is unclear who might fall under the “effective control” of the Department of 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, so it is possible that executive authorities will not interpret the term literally to cover such persons.

Military Commissions Act Revision

Sec. 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. Sec. 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.

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. Subparagraph (3) states that

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30 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 (section 1036) and limiting executive discretion to transfer such persons to foreign countries (section 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.

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


33 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 (continued...)

Congressional Research Service

297
(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 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). 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 as authorizing an expansion of the armed conflict to cover any new terrorist group that can be characterized as associated with Al Qaeda.

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 (section 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 (section 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

(...continued)


54 See Reauthorize the War on Terrorism, WASH. POST, May 18, 2011, at A16, available online at http://www.washingtonpost.com/opinions/reauthorize-the-war-on-terrorism2011/05/12/1Pyov35Q_story.html.

55 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 Qaeda 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”).

56 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…”).

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, 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.

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.

58 H.Rept. 112-78. The government brief it mentions was likely the brief filed in In re Guantanamo Bay Detainee Litigation, supra footnote 13.
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 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," arguing that "in purporting to affirm the conflict, [section 1034] would effectively recharacterize its scope and would risk creating confusion regarding applicable standards."

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, 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.

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

38 Id.
61 Executive Order on Periodic Review, supra footnote 39.
62 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.
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.

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, taking into consideration certain 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.  

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. 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. However, more recent funding limitations 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), prohibit the transfer of Guantanamo detainees into the United States for any purpose, including criminal prosecution. These restrictions, which are set to expire at the end of the 2011 fiscal year, 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 2011 NDAA and CAA effectively make military commissions the only viable forum for the criminal prosecution of Guantanamo detainees until the end of FY2011.

The funding restrictions established by section 1039, which apply for the duration of FY2012, cover a broader category of detainees than the restrictions contained in the 2011 NDAA and CAA. 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.

Section 1039 appears to establish less stringent restrictions on the transfer of Guantanamo detainees into the United States than the 2011 NDAA and CAA. 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 2011 NDAA not only prohibits military funds from being used either to transfer or release Guantanamo detainees into the United States, but also bars such funds from being used to assist in the transfer or release of such persons. Because Guantanamo

64 The restriction also generally precludes the transfer or release of detainees to U.S. territories or possessions.
65 For further discussion of these limitations, see CRS Report R40754, Guantanamo Detention Center: Legislative Activity in the 111th Congress, by Michael John Garcia.
detainees are currently in military custody, the 2011 NDAA appears to effectively bar the transfer of any Guantanamo detainee into the country for the duration of the 2011 fiscal year. Moreover, the 2011 CAA bars funds made available by it or any other act from being used by any government agency to transfer or release, or assist in the transfer or release, of a Guantanamo detainee into the United States. It should be noted that while the restriction on detainee transfers contained in section 1039 does not appear to be as rigid as the restrictions contained in the 2011 NDAA and CAA, other provisions of H.R. 1540, including its general ban on the prosecution of enemy belligerents for terrorist offenses in Article III court (section 1046, discussed infra), may eliminate the primary incentive for transferring wartime detainees into the country.

The White House has expressed strong objection to section 1039. 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.

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 were included in 2011 NDAA and CAA, but these limitations did not apply to funds appropriated or authorized to be appropriated for FY2012.

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

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69 See CRS Report R40754, Guantanamo Detention Center: Legislative Activity in the 111th Congress, by Michael John Garcia (discussing legislative history of the 2011 NDAA, and noting statements by Members reflecting an understanding that it constituted a complete prohibition on the transfer of Guantanamo detainees into the country).


70 White House Statement on H.R. 1540, supra footnote 12, at 2.

71 2011 NDAA, P.L. 111-383, §1034 (restricting use of funds which it authorized to be appropriated); 2011 CAA, P.L. 111-383, §1114 (restricting the use of any funds that it or any prior act appropriated or otherwise made available).
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 2011 NDAA and 2011 CAA, most of which are set to expire at the end of the 2011 fiscal year, and appear motivated by congressional concern over possible recidivism by detainees released from U.S. custody. 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, 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.

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72 Most of the applicable restrictions on detainee transfers contained in the 2011 NDAA and CAA concern funds made available for FY2011 (which ends 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).

73 The DNI reported in December 2010 that 13.5 percent of released Guantanamo detainees are “confirmed” and 11.5 percent “are suspected” of “reengaging in terrorist or insurgent activities after transfer.” See DNI Recidivism Summary, supra footnote 45.

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.”

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. 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.

72 White House Statement on H.R. 1540, supra footnote 12, at 2.
76 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. 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).
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 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."[77]

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.[7]

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. [78] In order for jurisdiction to exist, however, it must also be demonstrated the offense was "committed in the context of and associated with hostilities."[79] "Hostilities," in turn, is defined by the MCA to mean

[78] See 10 U.S.C. §950(c) (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).
"any conflict subject to the laws of war." 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. 

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 defined to exclude a person who qualifies for prisoner of war status under the Third Geneva Convention 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.

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. The bill does not explain how any of these criteria are to be determined. Military commissions have jurisdiction to make their own jurisdictional determinations, 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

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80 10 U.S.C. §948a(9).

81 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.

82 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.

83 10 U.S.C. §948a (6) & (7); §948d.

84 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.

85 10 U.S.C. §948d.
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 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, 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.

When the White House issued its statement regarding H.R. 1540, the bill had not yet been amended to add section 1046. However, the statement’s general criticism of aspects of the bill restricting executive discretion to choose the forum in which to prosecute detainees would appear applicable.

General Counterterrorism Matters

Sec. 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. The original authority is set to expire 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.

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86 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.

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 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. 1253: Summary and Analysis of Detainee Provisions

The Senate bill S. 1253, as reported out of the Armed Services Committee, covers “Detainee Matters” in subtitle D of Title X.

Detention Authority

Section 1031 provides that the U.S. Armed Forces are authorized to detain “covered persons” captured during hostilities authorized by the AUMF 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,⁴⁸ the bill defines “covered persons” in section 1031(b):

(b) Covered Persons—A covered person under this section is any person, including but not limited to persons for whom detention is required under section 1032, 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.

It states that dispositions under the law of war “may include” several options:

• long-term detention without trial until the end of hostilities against entities subject to 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.

⁴⁸ See supra, discussion in “Scope of Detention Authority Conferred by the AUMF.”
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 exclude U.S. citizens or lawful resident aliens from its coverage, but states that the provision authorizes their detention on the basis of conduct occurring within the United States only to the extent permitted by the Constitution. 99

Unlike the House bill, S. 1253 does not expressly reaffirm the existence of the armed conflict under the AUMF or explicitly define its scope. Instead, it provides for express detention authority in terms already asserted by the Administration, and appears intended to provide a clear statutory basis for the Administration's position. According to the Senate Armed Service Committee report accompanying the Senate bill:

The committee recognizes that the Armed Forces of the United States do not need specific statutory authorization to detain enemy belligerents under the law of war when they are captured in the course of any lawful armed conflict. Because the long-term nature of the current conflict has led to the detention of a number of individuals for a period that is not likely to end soon, the committee concludes that such statutory authorization is appropriate in this case. 99

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.

**Mandatory Military Detention**

Section 1032 generally requires at least temporary military custody for Al Qaeda members and members of "affiliated entities" who are taken into the custody or brought under the control of the United States on or after the date of enactment. This provision does not apply to all person who are permitted to be detained as "covered persons" under section 1031. In particular, the mandatory detention requirement in section 1032 excludes U.S. citizens from its purview, although it apparently remains applicable to U.S. resident aliens. The requirement applies as follows:

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99 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).

99 S.Rept. 112-26, at 176.
(2) APPLICABILITY TO AL-QAEDA AND AFFILIATED ENTITIES—The requirement in paragraph (1) shall apply to any covered person under section 1031(b) who is determined to be—

(A) a member of, or part of, al-Qaeda or an affiliated entity; and

(B) a participant 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. 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, 92 discussed infra, are satisfied.

Although section 1032 provides some general parameters for its mandatory detention requirements, it does not define them with specificity. This may allow some degree of executive discretion in assessing whether an individual falls under the purview of section 1032. For example, the provision does not supply criteria for assessing whether an organization is “an affiliated entity” of Al Qaeda. 93 Arguably, this provision might discourage the Executive from designating a particular group as an “affiliated entity” because military detention would then be required for all of the group’s members. The omission of any express reference to the Taliban in section 1032 seems to indicate that it need not be treated as an entity affiliated with Al Qaeda, although this interpretation would not conform with the Administration’s present use of the term “affiliate,” which it apparently uses to describe an even wider population than “associated forces.” 93 Section 1032 would not apply to a “lone wolf” terrorist with no ties to Al Qaeda or an affiliated group.

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91 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 94 (noting potential implications for the capture of suspected Al Qaeda members during U.S. operations in Iraq or Afghanistan).

92 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.

93 The 2011 Strategy 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 Associates 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 (continued...)

Congressional Research Service
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. 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.” Because the mandatory detention requirement is related to hostilities authorized by the AUMF, it would not 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 affiliated group).94

It appears that the Department of Defense has the responsibility for determining whether a person falls under a category that is subject to military detention. Section 1036 (discussed more fully infra) requires DOD to submit to Congress procedures for status determination of “persons captured in the course of hostilities authorized by the AUMF” for purposes of section 1031. This language could be interpreted to mean that only those who are captured by the military during military operations are meant to be subject to detention under section 1031,95 and by extension, to the mandatory detention requirement in section 1032. On the other hand, it could be interpreted merely to leave open the means by which other agencies are to determine whether individuals in their custody are subject to detention under sections 1031 and 1032. Whatever process is adopted to make such an initial determination 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.96 The provision does not prevent Article III trials of covered persons, although any time spent in military custody could complicate the prosecution of a covered defendant.97

(...continued)

the President is authorized to use force (including the authority to detain) based on the [AUMF]

Id. at note 1.

94 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 impeach the transfer to Iraq authorities of any insurgent believed to be part of Al Qaeda, potentially hampering U.S.-Iraq relations. See supra text accompanying footnote 91 (discussing interplay between section 1032 and section 1039 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 5 (describing detention procedures in Afghanistan).

95 Section 1031 also refers to the authority to detain persons “captured in the course of hostilities authorized by the Authorization for Use of Military Force,” which could be interpreted to limit its application to military captures and not civilian arrests.

96 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 McQaleh 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).

97 There has been one case of an individual who was transferred from Guantanamo to the United States for prosecution on terrorism charges. Ahmed Khalifa Ghalan 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 (continued...)
Transfer or Release of Guantanamo Detainees to Foreign Countries

Section 1033 establishes a permanent 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, which are generally set to expire at the end of the 2011 fiscal year,\(^5\) as well as those found in H.R. 1540, which would only apply to funds authorized for FY2012.

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 current law (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

(...continued)


\(^5\) Certain restrictions in the 2011 NDAA are set to expire in January 2012. See supra, text accompanying footnote 72.
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. In the case of a waiver of the provision 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 the 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).

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. It would presumably have similar concerns regarding the Senate bill.

Transfer of Guantanamo Detainees Into the United States

Section 1034 imposes a permanent 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 are currently in place pursuant to the 2011 NDAA, but these restrictions are set to expire at the end of the 2011 fiscal year. The funding limitation contained in section 1034 is also similar to one found in H.R. 1540, except that the restrictions found in the House bill only apply for the 2012 fiscal year.

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

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99 While current funding restrictions on detainee transfers also afford the Secretary of Defense limited waiver authority, they do 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 current law. See 2011 NDAA, P.L. 112-10, §1033; 2011 CAA, P.L. 112-10, §1013.
100 See supra section describing §1032 (“Mandatory Military Detention”).
101 2011 NDAA, P.L. 112-10, §1034(a)-(b).
Guantanamo detainees into the custody of civilian law enforcement for purposes of criminal prosecution. Moreover, the bill does not bar executive authorities from releasing into the United States those Guantanamo detainees who have been cleared of enemy belligerency status by administrative authorities or a reviewing court. 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.

**Periodic 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 this 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.

**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 captured in the course of hostilities authorized under the AUMF for purposes of section 1031 of the Senate bill. In the case of any unprivileged enemy belligerent who will be

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103 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, at 177 ("The 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.").

104 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.

105 It is not clear whether the status determination "for purposes of section 1031" means determination of whether a captured individual is an unprivileged enemy belligerent who 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.
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). 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). 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 captured in the course of hostilities 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, one permissible “disposition under the law of war” under sections 1031 and 1032 of the bill. 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.

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.

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105 See supra citations contained in footnote 33.
106 See supra section headed “Status Determinations for Unprivileged Enemy Belligerents.”
Military Commissions Act Revision

Section 1037 amends the MCA to permit plea agreements in capital cases. It is substantially similar to section 1033 of H.R. 1054, 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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The New SASC Detention Bill: An Analysis of Changes and Issues in Two Key Sections

by Robert Chesney

On Tuesday, the Senate Armed Services Committee passed a new version of the controversial detainee provisions to be included in the National Defense Authorization Act for FY '12. The text is here, thanks to Josh Gerstein at Politico, and a letter from Secretary of Defense Panetta objecting to certain aspects of the bill is here, also thanks to Josh. Below, I provide an overview of what is different – and what is or isn’t worth paying attention to — in relation to two provisions of the bill, the first of which (section 1031) expressly confers detention authority on the executive branch and the second of which (section 1032) purports to mandate the exercise of that authority for a subset of the otherwise-eligible persons (at least pending a decision as to what ultimately to do with the person—which could actually be a really, really brief period, as I explain below):

Section 1031: This is the provision expressly stating that the government has authority to use military detention in connection with the existing AUMF.

What is different from the prior version:

Omitting Reference to US Persons The definition of who may be detained (i.e., “covered persons”) is unchanged, but the bill no longer contains language that addresses the application of that authority to U.S. citizens or lawful permanent residents (the prior version was worded awkwardly, but was best read to provide express authority to apply the detention provision in such cases up to the limits permitted by the Constitution).

No Intention to Expand or Contract Existing Authority The amended version does have new language expressly stating that the section should not be read to expand or limit “the authority of the President or the scope of the Authorization for Use of Military Force.” Given the use of the disjunctive “or” rather than a limiting “under” or “pursuant to” in the midst of that sentence, this seems to be an indirect reference to the idea that the President may have Article II detention authority separate and apart from the AUMF (a position never advanced publicly by the current administration, though never expressly foresworn as a legal possibility either). I’m sure that aspect will excite some comment, but it’s really not doing anything substantive and should probably just be ignored.

Congressional Reporting Regarding Detention Activity There also is a new section requiring briefing to “Congress” as to how the authority in this section is applied, including specifically the “organizations, entities, and individuals” to which it gets applied. On one hand, I appreciate the idea at work here – trying to keep tabs on how DOD interprets “associated forces,” for example. But this language will need some work, I think. It’s not clear how often such reporting should occur or how detailed it must be. And it might make sense to limit such reporting to certain committees.

Section 1032 – This is the section described as requiring reliance on military detention for a subset of the person eligible for detention under Section 1031.

What is different from the prior version:
Clarifying the Subset of Detainable Persons Subject to “Mandatory” Detention. The prior version provided that detention authority must be used for the subset of detainable persons who are determined to be members of al Qaeda or of “affiliated forces,” so long as those persons participated in the planning or carrying out of an attack. That same general idea is carried forward in the new bill, except that “affiliated forces” has been replaced with “an associated force that acts in coordination with or pursuant to the direction of al-Qaeda.” That’s an improvement, since the phrase “associated force” is the one familiar from current military usage and appears elsewhere in the bill, whereas “affiliated forces” is neither of those things. Of course, we still lack clear metrics for the “associated forces” concept, which perhaps explains why the modifier “in coordination with or pursuant to the direction of al-Qaeda” was added. That’s actually a pretty substantial constraint; it might, for example, preclude application of section 1032 to an AQAP plotter barring good reason to believe that AQAP was not acting on its own initiative but rather at the specific direction of the original al Qaeda network, which won’t often be the case.

Requiring a Process for Making the Eligibility Determination and Controlling For Its Impact. A second major change is the requirement that the executive branch actually develop a system for making decisions as to whether a particular detainee falls under the section 1032 mandatory detention rule. In the prior version, there was nothing about this, and it left open huge questions about what Congress meant when it referred to persons “determined” to fall into the category described above. In this version, in contrast, the executive branch is required to develop procedures to (paraphrasing):

(i) identify the official(s) who will make the categorization decision and the process those officials will use to actually make the decision;

(ii) ensure that the 1032 requirement does not result in disrupting surveillance or other intelligence-gathering with respect to persons not already in custody (i.e., addressing the this-will-force-us-to-roll-em-up-prematurely concern);

(iii) ensure that the 1032 requirement does not result in a change of custody in the midst of any interrogation session that is ongoing when the 1032 decision is made (a single session, of course, will only go on so many hours, and this provision at most only saves a few hours before the change would have to be made assuming the person is in, say, FBI custody beforehand);

(iv) ensure that the requirement does not attach to situations in which a third-country controls the detainee and we merely have been granted access; and

(v) ensure that a “national security waiver” can be considered and granted for circumstances in which the government wishes to transfer a detainee to a third country’s custody (as is provided for elsewhere in the bill).

The bottom line is that this set of obligations probably precludes the executive branch from getting cute with the 1032 eligibility determination by dragging its feet with respect to the decision in a particular case for a really long time. That said, it is not as if it requires the executive branch to adopt procedures that ensure such decisions will be made within some specific number of minutes/hours/days/weeks/etc.

Is “Mandatory” Military Detention an Illusion. However? The interesting question all of this leaves open, I think, is whether the entire section 1032 system will prove to be a waste of time given that the actual obligation under 1032 is merely to hold such persons in military custody pending “disposition under the laws of war”...and that this actually leaves open the possibility of leaving someone in civilian custody. To be sure, “disposition under the laws of war” sounds like it would exclude civilian prosecution as a disposition option, but in fact it does not. As defined in the statute in section 1031(c) (3), the disposition options expressly include transfer of a person for trial before any
“alternative court or competent tribunal with jurisdiction,” which could certainly be a
civilian Article III court—and it does not say that this transfer can only occur on, say, the
eve of trial. As a result, there’s really nothing here to stop the executive branch from
making a determination that a given person is in fact subject to section 1032 but then, at
the exact same time, a further determination that the proper disposition option for the
person is a civilian criminal trial. In that case, the moment of mandatory military
detention could begin and end simultaneously, and if the person is already in civilian
custody he or she would stay right there. From this point of view, section 1032 neither
accomplishes what its supporters supposedly want nor what its opponents fear.
SEC. 1031. AFFIRMATION OF AUTHORITY OF THE ARMED FORCES OF THE UNITED STATES TO DETAIN COVERED PERSONS PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE.

(a) In General- Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107-40) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.
(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.
(c) Disposition Under Law of War- The disposition of a person under the law of war as described in subsection (a) may include the following:
   (1) Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force.
   (2) Trial under chapter 47A of title 10, United States Code (as amended by the Military Commissions Act of 2009 (title XVIII of Public Law 111-84)).
   (3) Transfer for trial by an alternative court or competent tribunal having lawful jurisdiction.
   (4) Transfer to the custody or control of the person's country of origin, any other foreign country, or any other foreign entity.
(d) Construction- Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.
(e) Requirement for Briefings of Congress- The Secretary of Defense shall regularly brief Congress regarding the application of the authority described in this section, including the organizations, entities, and individuals considered to be 'covered persons' for purposes of subsection (b)(2).

SEC. 1032. REQUIREMENT FOR MILITARY CUSTODY.

(a) Custody Pending Disposition Under Law of War-
   (1) IN GENERAL- Except as provided in paragraph (4), the Armed Forces of the United States shall hold a person described in paragraph (2) who is captured in the course of hostilities authorized by the Authorization for Use of Military Force (Public Law 107-40) in military custody pending disposition under the law of war.
   (2) COVERED PERSONS- The requirement in paragraph (1) shall apply to any person whose detention is authorized 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 of 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.

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

(4) WAIVER FOR NATIONAL SECURITY- The Secretary of Defense may, in consultation with the Secretary of State and the Director of National Intelligence, waive the requirement of paragraph (1) if the Secretary submits to Congress a certification in writing that such a waiver is in the national security interests of the United States.

(b) Applicability to United States Citizens and Lawful Resident Aliens-

(1) UNITED STATES CITIZENS- The requirement to detain a person in military custody under this section does not extend to citizens of the United States.

(2) LAWFUL RESIDENT ALIENS- The requirement to detain a person in military custody under this section does not extend to a lawful resident alien of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States.

(c) Implementation Procedures-

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

(2) ELEMENTS- The procedures for implementing this section shall include, but not be limited to, procedures as follows:

(A) Procedures designating the persons authorized to make determinations under subsection (a)(2) and the process by which such determinations are to be made.

(B) Procedures providing that the requirement for military custody under subsection (a)(1) does not require the interruption of ongoing surveillance or intelligence gathering with regard to persons not already in the custody or control of the United States.

(C) Procedures providing that a determination under subsection (a)(2) is not required to be implemented until after the conclusion of an interrogation session which is ongoing at the time the determination is made and does not require the interruption of any such ongoing session.

(D) Procedures providing that the requirement for military custody under subsection (a)(1) does not apply when intelligence, law enforcement, or other government officials of the United States are granted access to an individual who remains in the custody of a third country.

(E) Procedures providing that a certification of national security interests under subsection (a)(4) may be granted for the purpose of transferring a covered person from a third country if such a transfer is in the interest of the United States and could not otherwise be accomplished.

(d) Effective Date- This section shall take effect on the date that is 60 days after the date of the enactment of this Act, and shall apply with respect to persons described in
subsection (a)(2) who are taken into the custody or brought under the control of the United States on or after that effective date.

SEC. 1033. REQUIREMENTS FOR CERTIFICATIONS RELATING TO THE TRANSFER OF DETAINEE AT UNITED STATES NAVAL STATION, GUANTANAMO BAY, CUBA, TO FOREIGN COUNTRIES AND OTHER FOREIGN ENTITIES.

(a) Certification Required Prior to Transfer-

(1) IN GENERAL- Except as provided in paragraph (2) and subsection (d), the Secretary of Defense may not use any amounts authorized to be appropriated or otherwise available to the Department of Defense for fiscal year 2012 to transfer any individual detained at Guantanamo to the custody or control of the individual's country of origin, any other foreign country, or any other foreign entity unless the Secretary submits to Congress the certification described in subsection (b) not later than 30 days before the transfer of the individual.

(2) EXCEPTION- Paragraph (1) shall not apply to any action taken by the Secretary to transfer any individual detained at Guantanamo to effectuate--

(A) an order affecting the disposition of the individual that is issued by a court or competent tribunal of the United States having lawful jurisdiction (which the Secretary shall notify Congress of promptly after issuance); or

(B) a pre-trial agreement entered in a military commission case prior to the date of the enactment of this Act.

(b) Certification- A certification described in this subsection is a written certification made by the Secretary of Defense, with the concurrence of the Secretary of State and in consultation with the Director of National Intelligence, that the government of the foreign country or the recognized leadership of the foreign entity to which the individual detained at Guantanamo is to be transferred--

(1) is not a designated state sponsor of terrorism or a designated foreign terrorist organization;

(2) maintains control over each detention facility in which the individual is to be detained if the individual is to be housed in a detention facility;

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

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

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

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

(A) is related to the individual or any associates of the individual; and

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

(c) Prohibition in Cases of Prior Confirmed Recidivism-

(1) PROHIBITION- Except as provided in paragraph (2) and subsection (d), the Secretary of Defense may not use any amounts authorized to be appropriated or
otherwise made available to the Department of Defense to transfer any individual
detained at Guantanamo to the custody or control of the individual's country of
origin, any other foreign country, or any other foreign entity if there is a
confirmed case of any individual who was detained at United States Naval
Station, Guantanamo Bay, Cuba, at any time after September 11, 2001, who was
transferred to such foreign country or entity and subsequently engaged in any
terrorist activity.

(2) EXCEPTION - Paragraph (1) shall not apply to any action taken by the
Secretary to transfer any individual detained at Guantanamo to effectuate--
(A) an order affecting the disposition of the individual that is issued by a
court or competent tribunal of the United States having lawful jurisdiction
(which the Secretary shall notify Congress of promptly after issuance); or
(B) a pre-trial agreement entered in a military commission case prior to the
date of the enactment of this Act.

(d) National Security Waiver-

(1) IN GENERAL - The Secretary of Defense may waive the applicability to a
detainee transfer of a certification requirement specified in paragraph (4) or (5) of
subsection (b) or the prohibition in subsection (c) if the Secretary, with the
concurrence of the Secretary of State and in consultation with the Director of
National Intelligence, determines that--

(A) alternative actions will be taken to address the underlying purpose of
the requirement or requirements to be waived;

(B) in the case of a waiver of paragraph (4) or (5) of subsection (b), it is
not possible to certify that the risks addressed in the paragraph to be
waived have been completely eliminated, but the actions to be taken under
subparagraph (A) will substantially mitigate such risks with regard to the
individual to be transferred;

(C) in the case of a waiver of subsection (c), the Secretary has considered
any confirmed case in which an individual who was transferred to the
country subsequently engaged in terrorist activity, and the actions to be
taken under subparagraph (A) will substantially mitigate the risk of
recidivism with regard to the individual to be transferred; and

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

(2) REPORTS - Whenever the Secretary makes a determination under paragraph
(1), the Secretary shall submit to the appropriate committees of Congress, not
later than 30 days before the transfer of the individual concerned, the following:

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

(B) A statement of the basis for the determination, including--

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

(ii) in the case of a waiver of paragraph (4) or (5) of subsection (b),
an explanation why it is not possible to certify that the risks
addressed in the paragraph to be waived have been completely
eliminated.
(C) A summary of the alternative actions to be taken to address the underlying purpose of, and to mitigate the risks addressed in, the paragraph or subsection to be waived.

(e) Definitions- In this section:

(1) The term `appropriate committees of Congress' means--

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

(B) the Committee on Armed Services, the Committee on Appropriations, and the Permanent Select Committee on Intelligence of the House of Representatives.

(2) The term `individual detained at Guantanamo' means any individual located at United States Naval Station, Guantanamo Bay, Cuba, as of October 1, 2009, who-

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

(B) is--

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

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

(3) The term `foreign terrorist organization' means any organization so designated by the Secretary of State under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189).


SEC. 1034. PROHIBITION ON USE OF FUNDS TO CONSTRUCT OR MODIFY FACILITIES IN THE UNITED STATES TO HOUSE DETAINES TRANSFERRED FROM UNITED STATES NAVAL STATION, GUANTANAMO BAY, CUBA.

(a) In General- No amounts authorized to be appropriated or otherwise made available to the Department of Defense for fiscal year 2012 may be used to construct or modify any facility in the United States, its territories, or possessions to house any individual detained at Guantanamo for the purposes of detention or imprisonment in the custody or under the control of the Department of Defense unless authorized by Congress.

(b) Exception- The prohibition in subsection (a) shall not apply to any modification of facilities at United States Naval Station, Guantanamo Bay, Cuba.

(c) Individual Detained at Guantanamo Defined- In this section, the term `individual detained at Guantanamo' has the meaning given that term in section 1033(e)(2).

(d) Repeal of Superseded Authority- Section 1034 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383; 124 Stat. 4353) is amended by striking subsections (a), (b), and (c).
SEC. 1035. PROCEDURES FOR PERIODIC DETENTION REVIEW OF INDIVIDUALS DETAINED AT UNITED STATES NAVAL STATION, GUANTANAMO BAY, CUBA.

(a) Procedures Required- Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the appropriate committees of Congress a report setting forth procedures for implementing the periodic review process required by Executive Order No. 13567 for individuals detained at United States Naval Station, Guantanamo Bay, Cuba, pursuant to the Authorization for Use of Military Force (Public Law 107-40).

(b) Covered Matters- The procedures submitted under subsection (a) shall, at a minimum-

1. clarify that the purpose of the periodic review process is not to determine the legality of any detainee's law of war detention, but to make discretionary determinations whether or not a detainee represents a continuing threat to the security of the United States;
2. clarify that the Secretary of Defense is responsible for any final decision to release or transfer an individual detained in military custody at United States Naval Station, Guantanamo Bay, Cuba, pursuant to the Executive Order referred to in subsection (a), and that in making such a final decision, the Secretary shall consider the recommendation of a periodic review board or review committee established pursuant to such Executive Order, but shall not be bound by any such recommendation; and
3. ensure that appropriate consideration is given to factors addressing the need for continued detention of the detainee, including-
   (A) the likelihood the detainee will resume terrorist activity if transferred or released;
   (B) the likelihood the detainee will reestablish ties with al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners if transferred or released;
   (C) the likelihood of family, tribal, or government rehabilitation or support for the detainee if transferred or released;
   (D) the likelihood the detainee may be subject to trial by military commission; and
   (E) any law enforcement interest in the detainee.

(c) Appropriate Committees of Congress Defined- In this section, the term `appropriate committees of Congress' means--

1. the Committee on Armed Services and the Select Committee on Intelligence of the Senate; and
2. the Committee on Armed Services and the Permanent Select Committee on Intelligence of the House of Representatives.

SEC. 1036. PROCEDURES FOR STATUS DETERMINATIONS.

(a) In General- Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the appropriate committees of Congress a report
setting forth the procedures for determining the status of persons detained pursuant to the Authorization for Use of Military Force (Public Law 107-40) for purposes of section 1031.

(b) Elements of Procedures- The procedures required by this section shall provide for the following in the case of any unprivileged enemy belligerent who will be held in long-term detention under the law of war pursuant to the Authorization for Use of Military Force:

(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.

(c) Report on Modification of Procedures- The Secretary of Defense shall submit to the appropriate committees of Congress a report on any modification of the procedures submitted under this section. The report on any such modification shall be so submitted not later than 60 days before the date on which such modification goes into effect.

(d) Appropriate Committees of Congress Defined- In this section, the term 'appropriate committees of Congress' means--

(1) the Committee on Armed Services and the Select Committee on Intelligence of the Senate; and
(2) the Committee on Armed Services and the Permanent Select Committee on Intelligence of the House of Representatives.

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

(a) Clarification of Right- Section 949m(b)(2) of title 10, United States Code, is amended--

(1) in subparagraph (C), by inserting before the semicolon the following: `, or a guilty plea was accepted and not withdrawn prior to announcement of the sentence in accordance with section 949i(b) of this title'; and
(2) in subparagraph (D), by inserting `on the sentence' after `vote was taken'.

(b) Pre-trial Agreements- Section 949i of such title is amended by adding at the end the following new subsection:

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(c) Pre-trial Agreements- (1) A plea of guilty made by the accused that is accepted by a military judge under subsection (b) and not withdrawn prior to announcement of the sentence may form the basis for an agreement reducing the maximum sentence approved by the convening authority, including the reduction of a sentence of death to a lesser punishment, or that the case will be referred to a military commission under this chapter without seeking the penalty of death. Such an agreement may provide for terms and conditions in addition to a guilty plea by the accused in order to be effective.
(2) A plea agreement under this subsection may not provide for a sentence of death imposed by a military judge alone. A sentence of death may only be imposed by the unanimous vote of all members of a military commission concurring in the sentence of death as provided in section 949m(b)(2)(D) of this title.'.
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The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I write to express the Department of Defense’s principal concerns with the latest version of detainee-related language you are considering including in the National Defense Authorization Act (NDAA) for Fiscal Year 2012. We understand the Senate Armed Services Committee is planning to consider this language later today.

We greatly appreciate your willingness to listen to the concerns expressed by our national security professionals on the version of the NDAA bill reported by the Senate Armed Services Committee in June. I am convinced we all want the same result — flexibility for our national security professionals in the field to detain, interrogate, and prosecute suspected terrorists. The Department has substantial concerns, however, about the revised text, which my staff has just received within the last few hours.

Section 1032. We recognize your efforts to address some of our objections to section 1032. However, it continues to be the case that any advantages to the Department of Defense in particular and our national security in general in section 1032 of requiring that certain individuals be held by the military are, at best, unclear. This provision restrains the Executive Branch’s options to utilize, in a swift and flexible fashion, all the counterterrorism tools that are now legally available.

Moreover, the failure of the revised text to clarify that section 1032 applies to individuals captured abroad, as we have urged, may needlessly complicate efforts by frontline law enforcement professionals to collect critical intelligence concerning operations and activities within the United States.

Next, the revised language adds a new qualifier to “associated force” — “that acts in coordination with or pursuant to the direction of al-Qaeda.” In our view, this new language unnecessarily complicates our ability to interpret and implement this section.

Further, the new version of section 1032 makes it more apparent that there is an intent to extend the certification requirements of section 1033 to those covered by section 1032 that we may want to transfer to a third country. In other words, the certification requirement that currently applies only to Guantanamo detainees would permanently extend to a whole new category of future captures. This imposes a whole new restraint on the flexibility we need to continue to pursue our counterterrorism efforts.
Section 1033. We are troubled that section 1033 remains essentially unchanged from the prior draft, and that none of the Administration’s concerns or suggestions for this provision have been adopted. We appreciate that revised section 1033 removes language that would have made these restrictions permanent, and instead extended them through Fiscal Year 2012 only. As a practical matter, however, limiting the duration of the restrictions to the next fiscal year only will have little impact if Congress simply continues to insert these restrictions into legislation on an annual basis without ever revisiting the substance of the legislation. As national security officials in this Department and elsewhere have explained, transfer restrictions such as those outlined in section 1033 are largely unworkable and pose unnecessary obstacles to transfers that would advance our national security interests.

Section 1035. Finally, section 1035 shifts to the Department of Defense responsibility for what has previously been a consensus-driven interagency process that was informed by the advice and views of counterterrorism professionals from across the Government. We see no compelling reason—and certainly none has been expressed in our discussions to date—to upset a collaborative, interagency approach that has served our national security so well over the past few years.

I hope we can reach agreement on these important national security issues, and, as always, my staff is available to work with the Committee on these and other matters.

Sincerely,

cc:
The Honorable John McCain
Ranking Member

332
October 21, 2011

The Honorable Harry Reid
Senate Majority Leader
522 Hart Senate Office Building
Washington, D.C. 20510

Dear Majority Leader Reid:

We write as Members of the Senate Judiciary Committee and the Senate Select Committee on Intelligence to express our grave concern with Subtitle D (titled "Detainee Matters") of Title X of S.1253, the National Defense Authorization Act for Fiscal Year 2012. We support the majority of the provisions in this bill, which further national security and are of great importance to the needs of the men and women in our Armed Forces, but we cannot support the controversial detention policy provisions in S.1253.

The Executive Branch must have the flexibility to consider various options for handling terrorism cases, including the ability to prosecute terrorists for violations of U.S. law in Federal criminal courts. Yet, taken together, Sections 1031 and 1032 of Subtitle D of S.1253 are unprecedented and require more rigorous scrutiny by Congress. Section 1031 needs to be reviewed to consider whether it is consistent with the September 18, 2001 Authorization for Use of Military Force (AUMF), the law of war, and the Constitution, especially because it would authorize the indefinite detention of American citizens without charge or trial.

Section 1032 would require that certain terrorism suspects be held in the custody of the Armed Forces, which could disrupt vital counterterrorism operations. For example, if these controversial provisions are enacted, the FBI may have to hand over a terrorism suspect captured in the U.S. – like Najibullah Zazi – to the military in the middle of an interrogation, even if the individual is providing useful intelligence to the FBI about an unfolding terrorist plot. In addition, under these sections, a suspected terrorist captured abroad – such as Ahmed Warsame – may have to be kept in military custody, even if potential charges against the suspect are available only in Federal criminal courts and not military commissions. In sum, mandatory military custody is unwise and will harm our national security.
Recently, the Administration has made clear its opposition to requiring military custody for terrorism suspects by sharing the attached position paper with our offices. We concur with the Administration’s view that mandatory military custody is “undue and dangerous,” and that these provisions would “severely and recklessly undermine” our Nation’s counterterrorism efforts.

On Section 1033, we are concerned about the potential for recidivism of Guantanamo detainees and understand that the Administration has put in place a more stringent review process for all Guantanamo detainees, which must be satisfied before a detainee may be considered for transfer. Yet, for the past two years, Congress has made it virtually impossible for anyone to be transferred out of Guantanamo – even for prosecution in U.S. Federal courts or in other countries. We believe it unwise to make permanent in law the onerous certification requirements in Section 1033. Professionals in the Intelligence Community and law enforcement need the flexibility to use all tools to effectively interrogate, incarcerate, and bring terrorists to justice.

We wholeheartedly support providing needed resources to our Armed Forces. However, we do not support provisions that would undermine our Nation’s counterterrorism efforts. Given these significant concerns over the legislation, we request that you work to ensure that the “Detainee Matters” that are part of Subtitle D are removed.

Thank you very much for your attention to this matter.

Sincerely,

Dianne Feinstein  Patrick J. Leahy
Mark Udall  Richard J. Durbin
cc: The Honorable Carl Levin, Chairman, Senate Armed Services Committee

Enclosure
The SASC National Defense Authorization Act:
Undue and Dangerous Requirement of Mandatory Military Custody

The SASC-reported version of the NDAA includes a provision that would mandate military detention of any non-citizen who is a member or part of al Qaeda or an affiliated entity and has planned or carried out an attack or attempted attack against the United States or its coalition partners. Only the Secretary of Defense, in consultation with the Secretary of State and Director of National Intelligence, could waive this requirement—and only upon a written certification to Congress that a waiver is in the national security interest of the United States.

This requirement unduly constrains the President’s authority to investigate and stop terrorist attacks, and will ultimately ham national security.

- Military custody of captured terrorists makes sense in some cases, and the President already has authority under the 2001 Authorization for Use of Military Force (AUMF) to authorize the military to capture and detain individuals who are part of al Qaeda, the Taliban, and associated forces. But even if a tool might be valuable in some cases, requiring the use of that tool is bad policy. It reduces our options for investigating and effectively responding to terrorist threats, advertises to our enemy exactly how we will respond to each new capture, and creates major operational hurdles.

- Every single suspected terrorist captured on American soil—before and after the September 11th attacks—has first been taken into custody by law enforcement, not the United States military. There have been only two cases in recent history in which suspected terrorists were subsequently transferred to military custody, and both of these cases spawned extensive litigation and raised major statutory and constitutional questions concerning the legality of the government’s actions.

- Civilian law enforcement agents—not the military—would likely be the first responders in the event of a domestic terrorist attack or attempted attack on U.S. soil. Law enforcement officials focus first on questioning designed to obtain information about on-going attacks or plots, the location and nature of potential weapons, and associates of the captured individual who may still be at large. Under this bill, agents would be required to stop such questioning if the individual is determined to be a member of al Qaeda or an affiliated group and turn the individual over to military custody. This requirement would apply even if the individual was cooperating with law enforcement and providing critical and time-sensitive intelligence.

- To be sure, the bill contains a waiver provision. But the Secretaries of Defense and State, and the Director of National Intelligence are not those primarily responsible for investigating and responding to domestic terrorism; this responsibility falls primarily to the FBI, along with components of the Department of Homeland Security. In many circumstances, it may not be possible to arrange briefings, secure the necessary concurrences, and execute a waiver in real-time, as investigations are unfolding. Thus, the FBI would be required to halt critical intelligence-gathering
operations upon a determination that a suspected terrorist is part of al Qaeda and transfer the individual to military custody.

- There are times when federal law enforcement authorities will keep a suspected terrorist under full-time surveillance, but not arrest him, in order to continue observations that will yield more information about associates and operational plans. In other instances, federal law enforcement authorities may target a suspected terrorist in an undercover operation in order to collect intelligence and build a criminal case. Under this bill, absent a waiver from the Secretary of Defense, the U.S. military could be obliged to take custody of these individuals as soon as they are determined to be part of al Qaeda, thereby disrupting ongoing law enforcement investigations that otherwise could provide intelligence vital to national security and result in reliable jail time for the suspect.

- Under this provision, approximately one-third of the terrorists charged in federal court in 2010 would have initially been subject to mandatory military detention, absent a waiver from the Secretary of Defense. In some cases, the legislation would actually require the government to split up co-defendants—with American defendants in federal law enforcement custody and their non-citizen co-conspirators transferred to military custody—absent a waiver.

- The bill threatens our ability to ensure that terrorist suspects are incarcerated for the long-term. In some cases, we may initially believe that an individual is associated with al-Qaeda but later discover that he is a “lone wolf.” Placing such an individual in military custody could jeopardize what would have otherwise been a viable prosecution option.

- Some foreign governments, including many of our closest allies, are unwilling to transfer terrorism suspects to the United States or even provide evidence about suspected terrorists if they believe they will end up in military custody. If enacted into law, the bill will likely undermine international law enforcement cooperation, and could even result in dangerous terrorists being set free.

- For decades, presidents of both political parties have leveraged the strength and flexibility of our federal criminal justice system to incarcerate dangerous terrorists and gather critical intelligence. We have effectively used the criminal justice system to obtain information about plots against our homeland, the location of al Qaeda safe houses and training camps, the location of senior al Qaeda figures, and telephone addresses and e-mail addresses used by al Qaeda.

- The legislation is likely to be challenged on constitutional grounds. Under certain circumstances, the constitutionality of the military detention of an alien, especially one with substantial ties to the United States, could be unsettled and highly contentious. Moreover, the absence of a statutory provision for judicial review may lead to additional constitutional challenges.
The flexibility to choose from the beginning, based on the evidence and the facts and circumstances of each case, which system of detention and trial best serves our national security interests is not a luxury, but a necessity. By restricting that flexibility, the bill will severely and recklessly undermine our ability to incapacitate dangerous individuals and to protect the American people.
Thank you all very much. Thank you to AEI for inviting me to speak today, and to Dany for that kind introduction. I am honored to be here today.

Today, I want to talk about America’s role in the world and where we, as conservatives, should stand on issues of national security.

We have just passed the 10-year anniversary of the attacks of September 11th, a day that Americans should never forget. In the years since that horrible day, our country brought renewed focus to the threats we face. We altered our methods to approach these threats. We transformed our national security and intelligence institutions to help ensure that we would not face another similar attack.

For the past 10 years, much of our national energy has been focused on counterterrorism and the fronts in Afghanistan and Iraq. Our military and intelligence professionals, and their families, have carried a heavy load for all of us, and let me take the time to thank them now. They have devoted themselves to our country, some of them have paid the ultimate price, and for that we all owe them our deepest, eternal thanks.

At the ten-year anniversary of that dreadful day, it is appropriate that we reflect on the changes we’ve made and discuss how we should approach the future. This conversation is especially important given the events unfolding in the world and the disagreements that play out domestically about how to respond to those events. Whether it’s our troop numbers in Afghanistan, our actions in response to the changes across the Middle East and North Africa, or the costs of maintaining a strong defense in a time of intense budgetary concerns, the American people expect and deserve a principled, coherent national-security strategy to answer these questions. Especially when the current Administration has not provided us a coherent approach to national security and foreign policy, it is up to conservatives to provide a strong and viable alternative.

We have achieved remarkable progress on the counterterrorism front in the last 10 years.

We broke down barriers and established new systems to respond to that threat. Despite the change in administrations, most of the counterterrorism structures put in place after 9/11 have endured. They have continued because they worked and because they were consistent with our principles and values. From the expertise of our intelligence analysts to the skill and cooperation of our elite military units, we have spent the last decade honing and perfecting
our counterterrorism capabilities. We must not lose that capability, we must continue this fight, and we must provide the resources necessary to continue it successfully.

Some believe that after the last 10 years, Americans are tired of the burdens of defending America, that the decade has drained our energy for further engagements in the world. I believe, however, that now is not the time to walk away from the rest of the world. We must remember -- and we must consistently remind the country -- that America will not remain safe, America cannot remain a force for democracy and freedom in the world, if we refuse to engage around the world.

Some assert that there is a growing sentiment within conservative circles for a minimized role for America in the world. They argue that the future should be focused on the problems only within our borders. I believe this argument is wrong. It ignores the core of the conservative movement. And conservatives believe, above all else, that America is a force for good in the world. Now is the time to remind ourselves of the successful principles at the heart of who we are; the principles that made Americans confident in the leadership of the Republican Party.

We must remind the country of the principles that brought us out of the malaise of the 70s and into the strong posture of the 80s. It was morning in America then and it can be morning in America again. The country turned away from apologetic and confidence-shattering policies, and chose instead to be guided by the strength and principles of President Ronald Reagan.

Reagan sought to restore America's place in the world, and pushed the United States to actively oppose Communism and support our allies in that confrontation. He stressed that we be clear-headed about the threats we face, and proud of American strength and exceptionalism. He stressed that with our power and force we strive ultimately for the preservation of freedom and liberty. And he pushed a bigger defense budget so we could best protect the nation and its interests around the world.

I believe we must have a comprehensive view of the threats in the world, and a principled view of the sources and proper uses of American strength and power. So we must not lose sight of the geopolitical conditions that we face.

Of course, the threat of Al Qaeda and associated terrorist groups still exists. China continues its rise. Iran and North Korea continue their efforts to become nuclear states. And while the Middle East and North Africa are experiencing a significant period of change, the future stability of the region is not without doubt. We hope that this period will bring extraordinary advancements in freedom and stability for the region. But we must not ignore the new challenges that this change may bring. And we must do what we can to help those countries become more stable and free, not more autocratic.

President Reagan eloquently stated those principles. America cannot be passive in the world. The world is a better place with strong American leadership. We cannot lead from behind; we cannot sit back and rely on the power of our rhetoric alone to encourage peace and
prosperity in the world. We need the national will to engage both the threats and the opportunities we face.

We must have the strength of mind and clarity to know our enemies and understand their goals. The world remains a dangerous and uncertain place. Ignoring these threats, or refusing to confront them, will not make them go away. It will only make our opponents stronger and more likely to succeed. But understanding the threats we face is only one element of a strong national defense. We must be prepared to confront those threats.

**Future Threats**

As I said, America must continue to remain vigilant in a threatening and uncertain world. And we must keep our attention and resources focused on more than just the most immediate threats. China requires our attention. Since 1989, official Chinese defense spending has increased by nearly 13% each year. Although the actual Chinese defense budget is unknown and kept secret, we suspect that they are spending hundreds of billions of dollars in recent years. That investment includes a build-up of conventional and unconventional military capabilities across the board – in land, sea, space, and cyberspace, China is investing and growing.

In addition to its military growth, China obviously maintains an important economic position in the world. It is the world's second largest economy after the United States and has maintained average growth rates of over 10% for the past 30 years. It also holds over one quarter of the U.S. debt owed to the public.

Much has been written and said about the rise of China to superpower status. I don’t wish to provide a comprehensive answer to the China question – whether we ought to see our relationship as a partnership or one as adversaries. Much will depend on what the Chinese do, and what happens inside their institutions.

What I do believe is that we must be prepared for the potential threat that a rising China poses. We must recognize the changing nature of the geopolitical regime and give ourselves options in the future. We must build and maintain healthy, clear alliances. We must keep a strong American presence in the region. We must understand the Chinese ambitions, intentions, and capabilities, and how they see their future.

China will only surpass us if we let them. But it doesn’t have to happen. If we continue our security investments; if we maintain our leadership around the world; if we allow our market-based economy to flourish once again, China won’t surpass us. As Condoleezza Rice recently said: “Too many people ask ‘when’ China will surpass us; but we should be asking ‘if.’”

Unlike China, we have less clarity on Iran’s nuclear capabilities. But we already face Iran’s malign influence. They arm Iraqi insurgents who are targeting and killing American troops in Iraq. They support terror groups, like Hezbollah. Iran is the leading state sponsor of terror in the world and is a patron of the autocratic regime in Syria. It contributes to the instability of countries across the region.
Iran’s leaders have clearly expressed their desires to annihilate Israel. We should take their leaders’ public statements and intents seriously. They speak volumes about their desires and how they maintain power and position in their own country.

We must therefore recognize the strategic threat and position that Iran poses. We must not be resigned to a nuclear Iran. The debates about how a nuclear Iran would behave would then become real. Whether it would supply terrorist groups; bomb Israel; become more aggressive in the region. We don’t know and we must not become resigned to a nuclear Iran.

Staying power
America’s strength comes from many sources: our ideals of freedom and liberty, our economic success, our advanced technology and innovative prowess, and the bravery and training of our armed forces and intelligence professionals.

But maintaining a secure America requires more. America must be trusted by the rest of the world -- trusted to pursue victory without pause or retreat; trusted to have the stamina to fulfill our commitments; trusted to understand that with unique power comes unique responsibilities. In Iraq, in Afghanistan, in Libya, and in the rest of the world, our allies and our enemies must know that when America intervenes, we will not cut and run. We will not leave our allies to face the world’s threats alone.

If we cannot be trusted to have staying power, if our enemies and our friends don’t trust America’s commitment to stay until victory is achieved, our strength is diminished and our defense becomes even harder.

Our enemies must know, without doubt, that when America commits itself, we do NOT commit ourselves to artificial timelines of withdrawal or limits on troop levels. America commits itself to one thing: achieving lasting victory. Without that certainty, our enemies have little incentive to avoid provoking a conflict in the first instance. By making this commitment, we send a clear message—that confronting us will be costly and difficult. And in the end, we are safer — and the world is safer — if our enemies know that we will not retreat.

This is why we must maintain our presence in Afghanistan and Iraq until stability is achieved. And it hasn’t always popular to say, but it’s why we had to sustain our effort in Libya. People may disagree on whether engaging in Libya was the right option; but once we committed to the mission, America had to get the job done.

Let me reiterate now: we cannot walk away from Afghanistan. When the Afghans are ready, we can hand over security responsibilities. That will allow us to drawdown our forces in a strategic, coordinated fashion. I fear that President Obama is drawing down our surge forces much too quickly and endangering the progress we have made. And I fear too few are saying what the future will require: which is even after our troops leave Afghanistan, we must stay involved. We cannot leave Afghanistan to its own fate again -- we must support their security; it is both a moral responsibility and a necessity to America’s security.
We need leaders who not only understand this reality, but can express it and convince the American public of the rightness of the cause.

**Budget Challenges**
So this discussion gets us to, of course, our defense and intelligence budgets. We are experiencing a difficult time in American history. The economy continues to struggle to recover, and Americans are rightfully demanding that the government get control of the national debt. But our nation's defense is only as good as the resources we put forward to the effort. We must not only equip our men and women on the front lines today, but we must also invest in the technologies and capabilities of tomorrow. Our nation has invested heavily in our intelligence capabilities since 9/11. There is no doubt in my mind that we got an outstanding return on that investment.

Let me be clear -- while budget growth is unlikely in this difficult fiscal environment, we must hold the line against cuts that endanger key capabilities. Our national defense is not a luxury -- and we must avoid the mistakes of the 1990's when we cut too deep into intelligence and defense budgets. I will do all I can to ensure that our intelligence community has the resources it needs to perform its necessary mission.

America remains the best hope for international peace and security in the world. And it is incumbent upon our country's leaders to consistently make the case for a strong defense.

We must also have a sober understanding of what this role requires of us. September 11th taught us that we cannot expect to pull back from our leadership role every 10 or 20 years -- not if we hope to remain safe; not if we hope to remain the most influential country in the world. We cannot lose sight of the threats the world brings, we must have the will to remain in the fight until victory is achieved. And we must continue to fund our national security at the levels that match our strategic needs.

Americans may have lost confidence in some of their leaders. But they have NOT lost confidence in America. It is time for those who lead this great country to stand up and ensure our continued economic and military strength. It is up to us to make the case for what most Americans know: A strong America is a source of pride and a force for good in the world.

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5

343
Lawfare

Section 1031 of the NDAA and Other Issues It Raises

by Robert Chesney

Further to the exchange between myself and Steve Vladeck regarding Section 1031 of the SASC version of the NDAA FY '12, Raha Wala (Human Rights First) writes in with the following thoughtful comments and concerns about my last post [note: I've inserted some responses after each paragraph of Raha's post, in italics for ease of reference]:

I enjoyed your thoughtful comments in response to Steve Vladeck's post, but I have to take issue with your characterization of how the detention authority in Section 1031 of the NDAA interrelates with the requirements of IHL. Assuming that IHL even authorizes detention and that analogies to the rules of International Armed Conflict (IAC) are appropriate for deriving the detention standards, Section 1031 would not likely comply with those standards.

First, Section 1031 authorizes the detention of any member of al Qaeda, the Taliban, or "associated forces". The assumption seems to be that membership in an armed group provides a sufficient basis for detention under IHL in these circumstances, but that's far from clear. Membership could be a lawful basis for detention if analogies to the POW detention in GC3 are appropriate, but I think the principle of distinction counsels against applying the GC3 POW detention regime (as opposed to the GC4 civilian internment regime) to members of irregular forces acting on behalf of non-state actors. Anyhow, I'm willing to concede that this ship has more or less sailed on under current domestic law (at least as applied to members of al Qaeda and the Taliban pre-Afghanistan drawdown). But it's important to note that the issue is hardly settled as a matter of international law. [I agree that IHL is not settled with respect to detention authority in the NIAC setting. But I do not agree that the principle of distinction cuts in favor of applying a GCIV analogy rather than a GCIII analogy when it comes to persons who are members of organized armed groups; it can just as easily be argued that it cuts the opposite way, which highlights the point that members of organized armed groups flout and confound the principle of distinction.]

Second, a GC3 POW detention regime would not provide a basis for detaining "supporters" of armed groups, which is why you'd have to have to analogize to the civilian internment provisions in GC4 as a possible authority for detention. Here, you write that "there is little doubt that someone who is aiding the enemy" could be detained pursuant to this authority. I think that's an overstatement. GC4 permits the internment of civilians "only if the security of the Detaining Power makes it absolutely necessary." Considering that "substantial" or "direct" support is not defined in the statute (or in the current habeas jurisprudence) and could go beyond the many otherwise innocuous activities that constitute material support under the criminal law, the support grounds for detention are likely to be overbroad. Moreover, security internees held pursuant to GC4 detention grounds can only be held so long as they constitute a security risk, not "until the end of hostilities" as Section 1031 suggests. [This draws attention to several important features of the GCIV security internment model. I suspect we disagree as to how much bite the "absolute necessity" standard actually entails, or should entail, in practice.]

Finally, while I hope you're correct that the language in question in Section 1031 -- "captured in the course of hostilities" -- serves to limit the detention authority, I wouldn't be so confident. There's nothing in Section 1031 that states that U.S. armed forces must do the capturing or that such "hostilities" must be directed at U.S. forces. That's not to
Section 1031 necessarily authorizes the detention of a Hezbollah fighter that's targeting Israel, but it’s also by no means clear that the detention authority is limited to those posing a direct threat to the United States. The bigger problem is that Section 1031 could be construed to authorize the detention of individuals not sufficiently connected to any ongoing armed conflict. While the AUMP may be sufficient to delineate the scope of the armed conflict as a matter of domestic law, it’s a mistake to assume that anything authorized by the AUMP constitutes armed conflict, to which IHL is applicable, since IHL has its own threshold requirements for determining the existence of armed conflict. Even assuming the existence of such a broad and amorphous armed conflict, the “captured in the course of hostilities” language does not necessarily guarantee the required nexus between the individual subject to detention and hostilities in the armed conflict. Unlike in the Military Commissions Act, where there's at least some attempt to define “hostilities” to create a nexus to armed conflict, Section 1031 could be construed to create a self-fulfilling prophecy where the mere deployment of the military to detain the targeted individual creates the “hostilities” used (in part) to justify the detention. [If I read Raha correctly, he is making two distinct arguments here. First, he expresses concern about the scope of 1031 given that the “course of hostilities” condition does not explicitly mention attacks on or captures by US forces. I would not want it to contain such conditions. This would be a dramatic narrowing of existing authority under the AUMP; we are engaged in coalition operations, after all, and routinely detain persons captured by others who have not directly attacked US personnel but who nonetheless are members of AQ or the Taliban. That said, I don't see even the slightest chance that 1031 could be fairly read to encompass the Hezbollah-Israel scenario; there's just not way to reconcile it with the requirement of an AUMP nexus. Second, Raha expresses concern that 1031 in any event would allow detention of persons even absent conditions of armed conflict. That of course is a familiar criticism of the AUMP as well, given disagreement as to how broadly the US has construed the armed conflict concept to apply. I therefore don't see 1031 exacerbating that debate, though perhaps I should give it more thought.]

Let's put the Hezbollah fighter aside for a second and consider this question: Is there anything in Section 1031 that would prohibit the government from using the military to indefinitely detain without charge a little old lady from Switzerland who thinks she wrote a check to charity, but unwittingly ends up helping fund a group “associated” with al Qaeda? If there is, I don’t see it. [This hypo presents the question about the mens rea associated with “substantial support” as a detention standard. Section 1031 does not address mens rea in this context, and so the question lingers out there: must the person at least know the identity of the group to which it gives support? It's worth noting that even the sweeping civilian criminal material support law, 18 USC 2339B, requires actual knowledge, and could not be applied in the little old lady hypo. So why does this issue, and this specific hypo, always come up in the military detention context? Because it was widely reported that a DOJ attorney took this position in 2004 during oral argument before a district judge in an early GTMO habeas case. Yet this has, all along, been a matter of misreporting; as set forth here by Adam White, the government never argued that knowledge of the identity of the recipient group should not be required. There is truly no reason to think the answer would be different under section 1031, though I'd be perfectly happy to see the issue foreclosed by inserting language in 1031 that made clear that support must be knowing and voluntary.]

This was written by Robert Chesney. Posted on Wednesday, November 9, 2011, at 11:09 am.
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Lawfare

Detention Authority and Section 1031 of the NDAA

by Robert Chesney

In a post on the American Constitution Society's blog, Steve Vladeck takes aim at section 1031 of the Senate version of the NDAA FY '12, which concerns detention authority under the 9/18/01 AUMF. If you've not yet done so, I suggest you click through to read Steve's full account, and then come back here for my responsive thoughts. Don't worry, I don't mind waiting while you click over...

...and welcome back. As you just saw, Steve criticizes 1031 on two main grounds, one having to do with whether 1031 would expand the range of groups and individuals around the world to whom detention authority would extend and the other having to do with the existence of detention authority as to captures in the United States itself.

I. Detention Authority in General

Steve argues that 1031 expands beyond the scope of the 9/18/01 AUMF's detention grant at both the group and individual levels. It does so at the group level, he says, by breaking with the 9/18/01 AUMF's requirement of a nexus with al Qaeda (the group responsible for the 9/11 attacks), and it does so at the individual level by specifying that individuals may be detained based on providing support to hostilities even if they have not engaged in hostilities themselves (whereas the caselaw from the GTMO habeas proceedings, he says, requires proof that one is "part of" an AUMF covered group, not just an independent supporter).

Regarding the group-level concern:

I take Steve's point to be that 1031 opens to door to detention of persons fighting against our allies (whoever they might be) but not against us in any relevant sense. That's certainly a legitimate concern, but I don't think 1031 actually presents it. The language that strikes Steve as problematic is found in 1031(b), which defines the phrase "covered persons." Steve is right in pointing out that 1031 (b)'s definition, if examined in isolation, could be construed to be far broader than he or I would think appropriate. But I think there is a separate section of 1031 that imposes an additional constraint, one that should suffice to address this particular objection. Section 1031(a) states that "The Armed Forces of the United States are authorized to detain covered persons captured in the course of hostilities authorized by the [9/18/01 AUMF]." So let's say there is some Hezbollah fighter linked in some plausible way to hostilities against, say, Israel. Section1031(b) in isolation might, at least in theory, be read to categorize him as a "covered person." But in light of 1031(a), I see no way to assert detention authority over the individual despite this. Bottom line: I'd be happy to see the language rewritten to avoid these concerns more clearly, but in the end I think the concern is not warranted even if the language were left untouched.

Regarding the individual-level concern:

Steve argues that 1031(b)2 "overrides international law by authorizing detention of individuals who may have never committed a belligerent act," in that the section refers explicitly both to a person who has "committed a belligerent act or has directly supported such hostilities in aid of such enemy forces." Two questions, then: is this definition really contrary to international law, and is it different from the status quo under the AUMF? I'm skeptical on both counts, though the matter is murky.

As to international law: I assume Steve is speaking of IHL, and is essentially arguing that that the rule relating to detention for the duration of hostilities does not extend to persons who have not engaged in a belligerent act themselves. I have trouble accepting that for a couple of reasons, though I would agree that it is hardly crystal clear that the opposite position is the correct one. First, even if the detention-during-hostilities concept has no application, this does not mean IHL forbids the detention.
As to how 1031(b)(2) compares to the status quo: I'm not sure if Steve is arguing that the "direct support" concept breaks with the status quo under the current AUMF, but if he is then I'd have to disagree. To be sure, the vast majority of GMTO habeas cases turn on membership, not non-member support. But the fact remains that a mix of DC Circuit panels have repeatedly—and advisedly—referred to both membership and non-member support as providing an adequate detention predicate under the current statute. At most, I think it would be fair to say that this remains contentious and that the new statute if adopted would resolve the issue legislatively rather than judicially. That could be a feature rather than a bug of 1031(b)(2), however, in terms of which bodies ideally should be responsible for deciding whom the US should categorize as detainable.

2. Detention in the US

Steve's separate line of criticism concerns 1031's application to captures within the US. Section 1031 (d) is framed a bit awkwardly. It forbids use of detention authority on citizens or lawful permanent residents (LPRs) if detention would be based on conduct occurring in the United States (thus excluding the Hamdi scenario), "except to the extent permitted by the Constitution of the United States." Put more directly, as Steve notes, this amounts to a statement that detention authority extends to citizens and LPRs to the extent permitted by the Constitution.

Steve argues that this breaks with the status quo by trumping the Non-Detention Act of 1971, which forbids non-criminal detention of citizens absent some applicable statutory foundation for the detention. More specifically, it resolves the still-disputed question of whether the existing AUMF already does just that when it comes to domestic captures (a position many observers think the Supreme Court would have rejected had it had the chance in the Padilla or al-Marri cases, both of which diverted into criminal prosecutions before SCOTUS review). All that said, I don't think we should focus too much on whether this is a matter of clarification, restatement, or expansion compared to the status quo. We should focus, instead, on the merits of the arguments for and against allowing any military detention for citizens and LPRs based on domestic conduct, regardless of whether that authority already lies with the existing AUMF. Steve is definitely against it, and I'm sympathetic to his view but need to think it through further....

[Update: Steve has posted a thoughtful reply to my post here.]

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This was written by Robert Chesney. Posted on Thursday, November 3, 2011, at 5:57 pm.

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Unrest in Syria and U.S. Sanctions Against the Asad Regime

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November 9, 2011
Summary

This report analyzes the current unrest in Syria and the U.S. response to the Syrian government’s crackdown against demonstrators. It also provides background information on U.S. sanctions against the Asad regime and its supporters.

A variety of U.S. legislative provisions and executive directives prohibit direct foreign assistance funding to Syria and restrict bilateral trade relations, largely because of the U.S. State Department’s designation of Syria as a sponsor of international terrorism. On December 12, 2003, President George W. Bush signed the Syria Accountability Act, P.L. 108-175, which imposed additional economic sanctions against Syria. Syrian individuals and government officials are subject to targeted financial sanctions pursuant to executive orders relating to terrorism, proliferation, and regional security. Successive administrations have designated several Syrian entities as weapons proliferators and sanctioned several Russian companies for alleged weapons of mass destruction or advanced weapons sales to Syria.

The following legislation introduced in the 112th Congress addresses the current situation in Syria.

- **H.R. 2106, The Syria Freedom Support Act.** Sanctions the development of petroleum resources of Syria, the production of refined petroleum products in Syria, and the exportation of refined petroleum products to Syria.
- **H.Res. 296 (S.Res. 180 in the Senate).** Expresses support for peaceful demonstrations and universal freedoms in Syria and condemns the human rights violations by the Assad Regime.
- **H.R. 2105, The Iran, North Korea, and Syria Nonproliferation Reform and Modernization Act of 2011.** States that it shall be U.S. policy to fully implement and enforce sanctions against Iran, North Korea, and Syria for their proliferation activities and policies.
- **S. 1048, The Iran, North Korea, and Syria Sanctions Consolidation Act of 2011.** Amends the Iran, North Korea, and Syria Nonproliferation Act to include in the scope of such act a person that (1) acquired materials mined or extracted within North Korea’s territory or control; or (2) provided shipping services for the transportation of goods to or from Iran, North Korea, or Syria relating to such countries’ weapons of mass destruction programs, support for acts of international terrorism, or human rights abuses. Excludes from such provisions shipping services for emergency or humanitarian purposes.
- **S. 1472, The Syria Sanctions Act of 2011.** Denies companies that conduct business in Syria’s energy sector (investment, oil purchases, and sale of gasoline) access to U.S. financial institutions and requires federal contractors to certify that they are not engaged in sanctionable activity.
Contents

Uprising and Crackdown in Syria ................................................................. 1
  Overview: Syria’s Changing Political Landscape and Repercussions For U.S. Policy ........................................................................ 1
  Current Status ......................................................................................... 1
  The Syrian Opposition and Armed Resistance ....................................... 3
  International Reactions and Policy Responses ........................................ 4
    Syria’s Neighbors ................................................................................. 5
    Regional and Global Actors .................................................................. 5
  U.S. Policy and Sanctions ..................................................................... 6
  Congressional Action ............................................................................ 8
  Syria’s Economy Under Strain ............................................................... 9
    Sanctions and Syria’s Oil and Gas Sector ........................................... 10
  Options and Uncertainty ..................................................................... 11
  Overview .............................................................................................. 12
  General Sanctions Applicable to Syria .................................................. 12
  Specific Sanctions Against Syria ......................................................... 14
    The 2003 Syria Accountability Act ................................................... 15
    Targeted Financial Sanctions ........................................................... 16
    Sanctions Against the Commercial Bank of Syria ............................. 18

Figures

Figure 1. Map of Syria .............................................................................. 3

Tables

Table 1. U.S. Sanctions Against Syria in 2011 .......................................... 7

Appendixes

Appendix. Previous U.S. Sanctions and Legislation .................................. 12

Contacts

Author Contact Information ..................................................................... 19
Uprising and Crackdown in Syria

For a full account of recent events and an assessment of their implications, see “Current Status.”

Overview: Syria’s Changing Political Landscape and Repercussions For U.S. Policy

The Asad family has ruled Syria since 1970. President Bashar al Asad, like his father Hafez al Asad before him, has wielded almost total control over domestic politics and has steered the country’s outsized foreign policy to play key roles in multiple arenas in the Middle East (Lebanon, Israel-Palestine, Iran, and Iraq) despite Syria’s small size and lack of resources. Now, with the country in turmoil, many observers are interested in how prolonged Syrian instability (or a possible changing of the guard there) might affect other U.S. foreign policy priorities in the region, such as Lebanese stability and countering Hezbollah; limiting Iranian influence; and solving the Arab-Israeli conflict. Unlike in Egypt, where the United States has provided support to the military and democracy assistance to newly empowered political groups, the U.S. role in Syria is more limited. Some U.S. sanctions are already in place and Syria has been ineligible for U.S. aid due to its inclusion on the State Sponsor of Terrorism list. Military and intelligence cooperation is sporadic and limited. Thus the role the United States can play in Syria’s evolving domestic crisis is in question, and policymakers may be searching for channels of influence in order to preserve U.S. interests in a rapidly changing political landscape.

Current Status

More than 3,500 people have been killed during the uprising in Syria according to official estimates. The actual figure may be much higher. In addition, between 11,000 and 25,000 people have fled the country due to violence or regime threats against protesters and their families. Activists estimate that tens of thousands of people have been detained for organizing or participating in anti-government demonstrations. Despite the Syrian government’s recent formal agreement to an Arab League-proposed end to the government crackdown, most observers expect violence between regime forces and protesters to continue for some time.

Unrest in Syria shows no sign of abating, and much uncertainty persists regarding the country’s future. Some experts believe that the Alawite-dominated regime, in one form or another (perhaps without Asad family rule), can remain in power. Others believe that a sectarian war is likely and that recent violent clashes between Alawites and Sunnis reflect a trend toward heightened inter-commmunal conflict. Another view posits that international sanctions are working, and that economic pressure may eventually topple the regime perhaps within the next two years. Finally, some fear that the violence within Syria’s borders may spread elsewhere, with what has been a domestic conflict turning regional due to possible Sunni-Shiite tensions, a Syrian or Hezbollah provocation of Israel, or transnational Kurdish restiveness in Syria-Turkey-Iraq-Iran border areas.

Within Syria, protests continue nationwide, though central Damascus and Aleppo, the two largest cities, have remained quieter than most areas. The frequency of protests has remained steady, although unconfirmed reports suggest that in some cities, protest turnouts are diminishing.
opposition has begun to coalesce around a new umbrella organization, the Syrian National Council (SNC), most of whose members are exiles. Inside Syria, some local activists question SNC positions and leadership. The SNC remains officially committed to non-violent, peaceful protest. However new rebel groups composed of defected soldiers espouse and are conducting armed resistance. Most Syrians still reject international military intervention, though some have stated their support for U.N.-mandated assistance.\(^1\)

Various urban and rural areas (Dara’a, Hama, Idlib, Rastan, Deir Al Zour) have experienced regime-opposition clashes, but none more so than Homs, Syria’s third largest city. There, local fighters and army defectors reportedly are protecting whole neighborhoods from regime security forces, and casualties on both sides occur daily. Civilians in some areas are confined to their houses. In recent weeks, there has been a spate of reportedly sectarian-motivated killings of doctors, a nuclear engineer, and professors. However, some reports indicate that some Alawites inside Homs are opposed to the government crackdown.\(^2\) In early November, regime forces have attempted to retake areas of Homs controlled by defectors, allegedly deploying tanks to the Baba Amr area of Homs in attempt to wipe out rebel forces based there. According to one opposition figure, “The defectors and the people don’t have enough weapons or strength to wage a war against a professional and disciplined army. We cannot talk about a war between them because they’re not equal powers. It’s impossible for defectors to keep the city.”\(^3\)

Fear of all-out sectarian warfare, akin to the situation in Iraq between 2006 and 2008, may drive many religious minorities to continue their support for the Assad regime. Some Christians have participated in and are leaders of the protest movement, yet many are at least still publicly hesitant to withdraw their support from the government. Christian religious leaders have been especially vocal lately in articulating their communities’ ongoing support for the Assad regime, as have some Lebanese Christian leaders.\(^4\)

In order to bolster its claim that it is at least attempting to adopt political reforms, the Syrian government has taken formal steps toward liberalization, though many skeptics doubt the regime’s intentions to truly promote political pluralism in the midst of a brutal crackdown. In April, the regime abolished the Emergency Law, though it has continued its apparently unlawful detention of protestors. To date, the government has pledged to implement a new political parties law\(^5\) to allow for competition with the ruling Ba’ath party; to implement a new media law to promote press freedom; to implement a new decree to allow for more competition for state jobs; to hold parliamentary elections in early 2012; and to rewrite the constitution. In addition, several

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1 In October, one prominent longtime activist, Hailtham al-Malh, called for United Nations assistance but rejected help from NATO. According to Malh, “NATO means America and I’m against that. But it’s different when the Security Council intervenes. That provides an international umbrella, which is what is needed.” See, U.S. Open Source Center (OSC) Report GMP20111016637001, “Syria: Opposition Figure Al-Malh Supports International Intervention,” Al Akhbar (Beirut), October 14, 2011.

2 In September, three senior Alawite Shaykhs in Homs issued a statement in which they said that the Assad regime does not represent their entire religious sect. OSC Report GMP20110912631001, “Syria: Three Alawite Figures Condemn ‘Savage Acts,’ Ask Syrians To Join Protests,” Al-Arabiya.net (Dubai), September 12, 2011.


4 In early October, Lebanon’s Maronite Catholic Patriarch, Bishara al Rai, stated that he feared the collapse of “regimes described as dictatorial… could lead to civil war, with Christians being the main victims.”

pro-regime rallies have taken place in recent months, with crowds estimated by government sources to be as large as 100,000. The Syrian government continues to place the blame for instability on terrorist elements with external support.

Figure 1. Map of Syria

Source: CRS Graphics.

The Syrian Opposition and Armed Resistance

Syrian opposition groups have grown increasingly organized as the uprising has unfolded, but remain divided over strategy and tactics. Local Coordinating Councils active in many areas create an informal network linking activists around the country. Two opposition coalition groups, one based in Syria and the other based in neighboring Turkey, are seeking to shape the political agenda and strategy of the movement:

- The Syrian National Council (SNC) was formally organized in Turkey in October 2011 and brings together a range of external activists, along with representatives of the Damascus Declaration Forces for National and Democratic Change, the Syrian Muslim Brotherhood, and the Syrian Revolution General Commission (SRGC). The National Council has called for “immediate protection for civilians,” in contrast to some of its domestic counterparts. The Council also
firmly believes that dialogue with the Asad government is impossible. The Council rejected the Arab League agreement with the Syrian government on November 2 (see below), and called on the Arab League “to freeze Syria’s membership, ensure the protection of civilians and recognize the SNC as the representative of the Syrian revolution.” Prominent leaders of the SNC include Council chairman Burhan Ghalyun, a France-based Syrian academic, and Muhammad Riyad al Shaqish, the Controller General of the Syrian Muslim Brotherhood.

- The National Coordination Commission of the Forces of Democratic Change (NCC) is a Syria-based alliance of leftist groups, Kurdish activists, and individuals associated with the 2005 Damascus Declaration on political reform. The NCC has criticized calls for any civilian protection measures that might invite external military intervention and has left open the prospect of dialogue with the Syrian government, predicated on an end to the use of force against civilians. Prominent leaders of the NCC include general coordinator Hassan Abd al Azim and long-time domestic opposition activists such as Michel Kilo.

Reports from Syria increasingly suggest that dissident military personnel and officers, many acting under the aegis of two organizations called the Free Syrian Army and the Free Officers Movement, are actively targeting government security forces in armed attacks. Free Syrian Army forces are rumored to number several hundred personnel, but precise and verifiable estimates are not available. Public accounts further suggest that thousands of Syrian military and security personnel may have defected during the uprising as forces have been increasingly stretched geographically and logistically and as individuals have rejected orders to crack down on civilian protestors. The Syrian government has condemned the use of force against state security personnel and attributes the growing number of attacks on military and police forces to “terrorists” and armed Islamists.

The use of force by Syrian opposition groups raises fundamental questions about the nature and future of the Syrian uprising. It also is complicating internal opposition debates over strategy and tactics. Some groups view force as a necessary and appropriate response to the violently repressive tactics being used by government personnel. Others argue that the use of force opens the opposition to criticism, undercuts its international legitimacy, and could increase fear among “fence sitting” supporters of the government about the likelihood of violent chaos in the wake of regime change. The debate over the use of force is an extension of the broader political debate that divides the leading opposition groups over the possibility of dialogue with the Asad government. Those who view the government as disingenuous in its offers of reform and dialogue may be more likely to support or acquiesce to the use of force as the political confrontation continues.

International Reactions and Policy Responses

Syria’s geographic location, its diverse population, and its leaders’ foreign policy tactics raise the stakes of the current political confrontation for Syria’s neighbors and the international community. Destabilizing refugee flows, cross-border sectarian rivalries, the future of regional terrorist groups, the prospect of weapons proliferation, and potential changes to regional power dynamics all hang in the balance.
Syria’s Neighbors

To date, Syria’s neighbors have taken cautious and concerned approaches in response to the country’s unrest. Groups in each country have particular concerns about conflict in Syria potentially having destabilizing effects on their national security and diverse populations. Turkey has been the most vocal and involved of Syria’s neighbors to date, and the government of Turkish Prime Minister Recep Tayyip Erdoğan has shifted its approach from seeking to foster dialogue between the Asad government and its critics to hosting Syrian opposition groups and warning of unspecified sanctions or military actions if Syrian authorities continue to use force against civilians. This change in approach by Turkish Prime Minister Recep Tayyip Erdoğan seems to coincide with his desire to project a regionally populist stance that is not viewed by Arab populations as siding with autocrats or entrenched commercial interests. One of Turkey’s concerns is that region-wide unrest, especially in neighboring Syria, could endanger the political stability of the entire area and possibly jeopardize Turkey’s political and economic influence in the region.

Lebanese concerns are focused on the potential for conflict or regime change in Syria to affect Lebanon’s fragile sectarian balance. Some prominent Lebanese Christians have warned that the rise of Syria’s majority Sunni population to power could pose risks to Christians and other religious minorities in Syria and Lebanon. Reciprocally, Syrian officials accuse Lebanese Sunnis of providing shelter and support to armed opposition forces inside Syria. A number of disputed cross-border incidents illustrate rising Lebanese-Syrian tensions. The outsized role that Syria plays in Lebanon’s affairs and its role as a lifeline for Hezbollah further raises the stakes of the unrest both for Lebanon and for Israel. Hezbollah has stated its support for the Asad government and both have warned that third-party intervention in Syria’s crisis could lead to regional conflagration, widely interpreted as a threat to Israel.

Syria’s other neighbors also have concerns over instability there. In Iraq, Shiites including Prime Minister Nouri al Maliki, may be concerned over the possibility of Syrian Sunni Muslims toppling the Asad regime, and therefore the Prime Minister has supported Asad’s promises for reform. In Jordan, the monarchy may be concerned that violence in Syria may lead many Syrians to take refuge in Jordan, though to date fewer than a thousand Syrians are said to have sought refuge in the kingdom. Of all of the neighbors, Syrian unrest places Israel in the most precarious position. The Syrian regime has been a stable and predictable Israeli adversary for decades. If the Syrian regime fears its downfall may be imminent, Israelis fear that the Asad government could try to instigate a conflict with Israel in order to distract opposition to its rule. Should the Syrian regime fall, Israelis are concerned over its replacement with a more radical Sunni-Islamist government.

Regional and Global Actors

The Asad government has positioned Syria as a pivot point in a number of regional rivalries, complicating efforts by other Middle Eastern governments to take a unified and decisive approach to the current crisis. Syria’s role as a facilitator of Iranian support to Hezbollah while serving as host to Hamas and other Sunni terrorist groups is perhaps the most important example of this dynamic. Saudi Arabia’s King Abdullah has vigorously criticized the Asad government’s use of force against civilians, but many observers believe this may stem more from an interest in countering Iranian regional influence than from genuine concern for the well-being of Syrian nationals. Arab League diplomacy has focused on setting terms for a ceasefire and a resumption of dialogue between the opposition and the government, and the conditions of the agreement
announced on November 2 reflect this approach, but they have been met by criticism from Syrian opposition forces and a continuing use of force by Syrian security personnel and some armed opposition groups.

Action at the U.N. Security Council reflects shared concerns among the permanent members of the Security Council about the crisis and its potential spillover effects, along with deep divisions about the way forward. Russia and China jointly vetoed a proposed Security Council resolution in early October, citing concern that a resolution could pave the way for one-sided intervention in the Syrian unrest, and warning of the risks of repeating a scenario like the NATO-led intervention in Libya in the more fragile and geopolitically important environment of the Levant. Critics of the veto point to Russian and Chinese interests in preserving their long-standing arms sales relationships with Syria, protecting the principle of non-intervention, and gaining access to potential energy resources. On November 1, NATO Secretary-General Anders Fogh Rasmussen categorically ruled out the possibility of a NATO-led military intervention in Syria. The European Union has prohibited the purchase of Syrian oil exports, dealing a potentially crippling blow to Syrian state export revenues unless alternatives are found (see below).

U.S. Policy and Sanctions

President Obama and his Administration have been calling for Asad’s resignation since August. On November 2, after reports surfaced that Syria had agreed to an Arab League-proposed plan to end its crackdown, a State Department spokesperson reiterated the Administration position, stating that “Syria’s made a lot of promises to the international community in the past... Our position remains that President Assad has lost his legitimacy to rule and should step down.”

When asked whether or not the United States would intervene militarily in Syria to protect demonstrators, a State Department spokesperson responded that “The vast majority of the Syrian opposition continues to speak in favor of peaceful, nonviolent protests and against foreign intervention of any kind, and particularly foreign military intervention into the situation in Syria, and we respect that.” Some U.S. officials have publicly indicated their belief that President Asad will not be able to remain in office over time. According to Secretary of Defense Leon Panetta, “While he continues to resist, I think it’s very clear that it’s a matter of time before that (exit) in fact happens. When it does, we don’t know.” In response to unspecified threats against the recently confirmed U.S. Ambassador to Syria, Robert S. Ford, the Ambassador returned to Washington, D.C. in October. Ford had been previously targeted by pro-government demonstrators who obstructed a meeting he conducted with opposition activists in September 2011.

6 “U.S. Cautions on Syria Deal, Says Assad Must Go,” Reuters, November 2, 2011.
Table A-1. U.S.-Syrian Trade Statistics 2005-2010

<table>
<thead>
<tr>
<th></th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Exports to Syria</td>
<td>$155.0</td>
<td>$224.3</td>
<td>$361.4</td>
<td>$408.8</td>
<td>$300.0</td>
<td>$506.2</td>
</tr>
<tr>
<td>U.S. Imports from Syria</td>
<td>$323.5</td>
<td>$213.7</td>
<td>$110.5</td>
<td>$352.0</td>
<td>$285.9</td>
<td>$426.7</td>
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<tr>
<td>Totals</td>
<td>$478.5</td>
<td>$438.0</td>
<td>$471.9</td>
<td>$760.8</td>
<td>$585.9</td>
<td>$934.9</td>
</tr>
</tbody>
</table>

Source: TradeStats Express – National Trade Data, Presented by the Office of Trade and Industry Information (OTII), Manufacturing and Services, International Trade Administration, U.S. Department of Commerce.

The Administration has continued to expand U.S. sanctions on Syria while advocating further multilateral sanctions. Table 1 (below) summarizes U.S. sanctions activity since the start of the Syria uprising in March 2011.

Table 1. U.S. Sanctions Against Syria in 2011
(Implemented by Treasury Department's Office of Foreign Assets Control [OFAC])

<table>
<thead>
<tr>
<th>Date</th>
<th>Sanctioned Individual/Entity</th>
<th>Sanction or Related Activity Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>October 3, 2011, Treasury Department</td>
<td></td>
<td>OFAC issued two general licenses related to Syria to authorize payments in connection with overflight or emergency landing and transactions with respect to telecommunications</td>
</tr>
<tr>
<td>September 27, 2011, Treasury Department</td>
<td></td>
<td>OFAC issued a General License related to Syria to authorize third-country diplomatic and consular funds transfers and to authorize certain services in support of nongovernmental organizations' activities.</td>
</tr>
<tr>
<td>September 9, 2011, Treasury Department</td>
<td></td>
<td>OFAC issued four general licenses related to Syria to authorize wind down transactions, certain official activities of international organizations, incidental transactions related to U.S. persons residing in Syria and operation of accounts.</td>
</tr>
<tr>
<td>August 30, 2011, Treasury Department</td>
<td>Walid Moualem (Foreign Minister), Ali Abdul Karim Ali (Syrian Ambassador to Lebanon), Bouthaina Shaaban (Advisor to the President)</td>
<td>Added to OFAC's Specially Designated Nationals (SDN) List</td>
</tr>
<tr>
<td>August 18, 2011, Executive Order 13582</td>
<td>Government of Syria</td>
<td>Freezes all assets of the Government of Syria, prohibits U.S. persons from engaging in any transaction involving the Government of Syria, bans U.S. imports of Syrian-origin petroleum or petroleum products, prohibits U.S. persons from having any dealings in or related to Syria's petroleum or petroleum products, and prohibits U.S. persons from operating or investing in Syria.</td>
</tr>
</tbody>
</table>
### Unrest in Syria and U.S. Sanctions Against the Asad Regime

<table>
<thead>
<tr>
<th>Date</th>
<th>Sanctioned Individual/Entity</th>
<th>Sanction or Related Activity Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>August 18, 2011,</td>
<td>General Petroleum Corporation, Syrian Company For Oil Transport, Syrian Gas Company, Syrian</td>
<td>Added to OFAC's SDN List</td>
</tr>
<tr>
<td>Treasury</td>
<td>Petroleum Company, Syrtel</td>
<td></td>
</tr>
<tr>
<td>Department</td>
<td></td>
<td></td>
</tr>
<tr>
<td>August 10, 2011,</td>
<td>Commercial Bank of Syria and its Lebanon-based subsidiary, Syrian Lebanese Commercial Bank,</td>
<td>Added to OFAC's SDN List</td>
</tr>
<tr>
<td>Treasury</td>
<td>Syriatel, the country's main mobile phone operator</td>
<td></td>
</tr>
<tr>
<td>Department</td>
<td></td>
<td></td>
</tr>
<tr>
<td>August 4, 2011,</td>
<td>Mohammad Hamsho (businessman with ties to Asad family), Hamsho International Group</td>
<td>Added to OFAC's SDN List</td>
</tr>
<tr>
<td>Treasury</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Department</td>
<td></td>
<td></td>
</tr>
<tr>
<td>June 29, 2011,</td>
<td>Jamil Hassan (Head of Air Force Intelligence), Political Security Directorate (PSD, domestic</td>
<td>Added to OFAC's SDN List</td>
</tr>
<tr>
<td>Treasury</td>
<td>intelligence</td>
<td></td>
</tr>
<tr>
<td>Department</td>
<td></td>
<td></td>
</tr>
<tr>
<td>May 18, 2011,</td>
<td>President Bashar al Asad, Farouk al Shara (vice president), Adel Sa'ar (prime minister),</td>
<td>Added to OFAC's SDN List</td>
</tr>
<tr>
<td>Executive Order</td>
<td>Mohammad Ibrahim al Shaar (minister of the Interior), Ali Habib Mahmoud (minister of defense,</td>
<td></td>
</tr>
<tr>
<td>13573</td>
<td>Abdul Fatah Qudsya (head of Syrian military intelligence), Mohammed Dilb Zaltoun (director</td>
<td></td>
</tr>
<tr>
<td></td>
<td>of political security director), Nabil Rafik al Kuzbari, General Mohsen Chizari (Commander</td>
<td></td>
</tr>
<tr>
<td></td>
<td>of Iran Revolutionary Guard Corp Qods Force suspected of human rights abuses in Syria), Al</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Mashreq Investment Fund, Bena Properties, Cham Holding, Syrian Air Force Intelligence, Syrian</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Military Intelligence, Syrian National Security Bureau</td>
<td></td>
</tr>
<tr>
<td>April 29, 2011,</td>
<td>Maher al Asad, Ali Mamluk (director of the Syrian General Intelligence Directorate GID), Atif</td>
<td>Added to OFAC's SDN List</td>
</tr>
<tr>
<td>Executive Order</td>
<td>Najib (former head of the Syrian Political Security Directorate for Dara'a province and the</td>
<td></td>
</tr>
<tr>
<td>13572</td>
<td>president's cousin), the General Intelligence Directorate, and Iran's Islamic Revolutionary</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Guard Corps -- Quds Force (for allegedly assisting Syria in its crackdown)</td>
<td></td>
</tr>
</tbody>
</table>

**Source:** U.S. Treasury Department.

**Notes:** As part of its enforcement efforts, OFAC publishes a list of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific. Collectively, such individuals and companies are called Specially Designated Nationals or SDNs. Their assets are blocked and U.S. persons are generally prohibited from dealing with them.

### Congressional Action

The Syrian government's use of lethal force in response to political demonstrations has refocused attention on the basic tenets of U.S. policy toward Syria. Some Members of Congress and nongovernmental observers argue that the recent violence demonstrates the futility of expecting...
any substantive reform by Syrian authorities and suggests that U.S. policy should shift toward outright confrontation and embrace regime change as a policy goal. While the Administration has called for President Assad to step down, arguments in favor of regime change have been accompanied by wariness about what the implications of confrontation would be, and what the implications of regime change would be for regional security, particularly in light of the delicate sectarian balance in the Levant and a lack of established U.S. relationships with government and non-government actors in Syria. Other lawmakers have urged a gradual approach of increasing multilateral political condemnation and economic pressure against the Assad regime.

The following legislation introduced in the 112th Congress addresses the current situation in Syria.

- **H.R. 2106, The Syria Freedom Support Act**—Would, among other things, sanction the development of petroleum resources of Syria, the production of refined petroleum products in Syria, and the exportation of refined petroleum products to Syria.

- **H.Res. 296 (S.Res. 180 in the Senate), A Resolution Expressing support for peaceful demonstrations and universal freedoms in Syria and condemning the human rights violations by the Assad Regime**—Among other things, it urges the "President to continue to work with the European Union, the Government of Turkey, the Arab League, the Gulf Cooperation Council, and other allies and partners to bring an end to human rights abuses in Syria, hold the perpetrators accountable, and support the aspirations of the people of Syria."

- **H.R. 2105, The Iran, North Korea, and Syria Nonproliferation Reform and Modernization Act of 2011**—States that it shall be U.S. policy to fully implement and enforce sanctions against Iran, North Korea, and Syria for their proliferation activities and policies. Would, among other things, prohibit U.S. nuclear cooperation agreements and related export licenses and transfers of materials, services and goods with a country that is assisting the nuclear program of Iran, North Korea, or Syria, or is transferring advanced conventional weapons to such countries.

- **S. 1048, The Iran, North Korea, and Syria Sanctions Consolidation Act of 2011**—Amends the Iran, North Korea, and Syria Nonproliferation Act to include in the scope of such act a person that (1) acquired materials mined or extracted within North Korea's territory or control; or (2) provided shipping services for the transportation of goods to or from Iran, North Korea, or Syria relating to such countries' weapons of mass destruction programs, support for acts of international terrorism, or human rights abuses. Excludes from such provisions shipping services for emergency or humanitarian purposes.

- **S. 1472, The Syria Sanctions Act of 2011**—Denies companies that conduct business in Syria’s energy sector (investment, oil purchases, and sale of gasoline) access to U.S. financial institutions and requires federal contractors to certify that they are not engaged in sanctionable activity.

**Syria’s Economy Under Strain**

Though more robust Western sanctions on Syria have only recently been enacted, early reports indicate that the Syrian economy and national budget are suffering due to a drop in oil exports
resulting from sanctions, months of domestic unrest and the loss of international tourism
revenues, and new social and military spending aimed at quelling public anger. In September, the
International Monetary Fund indicated that it expects Syria’s economy to contract by 2% this
year.

The Syrian government has responded somewhat erratically to its negative economic outlook. In
order to preserve hard currency, the government initially banned almost all imported goods,
leading to price hikes, inflation, and shortages of many basic items. After 12 days, it rescinded the
ban, concerned about angering the private sector in Damaseus and Aleppo, which has largely
been supportive of the regime. The Central Bank of Syria says that it has $18 billion in foreign
exchange reserves and can cover import costs for up to a year. In addition, in late September the
Syrian government surprised many when it announced a massive increase in domestic spending,
predicately at the same time as new international sanctions were taking effect. The government
approved a 58% increase in the state budget, bringing it to $26.5 billion according to official
estimates. Food and energy subsidies account for 30% of the total budget.

Sanctions and Syria’s Oil and Gas Sector

With the loss of European markets due to an oil export ban, Western countries have denied Syria
a major source of revenue and hard currency (23%-30% of total government revenue or $4 billion
a year). Before sanctions, the main buyers of approximately 150,000 barrels per day (bpd) of
exported Syrian oil were Italy, Germany, France, the Netherlands, Austria, Spain and Turkey.
Syria produces about 380,000 bpd total. Existing foreign producers inside Syria are still able to
maintain operations, though many foreign companies, including Gulsands Petroleum (UK),
Royal Dutch Shell, Total (France), CNPC (China), and ONGC (India), have cut back production
because alternative buyers have yet to surface and Syria has limited domestic refining and storage
capacity. Western countries also have banned new investment in Syria’s oil and gas sector. These
include Canada, which announced a new investment ban in October. The Calgary-based Suncor
Energy Inc. already is an existing partner with Syria’s General Petroleum Corp in a $1.2 billion
Ebla natural gas project. In mid October, another Canadian company, Mena Hydrocarbons Inc.,
said that it had suspended drilling in Syria due to political turmoil in the country. Sanctions also
are having an impact on other aspects of Syria’s energy sector, including financing and shipping.
According to one oil products trader based in the Middle East, “I don’t do Syria anymore.
Sanctions appeared tougher, so I gave up.... The problem is getting a bank to finance it and a ship
owner to go there.”

Since new sanctions were enacted, many analysts have speculated about whether new investors
and foreign markets would arise for Syrian oil exports, albeit at lower prices due to sanctions and
increased shipping costs. Some experts believe that both India and China are in a position to
refine the heavy crude that Syria exports, and some reports suggest that India’s ONGC is
considering importing oil it currently produces in Syria to India, instead of shutting down its field
operations. According to one energy expert, “There is almost certainly someone who will buy
it.... In the past there have been trading companies that would launder oil for Iraq or Iran, for
example. Some countries will buy gasoline from Caribbean refiners without knowing the origin of
the oil.” However, others assert that some Asian buyers would find the prospect of

purchasing Syrian oil too risky. According to one report, "As far as Chinese and the Indians are concerned, they could of course try to buy some volumes. But the economics don't make any sense for them and volumes are too small to take the risks."12

Options and Uncertainty

At present, all eyes are fixed on the Syrian government and opposition's possible responses to the Arab League ceasefire and dialogue proposal. Fighting in and around the city of Homs appears to signal the Asad government's determination to quell resistance with force, and many in the region and internationally are interpreting the siege of Homs as a rejection of the Arab League agreement. Should the government follow through on its commitments to withdraw military forces from cities and reengage in dialogue with opposition, prolonged violence and potential sectarian escalation may be avoided. If opposition forces halt attacks on government personnel and are able to engage in dialogue with the government in a unified fashion, then prospects for a smoother transition to more open political competition could improve.

It appears unlikely that international diplomacy focused on a new round of Security Council-backed sanctions or the possible referral of the situation in Syria to the International Criminal Court (ICC) will resume in earnest until the response of both sides to the Arab League initiative becomes clearer. Russia and China appear adamantly that further sanctions targeting the Syrian government are unwarranted and argue that the international community should not overlook the use of force by Syrian opposition groups. The Security Council's response to the Libyan conflict revived a broad international debate over the effect of referrals to the ICC on the decisions of indicted leaders and officials facing calls for their resignation. Intransigence by the Asad government and disunity among Syrian opposition forces could alter regional and global policy calculations on these issues.

President Asad has taken a number of opportunities recently to warn of a regional "earthquake" and prolonged, destabilizing chaos in the event of intervention or the fall of his government. While these warnings have an obvious self-serving purpose, they mirror concerns being expressed by many observers and officials in the region who fear that the types of complications now on display in Libya could have far more dire consequences if they emerge in the more volatile context of the eastern Mediterranean.

Appendix. Previous U.S. Sanctions and Legislation

The following section provides background on U.S. sanctions against Syria. It predates the nation-wide unrest that began in March 2011. For recent information on U.S. sanctions, please see, Table 1 above.

Overview

Syria remains a U.S.-designated State Sponsor of Terrorism and is therefore subject to a number of U.S. sanctions. Syria was placed on the State Department’s State Sponsors of Terrorism List in 1979. Moreover, between 2003 and 2006 Congress passed legislation and President Bush issued new executive orders that expanded U.S. sanctions on Syria. At present, a variety of legislative provisions and executive directives prohibit U.S. aid to Syria and restrict bilateral trade. Principal examples follow.

General Sanctions Applicable to Syria

The International Security Assistance and Arms Export Control Act of 1976 [P.L. 94-329]. Section 303 of this act [90 Stat. 753-754] required termination of foreign assistance to countries that aid or abet international terrorism. This provision was incorporated into the Foreign Assistance Act of 1961 as Section 620A [22 USC 2371]. (Syria was not affected by this ban until 1979, as explained below.)

The International Emergency Economic Powers Act of 1977 [Title II of P.L. 95-223 (codified at 50 U.S.C. §1701 et seq.)]. Under the International Emergency Economic Powers Act (IEEPA), the President has broad powers pursuant to a declaration of a national emergency with respect to a threat “which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.” These powers include the ability to seize foreign assets under U.S. jurisdiction, to prohibit any transactions in foreign exchange, to prohibit payments between financial institutions involving foreign currency, and to prohibit the import or export of foreign currency.

The Export Administration Act of 1979 [P.L. 96-72]. Section 6(i) of this act [93 Stat. 515] required the Secretary of Commerce and the Secretary of State to notify Congress before licensing export of goods or technology valued at more than $7 million to countries determined to have supported acts of international terrorism. (Amendments adopted in 1985 and 1986 relettered Section 6(i) as 6(j) and lowered the threshold for notification from $7 million to $1 million.)

A by-product of these two laws was the so-called state sponsors of terrorism list. This list is prepared annually by the State Department in accordance with Section 6(j) of the Export

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13 Because of a number of legal restrictions and U.S. sanctions, many resulting from Syria’s designation as a country supportive of international terrorism, Syria is no longer eligible to receive U.S. foreign assistance. Between 1950 and 1981, the United States provided a total of $627.4 million in aid to Syria: $34.0 million in development assistance, $438.0 million in economic support, and $155.4 million in food assistance. Most of this aid was provided during a brief warming trend in bilateral relations between 1974 and 1979. Significant projects funded under U.S. aid included water supply, irrigation, rural roads and electrification, and health and agricultural research. No aid has been provided to Syria since 1981, when the last aid programs were closed out.
Administration Act. The list identifies those countries that repeatedly have provided support for acts of international terrorism. Syria has appeared on this list ever since it was first prepared in 1979; it appears most recently in the State Department’s annual publication Country Reports on Terrorism, 2009, issued on August 5, 2010. Syria’s inclusion on this list in 1979 triggered the above-mentioned aid sanctions under P.L. 94-329 and trade restrictions under P.L. 96-72.

Omnibus Diplomatic Security and Antiterrorism Act of 1986 [P.L. 99-399]. Section 509(a) of this act [100 Stat. 833] amended Section 40 of the Arms Export Control Act to prohibit export of items on the munitions list to countries determined to be supportive of international terrorism, thus banning any U.S. military equipment sales to Syria. (This ban was reaffirmed by the Anti-Terrorism and Arms Export Amendments Act of 1989—see below.) Also, 10 U.S.C. 2249a bans obligation of U.S. Defense Department funds for assistance to countries on the terrorism list.

Omnibus Budget Reconciliation Act of 1986 [P.L. 99-509]. Section 8041(a) of this act [100 Stat. 1962] amended the Internal Revenue Code of 1954 to deny foreign tax credits on income or war profits from countries identified by the Secretary of State as supporting international terrorism. [26 USC 901(j)]. The President was given authority to waive this provision under Section 601 of the Trade and Development Act of 2000 (P.L. 106-200, May 18, 2000).

The Anti-Terrorism and Arms Export Control Amendments Act of 1989 [P.L. 101-222]. Section 4 amended Section 6(j) of the Export Administration Act to impose a congressional notification and licensing requirement for export of goods or technology, irrespective of dollar value, to countries on the terrorism list, if such exports could contribute to their military capability or enhance their ability to support terrorism.

Section 4 also prescribes conditions for removing a country from the terrorism list: prior notification by the President to the Speaker of the House of Representatives and the chairmen of two specified committees of the Senate. In conjunction with the requisite notification, the President must certify that the country has met several conditions that clearly indicate it is no longer involved in supporting terrorist activity. (In some cases, certification must be provided 45 days in advance of removal of a country from the terrorist list).

The Anti-Economic Discrimination Act of 1994 [Part C, P.L. 103-236, the Foreign Relations Authorization Act, FY1994-1995]. Section 564(a) bans the sale or lease of U.S. defense articles and services to any country that questions U.S. firms about their compliance with the Arab boycott of Israel. Section 564(b) contains provisions for a presidential waiver, but no such waiver has been exercised in Syria’s case. Again, this provision is moot in Syria’s case because of other prohibitions already in effect.

The Antiterrorism and Effective Death Penalty Act of 1996 [P.L. 104-132]. This act requires the President to withhold aid to third countries that provide assistance (Section 325) or lethal military equipment (Section 326) to countries on the terrorism list, but allows the President to waive this provision on grounds of national interest. A similar provision banning aid to third countries that sell lethal equipment to countries on the terrorism list is contained in Section 549 of the Foreign Operations Appropriations Act for FY2001 (H.R. 5526, passed by reference in H.R. 4811, which was signed by President Clinton as P.L. 106-429 on November 6, 2000).

Also, Section 321 of P.L. 104-132 makes it a criminal offense for U.S. persons (citizens or resident aliens) to engage in financial transactions with governments of countries on the terrorism list, except as provided in regulations issued by the Department of the Treasury in consultation.
with the Secretary of State. In the case of Syria, the implementing regulation prohibits such transactions "with respect to which the United States person knows or has reasonable cause to believe that the financial transaction poses a risk of furthering terrorist acts in the United States." (31 CFR 596, published in the Federal Register August 23, 1996, p. 43462.) In the fall of 1996, the then chairman of the House International Relations Committee reportedly protested to then President Clinton about the Treasury Department's implementing regulation, which he described as a "special loophole" for Syria.

In addition to the general sanctions listed above, specific provisions in foreign assistance appropriations legislation enacted since 1981 have barred Syria by name from receiving U.S. aid. The most recent ban appears in Section 7007 of P.L. 111-117, the Consolidated Appropriations Act, 2010, which states that "None of the funds appropriated or otherwise made available pursuant to Titles III through VI of this Act shall be obligated or expended to finance directly any assistance or reparations for the governments of Cuba, North Korea, Iran, or Syria: Provided, That for purposes of this section, the prohibition on obligations or expenditures shall include direct loans, credits, insurance and guarantees of the Export-Import Bank or its agents."

Section 307 of the Foreign Assistance Act of 1961, amended by Section 431 of the Foreign Relations Authorization Act for FY1994-1995 (P.L. 103-236, April 30, 1994), requires the United States to withhold a proportionate share of contributions to international organizations for programs that benefit eight specified countries or entities, including Syria.

The Iran Nonproliferation Act of 2000, P.L. 106-178, was amended by P.L. 109-112 to make its provisions applicable to Syria as well as Iran. The amended act, known as the Iran and Syria Nonproliferation Act, requires the President to submit semi-annual reports to designated congressional committees, identifying any persons involved in arms transfers to or from Iran or Syria; also, the act authorizes the President to impose various sanctions against such individuals. On October 13, 2006, President Bush signed P.L. 109-353 which expanded the scope of the original law by adding North Korea to its provisions, thereby renaming the law the Iran, North Korea, and Syria Nonproliferation Act (or INKNSA for short). The list of Syrian entities designated under INKNSA includes Army Supply Bureau (2008), Syrian Navy (2009), Syrian Air Force (2009), and Ministry of Defense (2008). On May 24, 2011, the State Department designated the Industrial Establishment of Defense and Scientific Studies and Research Center (SSRC) under INKNSA.

**Specific Sanctions Against Syria**

Specific U.S. sanctions levied against Syria fall into three main categories: (1) sanctions resulting from the passage of the 2003 Syria Accountability and Lebanese Sovereignty Act (SALSA) that, among other things, prohibit most U.S. exports to Syria; (2) sanctions imposed by executive order from the President that specifically deny certain Syrian citizens and entities access to the U.S. financial system due to their participation in proliferation of weapons of mass destruction, association with Al Qaeda, the Taliban, or Osama bin Laden; or destabilizing activities in Iraq and Lebanon; and (3) sanctions resulting from the USA Patriot Act levied specifically against the Commercial Bank of Syria in 2006.

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The 2003 Syria Accountability Act

On December 12, 2003, President Bush signed H.R. 1828, the Syria Accountability and Lebanese Sovereignty Restoration Act into law, as P.L. 108-175. This law requires the President to impose penalties on Syria unless it ceases support for international terrorist groups, ends its occupation of Lebanon, ceases the development of weapons of mass destruction (WMD), and has ceased supporting or facilitating terrorist activity in Iraq (Section 5(a) and 5(d)). Sanctions include bans on the export of military items (already banned under other legislation, see above\textsuperscript{15}) and of dual use items (items with both civil and military applications) to Syria (Section 5(a)(1)). In addition, the President is required to impose two or more sanctions from a menu of six:

- a ban on all exports to Syria except food and medicine;
- a ban on U.S. businesses operating or investing in Syria;
- a ban on landing in or overflight of the United States by Syrian aircraft;
- reduction of diplomatic contacts with Syria;
- restrictions on travel by Syrian diplomats in the United States; and
- blocking of transactions in Syrian property (Section 5(a)(2)).

Implementation

On May 11, 2004, President Bush issued Executive Order 13338, implementing the provisions of P.L. 108-175, including the bans on munitions and dual use items (Section 5(a)(1)) and two sanctions from the menu of six listed in Section 5(a)(2). The two sanctions he chose were the ban on exports to Syria other than food and medicine (Section 5(a)(2)(A) and the ban on Syrian aircraft landing in or overflying the United States (Section 5(a)(2)(D). In issuing his executive order, the President stated that Syria has failed to take significant, concrete steps to address the concerns that led to the enactment of the Syria Accountability Act. The President also imposed two additional sanctions based on other legislation.

- Under Section 311 of the USA PATRIOT Act, he instructed the Treasury Department to prepare a rule requiring U.S. financial institutions to sever correspondent accounts with the Commercial Bank of Syria because of money laundering concerns.
- Under the International Emergency Economic Powers Act (IEEPA), he issued instructions to freeze assets of certain Syrian individuals and government entities involved in supporting policies inimical to the United States.

Waivers

In the executive order and in an accompanying letter to Congress, President Bush cited the waiver authority contained in Section 5(b) of the Syria Accountability Act and stated that he wished to issue the following waivers on grounds of national security:

\textsuperscript{15} Syria's inclusion on the State Sponsors of Terrorism List as well as SALSA requires the President to restrict the export of any items to Syria that appear on the U.S. Munitions List (weapons, ammunition) or Commerce Control List (dual-use items).
Regarding Section 5(a)(1) and 5(a)(2)(A): The following exports are permitted: products in support of activities of the U.S. government; medicines otherwise banned because of potential dual use; aircraft parts necessary for flight safety; informational materials; telecommunications equipment to promote free flow of information; certain software and technology; products in support of U.N. operations; and certain exports of a temporary nature.\textsuperscript{16}

Regarding Section 5(a)(2)(D): The following operations are permitted: takeoff/landing of Syrian aircraft chartered to transport Syrian officials on official business to the United States; takeoff/landing for non-trafficking purposes; takeoff/landing associated with an emergency; and overflights of U.S. territory.

Targeted Financial Sanctions

Since the initial implementation of the Syria Accountability Act (in Executive Order 13338 dated May 2004), the President has repeatedly taken action to sanction individual members of the Asad regime's inner circle.\textsuperscript{17} E.O. 13338 declared a national emergency with respect to Syria and authorized the Secretary of the Treasury to block the property of individual Syrians. Based on Section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), the President has annually extended his authority to block the property of individual Syrians (latest on April 29, 2011). When issuing each extension, the President has noted that the actions and policies of the government of Syria continued to pose an unusual and extraordinary threat.\textsuperscript{18}

The following individuals and entities have been targeted by the U.S. Treasury Department (Office of Foreign Assets Control or OFAC):

- On June 30, 2005, the U.S. Treasury Department designated two senior Syrian officials involved in Lebanon affairs, Syria’s then-Interior Minister and its head of military intelligence in Lebanon (respectively, the late General Kanaan and General Ghazali), as Specially Designated Nationals, thereby freezing any assets they may have in the United States and banning any U.S. persons, including U.S. financial institutions outside of the United States, from conducting transactions with them.\textsuperscript{19} Kanaan allegedly committed suicide in October 2005, though some have speculated that he may have been murdered.

- On January 18, 2006, U.S. Treasury Department took the same actions against the President’s brother-in-law, Assef Shawkat, chief of military intelligence.

\textsuperscript{16} According to U.S. regulations, any product that contains more than 10% de minimis U.S.-origin content, regardless of where it is made, is not allowed to be exported to Syria. For U.S. commercial licensing prohibitions on exports and re-exports to Syria, see 15 C.F.R. pt. 736 Supp. No. 1. The Department of Commerce reviews license applications on a case-by-case basis for exports or re-exports to Syria under a general policy of denial. For a description of items that do not require export licenses, see, Bureau of Industry and Security (BIS), U.S. Department of Commerce, Implementation of the Syria Accountability Act, available at http://www.bis.doc.gov/licensing/syriaimplementationmay14_04.htm.

\textsuperscript{17} According to the original text of E.O. 13338, the President's authority to declare a national emergency authorizing the blocking of property of certain persons and prohibiting the exportation or re-exportation of certain goods to Syria is based on "The Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), (NEA), the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, P.L. 108-175 (SAA), and Section 301 of Title 3, United States Code," available at http://www.treas.gov/offices/enforcement/cfic/legal/co/13338.pdf.

\textsuperscript{18} The President last extended the State of Emergency on April 29, 2011.

• On April 26, 2006, President Bush issued Executive Order 13399 that authorized the secretary of the Treasury to freeze the U.S.-based assets of anyone found to be involved in the February 2005 assassination of former Lebanese Prime Minister Rafiq Hariri. It also affects anyone involved in bombings or assassinations in Lebanon since October 2004, or anyone hindering the international investigation into the Hariri assassination. The order allows the United States to comply with UNSCR 1636, which calls on all states to freeze the assets of those persons designated by the investigating commission or the government of Lebanon to be involved in the Hariri assassination.

• On August 15, 2006, the U.S. Treasury Department froze assets of two other senior Syrian officers: Major General Hisham Ikhtiyar, for allegedly contributing to Syria's support of foreign terrorist organizations including Hezbollah; and Brigadier General Jama'a Jama'a, for allegedly playing a central part in Syria's intelligence operations in Lebanon during the Syrian occupation.

• On January 4, 2007, the U.S. Treasury Department designated three Syrian entities, the Syrian Higher Institute of Applied Science and Technology, the Electronics Institute, and the National Standards and Calibration Laboratory, as weapons proliferators under an executive order (E.O.13382) based on the authority vested to the President under IEEPA. The three state-sponsored institutions are divisions of Syria's Scientific Studies and Research Center, which was designated by President Bush as a weapons proliferator in June 2005 for research on the development of biological and chemical weapons.

• On August 1, 2007, the President issued E.O. 13441 blocking the property of persons undermining the sovereignty of Lebanon or its democratic processes and institutions. On November 5, 2007, the U.S. Treasury Department designated four individuals reportedly affiliated with the Syrian regime's efforts to reassert Syrian control over the Lebanese political system, including Assaad Halim Hardan, Wi'am Wahhab and Hafiz Makhluf (under the authority of E.O.13441) and Muhammad Nasif Khayrbik (under the authority of E.O.13338).

• On February 13, 2008, President Bush issued another Order (E.O.13460) blocking the property of senior Syrian officials. According to the U.S. Treasury Department, the order “targets individuals and entities determined to be responsible for or who have benefitted from the public corruption of senior officials of the Syrian regime. The order also revises a provision in Executive Order 13338 to block the property of Syrian officials who have undermined U.S. and international efforts to stabilize Iraq.” One week later, under the authority of

22 On July 29, 2010, President Obama extended that National Emergency with respect to Lebanon for another year, stating that "While there have been some recent positive developments in the Syrian-Lebanese relationship, continuing arms transfers to Hezbollah that include increasingly sophisticated weapons systems serve to undermine Lebanese sovereignty, contribute to political and economic instability in Lebanon, and continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." See, Notice of July 29, 2010—Continuation of the National Emergency With Respect to the Actions of Certain Persons to Undermine the Sovereignty of Lebanon or Its Democratic Processes and Institutions, Federal Register, Title 3—The President, [Page 45045).
24 A previous executive order, E.O. 13315, blocks property of former Iraqi President Saddam Hussein and members of (continued...)
E.O.13460, the U.S. Treasury Department froze the U.S. assets and restricted the financial transactions of Rami Makhluf, the 38-year-old cousin of President Bashar al-Asad. Makhluf is a powerful Syrian businessman who serves as an interlocutor between foreign investors and Syrian companies. According to one report, “Since a military coup in 1969, the Asads have controlled politics while the Makhlufs have been big business players. The tradition continues in the next generation, with Bashar al-Assad (sic) as president and Rami Makhluf as a leading force in business.”25 Makhluf is a major stakeholder in Syriatel, the country’s largest mobile phone operator. In 2008, the Turkish company Turkcell was in talks to purchase Syriatel, but, according to Reuters, negotiations over the sale were taking longer than expected because some Turkcell executives have U.S. passports.26 Then, in August 2008, Turkcell said it had frozen its plans for a venture in Syria amid U.S. opposition to the project. Makhluf’s holding company, Cham, is involved in several other large deals, including an agreement with Syria’s state airline and a Kuwaiti company to set up a new airline. Several months ago, Dubai-based real-estate company Emaar Properties announced it had agreed to set up a $100 million venture with Cham to develop real estate projects in Syria. Makhluf also is a minority shareholder in Gulfsands Petroleum,27 a publicly traded, United Kingdom-incorporated energy company. According to the Wall Street Journal, a Gulfsands executive said the Treasury Department’s sanctioning of Makhluf would have no impact on the company pursuing its partnership with Cham.28

Sanctions Against the Commercial Bank of Syria

As previously mentioned, under Section 311 of the USA PATRIOT Act, President Bush instructed the Treasury Department in 2004 to prepare a rule requiring U.S. financial institutions to sever correspondent accounts with the Commercial Bank of Syria because of money laundering concerns. In 2006, the Treasury Department issued a final ruling that imposes a special measure against the Commercial Bank of Syria as a financial institution of primary money laundering concern. It bars U.S. banks and their overseas subsidiaries from maintaining a correspondent account with the Commercial Bank of Syria, and it also requires banks to conduct due diligence that ensures the Commercial Bank of Syria is not circumventing sanctions through its business dealings with them.29

(...continued)

his former regime. On June 9, 2005, the Treasury Department blocked property and interests of a Syrian company, SES International Corp., and two of its officials under the authority of E.O.13315.

26 “Turkcell Continues Talks on Syriatel Stake,” Reuters, April 14, 2008.
27 Gulfsands’ chief executive and largest shareholder, John Dorrier, is an American citizen, and the company has offices in Houston.
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Iran Sanctions

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Summary

There is broad international support for imposing progressively strict economic sanctions on Iran to try to compel it to verifiably confine its nuclear program to purely peaceful uses. Many U.S. and international officials appear to agree that the sanctions have not, to date, hurt Iran’s economy to the point at which the Iranian leadership feels pressured to accommodate core Western goals on Iran’s nuclear program. However, as of September 2011, Iran’s leaders have stated publicly that sanctions are hurting Iran and they have stated interest in new proposals that could form the basis of revived nuclear talks, a development that could change assessments of the effect of sanctions.

Whether or not core goals have yet been accomplished, the United States and its allies appear to agree that sanctions might yet succeed and that pressure should be added to further weaken Iran’s energy sector and isolate Iran from the international financial system. The energy sector provides nearly 70% of government revenues. Iran’s large trading community needs financing to buy goods from the West and sell them inside Iran. There have been a stream of announcements by major international firms since early 2010 that they are exiting or declining to undertake further work in the Iranian market, particularly the energy sector, taking with them often irreplaceable expertise. Partly as a result, Iran’s oil production has remained relatively steady at about 4.1 million barrels per day, defying Iranian efforts to increase production, and production could fall by another 25% over the next five years. However, Iran now has small amounts of natural gas exports; it had none at all before Iran opened its fields to foreign investment in 1996. Several countries, particularly India, have held back or delayed billions of dollars in oil payments for Iran because bank payments mechanisms have been shut down by sanctions. However, Iran’s overall ability to limit the effects of sanctions has been aided by relatively high oil prices in 2011.

What has generated U.S. optimism about the use of sanctions has been the broadening of international support for and compliance with them. Using the authorities of U.N. Security Council Resolution 1929, adopted June 9, 2010, measures adopted since mid-2010 by the United Nations Security Council, the European Union, and several other countries target those sectors. These national measures complement the numerous U.S. laws and regulations that have long sought to try to pressure Iran, particularly the Iran Sanctions Act (ISA)—a 1996 U.S. law that mandated U.S. penalties against foreign companies that invest in Iran’s energy sector. In the 111th Congress, the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA, P.L. 111-195) expanded ISA to sanction Iran’s ability to obtain or make gasoline, for which Iran depends heavily on imports. International sales to Iran of gasoline fell significantly subsequently. CISADA also included measures further restricting the already limited amount of U.S. trade with Iran, and to promote the cause of the domestic opposition in Iran by sanctioning Iranian officials who are human rights abusers and facilitating the democracy movement’s access to information technology.

In light of U.S. revelations in October 2011 of a purported Iranian plot to assassinate the Saudi Ambassador to the United States, some are calling for additional U.S. and international sanctions to reinforce those imposed in 2010. In the 112th Congress, legislation, such as S. 1048 and H.R. 1905, would enhance both the economic sanctions and human rights-related provisions of CISADA and other laws. Some want to see sanctions imposed on Iran’s Central Bank, or even a broad or partial embargo on Iran’s sale of oil, to reinforce the sanctions effects discussed above. For a broader analysis of policy on Iran, see CRS Report RL32048, Iran: U.S. Concerns and Policy Responses, by Kenneth Katzman.
Contents

Overview ........................................................................................................................................... 1
Sanctions Targeting Iran's Energy Sector: The Iran Sanctions Act (ISA) and CISADA
Amendments .................................................................................................................................. 1
  Legislative History and Provisions ............................................................................................... 2
  Key "Triggers" .............................................................................................................................. 2
  Mandate and Time Frame to Investigate Violations .................................................................... 4
  Available Sanctions Under ISA ..................................................................................................... 5
  Waivers, Exemptions, and Termination Authority ....................................................................... 6
  Termination Requirements and Sunset Provisions ........................................................................ 7
Interpretations and Implementation ................................................................................................. 7
  ISA Sanctions Determinations: September 2010 to the Present .................................................... 8
  Non-Application to Crude Oil or Natural Gas Purchases from Iran or to Sales of
    Most Energy Equipment or Services ......................................................................................... 10
  Application to Energy Pipelines .................................................................................................... 12
  Application to Iranian Firms or the Revolutionary Guard ............................................................ 14
  Application to Liquefied Natural Gas ............................................................................................. 15
Ban on U.S. Trade and Investment With Iran ................................................................................... 24
  Non-Application to U.S. Imports of Products With Iranian Content .......................................... 26
  Application to Foreign Subsidiaries of U.S. Firms ....................................................................... 26
Subsidiaries Exiting Iran .................................................................................................................. 27
Banking and Finance: Treasury Department Financial Measures and CISADA ............................... 29
  Banking Provisions of CISADA .................................................................................................... 29
Sanctions .......................................................................................................................................... 30
Terrorism List Designation-Related Sanctions ............................................................................... 30
  Executive Order 13224 .................................................................................................................. 31
Proliferation-Related U.S. Sanctions ................................................................................................. 32
  Iran-Iraq Arms Nonproliferation Act .............................................................................................. 32
  Iran-North Korea-Syria Nonproliferation Act ............................................................................. 32
  Executive Order 13382 ................................................................................................................. 33
Foreign Aid Restrictions for Suppliers of Iran ................................................................................ 33
U.S. Efforts to Promote Divestment ................................................................................................. 33
U.S. Sanctions Intended to Support Democratic Change in Iran or Alter Iran's Foreign
Policy ............................................................................................................................................ 33
  Expanding Internet and Communications Freedoms .................................................................. 34
  Measures to Sanction Human Rights Abuses and Promote the Opposition ......................... 35
    Executive Order 13438 and 13572: Sanctioning Iranian Involvement in the
    Region ........................................................................................................................................ 35
    Separate Visa Ban ....................................................................................................................... 36
Blocked Iranian Property and Assets .............................................................................................. 36
U.N. Sanctions ................................................................................................................................ 36
International Implementation and Compliance .............................................................................. 38
  European Union and Other Western States ................................................................................. 38
  Japan and South Korea ............................................................................................................... 39
India/Asian Clearing Union ................................................................. 39
China, Russia, and Others ................................................................. 40
Contrast With Previous Periods ......................................................... 40
World Bank Loans ........................................................................ 41

Effects of Sanctions on Iran .............................................................. 45
  Effect on Nuclear Negotiations ....................................................... 46
  Counter-Proliferation Effects ......................................................... 46
  General Political Effects ............................................................... 47
  Economic Effects ........................................................................ 47
    Foreign Companies Exiting the Iran Market ............................... 48
    Foreign Firms Reportedly Remaining in the Iran Market .......... 49
    Subsidy Phase-Out Issue ........................................................... 49
  Effect on the Energy Sector .......................................................... 50
    Concerns About “Backfill” ......................................................... 51
    Effect on Gasoline Availability and Importation ..................... 56

Additional Sanctions: Possible Legislation, Administrative, and Multilateral Action .................................. 58
  Possible Additional Sanctions ....................................................... 61

Tables

Table 1. Major Energy Buyers From Iran (2010) ........................................ 12
Table 2. Comparison of Major Versions of H.R. 2194/P.L. 111-195 ................. 15
Table 3. Summary of Provisions of U.N. Resolutions on Iran Nuclear Program (1737,
  1747, 1803, and 1929) ................................................................. 38
Table 4. Points of Comparison Between U.S., U.N., and EU Sanctions Against Iran ........... 42
Table 5. Post-1999 Major Investments/Major Development Projects
  in Iran’s Energy Sector ................................................................. 52
Table 6. Entities Sanctioned Under U.N. Resolutions and
  U.S. Laws and Executive Orders .................................................. 64

Contacts

Author Contact Information ............................................................... 72
Overview

The Obama Administration’s policy approach toward Iran has contrasted with the Bush Administration’s by attempting to couple the imposition of sanctions to a consistent, direct U.S. effort to negotiate with Iran on the nuclear issue. However, with negotiations yielding no firm Iranian agreement to compromise, since early 2010 the Administration and Congress have focused on achieving adoption of and implementing additional U.S., U.N., and allied country sanctions whose cumulative effect could compel Iran to accept a nuclear bargain.

U.N. and worldwide bilateral sanctions on Iran (the latest of which are imposed by Resolution 1929, adopted June 9, 2010) are a relatively recent (post-2006) development. U.S. sanctions, on the other hand, have been a major feature of U.S. Iran policy since Iran’s 1979 Islamic revolution. Many of the U.S. sanctions overlap each other as well as the several U.N. sanctions now in place. Some U.S. sanctions, particularly the 1996 Iran Sanctions Act (ISA), caused differences of opinion between the United States and its European allies because it mandates U.S. imposition of sanctions on foreign firms. Successive Administrations have sought to ensure that U.S. sanctions do not hamper cooperation with key international partners whose support is needed to adopt stricter international sanctions.

Sanctions Targeting Iran’s Energy Sector: The Iran Sanctions Act (ISA) and CISADA Amendments

The Iran Sanctions Act (ISA) is one of many U.S. sanctions in place against Iran. Since its first enactment, it has attracted substantial attention because it is an “extra-territorial sanction”—it authorizes U.S. penalties against foreign firms, many of which are incorporated in countries that are U.S. allies. (U.S. firms are barred by executive orders, discussed below, from dealing with Iran.) When it was first enacted in 1996, Congress and the Clinton Administration saw ISA as a potential mechanism to compel U.S. allies to join the United States in enacting trade sanctions against Iran. American firms are separately restricted from trading with or investing in Iran under separate U.S. executive measures, as discussed below. As noted, a law enacted in the 111th Congress (CISADA, P.L. 111-195) amended ISA to try to curtail additional types of activity, such as selling gasoline and gasoline production-related equipment and services to Iran, and to restrict international banking relationships with Iran (among many provisions).

Originally called the Iran and Libya Sanctions Act (ILSA), ISA was enacted to try to deny Iran the resources to further its nuclear program and to support terrorist organizations such as Hizbollah, Hamas, and Palestine Islamic Jihad. Iran’s petroleum sector generates about 20% of Iran’s GDP (which is about $870 billion), 80% of its exports, and 70% of its government revenue. Iran’s oil sector is as old as the petroleum industry itself (early 20th century), and Iran’s onshore oil fields and oil industry infrastructure are far past peak production and in need of substantial investment. Its large natural gas resources (940 trillion cubic feet, exceeded only by Russia) were virtually undeveloped when ISA was first enacted. Iran has 136.3 billion barrels of proven oil reserves, the third-largest after Saudi Arabia and Canada.
Legislative History and Provisions

The opportunity for the United States to try to harm Iran’s energy sector came in November 1995, when Iran opened the sector to foreign investment. To accommodate its insistence on retaining control of its national resources, Iran used a “buy-back” investment program in which foreign firms gradually recoup their investments as oil and gas is discovered and then produced. With input from the Administration, on September 8, 1995, Senator Alfonse D’Amato introduced the “Iran Foreign Oil Sanctions Act” to sanction foreign firms’ exports to Iran of energy technology. A revised version instead sanctioning investment in Iran’s energy sector passed the Senate on December 18, 1995 (voice vote). On December 20, 1995, the Senate passed a version applying the provisions to Libya, which was refusing to yield for trial the two intelligence agents suspected in the December 21, 1988, bombing of Pan Am 103. The House passed H.R. 3107, on June 19, 1996 (415-0), and then concurred on a Senate version adopted on July 16, 1996 (unanimous consent). The Iran and Libya Sanctions Act was signed on August 5, 1996 (P.L. 104-172).

Key “Triggers”

ISA consists of a number of “triggers” - transactions with Iran that would be considered violations of ISA and could cause a firm or entity to be sanctioned under ISA’s provisions. When triggered, ISA provides a number of different sanctions that the President could impose that would harm a foreign firm’s business opportunities in the United States. ISA does not, and probably could not practically, compel any foreign government to act against one of its firms.

Original Triggers

ISA primarily targets foreign firms, because American firms are already prohibited from investing in Iran under the 1995 trade and investment ban discussed earlier. The original version of ISA requires the President to sanction companies (entities, persons) that make an “investment” of more than $20 million in one year in Iran’s energy sector. The definition of “investment” in ISA (Section 14 (9)) includes not only equity and royalty arrangements (including additions to existing investment, as added by P.L. 107-24) but any contract that includes “responsibility for the development of petroleum resources” of Iran. CISADA did not alter this trigger but it did amend the definition of investment to include pipelines to or through Iran and contracts to lead the construction, upgrading, or expansions of energy projects. CISADA also eliminated the wording in the original version of ISA that specifically exempts from sanctions sales of energy-

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1 As amended by CISADA (P.L. 111-195), these definitions include pipelines to or through Iran, as well as contracts to lead the construction, upgrading, or expansions of energy projects. CISADA also changes the definition of investment to eliminate the exemption from sanctions for sales of energy-related equipment to Iran, if such sales are structured as investments or ongoing profit-earning ventures.

2 Under Section 4(d) of the original act, for Iran, the threshold dropped to $20 million, from $40 million, one year after enactment, when U.S. allies did not join a multilateral sanctions regime against Iran. However, P.L. 111-195 explicit sets the threshold investment level at $20 million. For Libya, the threshold was $40 million, and sanctionable activity included export to Libya of technology banned by Pan Am 103-related Security Council Resolutions 748 (March 31, 1992) and 883 (November 11, 1993).

3 The definition of energy sector had included oil and natural gas, but now, as a consequence of the enactment of P.L. 111-195, also includes liquefied natural gas (LNG), oil or LNG tankers, and products to make or transport pipelines that transport oil or LNG.
related equipment to Iran. However, to be sanctionable, such sales would need to be structured as investments or ongoing profit-earning ventures rather than simple sales transactions.

The Iran Freedom Support Act (P.L. 109-293) amended ISA to add a trigger: that sanctions should be imposed on entities that sell to Iran weapons of mass destruction (WMD) technology or “destabilizing numbers and types” of advanced conventional weapons.

Trigger Added by CISADA: Selling Gasoline and Related Equipment

ISA, as initially constituted, did not address Iran’s gasoline dependency because sales to Iran of gasoline were not sanctionable under ISA. Nor did the original version sanction the selling to Iran of equipment with which it can build or expand its refineries using its own construction capabilities. However, taking responsibility for constructing oil refineries or petrochemical plants in Iran did constitute sanctionable projects under the original version of ISA because ISA’s definition of investment includes “responsibility for the development of petroleum resources located in Iran.” (Table 5 provides some information on openly announced contracts to upgrade or refurbish Iranian oil refineries.) Nor did ISA clearly apply to Iranian investments in oil refineries in several other countries, such as Iranian investment to help build five oil refineries in Asia (China, Indonesia, Malaysia, and Singapore) and in Syria, reported in June 2007, would have constituted “investment” under ISA.

Many in the 111th Congress took exception to the limited of the original version of ISA, arguing that Iran was dependent on gasoline imports to meet about 40% of its gasoline needs. There have been a relatively limited group of major gasoline suppliers to Iran, and many in Congress believed that trying to stop such sales could put economic pressure on Iran’s leaders. The ideas that became the core of CISADA were introduced as legislation in the 110th and 111th Congresses. In the 110th Congress, H.R. 2880 would have made sales to Iran of refined petroleum resources a violation of ISA. In the 111th Congress, a few initiatives to sanction sales of gasoline to Iran were adopted prior to CSIDA. Using U.S. funds to fill the Strategic Petroleum Reserve with products from firms that sell over $1 million worth of gasoline to Iran is prevented by the FY2010 Energy and Water Appropriation (H.R. 3183, P.L. 111-85, signed October 28, 2009). A provision of the FY2010 consolidated appropriation (P.L. 111-117) would deny Ex-Im Bank credits to any firm that sells gasoline to Iran, provides equipment to Iran that it can use to expand its oil refinery capabilities, or performs gasoline production projects in Iran. These initiatives did deter some gasoline sales to Iran, including a decision in December 2008 by Reliance Industries Ltd. of India to at least temporarily cease new sales of refined gasoline to Iran (December 31, 2008). That decision came after several Members of Congress urged the Ex-Im Bank of the United States to suspend assistance to Reliance, on the grounds that it was assisting Iran’s economy with the gas sales. The Ex-Im Bank, in August 2008, had extended a total of $900 million in financing guarantees to Reliance to help it expand.

CISADA sought, first and foremost, to build on these legislative initiatives by amending ISA to make sanctionable sales to Iran (over specified threshold amounts) of gasoline and related aviation and other fuels, or transactions that would help Iran make or import gasoline. Fuel oil, a petroleum by-product which is reportedly being sold to Iran by exporters in the Kurdish region of Iraq, is not included in the definition of refined petroleum.

CISADA had its origins in several bills introduced in April 2009 (H.R. 2194, S. 908, H.R. 1208, and H.R. 1985) that would amend ISA to make sanctionable efforts by foreign firms to supply refined gasoline to Iran or to supply equipment to Iran that could be used by Iran to expand or
construct oil refineries. H.R. 2194 and S. 908 were both titled the Iran Refined Petroleum Sanctions Act of 2009 (IRPSA). H.R. 2194 passed the House on December 15, 2009, by a vote of 412-12, with four others voting “present” and six others not voting.

A bill in the Senate, the “Dodd-Shelby Comprehensive Iran Sanctions, Accountability, and Divestment Act,” (S. 2799), was reported to the full Senate by the Senate Banking Committee on November 19, 2009, and passed the Senate, by voice vote, on January 28, 2010. It was adopted by the Senate under unanimous consent as a substitute amendment to H.R. 2194 on March 11, 2010, setting up conference action on the two versions of H.R. 2194. The Senate bill contained very similar provisions of the Iran Refined Petroleum Sanctions Act, but, as discussed in Table 2, added provisions affecting U.S.-Iran trade and other issues.

A public meeting of the House-Senate conference, chaired by Representative Berman and Senator Dodd, was held on April 28, 2010. Obama Administration officials were said to be concerned by some provisions of H.R. 2194 because of the legislation’s potential to weaken allied unity on Iran. The Administration sought successfully to persuade Members to delay passage of until a new U.N. sanctions resolution was adopted—for fear that some P5+1 countries might refuse to support the U.N. resolution if there is a chance their firms would be sanctioned by a new U.S. law. The U.N. Resolution was adopted on June 9, 2010. A conference report on H.R. 2194 was agreed on June 22, 2010, and was submitted on June 23, 2010. On June 24, 2010, the Senate passed it 99-0, and the House passed it 408-8, with one voting “present.” President Obama welcomed the passage and signed it into law on July 1, 2010.

As widely predicted, and as shown in Table 2, the final version contained many of the extensive provisions of the Senate version, and some of the efforts to compel sanctions represented in the House version. Administration concerns about angering U.S. partner countries were addressed in the provisions for waivers, delayed mandatory investigations of violations, and for the “special rule” exempting from sanctions companies that promise to end their business in Iran. As was widely predicted, the conference report contains provisions to sanction Iranian human rights abusers, including denial of visas for their travel to the United States and freezing of their assets.

Those who supported CISADA said it would strengthen President Obama’s ability to obtain an agreement with Iran that might impose limitations on its nuclear program. It was argued that Iran’s dependence on gasoline imports could, at the very least, cause Iran’s government to have to spend more for such imports. Others, however, believed the Iranian government would have numerous ways to circumvent its effects, including rationing, reducing gasoline subsidies in an effort to reduce gasoline consumption; or offering premium prices to obscure gasoline suppliers. The effect on Iran’s supplies are discussed later in this report.

**Mandate and Time Frame to Investigate Violations**

In the original version of ISA, there was no firm requirement, and no time limit, for the Administration to investigate potential violations and determine that a firm has violated ISA’s provisions. Some might argue that the CISADA amendments still do not set a binding determination deadline, although the parameters are narrowed significantly.

In restricting the Administration’s ability to choose not to act on information about potential violations, CISADA, Section 102(g)(5), makes mandatory that the Administration begin an investigation of potential ISA violations when there is “credible information” about a potential violation. The same section of CISADA makes mandatory the 180-day time limit for a
determination of violation (with the exception that the mandatory investigations and time limit go into effect one year after enactment (as of July 1, 2011), with respect to gasoline related sales to Iran). Under Section 102(h)(5), the mandate to investigate gasoline related sales can be delayed an additional 180 days if an Administration report, submitted to Congress by June 1, 2011, asserts that its policies have produced a significant result in sales of gasoline to Iran. No such report was submitted. However, there is still lack of precision and potential differences of opinion over what constitutes "credible information" that an investment or sanctionable sale has been undertaken.

Earlier, P.L. 109-293, the "Iran Freedom Support Act" (signed September 30, 2006) amended ISA by calling for, but not requiring, a 180-day time limit for a violation determination (there is no time limit in the original law). Early versions of legislation (H.R. 282, S. 333) that ultimately became the Iran Freedom Support Act (P.L. 109-293) contained ISA amendment proposals that were viewed by the Bush Administration as too inflexible and restrictive, and potentially harmful to U.S. relations with its allies. These provisions included setting a mandatory 90-day time limit for the Administration to determine whether an investment is a violation; cutting U.S. foreign assistance to countries whose companies violate ISA; and applying the U.S.-Iran trade ban to foreign subsidiaries of U.S. firms.

Available Sanctions Under ISA

Once a firm is determined to be a violator, the original version of ISA required the imposition of two of a menu of six sanctions on that firm. CISADA added three new possible sanctions and requires the imposition of at least three out of the nine against violators. The nine available sanctions against the sanctioned entity that the President can select from (Section 6) include

1. denial of Export-Import Bank loans, credits, or credit guarantees for U.S. exports to the sanctioned entity;
2. denial of licenses for the U.S. export of military or militarily useful technology to the entity;
3. denial of U.S. bank loans exceeding $10 million in one year to the entity;
4. if the entity is a financial institution, a prohibition on its service as a primary dealer in U.S. government bonds; and/or a prohibition on its serving as a repository for U.S. government funds (each counts as one sanction);
5. prohibition on U.S. government procurement from the entity;
6. restriction on imports from the violating entity, in accordance with the International Emergency Economic Powers Act (IEEPA, 50 U.S.C. 1701);
7. prohibitions in transactions in foreign exchange by the entity;
8. prohibition on any credit or payments between the entity and any U.S. financial institution;
9. prohibition of the sanctioned entity from acquiring, holding, or trading any U.S.-based property.

*Other ISA amendments under that law included recommending against U.S. nuclear agreements with countries that supply nuclear technology to Iran and expanding provisions of the USA Patriot Act (P.L. 107-56) to curb money-laundering for use to further WMD programs.
New Mandatory ISA Sanction Imposed by CISADA: Prohibition on Contracts With the U.S. Government

CISADA (Section 102(b)) added a provision to further incent foreign companies to comply with ISA. It requires companies, as a condition of obtaining a U.S. government contract, to certify to the relevant U.S. government agency, that the firm—and any companies it owns or controls—are not violating ISA, as amended. A contract may be terminated—and further penalties imposed—if it is determined that the company’s certification of compliance was false. CISADA requires a revision of the Federal Acquisition Regulation (within 90 days of CISADA enactment on July 1, 2010) to reflect this requirement. This requirement has been imposed in regulations, as per an interim rule issued on September 29, 2010. H.R. 6296, introduced September 29, 2010, in the 111th Congress, would have authorized state and local governments to ban such contracts.

Waivers, Exemptions, and Termination Authority

The President has had the authority under ISA to waive sanctions if he certifies that doing so is important to the U.S. national interest (Section 9(c)). CISADA (Section 102(c)), changed the 9(c) ISA waiver standard to “necessary” to the national interest. Under the original version of ISA, there was also waiver authority (Section 4(c)) if the parent country of the violating firm joined a sanctions regime against Iran, but this waiver provision was changed by the Iran Freedom Support Act (P.L. 109-293) to allow for a waiver determination based on U.S. vital national security interests. The Section 4(c) waiver was altered by CISADA to provide for a six month (extendable) waiver if doing so is vital to the national interest and if the parent country of the violating entity is “closely cooperating” with U.S. efforts against Iran’s WMD and advanced conventional weapons program. The criteria of “closely cooperating” are defined in the conference report, with primary focus on implementing all U.N. sanctions against Iran. However, it is not clear why an Administration would use a Section 4 waiver rather than a Section 9 waiver, although it could be argued that using a Section 4 waiver would support U.S. diplomacy with the parent country of the offending entity.

ISA (Section5(f)) also contains several exceptions such that the President is not required to impose sanctions that prevent procurement of defense articles and services under existing contracts, in cases where a firm is the sole source supplier of a particular defense article or service. The President also is not required to prevent procurement or importation of essential spare parts or component parts.

In the 110th Congress, several bills not adopted contained provisions that would have further amended ISA; H.R. 1400, which passed the House on September 25, 2007 (397-16), would have removed the Administration’s ability to waive ISA sanctions under Section 9(c), national interest grounds, although without imposing a time limit for a sanctions determination.

“Special Rule” Exempting Firms That End Their Business With Iran

CISADA (Section 102(g)(5) amended ISA to provide a means—a so-called “special rule”—for firms to avoid any possibility of U.S. sanctions by pledging to verifiably end their business with Iran and to forgo any sanctionable business with Iran in the future. Under the special rule, the Administration is not required to make a determination of sanctionability against a firm that makes such pledges. The special rule has been invoked on several occasions as discussed below.
Termination Requirements and Sunset Provisions

In its entirety, ISA application to Iran would terminate if Iran is determined by the Administration to have ceased its efforts to acquire WMD; is removed from the U.S. list of state sponsors of terrorism; and no longer “ poses a significant threat” to U.S. national security and U.S. allies. The amendments to ISA made by P.L. 111-195 would terminate if the first two criteria are met.

Even without such determinations, ISA was to sunset on August 5, 2001, in a climate of lessening tensions with Iran (and Libya). During 1999 and 2000, the Clinton Administration had eased the trade ban on Iran somewhat to try to engage the relatively moderate Iranian President Mohammad Khatami. However, some maintained that Iran would view its expiration as a concession, and renewal legislation was enacted (P.L. 107-24, August 3, 2001). This law required an Administration report on ISA’s effectiveness within 24 to 30 months of enactment; that report was submitted to Congress in January 2004 and did not recommend that ISA be repealed. ISA was scheduled to sunset on December 31, 2011 (as provided by P.L. 109-293). The sunset is now December 31, 2016, as provided for in CISADA.

Interpretations and Implementation

The Obama Administration has, as of 2010, stepped up U.S. efforts to use ISA authorities to discourage investment in Iran and to impose sanctions on companies that insist on continuing their business with Iran. This is a contrast from the first 10-15 years after ISA’s passage, in which successive Administrations hesitated to confront partner countries over its implementation.

Traditionally reticent to impose economic sanctions, the European Union opposed ISA, when it was first enacted, as an extraterritorial application of U.S. law. It threatened to file a formal complaint before the World Trade Organization (WTO). In April 1997, the United States and the EU agreed to avoid a trade confrontation over ISA and a separate Cuba sanctions law (P.L. 104-114). The agreement involved the promise by the EU not to file any complaint with the WTO over this issue, in exchange for the eventual May 18, 1998, announcement by the Clinton Administration to waive ISA sanctions (“national interest”—Section 9c—waiver) on the first project determined to be in violation. That project was a $2 billion contract, signed in September 1997, for Total SA of France and its partners, Gazprom of Russia and Petronas of Malaysia, to develop phases 2 and 3 of the 25+ phase South Pars gas field. The EU, for its part, pledged to increase cooperation with the United States on nonproliferation and counterterrorism. Then-Secretary of State Albright, in the May 18, 1998, waiver announcement, indicated that similar future such projects by EU firms in Iran would not be sanctioned, provided overall EU cooperation against Iranian terrorism and proliferation continued. (The EU sanctions against Iran, announced July 27, 2010, might render this understanding moot because the EU sanctions ban EU investment in and supplies of equipment and services to Iran’s energy sector.)

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5 This latter termination requirement added by P.L. 109-293. This law also removed Libya from the act, although application to Libya effectively terminated when the President determined on April 23, 2004, that Libya had fulfilled the requirements of all U.N. resolutions on Pan Am 103.

6 Dollar figures for investments in Iran represent public estimates of the amounts investing firms are expected to spend over the life of a project, which might in some cases be several decades.

7 Text of announcement of waiver decision by then Secretary of State Madeleine Albright, containing expectation of similar waivers in the future. http://www.pajtimes.com/law/albright_southpars.html.
investments made in Iran’s energy sector, as shown in Table 5, the Administration made no violations determinations from 1998 until September 2010.

ISA Sanctions Determinations: September 2010 to the Present

Prior to the passage of CISADA, several Members of Congress questioned why no penalties had been imposed for violations of ISA. State Department reports to Congress on ISA, required every six months, have routinely stated that U.S. diplomats raise U.S. policy concerns about Iran with investing companies and their parent countries. However, these reports have not specifically stated which foreign companies, if any, were being investigated for ISA violations. No publication of such deals has been placed in the Federal Register as required by Section 5e of ISA. In an effort to address the congressional criticism, Under Secretary of State for Political Affairs William Burns testified on July 9, 2008 (House Foreign Affairs Committee), that the Statoil project (listed in Table 6) was under review for ISA sanctions. Statoil is incorporated in Norway, which is not an EU member, and it would therefore not fall under the 1998 U.S.-EU agreement discussed above.

Possibly in response to the pending CISADA legislation, and to an October 2009 letter signed by 50 Members of Congress referencing Table 5, Assistant Secretary of State for Near Eastern Affairs Jeffrey Feltman testified before the House Foreign Affairs Committee on October 28, 2009, that the Obama Administration would review investments in Iran for violations of ISA. Feltman testified that the preliminary review would be completed within 45 days (by December 11, 2009) to determine which projects, if any, require further investigation. He testified that some announced projects were for political purposes and did not result in actual investment.

On February 25, 2010, Secretary of State Clinton testified before the House Foreign Affairs Committee that the State Department’s preliminary review was completed in early February and that some of the cases reviewed “deserve[] more consideration” and were undergoing additional scrutiny. The preliminary review, according to the testimony, was conducted, in part, through State Department officials’ contacts with their counterpart officials abroad and corporation officials. The additional investigations of problematic investments would involve the intelligence community, according to Secretary Clinton. State Department officials told CRS in November 2009 that they intended to complete the additional investigation and determine violations within 180 days of the completion of the preliminary review, or by early August 2010. (The 180-day time frame was, according to the Department officials, consistent with the Iran Freedom Support Act amendments to ISA discussed above, even though the 180-day time frame was not a mandatory deadline before CISADA was adopted.) On June 22, 2010, Assistant Secretary of State William Burns testified before the Senate Foreign Relations Committee that there were “less than 10” cases of possible ISA violations.

September 30, 2010, Sanctions Determinations

Several determinations of sanctionability were made on September 30, 2010. That day, a Swiss-based Iranian-owned oil trading company—Naftiran Intertrade Company (NICO)—became the first firm to be sanctioned under ISA. The three penalties selected were: a ban on Ex-Im Bank

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1 Much of this section is derived from a meeting between the CRS author and officials of the State Department’s Economics Bureau, which is tasked with the referenced review of investment projects. November 24, 2009.
credits; a denial of dual use export licensing to the firm; and a denial of bank loans exceeding $10 million. The mandatory ban on receiving U.S. government contracts applies as well.

That same day, following a months-long Administration review discussed later, four major energy sector investing companies were deemed eligible to avoid sanctions, under the ISA “special rule,” by pledging to end their business in Iran. They are

- Total of France,
- Statoil of Norway,
- ENI of Italy, and
- Royal Dutch Shell of Britain and the Netherlands.
- Jinx of Japan was exempted from sanctions under the special rule on November 17, 2010, according to a State Department announcement. The firm announced on October 15, 2010, that it is shedding its stake in the Azadegan development project shown in the table.

There remained some difference of opinion on the Administration invocation of the special rule, as evident at a hearing of the House Foreign Affairs Committee on December 1, 2010. At the hearing, Under Secretary Burns stated that companies exempted under the special rule had pledged to end their existing investments in Iran “in the very near future.” Some Members of Congress questioned the imprecision of that time frame and others questioned the process for determining whether a firm is adhering to its pledge to pursue no future business in Iran’s energy sector. Observers provided reasons for why the energy firms insisted they needed time to wind down their investments in Iran—under the buy-back program used for investments in Iran, the energy firms are paid back their investment over time, making it highly costly for them to suddenly end operations in Iran.

March 29, 2011, Sanctions Determination Against Belarusneft

As shown in Table 5, several additional foreign investment agreements have been agreed with Iran not covered in the September 2010 determination. Some of these firms remained under Administration scrutiny, and the Administration stated that determinations will be made within 180 days (by April 1, 2011). On March 29, 2011, with that deadline approaching, the State Department announced that one additional firm would be sanctioned under ISA—Belarusneft, a subsidiary of the Belarus government owned Belneftekhim—for a $500 million contract with Naftiran (the company sanctioned in September 2010) to develop the Jofeir oil field discussed in Table 5. Other subsidiaries of Belneftekhim were sanctioned in 2007 under Executive Order 13405 related to U.S. policy on Belarus. The three ISA sanctions imposed on March 29, 2011, were denial of Exim Bank financing, denial of U.S. export licenses, and denial of U.S. loans above $10 million.

The Administration announcement did not indicate that some of the other investments in Table 5 or other investments, for which no ISA determinations have been made to date, are still under investigation. In public statements and letters to the Administration, some Members of Congress have expressed concern that Chinese firms have not been sanctioned, indicating that the Administration might be emphasizing some policy goals with respect to China at the expense of implementing sanctions against Iran.
May 24, 2011, Sanctions Imposed on Gasoline-Related Sales

On May 24, 2011, the Administration issued its first sanctions determinations under the CISADA-amended “trigger” that requires sanctions against sales of gasoline and related equipment and services. The reasons for the sanctions, including size of gasoline shipments to Iran, as well as the ISA-related sanctions selected, can be found at http://www.state.gov/r/pa/prs/ps/2011/05/164132.htm. The seven firms sanctioned were:

- Petrochemical Commercial Company International (PCCI) of Bailiwick of Jersey and Iran
- Royal Oyster Group (UAE)
- Tanker Pacific (Singapore)
- Allvale Maritime (subsidiary of Ofer Brothers Group, Israel)
- Societe Anonime Monegasque Et Aeriennne (SAMAMA, Monaco, subsidiary of Ofer Brothers)
- Speedy Ship (UAE/Iran)
- Associated Shipbroking (Monaco)
- Petroleos de Venezuela (PDVSA) of Venezuela

The determinations of sanctionability of Allvale and SAMAMA were issued on September 13, 2011, as a “clarification” of the May 24 determinations, which named Ofer Brothers Group (and not Allvale or SAMAMA) as sanctioned entities at that time. Ofer Brothers Group, the parent company in Israel, is not therefore under sanction. Many of the firms sanctioned on May 24, 2011, including the two “clarified” as added on September 13, were subjected to the financial-related sanctions provided in ISA. With respect to PDVSA, the Administration made clear in its announcement that U.S.-based subsidiaries were not included in the determination and that U.S. purchases of Venezuelan oil would not be affected. The day prior to the May 2011 sanctions announcement, President Obama issued an executive order clarifying that it is the responsibility of the Treasury Department to implement those ISA sanctions that involve the financial sector, including bans on loans, credits, and foreign exchange for, or imports from the sanctioned entity, as well as blockage of property of the sanctioned entity (if these sanctions are selected by the Secretary of State, who makes the decision which penalties to impose on sanctioned entities).

Non-Application to Crude Oil or Natural Gas Purchases from Iran or to Sales of Most Energy Equipment or Services

Simple purchases of oil or natural gas from Iran are generally considered not to constitute violations of ISA, because ISA sanctions investment in Iran’s energy sector and sales to Iran of gasoline or gasoline-related services or equipment. Some of the deals listed in the chart later in this report involve combinations of investment and purchase. However, as discussed later, many experts are looking at trying to sanction such purchases of crude oil or natural gas as the optimal means of pressuring Iran’s economy.
Nor does ISA sanction sales to Iran of equipment that Iran could use to explore or extract its own oil or gas resources, unless such sales are structured to provide ongoing profits or royalties (and therefore meet the definition of investments as provided in ISA). For example, selling Iran an oil or gas drill rig or motors or other gear that Iran will use to drill for oil or gas would not appear to be sanctionable, unless the sale is structured to provide the seller ongoing profits or royalties. In addition, as noted, CISADA made sanctionable sales of equipment to Iran to enhance or expand its oil refineries, or equipment with which Iran could import gasoline (such as tankers), and of equipment that Iran could use to construct an energy pipeline.

Official credit guarantee agencies are not considered sanctionable entities under ISA. In the 110th Congress, several bills—including S. 970, S. 3227, S. 3445, H.R. 957 (passed the House on July 31, 2007), and H.R. 7112 (which passed the House on September 26, 2008)—would have expanded the definition of sanctionable entities to official credit guarantee agencies, such as France’s COFACE and Germany’s Hermes, and to financial institutions and insurers generally. Some versions of CISADA would have made these entities sanctionable but these provisions were not included in the final law, probably out of concern for alienating U.S. allies in Europe.

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9 Prior to CISADA, the definition of investment in ISA specifically exempted sales of equipment or services under that definition. CISADA omitted that exclusion.
Table 1. Major Energy Buyers From Iran (2010)
(amounts in millions of U.S. dollars; includes mineral fuels, crude oil, natural gas, distillates, and the like)

<table>
<thead>
<tr>
<th>Country</th>
<th>Amount (in millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Africa</td>
<td>22,855</td>
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<tr>
<td>China</td>
<td>13,044</td>
</tr>
<tr>
<td>Japan</td>
<td>11,030</td>
</tr>
<tr>
<td>India</td>
<td>9,394</td>
</tr>
<tr>
<td>Turkey</td>
<td>6,642</td>
</tr>
<tr>
<td>South Korea</td>
<td>6,447</td>
</tr>
<tr>
<td>Italy</td>
<td>5,763</td>
</tr>
<tr>
<td>Spain</td>
<td>4,348</td>
</tr>
<tr>
<td>Netherlands</td>
<td>2,608</td>
</tr>
<tr>
<td>Taiwan</td>
<td>2,162</td>
</tr>
<tr>
<td>Singapore</td>
<td>2,152</td>
</tr>
<tr>
<td>Greece</td>
<td>1,520</td>
</tr>
<tr>
<td>France</td>
<td>1,036</td>
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<tr>
<td>Germany</td>
<td>788</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>645</td>
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<tr>
<td>Austria</td>
<td>370</td>
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<tr>
<td>Indonesia</td>
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<td>Malaysia</td>
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<tr>
<td>United Kingdom</td>
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<td>Australia</td>
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<td>Czech Republic</td>
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<td>Brazil</td>
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</table>

Source: World Trade Atlas, adapted by Susan Chesser, Knowledge Services Group, CRS.

Application to Energy Pipelines

As noted earlier, ISA's definition of sanctionable "investment," which specifies investment in Iran's petroleum resources, defined as petroleum and natural gas, has been interpreted by successive administrations to include construction of energy pipelines to or through Iran. That interpretation was reinforced by amendments to ISA in CISADA, which specifically included in the definition of petroleum resources "products used to construct or maintain pipelines used to transport oil or liquefied natural gas."

The Clinton and Bush Administrations used the threat of ISA sanctions to deter oil routes involving Iran and thereby successfully promoted an alternate route from Azerbaijan (Baku) to Turkey (Ceyhan). The route became operational in 2005.
Only a few significant pipelines involving Iran have been constructed in recent years—a line built in 1997 to carry natural gas from Iran to Turkey. Each country constructed the pipeline on its side of their border. At the time the project was under construction, State Department testimony stated that Turkey would be importing gas originating in Turkmenistan, not Iran, under a swap arrangement. That was one reason given for why the State Department did not determine that the project was sanctionable under ISA. However, many believe the decision not to sanction the pipeline was because the line was viewed as crucial to Turkey, a key U.S. ally. That explanation was reinforced when direct Iranian gas exports to Turkey through the line began in 2001, and no determination of sanctionability has been made. In May 2009, Iran and Armenia inaugurated a natural gas pipeline between the two, built by Gazprom of Russia. No determination of sanctionability has been announced.

As shown in Table 5, in July 2007, a preliminary agreement was reached to build a second Iran-Turkey pipeline, through which Iranian gas would also flow to Europe. That agreement was not finalized during Iranian President Mahmoud Ahmadinejad’s visit to Turkey in August 2008 because of Turkish commercial concerns, but the deal reportedly remains under discussion. On February 23, 2009, Iranian newspapers said Iran had formed a joint venture with a Turkish firm to export 35 billion cubic meters of gas per year to Europe; 50% of the venture would be owned by the National Iranian Gas Export Company (NIGEC).

Iran and Kuwait have held talks on the construction of a 350-mile pipeline that would bring Iranian gas to Kuwait. The two sides have apparently reached agreement on volumes (8.5 million cubic meters of gas would go to Kuwait each day) but not on price.\(^\text{10}\) There are also discussions reported between Iran and Iraq on constructing pipelines to facilitate oil and gas swaps between the two, but no firm movement on these projects is evident.

**Iran-Pakistan- India Pipeline (IPI)**

Another pending pipeline project would carry Iranian gas, by pipeline, to Pakistan. India had been a part of the $7 billion project, which would take about three years to complete, but India did not sign a memorandum between Iran and Pakistan finalizing the deal on June 12, 2010. India reportedly has been concerned about the security of the pipeline, the location at which the gas would be officially transferred to India, pricing of the gas, tariffs, and the source in Iran of the gas to be sold. Other steps taken by India since late 2010 to prevent some banking transactions with Iran, discussed later, could suggest that India is now cautious about any expansion of energy relations with Iran. Previously, the threat of imposition of U.S. sanctions had not dissuaded Indian firms from taking equity stakes in various Iranian energy projects, as shown in Table 5.

During the Bush Administration, Secretary of State Rice on several occasions “expressed U.S. concern” about the pipeline deal or called it “unacceptable.” Possibly contributing to India’s hesitancy to move forward, the late Ambassador Richard Holbrooke, the Administration Special Representative on Pakistan and Afghanistan, during 2010 trips to Pakistan, raised the possibility that the project could be sanctioned if it is undertaken, citing enactment of CISADA. Nonetheless, energy experts in Iran\(^\text{11}\) say Iran has largely completed the pipeline extension from\(^\text{10}\) http://www.kuwaittimes.net/read_news.php?newsid=NDQ0OTY1NTU4; http://english.fasnews.com/newstext.php?n=8901181055.

\(^\text{11}\) For example, Bijan Kajelpour of Atich Consulting. Presentation at CSIS, October 4, 2011.
its network to the Pakistan border, meaning that the project could become operational if Pakistan completes construction on its side of the border, and the two are linked.

India may envision an alternative to the pipeline project, as a means of tapping into Iran’s vast gas resources. During high-level economic talks in early July 2010, Iranian and Indian officials reportedly raised the issue of constructing an underwater natural gas pipeline, which would avoid going through Pakistani territory. However, such a route would presumably be much more expensive to construct than would be an overland route.

**European Gas Pipeline Routes**

Iran also is attempting to position itself as a gas exporter to Europe. The Obama Administration, like its predecessors, takes the view that Iran be excluded from gas pipeline projects to Europe, even though the projects might make Europe less dependent on Russian gas supplies. One potential project involving Iran is the Nabucco pipeline project, which would transport Iranian gas to western Europe. Iran, Turkey, and Austria reportedly have negotiated on that project. Another is the Trans-Adriatic Pipeline (TAP) although, as discussed below, partners in that project have announced that Iranian gas would not be involved. Iran’s Energy Minister Gholam-Hossein Nozari said on April 2, 2009, that Iran is considering negotiating a gas export route—the “Persian Pipeline”—that would send gas to Europe via Iraq, Syria, and the Mediterranean Sea.

**Application to Iranian Firms or the Revolutionary Guard**

Although ISA is widely understood to apply to firms around the world that reach an investment agreement with Iran, the provisions could also be applied to Iranian firms and entities subordinate to the National Iranian Oil Company (NIOC), which is supervised by the Oil Ministry. The firm that was sanctioned, Naftiran Intertrade Company (NICO), is one such entity; it is a subsidiary of NIOC. However, such entities, including Naftiran, do not do business in the United States and would not likely be harmed by any of the penalties that could be imposed under ISA. Some of the other major components of NIOC are

- The Iranian Offshore Oil Company;
- The National Iranian Gas Export Co.;
- National Iranian Tanker Company; and
- Petroleum Engineering and Development Co.

Actual construction and work is largely done through a series of contractors. Some of them, such as Khatam ol-Anbia and Oriental Kish, have been identified by the U.S. government as controlled by Iran’s Islamic Revolutionary Guard Corps (IRGC) and have been sanctioned under various executive orders, discussed below. The relationship of other Iranian contractors to the Guard, if any, is unclear. Some of the Iranian contractor firms include Pasargad Oil Co, Zagros Petrochem. Co, Saieh Consultants, Qeshm Energy, Sadid Industrial Group, and others. Some believe the August 2011 confirmation of Khatam ol-Anbia’s chief, Rostam Ghasemi, as Oil Minister, will, over time, bolster the role of the IRGC in Iran’s oil sector. Ghasemi has also taken over the chair of the Organization of Petroleum Exporting Countries (OPEC) because it is Iran’s turn to hold that rotating post. Ghasemi has been subjected to asset freezes by the United States and an asset freeze and travel ban by the European Union. However, under an agreement between OPEC and
Austria, Ghasemi would be allowed to travel to Vienna (OPEC's headquarters) to attend OPEC meetings and perform his duties as rotating head of the organization.

Application to Liquefied Natural Gas

The original version of ISA did not apply to the development of liquefied natural gas. Iran has no LNG export terminals, in part because the technology for such terminals is patented by U.S. firms and unavailable for sale to Iran. However, CISADA, specifically includes LNG in the definition of petroleum resources and therefore makes investment in LNG (or supply of LNG tankers or pipelines) sanctionable.

Table 2. Comparison of Major Versions of H.R. 2194/P.L. 111-195

<table>
<thead>
<tr>
<th>House Version</th>
<th>Senate Version</th>
<th>Final Law and Implementation Status</th>
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<tbody>
<tr>
<td><strong>General Goals and Overview:</strong></td>
<td>Broader goals than House; sanctions sales of gasoline to Iran similar to House version of H.R. 2194, but also would affect several other U.S. sanctions against Iran already in place, including revoking some exemptions to the U.S. ban on imports from Iran.</td>
<td>Generally closer to the Senate version, but adds new provisions (not in either version) sanctioning Iranians determined to be involved in human rights abuses and prohibiting transactions with foreign banks that conduct business with Revolutionary Guard and U.N.-sanctioned Iranian entities.</td>
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<td>Seeks to expand the authorities of the Iran Sanctions Act (ISA, P.L. 104-172) to deter sales by foreign companies of gasoline to Iran.</td>
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<td><strong>Statement of U.S. Policy on Sanctioning Iran's Central Bank (Bank Markazi):</strong></td>
<td>Section 108 urges the President to use existing U.S. authorities to impose U.S. sanctions against the Iranian Central Bank or other Iranian banks engaged in proliferation or support of terrorist groups.</td>
<td>Section 104 (see below) contains sense of Congress urging U.S. sanctions against Iranian Central Bank and would prohibit U.S. bank dealings with any financial institution that helps the Central Bank facilitate circumvention of U.N. resolutions on Iran.</td>
</tr>
<tr>
<td>Section 2(c) and 3(a) state that it shall be U.S. policy to fully enforce ISA to encourage foreign governments:</td>
<td>Such authorities could include Section 311 of the USA Patriot Act (31 U.S.C. 5318A), which authorizes designation of foreign banks as &quot;of primary money laundering concern&quot; and thereby cut off their relations with U.S. banks.</td>
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<td>- to cease investing in Iran's energy sector.</td>
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<td>- to sanction Iran's Central Bank and other financial institutions that do business with the Iranian Central Bank (or any Iranian bank involved in proliferation or support of terrorist activities).</td>
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<td><strong>Extension of ISA to Sales of Gasoline:</strong></td>
<td>Section 102(a) contains similar provisions regarding both gasoline sales and sales of equipment and services for Iran to expand its own refinery capacity. However, sets the aggregate one-year sale value at $1 million—double the level of the House bill.</td>
<td>Section 102(a) contains provisions amending ISA to include sales of gasoline and refining services and equipment as sanctionable (similar to both versions). Sets dollar value “trigger” at $1 million transaction, or $5 million aggregate value (equipment or gasoline sales) in a one-year period. Specifies that what is sanctionable includes helping Iran develop its liquefied natural gas (LNG) sector. Products whose sales is sanctionable include LNG tankers and products to build pipelines used to transport oil or LNG. Includes aviation fuel in definition of refined petroleum. Formally reduces investment threshold to $20 million to trigger sanctionability.</td>
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<td>Section 3(a) would amend ISA to make sanctionable:</td>
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<td>- the sale to Iran of equipment or services (of over $200,000 in value, or $500,000 combined sales in one year) that would enable Iran to maintain or expand its domestic production of refined petroleum.</td>
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<td>- or, the sale to Iran of refined petroleum products or ships, vehicles, or insurance or reinsurance to provide such gasoline to Iran (same dollar values as sale of equipment).</td>
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<td><strong>Expansion of ISA Sanctions:</strong></td>
<td>Similar to House bill (Section 102(a)).</td>
<td>Section 102(b) amends ISA to add add three sanctions to the existing menu of six sanctions in ISA and requires the President to impose 3 out of the 9 specified sanctions on entities determined to be violators. (As it previously existed, ISA required the imposition of two out of six sanctions of the menu.)</td>
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<td>Section 3(b) would mandate certain sanctions (not currently authorized by ISA) on sellers of the equipment, gasoline, or services described in Section 3(a) to include:</td>
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<td>- prohibition of any transactions in foreign exchange with sanctioned entity;</td>
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<td>- prohibition of credit or payments to the sanctioned entity;</td>
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<td>- and, prohibition on any transactions involving U.S.-based property of the sanctioned entity.</td>
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<td>(These sanctions would be imposed in addition to the required two out of six sanctions currently specified in ISA.)</td>
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| **U.S. Government Enforcement Mechanism:**  
Section 3(b) also requires the heads of U.S. Government agencies to ensure that their agencies contract with firms that certify to the U.S. agency that they are not selling any of the equipment, products, or services to Iran (gasoline and related equipment and services) specified in Section 3(a).  
The section contains certain penalties, such as prohibition on future bids for U.S. government contracts, to be imposed on any firm that makes a false certification about such activity. | **Section 103(b)(4) contains a similar provision, but mandates that the head of a U.S. agency may not contract with a person who meets criteria of sanctionability in the act. Would not require the bidding/contracting firm to certify its own compliance, thereby placing the burden of verifying such compliance on the U.S. executive agency.** | **Section 102(b) amends ISA by adding a provision similar to the House version requiring, within 90 days of enactment (by October 1, 2010) new Federal Acquisition Regulations that mandate that firms to certify that they are not in violating of ISA as a condition of receiving a U.S. government contract, and providing for penalties for any falsification.**  
The Civilian Agency Acquisition Council issued the needed regulations (interim ruling) on September 29, 2010. Paperwork that firms must sign making that certification now included as part of their contract signature package. |
| **Additional Sanctions Against Suppliers of Nuclear, Missile, or Advanced Conventional Weapons Technology to Iran:**  
Section 3(c) provides an additional ISA sanction to be imposed on any country whose entity(ies) violate ISA by providing nuclear-weapon-related technology or missile technology to Iran.  
The sanction to be imposed on such country is a ban on any nuclear cooperation agreement with the United States under the Atomic Energy Act of 1954, and a prohibition on U.S. sales to that country of nuclear technology in accordance with such an agreement.  
The sanction can be waived if the President certifies to Congress that the country in question is taking effective actions against its violating entities. | **No equivalent, although, as noted below, the Senate bill does contain several proliferation-related provisions.** | **Section 102(a)(2) amends ISA by adding a prohibition on licensing of nuclear materials, facilities, or technology to any country which is the parent country of an entity determined to be sanctioned under ISA for providing WMD technology to Iran.**  
Waiver is provided on vital national security interest grounds. |
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<tr>
<td><strong>Alterations to Waiver and Implementation Provisions:</strong></td>
<td>Section 3(d)(1) imposes a requirement (rather than an nonbinding exhortation in the existing law) that the Administration &quot;immediately&quot; initiate an investigation of any potentially sanctionable activity under ISA.</td>
<td>No similar provisions</td>
<td>Implementation and waiver provisions closer to House version. Section 102(g) amends ISA to make mandatory the beginning of an investigation of potentially sanctionable activity, and makes mandatory a decision on sanctionability within 180 days of the beginning of such an investigation. (Previously, 180-day period was nonbinding.) Mandatory investigation (which goes into effect July 1, 2011) of gasoline sales to Iran can be delayed for 180 days subject to a report—by June 1, 2011—certifying that there has been a substantial reduction in gasoline sales to Iran as a result of CISADA.</td>
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<td>Section 3(d)(2) would require the President to certify that a waiver of penalties on violating entities described above is &quot;vital to the national security interest of the United States.&quot; rather than, as currently stipulated in ISA, is &quot;important to the national interest of the United States.&quot;</td>
<td>Section 102(c) sets 9(c) waiver standard as &quot;necessary to the national interest.&quot;</td>
<td>Section 102(g) also alters existing 4(c) ISA waiver to delay sanctions on firms of countries that are &quot;closely cooperating&quot; with U.S. efforts against Iran's WMD programs. (This is not an automatic &quot;carve out&quot; for cooperating countries.) Section 102(g)(3) adds to ISA a &quot;special rule&quot; that no investigation of a potential violation need be started if a firm has ended or pledged to end its violating activity in/with Iran. &quot;Special rule&quot; invoked twice, as discussed above.</td>
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<td><strong>Required Reports:</strong></td>
<td><strong>Section 107 contains a provision similar to the new reporting requirement of the House bill with regard to firms that sold gasoline and related equipment and services to Iran, and invested in Iran’s energy sector.</strong></td>
<td>Various reporting requirements throughout (separate from those required to trigger or justify the various sanctions or waivers). These reporting requirements are:</td>
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<td>Section 3(e) would amend ISA’s current Administration reporting requirements to also include an assessment of Iran’s support for militant movements and to acquire weapons of mass destruction technology.</td>
<td>The Senate bill does not require reporting on the IRGC that is stipulated in the House bill, or the report on Iran-G-20 trade.</td>
<td>- Amendment of section 10 of ISA to include a report, within 90 days of enactment, and annual thereafter, on trade between Iran and the countries of the Group of 20 Finance Ministers and Central Bank Governors. (From House version)</td>
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<td>A new reporting requirement would be created (every six months) on firms providing Iran gasoline and related equipment and services specified above, as well as the names and dates of such activity, and any contracts such entities have with U.S. Government agencies.</td>
<td>However, the Senate bill (Section 109) expresses the sense of Congress that the United States “continue to target” the IRGC for supporting terrorism, its role in proliferation, and its oppressive activities against the people of Iran.</td>
<td>- Section 110 of the law (not an amendment to ISA) requires a report within 90 days, and every 180 days hence, on investments made in Iran’s energy sector since January 1, 2006. The report must include significant joint ventures outside Iran in which Iranian entities are involved.</td>
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<td>The required report is to include information on persons the President determines is affiliated with Iran’s Islamic Revolutionary Guard Corp (IRGC), as well as persons providing material support to the IRGC or conducting financial transactions with the IRGC or its affiliates.</td>
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<td>- The Section 110 report is to include an estimate of the value of ethanol imported by Iran during the reporting period.</td>
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<td>Also required is an Administration report, within one year of enactment, on trade between Iran and countries in the G-20.</td>
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<td>- Section 111 (not an ISA amendment) requires a report within 90 days on the activities of export credit agencies of foreign countries in guaranteeing financing for trade with Iran.</td>
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**Expansion of ISA Definitions:**

<p>| Section 3(f) would expand the definitions of investing entities, or persons, contained in ISA, to include: | Similar provision contained in Section 102(d). | Does not include export credit agencies as a sanctionable entity under ISA (as amended). (However, a report is required on export credit agency activity, as discussed above.) |
| - export credit agencies. (Such a provision is widely considered controversial because export credit agencies are arms of their governments, and therefore sanctioning such agencies is considered a sanction against a government.) | Does include LNG as petroleum resources. |</p>
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<tr>
<td><strong>Termination Provisions:</strong></td>
<td><strong>Title IV would terminate the act's provisions 30 days after the President certifies that Iran has:</strong></td>
<td>Same as Senate version, which means that the amendments to ISA in this law terminate if the President certifies that Iran has ceased WMD development, and has qualified for removal from the U.S. terrorism list.</td>
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<td>Section 3(g) would terminate the bill's sanctions against persons who are sanctioned, under the act, for sales of WMD-related technology, if the President certifies that Iran has ceased activities to acquire a nuclear device and has ceased enrichment of uranium and other nuclear activities.</td>
<td>- ceased support for international terrorism and qualifies for removal from the U.S. &quot;terrorism list&quot;</td>
<td>However, the pre-existing version of ISA would continue to apply until the President also certifies that Iran poses no significant threat to U.S. national security, interests, or allies.</td>
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<tr>
<td><strong>ISA Sunset:</strong></td>
<td><strong>No similar provision.</strong></td>
<td>Sunset provision same as House version ISA to sunset December 31, 2016.</td>
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<td>Section 3(h) would extend all provisions of ISA until December 31, 2016. It is currently scheduled to &quot;sunset&quot; on December 31, 2011, as amended by the Iran Freedom Support Act (P.L. 109-293).</td>
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<td><strong>Additional Provisions That Are Not Amendments to ISA</strong></td>
<td><strong>Modification to U.S. Ban on Trade With and Investment in Iran:</strong></td>
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<tr>
<td><strong>No provision</strong></td>
<td>Section 103(b)(1) would ban all imports of Iranian origin from the United States, with the exception of informational material. Currently, modifications to the U.S. trade ban with Iran (Executive Order 12959 of May 6, 1995) that became effective in 2000 permit imports of Iranian luxury goods, such as carpets, caviar, nuts, and dried fruits.</td>
<td>Same as Senate version. However, contains a new section that the existing U.S. ban (by executive order) on most exports to Iran not include the exportation of services for Internet communications. Provision also states that the ban on most exports should not include goods or services needed to help non-governmental organizations support democracy in Iran. Both provisions designed to support opposition protesters linked to Iran's &quot;Green movement.&quot;</td>
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<td>- Section 103(b)(2)) generally reiterates/codifies current provisions of U.S. trade ban related to U.S. exports to Iran. Provision would prohibit exports to Iran of all goods except food and medical devices, informational material, articles used for humanitarian assistance to Iran, or goods needed to ensure safe operation of civilian aircraft.</td>
<td>Implementation: In July 2010, Treasury Office of Foreign Assets Control issued a statement that, effective September 29, 2010, the general license for imports of Iranian luxury goods will be eliminated (no such imports allowed). This went into effect that day.</td>
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<td><strong>Freezing of Assets/Travel Restriction on Revolutionary Guard and Related</strong></td>
<td>Section 103(b)(3) mandates the President to freeze the assets of Iranian diplomats, IRGC, or other Iranian official personnel deemed a threat to U.S. national security under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.). Provision would require freezing of assets of families and associates of persons so designated. Section 109 calls for a ban on travel of IRGC and affiliated persons.</td>
<td>Similar to Senate version</td>
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<td><strong>Entities and Persons:</strong></td>
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<tr>
<td>No provision</td>
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<td><strong>Application of U.S. Trade Ban to Subsidiaries:</strong></td>
<td>Section 104 would apply the provisions of the U.S. trade ban with Iran (Executive Order 12959) to subsidiaries of U.S. firms if the subsidiary is established or maintained for the purpose of avoiding the U.S. ban on trade with Iran. The definition of subsidiary, under the provision, is any entity that is more than 50% owned or is directed by a U.S. person or firm.</td>
<td>No provision</td>
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<td><strong>Mandatory Sanctions on Financial Institutions that Help Iran's Sanctioned Entities:</strong></td>
<td>No provision</td>
<td>Section 104(c) requires the Treasury Department to develop regulations (within 90 days of enactment) to prohibit and specify penalties for any U.S. financial transactions with any foreign financial institution that facilitates efforts by the Revolutionary Guard to acquire WMD or fund terrorism.</td>
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<td>- facilitate the activities of any person sanctioned under U.N. resolutions on Iran.</td>
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<td>- facilitates the efforts by Iran's Central Bank to support the Guard's WMD acquisition efforts or support any U.N.-sanctioned entity.</td>
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<td>No provision</td>
<td>Section 104(d) requires penalties to be specified in regulations within 90 days.</td>
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<td>No provision</td>
<td>Section 104(e) requires regulations (no date specified) to make this requirement retroactive to existing accounts, pending an audit by the U.S. banks involved.</td>
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<td><strong>Sanctions on Iranian Human Rights Abusers:</strong></td>
<td>No provision</td>
<td>Implementation: Treasury Department regulations implementing Section 104(c) and (d) provisions issued August 16, 2010. Regulations to implement 104(e) finalized in October 2011, based on proposals by Treasury Department's Financial Crimes Enforcement Network (FINCEN).</td>
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<td>No provision</td>
<td>Section 105 requires, within 90 days, a report listing Iranian officials (or affiliates) determined responsible for or complicit in serious human rights abuses since the June 12, 2009, Iranian election. Those listed are ineligible for a U.S. visa, their U.S. property is to be blocked, and transactions with those listed are prohibited.</td>
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<td>No provision</td>
<td>On September 29, 2010, President Obama issued Executive Order 13553 providing for these sanctions. See human rights section of this paper for Iranians sanctioned.</td>
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<td>Sanctioning Certain Information Technology Sales to Iran:</td>
<td>Section 105 prohibits U.S. executive agencies from contracting with firms that export sensitive technology to Iran. “Sensitive technology” is defined as hardware, software, telecommunications equipment, or other technology that restricts the free flow of information in Iran or which monitor or restrict “speech” of the people of Iran.</td>
<td>Section 106 of the conference report is similar to Senate version. The contracting restriction is to be imposed “pursuant to such regulations as the President may prescribe.”</td>
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<tr>
<td>No provision</td>
<td>Section 106(b) authorizes $64.61 million for FY2011 and “such sums as may be necessary” for FY2011 and 2012 for the Treasury Department’s Office of Terrorism and Financial Intelligence. The funds are authorized to ensure that countries such as Iran are not misusing the international financial system for illicit purposes. Iran is not mentioned specifically. $104.26 million is authorized by the section for FY2010 for the Department’s Financial Crimes Enforcement Network.</td>
<td>Section 109 authorizes $102 million for FY2011 and “such sums as may be necessary” for FY2012 and 2013 to the Treasury Department Office of Terrorism and Financial Intelligence. Another $100 million is authorized for FY2011 for the Financial Crimes Enforcement Network, and $113 million for FY2011 for the Bureau of Industry and Security for the Department of Commerce.</td>
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<td>Treasury Department Authorization to prevent misuse of the U.S. financial system by Iran or other countries:</td>
<td>No provision</td>
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<td>Hezbollah:</td>
<td>Section 110 contains a sense of Congress that the President impose the full range of sanctions under the International Emergency Economic Powers Act (50 U.S.C. 1701) on Hezbollah, and that the President renew international efforts to disarm Hezbollah in Lebanon (as called for by U.N. Security Council Resolutions 1559 and 1701).</td>
<td>Section 113 similar to Senate version.</td>
</tr>
<tr>
<td>No specific provision, although, as noted above, the House bill does expand ISA reporting requirements to include Iran’s activities to support terrorist movements. Lebanese Hezbollah is named as a Foreign Terrorist Organization (FTO) by the U.S. State Department.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Divestment:</td>
<td>Title II of the Senate bill (Section 203) prevents criminal, civil, or administrative action against any investment firm or officer or adviser based on its decision to divest from securities that</td>
<td>Similar to Senate version</td>
</tr>
<tr>
<td>No provisions</td>
<td>- have investments or operations in Sudan described in the Sudan Accountability and Divestment Act of 2007</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- or, engage in investments in Iran that would be considered sanctionable by the Senate bill.</td>
<td></td>
</tr>
<tr>
<td>House Version</td>
<td>Senate Version</td>
<td>Final Law and Implementation Status</td>
</tr>
<tr>
<td>---------------</td>
<td>---------------</td>
<td>------------------------------------</td>
</tr>
<tr>
<td>Prevention of Transshipment, Reexportation, or Diversion of Sensitive Items to Iran:</td>
<td>Section 302 requires a report by the Director of National Intelligence that identifies all countries considered a concern to allow transshipment or diversion of WMD-related technology to Iran (technically: &quot;items subject to the provision of the Export Administration Regulations&quot;).</td>
<td>Similar to Senate version, but does not provide for prior negotiations before designating a country as a &quot;Destination of Possible Diversion Concern.&quot; List of countries that are believed to be allowing diversion of specified goods or technology to Iran to be named in a report provided within 180 days of enactment.</td>
</tr>
<tr>
<td>No provision</td>
<td>Section 303 requires the Secretary of Commerce to designate a country as a &quot;Destination of Possible Diversion Concern&quot; if such country is considered to have inadequate export controls or is unwilling to prevent the diversion of U.S. technology to Iran. The provision stipulates government-to-government discussions are to take place to improve that country's export control systems. If such efforts did not lead to improvement, the section would mandate designation of that country as a &quot;Destination of Diversion Concern&quot; and would set up a strict licensing requirement for U.S. exports of sensitive technologies to that country.</td>
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</tbody>
</table>

**Ban on U.S. Trade and Investment With Iran**

A ban on U.S. trade with and investment in Iran was imposed on May 6, 1995, by President Clinton, through Executive Order 12959. This followed an earlier March 1995 executive order barring U.S. investment in Iran’s energy sector. The trade and investment ban was intended to blunt criticism that U.S. trade with Iran made U.S. appeals for multilateral containment of Iran less credible. Each March since 1995 (and most recently on March 10, 2010), the U.S. Administration has renewed a declaration of a state of emergency that triggered the investment ban; it is likely to be renewed again in March 2011. The operation of the trade regulations is

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12 The executive order was issued under the authority of: The International Emergency Economic Powers Act (IEEPA, 50 U.S.C. 1701 et seq.; the National Emergencies Act (50 U.S.C. 1601 et seq.; Section 505 of the International Security and Development Cooperation Act of 1985 (22 U.S.C. 2349aa-9) and Section 301 of Title 3, United States Code. An August 1997 amendment to the trade ban (Executive Order 13059) prevented U.S. companies from knowingly exporting goods to a third country for incorporation into products destined for Iran.
stipulated in Section 560 of the Code of Federal Regulations (Iranian Transactions Regulations, ITR’s). As noted above, in accordance with CISADA, the strict ban on imports from Iran was restored on September 29, 2010; the ban on exports to Iran was altered only slightly by CISADA.

Some modifications to the trade ban since 1999 account for the fact that trade between the United States and Iran is minimal. Total U.S.-Iran trade was about $300 million in 2010 ($208 million in exports to Iran, and $94 million in imports). Trade was about $350 million worth of goods for all of 2009 ($281 million in exports to Iran, and $67 million in imports from Iran). That is about half the value of the bilateral trade in 2008.

The following conditions and modifications, as administered by the Office of Foreign Assets Control (OFAC) of the Treasury Department, apply to the operation of the trade ban:

- Some goods related to the safe operation of civilian aircraft may be licensed for export to Iran (Section 560.528 of Title 31, C.F.R.). As recently as September 2006, the George W. Bush Administration, in the interests of safe operations of civilian aircraft, permitted a sale by General Electric of Airbus engine spare parts to be installed on several Iran Air passenger aircraft (by European airline contractors). (A provision of H.R. 6296, a bill introduced in the 111th Congress, sought to prevent these sales to Iran.) An Administration intent to sell Iran data to repair certain GE engines for its legacy American-made aircraft, in order to ensure safe operation, was notified to Congress on March 16, 2011. On June 23, 2011, the Administration sanctioned Iran Air as a proliferation entity under Executive order 13382, rendering any future licensing of parts or repairs for Iran Air unclear.

- U.S. firms may not negotiate with Iran or to trade Iranian oil overseas, but U.S. companies may apply for licenses to conduct “swaps” of Caspian Sea oil with Iran. A Mobil Corporation application to do so was denied in April 1999.

- According to the Iranian Transactions Regulations (ITR’s), the ban does not apply to personal communications (phone calls, e-mails), or to humanitarian donations. U.S. non-governmental organizations (NGOs) require a specific license to operate in Iran, but some of these NGOs say the licensing requirements are too onerous to make work in Iran practical. For example, there are restrictions on how a U.S. NGO may expend funds in Iran, for example to hire Iranian nationals.

- Since April 1999, commercial sales of food and medical products to Iran have been allowed, on a case-by-case basis and subject to OFAC licensing. According to OFAC in April 2007, licenses for exports of medicines to treat HIV and leukemia are routinely expedited for sale to Iran, and license applications are viewed favorably for business school exchanges, earthquake safety seminars, plant and animal conservation, and medical training in Iran.

- OFAC generally declines to discuss export licenses approved, and a press account on December 24, 2010, paints a picture of broad export approvals to Iran of such condiments as ice cream sprinkles, chewing gum, food additives, hot

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sauces, body-building supplements, and other goods that appear to have uses other than those that are purely humanitarian or nutritive. U.S. exporters widely mentioned include Mars Co. (candy manufacturer), Kraft Foods; Wrigley’s (gum); and McCormick and Co. (spices). Some goods were sold through a Revolutionary Guard-owned chains of stores in Iran called Qods; as well as a government-owned Shahrvarand store and a chain called Refah. OFAC officials indicated in the press accounts that such licenses were not in contradiction with U.S. law or policy, although there might have been less than full scrutiny of some Iranian end users and that such scrutiny might be increased in future licensing decisions.

- As far as financing of approved U.S. sales to Iran, private letters of credit can be used to finance approved transactions, but no U.S. government credit guarantees are available, and U.S. exporters are not permitted to deal directly with Iranian banks. The FY2001 agriculture appropriations law (P.L. 106-387) contained a provision banning the use of official credit guarantees for food and medical sales to Iran and other countries on the U.S. terrorism list, except Cuba, although allowing for a presidential waiver to permit such credit guarantees. No U.S. Administration has authorized credit guarantees, to date. In December 2004, the trade ban was further modified to allow Americans to freely engage in ordinary publishing activities with entities in Iran (and Cuba and Sudan).

- In April 2000, the trade ban was further eased to allow U.S. importation of Iranian nuts, dried fruits, carpets, and caviar. Financing was permitted for U.S. importers of these goods. The United States was the largest market for Iranian carpets before the 1979 revolution, but U.S. anti-dumping tariffs imposed on Iranian products in 1986 dampened many Iranian products. As discussed above, CISADA ended approval of such imports as of October 1, 2010. Prior to the entry into force of this CISADA provision, the number one U.S. import from Iran was pomegranate juice concentrate. Iranian carpets were another popular import, despite a U.S. tariff of about 3%-5%. Imports of Iranian caviar carried a duty of about 15%.

Non-Application to U.S. Imports of Products With Iranian Content

The ban on trade with Iran operates largely on items produced in and originating from Iran itself. In the case of crude oil, the United States, as noted, cannot import or trade overseas any Iranian crude oil. However, the regulations do not ban the importation, from foreign refiners, of gasoline or other energy products in which Iranian oil is contained and mixed with oil from other producers. The rationale for the regulation is that the product of a specific refinery is considered a product of the country where that refinery is located, and not a product of Iran, even if the product has some Iran-origin content. Some experts say that it is feasible to exclude Iranian content from any refinery, if there were a decision to ban U.S. imports of products with any Iranian content at all.

Application to Foreign Subsidiaries of U.S. Firms

The U.S. trade ban does not bar subsidiaries of U.S. firms from dealing with Iran, as long as the subsidiary has no operational relationship to the parent company. For legal and policy purposes, foreign subsidiaries are considered foreign persons, not U.S. persons, and are subject to the laws
of the country in which the subsidiaries are incorporated. The March 7, 2010, New York Times article, cited above, discusses some subsidiaries of U.S. firms that have been active in Iran and which have also received U.S. government contracts, grants, loans, or loan guarantees. Among major foreign subsidiaries of U.S. firms that have traded with Iran are the following:

- U.S. energy equipment firms. Some subsidiaries of such firms may still be in the Iranian market, according to their “10-K” filings with the Securities and Exchange Commission. These include Natco Group,14 Overseas Shipholding Group,15 UOP (United Oil Products, a Honeywell subsidiary based in Britain),16 Itron17, Fluor,18 Flowsure,19 Parker Drilling, Vantage Energy Services,20 Weatherford,21 and a few others. UOP reportedly sells refinery gear to Iran; new sales of which may be sanctionable under ISA, as amended by CISADA. In September 2011, the Commerce Department fined Flowsure $2.5 million to settle 288 charges of unlicensed exports and re-exports of oil industry equipment to Iran, Syria, and other countries.

- An Irish subsidiary of the Coca-Cola company provides syrup for the U.S.-brand soft drink to an Iranian distributor, Khoshgavar. Local versions of both Coke and of Pepsi (with Iranian-made syrups) are also marketed in Iran by distributors who licensed the recipes for these soft drinks before the Islamic revolution and before the trade ban was imposed on Iran.

- Transammonia Corp., via a Swiss-based subsidiary, is said to be conducting business with Iran to help it export ammonia, a growth export for Iran.

- Press reports in early October 2011 indicated that subsidiaries of Kansas-based Koch Industries may have sold equipment to Iran to be used in petrochemical plants (making methanol) and possibly oil refineries, among other equipment. However, the reports say the sales ended as of 2007, a time at which foreign firm sales of refinery equipment to Iran were not clearly sanctionable under ISA.22

Subsidiaries Exiting Iran

As international sanctions against Iran have increased in recent years, many foreign subsidiaries have decided that the risks of continuing to do business with Iran outweigh the benefits. These

14 Form 10-K Filed for fiscal year ended December 31, 2008.
18 “Exhibit to 10-K Filed February 25, 2009.” Officials of Fluor claim that their only dealings with Iran involve property in Iran owned by a Fluor subsidiary, which the subsidiary has been unable to dispose of. CRS conversation with Fluor, December 2009.
20 Form 10-K for Fiscal year ended December 31, 2007.
21 Form 10-K for Fiscal year ended December 31, 2008, claims firm directed its subsidiaries to cease new business in Iran and Cuba, Syria, and Sudan as of September 2007.
decisions to leave the Iran market might have been reached in discussions with their U.S. parent corporations.

- Chemical manufacturer Huntsman announced in January 2010 its subsidiaries would halt sales to Iran.

- Halliburton. On January 11, 2005, Iran said it had contracted with U.S. company Halliburton, and an Iranian company, Oriental Kish, to drill for gas in Phases 9 and 10 of South Pars. Halliburton reportedly provided $30 million to $35 million worth of services per year through Oriental Kish, leaving unclear whether Halliburton would be considered in violation of the U.S. trade and investment ban or the Iran Sanctions Act (ISA), because the deals involved a subsidiary of Halliburton (Cayman Islands-registered Halliburton Products and Service, Ltd., based in Dubai). On April 10, 2007, Halliburton announced that its subsidiaries were no longer operating in Iran, as promised in January 2005.

- General Electric (GE). The firm announced in February 2005 that it would seek no new business in Iran, and it reportedly wound down preexisting contracts by July 2008. GE was selling Iran equipment and services for hydroelectric, oil and gas services, and medical diagnostic projects through Italian, Canadian, and French subsidiaries.

- Oilfield services firm Smith International said on March 1, 2010, it would stop sales to Iran by its subsidiaries.

- On March 1, 2010, Caterpillar Corp. said it had altered its policies to prevent foreign subsidiaries from selling equipment to independent dealers that have been reselling the equipment to Iran. Ingersoll Rand, maker of air compressors and cooling systems, followed suit.

- In April 2010, it was reported that foreign partners of several U.S. or other multinational accounting firms had cut their ties with Iran, including KPMG of the Netherlands, and local affiliates of U.S. firms PricewaterhouseCoopers and Ernst and Young.

In the 110th Congress, S. 970, S. 3227, S. 3445, and three House-passed bills (H.R. 1400, H.R. 7112, and H.R. 957) - would have applied sanctions to the parent companies of U.S. subsidiaries if those subsidiaries are directed by the parent company to trade with Iran. The Senate version of CISADA contained a similar provision, but it was taken out in conference action. A provision of H.R. 6296, the bill introduced in the 111th Congress, would apply this sanction. Provisions in the 112th Congress are discussed at the section below on pending legislation.

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Banking and Finance: Treasury Department
Financial Measures and CISADA

U.S. efforts to shut Iran out of the international banking system have gained strength as other countries have joined the effort. These efforts have been implemented by the Treasury Department (office of then-Under Secretary of the Treasury Stuart Levey) through “targeted financial measures.” Since 2006, strengthened by leverage provided in five U.N. Security Council Resolutions, Levey and other officials have been able to convince at least 80 foreign banks that dealing with Iran entails financial risk and furthers terrorism and proliferation. Treasury Secretary Timothy Geithner has described Levey as having “led the design of a remarkably successful program”27 with regard to targeting Iran’s proliferation networks. Levey left office in April 2011 and was replaced by Daniel Cohen.

In earlier action intended to cut Iran off from the U.S. banking system, on September 6, 2006, the Treasury Department barred U.S. banks from handling any indirect transactions (“U-turn transactions,” meaning transactions with non-Iranian foreign banks that are handling transactions on behalf of an Iranian bank) with Iran’s Bank Saderat (see above), which the Administration accuses of providing funds to Hezbollah.28 Bank Sepah is subject to asset freezes and transactions limitations as a result of Resolutions 1737 and 1747. The Treasury Department extended that U-Turn restriction to all Iranian banks on November 6, 2008.

The Treasury Department has also used punishments to pressure firms to cease doing business with Iran. In 2004, the Treasury Department fined UBS $100 million for the unauthorized movement of U.S. dollars to Iran and other sanctioned countries, and in December 2005, the Treasury Department fined Dutch bank ABN Amro $80 million for failing to fully report the processing of financial transactions involving Iran’s Bank Melli (and another bank partially owned by Libya). In the biggest such instance, on December 16, 2009, the Treasury Department announced that Credit Suisse would pay a $536 million settlement to the United States for illicitly processing Iranian transactions with U.S. banks. Credit Suisse, according to the Treasury Department, saw business opportunity by picking up the transactions business from a competitor who had, in accordance with U.S. regulations discussed below, ceased processing dollar transactions for Iranian banks. Credit Suisse also pledged to cease doing business with Iran.

On December 17, 2008, the U.S. Attorney for the Southern District of New York filed a civil action seeking to seize the assets of the Assa Company, a UK-chartered entity. Assa allegedly was maintaining the interests of Bank Melli in an office building in New York City. An Iranian foundation, the Alavi Foundation, allegedly is an investor in the building.

Banking Provisions of CISADA

The Treasury Department efforts have been enhanced substantially by the authorities of Section 104 of CISADA and U.N. and EU sanctions. Broadly, Section 104 of CISADA seeks to exclude foreign banks from operating in the United States if these banks conduct transactions with the

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Revolutionary Guard or its affiliates, or with Iranian entities that are subject to international or U.S. sanctions. The premise of the provision is that cutting off Iran’s access to the international financial system would make it more difficult for Iran to move its money. The binding provisions of Section 104 require the Secretary of the Treasury to prescribe several sets of regulations to must forbid U.S. banks from opening new “correspondent accounts” or “payable through accounts”—or force the cancellation of existing such accounts—with foreign banks that process “significant transactions” with the entities discussed above. Foreign banks that do not have operations in the United States typically establish such accounts with U.S. banks as a means of accessing the U.S. financial system and financial industry. The entities with which transactions would trigger the sanctions are:

- The Islamic Revolutionary Guard Corps (IRGC) or any of its agents or affiliates that are sanctioned under U.S. executive orders. The two executive orders that have served as the principal source of U.S. sanctions against Iranian firms and organizations are Executive Order 13224 (September 23, 2001) and 13382 (June 28, 2005), discussed elsewhere in this paper.

- Any entity that is sanctioned by U.S. executive orders such as the two mentioned above. To date, over 125 entities (including individuals), almost all of them Iran-based or of Iranian origin, have been designated for Iran-related proliferation or terrorism activities under these orders.

- Any entity designated under the various U.N. Security Council resolutions adopted to impose sanctions on Iran.

- Any entity that assists Iran’s Central Bank in efforts to help the IRGC acquire weapons of mass destruction or support international terrorism.

Sanctions

As of October 13, 2011, the United States has not announced any sanctions against any bank under this provision of CISADA.

Terrorism List Designation-Related Sanctions

Several U.S. sanctions are in effect as a result of Iran’s presence on the U.S. “terrorism list.” The list was established by Section 6(j) of the Export Administration Act of 1979 (P.L. 96-72, as amended), sanctioning countries determined to have provided repeated support for acts of international terrorism. Iran was added to the list in January 1984, following the October 1983 bombing of the U.S. Marine barracks in Lebanon (believed perpetrated by Hezbollah). Sanctions imposed as a consequence include a ban on U.S. foreign aid to Iran; restrictions on U.S. exports to Iran of dual use items; and requires the United States to vote against international loans to Iran.

- The terrorism list designation restricts sales of U.S. dual use items (Export Administration Act, as continued through presidential authorities under the International Emergency Economic Powers Act, IEEPA, as implemented by executive orders), and, under other laws, bans direct U.S. financial assistance (Section 620A of the Foreign Assistance Act, FAA, P.L. 87-195) and arms sales (Section 40 of the Arms Export Control Act, P.L. 95-92, as amended), and requires the United States to vote to oppose multilateral lending to the designated
countries (Section 327 of the Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132). Waivers are provided under these laws, but successive foreign aid appropriations laws since the late 1980s ban direct assistance to Iran (loans, credits, insurance, Ex-Im Bank credits) without providing for a waiver.

- Section 307 of the FAA (added in 1985) names Iran as unable to benefit from U.S. contributions to international organizations, and require proportionate cuts if these institutions work in Iran. No waiver is provided for.

- The Anti-Terrorism and Effective Death Penalty Act (Sections 325 and 326 of P.L. 104-132) requires the President to withhold U.S. foreign assistance to any country that provides to a terrorism list country foreign assistance or arms. Waivers are provided.

U.S. sanctions laws do not bar disaster aid. The United States donated $125,000, through relief agencies, to help victims of two earthquakes in Iran (February and May 1997), and another $350,000 worth of aid to the victims of a June 22, 2002, earthquake. (The World Bank provided some earthquake related lending as well.) The United States provided $5.7 million in assistance (out of total governmental pledges of about $32 million, of which $17 million have been remitted) to the victims of the December 2003 earthquake in Bam, Iran, which killed as many as 40,000 people and destroyed 90% of Bam's buildings. The United States military flew in 68,000 kilograms of supplies to Bam. In the Bam case, there was also a temporary exemption made in the regulations to allow for a general licensing (no need for a specific license) for donations to Iran of humanitarian goods by American citizens and organizations. Those exemptions were extended several times but expired in March 2004. When that expiration occurred, the policy reverted to a requirement for specific licensing (application to OFAC) and approval process for donations and operations in Iran of U.S.-based humanitarian NGO's.

Executive Order 13224

The separate, but related, Executive Order 13324 (September 23, 2001) authorizes the President to freeze the assets of and bar U.S. transactions with entities determined to be supporting international terrorism. This order, issued two weeks after the September 11 attacks, under the authority of the IEEPA, the National Emergencies Act, the U.N. Participation Act of 1945, and Section 301 of the U.S. Code, was intended to primarily target Al Qaeda-related entities. However, it has increasingly been applied to Iranian entities. Such Iran-related entities named and sanctioned under this order are in Table 6, which also contains the names of Iranian entities sanctioned under other orders and under United Nations resolutions. On October 12, 2011, the Treasury Department designated Mahan Air, an airline operating in Iran and the Persian Gulf region, under this Order, for allegedly helping the Qods Force (the arm of Iran's Revolutionary Guard that supports pro-Iranian movements abroad) ship weapons and other gear. The announcement followed U.S. revelations of an alleged Qods plot to assassinate the Saudi Ambassador to the United States in Washington, D.C. – the Qods officers and others allegedly involved in this purported plot were sanctioned under this Order the previous day (October 11).

On July 28, 2011, the Treasury Department designated six members of Al Qaeda under this order for allegedly serving as financiers for Al Qaeda. The six are based in Iran, according to the Treasury Department and are allowed to operate from Iran under an agreement between Al Qaeda and the Iranian government.
Proliferation-Related U.S. Sanctions

Iran is prevented from receiving advanced technology from the United States under relevant and Iran-specific anti-proliferation laws and by Executive Order 13382 (June 28, 2005). Some of these laws and executive measures seek to penalize foreign firms and countries that provide equipment to Iran’s WMD programs.

Iran-Iraq Arms Nonproliferation Act

The Iran-Iraq Arms Nonproliferation Act (P.L. 102-484) imposes a number of sanctions on foreign entities that supply Iran with WMD technology or “destabilizing numbers and types of conventional weapons.” Sanctions imposed on violating entities include a ban, for two years, on U.S. government procurement from that entity, and a two-year ban on licensing U.S. exports to that entity. A sanction to ban imports to the United States from the entity is authorized.

If the violator is determined to be a foreign country, sanctions to be imposed are a one-year ban on U.S. assistance to that country; a one-year requirement that the United States vote against international lending to it; a one-year suspension of U.S. co-production agreements with the country; a one-year suspension of technical exchanges with the country in military or dual use technology; and a one-year ban on sales of U.S. arms to the country. The President is also authorized to deny the country most-favored-nation trade status; and to impose a ban on U.S. trade with the country.

The Iran-Iraq Arms Nonproliferation Act (Section 1603) also provides for a “presumption of denial” for all dual use exports to Iran (which would include computer software). A waiver to permit such exports, on a case-by-case basis, is provided for.

Iran-North Korea-Syria Nonproliferation Act

The Iran Nonproliferation Act (P.L. 106-178), now called the Iran-North Korea-Syria Non-Proliferation Act (INKSNA) authorizes sanctions on foreign persons (individuals or corporations, not countries or governments) that are determined by the Administration to have assisted Iran’s WMD programs. It bans U.S. extraordinary payments to the Russian Aviation and Space Agency in connection with the international space station unless the President can certify that the agency or entities under its control had not transferred any WMD or missile technology to Iran within the year prior. (A Continuing Resolution for FY2009, which funded the U.S. government through March 2009, waived this law to allow NASA to continue to use Russian vehicles to access the International Space Station.) Pending legislation in the 112th Congress, discussed later, would amend INKSNA.


The provision contains certain exceptions to ensure the safety of astronauts, but it nonetheless threatened to limit U.S. access to the international space station after April 2006, when Russia started charging the United States for transportation on its Soyuz spacecraft. Legislation in the 109th Congress (S. 1713, P.L. 109-12) amended the provision in order to facilitate continued U.S. access and extended INA sanctions provisions to Syria.
Executive Order 13382

Executive Order 13382 (June 28, 2005) allows the President to block the assets of proliferators of weapons of mass destruction (WMD) and their supporters under the authority granted by the International Emergency Economic Powers Act (IEEPA, 50 U.S.C. 1701 et seq.), the National Emergencies Act (50 U.S.C. 1601 et seq.), and Section 301 of Title 3, United States Code. Table 6 lists Iran-related entities sanctioned under the order. As an example, the IRGC is named as a proliferation entity under E.O. 13382.

Foreign Aid Restrictions for Suppliers of Iran

In addition, successive foreign aid appropriations punish the Russian Federation for assisting Iran by withholding 60% of any U.S. assistance to the Russian Federation unless it terminates technical assistance to Iran’s nuclear and ballistic missiles programs.

U.S. Efforts to Promote Divestment

A growing trend not only in Congress but in several states is to require or call for or require divestment of shares of firms that have invested in Iran’s energy sector (at the same levels considered sanctionable under the Iran Sanctions Act)\(^1\) The concept of these sanctions is to express the view of Western and other democracies that Iran is an outcast internationally.

Legislation in the 110\(^{th}\) Congress, H.R. 1400, did not require divestment, but would have required a presidential report on firms that have invested in Iran’s energy sector. Another bill, H.R. 1357, required government pension funds to divest of shares in firms that have made ISA-sanctionable investments in Iran’s energy sector and bar government and private pension funds from future investments in such firms. Two other bills, H.R. 2347 (passed by the House on July 31, 2007) and S. 1430, would protect mutual fund and other investment companies from shareholder action for any losses that would occur from divesting in firms that have investing in Iran’s energy sector.

In the 111\(^{th}\) Congress, H.R. 1327 (Iran Sanctions Enabling Act), a bill similar to H.R. 2347 of the 110\(^{th}\) Congress, was reported by the Financial Services Committee on April 28, 2009. It passed the House on October 14, 2009, by a vote of 414-6. A similar bill. S. 1065, was introduced in the Senate. Provisions along these lines was contained in CISADA (P.L. 111-195)—in particular providing a “safe harbor” for investment managers who sell shares of firms that invest in Iran’s energy sector.

U.S. Sanctions Intended to Support Democratic Change in Iran or Alter Iran’s Foreign Policy

A trend since the June 2009 Iran election dispute has been to promote the prospects for the domestic opposition in Iran. Proposals to target the Revolutionary Guard for sanctions, discussed

\(^{1}\) For information on the steps taken by individual states, see National Conference of State Legislatures. State Divestment Legislation.
throughout, represent one facet of that trend. The IRGC is involved in Iran’s WMD programs but it is also the key instrument through which the regime has suppressed the pro-democracy movement. Several measures to support the opposition’s ability to communicate, to reduce the regime’s ability to monitor or censor Internet communications and to identify and sanction Iranian human rights abusers, were included in CISADA.

Earlier legislation, the Iran Freedom Support Act (IFSA, P.L. 109-293), represented a congressional effort to promote the prospects for opponents of the regime. That law authorized “sums as may be necessary” to assist Iranians who are “dedicated” to “democratic values ... and the adoption of a democratic form of government in Iran”; and “advocate the adherence by Iran to nonproliferation regimes.”

Expanding Internet and Communications Freedoms

Some Members have focused on expanding Internet freedom in Iran or preventing the Iranian government from using the Internet to identify opponents. Subtitle D of the FY2010 Defense Authorization Act (P.L. 111-84), called the “VOICE” (Victims of Iranian Censorship) Act contained several provisions to increase U.S. broadcasting to Iran and to identify (in a report to be submitted 180 days after enactment, or April 25, 2009) companies that are selling Iran technology equipment that it can use to suppress or monitor the Internet usage of Iranians. The Act authorized funds to document Iranian human rights abuses since the June 12, 2009, presidential election. Another provision (Section 1241) required an Administration report, not later than January 31, 2010, on U.S. enforcement of sanctions against Iran, and the effect of those sanctions on Iran.

In the 111th Congress, the “Reduce Iranian Cyber-Suppression Act,” (S. 1475 and H.R. 3284) was incorporated into CISADA. It authorizes the President to ban U.S. government contracts with foreign companies that sell technology that Iran could use to monitor or control Iranian usage of the internet. Another provision of CISADA (Section 103(b)(2)) exempts from the U.S. export ban on Iran equipment to help Iranians communicate and use the Internet. The provisions were directed, in part, against firms, including a joint venture between Nokia (Finland) and Siemens (Germany), reportedly sold Internet monitoring and censorship technology to Iran in 2008. Perhaps to avoid further embarrassment, Siemens announced on January 27, 2010, that it would stop signing new business deals in Iran as of mid-2010. There is some concern that a large Chinese firm, Huawei, might have sold Iran Internet monitoring or censorship gear as part of its work in Iran’s communications industry although there is no clear information that it has done so.

In line with this trend, on March 8, 2010, OFAC amended the Iran Transactions Regulations that implement the U.S.-Iran trade ban to provide for a general license for providing to Iranians free mass market software in order to facilitate Internet communications. The ruling appeared to incorporate the major features of a proposal in the 111th Congress, H.R. 4301, the “Iran Digital Empowerment Act.” The OFAC determination required a waiver of the provision of the Iran-Iraq Arms Nonproliferation Act (Section 1606 waiver provision) discussed above.

To counter some of the efforts above, and among other measures, in 2011 the Iranian government established a “cyber police” force. Part of the force’s duties are to sensitize young Iranians to the

government view that Western countries are using the Internet to undermine Iran’s Islamic values and government.  

Measures to Sanction Human Rights Abuses and Promote the Opposition

Another part of the effort to help Iran’s opposition has been legislation to sanction regime officials involved in suppressing the domestic opposition in Iran. Senator John McCain proposed to offer amendments to S. 2799 (the Senate version of what became H.R. 2194) to focus on banning travel and freezing assets of those Iranians determined to be human rights abusers. These provisions were included in the conference report on CISADA. The provisions were similar to those of Senator McCain’s earlier stand alone bill, S. 3022, the “Iran Human Rights Sanctions Act.” Companion measures in the House were H.R. 4647 and H.R. 4649.

On September 29, 2010, the Administration implemented the CISADA provision when President Obama signed an Executive Order (13553) providing for the CISADA sanctions against Iranians determined to be responsible for or complicit in post-2009 Iran election human rights abuses. Along with the order, an initial group of eight Iranian officials were penalized, including Mohammad Ali Jafari, the commander-in-chief of the IRGC, and several other officials who were in key security or judicial positions at the time of the June 2009 election and aftermath. Several additional officials and security force entities have been sanctioned under the Order since, as shown in the table at the end of this paper. Under State Department interpretations of the executive order, if an entity is designated, all members of that entity are ineligible for visas to enter the United States. Similar sanctions against many of these same officials—as well as several others—have been imposed by the European Union - a total of 61 Iranians have been so sanctioned by the EU to date, including 29 Iranian officials sanctioned on October 5, 2011.

Executive Order 13438 and 13572: Sanctioning Iranian Involvement in the Region

Some sanctions have been imposed to try to punish Iran’s involvement in certain activities in the region. On July 7, 2007, President Bush issued Executive Order 13438. The order sanctions Iranian persons who are posing a threat to Iraqi stability, presumably by providing arms or funds to Shiite militias there. Some persons sanctioned have been Qods Force officers, some have been Iraqi Shiite militia-linked figures, and some entities have been sanctioned as well.

More recently, the Qods Force and a number of Iranian Qods Force officers, including Qods Force commander Qasem Soleimani, have been sanctioned under Executive Order 13572. That order was issued on April 29, 2011, targeting Syrian officials and other responsible for human rights abuses and repression of the Syrian people. The Iranians were sanctioned for allegedly helping Syria commit abuses against protesters and repress its domestic opposition movement that has conducted nationwide demonstration since March 2011. In September 2011, the

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European Union similarly sanctioned the Qods Force for its purported assistance to Syria’s repression.

Separate Visa Ban

On July 8, 2011, in conjunction with Britain, the United States imposed visa restrictions on more than 50 Iranian officials for participating in political repression in Iran. The State Department announcement stated that the names of those subject to the ban would not be released because visa records are confidential. The action was taken under the authorities of Section 212(a)(3)(C) of the Immigration and Nationality Act, which renders inadmissible to the United States a foreign person whose activities could have serious consequences for the United States.

Blocked Iranian Property and Assets

Iranian leaders continue to assert that the United States is holding Iranian assets, and that this is an impediment to improved relations. A U.S.-Iran Claims Tribunal at the Hague continues to arbitrate cases resulting from the 1980 break in relations and freezing of some of Iran’s assets. Major cases yet to be decided center on hundreds of Foreign Military Sales (FMS) cases between the United States and the Shah’s regime, which Iran claims it paid for but were unfulfilled. About $400 million in proceeds from the resale of that equipment was placed in a DOD FMS account and remains in this escrow account. Additionally, according to the Treasury Department “Terrorist Assets Report” for 2010, about $48 million in Iranian diplomatic property and accounts remains blocked - this amount includes proceeds from rents received on the former Iranian embassy in Washington, D.C. and ten other properties in several states, along with six related bank accounts.36

Other past disputes include the mistaken U.S. shoot-down on July 3, 1988, of an Iranian Airbus passenger jet (Iran Air flight 655), for which the United States, in accordance with an ICJ judgment, paid Iran $61.8 million in compensation ($300,000 per wage earning victim, $150,000 per nonwage earner) for the 248 Iranians killed. The United States has not compensated Iran for the airplane itself. As it has in past similar cases, the Bush Administration opposed a terrorism lawsuit against Iran by victims of the U.S. Embassy Tehran seizure on the grounds of diplomatic obligation.37

U.N. Sanctions

The U.S. sanctions discussed in this report are more extensive than those imposed, to date, by the United Nations Security Council or by individual foreign countries or groups of countries, such as the European Union. However, U.N. sanctions apply to all U.N. member states, and therefore tend to be more effective than unilateral sanctions. There is increasing convergence among all these varying sets of sanctions.

As part of a multilateral process of attempting to convince Iran to choose the path of negotiations or face further penalty, during 2006-2008, three U.N. Security Council resolutions—1737, 1747, and 1803—imposed sanctions primarily on Iran's weapons of mass destruction (WMD) infrastructure. The multilateral group negotiation with Iran ("P5+1:" the Security Council permanent members, plus Germany) at the same time offered Iran incentives to suspend uranium enrichment. After failed negotiations with Iran during 2009, Resolution 1929 was adopted on June 9, 2010, by a vote of 12-2 (Turkey and Brazil), with one abstention (Lebanon). (Iranian entities and persons sanctioned by the United Nations are in Table 6.)

The main points of Resolution 1929 are: 38

- It adds several firms affiliated with the Revolutionary Guard firms to the list of sanctioned entities.
- It makes mandatory a ban on travel for Iranian persons named in it and in previous resolutions—including those Iranians for whom there was a nonbinding travel ban in previous resolutions.
- It gives countries the authorization to inspect any shipments—and to dispose of its cargo—if the shipments are suspected to carry contraband items. However, inspections on the high seas are subject to concurrence by the country that owns that ship. This provision is modeled after a similar provision imposed on North Korea, which did cause that country to reverse some of its shipments.
- It prohibits countries from allowing Iran to invest in uranium mining and related nuclear technologies, or nuclear-capable ballistic missile technology.
- It bans sales to Iran of most categories of heavy arms to Iran and requests restraint in sales of light arms, but does not bar sales of missiles not on the "U.N. Registry of Conventional Arms."
- It requires countries to insist that their companies refrain from doing business with Iran if there is reason to believe that such business could further Iran's WMD programs.
- It requests, but does not mandate, that countries prohibit Iranian banks to open in their countries, or for their banks to open in Iran, if doing so could contribute to Iran's WMD activities.
- It authorizes the establishment of a "panel of experts," which is chaired by senior State Department arms control and proliferation adviser Robert Einhorn, to assist the U.N. sanctions committee in implementing the Resolution and previous Iran resolutions, and to suggest ways of more effective implementation.
- The resolution did not make mandatory some measures that reportedly were considered, including barring any foreign investment in Iranian bond offerings; banning insurance for transport contracts for shipments involving Iran; banning international investment in Iran's energy sector; banning the provision of trade credits to Iran, or banning all financial dealings with Iranian banks.

Table 3. Summary of Provisions of U.N. Resolutions on Iran Nuclear Program (1737, 1747, 1803, and 1929)

- Require Iran to suspend uranium enrichment, and to refrain from any development of ballistic missiles that are nuclear capable (1929)
- Prohibit transfer to Iran of nuclear, missile, and dual use items to Iran, except for use in light-water reactors
- Prohibit Iran from exporting arms or WMD-useful technology
- Prohibit Iran from investing abroad in uranium mining, related nuclear technologies or nuclear capable ballistic missile technology
- Freeze the assets of over 80 named Iranian persons and entities, including Bank Sepah, and several corporate affiliates of the Revolutionary Guard.
- Require that countries ban the travel of over 40 named Iranians
- Mandates that countries not export major combat systems to Iran
- Calls for "vigilance" (a nonbinding call to cut off business) with respect to all Iranian banks, particularly Bank Melli and Bank Saderat.
- Calls for vigilance (voluntary restraint) with respect to providing international lending to Iran and providing trade credits and other financing and financial interactions.
- Calls on countries to inspect cargoes carried by Iran Air Cargo and Islamic Republic of Iran Shipping Lines—or by any ships in national or international waters—if there are indications they carry cargo banned for carriage to Iran. Searches in international waters would require concurrence of the country where the ship is registered.
- A Sanctions Committee, composed of the 15 members of the Security Council, monitors Implementation of all Iran sanctions and collects and disseminates information on Iranian violations and other entities involved in banned activities. A "panel of experts" is empowered by 1929 to make recommendations for improved enforcement.


International Implementation and Compliance

U.S. allies have generally supported and joined the Obama Administration’s sanctions toward Iran, in part because the approach is perceived as not purely punitive, and in part because their own concerns about Iran’s nuclear advancement have increased. U.S. and European/allied approaches have been gradually converging since 2002, when the nuclear issue came to the fore, but as of 2010, an unprecedented degree of global consensus has emerged on how to deal with Iran. There is a degree of consensus among experts that many countries, not only allies of the United States, are complying with the provisions of U.N. sanctions, but there are selected exceptions (discussed below). Implementation appears to be somewhat less complete in Iran’s immediate region, perhaps because its neighbors do not want confrontation with Iran and are hesitant to disrupt traditional relationships among traders and businessmen in the region.

European Union and Other Western States

In its July 27, 2010, sanctions measures, the product of consensus among the EU states, the EU countries imposed sanctions on Iran that exceed those mandated in Security Council resolutions. Concurrent with the EU announcement, not only Norway (not an EU member) but also Canada
Iran Sanctions

and Australia announced similar, although less sweeping, Iran sanctions. A comparison between U.S., U.N., and EU sanctions against Iran is contained in the chart below, although noting that there are differing legal bases and authorities for these sanctions. A U.S. President cannot mandate a foreign company take any particular action; however, the U.S. government can penalize or reward foreign firms who take action that supports U.S. objectives. U.N. Security Council resolutions are considered binding on U.N. member states. The EU clarified in late October 2010, that its sanctions against Iran do not ban importation of Iranian oil and gas, nor do they ban exports of gasoline to Iran.

Japan and South Korea

In early September 2010, Japan and then South Korea announced Iran sanctions similar to those of the EU. Both countries adopted measures limiting trade financing for Iran, limiting new banking relations with Iran, sanctioning numerous named Iranian entities, and restricting new projects in Iran’s energy sector. The sanctions adopted by both were far more extensive than was expected by U.S. officials.

India/Asian Clearing Union

India has generally been considered friendly toward Iran and unlikely to impose any national sanctions on that country. Therefore, many experts were surprised when India’s central bank, in late December 2010, announced that it would no longer use a regional body, the Asian Clearing Union, to handle transactions with Iran. The Asian Clearing Union, based in Tehran, was set up in the 1970s by the United Nations to ease commerce among Asian nations. There have been allegations in recent years that Iran might be using the Clearing Union to handle transactions so as to avoid limitations imposed by European and other banks.

The Indian move complicated India’s purchases of about 350,000-400,000 barrels per day of Iranian oil, and Indian officials subsequently undertook negotiations with Iran to find an alternate mechanism to clear Indian payments for that oil and other Iranian goods. Still, the Indian move—and the reported difficulty in agreeing to a replacement payments mechanism—appeared to signal that India was taking steps to join U.S./European-led efforts to shut Iran out of the international financial system. The Indian move followed President Obama’s visit there in November 2010.

Several banks considered as replacement mechanisms were either under U.N. sanctions or fear fallout (restrictions in the U.S. banking system) from transacting banking business for Iran. In February 2011, India and Iran agreed to use an Iranian bank, Europaisch-Iranische Handelsbank (EIH) to clear the payments. EIH has accounts with National Iranian Oil Company as well as with the Central Bank of Germany, rendering the bank able to process the Indian payments to Iran. Some Members of Congress have previously characterized that bank as one of Iran’s few remaining access points to the European financial system and had asked the German government to order it closed. On May 23, 2011, the EU named EIH and about 100 other entities as Iran proliferation-related activities, meaning the bank might be forced to close and leaving India and Iran to again try to find an alternative payments mechanism. With approximately $6.3 billion in oil payments due Iran building up in an escrow account, in July 2011 Iran threatened to reduce or cut off entirely oil shipments to India. In late July 2011, the two identified Turkey’s Halkbank as

39 Letter signed by eleven U.S. Senators to German Foreign Minister Guido Westerwelle. February 1, 2011.
at least an interim solution, and about $1.3 billion was transferred to Iran. Iranian officials said that about $5 billion was still due, although on September 4, 2011, Iran's Central Bank Governor said India had fully settled its debt. Perhaps because of the payments difficulties, some Indian firms, including Reliance Industries, Ltd, have reduced their crude oil purchases from Iran.

Separately, the majority owner of EIH, Iran's Bank of Industry and Mines (BIM), was sanctioned by the United States as a proliferation entity under Executive Order 13382, for providing transactions for Bank Mellat and EIH in support of Iran's proliferation activities.

China, Russia, and Others

The position of Russia, China, and several other countries—that they will impose only those sanctions required by applicable U.N. Security Council resolutions, but not impose sanctions beyond those specifically mandated—has been of concern to several Members of Congress. As noted below, some Members and outside experts express concern that Chinese firms, in particular, are moving to fill the void left by vacating European firms ("backfill"), but Administration officials say they have not seen evidence of such a trend. At the same time, there have been reports that China has a balance due, of ranges from small amounts to up to $30 billion, for Iranian oil shipments because of the payments mechanisms identified above in the case of India. China reportedly has offered to settle some of its debt to Iran by providing goods, but Iran has rejected those offers on the grounds that it needs hard currency payment for oil.

An even more significant concern is that these and other countries are refusing or failing to prevent Iran from acquiring weapons and WMD technology. Secretary of State Clinton singled out China on January 19, 2011, as not enforcing all aspects of international sanctions that bar sales of most nuclear-related equipment to Iran; the comment came of the eve of the state visit to the United States by President Hu Jintao. On March 9, 2011, State Department Special Adviser for Non-Proliferation and Arms Control, Robert Einhorn, said Iran may be working with Chinese firms to obtain sensitive technology useful for nuclear weapons development. In some cases, Iran has been able, according to some reports, to obtain sophisticated technology even from U.S. firms. 40

A related issue is Iran's efforts to use the high seas or the territory of other countries to supply weapons to groups it supports (such shipments are barred by U.N. resolutions; see above). In March 2011, Israel intercepted a freighter, the Victoria, that it said was carrying Iranian weapons to Palestinian militant groups. Also in March 2011, Turkey, generally considered friendly toward Iran, complied with U.N. requirements by twice forcing the landing in Turkey of Iranian cargo aircraft. In both cases, the aircraft were searched, and in one instance, weapons were removed, allegedly bound for Syria, before the aircraft were allowed to proceed.

Contrast With Previous Periods

The emerging consensus on Iran sanctions differs from early periods when there was far more disagreement. Reflecting the traditional European preference for providing incentives rather than

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enacting economic punishments, during 2002-2005, there were active negotiations between the European Union and Iran on a “Trade and Cooperation Agreement” (TCA). Such an agreement would have lowered the tariffs or increased quotas for Iranian exports to the EU countries. However, negotiations were discontinued after the election of Ahmadinejad in June 2005, at which time Iran’s position on its nuclear program hardened. Similarly, there is insufficient international support to grant Iran membership in the World Trade Organization (WTO) until there is progress on the nuclear issue. Iran first attempted to apply to join the WTO in July 1996. On 22 occasions after that, representatives of the Clinton and then the George W. Bush Administration blocked Iran from applying (applications must be by consensus of the 148 members). As discussed above, as part of an effort to assist the EU-3 nuclear talks with Iran, at a WTO meeting in May 2005, no opposition to Iran’s application was registered, and Iran formally began accession talks.

Earlier, during the 1990s, EU countries maintained a policy of “critical dialogue” with Iran, and the EU and Japan refused to join the 1995 U.S. trade and investment ban on Iran. The European dialogue with Iran was suspended in April 1997 in response to the German terrorism trial (“Mykonos trial”) that found high-level Iranian involvement in killing Iranian dissidents in Germany, but resumed in May 1998 during Khatoms’s presidency. In the 1990s, European and Japanese creditors—over U.S. objections—rescheduled about $16 billion in Iranian debt. These countries (governments and private creditors) rescheduled the debt bilaterally, in spite of Paris Club rules that call for multilateral rescheduling. In July 2002, Iran tapped international capital markets for the first time since the Islamic revolution, selling $500 million in bonds to European banks. (A provision of H.R. 6296 would make sanctionable under ISA the purchase of Iranian sovereign debt).

World Bank Loans

The July 27, 2010, EU measures narrowed substantially the prior differences between the EU and the United States over international lending to Iran. As noted above, the United States representative to international financial institutions is required to vote against international lending, but that vote, although weighted, is not sufficient to block international lending. In 1993 the United States voted its 16.3% share of the World Bank against loans to Iran of $460 million for electricity, health, and irrigation projects, but the loans were approved. To block that lending, the FY1994-FY1996 foreign aid appropriations (P.L. 103-87, P.L. 103-306, and P.L. 104-107) cut the amount appropriated for the U.S. contribution to the bank by the amount of those loans. The legislation contributed to a temporary halt in new bank lending to Iran. (In the 111th Congress, a provision of H.R. 6296—Title VII—cut off U.S. contributions to the World Bank, International Finance Corp., and the Multilateral Investment Guarantee Corp. if the World Bank approves a new Country Assistance Strategy for Iran or makes a loan to Iran.)

During 1999-2005, Iran’s moderating image had led the World Bank to consider new loans over U.S. opposition. In May 2000, the United States’ allies outvoted the United States to approve $232 million in loans for health and sewage projects. During April 2003-May 2005, a total of $725 million in loans were approved for environmental management, housing reform, water and

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41 During the active period of talks, which began in December 2002, there were working groups focused not only on the TCA terms and proliferation issues but also on Iran’s human rights record, Iran’s efforts to derail the Middle East peace process, Iranian-sponsored terrorism, counter-narcotics, refugees, migration issues, and the Iranian opposition PMOI.
sanitation projects, and land management projects, in addition to $400 million in loans for earthquake relief.

Table 4. Points of Comparison Between U.S., U.N., and EU Sanctions Against Iran

<table>
<thead>
<tr>
<th>U.S. Sanctions</th>
<th>U.N. Sanctions</th>
<th>Implementation by EU (July 27, 2010) and Some Allied Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>General Observation: Most sweeping sanctions on Iran of virtually any country in the world</strong></td>
<td>Increasingly sweeping, but still intended to primarily target Iran's nuclear and other WMD programs. No mandatory sanctions on Iran's energy sector.</td>
<td>EU abides by all U.N. sanctions on Iran, but new package of Iran sanctions announced July 27, 2010, more closely aligns EU sanctions with those of the U.S. than ever before.</td>
</tr>
<tr>
<td><strong>Ban on U.S. Trade with and Investment in Iran:</strong></td>
<td>U.N. sanctions do not ban civilian trade with Iran or general civilian sector investment in Iran. Nor do U.N. sanctions mandate restrictions on provision of trade financing or financing guarantees by national export credit guarantee agencies.</td>
<td>Japan and South Korean sanctions (September 2010) similar to EU.</td>
</tr>
</tbody>
</table>

Executive Order 12959 bans (with limited exceptions) U.S. firms from exporting to Iran, importing from Iran, or investing in Iran.

There is an exemption for sales to Iran of food and medical products, but no trade financing or financing guarantees are permitted.

Sanctions on Foreign Firms that Do Business With Iran's Energy Sector:

The Iran Sanctions Act, P.L. 104-172 (as amended most recently by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, P.L. 111-195) mandates specified sanctions on foreign firms that invest threshold amounts in Iran's Energy Sector or that sell certain threshold amounts of refined petroleum or refinery related equipment or services to Iran.

No U.N. equivalent exists. However, preambular language in Resolution 1929 "no[es] the potential connection between Iran's revenues derived from its energy sector and the funding of Iran's proliferation-sensitive nuclear activities." This wording is interpreted by most observers as providing U.N. support for countries who want to ban their companies from investing in Iran's energy sector.

July 27, 2010, EU sanctions prohibit EU companies from financing energy sector projects in Iran (a de-facto ban on energy sector investment) and ban sales to Iran of equipment or services for its energy sector, including projects outside Iran. No ban on buying oil or gas from Iran or selling gasoline to Iran.

Japan and South Korean measures ban new energy projects in Iran and call for restraint on ongoing projects.
<table>
<thead>
<tr>
<th>U.S. Sanctions</th>
<th>U.N. Sanctions</th>
<th>Implementation by EU (July 27, 2010) and Some Allied Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ban on Foreign Assistance:</td>
<td>No U.N. equivalent</td>
<td>EU measures of July 27, 2010, ban grants, aid, and concessional loans to Iran. Also prohibit financing of enterprises involved in Iran's energy sector.</td>
</tr>
<tr>
<td>U.S. foreign assistance to Iran—other than purely humanitarian aid—is banned under Section 620A of the Foreign Assistance Act. That section bans U.S. assistance to countries on the U.S. list of &quot;state sponsors of terrorism.&quot; Iran has been on this &quot;terrorism list&quot; since January 1984. Iran is also routinely denied direct U.S. foreign aid under the annual foreign operations appropriations acts (most recently in Section 7007 of division H of P.L. 111-8).</td>
<td></td>
<td>Japan and South Korea measures did not specifically ban aid or lending to Iran.</td>
</tr>
<tr>
<td>Ban on Arms Exports to Iran:</td>
<td>Resolution 1929 (operative paragraph 8) bans all U.N. member states from selling or supplying to Iran major weapons systems, including tanks, armored vehicles, combat aircraft, warships, and most missile systems, or related spare parts or advisory services for such weapons systems.</td>
<td>EU sanctions include a comprehensive ban on sale to Iran of all types of military equipment, not just major combat systems.</td>
</tr>
<tr>
<td>Because Iran is on the &quot;terrorism list,&quot; it is ineligible for U.S. arms exports pursuant to Section 40 of the Arms Export Control Act (AECA, P.L. 95-92). The International Traffic in Arms Regulations (ITAR, 22 CFR Part 126.1) also cite the President's authority to control arms exports, and to comply with U.N. Security Council Resolutions as a justification to ban arms exports and imports.</td>
<td>The U.N. Resolutions on Iran, cumulatively, ban the export of almost all dual-use items to Iran.</td>
<td>No similar Japan and South Korean measures announced, but neither has exported arms to Iran.</td>
</tr>
<tr>
<td>Restriction on Exports to Iran of &quot;Dual Use Items&quot;:</td>
<td></td>
<td>EU bans the sales of dual use items to Iran, in line with U.N. resolutions.</td>
</tr>
<tr>
<td>Primarily under Section 6(j) of the Export Administration Act (P.L. 96-72) and Section 38 of the Arms Export Control Act, there is a denial of license applications to sell Iran goods that could have military applications.</td>
<td>Resolution 1747 (oper. paragraph 7) requests, but does not mandate, that countries and international financial institutions refrain from making grants or loans to Iran, except for development and humanitarian purposes.</td>
<td>Japan announced full adherence to strict export control regimes when evaluating sales to Iran.</td>
</tr>
<tr>
<td>Sanctions Against International Lending to Iran:</td>
<td></td>
<td>The July 27, 2010, measures prohibit EU members from providing grants, aid, and concessional loans to Iran, including through international financial institutions.</td>
</tr>
<tr>
<td>Under Section 1621 of the International Financial Institutions Act (P.L. 95-118), U.S. representatives to International financial institutions, such as the World Bank, are required to vote against loans to Iran by those institutions.</td>
<td></td>
<td>No specific similar Japan or South Korea measures announced.</td>
</tr>
</tbody>
</table>
### U.S. Sanctions

**Sanctions Against Foreign Firms that Sell Weapons of Mass Destruction-Related Technology to Iran:**

Several laws and regulations, including the Iran-Syria North Korea Nonproliferation Act (P.L. 106-178), the Iran-Iraq Arms Nonproliferation Act (P.L. 102-484) and Executive Order 13382 provide for sanctions against entities, Iranian or otherwise, that are determined to be involved in or supplying Iran's WMD programs (asset freezing, ban on transactions with the entity).

**Ban on Transactions With Terrorism Supporting Entities:**

Executive Order 13224 bans transactions with entities determined by the Administration to be supporting international terrorism. Numerous entities, including some of Iranian origin, have been so designated.

**Travel Ban on Named Iranians:**

The Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (P.L. 111-195) provides for a prohibition on travel to the U.S., blocking of U.S.-based property, and ban on transactions with Iranians determined to be involved in serious human rights abuses against Iranians since the June 12, 2009, presidential election there.

**Restrictions on Iranian Shipping:**

Under Executive Order 13382, the U.S. Treasury Department has named Islamic Republic of Iran Shipping Lines and several affiliated entities as entities whose U.S.-based property is to be frozen.

### U.N. Sanctions

**Resolution 1737 (oper. paragraph 12)** imposes a worldwide freeze on the assets and property of Iranian entities named in an Annex to the Resolution. Each subsequent Resolution has expanded the list of Iranian entities subject to these sanctions.

No direct equivalent.

**Resolution 1803 and 1929** authorize countries to inspect cargoes carried by Iran Air and Islamic Republic of Iran Shipping Lines (IRISL)—or any ships in national or international waters—if there is an indication that the shipments include goods whose export to Iran is banned.

### Implementation by EU (July 27, 2010) and Some Allied Countries

The EU measures imposed July 27, 2010, commit the EU to freezing the assets of entities named in the U.N. resolutions, as well as numerous other named Iranian entities.

Japan and South Korea froze assets of U.N.-sanctioned entities.

The EU sanctions announced July 27, 2010, contain an Annex of named Iranians subject to a ban on travel to the EU countries. An additional 21 Iranians involved in human rights abuses were subjected to EU sanctions on April 14, 2011.

Japan and South Korea announced bans on named Iranians.

The EU measures announced July 27, 2010, ban Iran Air Cargo from access to EU airports. The measures also freeze the EU-based assets of IRISL and its affiliates. Insurance and re-insurance for Iranian firms is banned.

Japan and South Korean measures take similar actions against IRISL and Iran Air.
Iran Sanctions

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<tr>
<th>U.S. Sanctions</th>
<th>U.N. Sanctions</th>
<th>Implementation by EU (July 27, 2010) and Some Allied Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>Banking Sanctions:</td>
<td>No direct equivalent</td>
<td>The EU announcement on July 27, 2010, prohibits the opening in EU countries of any new branches or offices of Iranian banks. The measures also prohibit EU banks from offices or accounts in Iran. In addition, the transfer of funds exceeding 40,000 Euros (about $50,000) between an Iranian bank and an EU bank require prior authorization by EU bank regulators.</td>
</tr>
<tr>
<td>A number of provisions and policies have been employed to persuade foreign banks to end their relationships with Iranian banks. Several Iranian banks have been named as proliferation or terrorism supporting entities under Executive Orders 13382 and 13224, respectively.</td>
<td>However, two Iranian banks are named as sanctioned entities under the U.N. Security Council resolutions.</td>
<td>Japan and South Korea measures similar to the above, with South Korea adhering to the same 40,000 Euro authorization requirement. Japan and S. Korea froze the assets of 15 Iranian banks; South Korea targeted Bank Mellat for freeze.</td>
</tr>
<tr>
<td>P.L. 111-195 contains a provision that prohibits banking relationships with U.S. banks for any foreign bank that conducts transactions with Iran's Revolutionary Guard or with Iranian entities sanctioned under the various U.N. resolutions.</td>
<td>No direct equivalent, although, as discussed above, U.S. proliferations laws provide for sanctions against foreign entities that help Iran with its nuclear and ballistic missile programs.</td>
<td>EU measures on July 27, 2010, require adherence to this provision of Resolution 1929.</td>
</tr>
<tr>
<td>No direct equivalent, although, as discussed above, U.S. proliferations laws provide for sanctions against foreign entities that help Iran with its nuclear and ballistic missile programs.</td>
<td>Resolution 1929 (oper. paragraph 7) prohibits Iran from acquiring an interest in any country involving uranium mining, production, or use of nuclear materials, or technology related to nuclear-capable ballistic missiles.</td>
<td></td>
</tr>
<tr>
<td>Operative Paragraph 9 of Resolution 1929 prohibits Iran from undertaking &quot;any activity&quot; related to ballistic missiles capable of delivering a nuclear weapon.</td>
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</table>

Effects of Sanctions on Iran

Assessing the effectiveness of U.S. and international sanctions on depends at least in part upon which goals are being examined. U.S. officials acknowledge that the sanctions have not achieved the core goal of altering Iran's commitment to its nuclear program. However, most outside experts agree that the sanctions are contributing to the subordinate goal of applying increasing pressure to Iran's economy. The International Monetary Fund and other experts say that high oil prices have helped Iran weather the economic effects of the sanctions. Iran's political system is in turmoil, and there is popular pressure on the regime to reform or change outright, but this sentiment appears to be caused by factors not directly related to Iran's economy or to international sanctions.

At various conferences, some Administration officials have urged to allow time for the existing sanctions to work but, following the October 2011 revelation of the alleged Iranian plot against...
the Saudi Ambassador to the United States, Administration officials appear to be pushing for additional international sanctions.

**Effect on Nuclear Negotiations**

There is a consensus that U.S. and U.N. sanctions have not, to date, accomplished their core strategic objective of causing a demonstrable shift in Iran’s commitment to its nuclear program. Most experts assess that the optimal means for sanctions to affect the nuclear program is by compelling an Iran decision to accept a compromise that would limit Iran’s nuclear development. In late November 2010, Iran accepted new nuclear talks in Geneva. However, during two days of talks (December 6 and 7), Iran did not agree to curbs on its enrichment of uranium, the core U.S. demand. There was an agreement to have new talks in Turkey, which took place during January 21-22, 2011. However, the talks, by all accounts, made little progress as Iran refused to discuss details of various proposals for nuclear confidence building measures. The talks were said to have nearly broken down at the end of the first day. An exchange of letters between Iran and the EU foreign policy representative (acting on behalf of the P5+1) during February-May 2011 did not indicate sufficient Iranian flexibility to prompt the P5+1 to seek to schedule new talks with Iran.

Some might argue that the assessment of the effect of sanctions on Iran’s negotiating stance might be subject to reassessment. In August 2011, Iranian officials indicated interest in Russian proposals to restart talks and indicated a willingness to allow closer IAEA “supervision” or inspections of Iran’s nuclear program. President Ahmadinejad, during his September 2011 U.N. General Assembly visit to the United States, said Iran might accept a proposal to cap the level of its uranium enrichment at 5%. These statements could represent new flexibility and indicate that sanctions might be causing Iranian leaders to seek to reduce international pressure. However, as of early November 2011, no new P5+1 talks with Iran are scheduled.

**Counter-Proliferation Effects**

A related issue is whether the cumulative sanctions have, in and of themselves, added bottlenecks to Iran’s nuclear efforts by making it difficult for Iran to import needed materials or skills. In a statement in the UAE on January 10, 2011, Secretary of State Clinton said that “The sanctions are working.... Their program, from our best estimate, has been slowed down.” Others, however, say that there is not clear evidence that sanctions are slowing Iran’s program in that International Atomic Energy Agency (IAEA) reports say that Iran’s stockpile of low-enriched uranium continues to expand, as do its holdings of 20% enriched uranium. This latter material is a cause of U.S. concern because of the technological skill needed to produce that level of enrichment. The lack of clear evidence that Iran is trying to acquire a nuclear weapons capability could be caused by Iranian decisions rather than the effect of sanctions.

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General Political Effects

The international community has hoped that international sanctions might widen splits in Iran’s leadership and cause its leaders to reconsider major foreign policy decisions, particularly the nuclear program. There are growing indications of splits in the Iranian leadership—particularly between President Ahmadinejad and the Supreme Leader—to the point at which there has been open discussion in Iran’s parliament since June 2011 of impeaching Ahmadinejad. In October 2011, the Supreme Leader raised the possibility of amending Iran’s constitution to eliminate the post of President altogether, and replace it with a parliamentary system in which the Majles selects a Prime Minister. However, this split does not appear to be driven primarily by differences over economic policy or how to react to international sanctions.

At the broader level, in early 2011, the opposition Green movement returned to the streets in a few significant protests. However, the protests were not sustained since and there is no evidence that international sanctions are affecting the strength of the domestic opposition either positively or negatively. The opposition is driven by long-standing political grievances and has not, to date, been joined by labor groups or other protesters articulating purely economic or foreign policy demands. Some argue that difficult economic conditions are contributing to the political quiescence of Iranian labor because the working class fears loss of pay from participation in demonstrations or from regime retaliation.

There have been anecdotal reports of unrest in 2011 among small and large merchants who are having trouble obtaining trade financing, insurance, and shipping availability, which is driving up their costs by an estimated 40%, even if the merchants can complete desired transactions at all. A substantial portion of the Iranian economy depends on import-export activity, so the damage to the merchant community from international sanctions has been considerable.

Economic Effects

An IMF study issued in August 2011 casts some doubt that international sanctions are seriously harming Iran’s economy. The study, based largely on a May 28-June 9, 2011 study visit, indicated that Iran’s GDP is growing at a rate of about 3.5% and is expected to increase to about 4.5% in the medium term. The study also credits positive economic effects to the government’s privatization program. The report also concurs with the view of many experts that high world oil prices remain—above $80 per barrel in mid-October 2011—enable the regime to mitigate the effects of international sanctions.

U.S. officials believe that Iran’s economy will inevitably begin to suffer as U.S. and partner strategy shuts Iran out of the global financial system, raises the costs for Iran of financing its transactions, and causes international firms to exit Iran:

- During 2006 and 2010, Treasury and State Departments officials say they persuaded at least 80 banks not to process transactions for Iranian banks. Among those that have pulled out of Iran are UBS (Switzerland), HSBC (Britain), Germany’s Commerzbank A.G., and Deutsche Bank AG. U.S. financial

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diplomacy has reportedly convinced Kuwaiti banks to stop transactions with Iranian accounts,\textsuperscript{46} and some banks in Asia (primarily South Korea and Japan) and the rest of the Middle East have done the same. Then-Under Secretary Levey said on September 20, 2010, that “today, Iran is effectively unable to access financial services from reputable banks and is increasingly unable to conduct major transactions in dollars or Euros.”\textsuperscript{47}

- As noted above, the banking sanctions have created difficulty for several of Iran’s oil customers to process payments to Iran. India and China were discussed above, and some reports say South Korea might owe Iran money for oil as well (up to $4.7 billion according to some sources). These payments difficulties have left Iran’s Central Bank short of hard currency and caused a reduction in the value of the currency, by many accounts. Earlier, in September 2010, the value of Iran’s currency, the rial, fell by about 15% when the UAE, a major financial hub for Iran, began restricting transactions with Iranian banks sanctioned by U.N. resolutions and by the United States. President Ahmadinejad told Iran’s Majles (parliament) on November 1, 2011 that international sanctions are causing serious problems for Iran’s banking sector.

- Treasury Department’s designations of affiliates and ships belong to Islamic Republic of Iran Shipping Lines (IRISL) reportedly are harming Iran’s ability to ship goods and raised the prices of goods to Iranian import-export dealers. Some ships have been impounded by various countries for nonpayment of debts due on them.

**Foreign Companies Exiting the Iran Market**

Because the international community has sought to isolate Iran economically, companies all over the world have come to a decision to end their business with Iran, even when such business would not appear to violate any U.N. or national sanction. Neither the U.S. ban on trade and investment with Iran, nor U.N. sanctions, nor European Union sanctions on Iran, ban trade with Iran in all civilian goods. Many experts believe that, over time, the efficiency and output of Iran’s economy will decline as foreign expertise departs and Iran attracts alternative investment from or imports goods from less capable foreign companies. Examples of major non-U.S. companies discontinuing business with Iran include the following:

- ABB of Switzerland said in January 2010 it would cease doing business with Iran.

- Siemens of Germany was active in the Iran telecommunications infrastructure market, but announced in February 2010 that it would cease pursuing business in Iran. Finmeccanica, a defense and transportation conglomerate of Italy, followed suit, as did Thyssen-Krupp, a German steelmaker.

- Germany’s Daimler (Mercedes-Benz maker) said in April 2010 it would freeze planned exports to Iran of cars and trucks.


\textsuperscript{47} Speech by Stuart Levey before the Center for Strategic and International Studies. September 20, 2010.
In August-September 2010, Japan and South Korea announced that their automakers Toyota, Hyundai, and Kia Motors would cease selling automobiles to Iran.

Attorneys for BNP Paribas of France told the author in July 2011 that, as of 2007, the firm was pursuing no new business in Iran, although it was fulfilling existing obligations in that market.

On June 30, 2011, according to press reports, the Danish shipping giant Maersk told Iran that it would no longer operate out of Iran's three largest ports. The firm's decision reportedly was based on the U.S. announcement on June 23, 2011, that it was sanctioning the operator of those ports, Tidewater Middle East Co., as a proliferation entity under Executive Order 13382. The pullout of Maersk will likely further raise shipping costs.

**Foreign Firms Reportedly Remaining in the Iran Market**

Some firms continue to run the financial risk of doing business with Iran. Some of the well-known firms that continue to do so include Alcatel-Lucent of France; Bank of Tokyo-Mitsubishi UFJ; Bosch of Germany; Canon of Japan; Fiat SPA of Italy; Ericsson of Sweden; ING Group of the Netherlands; Mercedes of Germany; Renault of France; Samsung of South Korea; Sony of Japan; Volkswagen of Germany; Volvo of Sweden; and numerous others. Some of the foreign firms that trade with Iran, such as Mitsui and Co. of Japan, Alstom of France, and Schneider Electric of France, are discussed in the March 7, 2010, *New York Times* article on foreign firms that do business with Iran and also receive U.S. contracts or financing. The *Times* article does not claim that these firms have violated any U.S. sanctions laws.

Other questions have arisen over how U.S. sanctions might apply to business with foreign firms that Iran might acquire a full or partial interest in. Such firms include Daewoo Electronics of South Korea, where an Iranian firm—Entekhab Industrial Corp.—is a leading bidder to take over that firm. Another example is Adabank of Turkey, which reportedly might be sold to Iran.

**Subsidy Phase-Out Issue**

A larger issue, which may have been affected by sanctions, but perhaps positively for Iran, is a long-delayed plan to phase out state subsidies on staple goods such as gasoline and some foods over the next five years. International sanctions might have helped Ahmadinejad convince the Majles (parliament) that passing the subsidy reduction plan was urgent if Iran was to parry the effects of burgeoning international sanctions. After several delays, the program started on December 19, 2010, with a reduction in subsidies of gasoline and bread. The price of traditional bread immediately escalated to 40 cents, from 15 cents, when the program began. Gasoline prices now run on a tiered system in which a small increment is available at the subsidized price of about 1.60 per gallon, but amounts above that threshold are available only at a price of about $2.60 per gallon, close to the world price. The lower and lower middle class is being compensated with direct cash payments of about $40 per month.48

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The IMF report of August 2011, discussed above, said that the phase-out removed about $60 billion in costs from Iran’s budget. The report also credits the regime with successfully containing initial impact of the rise in domestic energy prices on inflation. However, some Iranian economists say that 63 million Iranians qualify for the compensatory cash payments and that this costs the government nearly all of the savings incurred from the subsidy phase-out.

Nor has the subsidy phase out produced major additional unrest. When the plan went into effect in December 2010, some Iranian truckers simply stopped working on the grounds that their work was no longer profitable (because the government limited the amount of extra fees that can be charged to make up for the increase in costs). However, the subsidy phase out did not produce new Green movement demonstrations or other indicators of opposition.

**Effect on the Energy Sector**

As noted throughout, the U.S. objective has been to target sanctions against Iran’s energy sector, considered the engine of Iran’s economy. The sector is the source of nearly 70% of government revenue. Depriving the regime of substantial revenue, it is believed, will reduce its ability to import needed technology for its WMD programs and enlist and maintain the loyalty of security personnel.

There are clear indications that the sanctions—coupled with the overall sense that Iran is isolated from the international community—are causing substantial injury to the energy sector. U.S. officials in 2011 say that Iran has lost close to $60 billion in investment as numerous major firms have either announced pullouts from some of their Iran projects, declined to make further investments, or resold their investments to other companies. On the other hand, Treasury official David Cohen, mentioned above, testified in October 2011 that sanctions are likely to deprive Iran of an estimated $14 billion in oil revenue from 2011 to 2016.

Observers at key energy fields in Iran say there is little evidence of foreign investment activity and little new development activity sighted, including at the large South Pars gas field that Iran has focused on for at least 10 years. It is highly unlikely that Iran will attract the $145 billion in new investment by 2018 that Iran’s deputy Oil Minister said in November 2008 that Iran needs. Similar estimates come from independent Iranian energy experts, who say that, as of October 2011, the sector needs $130 billion in investment from 2011 until 2020. A Government Accountability Office (GAO) report of August 3, 2011, contains tables that discuss those firms that have discontinued commercial activity in Iran’s energy sector, as well as those still operating and investing. Table 3 shows international firms that have invested or remain invested in Iran’s energy sector. Some of them have not been determined to have violated ISA and may be under investigation by the State Department. As discussed above, some firms have been sanctioned, and others have avoided sanctions either through Administration waivers or invocation of the “special rule.”

Possibly or partly as a result of the relative lack of new investment, Iran’s oil production has remain relatively steady at about 4.1 million barrels per day (mbd) since the mid-2000s, despite government efforts to expand production. Production is projected to fall to about 3.3 mbd by

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2015.\(^5\) That estimate is somewhat less than the 25% decline over the next five years (by 2016) that the GAO August 3, 2011, report, quoting Oil and Gas Journal, estimates is possible. Others maintain that Iran’s gas sector can compensate for declining oil exports, although Iran has used its gas development primarily to reinject into its oil fields rather than to export. Iran exports about 3.5 trillion cubic feet of gas, primarily to Turkey, but also to Armenia. Some Members of Congress believe that ISA would have been even more effective in injuring Iran’s energy sector if successive administrations had imposed ISA sanctions more aggressively.

The EU sanctions apparently have also derailed a BP-NIOC joint venture in the Rhum gas field, 200 miles off the coast of Scotland. BP announced in November 2010 that it would stop production there to ensure compliance with the EU sanctions. In addition, partners in the Trans-Adriatic Pipeline (TAP) said in September 2010 that the pipeline would not be used to transport Iranian gas to Europe.

Some believe that a key to further harming Iran’s energy sector is to persuade remaining oil services firms to pull out of Iran. In press articles and in the December 1, 2010, House Foreign Affairs Committee hearing discussed above, the large oil services firm Schlumberger, which in incorporated in the Netherlands Antilles, has said it will wind down its business with Iran. However, press reports citing company documents say all contracts with Iran might not be terminated until at least 2013.\(^3\)

**Concerns About “Backfill”**

There has been a concern that some of the investment void might be “backfilled,” at least partly, by Asian firms such as those from China, Malaysia, Vietnam, and countries in Eastern Europe. However, many such deals are said to be in preliminary stages, and clear examples of “backfilling” are few, to date. Most of the companies that might backfill abandoned projects are perceived as not being as technically capable as those that have withdrawn from Iran. In July 2010, after the enactment of Resolution 1929 and CISADA, the Revolutionary Guard’s main construction affiliate, Khatem ol-Anbiya, announced it had withdrawn from developing Phases 15 and 16 of South Pars—a project worth $2 billion.\(^5\) Khatem ol-Anbiya took over that project in 2006 when Norway’s Kvaerner pulled out of it. It is likely that the IRGC perceived its involvement as likely to scare away foreign participation in the work because U.S. and U.N. sanctions are targeting the IRGC and its corporate affiliates.


### Table 5. Post-1999 Major Investments/Major Development Projects in Iran's Energy Sector

<table>
<thead>
<tr>
<th>Date</th>
<th>Field/Project</th>
<th>Company(ies)/Status (If Known)</th>
<th>Value</th>
<th>Output/Goal</th>
</tr>
</thead>
<tbody>
<tr>
<td>February 1999</td>
<td>Doroud (oil) (Energy Information Agency, Department of Energy, August 2006.)</td>
<td>Total (France)/ENI (Italy)</td>
<td>$1 billion</td>
<td>205,000 bpd</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Total/ Bow Valley (Canada)/ENI</td>
<td>$300 million</td>
<td>40,000 bpd</td>
</tr>
<tr>
<td>April 1999</td>
<td>Balal (oil) (&quot;Balal Field Development in Iran Completed,&quot; World Market Research Centre, May 17, 2004.)</td>
<td>Royal Dutch Shell (Netherlands)/Japex (Japan)</td>
<td>$800 million</td>
<td>190,000 bpd</td>
</tr>
<tr>
<td>Nov. 1999</td>
<td>Soroush and Nowruz (oil) (&quot;News in Brief: Iran,&quot; Middle East Economic Digest, MEED January 24, 2003.)</td>
<td>Norsk Hydro and Statoil (Norway) and Gazprom and Lukoil (Russia) No production to date; Statoil and Norsk have left project.</td>
<td>$105 million</td>
<td>65,000</td>
</tr>
<tr>
<td>April 2000</td>
<td>Anaran bloc (oil) (MEED Special Report, December 16, 2005, pp. 46-50.)</td>
<td>ENI</td>
<td>$1.9 billion</td>
<td>2 billion cuft/day (cfd)</td>
</tr>
<tr>
<td>July 2000</td>
<td>Phase 4 and 5, South Pars (gas) (Petroleum Economist, December 1, 2004.)</td>
<td>Gas onstream as of Dec. 2004</td>
<td></td>
<td></td>
</tr>
<tr>
<td>March 2001</td>
<td>Caspian Sea oil exploration—construction of submersible drilling rig for Iranian partner (IPR Strategic Business Information Database, March 11, 2001.)</td>
<td>GVA Consultants (Sweden)</td>
<td>$225 million</td>
<td>NA</td>
</tr>
<tr>
<td>June 2001</td>
<td>Darkhovin (oil) (&quot;Darkhovin Production Doubles,&quot; Gulf Daily News, May 1, 2008.) ENI told CRS in April 2010 it would close out all Iran operations by 2013. ENI exempted from sanctions on 9/30, as discussed above</td>
<td>ENI</td>
<td>$1 billion</td>
<td>100,000 bpd</td>
</tr>
<tr>
<td>May 2002</td>
<td>Masjed-e-Soleyman (oil) (&quot;CNPC Gains Upstream Foothold.&quot; MEED, September 3, 2004.)</td>
<td>Sheer Energy (Canada/China National Petroleum Company (CNPC), Local partner is Naftgaran Engineering</td>
<td>$80 million</td>
<td>25,000 bpd</td>
</tr>
<tr>
<td>Sept.</td>
<td>Phase 9 + 10, South Pars (gas)</td>
<td>LG Engineering and</td>
<td>$1.6 billion</td>
<td>2 billion cfld</td>
</tr>
<tr>
<td>Date</td>
<td>Field/Project</td>
<td>Company(ies)/Status (If Known)</td>
<td>Value</td>
<td>Output/Goal</td>
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</tr>
<tr>
<td>2002</td>
<td><strong>Phase 6, 7, 8, South Pars (gas)</strong></td>
<td>Construction Corp. (now known as GS Engineering and Construction Corp., South Korea)</td>
<td><strong>On stream as of early 2009</strong></td>
<td><strong>Statoil (Norway) $750 million</strong></td>
</tr>
<tr>
<td></td>
<td>(Source: Statoil, May 2011)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>October 2002</td>
<td><strong>Azadegan (oil)</strong></td>
<td></td>
<td><strong>Inpex (Japan) 10% stake. CNPC agreed to develop &quot;north Azadegan&quot; in Jan. 2009</strong></td>
<td><strong>China $1.76 billion</strong></td>
</tr>
<tr>
<td>January 2004</td>
<td><strong>Field began producing late 2008; operational control handed to NIOC in 2009. Statoil exempted from sanctions on 9/30/2010 because Statoil pledged to exit Iran market.</strong></td>
<td><strong>Petrobras (Brazil) $178 million</strong></td>
<td><strong>No production</strong></td>
<td></td>
</tr>
<tr>
<td>August 2004</td>
<td><strong>Tusun Block</strong></td>
<td><strong>Sinopec (China), deal finalized December 9, 2007</strong></td>
<td><strong>2 billion</strong></td>
<td><strong>300,000 bpd</strong></td>
</tr>
<tr>
<td>October 2004</td>
<td><strong>Yadavaran (oil)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2005</td>
<td><strong>Saveh bloc (oil)</strong></td>
<td><strong>PTT (Thailand) ?</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>June 2006</td>
<td><strong>Garmshar bloc (oil)</strong></td>
<td><strong>Sinopec (China) $20 million</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>July 2006</td>
<td><strong>Arak Refinery expansion</strong></td>
<td><strong>Sinopec (China); JGC (Japan). Work may have been taken over or continued by Hyundai</strong></td>
<td><strong>$959 million (major initial expansion; extent of Expansion to produce 250,000 bpd)</strong></td>
<td></td>
</tr>
<tr>
<td>Date</td>
<td>Field/Project</td>
<td>Company(ies)/Status (If Known)</td>
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</tr>
<tr>
<td>Sept. 2006</td>
<td>Khorramabad block (oil)</td>
<td>Heavy Industries (South Korea)</td>
<td>Hyundal work unknown</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Seismic data gathered, but no production is planned. (Statoil fact sheet, May 2011)</td>
<td>Norsk Hydro and Statoil (Norway).</td>
<td>$49 million</td>
<td></td>
</tr>
<tr>
<td>Feb. 2007</td>
<td>LNG Tanks at Tombak Port</td>
<td>Daelim (South Korea)</td>
<td>$320 million</td>
<td>200,000 ton capacity</td>
</tr>
<tr>
<td>March 2007</td>
<td>Esfahan refinery upgrade</td>
<td>Daelim (South Korea)</td>
<td>NA</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(&quot;Daelim, Others to Upgrade Iran's Esfahan Refinery,&quot; Chemical News and Intelligence, March 19, 2007.)</td>
<td>SKS Ventures, Petrolium Subsidiary (Malaysia)</td>
<td>$16 billion</td>
<td>3.4 billion cfd</td>
</tr>
<tr>
<td>Dec. 2007</td>
<td>Golshan and Ferdows onshore and offshore gas fields and LNG plant contract modified but reaffirmed December 2008</td>
<td>Belarusneft (Belarus) under contract to Natirian.</td>
<td>$500 million</td>
<td>40,000 bpd</td>
</tr>
<tr>
<td>2007</td>
<td>Jofair Field (oil)</td>
<td>Edison (Italy)</td>
<td>$44 million</td>
<td></td>
</tr>
<tr>
<td>(unspec.)</td>
<td>GAO report cited below. Belorusneft, a subsidiary of Beinsteakhim, sanctioned under ISA on March 29, 2011. Natirian sanctioned on September 29, 2010, for this and other activities.</td>
<td>PGNiG (Poland)</td>
<td>$2 billion</td>
<td>Status unclear</td>
</tr>
<tr>
<td>2008</td>
<td>Dayyer Bloc (Persian Gulf, offshore, oil)</td>
<td>Petro Vietnam Exploration and Production Co. (Vietnam)</td>
<td>$40-$140 million (dispute over size)</td>
<td></td>
</tr>
<tr>
<td>February 2008</td>
<td>Lavan field (offshore natural gas)</td>
<td>INA (Croatia)</td>
<td>$40-$140 million (dispute over size)</td>
<td></td>
</tr>
<tr>
<td>March 2008</td>
<td>Danan Field (on-shore oil)</td>
<td>Uhde (Germany)</td>
<td>300,000 metric tons/yr</td>
<td></td>
</tr>
<tr>
<td>April 2008</td>
<td>Mohgan 2 (onshore oil and gas, Ardebel province)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>?</td>
<td>Kermanshah petrochemical plant (new construction)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>GAO report cited below.</td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>
### Iran Sanctions

<table>
<thead>
<tr>
<th>Date</th>
<th>Field/Project</th>
<th>Company(ies)/Status (if Known)</th>
<th>Value</th>
<th>Output/Goal</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 2009</td>
<td><strong>“North Azadegan”</strong>&lt;br&gt;(Chinadaily.com, “CNPC to Develop Azadegan Oilfield,”&lt;br&gt;<a href="http://www.chinadaily.com.cn/bizchina/2009-01/16/content_7403699.htm">http://www.chinadaily.com.cn/bizchina/2009-01/16/content_7403699.htm</a>.)</td>
<td>CNPC (China)</td>
<td>$1.75 billion</td>
<td>75,000 bpd</td>
</tr>
<tr>
<td>January 2009</td>
<td><strong>Bushehr Polymer Plants</strong>&lt;br&gt;Production of polyethelene at two polymer plants in Bushehr Province&lt;br&gt;(GGO August 2011 report)</td>
<td>Sasol (South Africa)</td>
<td>?</td>
<td>Capacity is 1 million tons per year. Products are exported from Iran.</td>
</tr>
<tr>
<td>Oct. 2009</td>
<td><strong>South Pars Gas Field—Phases 6-8, Gas Sweetening Plant</strong>&lt;br&gt;CRS conversation with Embassy of S. Korea in Washington, D.C., July 2010&lt;br&gt;Contract signed but then abrogated by S. Korean firm</td>
<td>G and S Engineering and Construction (South Korea)</td>
<td>$1.4 billion</td>
<td></td>
</tr>
<tr>
<td>Nov. 2009</td>
<td><strong>South Pars: Phase 12—Part 2 and Part 3</strong>&lt;br&gt;(&quot;Italy, South Korea To Develop South Pars Phase 12,&quot; Press TV (Iran), November 3, 2009, <a href="http://www.presstv.com/pop/Print?id=110308">http://www.presstv.com/pop/Print?id=110308</a>.)</td>
<td>Daelim (S. Korea)—Part 2; Tecnimont (Italy)—Part 3</td>
<td>$4 billion ($2 bn each part)</td>
<td></td>
</tr>
<tr>
<td>February 2010</td>
<td><strong>South Pars: Phase 11</strong>&lt;br&gt;Drilling was to begin in March 2010, but drilling still delayed as of September 2011.&lt;br&gt;(&quot;China Curbs Iran Energy Work,&quot; Reuters, September 2, 2011)</td>
<td>CNPC (China)</td>
<td>$4.7 billion</td>
<td></td>
</tr>
</tbody>
</table>

**Totals: $41 billion investment**

### Other Pending/Preliminary Deals

**North Pars Gas Field (offshore gas).** Includes gas purchases (December 2006)

Work crews reportedly pulled from the project in early-mid 2011. ("China Curbs Iran Energy Work" Reuters, September 2, 2011)

**Phase 13, 14—South Pars (gas); (Feb. 2007).**


State Department said on September 30, 2010, that Royal Dutch Shell and Repsol have ended negotiations with Iran and will not pursue this project any further.

### Phase 22, 23, 24—South Pars (gas), incl. transport Iranian gas to Turkey, and on to Europe and building

<table>
<thead>
<tr>
<th>China National Offshore Oil Co.</th>
<th>$16 billion</th>
<th>3.6 billion cfd</th>
</tr>
</thead>
<tbody>
<tr>
<td>Royal Dutch Shell, Repsol (Spain)</td>
<td>$4.3 billion</td>
<td>?</td>
</tr>
<tr>
<td>Turkish Petroleum Company (TPAO)</td>
<td>$12 billion</td>
<td>2 billion cfd</td>
</tr>
</tbody>
</table>
### Iran Sanctions

<table>
<thead>
<tr>
<th>Date</th>
<th>Field/Project</th>
<th>Company(ies)/Status (If Known)</th>
<th>Value</th>
<th>Output/Goal</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>three power plants in Iran, initiated July 2007; not finalized to date.</td>
<td>Oman (co-financing of project)</td>
<td>$7 billion</td>
<td>1 billion cfd</td>
</tr>
<tr>
<td></td>
<td>Iran's Kish gas field (April 2008) includes pipeline from Iran to Oman</td>
<td>Taken over by Indian firms (ONGC, Oil India Ltd., Hinduja, Petronet in 2007). May also involve Sonangol (Angola) and PDVSA (Venezuela)</td>
<td>$8 billion from Indian firms/$1.5 billion Sonangol/$780 million PDVSA</td>
<td>20 million tonnes of LNG annually by 2012</td>
</tr>
<tr>
<td></td>
<td>Phase 12 South Pars (gas)—part 1. Incl. LNG terminal construction and Farzad-B natural gas block (March 2009). Financing stalled due to sanctions; Tehran gave ONGC and Hinduja until January 31, 2011, to line up financing or the bid will be considered abandoned.</td>
<td>Sinopec</td>
<td>up to $6 billion if new refinery is built</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Abadan refinery</td>
<td>Upgrade and expansion; building a new refinery at Hormuz on the Persian Gulf coast (August 2009)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


**Notes:** CRS has neither the mandate, the authority, nor the means to determine which of these projects, if any, might constitute a violation of the Iran Sanctions Act. CRS has no way to confirm the precise status of any of the announced investments, and some investments may have been resold to other firms or terms altered since agreement. In virtually all cases, such investments and contracts represent private agreements between Iran and its instruments and the investing firms, and firms are not necessarily required to confirm or publicly release the terms of their arrangements with Iran. Reported $20 million of investments in oil and gas fields, refinery upgrades, and major project leadership are included in this table. Responsibility for a project to develop Iran’s energy sector is part of ISA investment definition.

### Effect on Gasoline Availability and Importation

In March 2010, well before the enactment of CISADA on July 1, 2010, several gas suppliers to Iran, anticipating this legislation, announced that they had stopped or would stop supplying gasoline to Iran. Others have ceased since the enactment of CISADA. Some observers say that gasoline deliveries to Iran fell from about 120,000 barrels per day before CISADA to about 30,000 barrels per day immediately thereafter, although importation had recovered somewhat to about 80,000 barrels per day by September 2011. That suggests that Iran has lined up additional supplies from those still willing to do business with Iran. As noted in a *New York Times* report of

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March 7, 2010, and a Government Accountability Office study released September 3, 2010, some firms that have supplied Iran have received U.S. credit guarantees or contracts. The main suppliers to Iran over the past few years, and the GAO-reported status of their sales to Iran are listed below (with the caveat that some reports say that partners or affiliates of these firms may still sell to Iran in cases where the corporate headquarters have announced a halt):

- Vitol of Switzerland (notified GAO it stopped selling to Iran in early 2010);
- Trafalgar of Switzerland (notified GAO it stopped selling to Iran in November 2009);
- Glencore of Switzerland (notified GAO it stopped selling in September 2009);
- Total of France (notified GAO it stopped sales to Iran in May 2010);
- Reliance Industries of India (notified GAO it stopped sales to Iran in May 2009). Reliance has also told press outlets on April 1, 2010, that it would not import Iranian crude oil in 2010;
- Petronas of Malaysia (said on April 15, 2010, it had stopped sales to Iran);[58]
- Lukoil of Russia (reportedly to have ended sales to Iran in in April 2010,[59] although some reports continue that Lukoil affiliates are supplying Iran);
- Royal Dutch Shell of the Netherlands (notified GAO it stopped sales in October 2009);
- Kuwait's Independent Petroleum Group told U.S. officials it is no longer selling gasoline to Iran, as of September 2010;[60]
- Tupras of Turkey (according to the State Department on May 24, 2011);
- British Petroleum of United Kingdom, Shell, Q8, Total, and OMV are no longer selling aviation fuel to Iran Air, according to U.S. State Department officials on May 24, 2011;
- A UAE firm, Golden Crown Petroleum FZE, told the author in April 2011 that, as of June 29, 2010, it no longer leases vessels for the purpose of shipping petroleum products from or through Iran;
- Munich Re, Allianz, Hannover Re (Germany) were providing insurance and re-insurance for gasoline shipments to Iran. However, they reportedly have exited the market for insuring gasoline shipments for Iran;[61]
- Lloyd's (Britain). The major insurer had been the main company insuring Iranian gas (and other) shipping, but reportedly has ended that business as of July 2010. According to the State Department, key shipping associations have created

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clauses in their contracts that enable ship owners to refuse to deliver gasoline to Iran;

- The State Department reported on September 30, 2010, that Hong Kong company NYK Line Ltd. had ended shipping business with Iran (on any goods, not just gasoline);

- According to the State Department on May 24, 2011, Linde of Germany has said it had stopped supplying gas liquefaction technology to Iran, contributing to Iran’s decision to suspend its LNG program.

**Firms Believed to Still Be Supplying Gasoline or Related Equipment**

- The firms sanctioned by the Administration on May 24, 2011 (discussed above): PCCI (Jersey/Iran); Royal Oyster Group (UAE); Speedy Ship (UAE/Iran); Tanker Pacific (Singapore); Ofer Brothers Group (Israel); Associated Shipbroking (Monaco); and Petroleos de Venezuela (Venezuela);

- Zhuhai Zhenrong, Unipex, and China Oil of China are said by GAO to still be selling to Iran and have not denied continuing sales to the GAO;

- Emirates National Oil Company of UAE was reported by GAO to still be selling to Iran;

- Hin Leong Trading of Singapore was reported by GAO to still be selling gasoline to Iran;

- Some refiners in Bahrain reportedly may still be selling gasoline to Iran.

Despite the reduction in gasoline sales to Iran, Iranian officials have largely coped with the reduction in gasoline imports. The phaseout of gasoline subsidies discussed above has already reportedly begun to reduce demand for gasoline. Iran has also increased domestic production by converting at least two petrochemical plants to gasoline production, through a generally inferior process that initially produces benzene. The gasoline produced reportedly has led to a large increase in air pollution in Tehran, which was expected. Iran also says it has accelerated renovations and other improvements to existing gasoline refineries, allocating $2.2 billion for that purpose. Even before the subsidy reduction, there had not been gasoline shortages or gasoline rationing, although some Iranian oppositionists have reported otherwise.

Building new refining capacity appears to be Iran’s long term effort to reduce its vulnerability to gasoline supply reductions. Iran’s deputy oil minister said in July 2010 Iran would try to invest $46 billion to upgrade its nine refineries and build seven new ones, a far larger amount than Iran had previously allocated to oil refining capacity.

**Additional Sanctions: Possible Legislation, Administrative, and Multilateral Action**

Some in the 112th Congress believe that the cumulative effect of U.S. and international sanctions remain insufficient to accomplish key U.S. policy goals toward Iran, and are advocating further steps. The Administration joined such calls following the October 11, 2011 U.S. revelation of a purported Iranian plot to assassinate the Saudi Ambassador to the United States. Additional
momentum for sanctions is likely to result from a November 2011 IAEA report that is expected to include evidence that Iran has worked on a nuclear explosion technology. Open Administration discussion of additional sanctions might represent a change from the Administration position in June 2011, when outgoing Deputy Secretary of State Jim Steinberg told journalists ("The Cable") that the Administration does not support new legislation because the Administration is already implementing and expanding sanctions against Iran. Still, the Administration is said to prefer taking its own action rather than be bound by specific congressional requirements.

A House bill, H.R. 1905, the "Iran Threat Reduction Act of 2011" was marked up by the House Foreign Affairs Committee on November 2, 2011, along with H.R. 2015, which is a companion measure to S.1048, discussed below. As amended on November 2, H.R. 1905, contains language restating provisions of ISA and would:

- Add two sanctions to the available ISA menu: a ban on visas for the principal officers or controlling shareholders of sanctioned firms (and their subsidiaries, parents, and affiliates); and apply any ISA sanction to the principal officers of a sanctioned firm.
- Require the President to impose at least six out of the expanded ISA menu of 11 available sanctions on any sanctioned firm.
- Make subject to ISA sanctions (majority of the menu) any firm that helps Iran issue sovereign debt.
- Prohibit U.S. persons, subject to penalty, from conducting any business with the Revolutionary Guard of its affiliated entities, or with any foreign firm that conducts such banned transactions with the Revolutionary Guard or its affiliates.
- Ban commerce between Iran and subsidiaries of U.S. firms, in cases where the subsidiary is controlled or more than 50% owned by the parent firm.
- Ban previously permissible licensing of the sale to Iran of U.S. equipment to provide for the safe operation of Iran's civilian aircraft fleet.
- State that it is U.S. policy to support those in Iran seeking democracy, and require an Administration submission to Congress of a comprehensive strategy to help the Iranian people circumvent regime censorship and monitoring of their use of the Internet or other media.
- Require an Administration report listing all persons who are members of named Iranian government institutions, including high ranking Revolutionary Guard officers—and ban visas for the named individuals.
- Ban contact between any U.S. official and any Iranian official who poses a threat to the United States or is affiliated with terrorist organizations.
- Contain elements similar to H.R. 740 on Securities and Exchange Commission (SEC) disclosures, discussed further below.
- Sanction Iran's Central Bank if the President determines that it helped Iran acquire WMD or facilitated transactions for the Revolutionary Guard or for entities sanctioned by the United States.

• Set as U.S. policy to press Iraq not to close Camp Ashraf, an encampment in Iraq which houses about 3,300 Iranian oppositionists, unless the residents can be resettled. The Camp Ashraf issue is discussed in detail in CRS Report RL32048, *Iran: U.S. Concerns and Policy Responses*, by Kenneth Katzman.

A Senate bill that focuses primarily on economic sanctions and proliferation sanctions is S. 1048, introduced May 23, 2011, and titled the “Iran, North Korea, and Syria Sanctions Consolidation Act of 2011.” (As noted above, a companion measure, H.R. 2105, was marked up on November 2, 2011.) Among other provisions, S.1048:

• States (Section 101) that it is the policy of the United States to prevent Iran from acquiring a nuclear weapons capability.

• Primarily targets affiliates of the Revolutionary Guard for sanctions, and expands the list of sanctions (adding a ban on financing, aid, or investment) to be imposed on violators named under the Iran, Syria, North Korea Non-Proliferation Act, discussed above.

• Like H.R. 1905, subjects to ISA sanctions purchases of Iranian oil or gas in which the IRGC or its affiliates are involved. Unlike H.R. 1905, S. 1048 (Section 123) also mandates sanctions (ban on U.S. government contracts and ban on imports to the United States) of any entity determined to have conducted any commercial or financial transaction with the IRGC or its affiliates.

• Would sanction foreign firms that participate in energy-related joint ventures with Iran outside Iranian territory.

• Would prohibit ships to put into port in the United States if the vessel entered a port in Iran, North Korea, or Syria any time 180 days prior.

• Like H.R. 1905, would deny visas to senior officials of Iran, but extends that to North Korea and Syria, and does not define specific government agencies in Iran whose members shall be named by the Administration.

• Provides for sanctions against any person determined to be providing or acquiring militarily useful equipment to/from Iran, North Korea, or Syria.

• Contains Iran human rights-related and SEC disclosure provisions similar to bills discussed below.

Other economic sanctions-related measures introduced in the 112th Congress include S. 366 and H.R. 740. These bills would require firms to declare in their required filings with the Securities and Exchange Commission whether that firm had undertaken activity that could violate ISA, CISADA, or executive orders (13224 or 13382) and regulations that bar dealings with designated Iranian entities.

Another apparent trend in the 112th Congress, based on introduced legislation, is to expand the sanctioning of Iranians named as human rights abusers. This builds on the human rights provisions of CISADA and the earlier Iran Freedom Support Act. In particular, the Iran Human Rights and Democracy Promotion Act of 2011 (S. 879 and H.R. 1714) would: make mandatory investigations of Iranian human rights abusers; sanction the sale to Iran of equipment that could be used to suppress demonstrations; reauthorize the Iran Freedom Support Act (see below); and create a “Special Representative” position at the Department of State to focus on highlighting Iran’s human rights abuses and coordinate U.S. and international responses. As noted, portions of
H.R. 1905 and S. 1048, which mainly focus on economic sanctions, also contain measures to further penalize Iranian human rights abusers or otherwise promote Internet freedom and democracy in Iran.

Possible Additional Sanctions

Although there do not appear to be active discussions among the P5+1 on specific new United Nations actions to pressure Iran, there are a number of other possible sanctions that might receive consideration—either in a multilateral framework or for U.S. unilateral action targeting foreign firms and entities.

Comprehensive Oil Embargo

Most experts believe that the most effective sanction would be a mandated, worldwide embargo on the purchase of Iranian crude oil, although there are no indications that such a step is to be proposed at the United Nations in the near term or that doing so would achieve consensus. With the United States and Europe seeking to boost economic growth, a sanction that would almost certainly result in an increase in oil prices would appear unlikely to attract broad support. Short of imposing a military quarantine on Iran, the United States does not have the ability, by itself, to prevent Iran from exporting oil. However, as in the case of the Iran Sanctions Act, U.S. law could be used to force international energy firms to choose between buying Iranian oil or continuing their “business as usual” in the very large U.S. market.

In the 111th Congress, Representative Sherman introduced H.R. 6296, which, in Section 202, would amend ISA to make sanctionable “long term agreements” to buy oil from Iran—agreements that would involve large, up-front payments to Iran for purchases of oil over a long period of time. A provision of that bill would have extended ISA sanctionability to any energy project conducted with NIOC, anywhere in the world. An amended version of the bill was introduced in the 112th Congress (H.R. 1655, introduced April 15, 2011).

Iran “Oil-Free Zone”

There reportedly has been discussion among experts of closing the loophole in the U.S. trade ban under which Iranian crude oil, when mixed with other countries’ oils at foreign refineries in Europe and elsewhere, can be imported as refined product. The basis of the proposal, outlined by a think-tank called the Foundation of Defense of Democracies, is that restricting Iranian oil to use by only a limited number of refineries would force down the price received by Iran for its oil, although without raising the world price of oil significantly, if at all.

Sanctioning Iran’s Central Bank

There appears to be growing support among experts and within the Administration to sanction Iran’s Central Bank. Currently, there are no mandatory sanctions against Iran’s Central Bank (Bank Markazi) itself, although certain activities involving the Bank are potentially sanctionable, as discussed above. The Treasury Department has not designated the Central Bank (or any Iranian bank) as a “money laundering entity” for Iran-related transactions (under Section 311 of the USA Patriot Act). Nor has Treasury imposed any specific sanctions against Iran’s Central Bank for its efforts, discussed in numerous accounts, to help other Iranian banks circumvent the U.S. and U.N.
banking pressure. If there were evidence to support such judgments, Treasury could potentially designate it as a proliferation entity under Executive order 13382 or a terrorism supporting entity under Executive Order 13224.

Some see sanctioning the Central Bank as a realistic and effective additional option to pressure Iran. CISADA contains a provision (Section 104(b)) calling on the President to make such designations of the Central Bank. On August 9, 2011, a letter signed by 92 Senators was sent to President Obama urging "a comprehensive strategy to pressure Iran's financial system by imposing sanctions" on the Central Bank of Iran. In testimony before several congressional committees in October 2011, Treasury Undersecretary Cohen, discussed above, stated that the Administration is considering sanctioning the Central Bank if the United States is able to get broad international acceptance for doing so.

Several European countries reportedly have opposed such a sanction as an extreme step. If the Central Bank of Iran were cut off from the international banking system, it is possible that all mechanisms for paying Iran for crude oil would be shut down. That raises the potential for Iran to stop exporting oil, an action that would undoubtedly cause a significant rise in world oil prices. Alternatively, Iran might accept payment in goods or services, or in currencies that are non-convertible or difficult to convert. In addition, one of the Central Bank's roles is to keep Iran's currency, the rial, stable. It does so by using hard currency to buy rials to raise the currency value, or to sell rials to bring the value down. An unstable currency could harm Iran's ability to import some needed foodstuffs and medical products, according to those opposing that sanction. However, suggesting possibly eroding European opposition to sanctioning the Central Bank, Resolution 1929 references the need for vigilance in dealing with the Bank, but did not mandate any new sanctions against it.

Other Possibilities

Other possible international steps would likely have less of an adverse economic effect on the countries imposing those sanctions on Iran but would, if enacted in a U.N. Security Council resolution, be binding on U.N. member states and presumably have greater effect than would such steps by the United States alone or in concert with its allies.

- *Mandating Reductions in Diplomatic Exchanges with Iran or Prohibiting Travel by Iranian Officials.* Some have suggested a worldwide ban on travel to Iranian civilian officials, such as those involved in suppressing democracy activists. Some have called on countries to reduce their diplomatic presence in Iran, or to expel some Iranian diplomats from Iranian embassies in their territories. A further option is to limit sports or cultural exchanges with Iran, such as Iran's participation in the World Cup soccer tournament. However, many experts oppose using sporting events to accomplish political goals.

- *Banning Passenger Flights to and from Iran.* Bans on flights to and from Libya were imposed on that country in response to the finding that its agents were responsible for the December 21, 1988, bombing of Pan Am 103 (now lifted). There are no indications that a passenger aircraft flight ban is under consideration among the P5+1.

- *A Ban on Exports to Iran of Refined Oil Products and Energy Equipment and Services.* As noted, the EU sanctions formalized July 27, 2010, did not ban sales of gasoline but did ban the sale to Iran of equipment or services for Iran's energy
sector (refineries as well as exploration and drilling). Another possibility would be to make such a general ban on sales of energy equipment or services universal in a new U.N. resolution. U.N. sanctions against Libya for the Pan Am 103 bombing banned the sale of energy equipment to Libya.

- **Limiting Lending to Iran by International Financial Institutions.** Resolution 1747 calls for restraint on but does not outright ban international lending to Iran. An option is to make a ban on such lending mandatory.

- **Banning Trade Financing or Official Insurance for Trade Financing.** Another option is to mandate a ban on official trade credit guarantees. This was not made mandatory by Resolution 1929, but several countries imposed this sanction (as far as most trade financing) subsequently. In discussions that led to Resolution 1929, a ban on investment in Iranian bonds reportedly was considered but deleted to attract China and Russia’s support.

- **Banning Worldwide Investment in Iran’s Energy Sector.** This option would represent an “internationalization” of the U.S. “Iran Sanctions Act,” which is discussed in CRS Report RS20871, *Iran Sanctions*, by Kenneth Katzman. Such a step is authorized, not mandated, by Resolution 1929, and a growing number of countries have used that authority to impose these sanctions on Iran.

- **Restricting Operations of and Insurance for Iranian Shipping.** One option, reportedly long under consideration, has been to ban the provision of insurance, or reinsurance, for any shipping to Iran. A call for restraint is in Resolution 1929, but is not mandatory. The EU and other national measures announced subsequently did include this sanction (IRISL) to operate. (The United States has imposed sanctions on IRISL.)

- **Imposing a Worldwide Ban on Sales of Arms to Iran.** Resolution 1929 imposes a ban on sales of major weapons systems to Iran, but another option is to extend that ban to all lethal equipment.
Table 6. Entities Sanctioned Under U.N. Resolutions and U.S. Laws and Executive Orders

(Persons listed are identified by the positions they held when designated; some have since changed.)

<table>
<thead>
<tr>
<th>Entities Named for Sanctions Under Resolution 1737</th>
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<tbody>
<tr>
<td>Atomic Energy Organization of Iran (AEIO) Mesbah Energy Company (Arak supplier)</td>
</tr>
<tr>
<td>Kalaye Electric (Natanz supplier)</td>
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<tr>
<td>Pars Trash Company (centrifuge program) Farayand Technique (centrifuge program)</td>
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<tr>
<td>Defense Industries Organization (DIO)</td>
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<tr>
<td>7th of Tir (DIO subordinate)</td>
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<tr>
<td>Shahid Hemmat Industrial Group (SHIG)—missile program</td>
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<tr>
<td>Shahid Bagheri Industrial Group (SBIG)—missile program</td>
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<tr>
<td>Fajr Industrial Group (missile program)</td>
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<tr>
<td>Mohammad Qanadi, AEIO Vice President</td>
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<tr>
<td>Behman Asgarpour (Arak manager)</td>
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<tr>
<td>Ehsan Monajemi (Natanz construction manager)</td>
</tr>
<tr>
<td>Jafar Mohammadi (Advisor to AEIO)</td>
</tr>
<tr>
<td>Gen. Hosein Salimi (Commander, IRGC Air Force)</td>
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<td>Dawood Agha Jami (Natanz official)</td>
</tr>
<tr>
<td>Ali Hajinia Leilabadi (director of Mesbah Energy)</td>
</tr>
<tr>
<td>Lt. Gen. Mohammad Mehdí Nejad Nouri (Malak Ashtar University of Defence Technology rector)</td>
</tr>
<tr>
<td>Bahmanyar Morteza Bahmanyar (AIO official)</td>
</tr>
<tr>
<td>Reza Gholi Esmaeli (AIO official)</td>
</tr>
<tr>
<td>Ahmad Vahid Dastjerdi (head of Aerospace Industries Org., AIO)</td>
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<tr>
<td>Maj. Gen. Yahya Rahim Safavi (Commander in Chief, IRGC)</td>
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<table>
<thead>
<tr>
<th>Entities/Persons Added by Resolution 1747</th>
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<tbody>
<tr>
<td>Ammunition and Metallurgy Industries Group (controls 7th of Tir)</td>
</tr>
<tr>
<td>Parchin Chemical Industries (branch of DIO)</td>
</tr>
<tr>
<td>Karaj Nuclear Research Center</td>
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<tr>
<td>Novin Energy Company</td>
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<tr>
<td>Cruise Missile Industry Group</td>
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<tr>
<td>Sanam Industrial Group (subordinate to AIO)</td>
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<tr>
<td>Ya Mahdi Industries Group</td>
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<tr>
<td>Kavoshgar Company (subsidiary of AEIO)</td>
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<tr>
<td>Sho'a Aviation (produces IRGC light aircraft for asymmetric warfare)</td>
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<tr>
<td>Bank Sepah (funds AIO and subordinate entities)</td>
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<tr>
<td>Esfahan Nuclear Fuel Research and Production Center and Esfahan Nuclear Technology Center</td>
</tr>
<tr>
<td>Qods Aeronautics Industries (produces UAV's, para-giders for IRGC asymmetric warfare)</td>
</tr>
<tr>
<td>Pars Aviation Services Company (maintains IRGC Air Force equipment)</td>
</tr>
<tr>
<td>Gen. Mohammad Baqr Zolqadr (IRGC officer serving as deputy Interior Minister)</td>
</tr>
</tbody>
</table>
Brig. Gen. Qasem Soleimani (Qods Force commander)
Fereidoun Abbasi-Davani (senior defense scientist)
Mohsen Fakhrizadeh-Mahabadi (defense scientist)
Seyed Jaber Safdar (Najafan manager)
Mohsen Hojati (head of Fajr Industrial Group)
Ahmad Derakhshandeh (head of Bank Sepah)
Brig. Gen. Mohammad Reza Zahedi (IRGC ground forces commander)
Amir Rahimi (head of Esfahan nuclear facilities)
Mehrdasa Akhlaghi Ketabachi (head of SBIG)
Naser Maleki (head of SHIG)
Brig. Gen. Morteza Reza’i (Deputy commander-in-chief, IRGC)
Vice Admiral Ali Akbar Ahmadiyan (chief of IRGC Joint Staff)
Brig. Gen. Mohammad Hejazi (Basij commander)

Entities Added by Resolution 1803

Thirteen Iranians named in Annex 1 to Resolution 1803; all reputedly involved in various aspects of nuclear program. Bans travel for five named Iranians.

Electro Sanam Co.
Abzar Boresh Kaveh Co. (centrifuge production)
Barzaganin Tejarat Tavanmad Saccal
Jabber Ibn Hayan
Khorasan Metallurgy Industries
Niru Battery Manufacturing Co. (Makes batteries for Iranian military and missile systems)
Ettehad Technical Group (AIO front co.)
Industrial Factories of Precision
Joza Industrial Co.
Pahgam (Pioneer) Energy Industries
Tamas Co. (involved in uranium enrichment)
Safety Equipment Procurement (AIO front; involved in missiles)

Entities Added by Resolution 1929

Over 40 entities added; makes mandatory a previously nonbinding travel ban on most named Iranians of previous resolutions. Adds one individual banned for travel—ABIO head Javad Rahiqi

Amin Industrial Complex
Armament Industries Group
Defense Technology and Science Research Center (owned or controlled by Ministry of Defense)......
Doostan International Company
Farasakht Industries
First East Export Bank, PLC (only bank added by Resolution 1929)
Kaveh Cutting Tools Company
M. Babaie Industries
Iran Sanctions

Malek Ashtar University (subordinate of Defense Technology and Science Research Center, above)
Ministry of Defense Logistics Export (sells Iranian made arms to customers worldwide)
Mizan Machinery Manufacturing
Modern Industries Technique Company
Nuclear Research Center for Agriculture and Medicine (research component of the AEOI)
Pejman Industrial Services Corp.
Sabalut Company
Sahand Aluminum Parts Industrial Company
Shahid Karrazi Industries
Shahid Sattari Industries
Shahid Sayyade Shirazi Industries (acts on behalf of the DIO)
Special Industries Group (another subordinate of DIO)
Tiz Pars (cover name for SHIG)
Yazd Metallurgy Industries

The following are Revolutionary Guard affiliated firms, several are subsidiaries of Khatam ol-Anbiya, the main Guard construction affiliate:
Fater Institute
Garageh Satendegi Ghaem
Gorb Karbala
Gorb Nooh
Hara Company
Imensazan Consultant Engineers Institute
Khatam ol-Anbiya
Makin
Omran Sahel
Oriental Oil Kish
Rah Sahel
Rahab Engineering Institute
Sahel Consultant Engineers
Sepanir
Sepasad Engineering Company
The following are entities owned or controlled by Islamic Republic of Iran Shipping Lines (IRISL):
Iranco Hind Shipping Company
IRISL Benelux
South Shipping Line Iran

Entities Designated Under U.S. Executive Order 13382
(many designations coincident with designations under U.N. resolutions)

Entity: Shahid Hemmat Industrial Group (Iran)  Date Named: June 2005, September 2007
<table>
<thead>
<tr>
<th>Entity</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shahid Bakeri Industrial Group (Iran)</td>
<td>June 2005, February 2009</td>
</tr>
<tr>
<td>Atomic Energy Organization of Iran</td>
<td>June 2005</td>
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<tr>
<td>Novin Energy Company (Iran)</td>
<td>January 2006</td>
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<td>Mesbah Energy Company (Iran)</td>
<td>January 2006</td>
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<tr>
<td>Sanam Industrial Group (Iran)</td>
<td>July 2006</td>
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<tr>
<td>Ya Mahdi Industries Group (Iran)</td>
<td>July 2006</td>
</tr>
<tr>
<td>Bank Sepah (Iran)</td>
<td>January 2007</td>
</tr>
<tr>
<td>Defense Industries Organization (Iran)</td>
<td>March 2007</td>
</tr>
<tr>
<td>Pars Trash (Iran, nuclear program)</td>
<td>June 2007</td>
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<tr>
<td>Farayan Technique (Iran, nuclear program)</td>
<td>June 2007</td>
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<tr>
<td>Fajr Industries Group (Iran, missile program)</td>
<td>June 2007</td>
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<tr>
<td>Mizar Machine Manufacturing Group (Iran, missile prog.)</td>
<td>June 2007</td>
</tr>
<tr>
<td>Aerospace Industries Organization (AIO) (Iran)</td>
<td>September 2007</td>
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<tr>
<td>Korea Mining and Development Corp. (N. Korea)</td>
<td>September 2007</td>
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<tr>
<td>Islamic Revolutionary Guard Corps (IRGC)</td>
<td>October 21, 2007</td>
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<tr>
<td>Ministry of Defense and Armed Forces Logistics</td>
<td>October 21, 2007</td>
</tr>
<tr>
<td>Bank Melli (Iran's largest bank, widely used by Guard): Bank Melli Iran Zao (Moscow); Melli Bank PC (U.K.)</td>
<td>October 21, 2007</td>
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<td>Bank Kargoshaee</td>
<td>October 21, 2007</td>
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<tr>
<td>Arian Bank (joint venture between Melli and Bank Saderat). Based in Afghanistan</td>
<td>October 21, 2007</td>
</tr>
<tr>
<td>Bank Mellat (provides banking services to Iran's nuclear sector); Mellat Bank SB CJSC (Armenia). Reportedly has $1.4 billion in assets in UAE</td>
<td>October 21, 2007</td>
</tr>
<tr>
<td>Persia International Bank PLC (U.K.)</td>
<td>October 21, 2007</td>
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<tr>
<td>Khatam ol Anbiya Gharargah Sazandegi Nooh (main IRGC construction and contracting arm, with $7 billion in oil, gas deals)</td>
<td>October 21, 2007</td>
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<tr>
<td>Oriental Oil Kish (Iranian oil exploration firm)</td>
<td>October 21, 2007</td>
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<tr>
<td>Ghorb Karbal; Ghorb Nooh (synonymous with Khatam ol Anbiya)</td>
<td>October 21, 2007</td>
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<td>Sepasad Engineering Company (Guard construction affiliate)</td>
<td>October 21, 2007</td>
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<td>Omran Sahel (Guard construction affiliate)</td>
<td>October 21, 2007</td>
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<td>Sahel Consultant Engineering (Guard construction affiliate)</td>
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<td>Hara Company</td>
<td>October 21, 2007</td>
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<td>Gharargah Sazandegi Ghaem</td>
<td>October 21, 2007</td>
</tr>
<tr>
<td>Bahanmayer Morteza Bahmamyar (AIO, Iran missile official, see above under Resolution 1737)</td>
<td>October 21, 2007</td>
</tr>
<tr>
<td>Ahmad Vahid Dastjerdi (AIO head, Iran missile program)</td>
<td>October 21, 2007</td>
</tr>
<tr>
<td>Reza Gholi Esmaeli (AIO, see under Resolution 1737)</td>
<td>October 21, 2007</td>
</tr>
</tbody>
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Congressional Research Service
Morteza Reza'i (deputy commander, IRGC) See also Resolution 1747  
Mohammad Hejazi (Basij commander). Also, Resolution 1747  
Ali Akbar Ahmadian (Chief of IRGC Joint Staff). Resolution 1747.  
Hosein Salimi (IRGC Air Force commander). Resolution 1737  
Qassem Soleimani (Qods Force commander). Resolution 1747  
Future Bank (Bahrain-based but allegedly controlled by Bank Melli)  
Yahya Rahim Safavi (former IRGC Commander in Chief)  
Mohsen Fakhrizadeh-Mahabadi (senior Defense Ministry scientist)  
Dawood Agha-Jani (head of Natanz enrichment site)  
Mohsen Hojati (head of Fajr Industries, involved in missile program)  
Mehrdad Akhlaghi Kerabashi (heads Shahid Bakeri Industrial Group)  
Naser Maliki (heads Shahid Hemmat Industrial Group)  
Tamas Company (involved in uranium enrichment)  
Shahid Sazari Industries (makes equipment for Shahid Bakeri)  
7th of Tir (involved in developing centrifuge technology)  
Ammunition and Metallurgy Industries Group (partner of 7th of Tir)  
Parchin Chemical Industries (deals in chemicals used in ballistic missile programs)  
Karaj Nuclear Research Center  
Esfahan Nuclear Fuel Research and Production Center (NFRPC)  
Jabber Ibn Hayyan (reports to Atomic Energy Org. of Iran, AEIO)  
Safety Equipment Procurement Company  
Joza Industrial Company (front company for Shahid Hemmat Industrial Group, SHIG)  
Islamic Republic of Iran Shipping Lines (IRISL) and 18 affiliates, including Val Fajr 8; Kazar; Irininvest; Shipping Computer Services; Iran o Mar Shipping; Iran o Hind; IRISL Marine Services; Irtebar Shipping; South Shipping; IRISL Multimodal; Oasis; IRISL Europe; IRISL Benelux; IRISL China; Asia Marine Network; CISCO Shipping; and IRISL Malta.  
Firms affiliated to the Ministry of Defense, including Armament Industries Group; Farasakht Industries; Iran Aircraft Manufacturing Industrial Co.; Iran Communications Industries; Iran Electronics Industries; and Shiraz Electronics Industries  
Export Development Bank of Iran. Provides financial services to Iran's Ministry of Defense and Armed Forces Logistics  
Assa Corporation (alleged front for Bank Melli involved in managing property in New York City on behalf of Iran)  
11 Entities Tied to Bank Melli: Bank Melli Iran Investment (BMIIC); Bank Melli Printing and Publishing; Melli Investment Holding; Mehr Cayman Ltd.; Cement Investment and Development; Mazandaran Cement Co.; Shomal Cement; Mazandaran Textile; Melli Agrochemical; First Persian Equity Fund; BMIIC Intel. General

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Trading
IRGC General Rostam Qasemi, head of Khatem ol-Anbiya  
Construction Headquarters (key corporate arm of the IRGC)  
February 10, 2010 (see also October 21, 2007)
Fater Engineering Institute (linked to Khatem ol-Anbiya)  
February 10, 2010
Imensazan Consultant Engineers Institute (linked to Khatem ol-Anbiya)  
February 10, 2010
Makin Institute (linked to Khatem ol-Anbiya)  
February 10, 2010
Rahab Institute (linked to Khatem on-Anbiya)  
February 10, 2010
Entities sanctioned on June 16, 2010
- Post Bank of Iran
- IRGC Air Force
- IRGC Missile Command
- Rah Sahel and Sepanir Oil and Gas Engineering (for ties to Khatem ol-Anbya IRGC construction affiliate)
- Mohammad Ali Jafari—IRGC Commander-in-Chief since September 2007
- Mohammad Reza Naqdi—Head of the IRGC’s Basij militia force that suppresses dissent (since October 2009)
- Ahmad Yahedi—Defense Minister
- javedan Mehr Toos, javad Karimi Sabet (procurement brokers or atomic energy managers)
- Naval Defense Missile Industry Group (controlled by the Aircraft Industries Org that manages Iran’s missile programs)
- Five front companies for IRISL: Haft Darya Shipping Co.; Soroush Sarzamin Asatir Ship Management Co.; Safran Payam Darya; and Hong Kong-based Seibow Limited and Seibow Logistics.
Also identified on June 16 were 27 vessels linked to IRISKL and 71 new names of already designated IRISL ships.
Several Iranian entities were also designated as owned or controlled by Iran for purposes of the ban on U.S. trade with Iran.
Entities sanctioned on November 30, 2010
- Pearl Energy Company (formed by First East Export Bank, a subsidiary of Bank Mellat
- Pearl Energy Services, SA
- Ali Afsali (high official of First East Export Bank)
- IRISL front companies: Ashtead Shipping, Byfleet Shipping, Cobham Shipping, Dorking Shipping, Effingham Shipping, Farnham Shipping, Gomshall Shipping, and Horsham Shipping (all located in the Isle of Man).
- IRISL and affiliate officials: Mohammad Hosein Dajmar, Gholamhossein Golpavar, Hassan Jalil Zadeh, and Mohammad Haji Pajand.
Entities sanctioned on December 21, 2010:
- Bonyad (foundation) Taavon Sepah, for providing services to the IRGC
- Ansar Bank (for providing financial services to the IRGC)
- Mehr Bank (same justification as above)
- Moallem Insurance Company (for providing marine insurance to IRISL, Islamic Republic of Iran Shipping Lines)
Bank of Industry and Mine (BIM)  
May 17, 2011
- Tidewater Middle East Company  
June 23, 2011
- Iran Air
- Mehr-e Eqtesad Iranian Investment Co.

Entities Sanctioned Under Executive Order 13224 (Terrorism Entities)
Qods Force  
October 21, 2007

Congressional Research Service 69
Iran Sanctions

Bank Saderat (allegedly used to funnel Iranian money to Hezbollah, Hamas, PFLP, and other Iranian supported terrorist groups)  

Al Qaeda Operatives in Iran: Saad bin Laden; Mustafa Hamidi; Muhammad Rab'a al-Bahriyyi; Ali Saleh Husain

Qods Force senior officers: Hushang Allahdad, Hossein Musavi, Hasan Mortazavi, and Mohammad Reza Zahedi

Iranian Committee for the Reconstruction of Lebanon, and its director Hesam Khoshnevis, for supporting Lebanese Hezbollah

Imam Khomeini Relief Committee Lebanon branch, and its director Ali Zuraik, for providing support to Hezbollah

Razi Musavi, a Syrian based Iranian official allegedly providing support to Hezbollah

Liner Transport Kish (for providing shipping services to transport weapons to Lebanese Hezbollah)

For alleged plot against Saudi Ambassador to the U.S.: Qaseem Soleimani (Qods Force commander)

Hamid Abdollahi (Qods force)

Abdul Reza Shahabi (Qods Force)

Ali Gholam Shakuri (Qods Force)

Mansoor Arbabi (alleged plotter)

Mahan Air (for transportation services to Qods Force)

Entities Sanctioned Under the Iran North Korea Syria Non-Proliferation Act or Executive Order 12938

The designations are under the Iran, North Korea, Syria Non-Proliferation Act (INKSNA) unless specified. These designations expire after two years, unless re-designated

Baltic State Technical University and Glavkosmos, both of Russia  

D. Mendeleev University of Chemical Technology of Russia and Moscow Aviation Institute

Norinco (China), for alleged missile technology sale to Iran

Taiwan Foreign Trade General Corporation (Taiwan)

Tula Instrument Design Bureau (Russia), for alleged sales of laser-guided artillery shells to Iran

13 entities sanctioned including companies from Russia, China, Belarus, Macedonia, North Korea, UAE, and Taiwan

14 entities from China, North Korea, Belarus, India (two nuclear scientists, Dr. Surendar and Dr. V.S.R. Prasad), Russia, Spain, and Ukraine

14 entities, mostly from China, for alleged supplying of Iran’s missile program. Many, such as North Korea’s Chagangwonga Sinyong and China’s Norinco and Great Wall Industry Corp. have been sanctioned several times previously. Newly sanctioned entities included North Korea’s Paeksan Associated Corporation, and Taiwan’s Ecom Enterprise Co.

9 entities, including those from China (Norinco yet again). India (two chemical companies), and Austria. Sanctions against Dr. Surendar of India (see September 29, 2004) were ended, presumably because of

October 21, 2007
January 16, 2009
August 3, 2010
August 3, 2010
August 3, 2010
December 21, 2010
October 11, 2011
October 12, 2011
October 12, 2011
January 8, 1999 (E.O. 12938). Both removed on May 21, 2010
May 2003
July 4, 2003
September 17, 2003 (also designated under Executive Order 12938), removed May 21, 2010
April 7, 2004
September 29, 2004
December 2004 and January 2005
December 26, 2005
7 entities. Two Indian chemical companies (Balaji Amines and Prachi Poly Products); two Russian firms (Rosoboronexport and aircraft manufacturer Sukhoi); two North Korean entities (Korean Mining and Industrial Development, and Korea Pungang Trading); and one Cuban entity (Center for Genetic Engineering and Biotechnology).

9 entities. Rosoboronexport, Tula Design, and Komna Design Office of Machine Building, and Alexei Safonov (Russia); Zibo Chemical, China National Aerotechnology, and China National Electrical (China); Korean Mining and Industrial Development (North Korea) for WMD or advanced weapons sales to Iran (and Syria).

14 entities, including Lebanese Hezbollah. Some were penalized for transactions with Syria. Among the new entities sanctioned for assisting Iran were Shanghai Non-Ferrous Metals Pudong Development Trade Company (China); Iran's Defense Industries Organization; Sokka Company (Singapore); Challenger Corporation (Malaysia); Target Airfreight (Malaysia); Aerospace Logistics Services (Mexico); and Arif Durrani (Pakistani national).

13 entities: China Xinshidi Co.; China Shipbuilding and Offshore International Corp.; Huazhong CNC (China); IRGC; Korea Mining Development Corp. (North Korea); Korea Taesong Trading Co. (NK); Yolin/Yullin Tech, Inc. (South Korea); Rosoboronexport (Russia state arms export agency); Sudan Master Technology; Sudan Technical Center Co; Army Supply Bureau (Syria); R and M International FZCO (UAE); Venezuelan Military Industries Co. (CAVM);

16 entities: Belarus: Belarusian Optical Mechanical Association; Beltech Export; China: Karl Lee; Dalian Sunny Industries; Dalian Zhongbang Chemical Industries Co.; Xian Junyun Electronic; Iran: Milad Jafari; DIO; IRISL; Qods Force; SAD Import-Export; SBIG; North Korea; Tungun Trading; Syria: Industrial Establishment of Defense; Scientific Studies and Research Center; Venezuela: CAVIM.

Entities Designated as Threats to Iraqi Stability under Executive Order 13438

Ahmad Forouzandeh, Commander of the Qods Force Ramazan Headquarters, accused of fomenting sectarian violence in Iraq and of organizing training in Iran for Iraqi Shiite militia fighters

Abu Mustafa al-Shibani. Iran-based leader of network that funnels Iranian arms to Shiite militias in Iraq.

Ismail al-Lami (Abu Dura). Shiite militia leader, breakaway from Sadr Mahdi Army, alleged to have committed mass kidnappings and planned assassination attempts against Iraq Sunni politicians

Mishan al-Jaburi, Financier of Sunni insurgents, owner of pro-insurgent Al-Zawra television, now banned

Al Zawra Television Station

Khadi'ib Hezbollah (pro-Iranian Mahdi splinter group)

Abu Mahdi al-Muhandis

Iranians Sanctioned Under September 29, 2010, Executive Order 13553 on Human Rights Abusers

1. IRGC Commander Mohammad Ali Jafari

2. Minister of Interior at time of June 2009 elections Sadegh Mahsooli

3. Minister of Intelligence at time of elections Qolam Hossein

August 4, 2006 (see below for Rosoboronexport removal)

January 2007 (see below for Tula and Rosoboronexport removal)

April 23, 2007


May 23, 2011

January 9, 2008

January 9, 2008

January 9, 2008

January 9, 2008

January 9, 2008

January 9, 2008

July 2, 2009

July 2, 2009.

All sanctioned on September 29, 2010
Mohseni-Ejei

4. Tehran Prosecutor General at time of elections Saeed Mortazavi

5. Minister of Intelligence Heydar Moslehi

6. Former Defense Minister Mostafa Mohammad Najjar

7. Deputy National Police Chief Ahmad Reza Radan

8. Basij (security militia) Commander at time of elections Hossein Taeb


10. Basij forces commander (since October 2009) Mohammad Reza Naqdi (was head of Basij intelligence during post 2009 election crackdown)


12. Basij Resistance Force

13. Law Enforcement Forces (LEF)

14. LEF Commander Ismail Ahmad Moghadam

Iranians Sanctioned Under Executive Order 13572 (April 29, 2011) for Repression of the Syrian People

- Revolutionary Guard – Qods Force April 29, 2011

- Qasem Soleimani (Qods Force Commander) May 18, 2011

- Mohsen Chizari (Commander of Qods Force operations and training) Same as above

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Iran's Nuclear Program: Tehran's Compliance with International Obligations

Paul K. Kerr
Analyst in Nonproliferation

February 15, 2011
Summary

In 2002, the International Atomic Energy Agency (IAEA) began investigating allegations that Iran had conducted clandestine nuclear activities. Ultimately, the agency reported that some of these activities had violated Tehran’s IAEA safeguards agreement. The IAEA has not stated definitively that Iran has pursued nuclear weapons, but has also not yet been able to conclude that the country’s nuclear program is exclusively for peaceful purposes. The IAEA Board of Governors referred the matter to the U.N. Security Council in February 2006. Since then, the council has adopted six resolutions, the most recent of which (Resolution 1929) was adopted in June 2010.

The Security Council has required Iran to cooperate fully with the IAEA’s investigation of its nuclear activities, suspend its uranium enrichment program, suspend its construction of a heavy-water reactor and related projects, and ratify the Additional Protocol to its IAEA safeguards agreement. However, a November 2010 report from IAEA Director-General Yukiya Amano to the agency’s Board of Governors indicated that Tehran has continued to defy the council’s demands by continuing work on its uranium enrichment program and heavy-water reactor program. Iran has signed, but not ratified, its Additional Protocol.

Iran and the IAEA agreed in August 2007 on a work plan to clarify the outstanding questions regarding Tehran’s nuclear program. Most of these questions have essentially been resolved, but then-IAEA Director-General Mohamed ElBaradei told the agency’s board in June 2008 that the agency still has questions regarding “possible military dimensions to Iran’s nuclear programme.” The IAEA has reported for some time that it has not been able to make progress on these matters.

This report provides a brief overview of Iran’s nuclear program and describes the legal basis for the actions taken by the IAEA board and the Security Council. It will be updated as events warrant.
Contents

Introduction ....................................................................................................................................... 1
    Background ................................................................................................................................. 1
    Iran and the IAEA .................................................................................................................... 3
        Potential Noncompliance Since September 2005 ............................................................ 5
    Iran and the U.N. Security Council ............................................................................................ 6
Authority for IAEA and U.N. Security Council Actions ................................................................. 7
    IAEA Statute ............................................................................................................................. 7
    U.N. Charter and the Security Council .................................................................................... 8
Has Iran Violated the NPT? ............................................................................................................ 9

Appendixes

Appendix A. Iranian Noncompliance with Its IAEA Safeguards Agreement ................................. 12
Appendix B. Extended Remarks by William Foster Regarding Possible NPT Article II
    Violations .................................................................................................................................... 14

Contacts

Author Contact Information ............................................................................................................ 15
Introduction

Iran ratified the nuclear Nonproliferation Treaty (NPT) in 1970. Article III of the treaty requires non-nuclear-weapon states-parties to accept comprehensive International Atomic Energy Agency (IAEA) safeguards; Tehran concluded a comprehensive safeguards agreement with the IAEA in 1974. In 2002, the agency began investigating allegations that Iran had conducted clandestine nuclear activities; the IAEA ultimately reported that some of these activities had violated Tehran’s safeguards agreement. The agency has not stated definitively that Iran has pursued nuclear weapons, but has also not yet been able to conclude that the country’s nuclear program is exclusively for peaceful purposes. The IAEA continues to investigate the program.

Following more than three years of investigation, the IAEA Board of Governors referred the matter to the U.N. Security Council in February 2006. Since then, the council has adopted five resolutions requiring Iran to take steps to alleviate international concerns about its nuclear program. This report provides a brief overview of Iran’s nuclear program and describes the legal basis for the actions taken by the IAEA board and the Security Council.

For more detailed information about Iran’s nuclear program, see CRS Report RL34544, Iran’s Nuclear Program: Status, by Paul K. Kerr. For more information about the state of international diplomacy with Iran, see CRS Report RL32048, Iran: U.S. Concerns and Policy Responses, by Kenneth Katzman.

Background

Iran’s construction of a gas centrifuge-based uranium enrichment facility is currently the main source of proliferation concern. Gas centrifuges enrich uranium by spinning uranium hexafluoride gas at high speeds to increase the concentration of the uranium-235 isotope. Such centrifuges can produce both low-enriched uranium (LEU), which can be used in nuclear power reactors, and highly enriched uranium (HEU), which is one of the two types of fissile material used in nuclear weapons. HEU can also be used as fuel in certain types of nuclear reactors. Iran also has a uranium-conversion facility, which converts uranium oxide into several compounds, including uranium hexafluoride. Tehran claims that it wants to produce LEU for its current and future power reactors.

Iran’s construction of a reactor moderated by heavy water has also been a source of concern. Although Tehran says that the reactor, which Iran is building at Arak, is intended for the production of medical isotopes, it is a proliferation concern because the reactor’s spent fuel will contain plutonium well-suited for use in nuclear weapons. In order to be used in nuclear weapons, however, plutonium must be separated from the spent fuel—a procedure called “reprocessing.” Iran has said that it will not engage in reprocessing.

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1 The NPT defines a nuclear-weapon state as “one which has manufactured and exploded a nuclear weapon or other nuclear explosive device” prior to January 1, 1967. These states are China, France, Russia, the United Kingdom, and the United States.

Iran and the IAEA agreed in August 2007 on a work plan to clarify the outstanding questions regarding Tehran’s nuclear program. Most of these questions, which had contributed to suspicions that Iran had been pursuing a nuclear weapons program, have essentially been resolved. Then-IAEA Director-General Mohamed ElBaradei, however, told the IAEA board June 2, 2008, that there is “one remaining major [unresolved] issue,” which concerns questions regarding “possible military dimensions to Iran’s nuclear programme.” A November 23, 2010, report from IAEA Director-General Yukiya Amano to the Security Council and the IAEA board indicates that the agency has not made any substantive progress on these matters. Tehran has questioned the authenticity of some of the evidence underlying the agency’s concerns and maintains that it has not done any work on nuclear weapons.

Iran has also expressed concern to the IAEA that resolving some of these issues would require agency inspectors to have “access to sensitive information related to its conventional military and missile related activities.” The IAEA, according to a September 2008 report from ElBaradei, has stated its willingness to discuss with Iran

modalities that could enable Iran to demonstrate credibly that the activities referred to in the documentation are not nuclear related, as Iran asserts, while protecting sensitive information related to its conventional military activities.

Indeed, the agency says that it has made several specific proposals, but Tehran has not yet provided the requested information.

Several UN Security Council Resolutions, the most recent of which (Resolution 1929) was adopted June 9, 2010, require Iran to cooperate fully with the IAEA’s investigation of its nuclear activities, suspend its uranium enrichment program, suspend its construction of a heavy-water reactor and related projects, and ratify the Additional Protocol to its IAEA safeguards agreement. Resolution 1929 also requires Tehran to refrain from “any activity related to ballistic missiles capable of delivering nuclear weapons.” However, Amano’s November 2010 report indicated that Tehran has continued to defy the council’s demands by continuing work on its uranium enrichment program and heavy-water reactor program. Iranian officials have repeatedly stated that Iran will not suspend its enrichment program. Tehran has signed, but not ratified, its Additional Protocol. Iran has also continued its extensive ballistic missile program.

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4 Iran is also constructing a plant for the production of heavy water.
Iran and the IAEA

As noted, Iran is a party to the NPT and has concluded a comprehensive safeguards agreement. According to the IAEA, safeguards pursuant to such agreements are applied to verify a State’s compliance with its undertaking to accept safeguards on all nuclear material in all its peaceful nuclear activities and to verify that such material is not diverted to nuclear weapons or other nuclear explosive devices.8

Comprehensive safeguards are designed to enable the IAEA to detect the diversion of nuclear material from peaceful purposes to nuclear weapons uses, as well as to detect undeclared nuclear activities and material.9 Safeguards include agency inspections and monitoring of declared nuclear facilities.

The agency’s inspections and monitoring authority in a particular country are limited to facilities that have been declared by the government. Additional Protocols to IAEA comprehensive safeguards agreements increase the agency’s ability to investigate clandestine nuclear facilities and activities by increasing the IAEA’s authority to inspect certain nuclear-related facilities and demand information from member states.10 Iran signed such a protocol in December 2003 and agreed to implement the agreement pending ratification. Tehran stopped adhering to its Additional Protocol in 2006.

The IAEA’s authority to investigate nuclear-weapons-related activity is limited. Former IAEA Director-General ElBaradei explained in a 2005 interview that “we don’t have an all-encompassing mandate to look for every computer study on weaponization. Our mandate is to make sure that all nuclear materials in a country are declared to us.”11 Similarly, a February 2006 report from ElBaradei to the IAEA board stated that “absent some nexus to nuclear material the Agency’s legal authority to pursue the verification of possible nuclear weapons related activity is limited.”12

The current public controversy over Iran’s nuclear program began in August 2002, when the National Council of Resistance on Iran (NCRI), an Iranian exile group, revealed information during a press conference (some of which later proved to be accurate) that Tehran had built nuclear-related facilities that it had not revealed to the IAEA. The United States had been aware of at least some of these activities, according to knowledgeable former officials.13 Prior to the NCRI’s revelations, the IAEA had expressed concerns that Iran had not been providing the

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9 ibid.
agency with all relevant information about its nuclear programs, but had never found the country in violation of its safeguards agreement.

In fall 2002, the IAEA began to investigate Iran's nuclear activities at the sites named by the NCRI; inspectors visited the sites the following February. Adopting its first resolution (GOV/2003/69)14 on the matter in September 2003, the IAEA board called on Tehran to increase its cooperation with the agency's investigation, suspend its uranium enrichment activities, and "unconditionally sign, ratify and fully implement" an Additional Protocol.

In October 2003, Iran concluded a voluntary agreement with France, Germany, and the United Kingdom, collectively known as the "E3," to suspend its enrichment activities, sign and implement an Additional Protocol to its IAEA safeguards agreement, and comply fully with the IAEA's investigation.15 As a result, the agency's board decided to refrain from referring the matter to the U.N. Security Council. As noted, Tehran signed this Additional Protocol in December 2003, but has never ratified it.

Ultimately, the IAEA's investigation, as well as information Iran provided after the October 2003 agreement, revealed that Iran had engaged in a variety of clandestine nuclear-related activities, some of which violated the country's safeguards agreement (see Appendix A). After October 2003, Iran continued some of its enrichment-related activities, but Tehran and the E3 agreed in November 2004 to a more detailed suspension agreement.16 However, Iran resumed uranium conversion in August 2005 under the leadership of President Mahmoud Ahmadinejad, who had been elected two months earlier.

On September 24, 2005, the IAEA Board of Governors adopted a resolution (GOV/2005/77)17 that, for the first time, found Iran to be in noncompliance with its IAEA safeguards agreement. The board, however, did not refer Iran to the Security Council, choosing instead to give Tehran additional time to comply with the board's demands. The resolution urged Iran

- to implement transparency measures including access to individuals, documentation relating to procurement, dual use equipment, certain military owned workshops and research and development locations;
- to re-establish full and sustained suspension of all enrichment-related activity;
- to reconsider the construction of the research reactor moderated by heavy water;
- to ratify promptly and implement in full the Additional Protocol; and
- to continue to act in accordance with the provisions of the Additional Protocol.

No international legal obligations required Tehran to take these steps. But ElBaradei's September 2008 report asserted that, without Iranian implementation of such "transparency measures," the IAEA "will not be in a position to progress in its verification of the absence of undeclared nuclear material and activities in Iran."

15 The text of the agreement is available at http://www.iaea.org/NewsCenter/Focus/iaeainfo/ statement_iran21102003.shtml.
Iran announced in January 2006 that it would resume research and development on its centrifuges at Natanz. The next month, Tehran announced that it would stop implementing its Additional Protocol.

Potential Noncompliance Since September 2005

Iran further scaled back its cooperation with the IAEA in March 2007, when the government told the agency that it would stop complying with a portion of the subsidiary arrangements for its IAEA safeguards agreement.\(^{18}\) That provision, to which Iran agreed in 2003, requires Tehran to provide design information for new nuclear facilities “as soon as the decision to construct, or to authorize construction, of such a facility has been taken, whichever is earlier.” Since March 2007, Iran has argued that it is only obligated to adhere to the previous notification provisions of its subsidiary arrangements, which required Tehran to provide design information for a new facility 180 days before introducing nuclear material into it.

This decision has provided the basis for Iran’s stated rationale for its refusal to provide the IAEA with some information concerning its nuclear program. For example, Tehran has refused to provide updated design information for the heavy-water reactor under construction at Arak. Similarly, Tehran had refused to provide the IAEA with design information for a reactor that Iran intends to construct at Darkhovin. Although Iran provided the agency with preliminary design information in a September 22, 2009, letter, the IAEA has requested Tehran to “provide additional clarifications” of the information, according to a November 2009 report.\(^{19}\) Iran has also argued, based on its March 2007 decision, that its failure to notify the IAEA before September 2009 that it has been constructing a gas-centrifuge uranium enrichment facility, called the Fordow facility, near the city of Qom is consistent with Tehran’s safeguards obligations. Exactly when Iran decided to construct the facility is unclear. Amano reported in November 2010 that the IAEA has requested information from Iran regarding the Fordow construction decision, but Tehran has not yet responded to all of the agency’s requests.

Both the 2007 decision, which the IAEA has asked Iran to “reconsider,” and Tehran’s refusal to provide the design information appear to be inconsistent with the government’s safeguards obligations. Although Article 39 of Iran’s safeguards agreement states that the subsidiary arrangements “may be extended or changed by agreement between” Iran and the IAEA, the agreement does not provide for a unilateral modification or suspension of any portion of those arrangements.\(^{20, 21}\) Moreover, the IAEA legal adviser explained in a March 2009 statement that Tehran’s failure to provide design information for the reactors is “inconsistent with” Iran’s obligations under its subsidiary arrangements. The adviser, however, added that “it is difficult to conclude that” Tehran’s refusal to provide the information “in itself constitutes non-compliance with, or a breach of” Iran’s safeguards agreement. Nevertheless, ElBaradei’s November 2009 report described Tehran’s failures both to notify the agency of the decision to begin constructing the Fordow facility, as well as to provide the relevant design information in a timely fashion, as

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\(^{18}\) According to the 2001 IAEA Safeguards Glossary, subsidiary arrangements describe the “technical and administrative procedures for specifying how the provisions laid down in a safeguards agreement are to be applied.”


\(^{21}\) Available at http://www.armscontrolwonk.com/file_download/162/Legal_Adviser_Iran.pdf.
“inconsistent with” Iran’s safeguards obligations. The report similarly described Iran’s delay in providing design information for the Darkhovin reactor.

Amano’s November 2010 report also requested that Tehran provide the IAEA with information regarding any decisions to construct new facilities. Iran has announced that it intends to build additional enrichment facilities. Tehran may have violated its safeguards agreement if it has made decisions to construct new enrichment facilities without informing the IAEA.

Iran’s March 2007 decision also formed the basis for Tehran’s refusal until August 2009 to allow IAEA inspectors to verify design information for the Arak reactor. This action also appeared to be inconsistent with Tehran’s safeguards agreement. Article 48 of that agreement states that the IAEA “may send inspectors to facilities to verify the design information provided to the Agency”; in fact, the agency has a “continuing right” to do so, according to a November 2008 report from ElBaradei. Moreover, the legal adviser’s statement characterized Iran’s ongoing refusal to allow IAEA inspectors to verify the Arak reactor’s design information as “inconsistent with” Tehran’s obligations under its safeguards agreement. IAEA inspectors visited the reactor facility in August 2009 to verify design information, according to a report ElBaradei issued the same month. Inspectors have visited the facility several more times, according to several reports from Amano.

In addition to the lapses described above, Iran’s failure to notify the IAEA of its decision to enrich uranium to a maximum of 20% uranium-235 in time for agency inspectors to adjust their safeguards procedures may, according to Amano’s February 2010 report, have violated Iran’s IAEA safeguards agreement. Article 45 of that agreement requires that Tehran notify the IAEA “with design information in respect of a modification relevant for safeguards purposes sufficiently in advance for the safeguards procedures to be adjusted when necessary,” according to Amano’s report, which describes Iran’s enrichment decision as “clearly relevant for safeguards purposes.”

The IAEA board has neither formally found that any of the Iranian actions described above are in noncompliance with Tehran’s safeguards agreement, nor referred these issues to the U.N. Security Council. The IAEA board adopted a resolution November 27, 2009, that described Iran’s failure to notify the agency of the Fordow facility as “inconsistent with” the subsidiary arrangements under Iran’s safeguards agreement, but this statement did not constitute a formal finding of noncompliance.

**Iran and the U.N. Security Council**

As noted, Iran announced in January 2006 that it would resume research and development on its centrifuges at Natanz. In response, the IAEA board adopted a resolution (GOV/2006/14) February 4, 2006, referring the matter to the Security Council and reiterating its call for Iran to

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23 GOV/2008/59.
24 Iran stated in an April 2007 letter to the IAEA that, given Tehran’s March 2007 decision regarding the subsidiary arrangements to its safeguards agreement, such visits were unjustified.
take the measures specified in the September resolution. Two days later, Tehran announced that it would stop implementing its Additional Protocol.

On March 29, 2006, the U.N. Security Council President issued a statement, which was not legally binding, that called on Iran to “take the steps required” by the February IAEA board resolution. The council subsequently adopted six resolutions concerning Iran’s nuclear program: 1696 (July 2006), 1737 (December 2006), 1747 (March 2007), 1803 (March 2008), 1835 (September 2008), and 1929 (June 2010). The second, third, fourth, and sixth resolutions imposed a variety of restrictions on Iran.

Resolution 1696 was the first to place legally-binding Security Council requirements on Iran with respect to its nuclear program. That resolution made mandatory the IAEA-demanded suspension and called on Tehran to implement the transparency measures called for by the IAEA board’s February 2006 resolution. Resolution 1737 reiterated these requirements but expanded the suspension’s scope to include “work on all heavy water-related projects.” It is worth noting that the Security Council has acknowledged (in Resolution 1803, for example) Iran’s rights under Article IV of the NPT, which states that parties to the treaty have “the inalienable right ... to develop research, production and use of nuclear energy for peaceful Purposes.”

As noted, Resolution 1929 also requires Tehran to refrain from “any activity related to ballistic missiles capable of delivering nuclear weapons.” Iran has not complied with this provision.

Authority for IAEA and U.N. Security Council Actions

The legal authority for the actions taken by the IAEA Board of Governors and the U.N. Security Council is found in both the IAEA Statute and the U.N. Charter. The following sections discuss the relevant portions of those documents.

IAEA Statute

Two sections of the IAEA Statute explain what the agency should do if an IAEA member state is found to be in noncompliance with its safeguards agreement. Article III B. 4. of the statute states that the IAEA is to submit annual reports to the U.N. General Assembly and, “when appropriate,” to the U.N. Security Council. If “there should arise questions that are within the competence of the Security Council,” the article adds, the IAEA “shall notify the Security Council, as the organ bearing the main responsibility for the maintenance of international peace and security.”

Additionally, Article XII C. states that IAEA inspectors are to report non-compliance issues to the agency’s Director-General, who is to report the matter to the IAEA Board of Governors. The board is then to “call upon the recipient State or States to remedy forthwith any non-compliance

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28 The IAEA Statute is not self-executing; the Agency implements safeguards agreements reached with individual governments. As noted, comprehensive safeguards agreements are based on a model described in INFCIRC 153.
29 The text of the IAEA Statute is available at http://www.iaea.org/About/statute_text.html.
which it finds to have occurred," as well as "report the non-compliance to all members and to the Security Council and General Assembly of the United Nations."

In the case of Iran, the September 24, 2005, IAEA board resolution (GOV/2005/77) stated that the board

found that Iran’s many failures and breaches of its obligations to comply with its NPT Safeguards Agreement, as detailed in GOV/2003/75 [a November 2003 report from ElBaradei], constitute non compliance in the context of Article XII.C of the Agency’s Statute;

According to the resolution, the board also found

that the history of concealment of Iran’s nuclear activities referred to in the Director General’s report [GOV/2003/75], the nature of these activities, issues brought to light in the course of the Agency’s verification of declarations made by Iran since September 2002 and the resulting absence of confidence that Iran’s nuclear programme is exclusively for peaceful purposes have given rise to questions that are within the competence of the Security Council, as the organ bearing the main responsibility for the maintenance of international peace and security.

ElBaradei issued the report cited by the resolution, GOV/2003/75, in November 2003.30 It described a variety of Iranian nuclear activities, which are detailed in Appendix A, that violated Tehran’s safeguards agreement. ElBaradei has since reported that Iran has taken corrective measures to address these safeguards breaches. As noted above, the 2005 resolution called on Iran to take a variety of actions that Tehran was not legally required to implement.

U.N. Charter and the Security Council

Several articles of the U.N. Charter, which is a treaty, describe the Security Council’s authority to impose requirements and sanctions on Iran.31 Article 24 confers on the council "primary responsibility for the maintenance of international peace and security." The article also states that the "specific powers granted to the Security Council for the discharge of these duties are laid down" in several chapters of the charter, including Chapter VII, which describes the actions that the council may take in response to "threats to the peace, breaches of the peace, and acts of aggression."

Chapter VII of the charter contains three articles relevant to the Iraqi case. Security Council resolutions that made mandatory the IAEA’s demands concerning Iran’s nuclear program invoked Chapter VII. Article 39 of that chapter states that the council

shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

31 The text of the charter is available at http://www.un.org/aboutun/charter/.
Resolution 1696 invoked Article 40 of Chapter VII “in order to make mandatory the suspension required by the IAEA.” As noted, that resolution did not impose any sanctions on Iran. Article 40 states that

the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39 [of Chapter VII], call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable.

Resolutions 1737, 1747, 1803, and 1929, which did impose sanctions, invoked Article 41 of Chapter VII. According to Article 41, the Security Council

may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

As noted, Security Council resolution 1835 did not impose new sanctions, but reaffirmed the previous resolutions and called on Iran to comply with them.

It is worth noting that Article 25 of the U.N. Charter obliges U.N. members “to accept and carry out the decisions of the Security Council.”

Has Iran Violated the NPT?32

Whether Iran has violated the NPT is unclear. The treaty does not contain a mechanism for determining that a state-party has violated its obligations. Moreover, there does not appear to be a formal procedure for determining such violations. An NPT Review Conference would, however, be one venue for NPT states-parties to make such a determination.

The U.N. Security Council has never declared Iran to be in violation of the NPT; neither the council nor the U.N. General Assembly has a responsibility to adjudicate treaty violations. However, the lack of a ruling by the council on Iran’s compliance with the NPT has apparently had little practical effect because, as noted, the council has taken action in response to the IAEA Board of Governors’ determination that Iran has violated its safeguards agreement.

Iran’s violations of its safeguards agreement appear to constitute violations of Article III, which requires NPT non-nuclear-weapon states-parties to accept IAEA safeguards, in accordance with the agency’s statute, “for the exclusive purpose of verification of the fulfillment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.”

Tehran may also have violated provisions of Article II which state that non-nuclear-weapon states-parties shall not “manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices” or “seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.”

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32 Portions of this section are based on interviews with U.N. and State Department officials.
As noted, the IAEA is continuing to investigate evidence of what ElBaradei described in June 2008 as "possible military dimensions to Iran's nuclear programme." Such activities may indicate that Tehran has violated both Article II provisions described above. Moreover, a November 2007 National Intelligence Estimate (NIE) stated that "until fall 2003, Iranian military entities were working under government direction to develop nuclear weapons." This past program could be a violation of Article II, although the estimate does not provide any detail about the program. Nevertheless, the IAEA has never reported that Iran has attempted to develop nuclear weapons.

Despite the lack of such an IAEA conclusion, a 2005 State Department report regarding states' compliance with nonproliferation agreements argued that the country had violated Article II of the NPT:

The breadth of Iran's nuclear development efforts, the secrecy and deceptions with which they have been conducted for nearly 20 years, its redundant and surreptitious procurement channels, Iran's persistent failure to comply with its obligations to report to the IAEA and to apply safeguards to such activities, and the lack of a reasonable economic justification for this program leads us to conclude that Iran is pursuing an effort to manufacture nuclear weapons, and has sought and received assistance in this effort in violation of Article II of the NPT. The report also stated that Iran's "weapons program combines elements" of Tehran's declared nuclear activities, as well as suspected "undeclared fuel cycle and other activities that may exist, including those that may be run solely be the military."

The State Department's reasoning appears to be based on an interpretation of the NPT which holds that a wide scope of nuclear activities could constitute violations of Article II. The 2005 report states that assessments regarding Article II compliance "must look at the totality of the facts, including judgments as to" a state-party's "purpose in undertaking the nuclear activities in question." The report also includes a list of activities which could constitute such non-compliance.

The 2005 State Department report cites testimony from then-Arms Control and Disarmament Agency Director William Foster during a 1968 Senate Foreign Relations Committee hearing. Foster stated that "facts indicating that the purpose of a particular activity was the acquisition of a nuclear explosive device would tend to show non-compliance" with Article II. He gave two examples: "the construction of an experimental or prototype nuclear explosive device" and "the production of components which could only have relevance" to such a device. However, Foster

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35 According to the report, such activities can include (1) the presence of undeclared nuclear facilities; (2) procurement patterns inconsistent with a civil nuclear program (e.g., clandestine procurement networks, possibly including the use of front companies, false end-use information, and fraudulent documentation); (3) security measures beyond what would be appropriate for peaceful, civil nuclear installations; (4) a pattern of Article III safeguards violations suggestive of a pattern of activities designed to conceal nuclear activities from the IAEA; and (5) a nuclear program with little (or no) assurance of peaceful purposes, but great assurance for other purposes.
36 Nonproliferation Treaty, Senate Committee on Foreign Relations, Joint Committee on Atomic Energy [Part I] July 10-12, 17, 1968; Session 90-2 (1968). The complete statement regarding Article II violations is in Appendix B.
also noted that a variety of other activities could also violate Article II, adding that the United States believed it impossible “to formulate a comprehensive definition or interpretation.”

It is worth noting that the 2005 State Department report’s arguments appear to rely heavily on the notion that a state’s apparent intentions underlying certain nuclear-related activities can be used to determine violations of Article II. This interpretation is not shared by all experts.37

The 2005 report “primarily reflected activities from January 2002 through December 2003.” Whether the State Department assesses that Iran has violated Article II since then is unclear. A version of the report released in 2010, which “primarily reflect[s] activities from January 1, 2004, through December 31, 2008,” states that “the issues underlying” the 2005 report’s conclusion regarding Iran’s Article II compliance “remain unresolved.” As noted, the 2007 NIE assessed that Iran halted its nuclear weapons program in 2003.38

37 Personal communication with Andreas Persbo, Senior Researcher, the Verification Research, Training and Information Centre.

38 All quotations are from Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments, Department of State, July 2010, available at http://www.state.gov/t/avc/rls/rp/c9721.htm.
Appendix A. Iranian Noncompliance with Its IAEA Safeguards Agreement

The November 2003 report (GOV/2003/75) from IAEA Director-General ElBaradei to the agency's Board of Governors details what the September 2005 board resolution described as "Iran's many failures and breaches of its obligations to comply with its safeguards agreement."

The report stated that

Iran has failed in a number of instances over an extended period of time to meet its obligations under its Safeguards Agreement with respect to the reporting of nuclear material and its processing and use, as well as the declaration of facilities where such material has been processed and stored.

The report detailed some of these failures and referenced other failures described in two earlier reports (GOV/2003/40 and GOV/2003/63) from ElBaradei to the IAEA board.39

According to GOV/2003/40, Iran failed to declare the following activities to the agency:

- The importation of natural uranium, and its subsequent transfer for further processing.
- The processing and use of the imported natural uranium, including the production and loss of nuclear material, and the production and transfer of resulting waste.

Additionally, Iran failed to

- declare the facilities where nuclear material (including the waste) was received, stored and processed,
- provide in a timely manner updated design information for a research reactor located in Tehran, as well as
- provide in a timely manner information on two waste storage sites.

GOV/2003/63 stated that Iran failed to report uranium conversion experiments to the IAEA. According to GOV/2003/75, Iran failed to report the following activities to the IAEA:

- The use of imported natural uranium hexafluoride for the testing of centrifuges, as well as the subsequent production of enriched and depleted uranium.
- The importation of natural uranium metal and its subsequent transfer for use in laser enrichment experiments, including the production of enriched uranium, the loss of nuclear material during these operations, and the production and transfer of resulting waste.
- The production of a variety of nuclear compounds from several different imported nuclear materials, and the production and transfer of resulting wastes.

• The production of uranium targets and their irradiation in the Tehran Research Reactor, the subsequent processing of those targets (including the separation of plutonium), the production and transfer of resulting waste, and the storage of unprocessed irradiated targets.

Iran also failed to provide the agency with design information for a variety of nuclear-related facilities, according to the report. These included the following:

• A centrifuge testing facility.
• Two laser laboratories and locations where resulting wastes were processed.
• Facilities involved in the production of a variety of nuclear compounds.
• The Tehran Research Reactor (with respect to the irradiation of uranium targets), the hot cell facility where the plutonium separation took place, as well as the relevant waste handling facility.

Additionally, the report cited Iran's "failure on many occasions to co-operate to facilitate the implementation of safeguards, through concealment" of its nuclear activities.
Appendix B. Extended Remarks by William Foster Regarding Possible NPT Article II Violations

On July 10, 1968, then-Arms Control and Disarmament Agency Director William Foster testified before the Senate Foreign Relations Committee about the NPT. In response to a question regarding the type of nuclear activities prohibited by Article II of the treaty, Foster supplied the following statement:

Extension of Remarks by Mr. Foster in Response to Question Regarding Nuclear Explosive Devices

The treaty articles in question are Article II, in which non-nuclear-weapon parties undertake 'not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices,' and Article IV, which provides that nothing in the Treaty is to be interpreted as affecting the right of all Parties to the Treaty 'to develop research, production and use of nuclear energy for peaceful purposes... in conformity with Articles I and II of this Treaty.' In the course of the negotiation of the Treaty, United States representatives were asked their views on what would constitute the 'manufacture' of a nuclear weapon or other nuclear explosive device under Article II of the draft treaty. Our reply was as follows:

'While the general intent of this provision seems clear, and its application to cases such as those discussed below should present little difficulty, the United States believe [sic] it is not possible at this time to formulate a comprehensive definition or interpretation. There are many hypothetical situations which might be imagined and it is doubtful that any general definition or interpretation, unrelated to specific fact situations could satisfactorily deal with all such situations.

'Some general observations can be made with respect to the question of whether or not a specific activity constitutes prohibited manufacture under the proposed treaty. For example, facts indicating that the purpose of a particular activity was the acquisition of a nuclear explosive device would tend to show non-compliance. (Thus, the construction of an experimental or prototype nuclear explosive device would be covered by the term 'manufacture' as would be the production of components which could only have relevance to a nuclear explosive device.) Again, while the placing of a particular activity under safeguards would not, in and of itself, settle the question of whether that activity was in compliance with the treaty, it would of course be helpful in allaying any suspicion of non-compliance.

'It may be useful to point out, for illustrative purposes, several activities which the United States would not consider per se to be violations of the prohibitions in Article II. Neither uranium enrichment nor the stockpiling of fissile material in connection with a peaceful program would violate Article II so long as these activities were safeguarded under Article III. Also clearly permitted would be the development, under safeguards, of plutonium fueled power reactors, including research on the properties of metallic plutonium, nor would Article II interfere with the development or use of fast breeder reactors under safeguards.'
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