

# THE CONSTITUTION PROJECT



*Safeguarding Liberty, Justice & the Rule of Law*

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Dear Representative:

The Constitution Project is part of a diverse coalition of organizations signing a letter you will receive today **urging you to oppose Amendment 15 to H.R. 1735, the National Defense Authorization Act for Fiscal Year 2016 (“FY2016 NDAA”), and to support Amendment 16.** The former would expand significantly extreme and unnecessary restrictions on transferring detainees out of Guantanamo that the base bill already contains. The latter would provide a responsible path toward closing the prison.

We are writing separately to provide a more detailed explanation of Amendment 15, offered by Representative Jackie Walorski (R-IN), and of why we believe you should oppose it.

The FY2016 NDAA already bans, for one year, all transfers of Guantanamo detainees to the United States and all transfers to any “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 the common sense meaning of a combat zone).<sup>i</sup> The bill also reenacts cumbersome foreign transfer certification requirements that Congress rightly, and on a bipartisan basis, replaced with more sensible provisions in the FY2014 and FY2015 NDAAs.

Amendment 15 would extend the complete bans on transfers to the U.S. and to Yemen (one of the “combat zone” countries) for an additional year. Through a more subtle provision, it would also **entirely prevent repatriating or resettling 102 of the 122 remaining Guantanamo detainees**, including 37 who have been cleared for transfer by unanimous consent of all relevant US government agencies. Here is how it would do so:

Under the old foreign transfer certification requirements – which the FY2016 NDAA needlessly resuscitates – before transferring a detainee, the Secretary of Defense had to certify that he had acted or would act to “*ensure*” both that the transferred detainee “*cannot* take action to threaten the United States, its citizens, or its allies in the future,” and “*cannot* engage or reengage in any terrorist activity.” It is hard to imagine any Defense Secretary signing his or her name to that sort of absolute promise; indeed, the law included authority to waive those provisions if the risk of transfer could be substantially mitigated. Executing a waiver proved onerous and complicated, but the ability to do so at least made transfers under the old law possible.

Amendment 15 would **eliminate the waiver authority** for most of the remaining Guantanamo detainees by adding the following provision to the reenacted foreign transfer certification requirements:

(3) *EXCEPTION.*—*The Secretary may not exercise the waiver authority under paragraph (1) with respect to any individual detained at Guantanamo, who has ever been determined or assessed to be a detainee referred for prosecution, a detainee approved for detention, or a detainee approved for conditional detention by the Guantanamo Detainee Review Task Force established pursuant to Executive Order number 13492.*

That provision covers 102 of the 122 remaining detainees. If it became law, the practical reality would almost certainly be that the Defense Secretary would not execute transfers for any of those 102. Among them are 30 detainees who were cleared for transfer five years ago 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 provision would also bar transfer of an additional 7 detainees who have been cleared more recently by the military's Periodic Review Board ("PRB") process – which includes all of the same agency stakeholders noted above – as well as any detainee cleared by a PRB during the life of the provision.

Both current and former government officials – including Major General Michael Lehnert, who helped create Guantanamo<sup>ii</sup> – have said time and again that the prison 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.<sup>iii</sup> All of this is at an outlandish financial cost: the Pentagon spends over \$3 million annually *per detainee*.<sup>iv</sup>

If Amendment 15 were adopted, the FY2016 NDAA would essentially freeze the status quo at Guantanamo. That is bad national security policy, bad fiscal policy, and runs counter to our constitutional values. Congress should be working together with the Executive Branch to close Guantanamo responsibly.

### **We urge you to oppose Amendment 15.**

Sincerely,



Virginia Sloan, President



Scott Roehm, Senior Counsel

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i According to the IRS, "combat zones" include Afghanistan, Albania, Bahrain, Bosnia-Herzegovina, Croatia, Djibouti, Egypt, Iraq, Israel, Jordan, Kosovo, Kuwait, Kyrgyzstan, Macedonia, Montenegro, Oman, Pakistan, The Philippines, Qatar, Saudi Arabia, Serbia, Somalia, Syria, Tajikistan, Turkey, United Arab Emirates, Uzbekistan, and Yemen. See IRS Questions and Answers on Combat Zone Tax Provisions (revised March 20, 2015), available at <http://www.irs.gov/uac/Combat-Zones>; Armed Forces Tax Guide (2014), available at [http://www.irs.gov/publications/p3/ar02.html#en\\_US\\_2014\\_publink1000176201](http://www.irs.gov/publications/p3/ar02.html#en_US_2014_publink1000176201). More than half of these countries have accepted Guantanamo detainees in the past.

ii See Maj. Gen. Michael Lehnert (Ret.), I helped Create Gitmo. Now I Want It Shut Down., Politico, January 11, 2015, available at <http://www.politico.com/magazine/story/2015/01/guantanamo-closing-i-helped-create-gitmo-now-i-want-it-shut-down-114162.html#.VT-7O2RViko>.

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](http://www.armed-services.senate.gov/imo/media/doc/McKeon_02-05-15.pdf); see also Report of The Constitution Project Task Force on Detainee Treatment, available at <http://detaineeataskforce.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>.