THE CONSTITUTION PROJECT

Safeguarding Liberty, Justice & the Rule of Law

May 21, 2014

Dear Representative:

The Constitution Project (TCP) urges you to cast the following votes on amendments to the FY2015 National Defense Authorization Act (NDAA). Our positions carry forward recommendations and principles from TCP's Task Force on Detainee Treatment report (available at detaineetaskforce.org) and other relevant TCP statements.

"No" on the amendment sponsored by Rep. Jackie Walorski (R-IN) that would prohibit transferring any Guantanamo detainee to Yemen

TCP and a broad coalition of civil liberties, human rights, and religious organizations believe that the Walorski amendment is unnecessary, unwise, and unjust and have urged members to vote against it for the following reasons (see the groups' coalition letter, attached, for additional details):

- **A Yemen transfer ban is unnecessary** because current law already requires the Defense Secretary to consider a host of security-related factors in making the determinations necessary to execute a foreign transfer. Congress should not be in the business of micromanaging transfer 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.

- **A Yemen transfer ban is unwise** because Yemeni President Hadi and President Obama have pledged to work together to repatriate Yemeni detainees. A congressionally imposed prohibition on transfers to Yemen would undermine those efforts and send precisely the wrong signal to a key counterterrorism partner.

- **A Yemen transfer ban would make substantially reducing the Guantanamo population, much less closing the prison, nearly impossible** because a majority of the 154 remaining detainees are Yemeni. Every day that Guantanamo remains open we waste precious resources (*$2.8 million per detainee annually*), fuel terrorist recruitment efforts, violate human rights, and further damage relationships with international partners.

- **A Yemen transfer ban is unjust**. Following a painstaking review by all relevant national security agencies, 77 detainees were found to pose so little risk to the United States that they could be sent home or to a suitable third country, if one could be found. Of those cleared detainees, 57 are Yemeni. A Yemen transfer ban would punish these Yemeni detainees based solely on their country of origin. Congress should oppose, not sanction, that sort of discrimination.

"YES" on the Guantanamo Bay Detention Facility Closure Act of 2014 ("Closure Act"), sponsored by Representative Adam Smith (D-WA).

The status quo at Guantánamo Bay is not sustainable. As noted above, every day that Guantanamo remains open we waste precious resources (*$2.8 million per detainee annually*), fuel terrorist recruitment efforts, violate human rights, and further damage relationships with international partners. Moreover, as the war in Afghanistan winds to a close, there are serious questions about the extent to which the United States can continue to claim detention authority under the laws of war.

There is a growing bi-partisan consensus around shuttering Guantanamo. Representative Smith's Closure Act mandates substantial, concrete progress toward that goal. Most importantly, the Closure Act:

- **Lifts the categorical ban on transfers to the U.S., and in doing so allows for trials in Article III courts and transfers for medical care that cannot be provided at Guantanamo.**

  Detainees who can be prosecuted in federal courts should be. Our established federal judicial system has safely and effectively handled nearly 500 terrorism cases since 9/11, and it continues to do so. Those cases have produced valuable intelligence – one high profile criminal defendant has been described by U.S. officials as an "intelligence watershed." By contrast, military commissions are moving at a glacial pace amidst a sea of controversy. Of the seven convictions secured in military commissions to date, two have been overturned by the D.C. Circuit Court of Appeals and the trial of the 9/11 perpetrators remains far off. Because those D.C. Circuit decisions narrowed military commissions' jurisdiction, federal courts may now be the *only* venue available for trying some detainees.

  Lifting the U.S. transfer ban would also permit transfers to the U.S. for medical treatment that cannot be provided at Guantanamo. According to the SOUTHCOM Commander, the medical issues of the aging detainee population are increasing in scope and complexity. The U.S. is responsible for providing detainees in its custody with adequate medical care, which serves both our humanitarian and security interests. That obligation will become increasingly difficult – and costly – to satisfy without the flexibility to transfer to the U.S. aging detainees who present health problems that Guantánamo medical staff is not equipped to handle.

- **Requires that detainees promptly (within 60 days) receive the first of periodic reviews that the executive branch promised would occur several years ago.** Although the reviews have started, the pace has been exceptionally slow: only six hearings have been held to date, and only three of those cases have been decided. There is no compelling reason to continue to hold a detainee who does not pose a significant threat to the United States. The Periodic Review Boards are the mechanism for conducting that threat assessment and determining whether detainees not yet cleared for transfer should be. Mandating that the first round of reviews is conducted and completed in short order is an important step forward.

- **Ensures a timely and serious conversation between the Obama administration and Congress about plans for closing Guantanamo** by expediting, and in some cases enhancing, a series of reporting requirements in the NDAA.

Please contact Scott Roehm, Senior Counsel, with any questions. Thank you.

Scott Roehm
Office: 202.580.6930
E-mail: sroehm@constitutionproject.org