

FY2016 NDAA Conference Report Guantanamo Provisions

SUMMARY

The conference report for H.R. 1735, the National Defense Authorization Act for Fiscal Year 2016 (FY2016 NDAA), fails to provide a responsible legislative framework for closing the detention facility at Guantanamo Bay: it contains no mechanisms for transferring detainees to the United States for criminal prosecution—by either federal courts or military commissions—nor any plan for holding detainees in the United States until either they are cleared or until the end of hostilities. Moreover, it makes reducing the population of cleared detainees unnecessarily difficult by re-imposing onerous requirements on transfers to foreign countries.

President Obama has said he will veto the NDAA if such unreasonable transfer restrictions are not removed.¹ At a cost of over \$3 million per detainee every year,² Guantanamo is fiscally irresponsible. Moreover, national security experts from across the political aisle agree that Guantanamo damages our national security.³ It provides terrorist groups with a dangerous recruiting tool,⁴ hinders counterterrorism cooperation with our allies, and damages U.S. credibility and leadership abroad.⁵ As more than three dozen of the nation's most respected retired generals and admirals said earlier this year, "[i]t is hard to overstate how damaging the continued existence of the detention facility at Guantanamo has been and continues to be."⁶

SECTION 1031: BANS TRANSFERS TO THE UNITED STATES, INCLUDING FOR PROSECUTION OR CONTINUED DETENTION & SECTION 1032: BANS BUILDING OR MODIFYING FACILITIES IN THE UNITED STATES

- Closing Guantanamo requires a responsible framework for transferring some detainees to the United States for continued detention or prosecution. Section 1031 bans such transfers and Section 1032 prohibits the use of funding to construct or modify facilities to house Guantanamo detainees. Very few detainees can be prosecuted by military commission. The remaining detainees must be brought to the United States to be prosecuted. Moreover, to close Guantanamo, the ongoing military commission trials must be transferred to the United States.
- Transferring Guantanamo detainees to the United States is also necessary for the remaining 51 individuals the government believes cannot be prosecuted but who are not yet cleared for release. Section 1031 fails to provide a framework for continued law of war detention in the United States for these remaining individuals until they are either cleared for release or hostilities end.
- Sections 1031 and 1032 are unnecessary for keeping Americans safe. Federal prisons already hold more than 300 individuals convicted of terrorism-related offenses. According to the Executive Director of the American Correctional Association, the claim that U.S. prisons cannot handle terrorists is "nonsense" and "overheated rhetoric."⁷ To the contrary, "[e]very day, U.S. prisons hold watch over the nation's most dangerous, most ruthless and most cunning individuals."⁸
- Maximum security facilities in the United States cost an average of \$78,000 per detainee, annually.⁹ By contrast, the prison at Guantanamo costs taxpayers over \$3 million per detainee, per year. Maintaining the prison at Guantanamo is fiscally irresponsible.

¹ Gregory Korte, *White House threatens veto of defense bill over Guantanamo*, USA Today, May 13, 2015, <http://www.usatoday.com/story/theoval/2015/05/12/obama-defense-bill-veto-threat/27215093/>; Martin Mathishak, *White House threatens to veto House defense measure*, The Hill, May 12, 2015, <http://thehill.com/policy/defense/241865-white-house-threatens-to-veto-house-defense-measure>.

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

³ *National Security Leaders Support Closing Guantanamo* (Quote Sheet), <http://www.humanrightsfirst.org/sites/default/files/Quotes-National-Security-Leaders-Support-Closing-Guantanamo.pdf>.

⁴ *Guantanamo Bay: A Terrorists' Propaganda Tool*, <http://www.humanrightsfirst.org/guantanamo-bay-terrorists-propaganda-tool>.

⁵ Richard Norton-Taylor and Nicholas Watt, *Former UK ministers urge Obama to free Shaker Aamer from Guantanamo Bay*, July 3, 2015, <http://www.theguardian.com/world/2015/jul/03/former-uk-ministers-urge-obama-to-free-shaker-aamer-from-guantanamo-bay>.

⁶ Letter from Retired Military Leaders Group to Senators John McCain and Jack Reed, January 29, 2015, <http://www.humanrightsfirst.org/uploads/pdfs/RML-letter-McCain-Reed-GTMO-SecDef-Hearing.pdf>; for more on the Retired Military Leaders Group, see <http://www.humanrightsfirst.org/topics/retired-military-leaders>.

⁷ James A. Gondles, Jr., *We can handle them*, Miami Herald, December 17, 2009, <http://www.humanrightsfirst.org/sites/default/files/ACA-Gondles-Miami-Herald-Op-Ed.pdf>.

⁸ *Id.*

⁹ Carol Rosenberg, *Total U.S. tab tops \$5B for Guantanamo prison*, Miami Herald, July 30, 2013, <http://www.miamiherald.com/news/nation-world/article1953705.html>.

SECTION 1033: IMPOSES UNNECESSARY COUNTRY-SPECIFIC TRANSFER BANS

- ☑ Section 1033 includes a ban on any transfers to Libya, Somalia, Syria, and Yemen. Country-specific bans are unnecessary and inconsistent with American values. Our 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 based on an evaluation of the individual detainee, not the detainee's country of origin.
- ☑ Country-specific bans will also impede closing Guantanamo: 43 cleared detainees, making up more than 80 percent of those cleared for transfer by our national security experts, are from Yemen.

SECTION 1034: REINSTATES UNNECESSARY OVERSEAS TRANSFER RESTRICTIONS

- ☑ Section 1034¹⁰ would reinstate, with slight modifications, the onerous and unnecessary certification requirements for transferring cleared detainees to foreign countries that a bipartisan majority in Congress voted to replace with more sensible and flexible provisions in the FY2014 and FY2015 NDAs.
- ☑ Under the more flexible requirements, the administration has made significant progress in safely¹¹ transferring detainees. Moreover, the current transfer process is comprehensive and thorough—six national security and intelligence departments and agencies must unanimously agree that a detainee should be cleared. The Secretary of Defense must also determine that the transfer is in the national security interest of the United States, and that any risks can be substantially mitigated.

SECTION 1035: REQUIRES A COMPREHENSIVE PLAN FOR CLOSING GUANTANAMO—WITHOUT PROVIDING ANY PATHWAY TO ACTUALLY CLOSE GUANTANAMO

- ☑ Section 1035 requires the Secretary of Defense to submit a comprehensive detention strategy for Guantanamo detainees, including a description of the facilities in the United States to be used or modified for detention operations, the costs of such detention facilities, and a plan for the disposition of the remaining Guantanamo detainees. However, even after the detention plan is submitted, there is no provision for amending the ban on transfers to the United States or the ban on constructing or modifying facilities for holding detainees. There is no path to closing Guantanamo without lifting these bans. A much more sensible approach was passed by a bipartisan majority in the Senate Armed Services Committee last year.¹² Under that proposal, the bans would be lifted after a comprehensive plan was submitted to Congress—unless Congress voted to disapprove the plan. This approach provides a responsible path forward for closing Guantanamo, while simultaneously ensuring robust congressional oversight regarding the disposition of remaining detainees.

¹⁰ Specifically, Section 1034 would require the Secretary of Defense to certify in writing, unless effectuating a court order for release, 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.

¹¹ The percentage of Guantanamo "recidivists" has dropped considerably—only 4.9 percent of detainees transferred under the Obama Administration are confirmed of reengaging, down from 20.9 percent of those transferred under the Bush Administration. *Facts About the Transfer of Guantanamo Detainees*, <http://www.humanrightsfirst.org/resource/facts-about-transfer-guantanamo-detainees>; *ODNI's Latest Guantánamo Reengagement Numbers Are Encouraging*, September 16, 2015, <https://www.justsecurity.org/26060/latest-guantanamo-reengagement-numbers-encouraging/>.

¹² Marty Lederman, *The competing 2015 NDAA bills—A sign of hope for closing GTMO*, Just Security, June 5, 2014, <http://justsecurity.org/10818/competing-ndaa-gtmo-provisions/>.