

# NEXT THEY'LL PUT GITMO TRANSFER PROHIBITIONS ON USDA FUNDING

A number of people have commented on the Obama Administration's statement of opposition to a ban on Department of Homeland Security funding for Gitmo detainee transfers. Here's Benjamin Wittes:

The administration just issued a Statement of Administration Policy on a DHS appropriations bill (H.R. 2017), which contains a spending restriction similar to one of the Guantanamo transfer restrictions that provoked the administration's recent veto threat with respect to the McKeon legislation. Yet oddly, this time, there is no veto threat.

[snip]

I can think of two possible explanations beyond mere clerical error: First, and I certainly hope this is *not* the explanation, perhaps the administration is backing off the veto threat. Second, perhaps the transfer restrictions with respect to domestic civilian trials are only veto-worthy in combination with the other (from the administration's point of view) objectionable features of the McKeon bill but are on their own merely worthy of opposition.

In any event, it's a little puzzling.

And here's Josh Gerstein:

The view that Obama suddenly toughening his line against Congressional efforts to constrain his authority to prosecute and move detainees gathered steam just

last week when the administration threatened a veto of the Department of Defense Authorization bill over detainee-related provisions including one that appears to prevent any war-on-terror detainee placed in U.S. military custody from ever being transferred to the U.S.

However, the details of what precise measures or combination of measures would trigger a veto from Obama was unclear in the statement on the latest DoD bill, perhaps deliberately so. The official administration statement on the Homeland Security bill appears to indicate that a simple re-upping of the restrictions Obama signed with some complaints in December won't be enough by itself to get a bill vetoed.

Now, I frankly agree with Josh that the Defense Authorization was designed, in part, for maximum ambiguity about what might draw a veto.

But I think there's an even easier two-part explanation for not issuing a veto threat here.

This is the Department of Homeland Security appropriation. DHS doesn't exactly have primary jurisdiction over detainee affairs. And all this does is reaffirm the status quo (albeit without time limits).

Now, as Daphne Eviatar has pointed out to me via email, the language purports to apply to the DHS appropriation as well as any other act.

#### **SEC. 537**

**None of the funds appropriated or otherwise made available in this or any other Act** may be used to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions, including detaining, accepting custody of, or extending immigration benefits

to, Khalid Sheikh Mohammed or any other detainee who—

(1) is not a United States citizen or a member of the Armed Forces of the United States; and

(2) is or was held on or after June 24, 2009, at the United States Naval Station, Guantanamo Bay, Cuba, by the Department of Defense. [my emphasis]

So I suppose Congress could argue that this language governs all appropriations bills, including DOD and DOJ appropriations that would actually come into play in detainee affairs. And if so, it would eliminate one of the loopholes the ACLU pointed out in the language in the Defense Authorization for this year, which Obama already signed, which only prohibited the use of DOD funds, but not DOJ funds.

SEC. 1032. PROHIBITION ON THE USE OF FUNDS FOR THE TRANSFER OR RELEASE OF INDIVIDUALS DETAINED AT UNITED STATES NAVAL STATION, GUANTANAMO BAY, CUBA.

None of the funds authorized to be appropriated by this Act for fiscal year 2011 may be used to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions of Khalid Sheikh Mohammed or any other detainee who—

(1) is not a United States citizen or a member of the Armed Forces of the United States; and

(2) is or was held on or after January 20, 2009, at United States Naval Station, Guantanamo Bay, Cuba, by the Department of Defense.

Yet Obama's opposition to this amendment seems like a repeat of the status quo that already exists, with the White House complaining but not

vetoing the restriction.

Note, too, that unless I'm missing one of these "Statements of Administration Policy," Obama's official opposition to this year's transfer authority was limited to transfers to other countries, though Holder made repeated comments about the US transfer bans being unconstitutional during the debate itself.

Restrictions on Guantanamo Detainee Transfers: The Administration strongly objects to Section 1044, which prohibits the use of Department of Defense funds to transfer individuals held at the detention facilities at Guantanamo to the countries of Afghanistan, Pakistan, Saudi Arabia, Somalia and Yemen for one year following enactment of this bill. Individual detainee transfer determinations should be made on a case-by-case basis, taking into account all factors, including the threat posed by the particular detainee, U.S. legal obligations and broader U.S. national security interests. This provision restricts the United States' ability to make these case-by-case decisions for over seventy percent of the detainees being held at Guantanamo. By precluding transfers to these countries, section 1044 poses serious national security concerns, including by reducing the Executive Branch's ability to negotiate transfer conditions that promote national security.

Finally, note the language of Obama's non-signing signing statement on the Defense Authorization from January.

Despite my strong objection to these provisions, which my Administration has consistently opposed, I have signed this Act because of the importance of authorizing appropriations for, among other things, our military activities in

2011.

Nevertheless, my Administration will work with the Congress to seek repeal of these restrictions, will seek to mitigate their effects, and will oppose any attempt to extend or expand them in the future.

So in January, Obama basically said, "This is unconstitutional so don't make it any worse or I'll get cross," and this amendment, which effectively sustains the status quo but doesn't make it worse, gets pretty much the same response from the Administration.

But the defense bill **did** make detainee restrictions worse—far worse. Particularly given Holder's lead position on past opposition, I wonder whether Section 1042, which requires the Attorney General to ask permission from the Defense Secretary and Director of National Intelligence before prosecuting a terrorist in civilian courts, wasn't the final straw.

IN GENERAL.—Before any officer or employee of the Department of Justice institutes any prosecution of an alien in a United States district court for a terrorist offense, the Attorney General, Deputy Attorney General, or Assistant Attorney General for the Criminal Division, shall consult with the Director of National Intelligence and the Secretary of Defense about—

(1) whether the prosecution should take place in a United States district court or before a military commission under chapter 47A of title 10, United States Code; and

(2) whether the individual should be transferred into military custody for purposes of intelligence interviews.

One last point.

I noted this was the DHS appropriation. That's also significant because amendments are treated differently than they are on Defense Appropriations, as does the fearmongering that can be mobilized when the Defense bill is at risk of failing. A veto threat on a defense bill is just a far more powerful threat than it is on a DHS bill. So while I'm skeptical that Obama is really drawing a line in the sand, if he is, it's a far more useful place to draw it than on the DHS bill.