

Legal Sidebar

DOD Releases Plan to Close GTMO

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Conceding that “the politics of this are tough,” President Obama [announced](#) this morning the release of the [Department of Defense \(DoD\) plan](#) to close the prison facility at the U.S. Naval Station, Guantanamo Bay, Cuba. The document reiterates current procedures for transferring detainees to their home countries or other countries abroad, but perhaps more controversially, [promises](#) to “work with Congress to relocate [certain detainees] from the Guantanamo Bay detention facility to a secure detention facility in the United States, while continuing to identify other non-U.S. dispositions.” The plan does not specify a particular location within the United States where detainees would be housed (although [it states](#) 13 possible sites have been identified), but emphasizes the Attorney General’s 2014 conclusion that relocation to the United States would not risk ascribing to transferees additional rights under the U.S. Constitution or immigration laws. (This analysis, required by [section 1039](#) of the National Defense Authorization Act for FY 2014, is attached as an [appendix](#) to the plan).

Predicting that the closure of the detention facility will save between \$140 million and \$180 million over FY 2015 operating costs, the plan lays out how the Administration hopes to resolve the disposition of the 91 detainees remaining at Guantanamo Bay. The U.S. Government, [it says](#), is pursuing three lines of effort:

1. identifying transfer opportunities for detainees designated for transfer;
2. continuing to review the threat posed by those detainees who are not currently eligible for transfer and who are not currently facing military commission charges; and
3. continuing with ongoing military commissions prosecutions and, for those detainees who remain designated for continued law of war detention, identifying individualized dispositions where available, including military commission prosecution, transfer to third countries, foreign prosecutions or, should Congress lift the ban on transfers to the United States, transfer to the United States for prosecution in Article III courts and to serve sentences.

The plan acknowledges that current law prohibits the transfer of detainees into the United States. Current legislative barriers to the transfer of Guantanamo detainees to the United States include two provisions in the 2016 NDAA ([P.L. 114-92](#)). Like previous provisions in national defense authorization and appropriations legislation (beginning with [section 14103](#) of the 2009 Supplemental Appropriations Act ([P.L. 111-32](#))) section 1031 of the 2016 NDAA prohibits the use of funds for transfer or release of individuals detained at United States Naval Station, Guantanamo Bay, Cuba, to the United States. This prohibition expires on December 31, 2016. Section 1032, also reiterating prohibitions from previous years, prohibits until December 31, 2016, the use of funds to construct or modify facilities in the United States to house detainees transferred from Guantanamo Bay.

These provisions are also carried over in the 2016 Consolidated Appropriations Act (Omnibus) ([P.L. 114-113](#)), Division B, Title V (Commerce, Justice and Science) [sections 527 and 528](#), and Division C, Title VIII (Department of Defense) [sections 8103-8104](#), except that the prohibitions cover funds appropriated in “this or any other Act.” The transfer provision is repeated in Division F, Title V (Homeland Security) [section 532](#). Title IV, [section 412](#) of Division J (Military Construction and Veterans Affairs) repeats the prohibition on building modifications or construction in the United States to house Guantanamo detainees. [Title VI](#) of Division M (Intelligence) repeats the prohibitions with respect to the Intelligence Community.

The plan appears to be a response to a [2016 NDAA](#) provision that [directed DOD](#) to submit a comprehensive detention strategy, which included such elements as an assessment of possible detention sites within the United States. Some have [criticized](#) the DoD plan as failing to address sufficiently the required elements of the report. Additionally, although nothing in the DoD plan suggests that the White House is considering using an executive order to bypass the statutory restrictions and transfer detainees into the United States, it has been [suggested](#) that the President has constitutional authority to close the detention facility despite legislative prohibitions currently in force. Others, however, [disagree](#), and the Joint Chiefs of Staff have denied in a [recent letter](#) to certain Members of Congress that there is any intent to take actions contrary to statutory restrictions.

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