

Guantanamo Provisions in the House and Senate NDAs for Fiscal Year 2017

The House and the Senate passed their versions of the National Defense Authorization Act for the fiscal year 2017 (FY17 NDAA).¹ Both bills retain and add to unwise and unnecessary provisions that would make it impossible for President Obama to close the detention facility at Guantanamo Bay. Despite this, the Senate bill includes some sensible provisions that would allow detainees to plead guilty to Article III federal court offenses by video teleconference, allow temporary transfers of detainees to the United States for medical emergencies, and permit the Department of Defense to begin planning and designing facilities in the United States to hold Guantanamo detainees. At a cost of over \$10 million per detainee annually² Guantanamo is irresponsible, both fiscally and for our national security.³ Earlier this year, three dozen of the nation's most respected retired generals and admirals wrote to the Chairs and Ranking Members of the House and Senate Armed Services Committees urging Congress to come together and find a path to finally shutter the detention facility stating, "This should not be a political issue."⁴ This document outlines the impact of the Guantanamo provisions in the House and Senate FY17 NDAA bills.

SUMMARY

House Bill:

- Retains onerous overseas transfer certification requirements and imposes an additional obligation, which requires the U.S. government and the country receiving a Guantanamo detainee to enter into a memorandum of understanding and provide this to relevant congressional committees.
- Bans transfers to the United States until December 31, 2017 for any reason—including for trial in federal court.
- Bans transfers to Libya, Somalia, Syria, and Yemen until December 31, 2017.
- Requires information on the disposition of detainees that the Department of Defense has already provided.

Senate Bill:

- Retains onerous overseas transfer certification requirements and imposes two additional obligations: 1) requires the U.S. government and receiving countries to enter into a memorandum of understanding and provide this to relevant congressional committees; and 2) requires a report of each detainee's "terrorist actions and affiliations" prior to transfer.
- Bans transfers to the United States until December 31, 2017. Includes an exception for temporary transfers in cases of medical emergency. Detainees must be returned to Guantanamo Bay "as soon as feasible."
- Permits the Department of Defense to design and plan facilities in the United States to hold Guantanamo detainees.
- Bans transfers to Libya, Somalia, Syria, and Yemen as well as countries where the U.S. State Department has issued a travel warning, until December 31, 2017. Transfers would be prohibited to 26 additional countries, including Algeria, Turkey, and the Philippines—without any regard for military or intelligence expert opinions.
- Allows detainees to plead guilty to Article III federal court offenses via video teleconference and serve their sentences in foreign countries.

¹ House FY17 NDAA, available at <https://www.congress.gov/bill/114th-congress/house-bill/4909/text?q=%7B%22search%22%3A%5B%22national+defense+authorization+act%22%5D%7D&resultIndex=1>; Senate FY17 NDAA, available at <https://www.congress.gov/bill/114th-congress/senate-bill/2943/text>.

² <http://www.humanrightsfirst.org/sites/default/files/Fact-Sheet-Cost-of-Guantanamo.pdf>.

³ <http://www.humanrightsfirst.org/sites/default/files/Quotes-National-Security-Leaders-Support-Closing-Guantanamo.pdf>.

⁴ <http://www.humanrightsfirst.org/sites/default/files/GeneralsAdmiralslettertoHASCSASC.pdf>.

DETAIL

- Retain and increase onerous overseas transfer restrictions.** Both the House and Senate bills retain the onerous overseas transfer certification requirements that were inserted into the FY16 NDAA last year.⁵ These require the Secretary of Defense to certify that (among other things) the transfer is in the national security interests of the United States, and that the foreign country maintains control over any detention facility where the detainee would be held, will take steps to substantially mitigate any risk that the detainee would reengage in terrorism, and will share with the United States any information related to the detainee.⁶ Both bills also impose an additional obligation, requiring the U.S. government to enter into a memorandum of understanding with the foreign country accepting a detainee and provide this to the relevant congressional committees.⁷ The Senate bill also requires the Secretary of Defense to submit a report on the detainee's "previous terrorist actions and affiliations" before their transfer overseas.⁸ Given the already cumbersome and excessive certification requirements in current law, these additional obligations are unnecessary. Prior to transferring any detainee, the Secretary of Defense already conducts a thorough screening of the foreign country's security apparatus and undertakes every effort to ensure that transferring the detainee will not pose a threat to the United States. Imposing additional requirements may further obstruct the transfer process, including for the nine detainees unanimously cleared by all relevant agencies, and make it more difficult to close the prison.
- Prohibition on transfers to the United States.** Both the House and Senate bills ban transferring any Guantanamo detainee to the United States until December 31, 2017.⁹ Contrary to what some argue, U.S. prisons can safely hold Guantanamo detainees without posing a risk to surrounding areas. As the Executive Director of the American Correctional Association James A. Gondles Jr. recently stated, "To imply otherwise is insulting to the men and women ... charged with keeping communities safe and guarding the nation's most dangerous individuals."¹⁰ Gondles continued, "Hundreds of convicted terrorists have gone to prison in the United States since 9/11. None has escaped. None has created security threats for the communities near the prisons."¹¹ The bills also prevent the U.S. government from trying detainees in federal court, despite these courts' far stronger record on prosecuting terrorism charges compared with the Guantanamo military commissions.¹² While three out of the eight detainees convicted in the Guantanamo military commissions have had their convictions completely overturned and one has been partially overturned, federal courts have successfully prosecuted more than 500 people on terrorism charges since the September 11 attacks—over 67 of whom were arrested overseas—including Osama bin Laden's son-in-law, Suleiman Abu Ghaith.¹³
- Exception for emergency medical transfers.** The Senate bill includes an exception to the U.S. transfer ban, allowing temporary transfers for "emergency or critical medical treatment."¹⁴ Detainees must be returned to Guantanamo Bay "as soon as feasible" and the House and Senate Armed Services Committees must be notified of

⁵ See Sec. 1034, FY16 NDAA, available at <https://www.gpo.gov/fdsys/pkg/PLAW-114publ92/pdf/PLAW-114publ92.pdf>.

⁶ The full certification requirements, as set out in Sec. 1034, FY16 NDAA provide that unless a court orders a detainee to be released, before transferring a detainee, the Secretary of Defense must certify in writing, that: 1) The transfer is in the national security interests of the United States; 2) The foreign country is not a designated state sponsor of terrorism or designated foreign terrorist organization, maintains control over any detention facility where the detainee would be held, has taken or agreed to take steps to substantially mitigate any risk that the transferred detainee would reengage in terrorism or otherwise threaten the United States or its allies or interests, and will share with the United States any information that is related to the transferred individual; 3) The Secretary has considered previous reengagement in terrorist activity by Guantanamo detainees who were previously transferred to the country receiving the detainee and that the receiving country has taken or agreed to take steps that will substantially mitigate the risk of recidivism with regard to the individual to be transferred; and 4) The certification must include an intelligence assessment of the capacity, willingness, and past practices (if applicable) of the receiving country with respect to the above certifications.

⁷ Sec. 1098B, House FY17 NDAA and Sec. 1027, Senate FY17 NDAA. The relevant committees are the House and Senate Armed Services, Appropriations, and Intelligence Committees, the House Foreign Affairs Committee, and the Senate Foreign Relations Committee.

⁸ Sec. 1028, Senate FY17 NDAA. This report must be submitted to the House and Senate Armed Services, Appropriations, and Intelligence Committees.

⁹ Secs. 1032 and 1033, House FY17 NDAA and Secs. 1021 and 1022, Senate FY17 NDAA ban transfers from Guantanamo to the United States and prohibit constructing or modifying facilities in the United States for Guantanamo detainees. Section 1022A of the Senate bill also prohibits the Department of Defense from submitting reprogramming requests for funds for both these purposes, while the bans are in place.

¹⁰ <http://www.humanrightsfirst.org/sites/default/files/Gondles-statement-for-the-record-April-2016.pdf>.

¹¹ *Id.*

¹² <http://www.humanrightsfirst.org/sites/default/files/Federal-Court-Myth-vs-Fact.pdf>.

¹³ <http://www.humanrightsfirst.org/press-release/abu-ghaith-guilty-verdict-demonstrates-effectiveness-federal-courts>.

¹⁴ Sec. 1024, Senate FY17 NDAA.

the temporary transfer within five days. The bill also specifies that detainees would not receive any additional rights. Given the remote location of Guantanamo Bay and the increasing medical needs of an aging detainee population, this exception is welcome and should be retained in the final FY17 NDAA.

- Allows for designing and planning U.S. detention facilities.** The Senate bill permits the Department of Defense to design and plan facilities in the United States to hold Guantanamo detainees.¹⁵ Guantanamo is not only a national security risk,¹⁶ it is the most expensive prison on earth, costing taxpayers over \$10 million per prisoner annually.¹⁷ By comparison, federal supermax prisons in the United States cost \$78,000 per detainee, annually. To close Guantanamo, there must be a responsible framework to transfer some detainees to the United States for prosecution in federal court or continued law of war detention. This sensible provision will help move towards closing the prison and should be retained in the FY17 NDAA.
- Prohibition on transfers to specific countries.** Both the House and Senate FY17 NDAs extend the existing ban on transfers to Libya, Somalia, Syria and Yemen until December 31, 2017.¹⁸ The Senate NDAA also includes a ban on transfers to countries currently listed on the State Department's travel warning list.¹⁹ While there are exceptions for countries with certain types of travel warnings,²⁰ an additional 26 countries would still be barred from accepting Guantanamo detainees,²¹ including Algeria, Turkey, and the Philippines—without any regard for military or intelligence expert opinions. Country-specific bans are unnecessary and inconsistent with American values. Military and intelligence experts are in the best position to determine on a case-by-case basis whether a particular transfer poses a risk to national security, not the detainee's country of origin or lists produced for unrelated purposes that do not reflect the security needs of the United States.
- Article III guilty pleas by video teleconference.** The Senate bill would also permit detainees to plead guilty to federal court charges via video teleconference and to serve their sentences in foreign countries.²² This is a sensible provision, which several legal experts have praised as a positive development.²³ Military commissions can only try war crimes and the Senate FY17 NDAA would permit detainees who are guilty of federal crimes to be transferred out of Guantanamo to serve a prison sentence instead of remaining in detention indefinitely.
- Requires information on the disposition of detainees that has already been provided to Congress.** The House bill requires the Secretary of Defense to submit a report to Congress no later than July 19, 2017 detailing (among other matters) plans for the disposition of Guantanamo detainees and for the disposition of future battlefield captures.²⁴ This information was already required by last year's NDAA,²⁵ and was provided by the Department of Defense in its plan to close Guantanamo, released in February 2016.²⁶ It is unclear what additional information (if any) is required by these new provisions.

¹⁵ Sec. 1023, Senate FY17 NDAA.

¹⁶ <http://www.humanrightsfirst.org/sites/default/files/Quotes-National-Security-Leaders-Support-Closing-Guantanamo.pdf>.

¹⁷ <http://www.humanrightsfirst.org/sites/default/files/Fact-Sheet-Cost-of-Guantanamo.pdf>.

¹⁸ Sec. 1034, House FY17 NDAA and Sec. 1026, Senate FY17 NDAA.

¹⁹ Sec. 1029, Senate FY17 NDAA.

²⁰ Under Sec. 1029(c)(2), Senate FY17 NDAA countries are excepted from the ban if travel warnings are issued solely on the basis of medical deficiencies, infectious disease outbreaks, or other health-related concerns; natural disaster; and/or criminal activity.

²¹ The additional countries that would be barred from accepting Guantanamo detainees are Afghanistan, Algeria, Burkina-Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Eritrea, Iran, Iraq, Israel, Kenya, Lebanon, Mali, Mauritania, Niger, Nigeria, North Korea, Pakistan, Philippines, South Sudan, Sudan, Tunisia, Turkey, and Ukraine. See <https://travel.state.gov/content/passports/en/alertswarnings.html>.

²² Sec. 1025, Senate FY17 NDAA.

²³ <https://www.justsecurity.org/31104/detainees-plead-guantanamo/>; <https://www.justsecurity.org/31215/guilty-pleas-gtmo-detainees-without-setting-foot-us-soil/>.

²⁴ Sec. 1037, House FY17 NDAA.

²⁵ Sec. 1035, FY16 NDAA.

²⁶ <http://www.humanrightsfirst.org/sites/default/files/Close-GTMO-Plan-Fact-Sheet.pdf>.