

February 11, 2015

Re: Oppose S. 165 Barring Transfers out of Guantanamo

Dear Senator,

The undersigned civil liberties, human rights, national security, and religious organizations write to urge you to oppose S. 165 introduced by Senator Ayotte barring transfers out of Guantanamo. The bill would impose an effective two-year ban on *all* transfers, *anywhere*—even when U.S. military and intelligence agencies agree that a detainee is cleared for transfer—barring a court order. It would also replace responsible bipartisan foreign transfer provisions in the National Defense Authorization Act (NDAA) with restrictive certification requirements that would needlessly bind the hands of US national security officials. Taken together, these measures would effectively sustain detention operations at Guantanamo Bay for the foreseeable future, furthering inhumanely the continued detention of men cleared for transfer, squandering scarce resources, and—according to national security officials—making us less safe.

Transfer Moratoria

By imposing a two-year moratorium on all transfers out of Guantanamo S. 165 would put an immediate halt to the recent responsible progress toward closing the facility. In the last three months defense, intelligence, and diplomatic officials have secured the transfer of 27 men from the island prison, shrinking the population by almost twenty percent. Each of these transfers was conducted based on a finding by an interagency process among national security agencies—conducted either in 2009 as part of the Guantanamo Detainee Review Task Force process or more recently as part of the detainee’s Periodic Review Board (PRB) hearing—that the detainee in question did not represent a security threat to the United States; an updated assessment immediately prior to transfer; a determination by the Secretary of Defense that any risk of the individual reengaging upon transfer has been “substantially mitigate[d]”; and an assessment by the Secretary of Defense that the host country in question has the capacity and willingness to meet security assurances by that country prior to transfer.

The bill’s moratorium on transfers *anywhere* would needlessly halt the fastidious efforts of government officials working to transfer those cleared men and to ultimately close the island prison. Moreover, the moratorium would represent yet another injustice for the 54 men currently at the facility who have been cleared for transfer since 2010, many among them having been cleared by the Bush administration even earlier. Congress should encourage—not block—their transfer.

The bill’s two-year block on all transfers to Yemen—while redundant given the universal ban on transfers the bill proposes—is inappropriate. Principal Deputy Under Secretary of Defense Brian McKeon stated during his recent testimony before the committee that, given recent events, the administration is not even currently seeking transfers to the country. Congress should not be in the business of micromanaging these decisions and is ill-equipped to do so. Each transfer decision involves unique considerations and

should be made on a case-by-case basis by those with the relevant knowledge and expertise.

Reinstatement of Restrictive Transfer Requirements

Additionally, the bill would reinstate a series of restrictive transfer certification requirements very similar to those included in the FY 2013 NDAA. These provisions reject the bipartisan majority position on transfer requirements represented in the current NDAA and that of FY 2014 and needlessly bind the hands of the national security community.

The current NDAA overseas transfer restrictions reflect the will of a bipartisan majority in Congress. In fact, the Senate rejected with a 43-55 vote in the fall of 2013 an amendment that would have replaced the Senate provisions with more restrictive language. The House-Senate conference committee on the NDAA accepted the restrictions, and President Obama signed the NDAA. Reflected in current law, the provisions help facilitate an end to indefinite detention at Guantanamo Bay by putting in place factor-based standards for transfer designed to simultaneously allow flexibility and mitigate risks.

Congress passed the NDAA with these more flexible provisions in place to address the harm caused by unwarranted hurdles to overseas transfers of detainees who were never charged with a crime. In fact, almost half of the current 122 Guantanamo detainees were cleared for transfer by national security and intelligence agencies in 2010. Of the total 779 men detained there over the course of the last twelve years, only 15 have been charged or convicted of a criminal offense. In 2013, the last time that certain of the restrictions proposed in the S. 165 were in place, only 11 detainees were transferred from the facility.

In total, the bill's provisions will only further the injustice of indefinite detention at Guantanamo Bay for the foreseeable future, promoting with it the concomitant costs of detention operations at the facility and what top U.S. officials have characterized as the security risks associated with the facility's continued existence.

Furthering the Practice of Indefinite Detention

Even before consideration of this legislation, media reports in recent years made clear the bleak future of detainees still held at the facility. Lt. General John F. Kelly, who as head of U.S. Southern Command ultimately oversees the prison, testified to Congress in March of 2013 that detainees at the prison – most never accused of a crime – had been “devastated” by the government's failure to execute plans to shutter the detention facility. The hunger strike fed by this devastation has resulted in the forced feeding of scores of detainees and continues to this day. Passage of the bill currently under consideration would surely bring morale at the facility to a more profound low, particularly among the 54 men cleared for transfer from the facility almost five years ago. The human costs of the bill's proposed course of action are simply too great.

Sustaining the Unsustainable Expense of Prison Operations at Guantanamo

The fiscal costs, too, are significant. According to publically available records, detention costs per detainee are currently \$3.7 million per year. That represents more than \$200 million per year just to house the 54 men who have been cleared for transfer from the facility since 2010. Compare that to just \$1.84 million it would cost to house the same number of detainees in a U.S. federal prison for the same period. To put the current cost of Guantanamo in perspective, consider that the cost of housing just the detainees already cleared for transfer would cover more than half of the entire military's 2013 body armor budget. The cost associated with detaining even fewer detainees—just 28—could have fully funded the Veteran's Employment Program in 2014, which assists veterans during their transition to civilian life. With so many competing priorities, there is little justification for the continued expense of indefinite detention at Guantanamo.

Undercutting U.S. National Security Interests

Moreover, top U.S. officials, including in the Bush administration, have emphasized that keeping Guantanamo open is counterproductive to U.S. national security. National security leaders on both sides of the aisle agree that detentions at Guantanamo serve as a powerful propaganda weapon against the United States. Former President George W. Bush; former Secretaries of State Hillary Clinton, Condoleezza Rice, and Colin Powell; former Secretaries of Defense Robert Gates and Leon Panetta; former National Security Advisor James Jones; General Charles C. Krulak (ret.), former Commandant of the Marine Corps; General Joseph P. Hoar (ret.), former CENTCOM commander; former CJCS Admiral Mike Mullen; and Major General Michael Lehnert (ret.), who set up the prison, all support closing the detention facility.

Closing Guantanamo is good human rights policy, good fiscal policy, and—according to military and intelligence experts—good national security policy. We urge you to oppose any transfer provisions more restrictive than the bipartisan Guantanamo overseas transfer provisions in existing law and to support ongoing efforts to responsibly close the facility consistent with our commitments to human rights and national security. We urge you to reject S. 165.

Sincerely,

American Civil Liberties Union
Amnesty International USA
Appeal for Justice
The Center for Constitutional Rights
The Center for Victims of Torture
The Constitution Project
Council on American-Islamic Relations
Defending Dissent Foundation
Friends Committee on National Legislation
Human Rights First
National Association of Criminal Defense Lawyers

National Religious Campaign Against Torture
National Security Network
PEN American Center
Physicians for Human Rights
Reprieve
Win Without War