

## Guantanamo Provisions in the FY2016 NDAA

### SUMMARY

The National Defense Authorization Act for Fiscal Year 2016 (NDAA) currently prohibits the president from closing the detention facility at Guantanamo Bay. The NDAA bans transfers of Guantanamo Bay detainees to the United States for any reason, including for prosecution in federal courts or continued law of war detention, until December 31, 2016. It also includes onerous restrictions on transfers overseas and (for the first time in an NDAA) bans transfers of Guantanamo detainees to particular foreign countries.

At a cost of more than \$5 million per detainee every year,<sup>1</sup> Guantanamo is fiscally irresponsible. Moreover, national security experts from across the political spectrum agree that Guantanamo damages U.S. national security.<sup>2</sup> It provides terrorist groups with a dangerous recruiting tool,<sup>3</sup> hinders counterterrorism cooperation with our allies, and damages U.S. credibility and leadership abroad.<sup>4</sup> As more than three dozen of the nation's most respected retired generals and admirals said last year, "[i]t is hard to overstate how damaging the continued existence of the detention facility at Guantanamo has been and continues to be."<sup>5</sup>

### SECTIONS 1031 AND 1032: BANS TRANSFERS TO THE UNITED STATES, INCLUDING FOR PROSECUTION, AND BANS BUILDING OR MODIFYING DETENTION FACILITIES IN THE UNITED STATES

- ☑ 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. The NDAA does not contain any such framework and instead, bans all transfers to the United States—even for prosecution—and prohibits using funds to construct or modify U.S. facilities to house Guantanamo detainees. Military commission can only try war crimes, and those detainees who could be tried for other offenses must be brought to the United States to be tried in federal court.<sup>6</sup> Moreover, to close Guantanamo, the ongoing military commission trials must be transferred to the United States, along with the 44 individuals the government believes cannot be prosecuted but who are not yet cleared for release.
- ☑ 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.”<sup>7</sup> To the contrary, “[e]very day, U.S. prisons hold watch over the nation's most dangerous, most ruthless and most cunning individuals.”<sup>8</sup>
- ☑ Maximum security prisons in the United States cost \$78,000 per detainee, annually.<sup>9</sup> By contrast, the prison at Guantanamo costs taxpayers more than \$5 million per detainee, per year. Maintaining the prison at Guantanamo is fiscally irresponsible.

### SECTION 1033: COUNTRY-SPECIFIC TRANSFER BANS

- ☑ Section 1033 bans all 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.

<sup>1</sup> *The Cost of Guantanamo*, <http://www.humanrightsfirst.org/sites/default/files/Fact-Sheet-Cost-of-Guantanamo.pdf>.

<sup>2</sup> *National Security Leaders Support Closing Guantanamo* (Quote Sheet), <http://www.humanrightsfirst.org/sites/default/files/Quotes-National-Security-Leaders-Support-Closing-Guantanamo.pdf>.

<sup>3</sup> *Guantanamo Bay: A Terrorists' Propaganda Tool*, <http://www.humanrightsfirst.org/guantanamo-bay-terrorists-propaganda-tool>.

<sup>4</sup> 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>.

<sup>5</sup> 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>.

<sup>6</sup> *Myth v. Fact: Trying Terror Suspects in Federal Courts*, <http://www.humanrightsfirst.org/sites/default/files/Federal-Court-Myth-vs-Fact.pdf>.

<sup>7</sup> 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>.

<sup>8</sup> *Id.*

<sup>9</sup> 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 1034: OVERSEAS TRANSFER RESTRICTIONS**

- ☑ Section 1034<sup>10</sup> includes onerous certification requirements for transferring cleared detainees to foreign countries. It requires 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 transferred detainee would reengage in terrorism, and will share with the United States any information that is related to the transferred individual.
- ☑ Even before these new restrictions were imposed, the transfer process was comprehensive and thorough—the vast majority of transfers were pursuant to the unanimous agreement of six national security, law enforcement, and intelligence departments and agencies: the Department of Defense, the Joint Chiefs of Staff, Office of the Director of National Intelligence, Department of Homeland Security, Department of State, and Department of Justice. Pursuant to prior versions of the NDAA, the Secretary of Defense also had to determine that the transfer was in the national security interest of the United States, and that any risks associated with the transfer could be substantially mitigated.

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

- ☑ Section 1035 requires the Secretary of Defense to submit a comprehensive detention strategy for Guantanamo detainees within 90 days of enactment of the NDAA (around February 25, 2016). This strategy must include the costs and a description of the facilities in the United States to be used or modified for detention operations, and a plan for the disposition of the remaining Guantanamo detainees. However, even after this plan is submitted, the NDAA does not provide a path to 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.

<sup>10</sup> Specifically, Section 1034 provides 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.