May 17, 2016

RE:  ACLU Vote Recommendations on Floor Amendments to H.R. 4909, the National Defense Authorization Act for Fiscal Year 2017

Dear Representative:

The American Civil Liberties Union strongly urges you, as you consider the amendments made in order for floor consideration today to H.R. 4909, the National Defense Authorization Act for Fiscal Year 2017 (NDAA), by the full House of Representatives, to vote as follows:

**Vote “YES” on Thornberry Amendment No. 11**

Thornberry Amendment No. 11 would subject the head of the National Security Council (NSC) to the Senate confirmation process, during any presidential term in which the NSC has more than 100 covered employees. If the number of NSC covered employees exceeds 100, then the president would nominate, and the Senate would exercise its constitutional obligation of “advice and consent” to confirm or reject a nominee. If the number of NSC covered employees was at or below 100, then the president would have unilateral authority to install a national security advisor.

The ACLU recommends a vote in favor of Amendment No. 11. While the ACLU does not subscribe to all of the points made in the “findings” and “sense of Congress” sections of Thornberry Amendment No. 11, we strongly support the operative section, which subjects the national security advisor, specified as “the Assistant to the President for National Security Affairs” in the amendment, to the Senate confirmation process. The NSC has increasingly carried out functions historically carried out by the Departments of Defense and State, and the intelligence agencies. The amendment wisely provides a choice for each president of maintaining a smaller NSC staff that presumably would be acting more clearly as solely an advisor to the president, or maintaining a larger NSC staff that would be subjected to congressional oversight through the nomination and confirmation of the national security advisor. Providing these two alternatives to the president, based on the size of the NSC staff, is consistent with the twin constitutional principles of separation of powers and checks and balances.

**Vote “YES” on Nadler Amendment No. 12**

Nadler Amendment No. 12 strikes the Guantanamo domestic transfer restrictions in the NDAA, thereby ending a statutory prohibition on transferring detainees from
Guantanamo into the United States. Ending the prohibition on transfers to the United States is important to the objectives of closing the Guantanamo detention facility and ending indefinite detention without charge or trial.

**The ACLU recommends a vote in favor of Amendment No. 12.** The amendment would remove an obstacle to closing the Guantanamo detention facility and ending indefinite detention without charge or trial. The population at Guantanamo has dwindled to 80 men, of whom only 10 have ever been charged or tried for a crime. After more than 14 years of the United States operating a prison that was created to try to operate outside the Constitution and the rule of law, it is beyond time to close the prison and end indefinite detention. The ACLU supports the amendment’s striking of a prohibition on all transfers to the United States, because Guantanamo can only close when detainees charged with a crime can be put on trial in federal criminal courts, which are in the United States. The ACLU supports the NDAA’s existing prohibition on the construction of military facilities in the United States to hold Guantanamo prisoners because indefinite military detention and military commissions should not simply be moved to the United States. However, we strongly support ending the prohibition on transfers to the United States, and if Amendment No. 12 becomes law, we will work to support other legislation to ban any new military construction to house any of the current detainees.

**Vote “YES” on Walorski Amendment No. 13**

Walorski Amendment No. 13 would amend the Freedom of Information Act (FOIA) to explicitly state that the NSC is included within FOIA’s definition of the term “agency”, making explicit that the NSC is subject to the law just as other executive branch departments are, including the Executive Office of the President.

**The ACLU recommends a vote in favor of Amendment No. 13.** Since 9/11, the NSC has overseen some of the government's most consequential and controversial policies. It should not be beyond the reach of FOIA's transparency mandate. Making explicit that the NSC is covered by the FOIA would not prevent the government from protecting sensitive information, because the NSC would still be entitled to invoke the same broad exemptions as the Central Intelligence Agency and the Department of Defense. We are disappointed that the retroactivity in the original amendment has been excised, but on balance, an express statement of NSA’s FOIA obligation is a positive change to the law.

**Vote “NO” on Poe Amendment No. 14**

Poe Amendment No. 14 would be a dangerous expansion of the Department of Defense 1033 program that transfers military weapons and equipment from war zones to local law enforcement and communities. Under the amendment, federal and state agencies engaged in southern border security would have their requests for MQ-9 Reaper/Predator B drones, night-vision goggles, and Humvees prioritized over requests from other law enforcement agencies.

**The ACLU recommends a vote against Amendment No. 14.** Representative Poe’s amendment would perpetuate the abuse and surveillance of communities that have long been militarized. Misuse of 1033 military weapons and equipment by federal and state agencies doing border enforcement—within the
United States itself—has been documented, resulting in 1033 program suspension. Additionally, the 100-mile border zone would ensure this amendment’s deep reach into communities across our country, affecting millions of people.

**Vote “NO” on Walorski Amendment No. 18**

Walorski Amendment No. 18 would amend the overseas transfer restrictions for Guantanamo detainees to require a written memorandum of understanding between the United States and the country receiving the detainee, and then require the memorandum to be provided to relevant congressional committees. Particularly without any congressional hearing on the legislation, the House has no way to determine whether the amendment would needlessly impede or block any transfers overseas of cleared detainees.

**The ACLU recommends a vote against Amendment No. 18.** The amendment would add yet another requirement to the already unprecedented and unwarranted list of statutory requirements that must be met before the Secretary of Defense can certify a detainee at Guantanamo for transfer overseas. Particularly since Congress has had no hearings on the impact that such legislation will have on the ability of the Secretary of Defense to transfer cleared detainees for transfer overseas, the ACLU urges you to vote against the amendment.

Thank you for your attention to these concerns. If you have any questions about any of these amendments, please contact Chris Anders at 202-675-2308 or at canders@aclu.org.

Sincerely,

Karin Johanson
Director, Washington Legislative Office

Christopher E. Anders
Senior Legislative Counsel