

Guantanamo Provisions in the FY2017 HASC NDAA

On April 28, 2016, the House Armed Services Committee (HASC) voted 60-2 to report The National Defense Authorization Act for Fiscal Year 2017 (NDAA) to the full House. The bill prohibits the president from closing the detention facility at Guantanamo Bay. It bans transfers of Guantanamo detainees to the United States for any reason (including trial in federal court), until December 31, 2017. It also bans transfers to Libya, Somalia, Yemen and Syria, and retains onerous restrictions on transfers elsewhere. The bill also includes redundant language requiring information on the disposition of Guantanamo detainees that the Department of Defense already released in February this year.¹ At a cost of more than \$5.5 million per detainee every year,² keeping Guantanamo open is irresponsible – both financially and in terms of national security. As three dozen of the nation’s most respected generals and admirals wrote earlier this year, closing Guantanamo “is in our national security interests.”³ The retired officers urged Congress to “come together and find a path to finally shutter the detention facility,” stating, “This should not be a political issue.”

- Bans all transfers to the United States.** The HASC FY17 NDAA bans transferring any Guantanamo detainee to the United States, even for prosecution or continued detention. As the Department of Defense set out in its plan to close Guantanamo,⁴ in order to shutter the detention facility the ongoing military commission trials must be transferred to the United States, along with the 40 individuals the government believes cannot be prosecuted but who are not yet cleared for transfer. The bill also prevents the U.S. government from prosecuting detainees in federal court, despite these courts’ far stronger record on prosecuting terrorism charges compared with the Guantanamo military commissions.⁵ In spite of what some say, U.S. prisons can safely hold Guantanamo detainees without posing a risk to the 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.” Gondles went on to confirm, “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.”⁶ Additionally, maximum security prisons in the United States cost \$78,000 per detainee, annually. By contrast, the prison at Guantanamo costs taxpayers more than \$5.5 million per detainee, per year.⁷
- Bans on transfers to specific countries.** The HASC FY17 NDAA bans all transfers to Libya, Somalia, Syria, and Yemen. Country-specific bans are unnecessary and inconsistent with American values. Military and

¹ *What’s In the Close Guantanamo Plan?* <http://www.humanrightsfirst.org/sites/default/files/Close-GTMO-Plan-Fact-Sheet.pdf>

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

³ Letter from Retired Military Leaders Group to Chairs and Ranking Members of House and Senate Armed Services Committees, <http://www.humanrightsfirst.org/sites/default/files/GeneralsAdmiralslettertoHASCASASC.pdf>.

⁴ Above, note 1.

⁵ *Myth v. Fact: Trying Terror Suspects in Federal Courts*, <http://www.humanrightsfirst.org/sites/default/files/Federal-Court-Myth-vs-Fact.pdf>.

⁶ “US Prisons Can Safely Hold Guantanamo Bay Detainees.” Statement for the Record of James A. Gondles Jr., Executive Director, American Correctional Association, Before the House Homeland Security Subcommittee on Oversight & Management Efficiency, April 28, 2016. <http://www.humanrightsfirst.org/sites/default/files/Gondles-statement-for-the-record-April-2016.pdf>.

⁷ *Guantanamo by the Numbers*, <http://www.humanrightsfirst.org/resource/guantanamo-numbers>.

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.

- ☑ **Retains onerous overseas transfer restrictions.** The bill retains the onerous overseas transfer restrictions that were inserted into the FY16 NDAA last year. 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 transferred detainee would reengage in terrorism, and will share with the United States any information that is related to the transferred individual.⁸ Even before these restrictions were imposed, the transfer process was comprehensive and thorough. It required the unanimous agreement of six national security, law enforcement, and intelligence departments and agencies⁹ and sign off from the Secretary of Defense that the transfer was in the national security interest of the United States, and that any associated risks could be substantially mitigated.
- ☑ **Requires information on the disposition of detainees that has already been provided to Congress.** The HASC FY17 NDAA requires the Secretary of Defense to submit a report to Congress no later than July 19, 2017 detailing (among other matters) the disposition of Guantanamo detainees, as well as the disposition of future captures. This information was already required by last year's NDAA, and was provided by the Department of Defense in its recently released plan to close Guantanamo.¹⁰ It is unclear what additional information (if any) is required by these new provisions.

⁸ Specifically, Section 1034 of the FY16 NDAA 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.

⁹ 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.

¹⁰ *Plan for Closing the Guantanamo Bay Detention Facility* http://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf.