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Detainee Transfer Restrictions in Defense Bill Demand a Veto, TCP Says

WASHINGTON, D.C. -- Virginia Sloan, president of The Constitution Project, a bipartisan legal watchdog group, offered the following comment on H.R. 1735, the National Defense Authorization Act for Fiscal Year 2016, which passed the House of Representatives earlier today by a vote of 269 to 151:

"Time is running out to close Guantanamo and Congress isn't helping. Current law already contains burdensome and unnecessary restrictions on transferring detainees. The House-passed NDAA would expand those restrictions significantly. Unless the Senate drastically improves the bill, President Obama must carry through on his threat to veto it. In the meantime, the administration needs to do its part. There is no excuse for the now four-month delay since the last detainee transfer."

There are 122 detainees remaining at Guantanamo Bay, 57 of whom have been cleared for transfer by unanimous consent of the Joint Chiefs of Staff, the Director of National Intelligence, the State Department, the Justice Department, and the Department of Homeland Security. The administration transferred 27 detainees between November 2014 and January 2015, but none since.

Under current law, Guantanamo detainees cannot be transferred to the United States for any purpose. The Defense Secretary may only transfer detainees abroad after determining that each transfer is in the national security interest of the United States, and that actions will be taken to substantially mitigate the risk of the detainee engaging in terrorism after release. He must also explain those decisions to Congress 30 days prior to transfer.

The House-passed NDAA would expand current transfer restrictions in three significant ways:

- First, the bill would extend the blanket U.S. transfer ban for an additional two years. That means that no Guantanamo detainee could be prosecuted in a federal court, even if that is

the *only* court in which he could be prosecuted.

- Second, the bill would prohibit for two years transfers to a "combat zone." Bizarrely, the definition of that term is taken from the tax code and includes a host of countries, many of which can hardly be said to fit its common sense meaning. Close allies Israel and Saudi Arabia are among them. More than half of the countries the IRS has labeled "combat zones" have accepted Guantanamo detainees in the past.
- Third, the bill would reenact cumbersome foreign transfer certification requirements that Congress rightly, and on a bipartisan basis, replaced with more sensible provisions in the FY2014 and FY2015 NDAA's. And it would go even further: the old foreign transfer laws included authority for the Defense Secretary to waive the most onerous restrictions. The House-passed NDAA would eliminate that waiver authority with respect to 102 of the 122 remaining detainees, making it nearly impossible to transfer them.

Claims that additional transfer restrictions are necessary because of a purported increase in released detainees returning to the battlefield are unfounded. [According to the Director of National Intelligence](#), 94% of detainees transferred during the Obama administration are not even suspected of having engaged in terrorism post-release.

Prior to the House vote, the White House repeatedly warned that the administration strongly objected to numerous provisions in H.R. 1735 - including the Guantanamo transfer restrictions - and that the president's senior advisors would recommend he veto the bill if those objections were not addressed. According to the Statement of Administration Policy on H.R. 1735, "operating this facility weakens our national security by draining resources, damaging our relationships with key allies and partners, and emboldening violent extremists." The 151 votes against the bill today would be enough to sustain a presidential veto.

The Constitution Project [Task Force on Detainee Treatment](#) called for the closure of the facility in its comprehensive 2013 report on the treatment of suspected terrorists during the Clinton, Bush and Obama administrations.

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Created out of the belief that we must cast aside the labels that divide us in order to keep our democracy strong, The Constitution Project brings together policy experts and legal practitioners from across the political spectrum to foster consensus-based solutions to the most difficult constitutional challenges of our time through scholarship, advocacy, policy reform and public education initiatives. Established in 1997, TCP is based in Washington, D.C.

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