Oppose the Detaining Terrorists to Protect America Act of 2015

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Safeguarding Liberty, Justice & the Rule of Law

On January 13, Senator Kelly Ayotte (R-NH) introduced the Detaining Terrorists to Protect America Act of 2015 (DTPA).[i] The bill has been described deceptively as preventing the transfer out of Guantanamo of "the most dangerous detainees."[ii] In fact, the bill would effectively prohibit *all* transfers not ordered by a court for the remainder of the Obama presidency, including of those men who have long been cleared for transfer by unanimous agreement of U.S. national security agencies. The DTPA would also permanently toss aside stringent but workable foreign transfer restrictions that Congress adopted on a bipartisan basis less than 18 months ago and replace them with a previous statutory regime that proved needlessly cumbersome.

In short, the DTPA's purpose is to keep Guantanamo open. That is bad national security policy, bad fiscal policy, and runs counter to our constitutional values.

Both current and former government officials have said time and again that Guantanamo undermines our national security – it is a stain on our global reputation, serves as a recruiting tool for those who wish us harm, and damages counterterrorism cooperation with allies in ways that result in lost intelligence opportunities.[iii] At a time of deep budget cuts, the Pentagon spends over $3 million annually *per detainee*.[iv] Health crises at Guantanamo are inevitable because, according to the SOUTHCOM Commander, "the medical issues of the aging detainee population are increasing in scope and complexity."[v] And with the end of the combat mission in Afghanistan, serious questions have arisen about the extent to which the United States can continue to claim detention authority under the laws of war.

For all of these reasons, the Obama administration and Congress should be working together towards responsibly closing Guantanamo. The administration has made significant progress toward that end recently, resettling or repatriating 27 detainees since November 2014. Yet 122 remain, 54 of whom have been cleared for transfer – most for over 5 years – by the departments of Defense, Justice, State, and Homeland Security, the Office of the Director of National Intelligence (ODNI), and the Joint Chiefs of Staff.

The DTPA would freeze the status quo at Guantanamo. Specifically, the bill would:

Ban for two years *all* foreign transfers not ordered by a court

The bill would prohibit for two years the transfer of any detainee "who is currently or ever has been determined or assessed by Joint Task Force Guantanamo [(JTF-GTMO)] to be a high-risk or medium-risk threat to the United States, its interests, or its allies." While this sounds like a targeted provision, in fact it would apply to every remaining detainee at Guantanamo. That is not because all of these men currently present a high or medium risk threat, but because the bill uses an outdated and unreliable source for the determinations.

Between 2002 and 2008, JTF-GTMO wrote risk assessments for detainees. The files became public in 2011. Reviews of the assessments have shown that in many cases they relied on untrustworthy or irrelevant information,[vi] and that they were written with an eye towards justifying continued detention.[vii] In 2009, President Obama ordered a comprehensive, rigorous inter-agency review of all remaining detainees at Guantanamo.[viii] The review panel included senior officials from the military, the State Department, the Justice Department, the Department of Homeland Security, the Joint Chiefs of Staff, and ODNI. It assembled volumes of information from across the government relevant to determining a disposition for each detainee.[ix] By unanimous agreement, the review panel approved more than half of the detainees for transfer.[x] The ongoing Periodic Review Board process functions similarly and has cleared a handful of additional detainees over the last year.[xi] The DTPA ignores – and in effect renders meaningless – these more recent and accurate determinations, relying instead on the original flawed and now outdated JTF-GTMO assessments.[xii]

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Permanently reenact needlessly cumbersome foreign transfer certification requirements

Through the FY2014 NDAA, Congress smartly – and on a bipartisan basis – replaced what had proven to be a needlessly cumbersome certification and waiver regime for foreign transfers with a clear factor-based standard. Prior to transfer, the Defense Secretary must determine and explain to Congress what steps will be taken to substantially mitigate any risk of a detainee engaging in terrorist activities after release, and why the transfer is in U.S. national security interests. In making those determinations, he must consider:

- Assessments of the threat, if any, the detainee poses to U.S. security
- Prior confirmed cases of individuals released to the same country who later engaged in terrorist activity
- Any steps by the U.S. or the transfer country, or changed circumstances in the transfer country, that reduce the risk that an individual will engage in terrorist activity after release
- Any transfer country assurances that it 1) maintains control of its detention facilities (if the individual is to be detained after release); and 2) has or will work to substantially mitigate the risk that the individual will engage in terrorist activity
- An assessment of whether the transfer country can and will meet the above assurances, including considering any past practices[xiii]

The process is working under current law. Congress should allow it to continue.

Explicitly ban any transfer to Yemen for two years

A Yemen transfer ban is unnecessary, unwise and unjust. It is unnecessary because the Obama administration does not intend to transfer detainees to Yemen in the immediate future,[xiv] and because current law already requires the Defense Secretary to consider the host of security-related factors described above when deciding whether any transfer serves U.S. interests. It is unwise because Congress is ill equipped to micromanage transfer decisions and should not be in the business of doing 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. Finally, a Yemen transfer ban is unjust because it would punish Yemeni detainees, particularly those who have long been cleared for transfer, based solely on their country of origin. Congress should oppose, not sanction, this sort of discrimination.

Ban any transfers to the United States for two years

The DTPA would also carry forward for an additional two years a nonsensical blanket prohibition on transfers to the United States. Detainees who can be prosecuted in federal courts should be. Our established federal judicial system has safely and effectively handled over 500 terrorism cases since 9/11, and it continues to do so.[xv] Those cases have produced valuable intelligence – one high profile criminal defendant has been described by U.S. officials as an "intelligence watershed."[xvi] By contrast, military commissions are moving at a glacial pace amidst a sea of controversy. Of the eight convictions secured in military commissions to date, two have been overturned by the D.C. Circuit Court of Appeals. Because those D.C. Circuit decisions narrowed military commissions' jurisdiction, federal courts may now be the *only* venue available for trying some detainees.[xvii]

The U.S. transfer prohibition even extends to cases where a detainee needs emergency or critical medical treatment that cannot be provided at Guantanamo. The U.S. is responsible for providing detainees in its custody with adequate medical care, which serves both our humanitarian and security interests.[xviii] 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 Guantanamo medical staff is not equipped to handle.

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[i] *See* S.165, Detaining Terrorists to Protect America Act of 2015 (Introduced in Senate - IS), available at http://thomas.loc.gov/cgi-bin/query/z?c114:S.165:.

[ii] *See* Ayotte, McCain, Graham, Burr Introduce Legislation Restricting Transfers of Guantanamo Bay Detainees, available at http://www.ayotte.senate.gov/?p=press_release&id=1711.

[iii] *See* Testimony of the Honorable Brian P. McKeon, Principal Deputy Under Secretary of Defense for Policy, Department of Defense, *Guantanamo Detention Facility and Future of U.S. Detention Policy*, hearing before the Senate Armed Services Committee, February 5, 2015, available at http://www.armed-services.senate.gov/imo/media/doc/McKeon_02-05-15.pdf ("McKeon Testimony at 2/5/15 SASC Guantanamo Hearing"); *see also* Report of The Constitution Project Task Force on Detainee Treatment, available at http://detaineetaskforce.org/report/.

[iv] *See* Carol Rosenberg, *Total U.S. tab tops $5B for Guantánamo prison*, Miami Herald, July 30, 2013 (citing DoD figures), available at http://www.miamiherald.com/2013/07/30/3532539/pentagon-guantanamo-tab-52b-and.html.

[v] Posture Statement of General John F. Kelly, United States Marine Corps Commander, United States Southern Command, Before the 113th Congress House Armed Services Committee, 20 March 2013, available at http://docs.house.gov/meetings/AS/AS00/20130320/100395/HHRG-113-AS00-Wstate-KellyUSMCG-20130320.pdf.

[vi] *See* Carol Rosenberg and Tom Lasseter, *WikiLeaks: Secret Guantanamo files show U.S. disarray*, McClatchy Newspapers, April 24, 2011, available at http://www.mcclatchydc.com/2011/04/24/112729/wikileaks-us-intelligence-summaries.html.

[vii] *See* Scott Shane and Benjamin Weiser, *Judging Detainees' Risk, Often With Flawed Evidence*, New York Times, April 24, 2011, available at http://www.nytimes.com/2011/04/25/world/guantanamo-files-flawed-evidence-for-assessing-risk.html?hp.

[viii] *See* Executive Order 13492, available at http://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1893.pdf.

[ix] *See* Final Report of the Guantanamo Review Task Force, January 22, 2010, available at http://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf.

[x] *See id.*

[xi] *See* Periodic Review Secretariat, U.S. Department of Defense, available at http://www.prs.mil/ReviewInformation/FullReviewpage.aspx (showing reviews completed to date with dispositions).

[xii] Before any detainee is transferred – including those previously cleared by the Guantanamo Review Task Force – the Defense Department considers any relevant updated intelligence related to that detainee. *See* McKeon Testimony at 2/5/15 SASC Guantanamo Hearing.

[xiii] *See* National Defense Authorization Act for Fiscal Year 2014, Public Law 113–66 (Dec. 26, 2013) ("FY2014 NDAA"), Section 1035, available at https://www.congress.gov/113/plaws/publ66/PLAW-113publ66.pdf.

[xiv] *See* McKeon Testimony at 2/5/15 SASC Guantanamo Hearing ("A ban on transfers to Yemen is unnecessary because we are not, at the present time, seeking to transfer any of them in Yemen, especially in light of the recent further deterioration in the security situation.").

[xv] *See Guantanamo Detention Facility and Future of U.S. Detention Policy*, hearing before the Senate Armed Services Committee, February 5, 2015 (comments of Senator Tim Kaine), video available at: http://www.armed-services.senate.gov/hearings/15-02-05-guantanamo-detention-facility-and-future-of-us-detention-policy; http://www.humanrightsfirst.org/wp-content/uploads/DOJ-Terrorism-Related-Convictions.pdf.

[xvi] *See* Benjamin Weiser, *Terrorist Has Cooperated With U.S. Since Secret Guilty Plea in 2011, Papers Show*, New York Times, March 26, 2013, available at http://www.nytimes.com/2013/03/26/nyregion/since-2011-guilty-plea-somali-terrorist-has-cooperated-with-authorities.html?_r=0; *see also e.g.,* Marc Santora and William K. Rashbaum, *Bin Laden Relative Pleads Not Guilty in Terrorism Case*, New York Times, March 9, 2013, available at http://www.nytimes.com/2013/03/09/nyregion/sulaiman-abu-ghaith-bin-ladens-son-in-law-charged-in-new-york.html (noting defendant provided 22-page statement during post arrest questioning by law enforcement).

[xvii] In *Hamdan v. United States (Hamdan II)*, the D.C. Circuit overturned a military commission conviction because the offense charged, material support for terrorism, was not an internationally recognized war crime at the time of the alleged conduct. The D.C. Circuit ruled similarly in *Al-Bahlul v. United States* with respect to the charge of conspiracy.

[xviii] *See e.g.,* Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Arts. 76, 91; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Art. 30; U.S. Const. amend. VIII.