

Q&A: Transferring Cleared Guantanamo Detainees to Foreign Countries under the SASC FY 2014 NDAA (S.1197)

- Why is more clarity and flexibility needed in the process for transferring cleared detainees to foreign countries?** More than half of the remaining 164 Guantanamo detainees have long been cleared for transfer by U.S. national security and intelligence agencies, but current law needlessly complicates efforts to transfer them. The streamlined foreign transfer procedures in sections 1031(a) and (b) of the Senate bill provide the Secretary of Defense with important flexibility to effectuate transfers of cleared detainees both safely and efficiently.
- Under what circumstances can detainees cleared for transfer be repatriated or resettled?** Section 1031 of S.1197 provides for the transfer of detainees in three circumstances: 1) if cleared by a Periodic Review Board conducted by our national security agencies;¹ 2) by court order; or 3) if the detainee has been criminally charged and has either completed his sentence or is acquitted. In addition, the Secretary of Defense may determine that the transfer is in the national security interests of the United States and that action has been or will be taken to substantially mitigate any risk associated with the transfer. Moreover, where appropriate, safeguards can be put in place to track and monitor released individuals so that if a threat arises, our national security experts can address it through law enforcement or military means.
- What about the risk that detainees will “rejoin the fight” or “return to the battlefield”?** Many cleared detainees who are waiting to return home were never part of any fight, but were picked up by mistake during the chaos after 9/11. It is not in our national security or fiscal interest to continue holding these detainees and others who have been unanimously cleared for transfer by our intelligence and security agencies. Moreover, the claim that 28% of Guantanamo detainees “rejoined the fight” after being released is misleading, as several studies have explained.² The Department of Defense has stated that many detainees included in this category are merely suspected of having some associations with possible terrorist groups and very well may not have engaged in any activities that are a threat to the national security of the United States.³ Furthermore, considering transfers that occurred after 2009, when transfer guidelines were reformed, the ODNI reports that only 3 former Guantanamo detainees, or 4.2% of those transferred, are confirmed to have engaged in terrorism-related activity.⁴ Irrespective of the statistics, the issue is not about zero risk but about mitigating the risk associated with transfer using the diplomatic, intelligence, law enforcement, and military tools available to the United States government.

¹ Executive Order 13567, as codified in Section 1023 of the FY 2012 NDAA

² See Center for Policy and Research at Seton Hall University School of Law, National Security Deserves Better: Odd Recidivism Numbers Undermine the Guantanamo Policy Debate, March 23, 2012, *available at*: <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/loader.cfm?csModule=security/getfile&pageid=285565> and New America Foundation, Appendix: How many Guantanamo detainees “return to the battlefield?”, May 7, 2013, *available at*: http://newamerica.net/sites/newamerica.net/files/profiles/attachments/GTMO_Appendix_5-7-2013.pdf.

³ Todd Bresseale, Public Affairs Officer for Office of the Assistant Secretary of Defense (Detainee Policy), email to Jason Leopold, March 05, 2012, as quoted in Center for Policy and Research at Seton Hall University School of Law report, pg. ii, *available at*: <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/loader.cfm?csModule=security/getfile&pageid=285565>.

⁴ Office of the Director of National Intelligence, Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba, data as of July 15, 2013, *available at*: http://www.lawfareblog.com/wp-content/uploads/2013/09/September_2013_GTMO_Reengagement_UNCLASS_Release_FINAL.pdf

- Shouldn't we be concerned about releasing detainees who may not have been terrorists when they first arrived at Guantanamo but after years of detention are surely terrorists now?** Before any detainee can be released, a security assessment must be conducted for each individual to determine whether that individual *currently* poses a threat to the United States based on new evidence or changed circumstances, not simply whether that individual was a threat in the past. There is no basis for making blanket assumptions in place of these individualized threat assessments. In addition, prior to each detainee's release, a plan must be in place for reintegration of that detainee back into society. This plan may include monitoring, check-ins, and other security measures where appropriate.
- What can be done with detainees who are cleared for release but have nowhere to go?** Many of the countries whose nationals are on the list of cleared detainees have repeatedly asked for their nationals back, including Afghanistan⁶, Libya⁷, Saudi Arabia⁸ and Tunisia⁹. But for those whose countries refuse to accept them, the U.S. must make every effort to locate a third country where the detainee may be resettled. Similarly, if any detainees who are cleared for release cannot be repatriated to their home country due to a reasonable fear of torture or persecution, the State Department must redouble efforts to reach agreements with third countries that can accept these detainees. In some cases, such as with the Uighur detainees who have never posed a threat to the United States, the administration and this Congress should consider authorizing resettlement within the United States. Resettling even one Guantanamo detainee within the United States could go a long way to persuading other countries to resettle Guantanamo detainees on their soil.
- How can we transfer detainees out of Guantanamo to detention centers in other countries given the inability of some countries to maintain security at their prisons?** Many detainees have been cleared for release, not for detention in another country. These detainees therefore pose no "jailbreak risk." Those detainees who are considered too dangerous to release should be charged and tried abroad or in our federal courts using the authority in section 1033 of the SASC bill. If convicted, they should be imprisoned for the term of their sentence in a secure facility located abroad or within the United States. The level of security required must be based on the threat assessment for that particular individual. Each country of transfer presents a unique security situation, which must be assessed to determine whether the particular detainee can be imprisoned in that country securely. For convicted detainees held within the United States, our prison system has the capacity to hold detainees securely and indeed already holds over 300 convicted terrorists. No terrorist has ever escaped from our secure facilities. Executive branch officials responsible for our national security are best positioned to locate appropriate detention facilities for holding individuals who pose a security threat. Congress should not micromanage this process by imposing unreasonable transfer restrictions or otherwise substituting its judgment for that of experienced national security professionals in the executive branch.
- Don't we need a ban on transfers to Yemen given the threat posed by AQAP?** A categorical ban on all transfers to Yemen is unnecessary and counterproductive. Though the instability in Yemen presents concerns, transfer decisions should be made on a case-by-case basis and should be based on evidence of the risk posed by the individual detainee. Moreover, under the new leadership of President Hadi, Yemen is prepared to work with the United States to deal with the threat of terrorism, including by taking strong measures against AQAP and other threats that could compromise detainee transfer efforts.

⁶ Jeremy Herb, *Karzai: Obama should close Gitmo*, THE HILL, May 2, 2013, available at: <http://thehill.com/blogs/defcon-hill/policy-and-strategy/297451-karzai-says-obama-should-closeguantanamo>.

⁷ *Tripoli seeks repatriation of Libyans held in Guantanamo*, AFP, January 22, 2009, available at: http://www.google.com/hostednews/afp/article/ALeqM5hB1BELbdDW6AwSgT0i6bW_pi88dw.

⁸ Christopher Boucek, *The Saudi Process of Repatriating and Reintegrating Guantanamo Returnees*, CTC SENTINEL, December 15, 2007, available at: <http://www.ctc.usma.edu/posts/the-saudi-process-of-repatriating-and-reintegrating-guantanamo-returnees>.

Note: One Saudi Arabian detainee, Shaker Aamer, has dual citizenship with the United Kingdom, which has also demanded his return.

⁹ Bouazza ben Bouazza, *Tunisia Mission Asks For Repatriation Of Guantanamo Bay Detainees*, ASSOCIATED PRESS, September 14, 2011, available at: http://www.huffingtonpost.com/2011/09/14/tunisia-mission-guantanamo_n_962920.html.

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- Haven't previous rehabilitation programs to house detainees transferred abroad failed, resulting in released detainees joining AQAP in Yemen and/or engaging in future terrorist activity? What confidence is there that any future rehabilitation program would work?** Rehabilitation programs should be examined on a case-by-case basis. Any issues associated with particular rehabilitation program should be addressed head on to ensure that any program that is established is safe, lawful, and effective. The vast majority of Yemenis at Guantanamo have been unanimously cleared for transfer by the intelligence and defense agencies. With a well thought out rehabilitation program and other security assurances, it is possible to transfer these detainees while managing the risks. Moreover, President Hadi has been and remains determined to combat AQAP to prevent it from compromising any detention or rehabilitation facilities in Yemen.